NORTH CAROLINA REPORTS

VOLUME 226

This book is an exact photo-reproduction of the original Volume 226 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. 226

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1945

SPRING TERM, 1946

FALL TERM, 1946

REPORTED BY

JOHN M. STRONG

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

FALL TERM, 1945—SPRING TERM, 1946—FALL TERM, 1946.

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:

T. W. BRUTON,*
H. J. RHODES,
RALPH MOODY,‡
FRANK P. SPRUILL, JR.,
JAMES E. TUCKER.†

SUPREME COURT REPORTER:

JOHN M. STRONG.

CLERK OF THE SUPREME COURT:

ADRIAN J. NEWTON.

MARSHAL AND LIBRARIAN:

DILLARD S. GARDNER.

---

*Returned from U. S. Army, 15 July, 1946.
‡Moody appointed 15 November, 1944, upon the resignation of Mr. Patton.
†Assigned to Revenue Department, 15 July, 1946.

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[1]	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.

[1]Resigned 6 November, 1946. Succeeded by William G. Pittman.

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.

†Died 12 June, 1946. Succeeded by Thomas G. Neal.

SUPERIOR COURTS, FALL TERM, 1946

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
Judge Frizzelle

Beaufort—Sept. 16* (A); Sept. 23†; Oct. 7†; Nov. 4* (A); Dec. 2†.
Camden—Aug. 26.
Chowan—Sept. 9; Nov. 25.
Currituck—Sept. 2.
Dare—Oct. 21.
Gates—Nov. 18.
Hyde—Aug. 19†; Oct. 14.
Pasquotank—Sept. 16†; Oct. 7† (A) (2); Nov. 4†; Nov. 11.*
Perquimans—Oct. 28.
Tyrrell—Sept. 30.

SECOND JUDICIAL DISTRICT
Judge Stevens

Edgecombe—Sept. 9; Oct. 14; Nov. 11† (2).
Martin—Sept. 16 (2); Nov. 18† (A) (2); Dec. 9.
Nash—Aug. 26; Sept. 16† (A) (2); Oct. 7; Nov. 25*; Dec. 2†.
Washington—July 8; Oct. 21†.
Wilson—Sept. 2; Sept. 30†; Oct. 28† (2); Dec. 2 (A).

THIRD JUDICIAL DISTRICT
Judge Harris

Bertie—Aug. 26 (2); Nov. 11 (2).
Halifax—Aug. 12 (2); Sept. 30† (A) (2); Oct. 21* (A); Nov. 25 (2).
Hertford—July 29; Oct. 14 (2).
Northampton—Aug. 5; Oct. 28 (2).
Vance—Sept. 30*; Oct. 7†.
Warren—Sept. 16*; Sept. 23†.

FOURTH JUDICIAL DISTRICT
Judge Burney

Chatham—July 29† (2); Oct. 21.
Harnett—Sept. 2* (A); Sept. 16†; Sept. 30† (A) (2); Nov. 11* (2).
Johnston—Aug. 12*; Sept. 23† (2); Oct. 14 (A); Nov. 4†; Nov. 11† (A); Dec. 9 (2).
Lee—July 15; Sept. 9†; Sept. 16† (A); Oct. 28.
Wayne—Aug. 19; Aug. 26† (2); Oct. 7† (2); Nov. 25 (2).

FIFTH JUDICIAL DISTRICT
Judge Nimocks

Carteret—Oct. 14; Dec. 2.
Craven—Sept. 2*; Sept. 30† (2); Nov. 18† (2).
Greene—Dec. 2 (A); Dec. 9 (2).
Jones—Aug. 12†; Sept. 16; Dec. 9 (A).
Pamlico—Nov. 4 (2).
Pitt—Aug. 19†; Aug. 26; Sept. 9†; Sept. 23†; Oct. 21†; Oct. 28; Nov. 18 (A).

SIXTH JUDICIAL DISTRICT
Judge Carr

Duplin—July 22*; Aug. 26† (2); Sept. 30*; Dec. 2† (2).
Lenoir—Aug. 19; Sept. 23†; Oct. 14; Nov. 5† (2).
Onslow—July 15‡; Oct. 7; Nov. 18† (2).
Sampson—Aug. 5 (2); Sept. 9† (2); Oct. 21; Oct. 28†.

SEVENTH JUDICIAL DISTRICT
Judge Thompson

Franklin—Sept. 16† (2); Oct. 7*; Nov. 25† (2).
Wake—July 8*; Sept. 2* (2); Sept. 16† (A) (2); Sept. 30*; Oct. 14† (3); Nov. 4*; Nov. 11† (2); Nov. 25† (A); Dec. 2* (A) (2); Dec. 16†.

EIGHTH JUDICIAL DISTRICT
Judge Bone

Brunswick—Sept. 2; Sept. 9†.
Columbus—Aug. 26*; Sept. 23† (2); Nov. 11*; Nov. 18† (2).
New Hanover—July 22*; Aug. 12†; Aug. 19*; Oct. 7† (2); Oct. 28*; Nov. 4; Dec. 2† (2).
Pender—July 15†; Sept. 16*; Oct. 21†.

NINTH JUDICIAL DISTRICT
Judge Parker

Bladen—Aug. 5†; Sept. 16*.
Cumberland—Aug. 26*; Sept. 23† (2); Oct. 7* (A); Oct. 21† (2); Nov. 13* (2).
Hoke—July 29†; Aug. 19; Nov. 11.
Robeson—July 8† (2); Aug. 12*; Aug. 26† (A); Sept. 2* (2); Sept. 23* (A); Oct. 7† (2); Oct. 21* (A); Nov. 4*; Nov. 11† (A); Dec. 2† (2); Dec. 16*.

TENTH JUDICIAL DISTRICT
Judge Williams

Alamance—July 29†; Aug. 12*; Sept. 2† (2); Nov. 11† (A) (2); Nov. 25*.
Durham—July 15*; July 29† (A) (2); Sept. 2* (A) (2); Sept. 16† (2); Sept. 30† (A); Oct. 7*; Oct. 14† (A) (2); Oct. 28† (2); Dec. 2*.
Granville—July 22; Oct. 21†; Nov. 11 (2).
Orange—Aug. 19; Aug. 26†; Sept. 30†; Dec. 9.
Person—Aug. 5; Oct. 14.

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT
Judge Rousseau

Ashe—July 22† (2); Oct. 21*.
Alleghany—Sept. 30.
Forsyth—July 1* (2); Sept. 2* (2); Sept. 16† (2); Sept. 30† (A); Oct. 7* (2); Oct. 21† (A); Oct. 28†; Nov. 11*; Nov. 18† (2); Dec. 2* (2).

TWELFTH JUDICIAL DISTRICT
Judge Pless

Davidson—Aug. 19; Sept. 9† (2); Sept. 30† (A) (2); Nov. 18 (A) (2).
Guilford—Greensboro: July 8; July 29; Aug. 12†; Aug. 26† (2); Sept. 9; Sept. 23 (A); Sept. 23 (3); Oct. 14; Oct. 28 (3); Nov. 18† (2); Dec. 2† (2); Dec. 2 (A); Dec. 16.
Guilford—High Point: July 15; Aug. 5†; Sept. 16; Oct. 21; Oct. 28 (A) (2); Dec. 9 (A).

THIRTEENTH JUDICIAL DISTRICT
Judge Nettles

Anson—Sept. 9†; Sept. 23*; Nov. 11†.
Moore—Aug. 12*; Sept. 16†; Sept. 23† (A).
Richmond—July 15†; July 22*; Sept. 2†; Sept. 30*; Nov. 4†.
Scotland—Aug. 5; Oct. 28†; Nov. 25 (2).
Stanly—July 8; Sept. 2† (A) (2); Oct. 7†; Nov. 18.
Union—Aug. 19 (2); Oct. 14 (2).

FOURTEENTH JUDICIAL DISTRICT
Judge Alley

Gaston—July 22*; July 29† (2); Sept. 9* (A); Sept. 16† (2); Oct. 21*; Oct. 28† (A); Nov. 25* (A); Dec. 2† (2).
Mecklenburg—July 8* (2); July 29* (A) (2); Aug. 12* (2); Aug. 26*; Sept. 2† (2); Sept. 2† (A) (2); Sept. 16† (A) (2); Sept. 16* (A) (2); Sept. 30† (A) (2); Sept. 30*; Oct. 7† (2); Oct. 14† (A) (2); Oct. 28† (2); Oct. 28† (A) (2); Nov. 11*; Nov. 11† (A) (2); Nov. 18† (2); Nov. 25† (A) (2); Dec. 2* (A) (2); Dec. 9† (A); Dec. 16†.

FIFTEENTH JUDICIAL DISTRICT
Judge Clement.

Alexander—Aug. 26 (A) (2).
Cabarrus—Aug. 19*; Aug. 26†; Oct. 14 (2); Nov. 11† (A); Dec. 2† (A).
Iredell—July 29 (2); Nov. 4 (2).
Montgomery—July 8; Sept. 23†; Sept. 30; Oct. 28†.
Randolph—July 15† (2); Sept. 2*; Oct. 21† (A) (2).
Rowan—Sept. 9 (2); Oct. 7†; Oct. 14† (A); Nov. 18 (2); Dec. 2 (2).

SIXTEENTH JUDICIAL DISTRICT
Judge Sink

Burke—Aug. 5 (2); Sept. 23† (3); Dec. 9 (2).
Caldwell—Aug. 19 (2); Sept. 30† (A) (2); Nov. 25 (2).
Catawba—July 1 (2); Sept. 2† (2); Nov. 11*; Nov. 18†; Dec. 2† (A).
Cleveland—July 22 (2); Sept. 9† (A) (2); Oct. 28 (2).
Lincoln—July 15; Oct. 14; Oct. 21†.
Watauga—Sept. 16; Sept. 23 (A).

SEVENTEENTH JUDICIAL DISTRICT
Judge Phillips

Avery—July 1 (2); Oct. 14 (2).
Davie—Aug. 26; Dec. 2†.
Mitchell—July 22† (2); Sept. 16 (2).
Wilkes—Aug. 5 (2); Sept. 30† (2); Dec. 9 (2).
Yadkin—Aug. 19*; Nov. 18† (2).

EIGHTEENTH JUDICIAL DISTRICT
Judge Gwyn

Henderson—Oct. 7 (2); Nov. 18† (2).
McDowell—July 8† (2); Sept. 2 (2).
Polk—Aug. 19 (2).
Rutherford—Sept. 23† (2); Nov. 4 (2).
Transylvania—July 22 (2); Dec. 2 (2).
Yancey—Aug. 5 (2); Oct. 21† (2).

NINETEENTH JUDICIAL DISTRICT
Judge Bobbitt

Buncombe—July 8† (2); July 15 (A) (2); July 22*; July 29; Aug. 5† (2); Aug. 19*; Aug. 19 (A) (2); Sept. 2† (2); Sept. 16*; Sept. 16 (A) (2); Sept. 30† (2); Oct. 14*; Oct. 14 (A) (2); Oct. 28; Nov. 4† (2); Nov. 18*; Nov. 18 (A) (2); Dec. 2† (2); Dec. 16*; Dec. 16 (A) (2).
Madison—Aug. 26; Sept. 23; Oct. 21; Nov. 25; Dec. 23.

TWENTIETH JUDICIAL DISTRICT
Judge Armstrong

Cherokee—Aug. 5 (2); Nov. 4 (2).
Clay—Sept. 30.
Graham—Sept. 2 (2).
Haywood—July 8 (2); Sept. 16† (2); Nov. 18 (2).
Jackson—Oct. 7 (2).
Macon—Aug. 19 (2); Dec. 2 (2).
Swain—July 22 (2); Oct. 21 (2).

TWENTY-FIRST JUDICIAL DISTRICT
Judge Warlick

Caswell—July 1; Nov. 11 (2).
Rockingham—Aug. 5* (2); Sept. 2† (2); Oct. 21†; Oct. 28* (2); Nov. 25† (2); Dec. 9*.
Stokes—Aug. 19; Oct. 7*; Oct. 15†.
Surry—July 8 (2); Sept. 16; Sept. 23 (2); Dec. 16.

*For Criminal Cases.
†For Civil Cases.
‡For Jail and Civil Cases.
(A) Emergency Judge.

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. MRS. EVA L. YOUNG, Deputy Clerk, Wilson.

Wilmington, fourth Monday after the fourth Monday in March and September. J. DOUGLAS TAYLOR, Deputy Clerk, Wilmington.

OFFICERS

JOHN HALL MANNING, U. S. Attorney, Raleigh, N. C.
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, 1946.

I, Edward L. Cannon, Secretary of the Board of Law Examiners of the State of North Carolina, do certify the following named persons have duly passed examinations of the Board of Law Examiners as of the 9th of August, 1946:

ALLEN, WILLIAM ACQUILLA.....Charlotte.
ARMSTRONG, DAVID HARRISON.....Troy.
BALL, BEVERLY WHITE.....Hamlet.
BULLOCK, JOHN PAUL.....Fairmont.
BUSCHMAN, ELMER VICTOR.....Asheville.
CLONTZ, JAMES WILLIAM.....Salisbury.
COIRA, CHARLES FORTUNATA, JR. .....Lexington.
COLE, ENSER WILLIAM, JR. .....Salisbury.
CRAVEN, JAMES BRAXTON, JR. .....Morganton.
DAVIS, JAMES TOLIVER.....Forest City.
DUMONT, HARRY.....Asheville.
EDWARDS, HERMAN VANCE.....Bryson City.
FONVIELLE, WAYNE ALEXANDER, JR. .....Wilmington.
GARLAND, JAMES BOYCE.....Gastonia.
GAVIN, ROBERT LEE.....Sanford.
HINES, STEDMAN HOLT.....McLeansville.
HOWARD, CARL WILEY.....Bessemer City.
JONES, CARTER WALLACE.....Winton.
KLUTTZ, WILLIAM CLARENCE.....Salisbury.
LEE, CYRUS FIELD.....Wilson.
LIPTON, ROBERT ISRAEL.....Wilmington.
MARTIN, JACOB HARSHAW.....Blowing Rock.
MCCALL, SAMUEL HORACE, JR. .....Troy.
MITCHELL, WILLIAM GARRETT.....Leaksville.
MORGAN, THOMAS GRACEY.....Canton.
MURCHISON, WALLACE CARMICHAEL.....Wilmington.
PACKER, LOREN DAVID.....Biltmore.
PARRISH, FREDERICK MORTIMER, III.....Winston-Salem.
PHILIPS, HENRY HYMAN, JR. .....Tarboro.
POWELL, FRANK MCKINNON.....Whiteville.
RANDLEMAN, JAMES JULIUS.....Mount Airy.
RICHARDS, CHANNING LEATHERS.....Charlotte.
ROBERTSON, JOSEPH RODERICK.....Mount Airy.
SANFORD, JAMES TERRY.....Laurinburg.
SCOTT, ROBERT LYNCH.....Rocky Mount.
SHORT, HAROLD MILTON, JR. .....Charlotte.
SPAULDING, CHARLES CLINTON, JR. .....Durham.
TAYLOR, HERMAN LEROY.....Durham.
TRUESDALE, SIDNEY LOUIS.....Greensboro.
WILSON, JOHN KENYON, JR. .....Elizabeth City.
WOODSON, JAMES LEAKE.....Salisbury.

COMITY LICENSEES.

SOUTHWORTH, ATHERTON GIFFORD.....Charlotte, from District of Columbia.
CARPENTER, WILLIAM WILLOUGHBY.....Hendersonville, from South Carolina.
DOREY, DONALD JAMES.....Roxboro, from Virginia.
SANDERS, PAUL HAMPTON.....Durham, from Texas.
MAGGS, DOUGLAS BLOUNT.....Durham, from District of Columbia.

Given under my hand and the seal of the Board of Law Examiners, this the 9th of August, 1946.

(SEAL)

EDWARD L. CANNON, *Secretary,*
Board of Law Examiners.

CASES REPORTED

A

	PAGE
Absher, S. v.	656
Accident & Indemnity Co. v. Hood	706
Advisory Opinion *in re* Phillips	772
Airport Authority v. Johnson	1
Allred, Wright v.	113
Anderson, Speight v.	492
Arnold, Tarpley v.	679
Atlantic Coast Line R. R. v. Duplin County	719
Atlantic Greyhound Corp., Hoke v.	332
Atlantic Greyhound Corp., Hoke v.	692
Atlantic & Pacific Tea Co., Pressley v.	518
Atwater, Foster v.	472
Automobile Service Co., Freeman v.	736
Ayers, S. v.	579

B

Badgett, *In re*	92
Bailey v. McCotter	160
Baldwin, S. v.	295
Bank v. Board of National Missions	546
Bank v. Frazelle	724
Bank, Perry v.	667
Bank v. Rasberry	586
Bank v. Supply Co.	416
Bank, Welch v.	357
Barber, Lofton v.	481
Barnard v. Sober, Inc.	392
Barnes, Buffaloe v.	313
Barnes, Buffaloe v.	778
Bath v. Norman	502
B-C Remedy Co. v. Unemployment Compensation Comm.	52
Beasley, S. v.	577
Beasley, S. v.	580
Beatty, McCorkle v.	338
Beatty, S. v.	765
Belhaven v. Hodges	485
Bell v. Chadwick	598
Bennett, S. v.	82
Bennett v. Templeton	676
Benson v. Roberson	103
Benton, S. v.	745
Biggers, *In re*	647
Biggerstaff, S. v.	603
Blackwell, S. v.	760
Blanchard v. Blanchard	152
Board of Adjustment, Lee v.	107
Board of Elections, Ingle v.	454
Board of National Missions, Trust Co. v.	546
Board of Trustees of Elon College, Deaton v.	433
Board of Trustees of N. C. Local Governmental Employees' Retirement System, Gardner v.	465
Bowen, S. v.	601
Brandon, Patterson v.	89
Branson, Howell v.	264
Brawley, Lindsay v.	468
Brooks v. Brooks	280
Brown v. Hall	732
Brown v. Loftis	762
Brown, S. v.	681
Buffaloe v. Barnes	313
Buffaloe v. Barnes	778
Bullins, S. v.	142
Burgess, S. v.	771
Butler v. Butler	594

C

Cagle, Clark v.	230
Campbell v. Campbell	653
Cannon v. Cannon	634
Carroll, S. v.	237
Carter, Harrison v.	36
Chadwick, Bell v.	598
Charlotte v. Heath	750
Charlotte Supply Co., Bank v.	416
Church, Board of National Missions of, Trust Co. v.	546
Church, Penland v.	171
City of Charlotte v. Heath	750
City of Goldsboro, Spicer v.	557
City of High Point, Hunt v.	74
Clark v. Cagle	230
Clinton v. Ross	682
Clodfelter, Redwine v.	366
Clough, S. v.	384
Coe v. Surry County	125
Coleman v. Whisnant	258
Collins, *In re*	412
Commercial National Bank of Charlotte v. Supply Co.	416
Compensation Comm., B-C Remedy Co. v.	52
Conference, Talley v.	654

PAGE

Corley, Harrison v. 184
Cotton Co., Price v. 758
Cox v. Hinshaw 700
Crain v. Hutchins 642
Craver v. Spaugh 450
Crotts v. Thomas 385

D

Davis v. Lovick 252
Deaton v. Elon College 433
Deaton, S. v. 348
DeFord, *In re* 189
Diamond Steamship Transportation Corp., Highway Comm. v. 371
Dixie Fire Insurance Co., White v. 119
Drewer, Hobbs v. 146
Duke Power Co., Patterson v. 22
Duplin County, R. R. v. 719

E

Ellis, Johnston County v. 268
Ellison, S. v. 628
Elon College, Deaton v. 433
Ericson v. Ericson 474
Evans v. Horne 581

F

Farrar, S. v. 478
Ferrell v. Worthington 609
First-Citizens Bank & Trust Co. v. Frazelle 724
First Citizens National Bank & Trust Co., Perry v. 667
First-Citizens Bank & Trust Co. v. Rasberry 586
First Security Trust Co. v. Henderson 649
Floyd, S. v. 571
Foster v. Atwater 472
Frazelle, Trust Co. v. 724
Freeman v. Service Co. 736
Fuel Co., Howell v. 730

G

Gardner v. Retirement System 465
Gardner, S. v. 310
Gerringer v. Gerringer 105
Gibson, S. v. 194
Goldsboro, Spicer v. 557
Goodman, Price v. 223

PAGE

Graham v. Spaulding 86
Great Atlantic & Pacific Tea Co., Pressley v. 518
Greensboro-High Point Airport Authority v. Johnson 1
Greyhound Corp., Hoke v. 332
Greyhound Corp., Hoke v. 692
Grimes, S. v. 523
Guilford County, Ins. Co. v. 441
Guilford County, Stansbury v. 41

H

Hall, Brown v. 732
Harrell, S. v. 743
Harrington v. Taylor 769
Harrison v. Carter 36
Harrison v. Corley 184
Hart, S. v. 200
Hartford Accident & Indemnity Co. v. Hood 706
Harvey C. Hines Co., Tyndall v. 620
Harvey v. Linker 711
Heath, Charlotte v. 750
Hedgepeth, Kass v. 405
Henderson, Trust Co. v. 649
Herring, S. v. 213
Hicks v. Ins. Co. 614
High Point, Hunt v. 74
Hightower, S. v. 62
Highway Comm. v. Transportation Corp. 371
Hines Co., Tyndall v. 620
Hinshaw, Cox v. 700
Hobbs v. Drewer 146
Hodges, Belhaven v. 485
Hodges v. Hodges 570
Hoke v. Greyhound Corp. 332
Hoke v. Greyhound Corp. 692
Home Security Life Insurance Co., Hicks v. 614
Hood, Indemnity Co. v. 706
Hood v. Smith 573
Hopkins v. R. R. 655
Horn, Swink v. 713
Horn, Swink v. 718
Horne, Evans v. 581
Howard Sober, Inc., Barnard v. 392
Howell v. Branson 264
Howell v. Fuel Co. 730
Hunt v. High Point 74
Hutchins, Crain v. 642

I PAGE

Ice & Fuel Co., Howell v. 730
Indemnity Co. v. Hood 706
Ingle v. Board of Elections 454
In re Badgett 92
In re Biggers 647
In re Collins 412
In re DeFord 189
In re Estate of Smith 169
In re Phillips 772
In re Will of Lomax 498
Ins. Co. v. Guilford County 441
Ins. Co., Hicks v. 614
Ins. Co., Ireland v. 349
Ins. Co., Rewis v. 325
Ins. Co. v. Wells 574
Ins. Co., White v. 119
Ireland v. Insurance Co. 349

J

Jackson, Sample v. 408
Jackson, S. v. 66
Jackson, S. v. 760
James v. James 399
Jarrett, Turpin v. 135
Jefferson Standard Life Ins. Co. v. Guilford County 441
Jennings v. Morehead City 606
Jernigan v. Jernigan 204
Johnson, Airport Authority v. 1
Johnson v. Sidbury 345
Johnson, S. v. 266
Johnson, S. v. 671
Johnston Cotton Co., Price v. 758
Johnston County v. Ellis 268
Jones, Moore v. 149
Jones v. Realty Co. 303
Jordan, S. v. 155

K

Kass v. Hedgepeth 405
Kennedy v. Smith 514
King v. Rudd 156
King, S. v. 241

L

Lamb v. Lamb 662
Lanier v. Warsaw 637
Lawrence v. Lawrence 221
Lawrence v. Lawrence 624
Lee v. Board of Adjustment 107
Lewis, S. v. 249

PAGE

Liggett & Myers Tobacco Co., Shaw v. 477
Lindsay v. Brawley 468
Linker, Harvey v. 711
Locklear, S. v. 410
Loftis, Brown v. 762
Lofton v. Barber 481
Logan, Searcy v. 562
Lomax, *In re* Will of 498
Long v. Trantham 510
Longest, Wallace v. 161
Love v. Zimmerman 389
Lovick, Davis v. 252
Lumber Mutual Casualty Insurance Co. v. Wells 574

M

McConnell, Miller v. 28
McCorkle v. Beatty 338
McCotter, Bailey v. 160
McKnight, S. v. 766
McNair, S. v. 462
Malpass, S. v. 403
Mariakakis, Smith v. 100
Mason v. Mason 740
Matthews, S. v. 639
Maynor, S. v. 645
Maynor v. Tart 645
Miller v. McConnell 28
Miller, Wood v. 567
Moore v. Jones 149
Morehead City, Jennings v. 606
Morgan, S. v. 414
Mounce, S. v. 159
Mutual Life Ins. Co., Ireland v. 349
Myers Automobile Service Co., Freeman v. 736

N

Nash, S. v. 608
Nebel, Ramsey v. 590
Nelson, S. v. 529
Nessmith, Phillips v. 173
New York Life Ins. Co., Rewis v. 325
Norman, Bath v. 502
North Carolina Unemployment Compensation Comm., B-C Remedy Co. v. 52

O

Oil Co., Stonestreet v. 261
Outland, Wooten v. 245

	PAGE
Overcash, S. v.	632
Owenby, S. v.	521
P	
Palace Realty Co., Jones v.	303
Paper Co., Smith v.	47
Patterson v. Brandon	89
Patterson v. Power Co.	22
Pearce v. Pearce	307
Penland v. Church	171
Perry, S. v.	530
Perry v. Trust Co.	667
Peterson, S. v.	255
Peterson, S. v.	770
Petry, S. v.	78
Phillips, *In re*	772
Phillips v. Nessmith	173
Phillips v. Wearn	290
Power Co., Patterson v.	22
Presbyterian Church, Board of National Missions of, Trust Co. v.	546
Presnell, S. v.	160
Pressley v. Tea Co.	518
Price v. Cotton Co.	758
Price v. Goodman	223
R	
R. R. v. Duplin County	719
R. R., Hopkins v.	655
Raines, Whitaker v.	526
Ramsey v. Nebel	590
Rasberry, Trust Co. v.	586
Rea v. Simowitz	379
Realty Co., Jones v.	303
Realty Co., Vernon v.	58
Red Hill Methodist Church, Penland v.	171
Redwine v. Clodfelter	366
Retirement System, Gardner v.	465
Rewis v. Ins. Co.	325
Reynolds Realty Co., Vernon v.	58
Roberson, Benson v.	103
Robinson, S. v.	95
Rocky Mount Board of Adjustment, Lee v.	107
Ross, Clinton v.	682
Rountree v. Thompson	553
Rudd, King v.	156
S	
Sample v. Jackson	408
Savage, Toler v.	208
Searcy v. Logan	562
Service Co., Freeman v.	736
Setzer, v. S.	216
Sharpe, Tomlinson v.	177
Shaw v. Tobacco Co.	477
Shoup, S. v.	69
Sidbury, Johnson v.	345
Simowitz, Rea v.	379
Smith, Hood v.	573
Smith, *In re* Estate of	169
Smith, Kennedy v.	514
Smith v. Mariakakis	100
Smith v. Paper Co.	47
Smith v. Smith	506
Smith v. Smith	544
Smith, S. v.	738
Smith, Strickland v.	517
Sober, Inc., Barnard v.	392
Southern Oil Co., Stonestreet v.	261
Southern Railway Co., Hopkins v.	655
Southern Waste Paper Co., Smith v.	47
Spaugh, Craver v.	450
Spaulding, Graham v.	86
Speight v. Anderson	492
Spicer v. Goldsboro	557
Standard Ice & Fuel Co., Howell v.	730
Stanley v. Stanley	129
Stansbury v. Guilford County	41
Starnes v. Tyson	395
S. v. Absher	656
S. v. Ayers	579
S. v. Baldwin	295
S. v. Beasley	577
S. v. Beasley	580
S. v. Beatty	765
S. v. Bennett	82
S. v. Benton	745
S. v. Biggerstaff	603
S. v. Bowen	601
S. v. Blackwell	760
S. v. Brown	681
S. v. Bullins	142
S. v. Burgess	771
S. v. Carroll	237
S. v. Clough	384
S. v. Deaton	348
S. v. Ellison	628
S. v. Farrar	478
S. v. Floyd	571
S. v. Gardner	310
S. v. Gibson	194
S. v. Grimes	523

PAGE

S. v. Harrell 743
S. v. Hart 200
S. v. Herring 213
S. v. Hightower 62
S. v. Jackson 66
S. v. Jackson 760
S. v. Johnson 266
S. v. Johnson 671
S. v. Jordan 155
S. v. King 241
S. v. Lewis 249
S. v. Locklear 410
S. v. McKnight 766
S. v. McNair 462
S. v. Malpass 403
S. v. Matthews 639
S. v. Maynor 645
S. v. Morgan 414
S. v. Mounce 159
S. v. Nash 608
S. v. Nelson 529
S. v. Overcash 632
S. v. Owenby 521
S. v. Perry 530
S. v. Peterson 255
S. v. Peterson 770
S. v. Petry 78
S. v. Presnell 160
S. v. Robinson 95
S. v. Setzer 216
S. v. Shoup 69
S. v. Smith 738
S. v. Stewart 299
S. v. Stone 97
S. v. Taylor 286
S. v. Thomas 384
S. v. Thompson 651
S. v. Vaden 138
S. v. Walker 458
S. v. Witherington 211
State Board of Elections, Ingle v. 454
State Highway & Public Works Comm. v. Transportation Corp. 371
Statesville Theatre Corp., Webb v. 342
Stephenson v. Watson 742
Stewart, S. v. 299
Stone, S. v. 97
Stonestreet v. Oil Co. 261
Strickland v. Smith 517
Supply Co., Bank v. 416
Surry County, Coe v. 125
Swink v. Horn 713
Swink v. Horn 718

T

PAGE

Talley, Western North Carolina Conference v. 654
Tarpley v. Arnold 679
Tart, Maynor v. 645
Taylor, Harrington v. 769
Taylor, S. v. 286
Tea Co., Pressley v. 518
Telegraph Co., Ward v. 175
Templeton, Bennett v. 676
Theatre Corp., Webb v. 342
Thomas, Crotts v. 385
Thomas, S. v. 384
Thompson, Rountree v. 553
Thompson, S. v. 651
Tobacco Co., Shaw v. 477
Toler v. Savage 208
Tomlinson v. Sharpe 177
Town of Bath v. Norman 502
Town of Belhaven v. Hodges 485
Town of Clinton v. Ross 682
Town of Warsaw, Lanier v. 637
Transportation Corp., Highway Comm. v. 371
Trantham, Long v. 510
Trust Co. v. Board of National Missions 546
Trust Co. v. Frazelle 724
Trust Co. v. Henderson 649
Trust Co., Perry v. 667
Trust Co. v. Rasberry 586
Trust Co., Welch v. 357
Turpin v. Jarrett 135
Tyndall v. Hines Co. 620
Tyson, Starnes v. 395

U

Unemployment Compensation Comm., B-C Remedy Co. v. 52

V

Vaden, S. v. 138
Vernon v. Realty Co. 58

W

Wachovia Bank & Trust Co. v. Board of National Missions 546
Wachovia Bank & Trust Co., Welch v. 357
Walker, S. v. 458
Wallace v. Longest 161
Walston v. Whitley & Co. 537
Ward v. Telegraph Co. 175

	PAGE
Warsaw, Lanier v.	637
Watson, Stephenson v.	742
Wearn, Phillips v.	290
Webb v. Theatre Corp.	342
Welch v. Welch	541
Welch v. Trust Co.	357
Wells, Insurance Co. v.	574
Western North Carolina Conference v. Talley	654
Western Union Tel Co., Ward v.	175
Whisnant, Coleman v.	258
Whitaker v. Raines	526
White v. Insurance Co.	119
Whitley & Co., Walston v.	537
Will of Lomax, *In re*	498
Witherington, S. v.	211
Wood v. Miller	567
Wooten v. Outland	245
Worthington, Ferrell v.	609
Wright v. Allred	113

Z

Ziglar v. Ziglar	102
Zimmerman, Love v.	389

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

Greene v. Mills Co., 224 N. C., 714, petition for *certiorari* denied, 23 April, 1945.

AMENDMENT TO RULES OF THE BOARD OF LAW EXAMINERS..... 782

CASES CITED

A

Abbitt v. Gregory....201 N. C., 577.... 207
Abbott v. Cromartie.... 72 N. C., 292.... 485
Adams v. Durham....189 N. C., 232....7, 12, 17, 21
Aderholt v. Condon....189 N. C., 748.... 49
Advertising Co. v. Asheville....189 N. C., 737.... 639
Ahoskie v. Moye....200 N. C., 11.... 689
Albright v. Albright....172 N. C., 351.... 137
Albritton v. Albritton....210 N. C., 111.... 626
Alderman, *In re*....157 N. C., 507.... 193
Alexander v. Gibbon....118 N. C., 796.... 206
Allen v. Allen....121 N. C., 328.... 91
Allen v. Hammond....122 N. C., 754.... 654
Allen v. McPherson....168 N. C., 435.... 452
Allison v. Steele....220 N. C., 318.... 254
Allsbrook v. Walston....212 N. C., 225....260, 590
Allston v. Connell....140 N. C., 485.... 712
Alsworth v. Cedar Works....172 N. C., 17.... 484
Anderson v. Amusement Co....213 N. C., 130.... 344
Anderson v. Anderson....177 N. C., 401.... 342
Anderson v. Fidelity Co....174 N. C., 417.... 189
Anderson v. McRae....211 N. C., 197....234, 236
Apex v. Templeton....223 N. C., 645.... 35
Apostle v. Ins. Co....208 N. C., 95.... 206
Archie v. Lumber Co....222 N. C., 477.... 732
Armstrong v. Service Stores....203 N. C., 231.... 476
Arrington v. Ins. Co....193 N. C., 344.... 617
Asbury v. Albemarle....162 N. C., 247.... 17
Asheboro v. Morris....212 N. C., 331.... 34
Ashley v. Chevrolet Co....222 N. C., 25.... 327
Askew v. Dildy....188 N. C., 147.... 91
Askew v. Matthews....175 N. C., 187.... 318
Assurance Society v. Ashby....215 N. C., 280.... 618
Atkins v. Transportation Co....224 N. C., 688.... 148
Atkinson, *In re* Will of....225 N. C., 526.... 207
Austin v. King.... 97 N. C., 339.... 89
Austin v. Overton....222 N. C., 89.... 167
Avery v. Brantley....191 N. C., 396.... 40
Avery v. Stewart....136 N. C., 426.... 342
Aycock v. Cooper....202 N. C., 500.... 48

B

Bailey v. Hassell....184 N. C., 450.... 35
Bailey v. Hayman....218 N. C., 175.... 206
Bailey v. Hayman....220 N. C., 402....206, 749
Bailey v. Hayman....222 N. C., 58.... 206
Bailey v. McLain....215 N. C., 150....369, 370
Bailey v. Mineral Co....183 N. C., 525.... 345
Bailey v. Poole.... 35 N. C., 404.... 622
Baird v. Reynolds.... 99 N. C., 469.... 599
Baker v. McAden....118 N. C., 740.... 365

Baker v. R. R. ..... 91 N. C., 308 40
Ballinger v. Thomas ..... 195 N. C., 517 613
Bank v. Atmore ..... 200 N. C., 437 734
Bank v. Dardine ..... 207 N. C., 509 600
Bank v. Frederickson ..... 225 N. C., 267 320
Bank v. Gornto ..... 161 N. C., 341 728
Bank v. Insurance Co. ..... 209 N. C., 17 574
Bank v. McArthur ..... 168 N. C., 48 749
Bank v. McCaskill ..... 174 N. C., 362 543
Bank v. McCullers ..... 211 N. C., 327 476
Bank v. McEwen ..... 160 N. C., 414 506
Bank v. Misenheimer ..... 211 N. C., 519 665
Bank v. Motor Co ..... 216 N. C., 432 341
Bank v. Page ..... 206 N. C., 18 305
Bank v. Snow ..... 221 N. C., 14 64
Bank v. Stack ..... 179 N. C., 514 341
Bank v. Wilson ..... 168 N. C., 557 207
Barbee v. Greenberg ..... 144 N. C., 430 728
Barbee v. Lamb ..... 225 N. C., 211 255
Barger v. Smith ..... 156 N. C., 323 689
Barker v. Barker ..... 136 N. C., 316 597
Barnes, *In re* ..... 212 N. C., 735 779
Barnes v. Comrs. ..... 135 N. C., 27 457
Barnes v. Saleeby ..... 177 N. C., 256 743
Barnett v. Amaker ..... 198 N. C., 168 484
Barnhill v. Thompson ..... 122 N. C., 493 778
Barton v. Morphes ..... 13 N. C., 520 96
Basketeria Stores, Inc., v. Indemnity Co. ..... 204 N. C., 537 ..... 260, 263, 387
Basnight v. Jobbing Co. ..... 148 N. C., 350 443
Bass v. Hunter ..... 216 N. C., 505 61
Bateman v. Hopkins ..... 157 N. C., 470 566
Bateman v. Sterrett ..... 201 N. C., 59 57
Beaufort County v. Bishop ..... 216 N. C., 211 279
Beck v. Tanning Co. ..... 179 N. C., 123 ..... 460, 534
Beck v. Wilkins-Ricks Co. ..... 179 N. C., 231 395
Bedsole v. Monroe ..... 40 N. C., 313 519
Belk v. Belk ..... 175 N. C., 69 89
Belk's Department Store v. Ins. Co. ..... 208 N. C., 267 51
Bell v. Nivens ..... 225 N. C., 35 222
Bellamy v. Mfg. Co. ..... 200 N. C., 676 732
Benevolent Society v. Orrell ..... 195 N. C., 405 550
Bennett v. R. R. ..... 159 N. C., 345 39
Benton v. Alexander ..... 224 N. C., 800 665
Benton v. Building Co. ..... 223 N. C., 809 440
Bernhardt v. Brown ..... 122 N. C., 587 89
Berry v. Cedar Works ..... 184 N. C., 187 484
Berry v. Coppersmith ..... 212 N. C., 50 87
Berry v. McPherson ..... 153 N. C., 4 87
Best v. Garris ..... 211 N. C., 305 716
Best v. Kinston ..... 106 N. C., 205 39
Bivens v. Phifer ..... 47 N. C., 436 248
Bizzell v. Equipment Co. ..... 182 N. C., 98 505
Blackwelder v. Concord ..... 205 N. C., 792 76

Blades v. R. R.....218 N. C., 702..... 379
Blankenship v. Assurance Society.210 N. C., 471..... 357
Blount v. Jones.....175 N. C., 708..... 743
Boddie v. Bond.....154 N. C., 359..... 593
Bohannon v. Trotman.....214 N. C., 706..... 369
Bolick v. R. R.....138 N. C., 370..... 336
Bond v. Tarboro.....217 N. C., 289..... 590
Bonner v. Hodges.....111 N. C., 66..... 748
Boone v. Lee.....175 N. C., 383..... 342
Boozer v. Assurance Society.....206 N. C., 848..... 356
Borden v. Goldsboro.....173 N. C., 661..... 46
Boutten v. R. R.....128 N. C., 337..... 671
Bowden v. Lynch.....173 N. C., 203..... 137
Bowie v. Tucker.....197 N. C., 671..... 452
Bowling v. Bank.....209 N. C., 463..... 735
Bowman v. Blankenship.....165 N. C., 519..... 764
Bowser v. Tarry.....156 N. C., 35..... 671
Boyle v. Stallings.....140 N. C., 524..... 471
Brady v. Randleman.....159 N. C., 434..... 78
Brenizer v. Stephens.....220 N. C., 395.....60, 61
Brewer v. Brewer.....198 N. C., 669..... 627
Brewer v. Ring.....177 N. C., 476..... 392
Briggs v. Developers.....191 N. C., 784..... 325
Briggs v. Raleigh.....195 N. C., 223.....11, 16, 17, 18
Brigman v. Baley.....213 N. C., 119.....46, 779
Brinson v. Ins. Co.....195 N. C., 332..... 357
Britt v. R. R.....148 N. C., 37..... 622
Britton v. Miller..... 63 N. C., 268..... 248
Broadfoot v. Fayetteville.....124 N. C., 478..... 608
Broadnax v. Broadnax.....160 N. C., 432..... 40
Brockenbrough v. Comrs.....134 N. C., 1.....7, 10, 13, 18
Brogden, *Ex parte*.....180 N. C., 157..... 248
Broocks v. Muirhead.....223 N. C., 227..... 585
Brooks v. Brooks.....226 N. C., 280..... 597
Brooks v. Trust Co.....206 N. C., 436..... 446
Brown v. Aluminum Co.....224 N. C., 766.....330, 732
Brown v. Brown.....213 N. C., 347.....310, 543
Brown v. Durham.....141 N. C., 249..... 77
Brown v. Express Co.....192 N. C., 25..... 395
Brown v. Holland.....221 N. C., 135..... 137
Brown, *In re* Will of.....194 N. C., 583..... 501
Brown, *In re* Will of.....203 N. C., 347..... 501
Brown v. Lipe.....210 N. C., 199.....396, 397
Brunswick-Balke Co. v. Mecklenburg County .....181 N. C., 386..... 689
Bryan v. T. A. Loving Co.....222 N. C., 724.....328, 331, 731
Bryant v. Scott..... 21 N. C., 155..... 246
Bryson v. Lucas..... 84 N. C., 681..... 443
Buchanan v. Highway Comm.....217 N. C., 173.....49, 328
Buckner v. Ins. Co.....172 N. C., 762..... 356
Buffaloe v. Barnes.....226 N. C., 313..... 780
Buie v. Buie..... 24 N. C., 87..... 347
Building & Loan Asso. v. Swaim..198 N. C., 14..... 263
Bulluck v. Ins. Co.....200 N. C., 642..... 357
Bunch v. Edenton..... 90 N. C., 431.....76, 77

Burgin v. Board of Election.....214 N. C., 140..... 505
Burgin v. Patton..... 58 N. C., 425..... 248
Burleson v. Board of Aldermen..200 N. C., 30.....7, 21
Burnett v. Paint Co.....216 N. C., 204..... 52
Burns v. Stewart.....162 N. C., 360..... 484
Burriss v. Starr.....165 N. C., 657..... 713
Burton v. Cahill.....192 N. C., 505..... 248
Burwell v. Sneed.....104 N. C., 118.....566, 623
Butler v. Armour.....192 N. C., 510..... 650
Butler v. Winston.....223 N. C., 421..... 278
Butner v. Spease.....217 N. C., 82..... 770
Byers v. Byers.....222 N. C., 298.....543, 742
Byers v. Byers.....223 N. C., 85.....310, 543
Bynum v. Bank.....221 N. C., 101..... 318
Byrd v. Byrd.....117 N. C., 523..... 158
Byrd v. Johnson.....220 N. C., 184..... 57

C

Cab Co. v. Sanders.....223 N. C., 626..... 516
Cahoon v. Brinkley.....176 N. C., 5.....451, 452, 528
Cahoon v. Roughton.....215 N. C., 116..... 497
Calhoun v. Light Co.....216 N. C., 256..... 439
Cannon v. Cannon.....225 N. C., 611..... 635
Carnes v. Carnes.....204 N. C., 636.....284, 627
Carolina Beach v. Mintz.....212 N. C., 578..... 46
Carpenter v. Power Co.....191 N. C., 130.....337, 381
Carpenter v. Tucker..... 98 N. C., 316..... 680
Carruthers v. R. R.....218 N. C., 377..... 347
Carson v. Ins. Co.....171 N. C., 135..... 215
Carter v. Anderson.....208 N. C., 529..... 452
Carter v. Bryant.....199 N. C., 704..... 566
Carter v. Ins. Co.....208 N. C., 665..... 356
Cayton v. Clark.....212 N. C., 374..... 452
Cecil v. Lumber Co.....197 N. C., 81..... 396
Chance v. Ice Co.....166 N. C., 495..... 522
Charlotte v. Kavanaugh.....221 N. C., 259..... 34
Cherry v. Whitehurst.....216 N. C., 340..... 265
Chesson v. Jordan.....224 N. C., 289..... 495
Chozen Confections v. Johnson....220 N. C., 432..... 566
Christman v. Hilliard.....167 N. C., 4..... 89
Church v. Refining Co.....200 N. C., 469..... 91
Church v. Church.....158 N. C., 564..... 158
Clark v. Greenville.....221 N. C., 255..... 602
Clark v. Moore.....126 N. C., 1..... 491
Clark v. Stanley..... 66 N. C., 59..... 778
Clary v. Clary..... 24 N. C., 78..... 622
Clements v. Power Co.....178 N. C., 52..... 440
Clendenin v. Turner..... 96 N. C., 416.....39, 277
Clinard v. Winston-Salem.....217 N. C., 119..... 639
Coach Co. v. Lee.....218 N. C., 320.....381, 623, 644
Cobb v. R. R.....172 N. C., 58..... 689
Coble v. Coble..... 55 N. C., 392..... 310
Cochran v. Rowe.....225 N. C., 645..... 719
Cody v. Hovey.....219 N. C., 369..... 735

Cogdell v. R. R.....132 N. C., 852..... 623
Cogdill v. Hardwood Co.....194 N. C., 745..... 398
Coile v. Com. Travelers.....161 N. C., 104..... 617
Cole v. Fibre Co.....200 N. C., 484.....51, 305
Cole v. Koonce.....214 N. C., 188..... 148
Cole v. R. R.....211 N. C., 591..... 717
Coleman v. Whisnant.....225 N. C., 494..... 259
Coleman v. Whisnant.....226 N. C., 258.....387, 600, 670
Collier v. Collier..... 16 N. C., 352..... 286
Collins, *In re*.....226 N. C., 412..... 509
Collins v. Lamb.....215 N. C., 719..... 383
Collins v. Patterson.....119 N. C., 602..... 495
Colvard v. Light Co.....204 N. C., 97..... 624
Comer v. Winston-Salem.....178 N. C., 383..... 77
Commercial Trust v. Gaines.....193 N. C., 233..... 186
Comrs. of Beaufort v. Rowland...220 N. C., 24..... 565
Comrs. of Brunswick v. Walker..203 N. C., 505..... 46
Comrs. of Yancey v. Piercy..... 72 N. C., 181..... 734
Conley v. Pearce-Young-Angel Co. .....224 N. C., 211 .....149, 698, 762
Connor v. Dillard.....129 N. C., 50..... 173
Conrad v. Foundry Co.....198 N. C., 723..... 327
Cook v. Sink.....190 N. C., 620..... 91
Cooper v. Cooper.....221 N. C., 124..... 138
Cornelison v. Hammond.....224 N. C., 757..... 492
Cotton Mills v. Maslin.....195 N. C., 12..... 520
Councill v. Bailey.....154 N. C., 54..... 173
Council v. Sanderlin.....183 N. C., 253..... 51
Covington v. Furniture Co.....138 N. C., 374..... 440
Cowles v. Hardin..... 79 N. C., 577..... 571
Cowles v. Reavis.....109 N. C., 417..... 491
Cox v. Assurance Society.....209 N. C., 778..... 617
Coxe v. Carpenter.....157 N. C., 557..... 87
Craig v. Price.....210 N. C., 739..... 262
Craven, *In re* Will of.....169 N. C., 561..... 207
Craver v. Spaugh.....226 N. C., 450..... 528
Credle v. Gibbs..... 65 N. C., 192..... 265
Creech v. Grainger.....106 N. C., 213..... 364
Crews v. Crews.....175 N. C., 168..... 154
Crissman v. Palmer.....225 N. C., 472.....158, 716
Critcher v. Watson.....146 N. C., 150..... 263
Crotts v. Thomas.....226 N. C., 385.....728, 729
Crowell v. Parker.....171 N. C., 392..... 306
Crye v. Stoltz.....193 N. C., 802.....452, 505
C. T. H. Corp. v. Maxwell, Comr..212 N. C., 803..... 186
Culbreth v. Caison.....220 N. C., 717..... 550
Culp v. Lee.....109 N. C., 675..... 248
Cummings v. Swepson.....124 N. C., 579..... 471
Cummins v. Fruit Co.....225 N. C., 625..... 148
Cunningham v. Long.....186 N. C., 526.....388, 341, 342, 729
Currin v. Currin.....219 N. C., 815..... 599
Current v. Webb.....220 N. C., 425..... 437
Cutter v. Trust Co.....213 N. C., 686.....370, 589

D

Daniel, *In re* Estate of....225 N. C., 18.... 442
Daniel v. Power Co....201 N. C., 680.... 504
Daniels v. Fowler....120 N. C., 14.... 519
Darden v. Plymouth....166 N. C., 492.... 77
Darr v. Aluminum Co....215 N. C., 768....496, 497
Daughtry v. Cline....224 N. C., 381.... 465
Daughtry v. Daughtry....225 N. C., 358.... 309
David v. Crump....219 N. C., 625.... 600
Davis v. Davis....179 N. C., 185.... 509
Davis v. Long....189 N. C., 129.... 516
Davis v. R. R....170 N. C., 582.... 167
Davis v. Robinson....189 N. C., 589.... 294
Davis v. Summerfield....133 N. C., 325.... 376
Davis v. Wilmerding....222 N. C., 639.... 391
Dawson v. Ennett....151 N. C., 543.... 136
Deese v. Lumberton....211 N. C., 31.... 754
DeHoff v. Black....206 N. C., 687.... 347
Deitz v. Bolch....209 N. C., 202.... 505
DeLaney v. Hart....198 N. C., 96.... 294
Dent v. Mica Co....212 N. C., 241....234, 471
Dermid v. R. R....148 N. C., 180.... 440
Diamond v. Service Stores....211 N. C., 632.... 391
Dibbrell v. Ins. Co....110 N. C., 193.... 617
Dillingham v. Gardner....222 N. C., 79.... 514
Ditmore v. Rexford....165 N. C., 620.... 206
Dobson v. Finley.... 53 N. C., 495.... 491
Dobson v. Whisenhant....101 N. C., 645.... 566
Dorman v. Goodman....213 N. C., 406.... 484
Dowdy v. Dowdy....154 N. C., 556....154, 627
Doyle v. Raleigh.... 89 N. C., 133.... 779
Ducker v. Cochrane.... 92 N. C., 597.... 427
Dudley v. Dudley....225 N. C., 83....543, 742
Duffer v. Brunson....188 N. C., 789.... 505
Duffy v. Duffy....120 N. C., 346.... 133
Duffy v. Duffy....221 N. C., 521....370, 590
Duffy v. Phipps....180 N. C., 313.... 388
Duke v. Belhaven....174 N. C., 95.... 77
Dunnevant v. R. R....167 N. C., 232.... 440
Duplin County v. Harrell....195 N. C., 445.... 152
Dupree v. Daughtridge....188 N. C., 193.... 137
Dyer v. Dyer....212 N. C., 620....134, 649
Dyer v. Dyer....213 N. C., 634.... 649

E

Eagles v. R. R....184 N. C., 66.... 124
Earnhardt v. Clement....137 N. C., 91.... 748
Eason v. Buffaloe....198 N. C., 520....60, 294
Edgerton v. Taylor....184 N. C., 571.... 427
Edwards v. Junior Order....220 N. C., 41.... 491
Efird v. Comrs. of Forsyth....217 N. C., 691.... 719
Eldridge v. Mangum....216 N. C., 532.... 407
Elias v. Comrs. of Buncombe....198 N. C., 733.... 510

Eliason v. Coleman..... 86 N. C., 236..... 778
Elizabeth City v. Aydlett.....201 N. C., 602..... 110
Elizabeth City v. Commander.....176 N. C., 26..... 473
Elledge v. Parrish.....224 N. C., 397..... 137
Eller v. Dent.....203 N. C., 439..... 699
Ellis v. Ellis.....190 N. C., 418.....543, 571, 678
Ellis v. Power Co.....193 N. C., 357..... 439
Elrod v. Phillips.....214 N. C., 472..... 61
Ericson v. Ericson.....226 N. C., 474..... 654
Ervin v. Conn.....225 N. C., 267..... 320
Escoffery, *In re*.....216 N. C., 19..... 716
Estes v. Rash.....170 N. C., 341..... 678
Etheridge v. Palin..... 72 N. C., 213..... 600
Evans v. Lumber Co.....174 N. C., 31..... 376
Everett v. Fair Association.....202 N. C., 838..... 476
Everett, *In re* Will of.....153 N. C., 83..... 502
Everett v. Smith..... 44 N. C., 303..... 485
Ezzell v. Merritt.....224 N. C., 602..... 655
Ex parte Brogden.....180 N. C., 157..... 248
Exum v. Lynch.....188 N. C., 392.....259, 263

F

Fain, *In re*.....172 N. C., 790..... 192
Farrington v. McNeill.....174 N. C., 420..... 670
Fawcett v. Fawcett.....191 N. C., 679..... 260
Fayetteville v. Distributing Co...216 N. C., 596.....688, 689, 691
Featherstone v. Glenn.....225 N. C., 404..... 743
Federal Reserve Bank v. Mfg. Co.213 N. C., 489..... 670
Ferrell v. Hales.....119 N. C., 199..... 646
Fields v. Plumbing Co.....224 N. C., 841..... 330
Findly v. Ray..... 50 N. C., 125..... 263
Fish v. Hanson.....223 N. C., 143..... 369
Fisher v. Fisher.....218 N. C., 42..... 365
Fisher v. Ins. Co.....136 N. C., 217..... 189
Fisher v. Toxaway Co.....165 N. C., 663..... 484
Fisher v. Trust Co.....138 N. C., 224..... 520
Fitzgerald v. Concord.....140 N. C., 110.....76, 77
Flemming v. Asheville.....205 N. C., 765..... 639
Flowers v. King.....145 N. C., 234..... 505
Floyd v. R. R.....167 N. C., 55..... 211
Flynn v. Rumley.....212 N. C., 25..... 152
Follette v. Accident Association..107 N. C., 240..... 617
Ford v. Ins. Co.....222 N. C., 154..... 356
Ford v. Shedbee..... 21 N. C., 16.....665, 666
Ford v. McBrayer.....171 N. C., 420..... 136
Fore v. Assurance Society.....209 N. C., 548..... 357
Foscue v. Ins. Co.....196 N. C., 139..... 576
Foster v. Atwater.....226 N. C., 472..... 586
Foster v. Tryon.....169 N. C., 182..... 77
Fowler v. Fowler.....190 N. C., 536..... 171
Fox v. Mills, Inc.....225 N. C., 580.....109, 369, 413, 509, 716
Foxman v. Hanes.....218 N. C., 722..... 341
Fraley v. March..... 68 N. C., 160..... 173
Franklin v. Realty Co.....202 N. C., 212..... 61

Freeman v. Knight..... 27 N. C., 72..... 247
Frink v. Stewart..... 94 N. C., 484..... 689
Fuquay v. R. R.....199 N. C., 499..... 334

G

Gallimore v. Grubb.....156 N. C., 575.....388, 729
Gallop v. Clark.....188 N. C., 186..... 179
Garrett v. Trent.....216 N. C., 162..... 452
Garrison v. Machine Co.....519 N. C., 285..... 670
Gaster v. Thomas.....188 N. C., 346..... 452
Gaylord v. Berry.....169 N. C., 733..... 453
Gaylord v. McCoy.....161 N. C., 685.....388, 729
Gerow v. R. R.....189 N. C., 813..... 93
Gerringer v. Gerringer.....223 N. C., 818..... 207
Gibbs v. Higgins.....215 N. C., 201..... 206
Gill v. Charlotte.....213 N. C., 160..... 129
Gillespie v. Allison.....115 N. C., 542..... 57
Gilliam v. Underwood..... 56 N. C., 100..... 248
Gillis v. Transit Corp.....193 N. C., 346..... 211
Glass v. Shoe Co.....212 N. C., 70..... 484
Glenn v. Culbreth.....197 N. C., 675..... 719
Goldsboro v. Supply Co.....200 N. C., 405..... 655
Goldstein v. R. R.....188 N. C., 636..... 77
Goodman v. Goodman.....201 N. C., 808..... 160
Goodman v. Goodman.....208 N. C., 416..... 476
Gordon v. Gordon..... 88 N. C., 45..... 286
Gordon, *In re* S. v.....225 N. C., 241..... 647
Gorham v. Ins. Co.....214 N. C., 526..... 206
Goswick v. Durham.....211 N. C., 687..... 7
Graham v. Charlotte.....186 N. C., 649.....76, 77
Grandy v. Sawyer..... 62 N. C., 8..... 248
Grantham v. Grantham.....205 N. C., 363..... 254
Graves v. Howard.....159 N. C., 594..... 709
Gregory v. Ins. Co.....223 N. C., 124..... 149
Green v. Green.....131 N. C., 533..... 310
Greer v. Construction Co.....190 N. C., 632..... 49
Griffin v. Insurance Co.....225 N. C., 684..... 497
Grimes v. Andrews.....170 N. C., 515..... 342
Grocery Co. v. R. R.....215 N. C., 223..... 710
Grocery Co. v. Taylor.....175 N. C., 37..... 574
Groome v. Statesville.....207 N. C., 538..... 440
Groves v. Barden.....169 N. C., 8.....778, 779
Grubb v. Motor Co.....209 N. C., 88..... 263
Guilford County v. Estates Administration, Inc. .....213 N. C., 763.....151, 152
Gulledge v. R. R.....147 N. C., 234..... 39
Gulledge v. R. R.....148 N. C., 567..... 39
Gunter v. Mfg. Co.....166 N. C., 161..... 491
Gurley v. Power Co.....172 N. C., 690..... 381
Guy v. Ins. Co.....206 N. C., 118..... 357

H

Hairston v. Garwood.....123 N. C., 345..... 506
Hairston v. Keswick Corp.....214 N. C., 678..... 447

Hall v. Misenheimer....137 N. C., 183.... 713
Hall v. Presnell....157 N. C., 290.... 506
Hall v. Quinn....190 N. C., 326.... 91
Hall v. R. R....146 N. C., 345.... 39
Hall v. R. R....149 N. C., 108.... 39
Hallyburton v. Board of Education....213 N. C., 9....128, 129
Hamilton v. Lumber Co....160 N. C., 47.... 491
Hamilton v. Rocky Mount....199 N. C., 504.... 77
Hamlin v. Tucker.... 72 N. C., 502....519, 520
Hampton v. Griggs....184 N. C., 13....136, 137
Hampton v. Hawkins....219 N. C., 205.... 148
Hancock v. Wilson....211 N. C., 129.... 397
Hanes v. Shapiro....168 N. C., 24.... 738
Hanes v. Utilities Co....191 N. C., 13.... 40
Hanstein v. Ferrall....149 N. C., 240.... 491
Harden v. Furn. Co....199 N. C., 733.... 327
Harden v. Raleigh....192 N. C., 395.... 109
Hardie v. Tel. Co....190 N. C., 45.... 176
Hardison v. Reel....154 N. C., 273.... 263
Hardware Co. v. Banking Co....169 N. C., 744.... 540
Hardware Co. v. Jones....222 N. C., 530.... 152
Hargett v. Bell....134 N. C., 394.... 688
Hargrove v. Cox....180 N. C., 360.... 485
Harper v. Sudderth.... 62 N. C., 279.... 248
Harrell v. Hagan....147 N. C., 111....136, 137
Harrell v. Watson.... 63 N. C., 454.... 260
Harrington v. Rawls....136 N. C., 65....261, 637
Harrington v. Taylor....225 N. C., 690.... 770
Harris v. Bennett....160 N. C., 339.... 504
Harris v. Carter....189 N. C., 295.... 513
Harris v. Davenport....132 N. C., 697.... 379
Harris v. Harris....115 N. C., 587.... 192
Harris v. Harris....178 N. C., 7.... 781
Harris v. Watson....201 N. C., 661.... 779
Harris v. Wright....118 N. C., 422.... 431
Harrison v. Brown....222 N. C., 610.... 306
Harrison v. R. R....194 N. C., 656.... 149
Harry v. Graham.... 18 N. C., 76.... 491
Harty v. Harris....120 N. C., 408.... 727
Harvester Co. v. Carter....173 N. C., 229.... 540
Harwood v. Shoe....141 N. C., 161.... 431
Hastings v. Earp.... 62 N. C., 5.... 248
Hatchell v. Odom.... 19 N. C., 302.... 262
Hatcher v. Odom.... 19 N. C., 302.... 259
Hauser v. Craft....134 N. C., 319.... 484
Hauser v. Morrison....146 N. C., 248.... 265
Hayes v. Benton....193 N. C., 379.... 458
Hayes v. Elon College....224 N. C., 11....49, 437, 569
Hayes v. R. R....141 N. C., 195.... 210
Hayes v. Tel. Co....211 N. C., 192.... 148
Haygood's Will, *In re*....101 N. C., 574.... 500
Haynes v. Gas Co....114 N. C., 203.... 439
Hedgepeth, *In re*....150 N. C., 245.... 500
Hegler v. Mills Co....224 N. C., 669.... 328

Heilig v. Ins. Co.....222 N. C., 231..... 617
Helsabeck v. Vass.....196 N. C., 603..... 151
Hemphill v. Board of Aldermen..212 N. C., 185..... 496
Henderson v. Power Co.....200 N. C., 443..... 137
Henderson v. Womack..... 41 N. C., 437..... 248
Hendrix v. R. R.....202 N. C., 579..... 396
Henley v. Holt.....214 N. C., 384.....341, 342
Henning v. Warner.....109 N. C., 406..... 513
Henofer v. Realty Co.....178 N. C., 584..... 388
Henry v. Hilliard.....155 N. C., 372..... 114
Hensley v. Furniture Co.....164 N. C., 148..... 735
Henson v. Wilson.....225 N. C., 417..... 175
Heyer v. Bulluck.....210 N. C., 321..... 550
Hicks v. Kenan.....139 N. C., 337..... 443
Hicks v. Love.....201 N. C., 773..... 623
Higgins v. Higgins.....212 N. C., 219.....206, 207
High v. Bailey.....107 N. C., 70..... 154
Highway Comm. v. Transportation Corp. .....225 N. C., 198..... 189
Highway Comm. v. Transportation Corp. .....226 N. C., 371.....391, 438
Highway Commission v. Young..200 N. C., 603..... 754
Hill v. Bean.....150 N. C., 436.....460, 534
Hill v. Ins. Co.....207 N. C., 166..... 356
Hill v. Stansbury.....221 N. C., 339..... 735
Hill v. Stansbury.....223 N. C., 193..... 46
Hill v. Stansbury.....224 N. C., 356.....46, 449
Hill v. Young.....217 N. C., 114..... 35
Hines v. Foundation Co.....196 N. C., 322..... 40
Hines v. Lucas.....195 N. C., 376..... 735
Hinton, *In re* Will of.....180 N. C., 206..... 501
Hinton v. Vinson.....180 N. C., 393..... 710
Hobbs v. Coach Co.....225 N. C., 323..... 168
Hobbs v. Craige..... 23 N. C., 332..... 247
Hobbs v. Mann.....199 N. C., 532..... 175
Hodges v. Stewart.....218 N. C., 290..... 565
Hoggard v. Jordan.....140 N. C., 610..... 666
Hoke v. Glenn.....167 N. C., 594..... 309
Holder v. Mortgage Co.....214 N. C., 128..... 234
Holland v. Benevolent Assn.....176 N. C., 86..... 528
Holland v. Hartley.....171 N. C., 376..... 402
Holland v. Smith.....224 N. C., 255..... 550
Holloman v. Holloman.....127 N. C., 15..... 571
Holmes v. Crowell..... 73 N. C., 613..... 593
Holmes v. Fayetteville.....197 N. C., 740..... 756
Holton v. Andrews.....151 N. C., 340..... 727
Hood, Comr. of Banks, v. Davidson .....207 N. C., 329.....51, 432
Hood, Comr. of Banks, v. Holding .....205 N. C., 451..... 545
Hood, Comr. of Banks, v. Simpson .....206 N. C., 748.....706, 711
Hood v. Tel. Co.....162 N. C., 92..... 39
Hooks v. Neighbors.....211 N. C., 382..... 452
Hopkins v. Barnhardt.....223 N. C., 617..... 265

Horah v. Knox ..... 87 N. C., 483 208
Horton v. Horton ..... 186 N. C., 332 597
Horton v. Ins. Co. ..... 122 N. C., 498 617
Horton v. R. R. ..... 170 N. C., 383 540
Horton v. R. R. ..... 175 N. C., 472 ..... 93, 94
Hosiery Co. v. Express Co. ..... 184 N. C., 478 644
Hosiery Mill v. Hosiery Mills ..... 198 N. C., 596 735
Hotel Co. v. Griffin ..... 182 N. C., 539 743
Howell v. Howell ..... 223 N. C., 62 ..... 284, 627
Howell v. Pate ..... 181 N. C., 117 206
Howell v. Tyler ..... 91 N. C., 207 248
Hubbard v. R. R. ..... 203 N. C., 675 397
Hudson v. Hudson ..... 208 N. C., 338 137
Hughes v. Clark ..... 134 N. C., 457 585
Humphrey v. Beall ..... 215 N. C., 15 ..... 61, 294
Huneycutt v. Brooks ..... 116 N. C., 788 206
Huneycutt v. Comrs. ..... 182 N. C., 139 13
Hunt v. Casualty Co. ..... 212 N. C., 28 576
Hunter v. R. R. ..... 152 N. C., 682 376
Hurdle, *In re* Will of ..... 190 N. C., 211 502
Hutchins v. Durham ..... 118 N. C., 457 709
Hutchins v. Taylor-Buick Co. ..... 198 N. C., 777 395
Hutchinson v. Lucas ..... 181 N. C., 53 136
Hyder v. Hyder ..... 215 N. C., 239 543

I

Ingram v. Mortgage Co. ..... 208 N. C., 329 158
Ingram v. Smoky Mountain Stages, Inc. ..... 225 N. C., 444 167
In re Alderman ..... 157 N. C., 507 193
In re Barnes ..... 212 N. C., 735 779
In re Collins ..... 226 N. C., 412 509
In re Escoffery ..... 216 N. C., 19 716
In re Estate of Daniel ..... 225 N. C., 18 442
In re Estate of Poindexter ..... 221 N. C., 246 248
In re Estate of Wright ..... 204 N. C., 465 369
In re Fain ..... 172 N. C., 790 192
In re Hedgepeth ..... 150 N. C., 245 500
In re Jones ..... 153 N. C., 213 192
In re Lewis ..... 88 N. C., 31 192
In re Martin ..... 60 N. C., 153 778
In re Means ..... 176 N. C., 307 193
In re Parker ..... 214 N. C., 51 ..... 109, 110
In re Pine Hill Cemeteries, Inc. ..... 219 N. C., 735 ..... 109, 111, 113
In re Reynolds ..... 206 N. C., 276 370
In re Rowland ..... 202 N. C., 373 500
In re State v. Gordon ..... 225 N. C., 241 647
In re TenHoopen ..... 202 N. C., 223 192
In re Turner ..... 151 N. C., 474 192
In re Will of Atkinson ..... 225 N. C., 526 207
In re Will of Brown ..... 194 N. C., 583 501
In re Will of Brown ..... 203 N. C., 347 501
In re Will of Craven ..... 169 N. C., 561 207
In re Will of Haygood ..... 101 N. C., 574 500

In re Will of Hinton....180 N. C., 206.... 501
In re Will of McLelland....207 N. C., 375.... 369
In re Will of Lomax....224 N. C., 459....499, 641
In re Will of Lomax....225 N. C., 31....220, 499
In re Will of Lomax....225 N. C., 592.... 499
In re Will of Ross....182 N. C., 477.... 383
In re Will of Westfeldt....188 N. C., 702.... 500
In re Yelton....223 N. C., 845....776, 778
In re Young....222 N. C., 708.... 513
Institute v. Mebane....165 N. C., 644....260, 263
Ins. Co. v. Bullard....207 N. C., 652.... 476
Ins. Co. v. Carolina Beach....216 N. C., 778.... 585
Ins. Co. v. Guilford County....225 N. C., 293....442, 443, 444, 446, 505
Ins. Co. v. Morehead....209 N. C., 174....260, 576, 600, 670, 671
Ins. Co. v. Totten....203 N. C., 431....265, 485
Ins. Co. v. Wells....225 N. C., 547.... 575
Ins. Co. v. Wells....226 N. C., 574.... 599
Investment Co. v. Zindel....198 N. C., 109....114, 115
Iron Works v. Cotton Oil Co....192 N. C. 442....228, 229
Irwin v. Charlotte....193 N. C., 109....473, 474
Ivey v. Blythe....193 N. C., 705.... 294

J

Jackson v. Jackson....104 N. C., 433.... 627
Jackson v. Jackson....105 N. C., 433....284, 310
Jackson v. Tel. Co....139 N. C., 347.... 179
Jackson v. Thompson....214 N. C., 539.... 152
Jacksonville v. Bryan....196 N. C., 721.... 710
James v. Griffin....192 N. C., 285.... 136
Jarrell v. Snow....225 N. C., 430....639, 691
Jarvis v. Swain....173 N. C., 9....490, 491
Jearns v. Furn. Co....222 N. C., 438.... 328
Jefferson v. Jefferson....219 N. C., 333.... 483
Jenkins v. Castelloe....208 N. C., 406.... 397
Jenkins v. Ins. Co....222 N. C., 83.... 356
Jernigan v. Jernigan....207 N. C., 831.... 98
Johnson v. Hosiery Co....199 N. C., 38.... 52
Johnson v. Johnson.... 10 N. C., 556.... 263
Johnson v. Noles....224 N. C., 542.... 712
Johnson v. Sidbury....225 N. C., 208....346, 528
Johnson v. Wagner....219 N. C., 235.... 589
Johnston v. Garrett....190 N. C., 835.... 61
Johnston County v. Ellis....226 N. C., 269.... 505
Johnston County v. Stewart....217 N. C., 334.... 565
Jolley v. Tel. Co....204 N. C., 136.... 402
Jones v. Arrington.... 94 N. C., 541.... 34
Jones v. Bagwell....207 N. C., 378.... 623
Jones v. Casstevens....222 N. C., 411....306, 670
Jones v. Coleman....188 N. C., 631.... 342
Jones v. Fullbright....197 N. C., 274.... 318
Jones v. Griggs....219 N. C., 700.... 716
Jones, *In re*....153 N. C., 213.... 192
Jones v. Jones.... 80 N. C., 246.... 764
Jones v. Jones....173 N. C., 279.... 286

Jones v. R. R.....153 N. C., 419..... 605
Jones v. R. R.....176 N. C., 260..... 600
Jones v. Waldroup.....217 N. C., 178.....319, 323, 780, 781
Jordan v. Furnace Co.....126 N. C., 143..... 114

K

Kannan v. Assad.....182 N. C., 77..... 206
Kearny v. Thomas.....225 N. C., 156..... 670
Keiger v. Utilities Co.....199 N. C., 786..... 27
Keith v. Bailey.....185 N. C., 262..... 713
Keith v. Scales.....124 N. C., 497..... 553
Kelly v. Traction Co.....132 N. C., 368..... 347
Kendall v. Stafford.....178 N. C., 461..... 46
Kennedy v. Smith.....226 N. C., 514..... 517
Kepley v. Kirk.....191 N. C., 690..... 622
Kerr v. Bank.....205 N. C., 410..... 452
Kesler v. Smith..... 66 N. C., 154..... 382
Kidd v. Morrison..... 62 N. C., 31..... 719
Kilpatrick v. Harvey.....170 N. C., 668..... 719
Kindler v. Trust Co.....204 N. C., 198..... 670
King v. Davis.....190 N. C., 737..... 305
King v. King.....225 N. C., 639..... 505
King v. Mills Co.....210 N. C., 204..... 440
King v. Phillips..... 95 N. C., 245..... 574
King v. Rudd.....226 N. C., 156.....369, 414, 509
Kinsland v. Kinsland.....188 N. C., 810..... 689
Kirkpatrick v. Rogers..... 41 N. C., 130..... 248
Klingenberg v. Raleigh.....212 N. C., 549..... 76
Knight v. Braswell..... 70 N. C., 709..... 608
Knott v. Cutler.....224 N. C., 427..... 260
Kolman v. Wilbert.....219 N. C., 134..... 697
Krites v. Plott.....222 N. C., 679.....305, 483

L

Lambert v. Caronna.....206 N. C., 616..... 624
Land Co. v. Smith.....191 N. C., 619..... 729
Lanier v. Warsaw.....226 N. C., 637..... 691
Lassiter v. Lassiter..... 92 N. C., 130..... 286
Lassiter v. Tel. Co.....215 N. C., 227..... 330
Latham v. Ellis.....116 N. C., 30..... 192
Laughinghouse v. Ins. Co.....200 N. C., 434..... 617
Lawrence v. Eller.....169 N. C., 211.....484, 485
Lawrence v. Lawrence.....226 N. C., 221.....236, 625
Lawrence v. Nissen.....173 N. C., 359..... 689
Layton v. Godwin.....186 N. C., 312..... 566
Lea v. Johnson..... 31 N. C., 15..... 496
Leach v. Page.....211 N. C., 622..... 613
Lee v. Assurance Society.....211 N. C., 182..... 356
Lee v. Board of Adjustment.....226 N. C., 107.....369, 407, 408, 413, 509
Lee v. Eure..... 82 N. C., 428..... 151
Lee v. Ins. Co.....188 N. C., 538..... 357
Lee v. Martin.....191 N. C., 401..... 600
Lee v. Pearce..... 68 N. C., 76.....207, 208

Lee v. Thornton.....171 N. C., 209..... 519
Leggett v. Simpson.....176 N. C., 3..... 248
Lentz v. Johnson & Sons, Inc.....207 N. C., 614..... 670
Leonard v. Ins. Co.....209 N. C., 523..... 357
Leonard v. Ins. Co.....212 N. C., 151..... 357
Lerner Shops v. Rosenthal.....225 N. C., 316..... 670
Lester v. Harward.....173 N. C., 83..... 207
Letterman v. Miller.....209 N. C., 709..... 398
Lewellyn v. Lewellyn.....203 N. C., 575..... 396
Lewis, *In re*..... 88 N. C., 31..... 192
Likas v. Lackey.....186 N. C., 398..... 236
Lincoln v. R. R.....207 N. C., 787..... 175
Lindsey v. Speight.....224 N. C., 453..... 305
Linker v. Linker.....213 N. C., 351..... 151
Linville v. Nissen.....162 N. C., 95..... 179
Liske v. Walton.....198 N. C., 741..... 175
Lister v. Lister.....222 N. C., 555..... 35
Liverman v. Cline.....212 N. C., 43..... 179
Lockey v. Cohen, Goldman & Co.213 N. C., 356.....328, 331
Lockhart v. Lockhart..... 56 N. C., 205..... 248
Locklear v. Savage.....159 N. C., 236..... 87
Logan v. Griffith.....205 N. C., 580..... 34
Logan v. Johnson.....218 N. C., 200..... 49
Loggins v. Utilities Co.....181 N. C., 221..... 24
Lomax, *In re* Will of.....224 N. C., 459.....499, 641
Lomax, *In re* Will of.....225 N. C., 31.....220, 499
Lomax, *In re* Will of.....225 N. C., 592..... 499
London v. Commissioners.....193 N. C., 100..... 505
Long v. Austin.....153 N. C., 508..... 392
Long v. Merrill..... 4 N. C., 549..... 688
Long v. Rockingham.....187 N. C., 199..... 754
Love v. Edmonston..... 23 N. C., 152..... 255
Lowe v. Carter.....55 N. C., 377..... 248
Lowrie v. Oxendine.....153 N. C., 267..... 402
Ludwick v. Mining Co.....171 N. C., 60..... 743
Lumber Co. v. Branch.....158 N. C., 251..... 398
Lumber Co. v. Cedar Co.....142 N. C., 412..... 689
Lumber Co. v. Edwards.....217 N. C., 251..... 309
Lumber Co. v. Motor Co.....192 N. C., 377..... 540
Lumber Co. v. Power Co.....206 N. C., 515..... 330
Lumberton v. Hood, Comr.....204 N. C., 171..... 427
Lunsford v. Mfg. Co.....196 N. C., 510..... 440

Mc

McAfee v. Green.....143 N. C., 411..... 364
McAllister v. Pryor.....187 N. C., 832..... 439
McCain v. Ins. Co.....190 N. C., 549..... 710
McCabe v. Casualty Co.....209 N. C., 577..... 576
McCall v. Institute.....189 N. C., 775..... 712
McCaskill v. McKinnon.....125 N. C., 179..... 410
McConnell v. Caldwell..... 73 N. C., 338..... 208
McCormick v. Proctor.....217 N. C., 23..... 688
McCracken v. Smathers.....122 N. C., 799..... 391
McCullock v. R. R.....146 N. C., 316..... 398

McDaniel v. Leggett....224 N. C., 806.... 513
McDonald v. Ingram....124 N. C., 272.... 265
McFarland v. Harrington....178 N. C., 189.... 342
McGehee v. McGehee....189 N. C., 558....665, 666
McGraw v. R. R....209 N. C., 432.... 93
McGuinn v. High Point....217 N. C., 449.... 220
McGuinn v. McLain....225 N. C., 750.... 715
McKay v. Bullard....219 N. C., 535.... 491
McKeel v. Holloman....163 N. C., 132.... 206
McLamb v. Beasley....218 N. C., 308.... 179
McLean v. Board of Elections....222 N. C., 6.... 457
McLeary v. Norment.... 84 N. C., 235.... 501
McLelland, *In re* Will of....207 N. C., 375.... 369
McLeod v. Bullard.... 84 N. C., 515.... 207
McLeskey v. Heinlein....200 N. C., 290.... 61
McMahan v. R. R....170 N. C., 456.... 427
McManus v. McManus....191 N. C., 740....154, 284, 597
McNeely v. McNeely.... 82 N. C., 183.... 91
McNeely v. Walters....211 N. C., 112....513, 514
McNeill v. McNeill....223 N. C., 178.... 573
McRae v. Fayetteville....198 N. C., 51.... 754
McRae v. Lawrence.... 75 N. C., 289.... 749

M

Machine Co. v. Feezer....152 N. C., 516.... 540
Machine Co. v. McClamrock....152 N. C., 405.... 540
Mack v. Marshall Field & Co....218 N. C., 697.... 440
Madry v. Scotland Neck....214 N. C., 461.... 17
Mahler v. Ins. Co....205 N. C., 692.... 617
Mallard v. Housing Authority....221 N. C., 334....7, 11, 602
Manheim v. Taxi Corp....214 N. C., 689.... 148
Mfg. Co. v. Lumber Co. ....178 N. C., 571.... 716
Mfg. Co. v. McCormick ....175 N. C., 277.... 259
Mfg. Co. v. R. R. ....222 N. C., 330.... 464
Marsh v. Ins. Co....199 N. C., 341.... 617
Marsh v. Marsh....200 N. C., 746.... 91
Marshall v. Telephone Co....181 N. C., 292....622, 623
Martin v. Gould.... 17 N. C., 305.... 248
Martin v. Greensboro....193 N. C., 573.... 76
Martin, *In re*.... 60 N. C., 153.... 778
Martin v. Martin....130 N. C., 27....571, 627
Martin v. Vanlaningham....189 N. C., 656.... 57
Massengill v. Abell....192 N. C., 240.... 137
Matthews v. Matthews....214 N. C., 204....136, 137
Means, *In re*....176 N. C., 307.... 193
Medlin v. Ins. Co....220 N. C., 334.... 356
Medlin v. Medlin....175 N. C., 529....154, 543
Medlock v. Powell.... 96 N. C., 499.... 263
Melvin v. Bullard.... 82 N. C., 33.... 593
Merchant v. Lassiter....224 N. C., 343.... 395
Merrill v. Merrill.... 92 N. C., 657.... 39
Mertens v. Ins. Co....216 N. C., 741.... 356
Mewborn v. Kinston....199 N. C., 72....7, 21
Michaux v. Bottling Co....205 N. C., 786.... 732

Michaux v. Rocky Mount....193 N. C., 550....76, 77
Millar v. Wilson....222 N. C., 340....76
Miller v. Miller....75 N. C., 70....597
Miller v. Monazite Co....152 N. C., 608....712
Miller v. Neal....222 N. C., 540....34
Milling Co. v. Highway Comm....190 N. C., 692....98
Mills v. Ins. Co....210 N. C., 439....576
Misenheimer v. Sifford....94 N. C., 592....91
Misskelley v. Ins. Co....205 N. C., 496....358
Mitchell v. Bell....1 N. C., 244....263
Mitchell v. Moore....62 N. C., 281....654
Mitchell v. Parks....180 N. C., 634....248
Mizell v. Lumber Co....174 N. C., 68....728
Monger v. Lutterloh....195 N. C., 274....709, 729
Monroe v. Niven....221 N. C., 362....279, 505
Montgomery v. Blades....222 N. C., 463....259
Moody v. Moody....225 N. C., 89....742
Moore v. Iron Works....183 N. C., 438....175
Moore v. Meroney....154 N. C., 158....478
Moore v. Moore....130 N. C., 333....597
Moose v. Barrett....223 N. C., 524....571
Morgan v. Coach Co....225 N. C., 668....698
Morris v. Kramer....182 N. C., 87....402, 522
Morris v. Lambeth....203 N. C., 695....622
Morris v. Morris....89 N. C., 109....597
Morrison v. Cannon Mills....223 N. C., 387....440
Morrison v. Walker....179 N. C., 587....431
Mortgage Co. v. Long....205 N. C., 533....173
Moseley v. Knott....212 N. C., 651....137
Moseley v. R. R....197 N. C., 628....175
Motor Co. v. Insurance Co. ....220 N. C., 168....491
Motor Co. v. Jackson ....184 N. C., 328....647
Motor Service v. R. R....210 N. C., 36....688
Mountain Park Institute v. Lovill ....198 N. C., 642....636
Mullen v. Louisburg....225 N. C., 53....109
Mullinax v. Hord....174 N. C., 607....391
Murchison v. Williams....71 N. C., 135....151
Murphy v. Taylor....214 N. C., 393....485
Murrell v. Roberts....33 N. C., 424....485

N

Nannie v. Pollard....205 N. C., 362....318
Nash v. Monroe....198 N. C., 306....7, 21
Nash v. Royster....189 N. C., 408....392, 717
Navigation Co. v. Wilcox....52 N. C., 481....431
Neal v. Marion....126 N. C., 412....77
Neal v. Marion....129 N. C., 345....76
Neal v. Trust Co....224 N. C., 103....254
Neill v. Wilson....146 N. C., 242....40
Newbern v. Gordon....201 N. C., 317....207
New Hanover County v. Whiteman ....190 N. C., 332....34
Newman v. Bost....122 N. C., 524....318

Newsome v. Bunch....144 N. C., 15.... 192
Nichols v. Edenton....125 N. C., 13.... 337
Nichols v. Nichols....128 N. C., 108.... 571
Nichols v. York....219 N. C., 262.... 484
Norwood v. Crawford....114 N. C., 513.... 491

O

O'Briant v. Bennett....213 N. C., 400.... 158
O'Connor v. O'Connor....109 N. C., 139.... 284
Odom v. Lumber Co....173 N. C., 134.... 397
Odom v. Palmer....209 N. C., 93.... 716
Odum v. Oil Co....213 N. C., 478.... 437
Oliver v. Oliver....219 N. C., 299....543, 597
O'Neal v. Wake County....196 N. C., 184.... 505
Owens v. Hines....178 N. C., 325.... 604
Owens v. Lumber Co....212 N. C., 133.... 624
Oxford Orphanage v. Kittrell....223 N. C., 427.... 91

P

Pack v. Katzin....215 N. C., 233.... 236
Padgett v. Long....225 N. C., 392.... 571
Page v. Page....161 N. C., 170.... 310
Page v. Page....166 N. C., 90.... 192
Page v. Page....167 N. C., 346.... 286
Page v. Page....167 N. C., 350.... 192
Palmer's Will, *In re*....117 N. C., 134.... 39
Parham v. Hinnant....206 N. C., 200.... 452
Parham v. Morgan....206 N. C., 201.... 452
Parker, *In re*....214 N. C., 51....109, 110
Parker v. Morrill.... 98 N. C., 232.... 260
Parker v. Mott....181 N. C., 435.... 318
Parks v. Seagraves....203 N. C., 647.... 746
Parris v. Fischer & Co....219 N. C., 292.... 186
Parrish v. Mfg. Co....211 N. C., 7.... 179
Parrott v. Kantor....216 N. C., 584.... 179
Patrick v. Bryan....202 N. C., 62.... 192
Patrick v. Worthington....201 N. C., 483.... 388
Patterson v. Fuller....203 N. C., 788.... 670
Patterson v. McCormick....177 N. C., 448.... 136
Paul v. Ins. Co....183 N. C., 159.... 617
Paul v. Paul....199 N. C., 522.... 136
Payne v. Brown....205 N. C., 785.... 476
Peanut Co. v. Lucas....206 N. C., 922.... 600
Pearce v. Pearce....225 N. C., 571....284, 308, 309, 627
Pearce v. Privette....213 N. C., 501.... 613
Pearson v. Luther....212 N. C., 412.... 175
Pearson v. Millard....150 N. C., 303....387, 728
Pearson v. Stores Corp. ....219 N. C., 717.... 40
Pedrick v. R. R....143 N. C., 485.... 478
Peel v. Calais....223 N. C., 368.... 388
Peitzman v. Zebulon....219 N. C., 473.... 520
Penick v. Bank....218 N. C., 686....370, 590
Pepper v. Clegg....132 N. C., 312.... 528

Perrett v. Bird....152 N. C., 220.... 136
Perry v. Alford....225 N. C., 146.... 89
Perry v. Bassenger....219 N. C., 838.... 484
Perry v. Herrin....225 N. C., 601.... 440
Perry v. Surety Co....190 N. C., 284.... 504
Perry v. White....185 N. C., 79.... 497
Person v. Doughton....186 N. C., 723.... 458
Peterson v. Taylor....203 N. C., 673.... 342
Pharr v. Pharr....223 N. C., 115....310, 543
Phelps v. Davenport....151 N. C., 22....388, 729
Pick v. Hotel Co....197 N. C., 110.... 51
Picot v. Sanderson.... 12 N. C., 309.... 263
Pierce v. Carlton....184 N. C., 175....206, 207
Pierce v. Eller....167 N. C., 672.... 528
Pine Hill Cemeteries, Inc., *In re*..219 N. C., 735....109, 111, 113
Piner v. Richter....202 N. C., 573.... 516
Plemmons v. White's Service, Inc. ....213 N. C., 148....329, 331
Plott v. Construction Co....198 N. C., 782.... 476
Plumidies v. Smith....222 N. C., 326.... 375
Poindexter, *In re* Estate of....221 N. C., 246.... 248
Pollard v. Pollard....221 N. C., 46....154, 284, 627
Poole v. Board of Examiners....221 N. C., 199.... 458
Poole v. Poole....210 N. C., 536.... 171
Poovey v. Hickory....210 N. C., 630.... 735
Potato Co. v. Jenette....172 N. C., 1....305, 576
Potter v. Transit Co....196 N. C., 824.... 623
Power Co. v. Clay County....213 N. C., 698....723, 724
Power Co. v. Wissler....160 N. C., 269.... 754
Powers v. Sternberg....213 N. C., 41.... 167
Prevatt v. Harrelson....132 N. C., 250.... 88
Price v. Askins....212 N. C., 583.... 151
Pritchard v. Spring Co....151 N. C., 249.... 399
Pruitt v. Wood....199 N. C., 788....161, 476, 744
Pue v. Hood....222 N. C., 310.... 109
Pugh v. Allen....179 N. C., 307.... 137
Purnell v. R. R....190 N. C., 573.... 381

Q

Query v. Ins. Co. ....218 N. C., 386....158, 265, 716

R

Rader v. Coach Co....225 N. C., 537....49, 109, 158, 369, 413, 509, 716
Radford v. Asheville....219 N. C., 185.... 76
Ragan v. Ragan....212 N. C., 753.... 571
Ragan v. Ragan....214 N. C., 36.... 222
R. R. v. Beaufort County ....224 N. C., 115.... 722
R. R. v. Comrs. of Alamance..... 82 N. C., 259.... 34
R. R. v. Cumberland County .....223 N. C., 750.... 722
R. R. v. Goldsboro ....155 N. C., 356.... 561
R. R. v. Hardware Co. ....135 N. C., 73....520, 521
R. R. v. Lumber Co. ....185 N. C., 227.... 670

R. R. v. McCaskill ..... 94 N. C., 746..... 593
Rasberry v. Hicks..... 199 N. C., 702..... 719
Rawls v. Lupton..... 193 N. C., 428..... 384
Ray v. Blackwell..... 94 N. C., 10..... 600
Ray v. Patterson..... 165 N. C., 512..... 522
Realty Co. v. Charlotte..... 198 N. C., 564..... 505
Redding v. Vogt..... 140 N. C., 562..... 426
Redwine v. Clodfelter..... 226 N. C., 366..... 509
Reed v. Madison..... 213 N. C., 145..... 46
Reel v. Reel..... 9 N. C., 63..... 749
Rees v. Williams..... 164 N. C., 128..... 136
Reid v. R. R..... 162 N. C., 355..... 719
Reidsville v. Slade..... 224 N. C., 48..... 7, 20
Revis v. Asheville..... 207 N. C., 237..... 734, 735
Rewis v. Ins. Co..... 226 N. C., 325..... 319
Reynolds v. Cotton Mills..... 177 N. C., 412..... 39
Reynolds v. Express Co..... 172 N. C., 487..... 207
Reynolds, *In re*..... 206 N. C., 276..... 370
Reynolds v. Reynolds..... 208 N. C., 428..... 543
Reynolds v. Reynolds..... 208 N. C., 578..... 369, 370
Rhodes, Inc., v. Raleigh..... 217 N. C., 627..... 408
Rich v. Morisey..... 149 N. C., 37..... 665
Richards v. Smith..... 98 N. C., 509..... 277
Ridenhour v. Ridenhour..... 225 N. C., 508..... 222
Riggan v. Harrison..... 203 N. C., 191..... 385, 476
Ritchie v. White..... 225 N. C., 450..... 263
Roanoke Rapids v. Patterson..... 184 N. C., 135..... 543
Robbins v. Hosiery Mills..... 220 N. C., 246..... 331
Roberts v. Allman..... 106 N. C., 381..... 528
Roberts v. Merritt..... 189 N. C., 194..... 158
Robinson v. McAlhaney..... 214 N. C., 263..... 398
Robinson v. McAlhaney..... 216 N. C., 674..... 398, 637
Rodriguez v. Rodriguez..... 224 N. C., 275..... 505
Roebuck v. Carson..... 196 N. C., 672..... 670
Roediger v. Sapos..... 217 N. C., 95..... 452
Rogers v. Black Mountain..... 224 N. C., 119..... 179
Roper v. Leary..... 171 N. C., 35..... 689
Ross, *In re* Will of..... 182 N. C., 477..... 383
Ross v. Robinson..... 185 N. C., 548..... 743
Rousseau v. Bullis..... 201 N. C., 12..... 719
Rowland, *In re*..... 202 N. C., 373..... 500
Royal v. Sampson County..... 214 N. C., 259..... 127, 128
Ruffin v. Overby..... 105 N. C., 78..... 89
Rushing v. Utilities Co..... 203 N. C., 434..... 439, 440
Russell v. Monroe..... 116 N. C., 720..... 76, 77
Russell v. Steamboat Co..... 126 N. C., 961..... 382, 398

S

Samonds v. Cloninger..... 189 N. C., 610..... 260, 387
Sample v. Jackson..... 223 N. C., 335..... 409
Sample v. Jackson..... 225 N. C., 380..... 409
Sanders v. R. R..... 216 N. C., 312..... 478
Sandlin v. Yancey..... 224 N. C., 519..... 613
Sawyers v. Sawyers..... 93 N. C., 321..... 152

Scales v. Winston-Salem.....189 N. C., 469..... 76
Scheelky v. Koch.....119 N. C., 80..... 727
Schnepp v. Richardson.....222 N. C., 228..... 277
Schnibben v. Ballard & Ballard Co. .....210 N. C., 193..... 655
Schoenith, Inc., v. Mfg. Co.....220 N. C., 390..... 186
Scott v. Ins. Co.....208 N. C., 160..... 392
Scott v. Tel. Co.....198 N. C., 795..... 440
Sebastian v. Motor Lines.....213 N. C., 770.....175, 397, 516
Seed Co. v. Jennette Bros. Co.....195 N. C., 173..... 427
Self Help Corp. v. Brinkley.....215 N. C., 615..... 565
Selma v. Nobles.....183 N. C., 322..... 754
Sexton v. Elizabeth City.....169 N. C., 385..... 473
Shale Products Co. v. Cement Co.200 N. C., 226..... 34
Shapiro v. Winston-Salem.....212 N. C., 751..... 569
Sheets v. Dillon.....221 N. C., 426.....61, 62
Sheets v. Walsh.....217 N. C., 32.....474, 586
Shelton v. R. R.....193 N. C., 670.....491, 624
Shepard v. Leonard.....223 N. C., 110..... 415
Shipp v. Stage Lines.....192 N. C., 475.....206, 210
Shirley v. Ayers.....201 N. C., 51..... 148
Shober v. Wheeler.....144 N. C., 403..... 39
Shore v. Shore.....220 N. C., 802..... 476
Short v. Ins. Co.....194 N. C., 649..... 617
Shuford v. Building & Loan Assn. .....210 N. C., 237.....369, 413
Shuford v. Waynesville.....214 N. C., 135..... 408
Shull v. Johnson..... 55 N. C., 202..... 248
Silver v. Silver.....220 N. C., 191..... 476
Simmons v. Groom.....167 N. C., 271..... 305
Simms v. Killian..... 34 N. C., 252..... 713
Simons v. Lebrun.....219 N. C., 42.....206, 265
Sing v. Charlotte.....213 N. C., 60.....7, 8, 20
Sink v. Lexington.....214 N. C., 548..... 330
Sipe v. Herman.....161 N. C., 107..... 206
Sisk v. Motor Freight, Inc.....222 N. C., 631..... 189
Sledge v. Lumber Co.....140 N. C., 459..... 398
Sloan v. Assurance Society.....169 N. C., 257..... 566
Sluder v. Rollins..... 76 N. C., 271..... 528
Smith v. Assurance Society.....205 N. C., 387..... 357
Smith v. Bottling Co.....221 N. C., 202..... 220
Smith v. Hosiery Mill.....212 N. C., 661..... 465
Smith v. Lumber Co.....155 N. C., 389..... 136
Smith v. McClung.....201 N. C., 648..... 392
Smith v. Mears.....218 N. C., 193..... 550
Smith v. Miller.....155 N. C., 242..... 399
Smith v. Paper Co.....226 N. C., 47..... 432
Smith v. Sink.....211 N. C., 725..... 259
Smith v. Smith.....223 N. C., 433..... 158
Smith v. Smith.....225 N. C., 189 613
Smith v. Steen.....225 N. C., 644..... 383
Smithdeal v. Smithdeal.....206 N. C., 387..... 571
Snyder v. Heath.....185 N. C., 362..... 294
Snipes v. Winston.....126 N. C., 374..... 46
Somersette v. Stanaland.....202 N. C., 685..... 473

Southerland, *In re*.....188 N. C., 325..... 103
Sparrow v. Morrell & Co.....215 N. C., 452..... 309
Speas v. Bank.....188 N. C., 524..... 573
Speas v. Greensboro.....204 N. C., 239.....76, 77
Speed v. Perry.....167 N. C., 122.....403, 749
Spencer v. Bynum.....169 N. C., 119..... 263
Spencer v. McCleneghan.....202 N. C., 662..... 369
Spivey v. Spivey..... 37 N. C., 100..... 248
Sprinkle v. Sprinkle.....159 N. C., 81..... 608
Stancill v. Gay..... 92 N. C., 462..... 637
Starkey v. Gardner.....194 N. C., 74..... 61
Starnes v. Tyson.....226 N. C., 395..... 743
S. v. Abbott .....218 N. C., 470..... 579
S. v. Abernethy .....220 N. C., 226..... 64
S. v. Adams .....138 N. C., 688..... 74
S. v. Adams .....214 N. C., 501..... 634
S. v. Allison .....200 N. C., 190..... 142
S. v. Alston .....210 N. C., 258..... 534
S. v. Anderson .....196 N. C., 771..... 415
S. v. Anderson .....208 N. C., 771.....69, 675
S. v. Archbell .....139 N. C., 537.....535, 536
S. v. Auston .....223 N. C., 203.....64, 522
S. v. Ayres .....220 N. C., 161..... 647
S. v. Ayers .....226 N. C., 579..... 581
S. v. Bailey .....179 N. C., 724..... 341
S. v. Baker .....212 N. C., 233..... 464
S. v. Baker .....222 N. C., 428..... 632
S. v. Baldwin .....152 N. C., 822..... 652
S. v. Baldwin .....193 N. C., 566..... 675
S. v. Banks .....206 N. C., 479..... 415
S. v. Barnhill .....186 N. C., 446..... 465
S. v. Bass .....171 N. C., 780..... 689
S. v. Baxley .....223 N. C., 210..... 80
S. v. Beachum .....220 N. C., 531..... 141
S. v. Beal .....170 N. C., 764.....65, 535, 536
S. v. Beal .....199 N. C., 278.....98, 144, 342, 533, 674, 740, 748
S. v. Beasley .....208 N. C., 318..... 415
S. v. Beasley .....226 N. C., 577..... 581
S. v. Bell .....205 N. C., 225.....84, 416, 674
S. v. Bennett ..... 20 N. C., 170..... 68
S. v. Bennett .....226 N. C., 82..... 244
S. v. Benson .....183 N. C., 795.....65, 302, 303
S. v. Bentley .....223 N. C., 563.....68, 525, 740
S. v. Bethea .....186 N. C., 22..... 85
S. v. Bittings .....206 N. C., 798..... 533
S. v. Blue .....219 N. C., 612..... 631
S. v. Boswell .....194 N. C., 260..... 534
S. v. Bowser .....214 N. C., 249..... 534
S. v. Brackett .....218 N. C., 369..... 159
S. v. Bracy .....215 N. C., 248..... 661
S. v. Brady .....177 N. C., 587..... 415
S. v. Bright .....215 N. C., 537..... 141
S. v. Brite ..... 73 N. C., 26..... 159

S. v. Britt .....225 N. C., 364.....299, 605, 764
S. v. Brittain ..... 89 N. C., 481..... 204
S. v. Brodie .....190 N. C., 554..... 85
S. v. Brooks .....224 N. C., 627..... 609
S. v. Brown .....225 N. C., 22..... 526
S. v. Browning ..... 78 N. C., 555..... 748
S. v. Bruce .....106 N. C., 792..... 73
S. v. Buck .....191 N. C., 528..... 765
S. v. Buffkin .....209 N. C., 117..... 605
S. v. Burgess .....192 N. C., 668..... 69
S. v. Burnett .....174 N. C., 796.....580, 581
S. v. Burnette .....173 N. C., 734..... 68
S. v. Cagle .....209 N. C., 114.....96, 141
S. v. Calcutt .....219 N. C., 545.....69, 159, 579
S. v. Cameron .....166 N. C., 379..... 766
S. v. Carr .....196 N. C., 129..... 675
S. v. Carroll .....226 N. C., 237.....602, 603, 604
S. v. Chambers .....218 N. C., 442..... 412
S. v. Chapman .....221 N. C., 157.....530, 534
S. v. Clarke .....220 N. C., 392..... 415
S. v. Cloninger .....149 N. C., 567..... 341
S. v. Cody .....224 N. C., 470.....207, 740
S. v. Cohoon .....206 N. C., 388..... 124
S. v. Coleman .....178 N. C., 757..... 740
S. v. Collins ..... 30 N. C., 407..... 535
S. v. Cook .....207 N. C., 261..... 415
S. v. Cooper .....170 N. C., 719..... 642
S. v. Covington .....117 N. C., 834..... 302
S. v. Cox .....201 N. C., 357..... 536
S. v. Crandall .....225 N. C., 148..... 578
S. v. Craton ..... 28 N. C., 164..... 535
S. v. Crisp .....170 N. C., 785..... 65
S. v. Crook .....115 N. C., 760..... 68
S. v. Cureton .....215 N. C., 778..... 766
S. v. Cureton .....218 N. C., 491..... 661
S. v. Dancy ..... 78 N. C., 437..... 749
S. v. Dannenberg .....150 N. C., 799..... 408
S. v. Davenport .....156 N. C., 596..... 200
S. v. Davis .....209 N. C., 242..... 64
S. v. Davis .....214 N. C., 787..... 257
S. v. Davis .....223 N. C., 54..... 299
S. v. Dee .....214 N. C., 509..... 220
S. v. DeGraffenreid .....223 N. C., 461..... 631
S. v. DeGraffenreid .....224 N. C., 517..... 203
S. v. Dickerson .....189 N. C., 327..... 72
S. v. Dills .....204 N. C., 33..... 238
S. v. Donnell .....202 N. C., 782..... 674
S. v. Dowden .....118 N. C.,1145..... 302
S. v. Dowell .....106 N. C., 722..... 675
S. v. Dula .....204 N. C., 535..... 463
S. v. Dunheen .....224 N. C., 738..... 244
S. v. Earp .....196 N. C., 164..... 200
S. v. Elder .....217 N. C., 111..... 682
S. v. Ellerbe .....223 N. C., 770..... 149
S. v. Ellis .....200 N. C., 77..... 416

S. v. Epps ....213 N. C., 709.... 674
S. v. Evans ....198 N. C., 82.... 302
S. v. Everitt ....164 N. C., 399.... 68
S. v. Fain ....106 N. C., 760.... 675
S. v. Falkner ....182 N. C., 793.... 644
S. v. Farmer .... 26 N. C., 224.... 215
S. v. Farmer ....188 N. C., 243.... 161
S. v. Fleming ....194 N. C., 42.... 200
S. v. Fox .... 94 N. C., 928.... 675
S. v. Fulcher ....184 N. C., 663.... 124
S. v. Gay ....224 N. C., 141.... 771
S. v. Goff ....205 N. C., 545.... 416
S. v. Golden ....203 N. C., 440.... 385
S. v. Goldston ....201 N. C., 89.... 529
S. v. Gooch .... 94 N. C., 982.... 471
S. v. Gordon ....225 N. C., 241.... 647
S. v. Gore ....207 N. C., 618.... 85
S. v. Gosnell ....208 N. C., 401.... 674
S. v. Graham .... 74 N. C., 646....72, 461
S. v. Graham ....194 N. C., 459.... 653
S. v. Graham ....224 N. C., 347....405, 739
S. v. Graham ....225 N. C., 217.... 69
S. v. Green ....207 N. C., 369.... 84
S. v. Greer ....162 N. C., 640.... 141
S. v. Greer ....173 N. C., 759.... 68
S. v. Gregory ....203 N. C., 528.... 631
S. v. Gregory ....223 N. C., 415.... 68
S. v. Griffis ....117 N. C., 709.... 68
S. v. Hairston ....222 N. C., 455....641, 642
S. v. Hall ....224 N. C., 314.... 646
S. v. Ham ....224 N. C., 128....460, 461, 534, 674
S. v. Hamlet ....206 N. C., 568.... 529
S. v. Hardin ....183 N. C., 815.... 68
S. v. Hargrove ....216 N. C., 570....682, 765
S. v. Harris ....204 N. C., 422....144, 159
S. v. Harris ....213 N. C., 648....238, 240, 605
S. v. Harris ....222 N. C., 157....85, 765
S. v. Harris ....223 N. C., 697....641, 642
S. v. Harrison ....145 N. C., 408....212, 213
S. v. Hart ....186 N. C., 582....523, 674, 675, 748
S. v. Hart ....226 N. C., 200.... 290
S. v. Harwood ....206 N. C., 87.... 159
S. v. Hauser ....202 N. C., 738.... 641
S. v. Hawkins ....214 N. C., 326....103, 573, 641
S. v. Hayden ....224 N. C., 779.... 415
S. v. Haywood .... 61 N. C., 376.... 641
S. v. Hedden ....187 N. C., 803.... 298
S. v. Hefner ....199 N. C., 778.... 535
S. v. Henderson ....206 N. C., 830.... 69
S. v. Hendricks ....207 N. C., 873.... 605
S. v. Herring ....201 N. C., 543.... 534
S. v. Herring ....226 N. C., 213.... 525
S. v. Herron ....175 N. C., 754.... 766
S. v. Hewett ....158 N. C., 627.... 634
S. v. Hickey ....198 N. C., 45.... 72

S. v. Hicks ..... 130 N. C., 705 606
S. v. Hill ..... 225 N. C., 74 203
S. v. Hilton ..... 151 N. C., 687 68
S. v. Hobbs ..... 216 N. C., 14 ..... 73, 536
S. v. Hodgin ..... 210 N. C., 371 653
S. v. Hoggard ..... 180 N. C., 678 68
S. v. Holder ..... 133 N. C., 710 740
S. v. Holland ..... 211 N. C., 284 ..... 675, 744
S. v. Hollingsworth ..... 191 N. C., 595 72
S. v. Holly ..... 155 N. C., 485 96
S. v. Horne ..... 171 N. C., 787 748
S. v. Howley ..... 220 N. C., 113 64
S. v. Hudson ..... 218 N. C., 219 244
S. v. Hunt ..... 128 N. C., 584 412
S. v. Hunt ..... 197 N. C., 707 416
S. v. Hunter ..... 143 N. C., 607 461
S. v. Huntley ..... 91 N. C., 617 ..... 65, 535
S. v. Isaac ..... 225 N. C., 310 465
S. v. Jackson ..... 199 N. C., 321 460
S. v. Jackson ..... 226 N. C., 66 ..... 525, 526
S. v. Jacobs ..... 94 N. C., 950 200
S. v. Jarrell ..... 141 N. C., 722 674
S. v. Jarrett ..... 189 N. C., 516 740
S. v. Jaynes ..... 198 N. C., 728 69
S. v. Jeffreys ..... 117 N. C., 743 771
S. v. Jenkins ..... 208 N. C., 740 641
S. v. Jim ..... 12 N. C., 142 ..... 267, 268, 673
S. v. Johnson ..... 67 N. C., 55 ..... 215, 267, 268, 747
S. v. Johnson ..... 84 N. C., 863 525
S. v. Johnson ..... 161 N. C., 264 766
S. v. Johnson ..... 184 N. C., 637 ..... 96, 140
S. v. Johnson ..... 188 N. C., 591 415
S. v. Johnson ..... 193 N. C., 701 464
S. v. Johnson ..... 205 N. C., 610 529
S. v. Johnson ..... 218 N. C., 604 ..... 460, 534
S. v. Johnson ..... 219 N. C., 757 464
S. v. Johnson ..... 220 N. C., 773 72
S. v. Johnson ..... 226 N. C., 266 ..... 522, 672, 747
S. v. Johnson ..... 226 N. C., 671 ..... 740, 747
S. v. Johnston ..... 76 N. C., 209 673
S. v. Jones ..... 67 N. C., 285 749
S. v. Jones ..... 83 N. C., 605 675
S. v. Jones ..... 181 N. C., 546 ..... 526, 748
S. v. Jones ..... 182 N. C., 781 682
S. v. Jones ..... 203 N. C., 374 641
S. v. Jones ..... 211 N. C., 735 740
S. v. Jones ..... 222 N. C., 37 ..... 634, 771
S. v. Jordan ..... 110 N. C., 491 675
S. v. Jordan ..... 226 N. C., 155 412
S. v. Journegan ..... 185 N. C., 700 641
S. v. Keaton ..... 205 N. C., 607 641
S. v. Kelly ..... 216 N. C., 627 ..... 84, 674
S. v. Kennedy ..... 169 N. C., 288 65
S. v. Kincaid ..... 183 N. C., 709 622
S. v. King ..... 195 N. C., 621 299

S. v. King ....219 N. C., 667....464, 682
S. v. King ....222 N. C., 137.... 479
S. v. King ....225 N. C., 236.... 533
S. v. Kline ....190 N. C., 177.... 402
S. v. Lambert ....196 N. C., 524.... 675
S. v. Lance ....149 N. C., 551.... 652
S. v. Lawrence ....196 N. C., 562....72, 73
S. v. Lea ....203 N. C., 13.... 351
S. v. Lee ....213 N. C., 319.... 98
S. v. Lefevers ....216 N. C., 494.... 244
S. v. Lefler ....202 N. C., 700....524, 525, 526
S. v. Leonard ....195 N. C., 242.... 653
S. v. Levy ....220 N. C., 812.... 159
S. v. Lewis ....194 N. C., 620.... 415
S. v. Lewis ....224 N. C., 774....215, 524, 526
S. v. Lockey ....214 N. C., 525.... 257
S. v. Locklear ....118 N. C.,1154.... 572
S. v. Love ....187 N. C., 32.... 465
S. v. Lowry ....170 N. C., 730.... 461
S. v. Lumber Co. ....207 N. C., 47.... 476
S. v. McDowell ....145 N. C., 563.... 303
S. v. McGlammery ....173 N. C., 748.... 460
S. v. McKinnon ....223 N. C., 160....72, 460, 534, 766
S. v. McKnight ....196 N. C., 259.... 415
S. v. McLamb ....214 N. C., 322....385, 415
S. v. McLeod ....198 N. C., 649.... 461
S. v. McLean ....224 N. C., 704....156, 412
S. v. McNair ....226 N. C., 462.... 749
S. v. McNeill ....225 N. C., 560....124, 257, 258, 739
S. v. Mansell ....192 N. C., 20.... 99
S. v. Marsh ....132 N. C.,1000....267, 268, 673
S. v. Massey .... 86 N. C., 658....73, 771
S. v. Matheson ....225 N. C., 109....244, 302
S. v. Maxwell ....215 N. C., 32.... 631
S. v. Mays ....225 N. C., 486....244, 461, 641, 642
S. v. Mehaffey ....132 N. C.,1062.... 81
S. v. Melton ....120 N. C., 591.... 218
S. v. Melvin ....194 N. C., 394....460, 461
S. v. Merrick ....171 N. C., 788....534, 652
S. v. Miller ....197 N. C., 445.... 573
S. v. Miller ....219 N. C., 514....64, 84, 244, 641, 642
S. v. Miller ....225 N. C., 213....69, 479
S. v. Monds ....130 N. C., 697.... 673
S. v. Moon ....178 N. C., 715.... 337
S. v. Moore ....210 N. C., 459.... 161
S. v. Morgan ....225 N. C., 549....68, 526
S. v. Morris ....215 N. C., 552....207, 740
S. v. Morrow ....220 N. C., 441.... 609
S. v. Mosley ....213 N. C., 304....141, 634
S. v. Mull ....193 N. C., 668.... 739
S. v. Murray ....216 N. C., 681....85, 642
S. v. Nall ....211 N. C., 61.... 641
S. v. Nash ....109 N. C., 824.... 524
S. v. Newsome ....195 N. C., 552.... 302
S. v. Norris ....174 N. C., 808.... 496

S. v. Norwood ....115 N. C., 789.... 535
S. v. Oldham ....224 N. C., 415.... 298
S. v. Ormond ....211 N. C., 437.... 533
S. v. Orr ....175 N. C., 773....141, 142
S. v. Owenby ....226 N. C., 521.... 748
S. v. Ownby ....146 N. C., 677....523, 748
S. v. Oxendine ....187 N. C., 658.... 200
S. v. Oxendine ....224 N. C., 825.... 244
S. v. Page ....215 N. C., 333.... 674
S. v. Parker ....134 N. C., 209.... 460
S. v. Parker ....220 N. C., 416.... 580
S. v. Patterson .... 24 N. C., 346.... 99
S. v. Patterson ....222 N. C., 179.... 385
S. v. Payne ....213 N. C., 719....72, 73
S. v. Pelley ....221 N. C., 487.... 69
S. v. Perry ....209 N. C., 604.... 573
S. v. Phillips ....104 N. C., 786.... 535
S. v. Phillips ....185 N. C., 614.... 69
S. v. Pollok .... 26 N. C., 305.... 200
S. v. Porter ....101 N. C., 713.... 535
S. v. Potts ....100 N. C., 457.... 641
S. v. Powell ....106 N. C., 635.... 268
S. v. Prince ....223 N. C., 392.... 572
S. v. R. R. .... 74 N. C., 287.... 719
S. v. R. R. ....145 N. C., 495.... 688
S. v. Ratcliff ....199 N. C., 9....156, 536
S. v. Rawls ....203 N. C., 436.... 415
S. v. Ray ....206 N. C., 736.... 463
S. v. Ray ....212 N. C., 725.... 674
S. v. Ray ....212 N. C., 748.... 69
S. v. Razook ....179 N. C., 708.... 210
S. v. Reddick ....222 N. C., 520.... 159
S. v. Redman ....217 N. C., 483....630, 631, 632
S. v. Reitz .... 83 N. C., 634.... 461
S. v. Rhinehart ....209 N. C., 150....522, 748
S. v. Rhyne ....124 N. C., 847.... 301
S. v. Rippy ....127 N. C., 516.... 159
S. v. Ritter ....199 N. C., 116.... 159
S. v. Rivers ....224 N. C., 419.... 141
S. v. Roberson ....150 N. C., 837.... 302
S. v. Roberson ....215 N. C., 784.... 341
S. v. Robinson ....213 N. C., 273....65, 141, 142, 659
S. v. Rogers ....166 N. C., 388.... 73
S. v. Rogers ....173 N. C., 755.... 522
S. v. Rogers ....216 N. C., 731.... 349
S. v. Rose ....200 N. C., 342.... 534
S. v. Rountree ....181 N. C., 535.... 675
S. v. Rowe ....155 N. C., 436.... 65
S. v. Sheek ....219 N. C., 811.... 141
S. v. Shelton ....164 N. C., 513.... 661
S. v. Shepherd ....187 N. C., 609.... 69
S. v. Shepherd ....220 N. C., 377....80, 96
S. v. Shinn ....209 N. C., 22.... 96
S. v. Shook ....224 N. C., 728.... 73
S. v. Sinclair ....120 N. C., 603.... 65

S. v. Sinodis ....189 N. C., 565.... 464
S. v. Skeen ....182 N. C., 844.... 674
S. v. Smith ....145 N. C., 476.... 778
S. v. Smith ....157 N. C., 578....68, 525
S. v. Smith ....174 N. C., 804.... 525
S. v. Smith ....201 N. C., 494....156, 412
S. v. Smith ....211 N. C., 93.... 81
S. v. Smith ....221 N. C., 278.... 64
S. v. Smith ....221 N. C., 400....85, 464, 673
S. v. Smith ....225 N. C., 78....244, 299
S. v. Snipes ....185 N. C., 743.... 740
S. v. Spain ....201 N. C., 571....156, 412
S. v. Spencer ....176 N. C., 709.... 461
S. v. Stafford ....203 N. C., 601.... 744
S. v. Stancill ....178 N. C., 683.... 641
S. v. Staples ....157 N. C., 637.... 689
S. v. Starnes ....220 N. C., 384....220, 634
S. v. Steele ....190 N. C., 506....302, 460, 464, 465
S. v. Steen ....185 N. C., 768.... 602
S. v. Stefanoff ....206 N. C., 443....84, 641
S. v. Stephenson ....218 N. C., 258....72, 463
S. v. Stewart ....210 N. C., 362.... 652
S. v. Stokes ....181 N. C., 539.... 526
S. v. Stone ....224 N. C., 848.... 98
S. v. Storkey .... 63 N. C., 7....215, 673
S. v. Suddreth ....223 N. C., 610.... 257
S. v. Sutton ....225 N. C., 332.... 674
S. v. Tarlton ....208 N. C., 734.... 415
S. v. Teachey ....138 N. C., 587.... 302
S. v. Thomas ....118 N. C.,1113.... 301
S. v. Thorp .... 72 N. C., 186.... 623
S. v. Tilghman .... 33 N. C., 513.... 204
S. v. Todd ....222 N. C., 346.... 124
S. v. Toole ....106 N. C., 736.... 740
S. v. Trammell .... 24 N. C., 379.... 673
S. v. Triplett ....211 N. C., 105.... 675
S. v. Tripp ....168 N. C., 150.... 68
S. v. Tuttle ....207 N. C., 649....103, 460
S. v. Tyndall ....192 N. C., 559.... 200
S. v. Tyson ....208 N. C., 231.... 415
S. v. Vanderlip ....225 N. C., 610.... 415
S. v. Vanhook ....182 N. C., 831.... 689
S. v. Vick ....213 N. C., 235.... 297
S. v. Vickers ....184 N. C., 676.... 68
S. v. Vincent ....222 N. C., 543.... 675
S. v. Wade ....169 N. C., 306....605, 606, 766
S. v. Wagstaff ....219 N. C., 15....73, 85, 674
S. v. Walker ....173 N. C., 780....302, 303
S. v. Walker ....179 N. C., 730.... 416
S. v. Walker ....226 N. C., 458.... 534
S. v. Walsh ....224 N. C., 218....634, 771
S. v. Warren .... 95 N. C., 674.... 646
S. v. Warren ....113 N. C., 683.... 579
S. v. Watson ....208 N. C., 70....529, 609
S. v. Watts ....224 N. C., 771.... 257

S. v. Webb .....209 N. C., 302..... 69
S. v. Wellman .....166 N. C., 354..... 73
S. v. West ..... 51 N. C., 505.....65, 535
S. v. White .....162 N. C., 615..... 73
S. v. Whitehurst .....202 N. C., 631..... 674
S. v. Whitener .....191 N. C., 659..... 85
S. v. Whitley .....208 N. C., 661.....207, 740
S. v. Whitlock .....149 N. C., 542..... 689
S. v. Williams .....121 N. C., 628..... 81
S. v. Williams .....220 N. C., 445..... 219
S. v. Williams .....222 N. C., 609..... 219
S. v. Williams .....224 N. C., 183.....219, 261, 543
S. v. Williams .....225 N. C., 182..... 740
S. v. Wilson .....216 N. C., 130..... 69
S. v. Wilson .....217 N. C., 123..... 463
S. v. Winckler .....210 N. C., 556..... 522
S. v. Wingler .....184 N. C., 747..... 642
S. v. Wise .....225 N. C., 746..... 202
S. v. Wyont .....218 N. C., 505.....465, 522, 767, 769
Steele v. Coxe.....225 N. C., 726..... 622
Steele v. Ins. Co.....196 N. C., 408..... 709
Stephens Co. v. Homes Co.....181 N. C., 335..... 473
Stephens, *In re* Will of.....189 N. C., 267..... 502
Stewart v. Cab Co.....225 N. C., 654..... 516
Stewart v. Cary.....220 N. C., 214..... 565
Storm v. Wrightsville Beach.....189 N. C., 679..... 717
Stow v. Ward..... 12 N. C., 67..... 246
Stowe v. Ward..... 10 N. C., 604..... 246
Stratford v. Greensboro.....124 N. C., 127.....478, 756
Stratford v. Stratford..... 92 N. C., 297..... 543
Street v. Coal Co.....196 N. C., 178..... 622
Strickland v. Strickland..... 95 N. C., 471..... 646
Strunks v. Payne.....184 N. C., 582..... 93
Stultz v. Thomas.....182 N. C., 470..... 77
Suddreth v. Charlotte.....223 N. C., 630..... 639
Sugg v. Pollard.....184 N. C., 494..... 171
Supply Co. v. Roofing Co.....160 N. C., 443..... 427
Supply Co. v. Windley.....176 N. C., 18..... 599
Suskin v. Trust Co.....214 N. C., 347..... 40
Sweaney v. Hunter..... 5 N. C., 180..... 263
Swift v. Meekins.....179 N. C., 173..... 539
Swinson v. Nance.....219 N. C., 772..... 516
Sykes v. Everett.....167 N. C., 600..... 670

T

Tabor v. Ward..... 83 N. C., 291..... 57
Tankard v. R. R.....117 N. C., 558..... 565
Tarrant v. Bottling Co.....221 N. C., 390..... 168
Taylor v. Construction Co.....193 N. C., 775..... 397
Taylor v. Ins. Co.....182 N. C., 120..... 519
Taylor v. Smith.....116 N. C., 531.....319, 323, 780, 781
Taylor v. Stewart.....172 N. C., 203..... 699
Taylor v. Taylor.....225 N. C., 80.....310, 742
Taylorsville v. Moore.....212 N. C., 379..... 670

Temple Co. v. Guano Co.....162 N. C., 87..... 727
Templeton v. Kelley.....217 N. C., 164..... 634
TenHoopen, *In re*.....202 N. C., 223..... 192
Teseneer v. Mills Co.....209 N. C., 615.....491, 622
Thames v. Goode.....217 N. C., 639.....137, 138
Thigpen v. Ins. Co.....204 N. C., 551.....356, 357
Thigpen v. Trust Co.....203 N. C., 291.....471, 593
Thomas v. Carteret County.....182 N. C., 374..... 670
Thomas v. Conyers.....198 N. C., 229..... 513
Thomas v. Hipp.....223 N. C., 515..... 490
Thomas v. Houston.....181 N. C., 91..... 318
Thomas v. Rogers.....191 N. C., 736..... 294
Thomason v. Bescher.....176 N. C., 622.....387, 728
Thompson v. Bescher.....176 N. C., 622..... 260
Thompson v. Humphrey.....179 N. C., 44..... 136
Thompson v. Lumberton.....182 N. C., 260..... 639
Thompson v. Smith.....156 N. C., 345..... 593
Thornton v. Barbour.....204 N. C., 583..... 710
Threadgill v. Comrs. of Anson.....116 N. C., 616..... 608
Tilghman v. Hancock.....196 N. C., 780..... 88
Tilley v. Ellis.....119 N. C., 233..... 550
Tillman v. O'Briant.....220 N. C., 714..... 248
Timber Co. v. Bryan.....171 N. C., 265..... 728
Timber Co. v. Ins. Co.....192 N. C., 115..... 186
Timber Co. v. Wells.....171 N. C., 262..... 728
Tise v. Hicks.....191 N. C., 609..... 369
Tise v. Thomasville.....151 N. C., 281.....460, 534
Troitino v. Goodman.....225 N. C., 406.....228, 229, 347
Trotter v. Franklin.....146 N. C., 554..... 478
Trust Co. v. Bani .....166 N. C., 112..... 124
Trust Co. v. Drug Co. .....217 N. C., 502.....364, 365
Trust Co. v. Greyhound Lines....210 N. C., 293.....397, 398
Trust Co. v. *Henderson* .....225 N. C., 567..... 650
Trust Co. v. Lentz .....196 N. C., 398..... 593
Trust Co. v. Peirce .....195 N. C., 717..... 520
Trust Co. v. Watkins .....215 N. C., 292..... 485
Trustees v. Banking Co.....182 N. C., 298..... 325
Tuck v. Walker.....106 N. C., 285..... 152
Turner v. Glenn.....220 N. C., 620.....61, 62
Turner v. Grain Co.....190 N. C., 331..... 452
Turner, *In re*.....151 N. C., 474..... 192
Turner v. New Bern.....187 N. C., 541.....639, 689, 691
Turner v. Power Co.....154 N. C., 131..... 439
Turner v. Reidsville.....224 N. C., 42.....7, 20
Tysinger v. Coble Dairy.....225 N. C., 717..... 28
Tysinger v. Dairy Products.....225 N. C., 717.....167, 698
Tyson v. Robinson..... 25 N. C., 333..... 680

U

Umstead v. Board of Elections....192 N. C., 139..... 458
University v. Lassiter..... 83 N. C., 38..... 158

V

Vance v. Guy....223 N. C., 409....383, 484
Vance v. Guy....224 N. C., 607....464, 484
Van Landingham v. Sewing Machine Co. ....207 N. C., 355.... 179
Vanstory v. Thornton....110 N. C., 10.... 410
Vaughan v. Vaughan....211 N. C., 354....222, 627
Vaughan v. Vaughan....211 N. C., 554.... 649
Vaughan v. Vaughan....213 N. C., 189.... 649
Vick v. Baker....122 N. C., 98.... 228
Vinson v. Gardner....185 N. C., 193.... 136

W

Wade v. Lutterloh....196 N. C., 116.... 427
Wake Forest v. Medlin....199 N. C., 83.... 689
Walker v. Venters....148 N. C., 388.... 600
Walker v. Walker....224 N. C., 751.... 192
Wall v. Bain....222 N. C., 375.... 175
Wallace v. Bellamy....199 N. C., 759.... 710
Wallace v. Benner....200 N. C., 124.... 471
Waller v. Forsythe.... 62 N. C., 353.... 248
Walton v. McKesson....101 N. C., 428.... 476
Walton v. Pearson.... 85 N. C., 35.... 646
Ward v. Albertson....165 N. C., 218....387, 728
Ward v. R. R....224 N. C., 696.... 464
Ward v. Smith....223 N. C., 141....87, 89
Ward v. Stowe.... 17 N. C., 509....246, 247
Warren v. Bottling Co....204 N. C., 288.... 260
Warren v. Breedlove....219 N. C., 383....265, 727
Warren v. Land Bank....214 N. C., 206.... 735
Warren v. Maxwell....223 N. C., 604.... 458
Washington v. Hodges....200 N. C., 364....158, 735
Washington County v. Land Co...222 N. C., 637.... 476
Waters v. Belhaven....222 N. C., 20.... 76
Waters v. Waters....199 N. C., 667.... 476
Way v. Ramsey....192 N. C., 549.... 540
Wearn v. R. R....191 N. C., 575....51, 432
Webb v. Port Comm. ....205 N. C., 663....7, 10, 11, 12, 18
Weeks v. Weeks.... 77 N. C., 421.... 665
Weinstein v. Raleigh....218 N. C., 549.... 325
Wells v. Housing Authority....213 N. C., 744....7, 10, 11
Wells v. West....212 N. C., 656.... 738
Wessell v. Rathjohn.... 89 N. C., 377.... 207
West v. Ins. Co....210 N. C., 234.... 427
West v. Lee....224 N. C., 79.... 551
West v. Muhpyn....197 N. C., 488.... 136
Westbrook v. Southern Pines....215 N. C., 20.... 17
Westfeldt, *In re* Will of....188 N. C., 702.... 500
Weston v. Typewriter Co....183 N. C., 1.... 600
White v. Chappell....219 N. C., 652.... 24
White v. Comrs. of Johnston....217 N. C., 329.... 458
White v. New Bern....146 N. C., 447.... 78
White v. Pleasants....225 N. C., 760.... 305

White v. Rankin....206 N. C., 104.... 173
Whitehead v. Pittman....165 N. C., 89.... 778
Whiteside v. Assurance Society..209 N. C., 536.... 356
Whitley v. Arenson....219 N. C., 121.... 305
Whitlock v. Lumber Co....145 N. C., 120.... 431
Wikel v. Comrs. of Jackson....120 N. C., 451.... 719
Wilder v. Medlin....215 N. C., 542.... 671
Wilkes County v. Forester....204 N. C., 163.... 34
Wilkie v. Ins. Co....146 N. C., 513.... 305
Williams v. Charles Stores Co., Inc. ....209 N. C., 591....397, 398
Williams v. Chevrolet Co. ....209 N. C., 29.... 262
Williams v. Mfg. Co....153 N. C., 7.... 680
Williams v. Mfg. Co....180 N. C., 64.... 440
Williams v. R. R....121 N. C., 512.... 211
Williams v. Rand....223 N. C., 734.... 550
Williams v. Stores Co., Inc....209 N. C., 591.... 759
Williams v. Turner....208 N. C., 202....260, 599
Williams v. Weaver.... 94 N. C., 134.... 152
Williams v. Williams....180 N. C., 273.... 571
Williamson v. Cox....218 N. C., 177....136, 550
Williamson v. High Point....213 N. C., 96....15, 17, 756
Williamson v. Spivey....224 N. C., 311.... 593
Willis v. New Bern....191 N. C., 507....76, 77
Willis v. Trust Co....183 N. C., 267....136, 137
Willis v. White....150 N. C., 199.... 759
Wilmington v. Cronly....122 N. C., 383.... 34
Wilmington v. Cronly....122 N. C., 388.... 34
Wilmington v. McDonald....133 N. C., 548.... 34
Wilson v. Casualty Co....210 N. C., 585....238, 239
Wilson v. Charlotte....206 N. C., 856....158, 413
Wilson v. Lumber Co....186 N. C., 56.... 383
Wilson v. Massagee....224 N. C., 705.... 94
Wilson v. Robinson....224 N. C., 851.... 413
Wimberly v. R. R....190 N. C., 444.... 93
Winchester v. Cutler....194 N. C., 698.... 211
Winders v. Hill....141 N. C., 694.... 734
Winders v. Hill....144 N. C., 614.... 712
Wingler v. Miller....221 N. C., 137.... 277
Withers v. Lane....144 N. C., 184....403, 523, 748
Woodfin v. Ins. Co.... 51 N. C., 558.... 710
Woodie v. Wilkesboro....159 N. C., 353.... 96
Woodmen of the World v. Comrs. of Lenoir ....208 N. C., 433.... 57
Woodruff v. Woodruff....215 N. C., 685.... 742
Woody v. Cates....213 N. C., 792.... 138
Wooten v. Drug Co....169 N. C., 64.... 263
Wooten v. Smith....145 N. C., 476.... 778
Wright v. Allred....226 N. C., 113.... 255
Wright v. Howe.... 52 N. C., 412.... 208
Wright, *In re* Estate of....204 N. C., 465.... 369

Y

Yadkin County v. High Point.....219 N. C., 94.....398, 743
Yarborough v. Monday..... 14 N. C., 420..... 599
Yarborough v. Park Comm.....196 N. C., 284.....8, 754
Yarn Co. v. Dewstoe.....192 N. C., 121..... 137
Yelton, *In re*.....223 N. C., 845.....776, 778
Young, *In re*.....222 N. C., 708..... 513
Young v. Lumber Co.....147 N. C., 26..... 376
Young v. Wood.....196 N. C., 435..... 397
Young v. Young..... 97 N. C., 132..... 364
Young v. Young.....225 N. C., 340..... 742

Z

Zebulon v. Dawson.....216 N. C., 520..... 442

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1945

GREENSBORO-HIGH POINT AIRPORT AUTHORITY v. W. CLARENCE JOHNSON, TREASURER OF GUILFORD COUNTY,

and

GREENSBORO-HIGH POINT AIRPORT AUTHORITY v. HARGROVE BOWLES, TREASURER OF CITY OF GREENSBORO,

and

GREENSBORO-HIGH POINT AIRPORT AUTHORITY v. LOIS WELBORN, TREASURER OF CITY OF HIGH POINT.

(Filed 31 January, 1946.)

1. Municipal Corporations § 41: Taxation § 5—

The establishment and maintenance of an airport is a public purpose within the objects of municipal expenditure, and a city may appropriate funds therefor in proper instances.

2. Same—

The establishment and maintenance of an airport is not a necessary municipal expense and therefore a city may not incur debt or levy taxes therefor without submitting the question to a vote.

3. Municipal Corporations § 2—

The Legislature has power to create a municipal authority to construct, maintain and operate an airport.

4. Municipal Corporations § 41—

A county and cities located therein may lawfully join in the construction, maintenance and operation of an airport if each of them is benefited by it. G. S., 63-4.

5. Appeal and Error § 40d—

Where the agreed facts contain a stipulation that the appropriations in question were made by defendant municipalities out of funds in their hands not derived from *ad valorem* taxes, but mainly from the sale of property, the Supreme Court on appeal is bound by the stipulation.

6. Constitutional Law § 8a—

Our Constitution is a limitation and not a grant of legislative power, and all powers not withdrawn are reserved to the people to be exercised by their representatives.

7. Constitutional Law § 8d—

Municipalities are creatures of the Legislature, and the Legislature in its discretion may create *quasi*-municipal corporations to perform ancillary municipal functions, and grant to such corporations even greater powers than those absolutely necessary to perform the particular function, and give the municipality only such control over the corporation as the Legislature may deem expedient.

8. Municipal Corporations § 41: Taxation § 9—

A municipal corporation may appropriate funds to a *quasi*-municipal corporation created by the Legislature when such corporation is an agency of the municipality in the performance of a public function having a reasonable connection with the convenience and necessity of the contributing municipality.

9. Same—

In determining whether the purpose of a *quasi*-municipal corporation is a public purpose as a predicate for the appropriation of municipal funds in its aid, the terms of the creating act are not controlling, but the courts will ascertain whether its purpose in fact has a reasonable relationship to the convenience and necessity of the contributing municipality.

10. Same: Greensboro-High Point Airport Authority held agency of the municipalities for performance of public services.

Construing ch. 98, Public-Local Laws of 1941, as amended by ch. 601, Session Laws of 1943, *in pari materia* with ch. 206, Session Laws of 1945, *it is held:* that the Greensboro-High Point Airport Authority is an agency not only of Guilford County but also of the municipalities of Greensboro and High Point in the operation and maintenance of the airport, notwithstanding that the creating act does not so stipulate, since the Act of 1941 does specifically authorize the said cities to contract with the authority and provides that each of the municipalities appoint one member of the board of directors of the said authority, and ch. 206, Session Laws of 1945, gives complete and express recognition of the authority as an agency of Greensboro and High Point as well as of Guilford County, and it being apparent that in fact the authority does function to perform such public purpose for each of the municipalities and that the Legislature intended to constitute it their agency, the provisions of G. S., 63-4, permitting the three municipalities to act jointly in such undertaking not having been repealed or modified by the supplementary acts.

11. Mandamus § 2a—

The treasurers of municipalities act in a ministerial capacity in the payment of appropriations lawfully made by their respective boards and governing bodies, and therefore *mandamus* will lie to compel such payment.

BARNHILL, J., concurring in part and dissenting in part.

WINBORNE, J., joins in concurring opinion of *Barnhill, J.*

DENNY, J., concurring.

APPEAL by defendants from *Sink, J.,* at Chambers in the courthouse in Greensboro, N. C., 19 October, 1945.

The three cases above entitled, because of their similarity in factual and legal features and interconnected interests, were consolidated for hearing, and by consent of all parties heard by Judge Hoyle Sink on agreed facts without a jury.

The actions are brought for *writs of mandamus* to compel defendants, treasurers of Guilford County, the City of Greensboro, and the City of High Point, respectively, to pay to the plaintiff appropriations made by their respective boards and governing bodies to plaintiff from funds now in their hands. It is conceded by the defendants that plaintiff is entitled to the writs if the appropriations were within the constitutional and lawful power of the individual and several boards to make.

Omitting purely formal matter, the statement of fact in appellants' brief, to which there is no objection, may be adopted as a concise summary of the pertinent facts. Where necessary, this will be supplemented from the stipulations of the parties.

"The plaintiff is a body politic and corporate of the State of North Carolina, created, organized and existing under and by virtue of Chapter 98, Public-Local and Private Laws of 1941, and amendments thereto, and is now the owner of and in possession of all of the property, real and personal, used in the operation of the Greensboro-High Point Airport and is now operating said airport.

"Guilford County is a body politic and corporate of the State of North Carolina, and prior to June 20, 1942, owned and operated the Greensboro-High Point Airport. The defendant, W. Clarence Johnson, is the duly elected qualified and acting Treasurer of Guilford County. On the 23rd day of June, 1945, the County Commissioners of Guilford County adopted an appropriation resolution for the fiscal year 1945-1946, which contained an appropriation of $20,000 for the Greensboro-High Point Airport, to be paid wholly and entirely from funds derived from sources other than *ad valorem* taxes. Plaintiff has made demand upon said W. Clarence Johnson, as Treasurer of Guilford County, for the payment of said appropriation to it which was refused by him because he had

been advised that the County Commissioners of Guilford County could not lawfully make said appropriation, and that he as Treasurer, therefore, had no legal right to make such payment.

"City of Greensboro is a municipal corporation duly created and chartered by the General Assembly of the State of North Carolina, Chapter 37, Private Laws of 1923, and amendments thereto, and the defendant, Hargrove Bowles, is the duly appointed qualified and acting Treasurer of the City of Greensboro. The City Council of the City of Greensboro, on the 19th day of September, 1944, created a Capital Reserve Fund. On the 3rd day of July, 1945, the City Council of the City of Greensboro adopted an ordinance authorizing the withdrawal of $27,000 from said Capital Reserve Fund for the purpose of making improvements at the Greensboro-High Point Airport, said funds being from receipts from revenues derived from sources other than *ad valorem* taxes, which are not pledged or otherwise applicable by law to the payment of existing debt of the City of Greensboro. On the 4th day of September, 1945, the City Council of the City of Greensboro adopted a resolution, finding that the legal requirements for the withdrawal of said funds, including the approval of the Local Government Commission, had been met and appropriated said sum of $27,000 to the Greensboro-High Point Airport Authority. Plaintiff has made demand upon said Hargrove Bowles, as Treasurer of the City of Greensboro, for the payment of said appropriation to it which was refused by him because he had been advised that the City Council of the City of Greensboro could not lawfully make said appropriation, and that he, as Treasurer, therefore, had no legal right to make such payment.

"City of High Point is a municipal corporation duly created and chartered by the General Assembly of the State of North Carolina, Chapter 107 of the Private Laws of 1931, and amendments thereto, and the defendant, Lois Welborn, is the duly appointed, qualified and acting Treasurer of the City of High Point. The City Council of the City of High Point, on the 10th day of August, 1945, adopted a budget ordinance for the City of High Point for the fiscal year 1945-1946, which contained an appropriation for the Greensboro-High Point Airport Authority of $25,000 from funds derived from the sale of properties and unappropriated surplus revenues from sources other than the levy of *ad valorem* taxes which are not pledged or otherwise applicable by law to the payment of the existing debt of the City of High Point. Plaintiff has made demand upon said Lois Welborn, as Treasurer of the City of High Point for the payment of said appropriation to it which was refused by her because she had been advised that the City Council of the City of High Point could not lawfully make said appropriation, and

that she as Treasurer, therefore, had no legal right to make such payment."

Certain statutes are cited in the stipulation as necessary to a determination of the controversy, which are here reproduced by direct quotation in part, or summarized. Portions considered in the argument as more important to decision are printed in italics. Numerals relate to sections and subsection.

Public-Local Laws 1941, chapter 98, as amended by 1943 Session Laws, chapter 601.

The act is captioned: "AN ACT ENABLING THE COUNTY OF GUILFORD TO ESTABLISH AN AIRPORT AUTHORITY FOR THE MAINTENANCE OF AIRPORT FACILITIES IN THE COUNTY OF GUILFORD FOR THE CITIZENS OF GREENSBORO, HIGH POINT, GUILFORD COUNTY AND VICINITY."

(1) It creates the "Greensboro-High Point Airport Authority" as a body corporate, with powers and jurisdiction enumerated; (2) to consist of five members, two of whom shall be resident voters of Greensboro, two resident voters of High Point, and one from Guilford County at large. One each of these is appointed by the City Council of Greensboro and the City Council of High Point, from resident members, and three are appointed by the Commissioners of Guilford County. Their terms are fixed, and they take oaths of office. (3) They constitute a board of directors and pass by-laws relating to management. (4) Power is given them to "purchase, acquire, establish, construct, own, control, lease, equip, improve, maintain, operate and regulate airports or landing fields" within Guilford County; and to "purchase, improve, own, hold, lease and/or operate real or personal property"—to borrow money, issue bonds secured by mortgages *with* the consent of Guilford County, upon any property held or to be held by it. To sue and be sued; to acquire by purchase lands for construction and maintenance and operation of airports anywhere in Guilford County; to make contracts and hold personal property, and acquire interest in any airport existing in Guilford County. (4-1) To make rules and regulations and adopt schedule of fees and charges not in conflict with State law or rules and regulations of the Civil Aeronautics Administration of the Federal Government. (4-2) To issue bonds, notes or securities upon approval of Guilford County Commissioners and Local Government Commission; (4-3) to dispose of property upon approval of the Commissioners of Guilford County; (4-4) to purchase insurance; (4-5) to authorize or deny or withdraw the right of any person, firm or corporation to construct, operate or maintain any airport or landing field within Guilford County.

"Sec. 5. The Airport Authority is hereby authorized and empowered to acquire from the County of Guilford, the Cities of Greensboro, and High Point, by agreement therewith, and such county and cities are

hereby authorized and empowered to grant and convey either by gift or for such consideration as it may be deemed wise, or any real or personal property which it now owns or may hereafter be acquired, and which may be necessary for the construction, operation and maintenance of any airport located in the County of Guilford.

"Sec. 6. Any lands acquired, owned, controlled or occupied by the said Airport Authority shall, and are hereby declared to be acquired, owned, controlled and occupied for a public purpose."

Sec. 7 authorizes the acquisition of private property for airport purposes by purchase, gift, devise or exercise of the right of eminent domain.

Sec. 8 requires annual reports to Commissioners of Guilford County. "The said Airport Authority shall be regarded as the corporate instrumentality and agent for the County of Guilford for the purpose of developing airport facilities in the County of Guilford, but it shall have no power to pledge the credit of the County of Guilford, or any subdivision thereof, or to impose any obligation upon the County of Guilford or any subdivision thereof, except and when such power is expressly granted by statute or the consent of the County of Guilford.

"Sec. 9. All rights or powers given to the counties or municipalities by the statutes of North Carolina, which may now be in effect or be enacted in the future relating to the development, regulation and control of municipal airports and the regulations of aircraft are hereby vested in the said Airport Authority, and the County of Guilford may delegate its powers under the said acts to the Authority and the Authority shall have concurrent right with the County of Guilford to control, regulate and provide for the development of aviation in the County of Guilford."

Sections 10, 11 and 12 omitted as unessential.

1945 Session Laws, chapter 137, authorizes investment of funds in certain named securities, purchase of its outstanding bonds and authorizes the Authority to operate on any airport premises "restaurants, agricultural fairs, tracks, motion picture shows, and other amusements."

1945 Session Laws, chapter 206, captioned as follows: "AN ACT ENABLING GUILFORD COUNTY AND CERTAIN MUNICIPALITIES LOCATED THEREIN TO ISSUE BONDS AND LEVY AD VALOREM TAXES FOR AIRPORTS AND AIRPORT FACILITIES IN GUILFORD COUNTY"—purports to authorize Guilford County and the cities of Greensboro, High Point and Gibsonville to issue bonds, notes, and certificates of indebtedness, when authorized by popular vote in the respective county and municipalities, and levy *ad valorem* taxes "for the promotion, purchase, operation, repair, maintenance, expansion or construction of airports, airport facilities, and parking areas in Guilford County. It further provides that the act shall not repeal any of the provisions of chapter 98 of the Public-

(e) The county and cities concerned may lawfully join in such an enterprise if each of them is benefited by it. G. S., 63-4.

It is within the stipulated facts that the several appropriations made to the plaintiff are out of funds now in their hands, in each case, not derived from *ad valorem* taxes, but mainly from the sale of property, and it is not disputed that the funds are free from other specified purpose or legal commitment. There is nothing in the record itself to indicate otherwise, and we are bound by the stipulation on which the court below acted. In this situation no question of credit or taxation in violation of Article VII, section 7, is involved, and the prohibition constituting the *ratio decidendi* in *Sing v. Charlotte, supra,* does not apply.

The main objections which have been urged are that the several acts of the Legislature mentioned in the statement have created in the plaintiff a municipal corporation, to all intents and purposes independent and distinct from the county or municipalities it is intended to serve, and have so insulated it as to deprive the municipalities of the legal right to contribute to it under the guise of appropriating money for a public purpose; that the statute fails to give to the municipalities an adequate control of the Airport Authority; and that there is no express language in the Act creating the Authority an agent of the cities of Greensboro and High Point.

These objections are similar in aspect, and the answer to each of them lies in the broad scope of legislative discretion in statutes dealing with towns and cities, and in the actual recognition given the plaintiff Airport Authority as an agency of these municipalities and the authority given to Guilford County, Greensboro and High Point to deal with it in the several pertinent statutes made a part of the agreed facts. Chapter 98, Public-Local Laws of 1941, as amended by chapter 601, Session Laws of 1943, secs. 1 and 2; chapter 206, Session Laws of 1945.

Our Constitution does not operate as a grant, but as a limitation on the legislative power; and all powers not withdrawn through its restrictions are reserved to the people to be exercised by their representatives in the Legislature. *Yarborough v. N. C. Park Commission,* 196 N. C., 284, 145 S. E., 563. Since the prohibition of Article VII, sec. 7, of the Constitution is concededly not applicable to the present case, and in the absence of other constitutional restrictions, the subjects dealt with in the statutes under review fall within these reserved powers. We have no power to review a statute with respect to its political propriety as long as it is within the legislative discretion and has a reasonable relation to the end sought to be accomplished.

"Public Purpose" as we conceive the term to imply, when used in connection with the expenditure of municipal funds from the public

treasury, refers to such public purpose within the frame of governmental and proprietary power given to the particular municipality, to be exercised for the benefit, welfare and protection of its inhabitants and others coming within the municipal care. It involves reasonable connection with the convenience and necessity of the particular municipality whose aid is extended in its promotion.

If the appropriations made by the county and municipalities were indeed made, as a mere gift, to another political subdivision—another town or city of an independent governmental capacity, incapable of performing the public service which has become the felt need of the contributing municipality, the authority for such a donation might be questioned. But that situation is not before us. The plaintiff Airport Authority is neither a private corporation nor a political territorial subdivision. It is a *quasi*-municipal corporation of a type known since *McCulloch v. Maryland,* 4 Wheat., 316, and commonly used in this and other states to perform ancillary functions in government more easily and perfectly by devoting to them, because of their character, special personnel, skill and care. The legality of the appropriations to its support as involving a public purpose does not depend on the strict propriety of the terms of the creating act as a piece of ideal legislation, as much as it does upon the nearness or remoteness of the benefits enjoyed by the municipality through its operation with respect to the public service sought to be promoted. If the adjuvant corporation is invested with the power and is given the capacity to meet the demand, the legal requirements justifying aid from the public funds have been met. The fact that other and even greater powers have been given to the corporation than those absolutely necessary to the performance of the particular function is, as we have said, a matter within the legislative discretion. Furthermore, the reciprocal and functional relation between the Greensboro-High Point Airport Authority and the cities whose name it bears is outstanding. Proximity to these large communities, which are in key positions with respect to trade and transportation over a wide area, is as essential to the existence of the airport as the latter is to the progress and expansion of the cities themselves and the convenience of their inhabitants and those who communicate or deal with them.

In considering questions concerning the powers conferred on the *quasi*-municipal corporation and the control over it exercised by the municipality with which it is connected, it must be remembered that counties, cities and towns derive practically all their powers from the Legislature, through appropriate statutory law, rather than constitutional grants; and the Legislature, in implementing their functions or in creating a separate corporate agency to serve a particular governmental purpose, is not bound by the limitations of the general statute under which the

municipalities are formed or the special charters and laws delimiting their authority. It may give to these specially created agencies such powers and call upon them to perform such functions as the Legislature may deem best. *Brockenbrough v. Commissioners, supra.*

If we give full faith and credit to this power of the Legislature over municipal government, it is clear that we must think in terms of *agencies* rather than of *agents* when we speak of ancillary corporations which have been given charge of particular municipal public functions. The powers given to such corporations are direct and legislative, and not conferred by municipal resolution unless the statute should so direct. They are, in fact, agents of the law. In so far as constitutional restrictions are concerned, the General Assembly may distribute the functions of a municipality as it may deem best, the only limitation being its own sound judgment in creating a unified and efficient government. By the exercise of the same sound judgment and legislative discretion, it may, as it has attempted here to do, create a more or less autonomous agency, giving to the municipality only such control as it may consider advisable where the particular functions to be performed involve great detail and complexity, and demand close attention and skilled personnel. Perhaps in no other way could continuity and efficiency in the service be secured against political changes and petty directives.

In the type of corporation we have here control is ordinarily given, as it is here, by a representative directorate chosen by the governing bodies concerned, with such other provisions in the Act as will insure to the municipality the integrity of the operations and their continued employment in aid of the public purpose being promoted. *Webb v. Port Commission, supra; Wells v. Housing Authority, supra.*

The public statute, G. S., 63-4, permitting the three municipalities concerned to act jointly is not repealed or modified, or its authority in any way affected by the supplementary acts under which the purpose and policy of the public statute are carried out in the creation of a single Airport Authority to serve all three municipalities—obviously the only way in which it could be done.

The record itself constitutes a refutation of the theory that the agency thus created is an independent corporation, incapable of performing the public service required of it with respect to Greensboro and High Point, or that it is not committed by the pertinent statutes to supply the public need or convenience thus conceded to be a public purpose, and to the accomplishment of which the municipalities are permitted to spend public money. The airport itself is conveniently located between these populous cities, and they are the immediate beneficiaries of its operation, in so far as the convenience of their citizens is concerned, with respect to mail, freight and passenger service, in all of which the record shows an amaz-

Local Laws of 1941, as amended by chapter 601 of the 1943 Session Laws of North Carolina, and shall not be construed as a limitation on powers possessed by the county or municipalities involved; but further provides that all laws and clauses of laws in conflict with the Act are repealed "notwithstanding any charter provision of any city or town or any public, local or private act."

Upon the hearing Judge Sink granted writs of *mandamus* as prayed for, and all of the defendants excepted and appealed.

Thomas C. Hoyle for W. C. Johnson, Treasurer of Guilford County, appellant.

H. C. Wilson for Hargrove Bowles, Treasurer of City of Greensboro, appellant.

G. H. Jones for Lois Welborn, Treasurer of City of High Point, appellant.

D. Newton Farnell, Jr., for plaintiff, appellee.

SEAWELL, J. Preliminary to a discussion of the questions involved in the appeal, there are certain postulates which must be conceded:

(a) The establishment and maintenance of an airport is a public purpose within the objects of municipal expenditure. *Goswick v. Durham,* 211 N. C., 687, 191 S. E., 728; *Turner v. Reidsville,* 224 N. C., 42, 29 S. E. (2d), 211; *City of Reidsville v. Slade,* 224 N. C., 48, 29 S. E. (2d), 215.

(b) It is not a necessary expense, however, and debt may not be incurred or taxes levied for that purpose without a vote of the people. *Sing v. Charlotte,* 213 N. C., 60, 197 S. E., 151.

(c) Other conditions favorable, the municipality may appropriate for building and maintaining the facility out of funds on hand not obligated to other uses. *Goswick v. Durham, supra; Adams v. Durham,* 189 N. C., 232, 126 S. E., 611; *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,* 200 N. C., 30, 156 S. E., 241.

(d) The municipal authority to construct, maintain and operate such airport may be confided to a municipal corporate authority created for that purpose by appropriate legislative action. *Turner v. Reidsville, supra; City of Reidsville v. Commissioners, supra; Brockenbrough v. Commissioners,* 134 N. C., 1, 17, 46 S. E., 28; *Webb v. Port Commission,* 205 N. C., 663, 172 S. E., 377; *Wells v. Housing Authority,* 213 N. C., 744, 197 S. E., 693; *Cox v. City of Kinston,* 217 N. C., 391, 8 S. E. (2d), 252; *Mallard v. Housing Authority,* 221 N. C., 334, 20 S. E. (2d), 281; *Benjamin v. Housing Authority,* 198 S. C., 79, 15 S. E. (2d), 737.

ing amount of "on" and "off" traffic flowing to and from these cities, and only remotely to others. In connection with the performance of these services Greensboro and High Point are given, with Guilford County, joint control of the directorate by proportional appointment of its members. In this situation the contention that the Airport Authority is not committed by law to this service and is not an agency of these two cities, and that their contributions are mere gifts to an independent corporation not charged with carrying out any public purpose or any municipal function in which they are directly interested, would hardly be accepted as sound.

In *Briggs v. Raleigh,* 195 N. C., 223, the only possible community or municipal benefit to the City of Raleigh discernible in the transaction whereby $75,000 to $100,000 was donated to the fair grounds enterprise, and approved by the Court, other than the satisfaction which comes from a benevolent action, was the fact that it increased the city's trade or put its inhabitants nearer the educational enterprise.

The appropriation which a municipality may make to an agency of this sort on the ground that it is a public purpose is not a loan and is not intended to be a lien on its assets. *Webb v. Port Commission, supra; Wells v. Housing Authority, supra; Mallard v. Housing Authority, supra; Briggs v. Raleigh, supra,* and cases cited *infra.* Disposition of its property upon liquidation, which is not expected to occur, is a legislative care when the necessity arises.

It is pointed out that the Airport Act expressly declares the Authority to be an agent of Guilford County, but makes no such declaration as to Greensboro and High Point. The question of agency, however, must be determined from the entire Act and from the actual relation of the Airport Authority to the municipal functions of these two cities therein established, and the authority given the cities to deal with it, rather than from any declaration in the Act, especially one which is obviously not intended to be exclusive. Perusal of the Act leaves no doubt that the Legislature intended that the Airport Authority should perform for Greensboro and High Point all things necessary for the construction, maintenance and management of airport facilities, which they each might have done independently, but are by public statute (G. S., 63-4) permitted to do jointly. The Act, as we have seen, gives these two cities participation in the selection of members of the commission, or directors, and their replacement and succession—the right to be exercised by each city independently of any other authority, and makes frequent reference to the duties which the Airport Authority is to perform for these cities. In section 5—and this should be decisive of the point raised—the Act, as amended, gives to Greensboro and High Point full authority to deal with the plaintiff Airport Authority in language which cannot be con-

strued otherwise than an acceptance and recognition of the challenged agency; indeed, more than that, it does in intent and in effect establish that relationship by direct authority to these municipalities to give to the agency material and substantial support. See section 5, *supra.*

In this connection the whole legislation on the subject must be considered *in pari materia,* and the provisions of chapter 206, Session Laws of 1945, cannot be ignored. This chapter gives complete and express recognition of the plaintiff Authority as the agency of Greensboro and High Point, as well as of Guilford County; and the authority is given each municipality to deal with it, and upon a plebiscite to lend credit and to issue bonds and raise money for its support. The statutes creating the agency (chapter 98, Public-Local Laws of 1941, and chapter 601, Session Laws of 1943) are cited in chapter 206, *supra,* and their authority is there expressly preserved. The significance of this later statute lies in the fact that it does not in itself create the agency, but recognizes its creation under the former statutes and the purpose of its creation, *and authorizes these municipalities to deal with it and give it aid.* Since these cities are given authority to raise money by taxation and expend it in aid of plaintiff agency, the authority is adequate to appropriate for that purpose from surplus and uncommitted funds already on hand. *Adams v. Durham, supra.* It is true they are not proceeding under this statute to raise the funds, but that does not diminish the authority given to deal with the agency when they have the funds which may be applied.

Supplementing what has been said about the complete control of counties, cities and towns by the Legislature from which their powers are derived, we might refer to some of the "set-ups" which have met our approval and compare them with similar features of the act under review.

The Morehead Port Commission was created by chapter 75, Private Laws of 1933, and the act of creation was reviewed in *Webb v. Port Commission, supra.* Perusal of the Act—which is largely recapitulated in the case cited, will show that there is no control whatever of the Port Commission given to the governing body of Morehead City except that given through the appointment of members of the Commission; and yet the Court upheld the provision permitting financial aid to be given by Morehead City on the principle of its interest in the public purpose being served.

By chapter 271, Private Laws of 1899, a corporation known as "The Board of Water Commissioners of the City of Charlotte" was created to carry on that function for the city. Apart from the appointment of the members of this board by the Aldermen of Charlotte, there is not a vestige of control given to the city, unless the privilege of locating hydrants and paying for their installation and upkeep could be so con-

sidered. Not only did it take away all the powers of the City Board of Aldermen in the premises and give them to the newly created corporation, but the statute provides that the acts of the Water Commissioners shall be deemed the acts of the municipality. The law was amended by chapter 196, Private Laws of 1903, and came under review here in *Brockenbrough v. Charlotte, supra.* Commenting on this law in the cited case, *Justice Connor,* speaking for the Court, says:

"It is clear that the Legislature may, in aid of municipal government, *or for the purpose of discharging any municipal functions,* or for any proper purpose, create municipal boards and confer upon them such powers and duties as in its judgment may seem best." (Italics ours.)

In other instances the Legislature has gone further and has completely committed municipal functions to a legislative board or corporation without any control of the governing body of the county, and yet the county is required to furnish the finances. *Huneycutt v. Comrs.,* 182 N. C., 319, 109 S. E., 4, dealt with a situation of that kind and found abundant support for its approval in the cases cited on p. 321.

The municipalities represented here have attempted to appropriate funds to a public purpose served by a statutory agency in whose appointment they participate and whose benefits are laid upon their threshold. The technical objections to the form of the statute do not outweigh the presence of that reality which the law and the decided cases have always sought as the determining factor—the relation of the municipality to the public purpose to which it lends its support—the practical satisfaction of the municipal need felt by its inhabitants. If the statute creating the Airport Authority has defects which merit legislative or judicial attention, they are not before us on this appeal.

Unquestionably the immediate future of civil aviation will bring to us results undreamed of; transportation of mail, passengers and freight will reach proportions hitherto thought impossible. Already we have in this method of travel and transportation a rival of all other means now employed; and an opportunity which these cities, amongst our largest and most prosperous, can no more afford to lose than we can afford to deny to them except upon cogent reasons.

In affirming *Hesse v. Rath,* 224 App. Div., 344, 230 N. Y. Supp., 676, 249 N. Y., 436, 164 N. E., 342, the Court, speaking through *Cardozo, Ch. J.,* says:

"A city acts for city purposes when it builds a dock or a bridge or a subway. . . . Its purpose is not different when it builds an airport. . . . Aviation is to-day an established method of transportation. The future, even the near future, will make it still more general. The city that is without the foresight to build the ports for the new traffic may soon be left behind in the race of competition. Chalcedon was called

the city of the blind, because its founders rejected the nobler site of Byzantium lying at their feet. The need for vision of the future in the governance of cities has not lessened with the years. The dweller within the gates, even more than the stranger from afar, will pay the price of blindness."

We have been cited no provision of the Constitution, and we find nothing in the statutes, which would justify us in raising a judicial bar to the appropriations which the municipalities have sought to make for the accomplishment of this widely recognized public purpose, or justify reversal of the judgment entered in the Superior Court. The defendants are acting in a ministerial capacity and are amenable to the writs demanded.

The judgment is

Affirmed.

BARNHILL, J., concurring in part and dissenting in part: I concur in the conclusion that the judgment below, in so far as it requires the treasurer of Guilford County to pay to plaintiff the amount appropriated to its use by the commissioners of Guilford County, must be affirmed. In my opinion, on this record, the appropriations made by Greensboro and High Point are nothing more or less than gifts or grants in aid which these municipalities have no legal right to make. For that reason plaintiff is not entitled thereto. As to them the judgment should be reversed.

The plaintiff corporation was created by and draws its authority from a Special Act of the Legislature, ch. 98, Public-Local Laws 1941. Hence the general statute, G. S., 63-4, which authorizes counties and cities jointly to establish and maintain an airport is not pertinent and has no bearing on the question here presented. About the other postulates initially listed in the majority opinion, in so far as they may affect decision here, there is no divergence of opinion.

It is conceded in the majority opinion that a municipality may expend its funds only for a public purpose and that "public purpose" when used in connection with the expenditure of municipal funds refers to such public purpose within the frame of governmental and proprietary powers given to the particular municipality, to be exercised for the benefit, welfare and protection of its inhabitants and others coming within the municipal care.

Thus we seem to be agreed that the appropriation of public money is permissible only when it is within the functional framework and in furtherance of the governmental or proprietary activities of the particular municipality and that to constitute a public purpose the objective must be directly connected with the local government and tend to pro-

mote the general welfare of the residents of the corporate community. *Williamson v. High Point,* 213 N. C., 96, 195 S. E., 90; *Davis v. City of Taylor,* 67 S. W. (2d), 103, 123 Tex., 39. That is, it must be a corporate purpose directly connected with the local government and having for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity or contentment of the inhabitants or residents within the political division from whence the revenue for its support is derived. *Green v. Frazier,* 176 N. W., 11, 44 N. D., 395; *Lott v. City of Orlando,* 196 So., 313, 142 Fla., 338; *Platte Valley Public Power and Irrigation Dist. v. Lincoln County,* 14 N. W. (2d), 202.

So then, as we are agreed upon the applicable general principles of law, the legality of the appropriations made by High Point and Greensboro for the benefit of plaintiff is to be determined by the facts appearing in this particular case.

Briefly the pertinent facts are these:

1. The 1941 Legislature, by Special Act, ch. 98, Public-Local Laws 1941, created the plaintiff corporation as an instrumentality and agent of Guilford County. As such agent or instrumentality it was given power to acquire property and maintain, operate, and regulate airfields within Guilford County, and it was required to make detailed annual reports to the county board of commissioners.

2. The Special Act provides for a governing board composed of five citizens of Guilford County. The board of commissioners of Guilford County was empowered to select three members of said board, one from High Point, one from Greensboro, and one from the county at large. Greensboro and High Point are granted the privilege of selecting one each.

3. At the time of the adoption of said Act and thereafter Guilford County owned and operated an airport within the county. The board of commissioners of said county in April, 1942, "decided to carry out the provisions of said Act and activated said Greensboro-High Point Airport Authority." To that end the county conveyed all its airport property to plaintiff authority and thereafter operated its airport facilities through the plaintiff, its corporate instrumentality and agent.

4. In 1943 the 1941 Special Act was amended. Ch. 601, Session Laws 1943. By said amendment plaintiff was (1) granted all the powers given to counties or municipalities by general statutes relating to airports, (2) authorized, *with the consent of Guilford County,* to issue notes, bonds, and other securities and to execute mortgages and deeds of conveyance, and (3) to deny to or withdraw from any other person or corporation the right to operate an airport within Guilford County. Thus Guilford was given a greater measure of control over the corporate activities of plaintiff.

5. Greensboro and High Point are cities within and are a part of Guilford County. As such they, together with the rest of Guilford, receive direct benefits from the operation of the airport. But it does not appear that either furnished any part of the property, real or personal, used by plaintiff in maintaining the airport facilities. They did not "join with" Guilford in activating plaintiff.

6. Neither city exercises any control over plaintiff. It may continue its operations or cease so to do and convey its property or liquidate its assets without let or hindrance from them; and in the event of liquidation they would have no claim to any part of its assets.

7. It is alleged in each complaint that plaintiff authority is the corporate instrumentality and agent of Guilford County. But it is not alleged or stipulated by the parties or found by the court that plaintiff is the instrumentality of either city.

So then, briefly stated, we have this situation. Guilford County, through a corporate agency is maintaining airport facilities in Guilford County. It furnished the necessary property and is making contributions toward its maintenance or enlargement. High Point and Greensboro each have appropriated funds to be paid to plaintiff to be used for capital improvements.

Is plaintiff as a matter of law entitled to the funds thus appropriated? The divergence of opinion arises here.

Under some circumstances a municipality may make a contribution to a wholly independent and unrelated corporation for a particular purpose such as to procure the location of some public institution within or near its bounds. *Briggs v. Raleigh,* 195 N. C., 223, 141 S. E., 597; Anno. 46 A. L. R., 679, 698, 737. Such occasions are rare—and this is not one of them. Ordinarily public money is expended in furtherance of governmental and proprietary objectives either directly by the municipal authorities or indirectly through corporate agencies.

We are agreed that the maintenance of an airport is a "public purpose" in which a municipality may engage for and in behalf of its citizens either directly or through the agency of an "adjuvant" corporation. So then, concededly, decision here rests squarely upon the question whether plaintiff is the instrumentality or agent of High Point and Greensboro. This is the crux of the case.

In answering this question in the affirmative the majority opinion reasons thus: Plaintiff is operating an airport in Guilford County which serves the residents of High Point and Greensboro. These cities have statutory authority to operate airports and they are mentioned "frequently" in the Special Act creating plaintiff. Therefore, although plaintiff, by express provisions of the Act creating it, is made the instrumentality and agent of Guilford County only, it is in fact also the

corporate agent of these two cities. It being their agent, they may appropriate funds for its support.

In my opinion the conclusion is a *non sequitur*. The Act under which plaintiff operates makes it the corporate agent of Guilford County. *Expressum facit cessare tacitum.*

The county alone exercises supervisory control. While the existence of the right of control in the principal or parent corporation is not an absolute essential, its existence in the one municipality to the exclusion of the others is significant. *Expressio unius est exclusio alterius.*

I readily concede that under G. S., 63-4, High Point or Greensboro, either separately or jointly with Guilford County, may acquire and maintain an airport and use nontax funds for that purpose without first submitting the question to the voters for their approval. The point is *they have not undertaken to do so.* When Guilford County elected to seek special legislative authority to operate its airport through a corporate agency it elected to act alone and not in co-operation with other municipalities.

Of course High Point and Greensboro receive direct benefits from the operation of the airport. They are component parts of the county which was created for the very purpose of serving its people, including those residing within the two cities. Any governmental or proprietary activity of the county naturally reacts to their advantage. But the mere fact the airport is an instrumentality of Guilford, is located near these two cities, and the county thus renders a service for them which they could provide for themselves does not make it their agent or warrant the conclusion that the operation of the airport is within the compass of the corporate activities of these cities or either of them.

When we adopt the majority view, read into the special statute an intent it does not express, and hold to the contrary, we in effect declare that every activity of a county constitutes a "public purpose" for each and every town or city within its bounds.

A municipality is not the giver of gifts. *Briggs v. Raleigh, supra.* Even with express legislative authority it cannot pay gifts or gratuities out of public funds or assume any function which is not within the compass of its own corporate activities or usual or necessary powers. *Brown v. Comrs.*, 223 N. C., 744, 20 S. E. (2d), 104; *Madry v. Scotland Neck*, 214 N. C., 461, 199 S. E., 618; *Williamson v. High Point, supra;* 38 Am. Jur., 85, sec. 395, and 91, sec. 399. It must confine itself to the business of government for which it was created and its proprietary powers are to be exercised primarily for the advantage of the compact community. *Asbury v. Albemarle*, 162 N. C., 247, 78 S. E., 146.

A public auditorium, *Adams v. Durham*, 189 N. C., 232, 126 S. E., 611, or a public library, *Westbrook v. Southern Pines*, 215 N. C., 20,

1 S. E. (2d), 95, within Greensboro is as to that municipality a public purpose. While High Point may maintain an auditorium or library for itself, I assume no one would seriously contend that it could appropriate funds in aid of such institution in Greensboro. It seems to me to be equally illogical to say that High Point and Greensboro can make a grant or gift to maintain the corporate agency of Guilford. When we so hold we go a full bowshot further than this or any other court has heretofore gone.

The cases cited in the majority opinion sustain the position that a municipality may act through a corporate agency, which is conceded. No one of them, however, has any bearing on the question of the legality of the proposed appropriations.

Briggs v. Raleigh, supra, is more nearly in point, but that case is easily distinguishable. There the appropriation or contribution was made to obtain the location of a public institution near the boundary of the city and comes within the principle enunciated in the line of decisions there cited. Anno. 46 A. L. R., 679, 698, 737.

The 1945 amendment, ch. 206, Session Laws 1945, is an enabling Act. Whether the Legislature may thus empower the cities named to lend their credit to and guarantee the obligations of the plaintiff is not before us for decision. It contains no provision which alters or attempts to alter the then existing status of plaintiff in its relation to these cities, and it expressly provides that nothing therein contained shall be construed to repeal any of the provisions of the 1941 Act, one of which makes plaintiff an agent of Guilford County.

Even if it be conceded that this amendment in effect authorizes Greensboro and High Point to adopt plaintiff as their instrumentality and agency the fact remains the plaintiff has not elected to so allege, and it is not so found or stipulated although expressly denied in the further answers.

As to High Point there is another serious question. It adopted a 1945-1946 budget in part as follows:

"Special appropriations are hereby made out of monies derived from the sale of properties and the amount appropriated to Greensboro-High Point Airport Authority is for construction of capital improvements and in the sum of $25,000."

Ordinarily cities obtain funds with which to buy property through taxation. When tax money is used to purchase property and the property is sold, the money received therefrom is in a legal sense derived from taxation. The conversion and reconversion do not change its essential nature as tax money.

The appropriation, as required by statute, G. S., 160-434, specifies the source of the money for its payment—proceeds from the sale of prop-

erty. It must be made, if at all, as directed. The parties stipulate: ". . . and the city of High Point has on hand funds not derived from *ad valorem* taxes *as aforesaid* with which to pay the aforesaid appropriation."

Is this a stipulation of fact that the property sold was not purchased with tax money, or an erroneous conclusion that proceeds from the sale of property which was acquired through taxation are not derived from *ad valorem* taxes? It is not clear the parties meant the first. It would seem to be the latter. In any event it is left in serious doubt and for that reason plaintiff has not shown a clear legal right to this appropriation.

In filing this opinion I have sought merely to state the reasons why I cannot concur in the conclusion of the majority. In the light of what I have said it has been thought advisable to amplify the majority opinion by way of reply and further argument. Even so, I have no desire to engage in a running debate. As I have expressed my understanding of the law as applied to the facts appearing in this record I am content. I add only this:

(1) It is now contended that although plaintiff was created and activated under a special Act which defines and limits its authority we may apply the general statute.

(2) The majority opinion as originally drafted is bottomed on a fact which is neither alleged in the complaints nor stipulated in the agreed facts, *but which is expressly denied in the answers.* To warrant relief in a *mandamus* proceeding there must be allegation and proof or admission sufficient to disclose a clear legal right to the relief demanded. Here it is granted on a fact which is specifically denied and unrefuted by allegation or finding of fact.

(3) Now it is said that we are dealing with agencies and not agents, and that plaintiff is an agency which "serves the convenience" of Greensboro and High Point, and this is sufficient to justify and authorize the appropriations. This, to my mind, is notable for its novelty.

(4) Neither the financial condition of plaintiff nor the rosy future of aviation, separately or in combination, justifies the appropriations.

(5) In *Webb v. Port Commission* the right of Morehead City to make contribution toward the support of the Port Commission was not at issue. *Brockenbrough v. Charlotte* is similarly distinguishable. The other authorities cited are so different factually they have no application here.

It may be that upon proper allegation and finding the 1945 amendment, ch. 206, Session Laws 1945, could be given an intent and meaning that would support an affirmance. Be that as it may, on this record the plaintiff, in my opinion, has failed to show a clear legal right to the

relief demanded as against Greensboro and High Point. Hence I vote to affirm the judgment in the case against the treasurer of Guilford County and to reverse as to the treasurers of High Point and Greensboro.

The further reformation of the majority opinion comes so late it leaves me no time within which to make this dissent conform to its outline without causing undue delay in final decision. I must rest content with its present form.

WINBORNE, J., joins in this opinion.

DENNY, J., concurring: The Greensboro-High Point Airport Authority was created as an agency of Guilford County by chapter 98 of the Public-Local Laws of 1941. The agency was created for the purpose of operating and maintaining an airport formerly owned and operated by Guilford County, which airport is located about equidistant from Greensboro and High Point. The corporation or agency created by the above Act derives its powers from the Act and the amendments thereto, as well as from the general law. See section 9 of the Act set out in the majority opinion. This fact, however, does not prevent the operation, expansion and maintenance of the airport by such agency from being for a public purpose, as declared by the general law. G. S., 63-5. *Turner v. Reidsville,* 224 N. C., 42, 29 S. E. (2d), 211; *Reidsville v. Slade,* 224 N. C., 48, 29 S. E. (2d), 215.

While strictly speaking the Greensboro-High Point Airport Authority is an agency of Guilford County, it operates and maintains an airport primarily for the benefit of the City of Greensboro and the City of High Point, and is authorized by the Act of its creation to contract with said municipalities. No doubt the primary purpose in creating the Airport Authority was to establish and maintain adequate airport facilities for these two cities, in lieu of the establishment of separate airports by the respective municipalities or for the establishment of a single airport under the general law by the joint action of the municipalities to be served. G. S., 63-4.

I think that chapter 206 of the Session Laws of 1945, authorizes the City of High Point, the City of Greensboro and Guilford County to contribute to the support, expansion and maintenance of the Greensboro-High Point Airport, now operated by the Airport Authority. The governing boards of the respective municipalities named in this Act cannot levy an *ad valorem* tax for the support, expansion or maintenance of an airport, without a vote of the people. *Sing v. Charlotte,* 213 N. C., 60, 195 S. E., 271. This Act, however, provides that these respective municipalities "may levy an annual *ad valorem* tax for the promotion, purchase, operation, repair, maintenance, expansion or construction of

airports, airport facilities, equipment, buildings and parking areas in Guilford County, provided a majority of the qualified voters in the respective political subdivisions approve same at an election called and held for any or all of said purposes." The Act further authorizes the municipalities which are parties hereto, to enter into an agreement or contract with the Greensboro-High Point Airport Authority for receiving, administering and expending any funds obtained under authority of the Act. An election in which the qualified voters might approve the levy of an *ad valorem* tax for the purposes authorized in the Act, would not affect one way or the other the right of the respective governing boards to contract with the Greensboro-High Point Airport Authority relative to the expenditure of the tax funds. I think when the General Assembly authorized Greensboro, High Point and Guilford County to contract with the Greensboro-High Point Airport Authority for the expenditure of funds raised by *ad valorem* taxes, it gave these municipalities the power to contract with said Airport Authority for the development of the Greensboro-High Point Airport and to appropriate any unappropriated funds in the treasury of the respective political subdivisions for that purpose, provided such funds were derived from sources other than taxation.

In this jurisdiction a municipal hospital is held not to be a necessary governmental expense. Nevertheless, if a municipality has funds in its treasury, derived from sources other than taxation, such funds may be expended for the support and maintenance of a municipal hospital. *Nash v. Monroe,* 198 N. C., 306, 151 S. E., 634. A city may use funds on hand for a public purpose, without the approval of the voters, provided the funds were obtained from sources other than taxation. *Burleson v. Board of Aldermen,* 200 N. C., 30, 156 S. E., 241; *Mewborn v. Kinston,* 199 N. C., 72, 154 S. E., 76; *Adams v. Durham,* 189 N. C., 232, 126 S. E., 611.

It is stipulated that the funds appropriated by the respective municipalities which are parties hereto, were derived from sources other than taxation. We are bound by the record.

The imposition of a tax is not involved. The funds appropriated are already on hand and the expenditure thereof will impose no further liability on the respective municipalities. Moreover, the expenditure of the funds is restricted to capital improvements at the Greensboro-High Point Airport. This is in conformity with the provisions of the 1945 Act, which authorizes the municipalities and the Airport Authority to contract as to the expenditure of any sums received from the municipalities and expended by the Airport Authority. Therefore, I vote to affirm.

DANIEL PATTERSON v. DUKE POWER COMPANY AND C. B. COX.

(Filed 31 January, 1946.)

1. Carriers § 15—

Ordinarily a passenger who has obtained a transfer and has safely alighted from one urban bus with the intent to transfer to another is not a passenger while traveling on the public street for the purpose of making the transfer, so as to impose upon the carrier the duty to protect him from the hazards of the street.

2. Same—

When a person attempting to transfer from one urban bus to another reaches the second bus as the driver shuts the door, knocks to attract the driver's attention, but receives no recognition of his signal, the relationship of carrier and passenger is not resumed, since he had not entered the premises of the carrier, had done nothing to entitle the carrier to demand the surrender of his transfer and the carrier had done nothing to indicate his acceptance as a passenger.

3. Carriers § 21c: Nonsuit held proper in this action by person injured while attempting to transfer from one urban bus to another.

The evidence disclosed that the plaintiff, attempting to transfer from one urban bus to another along a city street, approached the second bus as the driver closed the door, knocked on the door to attract the driver's attention with one hand resting on the bus, that the bus moved off and then gave a sudden lurch causing plaintiff to fall, resulting in injury when plaintiff was struck by the rear wheel. Plaintiff contended that the defendant was negligent in overcrowding the bus so as to prevent the driver from seeing whether additional passengers were attempting to board by merely turning his head. *Held:* There was no causal connection between the alleged overcrowding and the accident, and after the driver shut the door and started the bus, thus indicating that the bus was taking on no more passengers, his duty was to give attention to traffic, and the sudden jerk of the bus to enter the stream of traffic breached no duty owed plaintiff, nor was the driver, in absence of notice, required to foresee that plaintiff would place his hand on the bus and follow it out into the street, and therefore defendant's motion to nonsuit should have been allowed.

APPEAL by defendant from *Clement, J.*, at June Term, 1945, of GUILFORD.

Civil action to recover damages for personal injuries.

On or about 1 May, 1944, plaintiff boarded one of defendant's electric passenger trolleys at a point on East Market Street in Greensboro for the purpose of going to Freeman Mill Road. In order for him to complete his trip, it was necessary that he transfer to another bus at the intersection of Market and Elm Streets. He paid his fare and received from the motorman a transfer ticket. When he reached the point of

transfer, he alighted from the East Market Street trolley, crossed West Market Street and walked along Elm Street to the point where the Freeman Mill bus was waiting, with the intent to board said bus and complete his trip. He had his transfer—good only for continuous passage on first connecting car or bus from transfer point—in his hand.

Just as he walked up to get on the bus, the door closed. He put his hand on the side of the bus and began to knock on the bus to attract the attention of the driver. The bus was then moving off. The plaintiff made one step into the street, the bus suddenly jerked, and plaintiff lost his balance and fell so that the rear wheel of the bus ran over and broke his right leg.

In respect to his attempt to attract the attention of the driver he testified in part:

"I knocked pretty loud. I knocked two times and then he started moving off, that is when I knocked hard. When the door went to I had one foot on the curb and my left hand on the side of the bus. It threw me back when it made a sudden jerk . . . I was on the sidewalk when the door closed . . . I had my hand resting on the sill and knocked on the door with my right hand . . . I stepped out into the street as the bus moved off, and I made one step and knocked the second time . . . It started moving off and I knocked hard, and it moved off and that is what threw me with a sudden jerk."

Issues were submitted to and answered by the jury in favor of the plaintiff. From judgment on the verdict the defendants appealed.

Armistead W. Sapp for plaintiff, appellee.

W. S. O'B. Robinson, Jr., and R. M. Robinson for defendants, appellants.

BARNHILL, J. Did the court below err in overruling defendant's motion to dismiss this action as in case of nonsuit, entered at the conclusion of the evidence for plaintiff and duly renewed at the conclusion of all the testimony? This is the one question defendant seeks to present on this appeal.

The plaintiff makes these specific allegations of negligence:

(1) The operator of the bus permitted his bus to be overcrowded;

(2) He was unable to see clearly to his right to ascertain whether or not additional passengers were attempting to get on the bus or were in the vicinity of the bus without leaning forward or backward or making some effort other than simply turning his head;

(3) He, without ascertaining whether or not plaintiff was standing by his bus and without investigating the knock on the door, drove his

bus from the loading station in a rapid, careless, heedless, and reckless manner; and

(4) The driver, before the entire bus had left the curb, started in such manner as to cause the bus to lunge forward and causing the side of the bus to strike the plaintiff.

How the unlawful overcrowding of the bus, if such be the case, could cause the injury complained of we are unable to perceive. Nor can we comprehend that plaintiff has cause to complain because the motorman declined to accept additional passengers on a bus already filled beyond lawful capacity.

The plaintiff's theory of his cause of action as developed in the court below and as presented here, in fact, is bottomed upon the theory that he, while transferring from one bus to the other, was a passenger for whose safety and protection defendant was required to exercise a high degree of care, and as he was injured, while a passenger, by defendant's own bus, defendant is liable.

Ordinarily the relationship of carrier and passenger terminates when the carrier discharges a passenger in a place of safety at the destination contracted for or designated by the passenger. *Loggins v. Utilities Co.*, 181 N. C., 221, 106 S. E., 822; *White v. Chappell,* 219 N. C., 652, 14 S. E. (2d), 843. Does this rule apply when the passenger has applied for and obtained a transfer which entitles him to board another bus at the transfer point without additional charge, or is he a passenger while passing across and along the public street for the purpose of reaching the second bus?

The great weight of authority is to the effect that a passenger on a steam railroad train, making a necessary transfer from one car or train to another, as a part of one continuous trip, does not lose his status as a passenger while making the transfer.

These cases are bottomed on facts and circumstances which bear directly upon the status of the passenger during all stages of his journey. He is traveling to a destination specified on the ticket—the contract of carriage. The necessary transfer was within the contemplation of the parties at the time of the making of the contract. He goes from one car or one train to the other on company property, using the facilities furnished for passengers. The carrier has complete control of its roadbeds, stations, platforms, and yards. It has the selection, control, management and operation of the whole instrumentalities of carriage and at least a limited control over and direction of the passenger.

Manifestly it would be unjust and unreasonable to apply those decisions as controlling here without a careful appraisal of the carriage by urban streetcar or bus companies as distinguished from that by utilities

which operate on their own property under contracts of carriage from one specified point to another.

The very nature of the services rendered by such urban companies makes it impossible for them to maintain depots, stations, platforms, or grounds for the reception and discharge of passengers. Of necessity they accept their passengers from and discharge them on the sidewalk and street corner over which they have no control.

A passenger on a city bus does not buy transportation to a particular destination. He pays his fare and may ride to the terminus of the bus route or he may alight at any regular bus stop. At his option he may have, upon request, a transfer or pass ticket which entitles him to embark on some other connecting bus traveling a different route and complete his journey to some part of the city not served by the original bus. For this transfer there is no additional charge and it is usable, within a specified time, at the option of the holder.

A transfer ticket such as the one issued here imposes no liability on the carrier to make the transfer. The passenger himself at his election makes the transfer, traveling the course of his own choosing in the manner best suited to his own desires, without direction or suggestion from the carrier. In so doing he is traveling on the public streets where he has a right to be independently of his possession of a transfer.

In the interim between leaving one car and offering himself as a passenger on another he is just another member of the public, wending his way to a particular destination for a particular purpose—to find and board a bus going his way. He is outside the direction and control of the carrier on the public highway over which the bus company has no control and he is not using any of the facilities furnished for passengers. Instead he is exercising his right as one of the general public.

On the question whether, under such circumstances, the holder of a transfer, while going from one bus to another, is a passenger within the meaning of the law which exacts of the carrier a high degree of care for his safety, there are many *dicta* but comparatively few decisions. In many instances courts have said he is a passenger when in fact decision rested on some other ground.

A careful examination of these decisions discloses that the plaintiff (1) had just alighted from the bus without opportunity to reach a place of safety, or (2) had boarded or was in the act of boarding the second bus, or (3) was at the station or on the platform of the carrier, or (4) the carrier had undertaken directly or indirectly to control the movements of the plaintiff. (For a careful and interesting analysis of some of these decisions see *Va. R. & Power Co. v. Dressler,* 111 S. E., 243, 22 A. L. R., 301.)

Still others are bottomed squarely on the conclusion that plaintiff was a passenger while passing from one bus to the other. Decision, however, is based on particular circumstances taking the case out of the general rule. In *Sowash v. Traction Co.,* 188 Pa., 618, a portion of track was torn up so that the streetcar could not continue on its regular course. As a consequence passengers were transferred to another bus beyond the break in the track. It was held that while being so transferred they retained their status as passengers. In *Powers v. Old Colony St. Ry. Co.,* 87 N. E., 192 (Mass.), interruption of the passage of the streetcar by work abolishing a grade crossing necessitated the transfer. Here it was held that during the transfer under the direction of the company plaintiff did not lose his standing as a passenger.

Giving full consideration to these and like decisions, we are of the opinion that sound reason compels the conclusion that ordinarily a passenger who has obtained a transfer and has safely alighted from one bus with the intent to transfer to another is not a passenger while traveling on the public street for the purpose of making the transfer, so as to impose upon the carrier the duty to protect him against the hazards of the street. This conclusion is supported by well-reasoned decisions from other jurisdictions. *Pugh v. City of Monroe,* 6 So. (2d), 83 (La.); *Coyle v. St. Ry. Co.,* 173 N. E., 586 (Mass.); *Perkins v. New Orleans Ry. & Light Co.,* 53 So., 484 (La.); *Cory v. Public Service, Inc.,* 3 La. App., 217; *Chattanooga Electric Ry. Co. v. Boddy,* 58 S. W., 646; *Niles v. Boston Elev. R. Co.,* 114 N. E., 730; *Va. R. & Power Co. v. Dressler, supra; Klovedale v. Ohio Public Service Co.,* 6 N. E. (2d), 995.

"The fact that plaintiff had a transfer and intended to pursue his journey on another car did not make him a passenger after he had safely alighted from and cleared the car on which he had been riding. Such relationship did not continue during the time he was walking upon the public highway to the car for which he had a transfer. While the plaintiff was walking upon the public highway from the car from which he alighted to the car upon which he intended to continue his journey, he was not a passenger, notwithstanding the fact that, if he had reached the car for which he had a transfer, and had boarded it, the relation of passenger and carrier would then have been restored." *Va. R. & Power Co. v. Dressler, supra.*

Hence plaintiff is not entitled to recover on the theory that defendant failed to furnish him protection against the hazards of the street. Under such circumstances the defendant owed him no duty it did not owe to all others on the sidewalk or in the street.

The carrier-passenger relationship had not been resumed at the time plaintiff was injured. He does not assert that he had actually boarded the second bus or that he was in the act of so doing at the time he was

injured. Instead he alleges: "Just as I reached the front door of the bus, the driver . . . shut the door." Thereupon plaintiff "then stepped to the door and knocked loudly enough for the driver to have easily heard him had he been giving proper attention to the care and safety of passengers rightfully occupying or desiring to occupy his bus." He had not entered upon the premises of the carrier and had done nothing which entitled the carrier to demand of him the surrender of his transfer ticket or the payment of an additional fare, or in any way control his actions.

A streetcar company owes no duty as a carrier to one who intends to take the car as a passenger until the prospective passenger has received some recognition from the motorman in answer to his signal for that purpose. *Keiger v. Utilities Co.*, 199 N. C., 786, 155 S. E., 875, Anno. 75 A. L. R., 285.

To create the carrier-passenger relationship off the premises of the carrier one must do some physical act in regard to boarding the vehicle such as an attempt to enter, or his intention must be communicated to the carrier's agent in charge when the physical chance of boarding may be accomplished with safety to both parties. *Klovedale v. Ohio Public Service Co., supra.*

The relation is in force when one, intending in good faith to become a passenger, goes to the place designated as the site of departure, at the appropriate time, and the carrier takes some action indicating his acceptance as a passenger. *Sanchez v. Pac. Auto Stages,* 2 Pac. (2d), 845 (Cal.). See also *Moss v. Mason City & Clear Lake R. Co.,* 251 N. W., 627 (Iowa); *Chesley v. Waterloo R. Co.,* 176 N. W., 961 (Iowa).

This is not a case where the plaintiff "had his foot on the step." *Clark v. Traction Co.,* 138 N. C., 77; *Tompkins v. Boston Elev. Ry. Co.,* 87 N. E., 488 (Mass.). Here the door closed as the plaintiff approached, giving clear notice that the bus was taking on no more passengers. No actual effort was made to get aboard and the desire to do so was not communicated to the driver at a time when it could be done in safety or while the bus was open for the reception of passengers.

Pugh v. City of Monroe, supra, is substantially on all fours. There as here plaintiff held a transfer and had reached the bus and was knocking on it in an attempt to attract the attention of the driver. The bus moved off while the plaintiff had her hand on the bus, causing her to fall and receive injuries. The Court said:

"Plaintiff's petition is obviously vulnerable in that it does not unequivocally allege that Paulus (the driver) was aware of her presence and from her actions should have known that she wished to take his bus. This being true, all the allegations of negligence directed to him fall of their own weakness."

Having shut the door and started his bus, it was the primary duty of the driver to give his attention to approaching vehicles so that he could enter the line of traffic with safety to his passengers. The sudden jerk of the bus as it speeded up breached no duty defendant owed the plaintiff. Nor was defendant's driver, in the absence of notice, required to foresee that plaintiff would place his hand on the bus and follow it out into the street in an attempt to attract his attention. Such prevision is not exacted by the law. *Tysinger v. Coble Dairy,* 225 N. C., 717.

The plaintiff's injury was most unfortunate. Whether it was the result of his own negligence or was just a regrettable accident we need not say. In any event he has failed to offer evidence tending to show that it was proximately caused by the negligent or wrongful conduct of the defendant. Hence the court erred in denying the motion to dismiss as in case of nonsuit.

Reversed.

H. M. MILLER, INDIVIDUALLY, AND AS TAX COLLECTOR OF ASHE COUNTY, v. MRS. LAURA McCONNELL,

and

H. M. MILLER, INDIVIDUALLY, AND AS TAX COLLECTOR OF ASHE COUNTY, v. W. E. McNEILL AND WIFE, ASTORIA McNEILL.

(Filed 31 January, 1946.)

1. Taxation § 40d—

Where a tax collector accepts checks in payment of taxes and thereupon issues tax receipts, and such checks are returned unpaid without negligence on the part of the tax collector in presenting them for payment, and the tax collector thereupon immediately corrects his records, G. S., 105-382, and settles with the county for the taxes, *held:* the tax collector may institute an action under G. S., 105-414, to enforce the tax lien.

2. Taxation § 40d—

In an action by a political subdivision to enforce a lien for taxes under G. S., 105-414 no statute of limitations is applicable, since the sovereign is not mentioned therein and the maxim *nullum tempus occurrit regi* applies.

3. Same—In action under G. S., 105-414, limitations prescribed by C. S., 441 and 8037, are not applicable.

Plaintiff, as tax collector, accepted checks in payment of taxes. The checks were returned unpaid and plaintiff instituted this suit under G. S., 105-414. Defendants pleaded the 18 months and 24 months statutes of limitation, C. S., 8037, as amended, and the three-year statute, C. S., 441. *Held:* The limitations described by C. S., 8037, as amended, pertain to

the foreclosure of certificates of tax sales and said section was repealed by Public Laws 1939, ch. 310, sec. 1725, and the three-year statute, C. S., 441, applies to actions on the unpaid checks, and therefore, defendants having pleaded no applicable statute of limitations, no issues in this respect are presented.

4. Trial § 36—

Issues submitted by the court are sufficient when they present to the jury proper inquiries as to all determinative facts and afford the parties opportunity to introduce all pertinent evidence and to apply it fairly, and when the issues submitted are sufficient an exception to the refusal to submit other issues is untenable.

5. Taxation § 40j—

An action to foreclose a lien for delinquent taxes is *in rem* and a personal judgment may not be obtained against the owner for the amount of the taxes.

6. Appeal and Error § 39b—

Where certain issues submitted are inappropriate and do not affect the rights of the parties, any error in the instructions relating to such issues is harmless.

7. Taxation § 40j—

Where in an action under G. S., 105-414, the complaint describes the real estate sought to be foreclosed to enforce the tax lien, the order of foreclosure is restricted to the described real estate and so much of the judgment as authorizes the sale of other lands is in excess of the jurisdiction of the court.

APPEAL by defendants from *Alley, J.*, at May-June Civil Term, 1945, of ASHE.

Two civil actions to declare and to foreclose tax liens under G. S., 105-414, formerly C. S., 7990, by virtue of authority granted under provisions of G. S., 105-382, formerly section 1710 of chapter 310 of Public Laws 1939, consolidated for purpose of trial.

Allegations substantially these are admitted in the pleadings—which are offered in evidence.

1. During the period from 1 December, 1930, to 1 December, 1936, the plaintiff in these actions was, and acted as sheriff and tax collector of Ashe County, a body politic and corporate, duly created, organized and existing under and by virtue of the laws of the State of North Carolina, with the usual powers prescribed by statute.

2. On 1 April, 1931 and 1932, respectively, Mrs. Laura McConnell, defendant in the first action, was the owner in fee simple and in possession of a certain parcel of land in the Town of Jefferson, Jefferson Township, Ashe County, and popularly known as the Mountain Inn or Martin Hardin Hotel property, which in said years was lawfully listed by her,

and in her name, and assessed for taxation in said county, the taxes amounting to $86.94 for the year 1931, and $105.30 for 1932—a total of $192.24.

3. On 1 April, 1931 to 1934, inclusive, W. E. McNeill and his wife, Astoria McNeill, "or either of them," defendants in the second action were, and now are the owners in fee simple and possessed of four lots in the Town of Jefferson and 130 acres of land in Jefferson Township, listed in said years for taxation in Ashe County by W. E. McNeill, and of the municipal waterworks system for the Town of Jefferson, more specifically described by reference to title deeds to W. E. McNeill and wife, Astoria, of record in office of register of deeds of Ashe County, and which were lawfully assessed for taxation by the County of Ashe for each of the years 1931 to 1934, inclusive.

Plaintiff further alleges in the complaints in the two actions, respectively, and, on trial below, offered evidence tending to show: (1) That (a) the taxes so assessed by Ashe County to which the first action relates, to wit, the total sum of $192.24, became due and payable on the first Monday in October, 1931 and 1932, respectively, the years for which same were levied and assessed, and (b) the taxes so assessed by Ashe County to which the second action relates, to wit, the total sum of $595.43, less $192.24, that is, $403.19 became due and payable on the first Monday in October of the years 1931 to 1934, inclusive—the years for which same were levied and assessed. (2) That as to the taxes (a) to which the first action relates, W. E. McNeill, son-in-law of defendant therein, Mrs. Laura McConnell, executed and delivered to H. M. Miller, Tax Collector, on 9 November, 1932, and 7 November, 1933, his checks for the taxes sued upon therein, and in this manner undertook to pay said taxes for said defendant, and (b) to which the second action relates, W. E. McNeill executed and delivered to H. M. Miller, Tax Collector, checks aggregating $595.43 in payment of taxes to which same relates, including therein $192.24 in payment of taxes due by Laura McConnell, recovery of which is sought in the first action and not in the second action. Whereupon (as to both actions) the said H. M. Miller, Tax Collector, detached from the tax books the original tax receipts for said taxes and delivered them to W. E. McNeill, and duly presented said checks to the bank, on which they were drawn, for payment, and same were dishonored by the bank for lack of funds to pay same. (3) That plaintiff H. M. Miller, in his official tax settlements with the Board of Commissioners for Ashe County, was compelled to account for, and did account for and pay to said county the amount of taxes of defendants to which the respective actions relate as hereinabove set forth and specified.

Plaintiff further alleges (A) that the said taxes to which both actions relate, together with such penalty, interest and costs as are allowed by law, are now due and owing to plaintiff "on the property above described" after demand, "as will hereinafter more fully appear"; and that the lien of the taxes so levied, respectively, attached to the said real estate described in the respective actions, and continues until said taxes, with penalties, interest and costs, that shall have accrued thereon, shall be paid. (B) That plaintiff, as he is informed and alleges, by said payment, was subrogated to all the rights of the County of Ashe against the respective defendants for the collection of said taxes, and "is expressly authorized" by statute (now G. S., 105-382) to maintain these actions, respectively, for the collection of same, for which purpose these actions are instituted under and by virtue of old C. S., 7990 (now G. S., 105-414). And (C) that plaintiff requests that judgments and liens for the taxes whereof recovery is sought be declared to be inferior to the rights of purchasers for value, if any, and of any persons acquiring for value and in good faith, liens of record with respect to the properties, and without knowledge that the checks referred to in these foreclosure "suits" had not been collected, or the taxes, for which same were given, not paid.

Defendants, in their respective answers, deny all of the said allegations of the plaintiff, and (1) by way of further answer: In the first action, defendant therein avers (a) that she has no knowledge or information as to the checks alleged to have been executed by W. E. McNeill, on the date stated, in payment of taxes for the years designated, but if same were executed, they were not signed by her, and she had no knowledge that they were unpaid; and (b) that she has sold her property in the Town of Jefferson, known as the Mountain Inn or Martin Hardin Hotel property listed in her name for taxation in 1931 and 1932, and did not own same at the time this action was instituted and now has no interest in same; and (2) by way of further answer in the second action, the defendants therein aver that on 9 November, 1932, and 7 November, 1933, defendant W. E. McNeill executed and delivered to plaintiff his checks for the taxes sued on therein—whereupon plaintiff detached the original tax receipts for the taxes represented by said checks and delivered them to him, and that at the time he executed said checks he told plaintiff that he did not have sufficient funds in the bank to pay them.

And defendants, in their respective answers, aver and plead in bar of plaintiff's right to recover in each action the eighteen months, the twenty-four months and the thirty-six months statutes of limitation.

And upon the trial below plaintiff offered evidence tending to show these facts: That W. E. McNeill, who is son-in-law of Mrs. Laura McConnell, gave plaintiff some checks for taxes of himself and Mrs.

McConnell for years 1931 to 1933, one dated 12-22-33 for $110.00, one dated 11-9-33 for $179.79 and another dated 7 November, 1933, for $304.94, a total of $595.43, each signed by W. E. McNeill, and the deputy surrendered the tax receipts to him; that plaintiff took checks to the bank several times and there were no funds and the checks have not been paid; that when plaintiff settled with the County of Ashe, he accounted for those tax receipts; that when the checks were returned unpaid, plaintiff marked "Not paid" upon the duplicate receipts in the original tax book with respect to taxes of defendants for the years; and that plaintiff did not bring any civil action against Mrs. McConnell until the first action here was instituted 5 February, 1942.

And the parties in the second action entered into a stipulation in pertinent part, that the taxes on the real estate thereon on which plaintiff seeks to obtain a lien amounts to $403.19; that the real estate has not been advertised and sold for said taxes; that plaintiff is not the owner of any certificate of tax sale, or the holder of any deed under any tax sale; that the checks, covering said taxes, executed by defendant to plaintiff were dated 22 December, 1933, 9 November, 1932, and 7 November, 1933; and that plaintiff failed and neglected to take any action to collect said taxes until the institution of this, second action here, on 5 February, 1942.

Defendants, on the other hand, offered evidence tending to show that plaintiff had failed to make proper entry of nonpayment upon tax books when checks were not paid. And defendant McConnell offered in evidence deed dated 3 September, 1938, and registered 4 December, 1939, showing that she had sold the land involved in the first action.

Identical issues were submitted to, and answered by the jury in the two actions, as follows:

"1. Did the plaintiff immediately upon the return of the checks tendered by W. E. McNeill in payment of his own taxes and the taxes of Mrs. Laura McConnell for the years 1931 to 1933, inclusive, upon ascertaining that there were not funds in the bank with which to pay said checks enter upon the records of Ashe County that said taxes had not been paid, as alleged in the complaint? Answer: Yes.

"2. Was the plaintiff in his settlement with the Board of Commissioners of Ashe County for the taxes of 1931 to 1933 inclusive, required by the said Board of Commissioners to account for and pay and did pay the sum of $595.43 embraced in the checks of the defendant, W. E. McNeill and Laura McConnell for their taxes for the years 1931 to 1933 inclusive, as alleged in the complaint? Answer: Yes.

"3. Did the plaintiff institute his action against the defendant for the recovery of the amount of taxes he was so required to pay within three

years from the time of his cause of action accrued, as alleged in the answer? Answer: .....

"4. What amount, if anything, is the plaintiff entitled to recover of the defendant, W. E. McNeill? Answer: ....."

Upon the verdict of the jury the court adjudged in each action that "plaintiff restored his tax lien against the property described in the complaint by immediately upon return of the unpaid checks, entering on the said records that said tax was not paid."

And, in the first action, the court adjudged (1) that the judgment be and the same is hereby declared a specific lien upon any and all real estate owned by the defendant in Ashe County on 1 October, 1931, and 1 October, 1932, that has not been conveyed by defendant to innocent purchasers for value and without notice, but "especially provided that this judgment is not a lien upon the property once owned by defendant known as the Martin Hardin Hotel property"; and (2) that in the event defendant fails to pay to plaintiff the sum of $192.24, plus certain interest and cost, including attorney's fee, within thirty days from date of judgment, the commissioner, therein appointed, is authorized and empowered to sell said lands at public auction, etc., and make report to the court for confirmation, etc.

And in the second action the court adjudged (1) that the judgment be, and is declared a specific lien upon the lands described in the complaint therein "as well as any other property owned by the defendants in the County of Ashe in the years 1931 to 1934, inclusive, which have not been sold and conveyed by the defendants to an innocent purchaser for value and without notice of this tax lien," and (2) that in the event defendants fail to pay to plaintiff $403.19, plus certain interest and cost, including attorney's fees, within thirty days from date of judgment, the commissioner herein appointed, is authorized and empowered to sell said lands at public auction, etc., and make report to the court for confirmation, etc.

Defendants appeal from the judgment, respectively, and assign error.

Bowie & Bowie for plaintiff, appellee.

Ira T. Johnston and W. B. Austin for defendants, appellants.

WINBORNE, J. Appellants in their joint brief say that these cases hinge upon the question as to whether the plaintiff, at the time of the institution of these actions on 5 February, 1942, could legally avail himself of the provisions and protection of G. S., 105-414. We are of opinion and hold that he could do so.

While in this State taxes are payable in existing national currency, any tax collector may, in his discretion and at his own risk, accept

checks in payment of taxes, and thereupon issue tax receipts. And in any such case, if the check be thereafter returned unpaid, without negligence on the part of the tax collector in presenting it for payment, the taxes for which the check was given shall be deemed unpaid, and the collector shall immediately correct his records and shall proceed to collect the taxes either by civil action on the check, or "by the use of any remedy allowed for the collection of taxes." G. S., 105-382. See *Miller v. Neal,* 222 N. C., 540, 23 S. E. (2d), 852. The scope of the statute is all-inclusive, and, under the conditions stated, any existent remedy would be available to him.

One of the remedies then, and now prescribed for the collection of taxes is provided in G. S., 105-414, formerly C. S., 7990. This remedy is an action in the nature of an action to foreclose a mortgage to enforce the tax lien upon real estate by sale thereof under order of court. The present actions are instituted under this statute.

But defendants plead the eighteen months, the twenty-four months and the three-year statute of limitation. However, the first two of these statutes pertained to the foreclosure of certificates of tax sales of real estate, C. S., 8037, as amended by Public Laws 1927, chapter 221, section 4, and by other acts of subsequent sessions of the General Assembly, which section as so amended was repealed by Public Laws 1939, chapter 310, section 1725. And the three-year statute, C. S., 441, was referred to in the case of *Miller v. Neal, supra,* in reference to actions on the unpaid checks. The present actions are not for the purpose of recovering on the checks but are brought specifically under the provisions of G. S., 105-414, as aforesaid.

And in this statute no limitation of action is prescribed. However, in view of the fact that this statute contains no such limitation, decisions of this Court have held that the maxim, *nullum tempus occurrit regi,* that time does not bar the sovereign, still subsists as the law, in this State, at least in respect to collection of taxes. *R. R. v. Comrs.,* 82 N. C., 259; *Jones v. Arrington,* 94 N. C., 541; *Wilmington v. Cronly,* 122 N. C., 383, 30 S. E., 9; *S. c.,* 122 N. C., 388, 30 S. E., 9; *Wilmington v. McDonald,* 133 N. C., 548, 45 S. E., 864; *New Hanover County v. Whiteman,* 190 N. C., 332, 129 S. E., 808; *Shale Products Co. v. Cement Co.,* 200 N. C., 226, 156 S. E., 777; *Wilkes County v. Forester,* 204 N. C., 163, 167 S. E., 691; *Logan v. Griffith,* 205 N. C., 580, 172 S. E., 348; *Asheboro v. Morris,* 212 N. C., 331, 193 S. E., 424; *Charlotte v. Kavanaugh,* 221 N. C., 259, 20 S. E. (2d), 97.

We do not intimate, however, that a private individual, such as the plaintiff, who is privileged to resort to the provisions of G. S., 105-414, may invoke protection in the maxim *nullum tempus occurrit regi.* But

as the statutes of limitation pleaded are inapplicable, further discussion of the applicability of other statutes of limitation would be *dictum.*

Defendants further assign as error the refusal of the court to submit issues tendered by them.

In this connection the issues submitted by the court are sufficient when they present to the jury proper inquiries as to all determinative facts in dispute, and afford the parties opportunity to introduce all pertinent evidence and to apply it fairly. *Hill v. Young,* 217 N. C., 114, 6 S. E. (2d), 830, and cases cited. See also *Lister v. Lister,* 222 N. C., 555, 24 S. E. (2d), 342. When tested by these principles, the issues submitted appear to be sufficient. When sufficient issues are submitted, there is no ground for exception to the refusal to submit others. *Bailey v. Hassell,* 184 N. C., 450, 115 S. E., 166.

Defendants also assign as error certain instructions pertaining to answers to the third and fourth issues. In view of the inapplicability of the three years statute of limitation, the third issue was inappropriate. And as to the fourth issue, an action to foreclose a lien for delinquent taxes is *in rem,* and a personal judgment may not be obtained against the owner of the property for the amount of the taxes. See *Apex v. Templeton,* 223 N. C., 645, 27 S. E. (2d), 721, and cases cited. Therefore, the fourth issue was also inappropriate. Hence, if there be error in the instruction of the court, as to either issue, it will be deemed harmless.

Defendants also except to the judgments as signed. In this connection, when compared therewith, it appears that these judgments go beyond the scope of the allegations of the complaint. In each action the complaint describes certain real estate against which order of sale for foreclosure of the tax lien is sought. The order of foreclosure is restricted to these particular parcels of real estate. And so much of the judgments as authorize the sale of other lands is in excess of the jurisdiction of the court as to the subject of the action. To this extent the judgments below are modified.

Other exceptions have been considered and found to be without merit.

Modified and affirmed.

HOWARD R. HARRISON, ADMINISTRATOR OF MAE GALLATIN EBY, v. FAULK CARTER.

(Filed 31 January, 1946.)

1. Executors and Administrators § 3—

Where, after letters of administration have been issued, a will is found and probated and letters issued thereon, the letters of administration must be revoked, G. S., 28-31; however, all acts done by the administrator in good faith prior to the discovery and probate of the will are valid and binding.

2. Executors and Administrators § 4: Abatement and Revival § 11—

A cause of action which survives against successor personal representatives of an estate likewise survives in their favor. G. S., 28-172, -181.

3. Same—

Upon the revocation of letters the clerk of the Superior Court is required immediately to appoint a successor, G. S., 28-33, and the law contemplates a continuity of succession until the estate has been fully administered.

4. Same: Death § 4—

A cause of action for wrongful death properly instituted does not abate upon the death, resignation or removal of the personal representative who instituted the action, but the action survives to his successor. G. S., 1-74.

5. Same—

The personal or legal representative of an estate in instituting an action is a formal or nominal, although a necessary, party, and acts in the capacity of a trustee or agent for the estate, or for the beneficiaries of the estate when the recovery, as in case of actions for wrongful death, is not an asset of the estate.

6. Same—Where action for wrongful death is instituted within time allowed, third successive representative may be made party and maintain action.

The duly appointed administrator of the estate of deceased instituted action for wrongful death within the time allowed. More than a year thereafter it was discovered that deceased had left a will, which was duly probated in the state of her residence. On motion of defendant in the action for wrongful death, an order was entered revoking the letters and directing the administrator to show cause, and on the same day an administrator *c. t. a.* was appointed. At the hearing on the motion to show cause it was ordered that the order of revocation remain in full force and effect. Eighteen days thereafter the administrator *c. t. a.* resigned, having made no reports and taken no steps in regard to prosecuting the action. The original administrator at the instance of the beneficiary of the estate was appointed administrator *c. t. a., d. b. n. Held:* The motion of the administrator *c. t. a., d. b. n.*, that he be permitted to enter the action for wrongful death as plaintiff should have been allowed.

HARRISON *v.* CARTER.

APPEAL by plaintiff from *Sink, J.*, at May Term, 1945, of MOORE.

Civil action for wrongful death.

1. Mae Gallatin Eby, a citizen of Dauphin County, Pa., died in Moore County, N. C., 24 February, 1942, when the Sand Hill Hotel at Aberdeen, N. C., owned by defendant, Faulk Carter, was burned. The deceased was a guest of the hotel at the time of her death, and plaintiff alleges that her death was caused by the negligence of the defendant.

2. On 22 January, 1943, Howard R. Harrison, a citizen of Moore County, N. C., was duly appointed administrator of the estate of Mae Gallatin Eby, by the clerk of the Superior Court of Moore County, and gave bond as required by law, and forthwith on 22 January, 1943, said administrator instituted this action against the defendant for the wrongful death of his intestate, Mae Gallatin Eby. The summons and verified complaint were served on the defendant. Answer was filed. An amended complaint and an amended answer were filed.

3. Thereafter, about 29 May, 1944, it was discovered that Mae Gallatin Eby left a will, which had been duly probated in Dauphin County, State of Pennsylvania, on 30 June, 1942. An exemplified copy of the will was filed in the office of the clerk of the Superior Court of Moore County, N. C., and duly recorded in the Book of Wills.

4. On 22 August, 1944, the clerk of the Superior Court of Moore County, N. C., on motion of the defendant in this action, entered an order revoking the letters of administration issued to Howard R. Harrison on 22 January, 1943, and ordered Howard R. Harrison to appear before said clerk on 5 September, 1944, at 3:00 o'clock p.m., and show cause, if any, why the order of revocation should not remain in full force and effect. On the same day, 22 August, 1944, the clerk appointed E. J. Burns administrator *c. t. a.* of the estate of Mae Gallatin Eby, and issued such letters of administration to him.

5. The hearing on the motion to show cause was held at the request of Howard R. Harrison, on 6 September, 1944, all parties being present and represented by their respective attorneys. Whereupon, the clerk entered an order to the effect that the former order entered 22 August, 1944, shall remain in full force and effect, and that the letters of administration on the estate of Mae Gallatin Eby heretofore issued to the said Howard R. Harrison shall be and remain recalled and revoked, and that the letters of administration *c. t. a.* on the estate of the said Mae Gallatin Eby, deceased, issued to E. J. Burns, remain in full force and effect.

6. E. J. Burns, as administrator *c. t. a.* of the aforesaid estate, filed his resignation with the clerk of the Superior Court of Moore County on 9 September, 1944, and accordingly the clerk accepted the resignation. E. J. Burns made no reports, and took no action looking to the

prosecution of this action against the defendant. In his letter of resignation to the clerk, he stated he was a stranger to the matter and that Ben Eby, the sole beneficiary under the will, had requested that his personal friend, Howard R. Harrison, be appointed administrator *c. t. a.* of the estate, and he requested the appointment of Harrison as such administrator, which request was also made to the clerk in writing by the said Ben Eby. Whereupon, Howard R. Harrison was appointed as administrator *c. t. a., d. b. n.,* of the estate of Mae Gallatin Eby, deceased, accepted the appointment, and duly qualified as such administrator, and such letters of administration were issued on the.....day of September, 1944.

7. On 20 September, 1944, Howard R. Harrison, administrator *c. t. a., d. b. n.,* filed a motion praying that he be permitted to enter this action as plaintiff, reciting the fact that as administrator without the will annexed he had begun the action and brought the suit in good faith and that under the law he should be and act as plaintiff and prosecute said action, as will appear from the records on file in this court.

The clerk held that since E. J. Burns was not appointed administrator *c. t. a.* of the estate of Mae Gallatin Eby until after the expiration of more than twelve months from the death of Mae Gallatin Eby, and Howard R. Harrison was not appointed administrator *c. t. a., d. b. n.,* until after the resignation of E. J. Burns, as administrator *c. t. a.,* this action cannot be maintained, and that Howard R. Harrison, administrator *c. t. a., d. b. n.,* cannot legally be made a party to this action, and denied the motion and dismissed the action. On appeal to the Superior Court, his Honor approved the order of the clerk and confirmed it in all respects. From judgment so entered, Howard R. Harrison, administrator *c. t. a., d. b. n.,* appeals to the Supreme Court.

Douglass & Douglass and Seawell & Seawell for plaintiff.

Sharp & Sharp, U. L. Spence, and Varser, McIntyre & Henry for defendant.

DENNY, J. The sole question for our determination on this appeal is whether or not Howard R. Harrison, administrator *c. t. a., d. b. n.,* of Mae Gallatin Eby, deceased, has the legal right to be made the plaintiff in this action and to prosecute the same.

This identical question does not seem to have been passed upon heretofore by this Court. Nevertheless we think the court below did err in signing the judgment denying the motion of Howard R. Harrison, administrator *c. t. a., d. b. n.,* of Mae Gallatin Eby, deceased, to be substituted as plaintiff in the action.

This action, for the wrongful death of Mae Gallatin Eby was duly and properly instituted by the administrator of the decedent's estate within one year after such death, as required by G. S., 28-173.

The appellee contends that upon the facts in this case, the Court is without power to convert the pending action, that cannot be maintained, into a new one by admitting a new party plaintiff, citing *Merrill v. Merrill,* 92 N. C., 657; *Clendenin v. Turner,* 96 N. C., 416; *Best v. Kinston,* 106 N. C., 205, 10 S. E., 997; *Hall v. R. R.,* 146 N. C., 345, 59 S. E., 879; *Gulledge v. R. R.,* 147 N. C., 234, 60 S. E., 1134; *S. c.,* 148 N. C., 568, 62 S. E., 732; *Hall v. R. R.,* 149 N. C., 108, 62 S. E., 899; *Bennett v. R. R.,* 159 N. C., 345, 74 S. E., 883; *J. H. Hood, Admr., v. Amer. Tel. & Tel. Co.,* 162 N. C., 92, 77 S. E., 1094; *Reynolds v. Cotton Mills,* 177 N. C., 412, 99 S. E., 240. We do not concede that the pending action cannot be maintained. Moreover, each of the above cited cases is distinguishable from the one here presented. It will be observed upon examination of the above authorities, that either a new cause of action was involved or the original action was instituted by a party without legal authority to institute it. That is not the situation here. This action was brought by an administrator legally appointed by the probate court having exclusive jurisdiction of the subject matter. Moreover, pending the appointment and qualification of an administrator or the probate and filing of a will, a collector may be appointed in order that an action for wrongful death may be instituted within the statutory time. G. S., 28-25; *In re Palmer's Will,* 117 N. C., 133, 23 S. E., 104; *Gulledge v. R. R., supra.*

It is provided by statute in this State, that whenever letters of administration have been issued and a will is subsequently probated and letters issued thereon, the letters of administration must be revoked. G. S., 28-31. This same statute, however, provides that all acts by the administrator, done in good faith, are valid. *Shober v. Wheeler,* 144 N. C., 403, 57 S. E., 152.

The acts of administration done prior to the discovery and probate of a will, in the due course of administration, "are binding on the parties interested in the estate, including the executor in the will." 21 Am. Jur., sec. 165, p. 466, citing numerous authorities. Furthermore, it is provided in G. S., 28-181, "In case the letters of administration of an executor, administrator or collector are revoked, pending an action to which he is a party, the adverse party may, notwithstanding, continue the action against him in order to charge him personally. If such party does not elect so to do, within six months after notice of such revocation, the action may be continued against the successor of the executor, administrator or collector in the administration of the estate, in the same manner as in case of death." A cause of action which survives against

successor personal representatives of an estate likewise survives in favor of successor personal representatives of an estate. G. S., 28-172; *Suskin v. Trust Co.,* 214 N. C., 347, 199 S. E., 276. And, where an action is brought to recover assets by "a general executor or administrator, who afterwards dies, resigns or is removed," the action "may be revived in the name of his successor." Schouler on Wills, Executors and Administrators, sixth edition, Vol. 3, sec. 2144. While any sum recovered for wrongful death is not a part of the assets of the decedent's estate, nevertheless such sum can only be recovered in the name of decedent's personal representative, and must be distributed under the laws of intestacy in this State. G. S., sections 28-173 and 28-176; *Neill v. Wilson,* 146 N. C., 242, 59 S. E., 674; *Hines v. Foundation Co.,* 196 N. C., 322, 145 S. E., 612; *Hanes v. Sou. Public Utilities Co.,* 191 N. C., 13, 131 S. E., 402; *Pearson v. Stores Corp.,* 219 N. C., 717, 14 S. E. (2d), 811.

Once a personal representative of an estate is duly appointed, if such representative dies, resigns or is removed, the law contemplates a continuity of succession until the estate has been fully administered; and upon the death, resignation or removal of a personal representative, who has properly brought an action for wrongful death, the action does not abate. G. S., 1-74. And G. S., 28-33, requires the clerk of the Superior Court, in all cases of revocation of letters, to appoint immediately some person to succeed in the administration of the estate. It is immaterial in so far as the continuity of the succession is concerned, whether the successor be an administrator *d. b. n.,* an executor, an administrator *c. t. a.,* an administrator *c. t. a., d. b. n.,* or a collector. The intent and purpose of the law relative to administration of estates is to protect and preserve the estate and all rights incident thereto. This is necessarily true because beneficiaries of estates must act through personal or legal representatives of the decedent's estate, and such representatives in turn act under the supervision of probate courts. And while the right to bring an action for the benefit of an estate or the beneficiary thereof, is given by statute to the personal or legal representative of such estate, such representative, though a necessary, is, none the less, a formal or nominal party, acting in the capacity of a trustee or agent of the beneficiary of the estate. Sherman and Redfield on Negligence, Vol. 4, sec. 826, p. 1874; *Baker v. R. R.,* 91 N. C., 308; *Broadnax v. Broadnax,* 160 N. C., 432, 76 S. E., 216; *Avery v. Brantley,* 191 N. C., 396, 131 S. E., 721.

Has the right of the appellant to prosecute this action been impaired because the defendant was the movent in obtaining the revocation of the original letters of administration and had a friendly administrator *c. t. a.* appointed as successor to the administrator, and who did not have himself made a party to the action? We do not think so. E. J. Burns held his letters as administrator *c. t. a.* of the estate for only 18 days, when

he resigned. It is clearly indicated by him in his resignation that he held his appointment merely as a straw man. He stated he was a stranger to the proceedings and had done nothing for or in behalf of the estate. He further stated that he was not the choice of the sole beneficiary under Mrs. Eby's will, for personal representative of the estate, but that the original administrator was the choice of the sole beneficiary, and that he had so indicated his choice in writing to the clerk of the Superior Court. Whereupon, Howard R. Harrison, said original administrator, was duly appointed administrator *c. t. a., d. b. n.,* of said estate, and is now acting in that capacity. It would be a travesty upon the administration of justice if a defendant in an action for wrongful death could, without notice, obtain the revocation of the letters of a personal representative of an estate, who had brought an action against him and have a successor appointed who was friendly to the defendant, and thereby defeat the action. The law is not so impotent. "Where an executor or administrator has been removed or discharged, the suit should be continued in the name of his successor in office." 1 C. J. S., sec. 112 (a), p. 159; *Kearns v. Dean,* 19 Pac., 817, 77 Cal., 555; *Skalski v. Krieger,* 159 N. E., 851, 26 Ohio App., 186; 1 Am. Jur., sec. 177, p. 112; 1 C. J., sec. 227, p. 145 and p. 149, note 88; *Taylor v. Savage,* 1 How., 282, 11 L. Ed., 132; *Lunsford v. Lunsford,* 122 Ala., 242, 25 S., 171; *More v. More,* 127 Cal., 460, 59 P., 823; *Tray Nat. Bank v. Stanton,* 116 Mass., 435; *Cox v. Martin,* 75 Miss., 229, 36 L. R. A., 800; *Burlington & M. R. Co. v. Crockett,* 17 Neb., 370, 24 N. W., 219; *Trimmer v. Todd,* 52 N. J. Eq., 426, 28 A., 583; *Heywood v. Ogden Motor Co.,* 71 Utah, 417, 266 Pac., 1040, 62 A. L. R., 1232. The appellant's motion should have been allowed.

The judgment of the court below is

Reversed.

GEORGE L. STANSBURY v. GUILFORD COUNTY.

(Filed 31 January, 1946.)

1. Judgments § 33b—Consent judgment stipulating that it should be without prejudice bars identical claims, but not other claims arising on same facts.

In an action instituted by taxpayers on behalf of the county one of the causes alleged was to recover the amount of increase in salary which had been paid the chairman of the board of county commissioners. The court denied the taxpayers recovery on this cause and the action was terminated by consent judgment which provided that it should be without prejudice to the legal rights of the parties. The county accepted the

proceeds of the judgment entered therein on the other causes of action and became a party to the action. In an action entered simultaneously and in which the county treasurer and accountant were made parties a temporary order restraining the payment of the increase in salary to the chairman was made permanent by a consent judgment which stipulated that it should not be binding on the parties in any subsequent litigation involving the same matter. *Held:* The prior actions do not bar an action by the chairman of the board of county commissioners to recover the increase in salary for the months subsequent to the date of the institution of the prior actions nor any defenses the county might have to such recovery, but does bar the county from seeking to recover as a counterclaim the increase in salary which had been paid to the chairman prior to the institution of the actions, since the prior judgment was not intended to preclude claims which were not specifically adjudicated therein even though arising on the facts, but is a bar to further litigation of the identical claims therein determined.

2. Public Officers § 11—Emoluments of chairman may not be increased upon his appointment as manager when no additional duties are imposed.

The resolution of a county board of commissioners recited that the chairman for two years previous had been performing the duties of all time chairman, and stipulated that he was to continue to devote his entire time to county affairs, acting as whole-time chairman, and that his compensation thereafter should be $350 per month. G. S., 153-20. *Held:* The resolution imposed no additional duties upon the chairman but was solely to adjust the chairman's compensation, and therefore, under the facts of this case, the board of commissioners was without authority to increase the salary above that prescribed by the pertinent statute. (Ch. 427, Public-Local Laws of 1927.)

APPEAL by defendant from *Alley, J.,* at September Term, 1945, of GUILFORD (Greensboro Division).

Civil action instituted 20 February, 1944, for the recovery of $2,600.00 from the defendant, alleged to be due as a balance on salary.

This cause was heard by his Honor upon an agreed statement of facts, a jury trial having been waived by the parties. The essential parts of the agreed statement of facts are as follows:

1. Chapter 427 of Public-Local Laws of 1927, ratified 3 March, 1927, fixed the salary of the Chairman of the Board of Commissioners of Guilford County at $1,800.00 per annum.

2. Chapter 91, Public Laws of 1927, ratified 7 March, 1927, is a comprehensive Act, which applies to all the counties of the State and provides, among other things, for the appointment of County Managers. Section 5 of the Act, G. S., 153-20, reads as follows:

"*Manager Appointed or Designated.* The Board of County Commissioners may appoint a county manager who shall be the administrative head of the County Government, and shall be responsible for the admin-

istration of all the departments of the County Government which the board of county commissioners has the authority to control. He shall be appointed with regard to merit only, and he need not be a resident of the county at the time of his appointment. In lieu of the appointment of a county manager, the board may impose and confer upon the chairman of the board of county commissioners the duties and powers of a manager, as hereinafter set forth, and under such circumstances said chairman shall be considered a whole time chairman. Or the board may impose and confer such powers and duties upon any other officer or agent of the county who may be sufficiently qualified to perform such duties, and the compensation paid to such officer or agent may be revised or adjusted in order that it may be adequate compensation for all the duties of his office. The term 'manager' herein used shall apply to such chairman, officer, or agent in the performance of such duties."

Section 8 of said Act, G. S., 153-23, is as follows:

"*Compensation.* The county manager shall hold his office at the will of the board of commissioners, and shall be entitled to such reasonable compensation for his services as the board of commissioners may determine. The board shall also fix the compensation of such subordinate officers, agents and employees as may be appointed by the county manager."

3. The Board of Commissioners of Guilford County, on 2 January, 1939, passed the following resolution:

"Resolved, that Whereas, the financial affairs of Guilford County have increased to such a degree as to require the whole time services of the Chairman of this Board, and Whereas, the said Chairman has for the past two years been performing the duties of an all time chairman, and Whereas, the compensation which he has received for such services has been inadequate:

"Now, Therefore, it is the desire of this Board that its chairman, George L. Stansbury, continue to devote his entire time to the affairs of the County acting as whole time chairman under Section 1302 (5) of the Consolidated Statutes of North Carolina, and that his compensation be fixed at $350 per month, beginning December 1, 1938."

The plaintiff did not vote on the above resolution.

4. That from 2 January, 1939, to 7 December, 1942, the plaintiff devoted his entire time to the affairs of the county, acting as whole time chairman, pursuant to said resolution.

5. That from 1 January, 1939, until 31 October, 1941, both inclusive, the plaintiff received from Guilford County each month a salary of $350.00.

6. Beginning with November, 1941, until 7 December, 1942, the expiration of the plaintiff's term of office as a Commissioner of Guilford

County, the county paid the plaintiff only $150.00 per month, although he continued to act as a whole time chairman during said period.

7. On 10 November, 1941, Thomas J. Hill and others, citizens and taxpayers of Guilford County, for and on behalf of said county, instituted an action in the Superior Court of Guilford County against the plaintiff and other County Commissioners serving at that time, to recover numerous alleged illegal payments made and authorized by said Commissioners. The sixth cause of action in said suit was to recover from this plaintiff and the other Commissioners of Guilford County the difference between $150.00 per month, the salary paid prior to the adoption of the above resolution and $350.00 per month, paid pursuant to the terms of said resolution.

8. At the same time the above suit was instituted, the same plaintiffs instituted an action against Guilford County, the members of its Board of Commissioners, the Treasurer of Guilford County and the County Accountant. Simultaneously with the issuing of the summons in said action, the court made an order temporarily restraining and enjoining the defendants from making payment to George L. Stansbury, the plaintiff in this action, of any sum in excess of $150.00 per month, as salary as Chairman of the Board of Commissioners of Guilford County. This temporary restraining order was made permanent by consent of all parties thereto, 5 October, 1942, but the judgment contained a stipulation that said judgment should not be binding on the parties thereto in any subsequent litigation involving the same subject matter or any interest therein.

9. In the cause of action to recover the difference between $150.00 and $350.00 per month, paid to this plaintiff from January, 1939, until and including October, 1941, the court denied plaintiffs a recovery on this part of their claim, and the action was terminated by a consent judgment with a proviso that said judgment was entered without prejudice to the legal rights of any of the parties thereto.

The plaintiff now seeks to collect as additional compensation the sum of $200.00 per month from 1 November, 1941, until 7 December, 1942, or a total of $2,600.00.

The defendant sets up as a defense and counterclaim, a claim for the refund of all sums paid to this plaintiff in excess of $150.00 per month, from 2 January, 1939, to 1 November, 1941, being the identical claim litigated in the above action brought by Hill, *et al.*, against Stansbury, *et al.*, for and on behalf of Guilford County. To this counterclaim the plaintiff pleads the three-year statute of limitations.

The court below held as a matter of law "That Chapter 91 of the Public Laws of 1927, supersedes and repeals, as to the salary of the Chairman of the Board of Commissioners of Guilford County, the pro-

visions of Chapter 427 of the Public Laws of 1927;" and that the proceedings of the board relative to compensation of the plaintiff were regular and authorized by law, and the plaintiff is entitled to receive the additional compensation in accordance with the provisions of the resolution adopted by said board on 2 January, 1939. Judgment was entered for plaintiff. Defendant appealed.

Clifford Frazier, R. R. King, Jr., and D. Newton Farnell, Jr., for plaintiff.

Thos. C. Hoyle and Rupert T. Pickens for defendant.

DENNY, J. The judgments entered in the actions referred to in the above statement of facts and pleaded by the respective parties in this action, are not binding on the parties hereto, except as to the specific claims litigated therein. Consequently, the plaintiff has the right to pursue his claim against the defendant for alleged additional compensation, which claim was not adjudicated in the former litigation. Likewise, the defendant, for whose benefit one of the former actions was brought, has the right to assert its defense to plaintiff's claim, notwithstanding the decision in such action, which, among other things, involved the same legal questions presented on this appeal.

Chapter 91, Public Laws of 1927, authorizes the Board of County Commissioners in any county, to appoint a county manager. The Act provides further: "In lieu of the appointment of a county manager, the board may impose and confer upon the chairman of the board of county commissioners the duties and powers of a manager, as hereinafter set forth, and under such circumstances said chairman shall be considered a whole time chairman. Or the board may impose and confer such powers and duties upon any other officer or agent of the county who may be sufficiently qualified to perform such duties, and the compensation paid to such officer or agent may be revised or adjusted in order that it may be adequate compensation for all the duties of his office. The term 'manager' herein used shall apply to such chairman, officer, or agent in the performance of such duties."

It will be noted that the adjustment of compensation is limited to such officer or agent as may be designated in lieu of naming a whole time chairman or county manager, and we think the term "manager" which shall apply to such chairman, officer or agent, in the performance of his duties, is used here to indicate the powers and duties which may be conferred upon a whole time chairman, other officer or agent who may be acting in lieu of a county manager.

All the powers and duties of a county manager may be delegated to the chairman of a Board of County Commissioners, or other officer or

agent of the county, but such duties must be assumed and carried out in his capacity as such chairman, officer or agent, and the mere delegation of such additional powers and duties does not create a new office. Otherwise, the question of double office holding would confront us, as pointed out in *Hill v. Stansbury,* 223 N. C., 193, 25 S. E. (2d), 604, citing *Brigman v. Baley,* 213 N. C., 119, 195 S. E., 617.

No additional duties were imposed upon the plaintiff by the resolution adopted by the Board of Commissioners of Guilford County, 2 January, 1939, which purported to fix the salary of the plaintiff at $350.00 per month. The resolution contains the statement that the plaintiff had been performing the duties of a whole time chairman for two years prior thereto. Therefore, the primary purpose of the resolution was to adjust plaintiff's compensation and not to change or enlarge his duties. It is conceded that the duties performed by the plaintiff were germane to his office, and there is no contention that the plaintiff's services were not satisfactory or that the compensation fixed in the resolution was excessive. The challenge is solely to the authority of the Board of Commissioners of Guilford County to pay the plaintiff more than the $1,800.00 authorized by chapter 427, Public-Local Laws of 1927. *Kendall v. Stafford,* 178 N. C., 461, 101 S. E., 15.

Conceding, but not deciding, that there is implied legislative authority for the payment of additional compensation to the plaintiff, we think the Board of Commissioners, of which plaintiff was a member, was without legal authority to increase the salary of the plaintiff in excess of that expressly fixed by statute. *Hill v. Stansbury, supra; Reed v. Madison,* 213 N. C., 145, 195 S. E., 620; *Carolina Beach v. Mintz,* 212 N. C., 578, 194 S. E., 309; *Commissioners of Brunswick v. Walker,* 203 N. C., 505, 166 S. E., 385; *Kendall v. Stafford, supra; Borden v. Goldsboro,* 173 N. C., 661, 92 S. E., 694; *Snipes v. Winston,* 126 N. C., 374, 35 S. E., 610. The verdict below must be reversed.

As heretofore stated, the counterclaim of the defendant, pleaded herein, was adjudicated in the former action brought by Hill *et al. v.* Stansbury *et al.,* on behalf of Guilford County and for its benefit. Guilford County not only ratified and approved the action of its citizens in initiating that action, but accepted the proceeds of the judgment entered therein, and became a party thereto. See *Hill v. Stansbury,* 224 N. C., 356, 30 S. E. (2d), 150. We think the proviso in the judgment in the former action was not intended to authorize the further adjudication of the same claims adjudicated therein, but the judgment was intended to be without prejudice to the parties, as to other claims or defenses thereto not expressly adjudicated therein, but arising out of the same factual situation. Hence, we hold that the defendant by accepting the benefits of the

judgment in the former action is estopped from asserting the counterclaim herein pleaded.

The judgment of the court below is

Reversed.

MRS. FLOYD E. SMITH, DAUGHTER OF GEORGE BRADSHAW McPHERSON, DECEASED, v. SOUTHERN WASTE PAPER COMPANY, EMPLOYER, AND GENERAL ACCIDENT FIRE & LIFE ASSURANCE CORPORATION, CARRIER.

(Filed 31 January, 1946.)

1. Master and Servant § 55d—

While the findings of fact by the Industrial Commission, when supported by competent evidence, are conclusive, the rulings of the Commission are subject to review on questions of law, (a) whether the Industrial Commission has jurisdiction, (b) whether the findings are supported by the evidence, (c) whether upon the facts established the decision is correct.

2. Master and Servant §§ 4a, 39b—

The generally accepted definition of an independent contractor is that he is one who exercises an independent employment and contracts to do a piece of work according to his own judgment and method, without being subject to his employer except as to the results of his work.

3. Master and Servant § 39b—Finding of Industrial Commission that deceased was employee and not independent contractor held supported by evidence.

The evidence tended to show that deceased was a machinist and contracted to construct a conveyor in accordance with a rough sketch furnished by defendant for defendant's waste paper plant, the conveyor to be constructed from materials furnished by defendant on the premises of another corporation, that no definite payment was set but that deceased was to be paid $1.00 per hour, that deceased would send in a weekly statement of the hours he had worked and the amount he had spent for incidentals, and checks for labor and expense, if any, were issued to him each week, that deceased worked regularly each week for five eight-hour days and one four-hour day, and had been working for five or six weeks at the time of the injury. There was no evidence that any instructions as to the work were given while the conveyor was under construction, but an employee of defendant testified that he made a suggestion about the location of grease cups which was complied with by deceased. *Held:* The parties appear to have treated the contract as one of employment, and considering all the evidence, it was sufficient to sustain the Commission's finding that deceased was an employee and not an independent contractor.

4. Contracts § 8—

It is a well settled principle of law in the interpretation of contracts that in determining the meaning and effect of the terms of a contract, where its nature and intent are not clear, the construction placed upon the contract by the parties themselves will usually be adopted by the court.

5. Master and Servant § 39h—

Employment continuously for five or six weeks in construction of facilities for handling material in defendant's plant may not be held to be either casual or not in the course of defendant's business.

BARNHILL and WINBORNE, JJ., dissent.

APPEAL by plaintiff from *Alley, J.*, at September Term, 1945, of GUILFORD. Reversed.

Claim for compensation under the Workmen's Compensation Act for the death of George Bradshaw McPherson.

The Industrial Commission found that the deceased was an employee of defendant Southern Waste Paper Company, and that his injury by accident, resulting in his death, arose out of and in the course of his employment by the defendant.

Upon appeal to the Superior Court, the award of the Industrial Commission was reversed upon the ground that on the facts found and established by the record the deceased was an independent contractor.

Plaintiff excepted and appealed.

Wm. E. Comer for plaintiff.

Armistead W. Sapp for defendants.

DEVIN, J. The plaintiff's appeal presents the question whether, upon the facts shown by the record, and found by the Industrial Commission, the plaintiff's intestate was, with respect to the work in which he was engaged at the time of his fatal injury, an employee of the defendant Waste Paper Company, or an independent contractor. The court below held that he was not an employee, but an independent contractor, and on that ground reversed the award of the Industrial Commission, and denied compensation.

While the findings of fact by the Industrial Commission, when supported by competent evidence, are conclusive, the rulings of the Commission are subject to review on questions of law, (a) whether the Industrial Commission has jurisdiction, (b) whether the findings are supported by the evidence, (c) whether upon the facts established the decision is correct. *Aycock v. Cooper*, 202 N. C., 500, 163 S. E., 569; *Buchanan*

v. Highway Com., 217 N. C., 173, 7 S. E. (2d), 382; *Logan v. Johnson,* 218 N. C., 200, 10 S. E. (2d), 653; *Rader v. Coach Co.,* 225 N. C., 537.

The generally accepted definition of an independent contractor is that he is one who exercises an independent employment and contracts to do a piece of work according to his own judgment and method, without being subject to his employer except as to the results of his work. *Aderholt v. Condon,* 189 N. C., 748, 128 S. E., 337; *Greer v. Construction Co.,* 190 N. C., 632, 130 S. E., 739. In the recent case of *Hayes v. Elon College,* 224 N. C., 11, the distinction between an employee entitled to benefits under the Workmen's Compensation Act and an independent contractor was discussed and the incidents of those relationships analyzed by *Justice Barnhill,* with citation of numerous authorities. The principles of law therein stated seem now to be well settled, but difficulty frequently arises in the application of these general principles to the particular facts of individual cases.

In the case at bar it appears from the evidence and findings of fact reported by the Industrial Commission that defendant's business was that of handling and processing waste paper, and that the defendant engaged the services of the deceased, who was a machinist or millwright, to construct a metal conveyor belt to be used in defendant's plant, in the course of its business, to convey waste paper to a paper press or baler; that the conveyor, which was 30 feet long and 5 feet wide, was to be constructed from materials obtained from, and on the premises of, the Southern Converting Company, a separate corporation dealing in scrap metal. Defendant's president had formerly been vice-president of the Converting Company. The deceased had not theretofore done any work for or been employed by the defendant, but had worked for the Converting Company.

As bearing on the question at issue the Industrial Commission reported the testimony of a witness, a brother-in-law of the deceased, to the effect that deceased was working by the hour at $1.00 an hour, and was employed there 5 or 6 weeks before his injury, "that deceased had no written contract with the Southern Waste Paper Company, and that there was no verbal contract." It appeared, however, that this witness was not present when the contract for the construction of the conveyor was made, and that he had seen the deceased at work on the conveyor belt on only one occasion.

The Industrial Commission also included in its report the substance of the testimony of the president of defendant Waste Paper Company to the effect that he made the agreement with the deceased; that he outlined to him what he wanted done by a rough sketch of the plans, length, width and purpose of the conveyor, and worked out the basis on which deceased would take the job; no definite sum was set, but the deceased agreed to

do the work for $1.00 per hour, the defendant to furnish the materials, the work to be done on the yard of the Converting Company. This witness testified that he had no agreement with deceased, nor did he give directions, as to the number of hours a day he should work, when he should start or quit, or when he should do specific pieces of work, or what help, if any, he should employ; that all he was interested in was to have the job done as expeditiously as possible, and that he did not attempt to direct the deceased as to details of the work.

It also appeared from the testimony that the defendant had not had occasion to employ a full-time mechanic, and did not keep a social security sheet for the deceased. The method of payment under the agreement was that deceased would send in each week a statement of the number of hours he had worked and the amount he had spent for incidentals which were entered on the books, and checks for his labor and expense, if any, were issued to him each week. Most of the materials purchased by deceased for the job were billed directly to defendant. Deceased worked regularly each week for five eight-hour days and one four-hour day. This continued for five or six weeks. After his death check was sent claimant for $40, marked "payment in full for labor by George B. McPherson from Dec. 30, 1944, to date of injury." The injury occurred 3:15 p.m. Friday, January 5, 1945. The work was not finished at the time of his death. While there was no evidence that any instructions as to the work were given deceased while the conveyor was under construction, an employee of defendant testified he made a suggestion about the location of grease cups which was complied with by deceased. Defendant's president also testified he was around where the work was being done but did not recall giving any instructions as to the construction; that he may have talked to deceased about various designs but did not recall any specific changes he had suggested to him; may have helped him some in picking up parts for him; did not know that deceased employed any help, but the understanding was he would be paid for any disbursements for help or material. There was no evidence that deceased had employed any help.

It also was found by the Industrial Commission that the deceased maintained no office or organization as a contractor, and that prior to his work for the defendant on the conveyor he had worked on several defense jobs as an employee for wages.

We have stated the evidence appearing in the record in greater detail than is embraced in the specific findings of the Industrial Commission, but in substantial accord therewith. Upon this evidence the Commission found and concluded as a matter of law that the deceased was an employee of the defendant and not an independent contractor, and awarded compensation to the plaintiff under the statute.

The question here presented is not without difficulty. The testimony of plaintiff's witness that deceased was working for defendant at an hourly wage without written or verbal contract would have tended to sustain the conclusion that deceased was an employee within the meaning of the Act, but for the fact that this witness was apparently not informed as to the terms of the contract under which the deceased was working.

On the other hand, the testimony of defendant's president that the deceased, who had never theretofore worked for defendant, had contracted to do a specified piece of construction work according to his own judgment and method without being subject to the defendant except as to the results of his work, and that at the time of his injury he was exercising an independent employment, not on the immediate premises of defendant, would seem to support the ruling of the court below that the relationship of deceased to the work on which he was engaged at the time was that of an independent contractor. However, there are other circumstances appearing in the evidence which might be understood to militate to some extent against this view, in that they tend to show that some control was exercised by defendant over the details of the construction. *Johnson v. Hosiery Co.,* 199 N. C., 38, 158 S. E., 591. In this situation and as material to the correct answer to the question at issue, we note that the parties themselves appear to have treated the contract as one of employment only, at an hourly wage, payable weekly, for an indefinite period, and that deceased gave in his time to the bookkeeper for entry on the books of the number of hours worked each week, and defendant issued to him checks accordingly, marked for labor performed. While the conveyor belt was not constructed on the immediate premises of defendant, it was intended for use in the course of the business of the defendant in defendant's plant to facilitate the conveyance of waste paper to the presser or baler. It is a well settled principle of law in the interpretation of contracts that in determining the meaning and effect of the terms of a contract, where its nature and intent are not clear, the construction placed upon the contract by the parties themselves will usually be adopted by the Court. *Belk's Department Store v. Ins. Co.,* 208 N. C., 267, 180 S. E., 63; *Hood v. Davidson,* 207 N. C., 329, 177 S. E., 5; *Pick v. Hotel Co.,* 197 N. C., 110, 147 S. E., 819; *Wearn v. R. R.,* 191 N. C., 575, 132 S. E., 576; *Council v. Sanderlin,* 183 N. C., 253 (259), 111 S. E., 365; *Harten v. Loffler,* 212 U. S., 397; *National Bank of Burlington v. Fidelity & Casualty Co.,* 126 F. (2), 920; *Buden v. New York Trust Co.,* 83 F. (2), 168; *Navy Gas & Supply Co. v. Schoech,* 105 Col., 374; *Fullerton v. U. S. Casualty Co.,* 184 Iowa, 219; Restatement Law of Contracts, sec. 235 (e); 12 Am. Jur., 787. As was said by *Chief Justice Stacy* in *Cole v. Fibre Co.,* 200 N. C., 484, 157

S. E., 857: "In the construction of contracts . . . no court can go far wrong by adopting the *ante litem motam* practical interpretation of the parties, for they are presumed to know best what was meant by the terms used in their engagements."

In *Old Colony Trust Co. v. Omaha,* 230 U. S., 100, it was said: "Generally speaking, the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence."

In *Meyer & Sons Co. v. Grady,* 194 Wis., 615, it was said that in the interpretation of a contract of employment weight should be attached to "the construction given to the contract by the parties themselves during the period of its execution; and the acts of the parties which indicate their relationship to each other."

In this view we are constrained to hold that there was support in the evidence for the finding and conclusion of the Industrial Commission that the deceased was an employee rather than an independent contractor. Nor may the claimant be excluded from compensation on the ground that the employment of the deceased was "both casual and not in the course of the trade, business, profession or occupation of his employer." G. S., 97-2 (b). In accord with the interpretation of those terms set forth in *Johnson v. Hosiery Co.,* 199 N. C., 38, 153 S. E., 591, the work on which deceased had been employed continuously for five or six weeks in the construction of facilities for handling material in defendant's plant may not be held to be either casual or not in the course of defendant's business. *Cf. Burnett v. Paint Co.,* 216 N. C., 204, 4 S. E. (2d), 507.

For the reasons stated we conclude there was error in the ruling of the court below, and that the judgment must be

Reversed.

BARNHILL and WINBORNE, JJ., dissent.

B-C REMEDY COMPANY v. UNEMPLOYMENT COMPENSATION COMMISSION OF NORTH CAROLINA.

(Filed 31 January, 1946.)

1. Master and Servant § 59d—

The provision of the North Carolina Unemployment Compensation Act for refund of money is sufficiently broad to cover refund of money paid through mistake without raising technical distinctions between voluntary

and involuntary payments, and defense to recovery on the ground that there is no remedy for recovery for taxes voluntarily paid is inapplicable. G. S., 96-10 (e).

2. Same—

Section 26, ch. 377, Session Laws of 1943, which enlarges the time within which the application and refund of unemployment compensation taxes may be made from one to three years, is procedural and relates merely to the limitation on the authority of the commission to make refund, and therefore giving the statute retroactive effect does not violate any constitutional inhibition, but even if it should be considered strictly as a statute of limitations, retroactive effect would not impair obligations of contracts or destroy vested rights, and therefore would be constitutional.

3. Limitation of Actions § 3—

Giving retroactive effect to statutes enlarging the period of limitation for the institution of an action or filing of claim does not violate any constitutional inhibition when such effect does not impair the obligations of contracts or disturb vested rights.

4. Master and Servant § 59d—

Section 26, ch. 377, Session Laws of 1943 (G. S., 96-10 [e]), *is held* to disclose the intent that its provisions be retroactive as well as prospective, and under the statute an employer may file claim for refund of taxes erroneously paid within three years of payment and the Commission may make refund, even though such refund was precluded under the terms of the prior statute because more than one year had elapsed from date of payment.

5. Same—

Under the facts of this case formal application for refund of taxes paid *held* waived, and further, the Commission had authority to make the refund on its own initiative.

APPEAL by defendant from *Jeff D. Johnson, Jr., Special Judge,* at April Term, 1945, of DURHAM.

This is a controversy without action to determine the right of the plaintiff to recover or the power of the defendant to refund an item of $661.16 erroneously paid as a contribution or tax with respect to employment for the year 1940.

The payment was made under the following circumstances:

The plaintiff is an employing corporation liable to contributions under the North Carolina Unemployment Compensation Act, and the defendant is the State agency authorized to collect and receive such contributions.

Effective 1 January, 1940, the Congress amended the National Social Security Act so as to exclude wages in excess of $3,000 paid to any

individual as "wages" within the Act. Because of the interrelation between the Federal and State taxes and administration, and the necessity of readjustment, the North Carolina General Assembly enacted chapter 320, Public Laws of 1941, excluding from the tax remuneration in excess of $3,000 paid to any individual for employment during the calendar year 1940. Subsequent to the effective date of these laws, the plaintiff paid to the defendant its tax for the period, erroneously including therein tax computed on salary paid to one of its employees in excess of $3,000. It is admitted in the agreed facts that "the law and regulations in effect at the time the payment was made did not require the payment of taxes on salaries in excess of $3,000, as set forth in 57(a)2 of said act."

On 18 December, 1942, plaintiff applied for a refund under section 14 (d) of the Unemployment Act. The refund was denied because application had not been made within one year from payment of the tax, that being the terms of the law as it then stood. Subsequently, by chapter 377, Session Laws of 1943, section 14 (d) was amended so as to enlarge the time during which application is required to be made, or refund made by the Commission on its own motion, to three years.

Upon these facts the defendant contended that it had no power to make the refund; that plaintiff's right to recovery had become barred by the expiration of one year from payment, under the one year statute, and could not constitutionally be revived by the amendment enlarging the time to three years; and that the amendment itself was not intended to be retrospective or retroactive, and should not be so construed. The defendant, however, expresses a willingness to refund the money if the statute can be construed otherwise, and stipulates that judgment should be entered for the plaintiff if it should be found that the Commission has power to make the refund.

The pertinent part of the amended statute reads:

"(d) If not later than three years from the last day of the period with respect to which a payment of any contributions or interest thereon was made, or one year from the date on which such payment was made, whichever shall be the later, an employer who has paid such contributions or interest thereon shall make application for an adjustment thereof in connection with subsequent contribution payments, or for a refund thereof because such adjustment cannot be made, and the commission shall determine that such contributions or interest or any portion thereof was erroneously collected, the commission shall allow such employer to make an adjustment thereof, without interest, in connection with subsequent contribution payments by him, or if such adjustment cannot be made, the commission shall refund said amount, without interest, from the fund. For like cause and within the same period,

adjustment or refund may be so made on the commission's own initiative: Provided, that nothing in this section or in any other section of this act shall be construed as permitting refund of moneys due and payable under the law and regulations in effect at the time such moneys were paid."

The parties consider, and so agree, that the sole question involved is whether the cited law is intended to be retrospective, and may be retroactively applied for plaintiff's relief.

The matter was submitted in a controversy without action on the above facts to Judge Jeff D. Johnson at a regular term of Durham Superior Court, and judgment was rendered in favor of the plaintiff for the amount demanded. Defendant appealed.

Victor S. Bryant for plaintiff, appellee.

Chas. U. Harris, R. B. Overton, and R. B. Billings for defendant, appellant.

SEAWELL, J. As a part of its defense, appellant suggests that there is no remedy for recovery of tax voluntarily paid. That could only be true where the statute fails to provide for a refund under such circumstances, and in a jurisdiction which would regard an action at law for its recovery as a suit against the State, without statutory authority for its institution. In view of the construction we give the statute, we do not find it necessary to discuss the point. The Act is broad enough in its phraseology to cover refund of money paid through mistake, without raising technical distinctions between voluntary and involuntary payments. There is no question that the item was erroneously collected or paid within the meaning of that term as used in the statute.

We come to the question whether the statute, as amended, may be retroactively applied in favor of appellee's claim. Against this appellant interposes the objection that the claim had been already barred by a statute of limitation, and the Legislature could not constitutionally restore the remedy; and that the statute is entirely prospective in legislative intent.

Statutes such as that under review are not usually regarded as strictly statutes of limitation upon actions, such as we have in G. S., Art. 5, sec. 1-46, *et seq.*, and which have given rise to many vexing questions regarding the effect of repeal, suspension, extension and revival of the remedy. The statute is procedural, and the limitation it imposes is addressed rather to the power of the Commission to make the refund and the conditions upon which it may be made than to any limitation upon an action for the recovery of the money. While the limitation on the authority of the Commission to make the refund is just as fatal

to the claim, so long as it lasts, as a statute of limitation addressed to an action itself, it can readily be understood that a change of the law enlarging the time in which the refund may be applied for or made does not involve any constitutional inhibitions such as apply to ordinary statutes of limitation, and the Legislature has the power to apply it retroactively, if it has that in mind. In fact, it is the statute itself which creates the right, and it has the same power to renew it. *Graham v. DuPont,* 262 U. S., 233, 67 L. Ed., 965; *Unemployment Compensation Commission of Kentucky v. Consolidation Coal Company,* 152 S. W. (2d), 971, 287 Ky., 330.

But apart from this suggestion, and considering the statute to be one of strict limitation on actions, there can be no doubt that the Legislature can waive statutes of limitation which have completely run in favor of the State. In the situation here presented—that of a taxpayer attempting to recover from the State money justly his, and the State attempting through its own laws to let him have it—it does not follow that any of the ordinary difficulties in the way of a revival of a remedy have any force or application. The Constitution is infringed only when such action impairs the obligation of a contract or destroys a vested right, and these inhibitions are invoked when it is sought to enforce the restored remedy *in invitum.* The relation between the State and a taxpayer is not one of contract; and certainly the State has acquired no vested interest in appellee's money which it cannot waive by appropriate legislation. Even a private debtor may waive the bar of the statute by his own conduct, and in so far as constitutional limitations are concerned, the State certainly has as much freedom in that respect as an individual.

The statute is not only broad enough to cover taxes "erroneously collected," but it is also broad enough in its terms to cover any sort of taxes erroneously paid during the three year period preceding its enactment, provided no statutory rule of construction stands in the way. Considering the relationship of the parties and the remedial nature of the statute, any deterring rule should be fortified by some consideration of public policy rather than merely based on the experience that most legislation is prospective.

No material change has been made by the amendment except the extension of time for making application for the refund or the power of the Commission to make it on its own initiative. The whole statute is intended to give relief to a class whose equities continually arise in natural course regardless of changes in the law which might occur at any time. Such a statute could not be expected to make a clean break with the past—repeal the old law—and make no readjustment whereby those still equitably entitled to relief, or entitled under previously existing law,

might be heard. The fact that no express provision was made in the amendment for them strongly leads to the conclusion that it was intended they should have the benefit of the extended time. Once this is conceded, the theory of exclusively prospective application breaks down and the statute operates retroactively; and it does not make any distinction or create any classes among those from which taxes have been erroneously collected prior to the enactment of the law when action is taken in time.

Since, as we have said, the language employed is broad enough to express the retrospective intent and to be retroactively applied, we think the statute falls under the rule expressed in *Byrd v. Johnson,* 220 N. C., 184, 185, 16 S. E. (2d), 843, in which, quoting from *Gillespie v. Allison,* 115 N. C., 542 (548), 20 S. E., 627, it is said:

" 'No vested right of property has been disturbed, and, in our view, this is a remedial statute enlarging rights instead of impairing them. *"Statutes are remedial and retrospective, in the absence of directions to the contrary,* when they create new remedies for existing rights, remove penalties or forfeitures, extenuate or mitigate offenses, supply evidence, make that evidence which was not so before, abolish imprisonment for debt, enlarge exemption laws, enlarge the rights of persons under disability, and the like, unless in doing this we violate some contract obligation or divest some vested right." *Larkins v. Saffarans,* 15 Fed. Rep., 147. These principles as to vested rights and retrospective laws are carefully discussed in the great and leading case of *Calder v. Bull,* 3 Dallas, 386. See, also, many cases collected in Myers on Vested Rights, ch. 1; *Hinton v. Hinton,* Phillips, 410; *Tabor v. Ward,* 83 N. C., 294.' *Martin v. Van Laningham,* 189 N. C., 656 (658); *Bateman v. Sterrett,* 201 N. C., 59 (61-62); *Woodmen of the World v. Comrs. of Lenoir,* 208 N. C., 433." (Italics ours.)

The case at bar is in all respects similar to the factual situation in *Unemployment Compensation Commission v. Consolidation Coal Co., supra,* where it appears that the Kentucky Unemployment Compensation Law was amended in the same respect as ours and under the same necessity. The opinion covers every phase of the subject, and the conclusion reached, it seems to us, is sound.

Also, in a factual situation comparable to the one under review, in *Graham v. DuPont, supra,* involving the effect of an amendment to the refunding statute, the Court held it to be retroactive and applicable to a claim for refund which might have been barred under the previous law, and denied injunctive relief because the claimant had, under this provision, an adequate remedy at law.

We are of opinion that the statute is retroactive in its effect and under the agreed facts makes it the imperative duty of the appellant to make the refund.

The appellant points out that even if the amended statute is available to the plaintiff, it has not made the application required by the statute. Under the stipulations before us, we regard the formal application as waived. The defendant Commission has admitted all the facts necessary to make it mandatory upon it to refund the tax. Moreover, under the law the Commission might make the refund on its own initiative upon finding the facts to be as it is agreed they actually are, and has expressed its willingness that judgment should be entered against it if it has power to make the refund. In this situation, the court was justified in entertaining the proceeding and rendering judgment.

We think the court below reached the correct conclusion and its judgment is

Affirmed.

S. M. VERNON AND HIS WIFE, MYRTLE VERNON; JOHN H. HARDING AND HIS WIFE, EDNA HARTMAN STRADER HARDING; T. S. HUTCHINS AND HIS WIFE, GURTHA HUTCHINS; L. A. PLASTER, SR., AND HIS WIFE, LILLIE B. PLASTER; J. FRANK CASPER AND HIS WIFE, ANNIE CASPER; JOHN CLICK AND HIS WIFE, BESSIE N. CLICK; H. L. CROTTS AND HIS WIFE, ALMEDA S. CROTTS; VERNON M. BRADFORD AND HIS WIFE, LELIA MAE BRADFORD; J. W. INGE AND HIS WIFE, DORIS T. INGE; J. E. STANFORD AND HIS WIFE, ALMA STANFORD; H. T. REICH, AN UNMARRIED MAN; C. S. JOHNSON, AN UNMARRIED MAN; WILSON BROTHERS LUMBER COMPANY (A CORPORATION); THOMAS M. ARMFIELD, A WIDOWER; ANNE NOBLE NORTHUP, TRUSTEE FOR THE ESTATE OF W. C. NORTHUP; VIRGINIA S. PLEASANTS AND ESTATES ADMINISTRATION (A CORPORATION), EXECUTORS AND TRUSTEES OF THE ESTATE OF W. F. SHAFFNER, SR.; OSCAR O. EFIRD, TRUSTEE; WINSTON-SALEM BUILDING & LOAN ASSOCIATION; W. L. FERRELL, TRUSTEE; RANSOM S. AVERITT, TRUSTEE OF JESSE D. BRYANT; THE FIDELITY COMPANY, TRUSTEE; AND PIEDMONT FEDERAL SAVINGS & LOAN ASSOCIATION, PETITIONERS, v. R. J. REYNOLDS REALTY COMPANY (A CORPORATION); FRED S. HUTCHINS, TRUSTEE; FIRST FEDERAL SAVINGS & LOAN ASSOCIATION; CICERO C. SMITH AND HIS WIFE, EFFIE F. SMITH; SALLY J. JACKSON, TRUSTEE; L. K. MARTIN, TRUSTEE; SHENANDOAH LIFE INSURANCE COMPANY; W. C. HENDRIX AND HIS WIFE, BESSIE MAY HENDRIX; ELGIN T. PHELPS AND HIS WIFE, VERSIE PHELPS; H. G. GROGAN AND HIS WIFE, CLEONA MAE GROGAN; WILLIAM S. ROTHROCK, AN UNMARRIED MAN; ERNEST K. JAMES AND HIS WIFE, ELVA R. JAMES; L. C. PEGRAM AND HIS WIFE, DAISY PEGRAM; HUGHES L. LANE, A WIDOW; H. S. CODY, TRUSTEE; METROPOLITAN LIFE INSURANCE COMPANY (A CORPORATION); WILLIAM MESSICK, AN UNMARRIED MAN; TEDDY ROOSEVELT CROUSE AND HIS WIFE, MAUD CROUSE; ED CHAMPAGNE AND HIS WIFE, EMILY FRANCES CHAMPAGNE; T. W. SURRATT AND HIS WIFE, FLAUDIA L. SUR-

RATT; JUNIOR LEAGUE HOSPITAL FOR INCURABLES; CITY OF WINSTON-SALEM AND FORSYTH COUNTY, RESPONDENTS.

(Filed 31 January, 1946.)

1. Deeds § 16—

A restrictive covenant contained in deeds to lots in a subdivision developed according to a general scheme or plan is contractual in nature and creates a species of incorporeal property right.

2. Same—Changed conditions outside development not grounds for relief against restrictive covenants in absence of breach within development.

This action was brought for equitable relief against restrictive covenants contained in deeds to property in a residential development precluding sale or lease to Negroes for a period of 50 years. Plaintiffs allege that in recent years the whole surrounding area for the depth of one-quarter mile has been acquired by and is owned, used and occupied by Negroes, and that the restrictions had therefore become a burden and not a benefit to the property. *Held:* Radical change in the ownership, use and occupancy of the property immediately surrounding and adjacent to the restricted development affords no grounds for equitable relief against restrictive covenants when there has been no breach of the restrictions within the covenanted area.

3. Equity § 1—

It is not the way of equity to override the law or to invalidate contracts or to destroy property rights.

APPEAL by plaintiffs from *Nettles, J.,* at September Term, 1945, of FORSYTH. Affirmed.

Civil action for equitable relief against the burden of restrictive covenants contained in deeds to property in a residential development, heard on demurrer.

Eliminating all elaboration the complaint alleges:

Skyland, a residential section of Winston-Salem, was divided and sold under a uniform scheme or plan of development which included a restrictive covenant inserted in all the deeds, expressly prohibiting sale or lease to Negroes for a period of 50 years. Plaintiffs and defendants now own all the property within Skyland. There has been no breach of the covenant by any property owner. When the property was developed and the lots therein were sold, all the property immediately surrounding and adjacent to Skyland was owned, occupied, and used by white people only. At that time purchasers had no cause to believe that the surrounding conditions would ever adversely affect the desirability of the property as an exclusive white residential section. However, in recent years the whole surrounding area for a depth of a quarter mile has been acquired by, and is now owned, used, and occupied by Negroes. This radical change in conditions outside but immediately adjacent to

Skyland has made further sales of property within the development to whites impossible except at greatly reduced prices, renders the restriction burdensome, and causes plaintiffs irreparable damage. Even so, defendants, or some of them, still assert the validity of the covenant and insist upon its observance. By reason of the facts alleged the restrictive covenant should be canceled and annulled as a cloud on the title of plaintiffs.

When the case came on for hearing in the court below certain defendants appeared and demurred *ore tenus* for that the complaint fails to state a cause of action. The demurrer was sustained and plaintiffs appealed.

Ingle, Rucker & Ingle for plaintiff, appellants.
No counsel contra.

BARNHILL, J. That covenants reasonably restricting the ownership, use, or occupancy of land, inserted in deeds as a part of a general scheme or plan of development, for the benefit of all owners of property within the development, are valid is conceded. 14 Am. Jur., 616. And plaintiffs do not challenge the validity of a covenant against the sale or lease of property to persons of a certain race or color or restricting its ownership or occupancy to persons of the Caucasian race. *Eason v. Buffaloe,* 198 N. C., 520, 152 S. E., 496; *Grady v. Garland,* 67 App. D. C., 73, 89 F. (2d), 817 (Writ of *certiorari* denied, 82 L. Ed., 536); *Meade v. Dennistone,* 114 A. L. R., 1227; Annos. 9 A. L. R., 120, 66 A. L. R., 531, 114 A. L. R., 1237; 14 Am. Jur., 618.

So then the case comes to this: When the covenant was inserted in the deeds to all the property in Skyland as a part of a uniform plan of development, it was thought to be an advantageous restriction materially enhancing the value of the property for residential purposes. The covenant has not been breached. It has served and is serving its purpose. Even so, there has been a radical change in the complexion of the use and occupancy of all the property immediately surrounding Skyland so that now the restriction is more burdensome than beneficial.

Hence this appeal poses for decision one question only: Does a radical change in the ownership, use, and occupancy of the property immediately surrounding and adjacent to the restricted development afford grounds for equitable relief against the pleaded covenant when there has been no breach thereof within the covenanted area?

While there are decisions *contra,* the great weight of authority in this country answers in the negative. 14 Am. Jur., 615; 26 C. J. S., 549; Annos. 46 A. L. R., 372, 54 A. L. R., 812; 85 A. L. R., 986. (See also cases cited in *Brenizer v. Stephens,* 220 N. C., 395, 17 S. E. (2d), 471.)

Decisions in this jurisdiction are in accord with the majority view. *Brenizer v. Stephens, supra; Turner v. Glenn,* 220 N. C., 620, 18 S. E. (2d), 197; *Sheets v. Dillon,* 221 N. C., 426, 20 S. E. (2d), 344; *Franklin v. Realty Co.,* 202 N. C., 212, 162 S. E., 199; *Johnston v. Garrett,* 190 N. C., 835, 130 S. E., 835; *Starkey v. Gardner,* 194 N. C., 74, 138 S. E., 408. *Cf. Humphrey v. Beall,* 215 N. C., 15, 200 S. E., 918; *McLeskey v. Heinlein,* 200 N. C., 290, 156 S. E., 489.

The covenant is contractual in nature and creates a species of incorporeal property right. *Sheets v. Dillon, supra.* Its purpose is to preserve the covenanted area as a residential section for Caucasians only. It does not purport to regulate or control the use and occupancy of adjacent property or to prevent the invasion thereof by members of other races.

Ordinarily the acquiescence of owners in the breach of the covenant in respect to some lots constitutes a waiver of the right to insist upon it as to others. (*Cf. McLeskey v. Heinlein, supra.*) This law of waiver is the fundamental principle that underlies the decisions in such cases and gives equity a toe hold to interfere and relieve against covenants which have become burdensome. Anno. 46 A. L. R., 372. But it is not the way of equity to override the law or to invalidate contracts or to destroy property rights.

Contractual relations do not disappear as circumstances change. So equity cannot balance the relative advantages and disadvantages of a covenant and grant relief against its restrictions merely because it has become burdensome. It is bound to give effect to the contract unless changed conditions within the covenanted area, acquiesced in by the owners to such an extent as to constitute a waiver or abandonment, is made to appear. *McLeskey v. Heinlein, supra; Franklin v. Realty Co., supra.*

The changed conditions outside the development afford no grounds for relief. Those who purchase property subject to restrictive covenants must assume the burdens as well as enjoy the benefits, for equity does not grant relief against a bad bargain voluntarily made and unbreached.

Plaintiffs insist that *Elrod v. Phillips,* 214 N. C., 472, 199 S. E., 722, and *Bass v. Hunter,* 216 N. C., 505, 5 S. E. (2d), 558, are in conflict with this conclusion and align this Court with the minority view. In this we cannot concur. We, in *Brenizer v. Stephens, supra,* differentiated these decisions in this language:

". . . in both cases, we find conspicuously absent from the facts agreed the essential conditions on which restrictions of this kind are enforced in favor of owners who are not parties or privies to the deed—the requirement that the deeds and restrictions therein are made in pursuance of a general plan of development and improvement—so as to give rise to a

mutuality of covenant and consideration, or to create mutual negative equitable easements, or at least to give other owners in the covenanted area a legal or equitable right to the enforcement of the restrictions in the deeds of other owners. In fact, in neither of the cases does it appear that restrictions of the kind were general throughout the territory, or, indeed, that they were found elsewhere than in the deeds from which they were sought to be removed or those of the immediate parties to the suit."

This distinction has since been recognized and approved in two other cases, *Turner v. Glenn, supra,* and *Sheets v. Dillon, supra.*

For the reasons stated the judgment below is

Affirmed.

STATE v. WALTER HIGHTOWER.

(Filed 31 January, 1946.)

1. Criminal Law § 79—

Assignments of error not brought forward in defendant's brief and in support of which no reason or argument is stated or authority cited are deemed abandoned. Rule 28.

2. Criminal Law § 53i—

A charge that the jury should consider the testimony of defendant in the light of his interest in the verdict and in the "outcome of the trial" is not error.

3. Same—

A charge on the credibility of defendant's testimony which uses the phrase "if you come to the conclusion that he is telling the truth" is without error.

4. Homicide § 27c—

Since the enactment of the statute dividing murder into degrees, C. S., 4200, G. S., 14-17, the use of the adjective "aforethought" in charging upon murder in the first degree is not required, the definition and use of the term "premeditation and deliberation" being sufficient.

5. Homicide § 27a—

The use of the term "the implement offered in evidence and referred to by witnesses as a knife" *is held* a sufficiently definite reference to the weapon offered in evidence, it appearing that the jury could not have misunderstood.

6. Homicide § 1c—

A sharp, thick, pointed blade six inches long, sufficient when stabbed into the body of another to reach and penetrate the heart, is, when so used, *per se* a deadly weapon.

7. Homicide § 7a—

Mere words, however abusive, are not sufficient provocation to reduce murder in the second degree to manslaughter, but legal provocation must be circumstances amounting to an assault or threatened assault.

8. Homicide § 27f—

In this prosecution for murder in the first degree *it is held* that the court below fairly and fully presented defendant's cause, both as to the law and evidence, on defendant's defenses of insanity, drunkenness, provoked assault, and self-defense.

APPEAL by defendant from *Bobbitt, J.,* at August Term, 1945, of WILKES. No error.

Criminal prosecution on bill of indictment charging that defendant did kill and murder one William Bunker.

Defendant and deceased were prisoners confined in a prison camp located in Wilkes County. Some time shortly prior to the homicide the defendant had been put in solitary confinement for a period of days. He believed that this was due to the fact the deceased had reported to the prison officials certain acts of sex perversion by defendant. Being incensed thereby, he had made a number of threats against deceased, the object of his unnatural love.

On Sunday, 1 April, 1945, the prisoners were in camp, more or less at ease. Bunker, the deceased, and two other prisoners were passing ball in the yard outside the cell block. The defendant went to the yard and told Bunker he wanted to see him. He put his arm around Bunker and they walked into the cell block and continued on down about midway the cell block while the defendant still held Bunker around his waist. As they proceeded defendant had a knife-like weapon in his hand and Bunker was holding defendant's wrist. Bunker cried out to the twenty-odd prisoners in the cell block, asking for help and pleading that they stop defendant and not let defendant kill him. They in turn shouted to defendant, telling him not to kill Bunker, but they did nothing further to interfere.

Bunker lost his hold on defendant's wrist. Defendant then tripped Bunker, who fell to the floor. Thereupon defendant stabbed him several times with the weapon. He said, "G—— d—— you, I told you I was going to kill you." Bunker managed to get up and run to the sink. Defendant caught up with him, knocked him down, and stabbed him five or six times. Two of the stab wounds entered the heart, causing the death of Bunker before he reached the hospital.

The weapon used by defendant was a hand-made knife or dirk-like instrument, having a wood handle and a blade six inches long. The

blade was set in the handle, was sharp on both sides and was pointed on the end. It was about 3/16 inch thick and 3/4 inch wide.

There was a verdict of guilty of murder in the first degree. The court pronounced judgment of death and defendant appealed.

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

J. Allie Hays and Eugene Trivette for defendant, appellant.

BARNHILL, J. The record contains seventy assignments of error. Of these, eleven are brought forward and noted in defendant's brief. The others, in support of which no reason or argument is stated or authority cited, are deemed to be abandoned. Rule 28, 221 N. C., 562; *S. v. Abernethy,* 220 N. C., 226, 17 S. E. (2d), 25; *S. v. Miller,* 219 N. C., 514, 14 S. E. (2d), 522; *S. v. Howley,* 220 N. C., 113, 16 S. E. (2d), 705; *Bank v. Snow,* 221 N. C., 14, 18 S. E. (2d), 711.

In its charge the court cautioned the jury they should consider the testimony of the defendant "in the light of his interest in your verdict, and in the outcome of the trial." The use of the term "in the outcome of the trial" does not constitute a substantial departure from language we have heretofore approved. The outcome of the trial depends upon and is controlled by the outcome of the verdict. Essentially they are one and the same. *S. v. Davis,* 209 N. C., 242, 183 S. E., 420; *S. v. Auston,* 223 N. C., 203, 25 S. E. (2d), 613.

Defendant likewise excepts to the use of the language "if you come to the conclusion that he is telling the truth." The exception is without merit. To find is to arrive at a conclusion. Webster's Int. Dict. So then, "if you find," "if you are convinced" and "if you come to the conclusion" are equivalent and synonymous expressions. The use of one in preference to another is not prejudicial.

In defining murder in the first degree, and particularly the element of malice, the court did not use the adjective "aforethought." In this there was no error. *S. v. Smith,* 221 N. C., 278, 20 S. E. (2d), 313. "Malice aforethought" was a term used in defining murder prior to the time of the adoption of the statute dividing murder into degrees. As then used it did not mean an actual, express or preconceived disposition; but imported an intent, at the moment, to do without lawful authority, and without the pressure of necessity, that which the law forbade. *S. v. Crawford,* 13 N. C., 425. As used in C. S., 4200, now G. S., 14-17, the term "premeditation and deliberation" is more comprehensive and embraces all that is meant by "aforethought," and more. Hence the use of "aforethought" is no longer required.

The weapon used by the defendant had been minutely described. It had been offered in evidence and exhibited to the jury. The court referred to it as "the implement offered in evidence and referred to by witnesses as a knife." No further definition of "implement" was required. As used by the court it meant the weapon offered in evidence. This was as definite and certain as it was possible for the court to make it. It is inconceivable that the jury could have misunderstood.

Nor did the court err in instructing the jury that the implement, when used to stab another in the manner described by witnesses, was a deadly weapon. It had a sharp, thick, pointed blade six inches long, sufficient, when stabbed into the body of another, to reach and penetrate the heart. It was when so used *per se* a deadly weapon. The court correctly so instructed the jury. *S. v. West,* 51 N. C., 505; *S. v. Huntley,* 91 N. C., 617; *S. v. Sinclair,* 120 N. C., 603; *S. v. Beal,* 170 N. C., 764, 87 S. E., 416.

The court further instructed the jury "that legal provocation that will reduce murder in the second degree to manslaughter must be more than mere words, for language, however abusive, neither excuses nor mitigates the killing," and "the law does not recognize circumstances as a legal provocation which in themselves do not amount to an assault or a threatened assault." Such is the law in this jurisdiction. *S. v. Benson,* 183 N. C., 795, 111 S. E., 869; *S. v. Kennedy,* 169 N. C., 288, 84 S. E., 515. Here it was the deceased and not the defendant who is alleged to have used abusive language and thus induced the assault which resulted in death. *S. v. Robinson,* 213 N. C., 273, 195 S. E., 824; *S. v. Rowe,* 155 N. C., 436, 71 S. E., 332; *S. v. Crisp,* 170 N. C., 785, 87 S. E., 511.

The defendant excepts for that the court committed error in failing to charge the jury as to what constitutes excusable homicide. In this connection he insists that deceased assaulted defendant by calling him a "G—— d—— black s.o.b.," and the court failed to apply the law applicable to this nonfelonious assault. A careful review of the charge fails to disclose any merit in this exception. The court below fairly and fully presented the defendant's cause, both as to the law and the evidence, on his defenses of (1) insanity, (2) drunkenness, (3) provoked assault, and (4) self-defense. There was no evidence which, if accepted, would justify an acquittal on the grounds of self-defense. There is little support for the contention that defendant's assault on deceased was made in the heat of passion induced either by abusive language or an assault or a threatened assault. Yet the court below very carefully explained the law of manslaughter as applied to the evidence offered and defined and explained the law of self-defense. In this manner as well as in the state-

ment of contentions it gave defendant the full benefit of every possible aspect of the testimony favorable to him.

Counsel assigned to defend this prisoner have presented his cause with that degree of diligence and fidelity the public has come to expect from members of the legal profession of this State. They have pointed out and sought review of every possible criticism of the charge. These exceptive assignments of error as well as the case as a whole have received consideration commensurate with the gravity of the case. No cause for disturbing the verdict is made to appear.

In the trial below we find

No error.

STATE v. E. L. JACKSON.

(Filed 31 January, 1946.)

1. Rape § 23—

The punishment for a simple assault committed by a man or boy over 18 years of age upon a female, is in the discretion of the court, such assault being expressly excluded from the proviso of G. S., 14-33, limiting punishment to a fine of $50 or imprisonment of 30 days.

2. Same: Criminal Law § 62f—Judgment may be suspended only where defendant either assents or, being present, fails to object.

Defendant entered a plea of simple assault upon his daughter and a *nol. pros.* was entered on the charge of assault on his wife. Judgment was entered that the defendant be confined in jail and work the roads for two years, suspended upon payment of $100 for the use and benefit of his wife and $50 monthly thereafter for her benefit. Defendant excepted and appealed. *Held:* The court was without power to suspend the execution of the judgment on condition over the objection of the defendant, since the form of punishment imposed is neither sanctioned by statute nor assented to by defendant. Defendant was not placed on probation and G. S., ch. 15, Art. 20, is not involved in the decision.

APPEAL by defendant from *Williams, J.,* at September Term, 1945, of PENDER. Error.

Criminal prosecutions on bills of indictment charging that defendant, a male person over 18 years of age, did assault (1) Mrs. Earl Walker, a female person, and (2) Mrs. E. L. Jackson, a female person.

The defendant and his wife, Mrs. E. L. Jackson, live together in their home in Pender County. Their daughter, Mrs. Earl Walker, lives with them. On the afternoon of 18 August, 1945, the defendant returned to his home from a half-day fishing trip. His wife and daughter com-

plained that he had left home without providing a sufficient quantity of stove wood. An argument followed. The defendant's wife and daughter ordered him to get out of the house and leave home. The defendant slapped his daughter and a scuffle ensued.

A warrant charging an assault on Mrs. Walker and on Mrs. Jackson was issued by a magistrate and defendant was held under bond for trial in the county court. At the trial in the county court defendant was adjudged guilty and from the judgment pronounced he appealed.

In the Superior Court the grand jury returned two separate bills, one charging an assault on Mrs. Walker and the other an assault on Mrs. Jackson. The bills of indictment contain the averment that defendant is a man or boy over 18 years of age and the person assailed is a female person.

The two causes were consolidated for the purpose of trial and at the close of all the evidence defendant tendered a plea of guilty of a simple assault on Mrs. Walker, which plea was accepted. Thereupon a *nol. pros.* was entered as to the bill of indictment charging that defendant assaulted Mrs. Jackson.

The court pronounced judgment on the plea as follows:

"Let defendant be confined in jail and work roads for two years, suspended upon payment of $100.00 into the Office of Clerk of Superior Court for use and benefit of wife and $50.00 on the 25th of September and monthly thereafter."

Defendant excepted and appealed.

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

Earlie C. Sanderson for defendant, appellant.

BARNHILL, J. Defendant, by his exceptive assignments of error, poses two questions for decision: (1) when a man or boy over 18 years of age who is charged with an assault on a female tenders a plea of guilty of a simple assault "on Mrs. Walker," may the court impose sentence in excess of 30 days; and (2) may the court impose a prison sentence and then over the objection of defendant suspend or stay execution on condition the defendant make regular monthly payments toward the support of his wife who was not the person assaulted?

G. S., 14-33, creates no new offense. It relates only to punishment. Under its provisions all assaults, and assaults and batteries, not made felonies by other statutes are general misdemeanors punishable in the discretion of the court, except where no deadly weapon has been used and no serious damage done the punishment may not exceed a fine of $50 or imprisonment for 30 days, unless the assault is committed upon

a female by a man or boy over 18 years of age. Assaults and assaults and batteries upon a female by a man or boy over 18 years of age are expressly excluded from the proviso or exception. Thus they remain general misdemeanors. *S. v. Smith,* 157 N. C., 578, 72 S. E., 853; *S. v. Gregory,* 223 N. C., 415, 27 S. E. (2d), 140; *S. v. Bentley,* 223 N. C., 563, 27 S. E. (2d), 738; *S. v. Morgan,* 225 N. C., 549.

As said by *Walker, J.,* speaking for the Court in *S. v. Smith, supra:*

"Discarding all superfluities and rejecting nice distinctions and subtle refinements, and stripping these statutes to the bone, even to the marrow, the real intention of the Legislature is laid perfectly bare and its meaning becomes apparent. It all, therefore, results in this, that a man who is . . . convicted of a simple assault and battery upon a woman, . . . he being over the age of eighteen years, can be punished at the discretion of the court . . ."

But the court below pronounced judgment and then over the protest and objection of defendant suspended or stayed execution for an indefinite period on condition that defendant make monthly payments toward the support of his wife. In this there was error.

At common law the court could suspend judgment temporarily for some special purpose such as to allow the defendant time in which to move for a new trial or to show that he was entitled to the benefit of clergy or to apply for a pardon or to take some other step in the ordinary procedure of the case. *S. v. Bennett,* 20 N. C., 170; *S. v. Crook,* 115 N. C., 760; *S. v. Hilton,* 151 N. C., 687, 65 S. E., 1011.

In the early years of our history our judges, desiring to show leniency and at the same time hold the defendant under some restraint, began to extend the scope of this power by suspending sentence or staying execution on good behavior or other stipulated conditions. The procedure was upheld on the grounds that such orders were not prejudicial but favorable to the defendant and decision in each case was made to turn on the fact that defendant, being present, either sought or consented to such order.

"The authority of the court, on conviction, to postpone the infliction of punishment has been conceded only where the defendant either expressly assents or, being present, fails to object, and is therefore presumed to give his consent to the order." *S. v. Griffis,* 117 N. C., 709.

As thus approved the practice has prevailed so long that it may now be considered a settled part of the permissible procedure in such cases. *S. v. Crook, supra; S. v. Griffis, supra; S. v. Hilton, supra; S. v. Everitt,* 164 N. C., 399, 79 S. E., 274; *S. v. Tripp,* 168 N. C., 150, 83 S. E., 630; *S. v. Burnette,* 173 N. C., 734, 91 S. E., 364; *S. v. Greer,* 173 N. C., 759, 92 S. E., 147; *S. v. Hoggard,* 180 N. C., 678, 103 S. E., 891; *S. v. Hardin,* 183 N. C., 815, 112 S. E., 593; *S. v. Vickers,* 184 N. C., 676,

114 S. E., 168; *S. v. Phillips,* 185 N. C., 614, 115 S. E., 893; *S. v. Shepherd,* 187 N. C., 609, 122 S. E., 467; *S. v. Henderson,* 206 N. C., 830, 175 S. E., 201; *S. v. Anderson,* 208 N. C., 771, 182 S. E., 643; *S. v. Ray,* 212 N. C., 748, 194 S. E., 472; *S. v. Wilson,* 216 N. C., 130, 4 S. E. (2d), 440; *S. v. Calcutt,* 219 N. C., 545, 15 S. E. (2d), 9; *S. v. Pelley,* 221 N. C., 487, 20 S. E. (2d), 850; *S. v. Miller,* 225 N. C., 213; *S. v. Graham,* 225 N. C., 217.

But here the defendant did not consent. He in apt time entered his exception and noted his appeal. Hence, since the form of punishment imposed is neither sanctioned by statute nor assented to by defendant, the judgment cannot stand.

As said by *Stacy, C. J.,* in *S. v. Webb,* 209 N. C., 302, 183 S. E., 367:

"As the defendant neither sought nor accepted the indulgence and forbearance of the court, it was error to withhold final judgment, or some judgment in its nature final, so that the defendant might test the validity of the trial by appeal." *S. v. Burgess,* 192 N. C., 668, 135 S. E., 771; *S. v. Jaynes,* 198 N. C., 728, 153 S. E., 410; *S. v. Griffis, supra.*

The defendant was not placed on probation. The court clearly proceeded under the practice prevailing prior to the adoption of ch. 132, Public Laws 1937, now G. S., ch. 15, Art. 20. Hence anything here said has no bearing upon and is not intended as an interpretation or delimitation of that Act.

The judgment entered is stricken and the cause is remanded for a proper judgment.

Error and remanded.

STATE v. MONROE D. SHOUP.

(Filed 31 January, 1946.)

1. Criminal Law § 67—

On an appeal in criminal cases the Supreme Court cannot pass upon the weight of the evidence but only whether there is sufficient evidence to support conviction.

2. Larceny § 7—Evidence held sufficient to sustain conviction of larceny from the person.

The evidence tended to show that defendant and another, both of whom had been drinking, rode some distance in adjacent seats on a bus, that defendant got off the bus before reaching the station in a city short of the destination called for on his ticket, that he was later found in a hotel registered under an assumed name and having in his possession four $50

bills and three $20 bills, the identical denominations which his co-passenger had missed from his pocketbook when he found it on his bus seat after search upon discovering it was missing when he alighted from the bus, that the co-passenger had seen the money in his pocketbook after passing a station some 85 miles before the station at which defendant alighted, together with testimony that defendant made a statement to the officers to the effect that he did not know how much money his co-passenger had until he took it, with circumstances tending to show that prior thereto defendant did not have large sums of money *is held* sufficient to overrule defendant's motions for judgment of nonsuit.

3. Criminal Law § 34d—

Evidence that after the crime was committed defendant left the bus before reaching the station in a city prior to the city called for on his ticket, and registered at a hotel under an assumed name *held* competent as an incriminating circumstance in the nature of an admission as tending to show motive to cover up identity and avoid being traced.

4. Criminal Law § 81c—

Where defendant does not make it appear that a statement made by him was true, testimony of a police officer that he did not think it worth while to investigate defendant's statement, cannot be held prejudicial.

5. Constitutional Law § 35—

The introduction in evidence of incriminating papers taken from the defendant at the time of his arrest does not infringe the constitutional guarantee against self-incrimination, Art. I, sec. 11, and in the instant case defendant went upon the stand and thus waived such right.

6. Larceny § 6—

A paper issued defendant by his employer which entitled defendant to two weeks delay in paying a $5 deposit on house rent *held* competent in this prosecution for larceny to contradict defendant's claim as to the amount of money he had prior to the commission of the crime.

7. Criminal Law § 78e (2)—

An exception to the statement of the testimony of a witness is not available on appeal when defendant does not bring the matter to the trial court's attention at the time for immediate correction.

8. Criminal Law § 53k—

Statement of a contention favorable to defendant cannot be held for error, since, if defendant desired the statement made in any particular form, and, in fact, to entitle defendant to the statement of the contention at all, it is incumbent on defendant to submit request therefor.

9. Criminal Law § 53b—

The failure of the court to charge the jury as to the degree of circumstantial proof required to convict is not held for error in this case, the charge that the jury should be satisfied from the evidence beyond a reasonable doubt of defendant's guilt in order to justify conviction being sufficient on the degree of proof required. G. S., 1-180.

STATE *v.* SHOUP.

APPEAL by defendant from *Alley, J.*, at 9 July, 1945, Mixed Term, of GUILFORD.

The defendant was tried upon an indictment charging him with larceny of $260 from the person of C. H. Josey, and challenges the conduct of the trial in the particulars noted. The following summary is sufficient to present the case for review:

There was evidence to the effect that Josey and the defendant had ridden in the same bus seat from some distance east of Raleigh, Josey going home to Salisbury, and Shoup to Charlotte. Both had been drinking, and Josey had had several drinks. Josey had in his wallet about $300, which he had borrowed on his trailer from a bank in Norfolk—four $50 bills and three twenties in one compartment and the rest in another. The two sat together again on changing buses at Raleigh, and Josey saw the money in his pocketbook beyond Raleigh. Shoup got off the bus in Greensboro, before reaching the station, and Josey went on to Salisbury. There, on getting off the bus, he missed his pocketbook, and turning back, found it lying in the seat he had occupied, but found the four $50 bills and three twenties gone. The rest of the money was not disturbed.

Two police officers of Greensboro, having been given a description of Shoup and the denominations of the seven bills lost, found Shoup at a hotel, registered under the name of Foster. They found a purse hidden under a rug in the room, which Shoup admitted was his, containing four $50 bills, three $20 bills, and three ones. Shoup claimed that the money was his. Asked why he took the money, he replied that he didn't know the man had that much money. On cross-examination one of the officers modified the testimony to this: "I said, 'You did not know he had that much money until you took it?' and he said, 'Yes.'"

On the defense Shoup gave various reasons why he got off at Greensboro instead of going on to Charlotte as his ticket read, and introduced evidence tending to account for the money in his possession. As to the registration at the hotel, he said he sometimes went under the name Foster.

The State, over defendant's objection, was permitted to introduce a "notice" or paper issued to defendant by the Housing Office of Norfolk Navy Yard guaranteeing two weeks rent at Dale Dormitories, which would permit him to delay paying a "security deposit of $5" to the apartments for that length of time. The purpose as stated was to show the improbability of defendant having that much money at the time. Defendant stated that such a paper was issued to "all of them."

At the conclusion of the State's evidence, and again at the conclusion of all the evidence, defendant moved for judgment of nonsuit, and the

motions were denied. The defendant was found guilty and from the judgment imposing sentence appealed, assigning errors.

To save repetition particular incidents of the trial to which exceptions were taken are noted in the opinion.

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

William E. Comer for defendant, appellant.

SEAWELL, J. Our office on review does not permit us to pass on the weight of evidence. We can only assure the demurring defendant that he shall not be convicted except on evidence tending to show his guilt; *S. v. McKinnon,* 223 N. C., 160, 25 S. E. (2d), 606; *S. v. Johnson,* 220 N. C., 773, 18 S. E. (2d), 358; *S. v. Stephenson,* 218 N. C., 258, 10 S. E. (2d), 819; G. S., 15-173, and annotations; and we cannot agree with counsel for the appellant that the evidence submitted to the jury on the trial is not of that character. The motions for judgment as of nonsuit were properly overruled.

Appellant's first exception relates to the evidence that he registered at a hotel in Greensboro under an assumed name, after breaking his trip to Charlotte at that point and leaving the bus before reaching the station. Taken with other related circumstances it leads to the inference that his motive was to cover up his identity and avoid being traced for the recent crime. It was in the nature of an admission and competent as an incriminating circumstance. *S. v. Payne,* 213 N. C., 719, 197 S. E., 573; *S. v. Lawrence,* 196 N. C., 562, 146 S. E., 795; *S. v. Dickerson,* 189 N. C., 327, 127 S. E., 256. Exceptions 2 and 3 question the competency of the police officer's testimony that he did not think it worth while to investigate the claim of defendant that he had relatives in Greensboro. It is not clear that defendant could have been prejudiced by the statement.

Exceptions 5 and 6 are to the identification of the written "notice" or guaranty by the Navy Housing office of two weeks rent at the Dale Dormitories, and its introduction in evidence. The objection is both to its relevancy, and to its use as having been taken from defendant on a personal search, and thus compelling him to testify against himself. As to the manner of its acquisition and subsequent use in evidence, our Court has uniformly held that Article I, sec. 11, of the Constitution is not infringed by the introduction of evidence thus procured. Moreover, the defendant went upon the stand in his own behalf and waived his constitutional right against self-incrimination. *S. v. Hickey,* 198 N. C., 45, 48, 150 S. E., 615; *S. v. Graham,* 74 N. C., 646, 648. *S. v. Hollingsworth,* 191 N. C., 595, 132 S. E., 667, is distinguishable. In that case the defendant was required in open court and in the presence of the jury

to hand over to the State incriminating documents for use against him in the trial. As to the relevancy of the paper, however minor it may be in probative force, we cannot say that it is devoid of any inference contradictory of defendant's claim as to the amount of money he had when he came to Norfolk, a matter of circumstantial importance in the case. See *S. v. Payne, supra; S. v. Lawrence,* 196 N. C., 562, 146 S. E., 395; *S. v. Wellman,* 166 N. C., 354, 81 S. E., 745; *S. v. White,* 162 N. C., 615, 77 S. E., 999; *S. v. Bruce,* 106 N. C., 792, 11 S. E., 475.

In exception 8 the appellant complains that the trial judge misstated the testimony of a police officer in summing up the evidence. The judge told the jury, in substance, that the defendant said he took the money "because he did not know how much the man had." Passing the fact that this is a close approximation to the officer's testimony, if it was an erroneous statement, it was such as to require that the attention of the judge should be called to it at the time for immediate correction, otherwise it would not be available on appeal. This was not done. *S. v. Wagstaff,* 219 N. C., 15, 12 S. E. (2d), 657; *S. v. Hobbs,* 216 N. C., 14, 3 S. E. (2d), 431.

Exception 9 assigns as error the fact that the judge, as a contention and not as a direct statement of law, instructed the jury that where the conduct of the defendant could be attributed to either of two motives, one innocent and the other criminal, the jury should take the more charitable view. *S. v. Massey,* 86 N. C., 660. This was, of course, favorable to the defendant, but the court was not bound to give the instruction at all in the absence of a request. It was the privilege of the defense to ask for it if it was desired in different form. See *S. v. Rogers,* 166 N. C., 388, 390, 391, 81 S. E., 999.

The last assignment of error, exception 10, points out that the court failed to state the law where circumstantial evidence is involved, and that the evidence here is predominantly of that character. Precisely in what the failure consists, we are left to surmise: We assume that it relates to the degree of circumstantial proof required to convict. Every now and then, through the force of precedent, definitions and interpretations of the more technical features of the law are newly included in the category of "musts" in explaining the law and applying it to the evidence under G. S., 1-180. Perhaps in extraordinary or unusual conditions that duty might arise with regard to circumstantial evidence, but no precedent is brought to our attention in the instant case. The presence, use, and significance of circumstantial evidence in cases of this kind are commonly understood by all men, and there is danger that too much elaboration might have a tendency to confuse rather than aid the intellectual processes in reaching a reasonable verdict. In the present state of the law and practice, and upon the facts of this case, we think the duty

of the trial court is fully implied in the following observation from *S. v. Shook,* 224 N. C., 728, 731, in which the Court quotes with approval from *S. v. Adams,* 138 N. C., 688, 50 S. E., 765:

"There is no particular formula by which the Court must charge the jury upon the intensity of proof. 'No set of words is required by the law in regard to the force of circumstantial evidence. All that the law requires is that the jury shall be clearly instructed, that unless after due consideration of the evidence they are "fully satisfied" or "entirely convinced" or "satisfied beyond a reasonable doubt" of the guilt of the defendant, it is their duty to acquit . . .'"

The charge in the instant case met this requirement.

Upon the record we find

No error.

CARL HUNT, ADMINISTRATOR OF THE ESTATE OF WILLIAM L. HUNT, v. CITY OF HIGH POINT, A MUNICIPAL CORPORATION.

(Filed 31 January, 1946.)

1. Municipal Corporations § 14—City is required to provide handrails and sufficient light when appropriate in discharge of duty to maintain streets in reasonably safe condition.

Plaintiff instituted this action alleging that his intestate was killed as a result of the negligence of defendant municipality in failing to provide handrails or guards and sufficient light at a bridge which was a part of a city street. Defendant demurred on the ground that it was acting in its sovereign capacity and was immune from suit. *Held:* The demurrer should have been overruled, since the maintenance of guard rails and providing reasonably adequate light when appropriate is required of a city in discharge of its positive duty to maintain its streets in a reasonably safe condition for travel, G. S., 160-54. The doctrine of sovereign immunity obtains in this State only when the negligence alleged is solely or exclusively predicated on defect or negligence in the original construction.

2. Same—

While a city may not be under legal necessity of lighting its streets at all, where a city does maintain street lights, it is negligent in failing to provide lighting which is reasonably required at a particular place because of a dangerous condition of the street.

APPEAL by plaintiff from *Sink, J.,* 3 August, 1945, of GUILFORD.

This is an action to recover damages for the personal injury and death of plaintiff's intestate through the alleged negligence of the defendant

municipality in failing to provide handrails or guards, or to sufficiently light a bridge, part of the city street, constituting a danger to life and limb of those traveling thereupon, or to provide other appropriate means of protection.

The bridge, it is alleged, was over a creek or ravine running through that part of the city, and plaintiff's intestate, attempting to cross it in the nighttime, fell off the bridge into the ravine upon the rocks, breaking his hip, remaining partly submerged in the water, unable to extricate himself, for several hours. He finally died as the result of the injury.

The defendant demurred to the complaint as not stating a cause of action for that it appears on the face of the declaration that in both respects complained of—that is, as to furnishing handrails upon the bridge and as to lighting it—the municipality was acting in a sovereign or governmental capacity, was immune from suit, and whatever injury plaintiff's intestate sustained was *damnum absque injuria.* The demurrer was sustained, and plaintiff appealed.

Byron Haworth and Walser & Wright for plaintiff, appellant.

G. H. Jones for defendant, appellee.

SEAWELL, J. In no other of its aspects is the doctrine of "governmental immunity" more widely challenged than in its application to dangerous conditions in the streets created by defects of construction. Speaking of the rule of liability now prevailing in the majority of the states, McQuillin on Municipal Corporations, Revised Vol. 7 (1945), sec. 2901, has this to say:

"Apart from statute, late decisions in a majority of the states affirm implied municipal liability to private action for injuries resulting from defective public ways. In other words, the right to recover against a city for actionable negligence for defects in its streets and sidewalks is based on the common law, and requires no statute to proclaim it."

And further:

"Generally concerning public ways, the judicial decisions have established and imposed these obligations upon the municipal authorities: (1) Streets must be constructed in a reasonably safe manner, and to this end ordinary care must be exercised; (2) they must at all times be kept in proper repair or in a reasonably safe condition in so far as may be by the exercise of ordinary diligence and continuous supervision; (3) reasonably safe condition or proper repair implies that bridges, dangerous embankments, walls, declivities and like places and things adjoining or near the way must be safeguarded against by adequate railings, barriers or appropriate signals."

It will be observed that this analytical statement of municipal duty is presented almost in *ipsissimis verbis,* and approved, in *Willis v. New Bern,* 191 N. C., 507 (loc. cit. 510-511), 132 S. E., 286, 288. It is to be noted that in *Willis v. New Bern, supra,* no statute is referred to or made the basis of decision, although many of the cited cases depend on the force of the statute long existing in this State.

It has been repeatedly held that G. S., 160-54, relating to streets and bridges, imposes on towns and cities the positive duty to maintain the streets in a reasonably safe condition for travel, and that negligent failure to do so will render the municipality liable to private action for proximate injury. *Bunch v. Edenton,* 90 N. C., 431; *Russell v. Monroe,* 116 N. C., 720, 726, 121 S. E., 550; *Neal v. Marion,* 129 N. C., 345, 40 S. E., 116; *Fitzgerald v. Concord,* 140 N. C., 110, 113, 52 S. E., 309; *Graham v. Charlotte,* 186 N. C., 649, 120 S. E., 466; *Michaux v. Rocky Mount,* 193 N. C., 550, 137 S. E., 663; *Speas v. Greensboro,* 204 N. C., 239, 167 S. E., 804; *Radford v. Asheville,* 219 N. C., 185, 13 S. E. (2d), 256; *Waters v. Belhaven,* 222 N. C., 20, 21 S. E. (2d), 840; *Millar v. Wilson,* 222 N. C., 340, 23 S. E. (2d), 42.

It might well be questioned whether in the face of such a statute, upon which the public have a right to rely, preservation or continuance of an original structure palpably dangerous to the public could be reconciled with the proper maintenance of the streets in a reasonably safe condition for travel. In most other jurisdictions, as we have seen, that question has been resolved against the municipality. It might also be questioned whether, after the enactment of such a statute, a municipality could claim immunity from liability for obviously dangerous defects of construction subsequently installed. On both questions the weight of authority is generally against immunity. But in our own jurisdiction the defense of governmental immunity, or the existence of judicial discretion, has been upheld where the conduct of the municipality is called in question with respect to original planning and construction alone. *Scales v. Winston-Salem,* 189 N. C., 469, 127 S. E., 543; *Martin v. Greensboro,* 193 N. C., 573, 137 S. E., 666; *Blackwelder v. Concord,* 205 N. C., 792, 172 S. E., 392; *Klingenberg v. Raleigh,* 212 N. C., 549, 194 S. E., 297.

If the plaintiff had predicated the charge of negligence solely or exclusively on defect or negligence in the original construction of the street, and not to the breach of an incidental duty of safeguarding the danger thus created, the defendant might have relied on these cases with assurance. But the allegations of the complaint, and this appeal, raise the question whether it was the duty of the municipality to provide such means as ordinary prudence might require to alleviate the danger or avert injury. On this question authority here and elsewhere is uniformly against appellee. *Willis v. New Bern, supra; Speas v. Greensboro,*

supra; Comer v. Winston-Salem, 178 N. C., 383, 100 S. E., 619; *Graham v. Charlotte, supra; Michaux v. Rocky Mount, supra; Hamilton v. Rocky Mount,* 199 N. C., 504, 154 S. E., 844.

It is the existence of the danger, not its origin, with which the unwarned traveller is concerned, and which engages the attention of the safety laws. A municipality cannot, with impunity, create in its streets a condition palpably dangerous, neglect to provide the most ordinary means of protection against it, and avoid liability for proximate injury on the plea of governmental immunity.

In *Speas v. Greensboro, supra, Justice Adams,* writing the opinion for the Court, said: "The exercise of due care to keep its streets in a reasonably safe and suitable condition is one of the positive obligations imposed upon a municipal corporation. Discharge of this obligation cannot be evaded on the theory that in the construction and maintenance of its streets the municipality acts in a governmental capacity."

In *Willis v. New Bern, supra* (loc. cit. pp. 510-511), it is said: "(1) They shall be constructed in a reasonably safe manner, and to this end ordinary care must be exercised at all times; (2) They shall be kept in proper repair or in a reasonably safe condition to the extent that this can be accomplished by proper and reasonable care and continuing supervision; (3) proper repair implies that all bridges, dangerous pits, embankments, dangerous walls and the like perilous places and things very near and adjoining the streets shall be guarded against by proper railings and barriers or other reasonably necessary signals for the protection of the public. *Russell v. Monroe,* 116 N. C., 720; *Neal v. Marion,* 126 N. C., 412; *Fitzgerald v. Concord,* 140 N. C., 110; *Brown v. Durham,* 141 N. C., 249; *Darden v. Plymouth,* 166 N. C., 492; *Foster v. Tryon,* 169 N. C., 182; *Duke v. Belhaven,* 174 N. C., 96; *Stultz v. Thomas,* 182 N. C., 470; *Goldstein v. R. R.,* 188 N. C., 636."

In *Fitzgerald v. Concord, supra,* at page 112, *Justice Hoke,* speaking for the Court, adopts the language of *Merrimon, J.,* in delivering the opinion of the Court in *Bunch v. Edenton, supra:* "And proper repair implies also that all bridges, dangerous pits, embankments, dangerous walls, and the like perilous things very near and adjoining the streets shall be guarded against by proper railings and barriers."

In 8 Am. Jur., p. 937, the erection of guard rails is referred to the duty of maintenance and repair: "The necessity of erecting guard rails upon bridges, or upon the approaches thereto is unquestionably a part of the duty of maintenance and repair, if such rails are in fact reasonably necessary for the safety of the public in using the bridge. Failure in this regard will render the political subdivision charged with the maintenance liable for injuries resulting therefrom."

Appellee argues that since a municipality is not under the legal necessity of lighting its streets at all, it is under no obligation to light them at points of danger, citing *Brady v. Randleman,* 159 N. C., 434, 74 S. E., 811; *White v. New Bern,* 146 N. C., 447, 59 S. E., 992. Well considered cases applying that doctrine are careful to note that its application is confined to situations where the statute imposing the more positive duty has been observed, and the streets are in reasonably safe condition for travel; in the case at bar, accepting the allegations of the complaint as true, they were not. Under the suggested view the law, upon which the traveling public have a right to rely, would be nullified by a doctrine extended far beyond its political necessities and become a trap. Careful examination of the cited cases show this principle to be recognized. The highly progressive and industrialized City of High Point had not exercised the privilege of a complete blackout and, therefore, had the facilities for adequately lighting this dangerous section of the street, if that is what ordinary prudence would suggest.

Courts are reluctant to dictate just what devices of warning or protection should be adopted in particular cases or as to particular dangerous conditions under control of a municipality, or other party, charged with negligence, but the absence of the appropriate devices, particularly those in common use for the purpose, is evidence of negligence; and so is absence of reasonably adequate lighting in a defective condition of the streets exposing the traveller to this sort of danger.

In applying the statute, G. S., 160-54, requiring towns and cities to keep their streets in a reasonably safe condition for travel, the decisions have made no distinction which would justify us in excluding from that care dangerous situations, of whatever origin, on the theory of governmental immunity. Negligent failure to take such measures as ordinary prudence requires to avert injury, where the municipality has actual or imputable knowledge of the dangerous condition, would render the municipality liable for injury proximately caused.

The plaintiff has the right to go to the jury in proof of the allegations of his complaint, and the judgment sustaining the demurrer is

Reversed.

STATE v. KENNETH PETRY.

(Filed 31 January, 1946.)

1. Criminal Law § 41e—

Inconsistency in the testimony of a witness goes only to its credibility and not to its competency.

2. Criminal Law § 41e: Rape § 25—

In this prosecution for assault with intent to commit rape, the blouse offered in evidence *held* competent for the purpose of corroborating the testimony of witnesses as to tears about the shoulder, and inconsistencies in the testimony of prosecutrix on the question of whether the blouse was in the same condition at the trial as it was immediately after the assault affects only the question of credibility.

3. Criminal Law § 48b—

Where there is no request to limit the scope of evidence competent for the purpose of corroboration, the evidence is competent for general purposes. Rule 21.

4. Criminal Law § 1b—

Intent is a mental attitude which seldom may be proven by direct evidence, but must ordinarily be proven by circumstances from which it may be inferred.

5. Rape § 25—

Evidence in this case *held* sufficient upon the question of whether the assault was committed by the defendant with intent to commit rape.

6. Rape § 24—

In order to constitute an assault with intent to commit rape it is not necessary that the intent continue throughout the assault, it being sufficient if at any time during the assault the defendant intends to accomplish his purpose notwithstanding any resistance on the part of prosecutrix.

7. Criminal Law § 53c: Rape § 25—

In this prosecution for assault with intent to commit rape the charge of the court *is held* to have correctly placed the burden on the State to prove each of the essential elements of the offense beyond a reasonable doubt, and defendant's exception thereto is untenable.

APPEAL by defendant from *Williams, J.*, at June Criminal Term, 1945, of WAKE.

The defendant was tried upon a bill of indictment charging him with an assault, with intent to commit rape, upon one Martha Anne Midgette. The jury returned a verdict of guilty of an assault with intent to commit rape. From sentence of imprisonment predicated on the verdict the defendant appealed, assigning errors.

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

W. Brantley Womble and L. S. Brassfield for defendant, appellant.

SCHENCK, J. The defendant was convicted upon the charge of having committed an assault upon one Martha Anne Midgette, with the intent

to commit rape upon the said Midgette, and judgment of imprisonment was pronounced, from which the defendant appealed to the Supreme Court, assigning errors.

This case can best be discussed by considering the exceptive assignments of error in the order set out in the appellant's brief.

The first exceptive assignments of error set out in the appellant's brief, which relate to the admission in evidence, over objection of the defendant, of a blouse contended by the State to have been worn by the prosecutrix at the time of the alleged assault. It is contended by the appellant that the testimony of the prosecutrix was to the effect that the blouse at the time it was offered in evidence was not in the same condition as it was immediately after the alleged assault, and was therefore not competent to be introduced in evidence. In the first place we do not concur in the defendant's contention as to the testimony of the prosecutrix. An examination of the record reveals that the prosecutrix at one time testified in effect that the condition of the blouse was the same at the time of its introduction in evidence and at the time immediately following the assault. She testified on redirect examination, that the blouse was in the same condition at the trial as when she took it off the day of the assault, although at another time she said the condition was not the same. Her testimony on this subject appears to be inconsistent, and if it be so, such inconsistency in the testimony goes only to its credibility. *S. v. Baxley,* 223 N. C., 210, 25 S. E. (2d), 621. The blouse introduced had certain tears about the shoulder, and the prosecutrix, as well as the witness Hodge, testified that the night of the alleged assault the blouse prosecutrix had on was torn about the shoulder. The admission of the blouse in evidence was competent for the purpose of corroborating these two witnesses, and, in the absence of request to limit it to corroboration it was competent for general purposes. *S. v. Shepherd,* 220 N. C., 377, 17 S. E. (2d), 469; Rule 21, Rules of Practice in the Supreme Court, 221 N. C., 558. These exceptions cannot be sustained.

The second group of exceptive assignments of error set out in appellant's brief are those relating to the refusal of the court to sustain defendant's motion at the conclusion of State's evidence and renewed at the conclusion of all the evidence, to dismiss the action as it relates to the charge of an assault with intent to commit rape. While the appellant does not seem to controvert that there was sufficient evidence to be submitted to the jury upon the charge of an assault, he does controvert that there was sufficient evidence to be submitted to the jury upon the charge of an assault with intent to commit rape. The gravamen of the charge in the bill is an assault with intent to commit rape, and an intent being a mental attitude it is seldom, if ever, susceptible of proof by direct evidence, it must ordinarily be proven by circumstantial evidence, that is,

by proving facts from which it may be inferred. *S. v. Smith,* 211 N. C., 93, 189 S. E., 175. However, in the instant case the evidence was sufficient to carry to the jury the issue of defendant's intent to commit rape. The prosecutrix testified in effect that the defendant forced her upstairs into a room alone and that he told her "I brought you here for one purpose and I don't intend to let you out until I get it," and also said to her "he brought me there for one reason and I might as well lay down because he wouldn't stop until he got it." It is not necessary to complete the offense charged that the defendant retain the intent throughout the assault, but if he, at any time during the assault, have an intent to gratify his passions upon the prosecutrix, notwithstanding any resistance upon her part, the defendant would be guilty of the offense charged, *S. v. Williams,* 121 N. C., 628, 28 S. E., 405; 89 N. C., 521; *S. v. Mehaffey,* 132 N. C., 1062, 44 S. E., 107. None of this group of assignments can be sustained.

The third group of exceptive assignments of error set out in appellant's brief relate to the charge of the court, it being contended by the defendant that the court failed to charge that the burden of proof of the offense rested on the State to satisfy the jury beyond a reasonable doubt as to each essential element of the offense. We do not concur with the interpretation of the charge contended for by the appellant. The court charged the jury: "If you find from the evidence and beyond a reasonable doubt that the prisoner assaulted the prosecutrix Martha Anne Midgette with intent to commit rape you will return such a verdict, that is, guilty of assault with intent to commit rape. If you do not so find you will consider upon the evidence as to whether or not the prisoner is guilty of assault upon a female. If you find from the evidence and beyond a reasonable doubt that the prisoner assaulted the prosecutrix, Martha Anne Midgette, you will return a verdict of guilty of assault upon a female. If you have a reasonable doubt as to either of these charges you will return a verdict of not guilty." And, again, in conclusion, the court charged: "Now, gentlemen, this is largely a question of fact for you. As I said a moment ago, if you find, beyond a reasonable doubt, that the defendant committed an assault upon the prosecuting witness, Martha Anne Midgette, as I have defined that term to you, with the intent in his mind to carnally know and ravish Martha Anne Midgette by force and violence and against her will notwithstanding any resistance she might make, it will be your duty to return a verdict of guilty of assault with intent to commit rape. If you do not so find beyond a reasonable doubt but do find beyond a reasonable doubt that he committed an assault as I have defined that term to you, you will find him guilty of assault upon a female. If you have a reasonable doubt as to either of those charges you will return a verdict of not guilty." This

group of exceptive assignments of error set out in appellant's brief are untenable.

We have considered each assignment of error set out in the appellant's brief, those not so set out being deemed abandoned, and see no legal cause for disturbing the judgment below, and therefore, we find

No error.

STATE v. RAYMOND BENNETT, HUGH GIBSON (ALIAS BOB O'CONNELL, ALIAS BOB MARTIN, ALIAS F. H. HEATER), LACY SALMON, HERBERT CARROLL, HENRY HADIE AGNER, CLARENCE NORRIS AND SAM H. THOMPSON.

(Filed 31 January, 1946.)

1. Homicide § 4d—

Murder committed in the perpetration or attempt to perpetrate a robbery is murder in the first degree. G. S., 14-17.

2. Same—

Where there is a conspiracy to rob and one of the conspirators kills in the attempt to perpetrate the robbery, each of the conspirators is guilty.

3. Criminal Law § 41d—

Where incriminating testimony of a witness has been attacked by cross-examination to impeach the witness' credibility, testimony by officers of similar, consistent statements made by the witness is competent for the purpose of corroborating the witness.

4. Criminal Law § 33—

The finding of the court that the confessions offered in evidence were voluntary will not be disturbed on appeal when the finding is supported by evidence.

5. Same—

Unless challenged, the voluntariness of a confession will be taken for granted.

6. Same—

The fact that defendants were under arrest and in the presence of a number of officers at the time of making confessions does not in itself render the confessions incompetent for lack of voluntariness.

7. Criminal Law § 34g—

Conversations between several conspirators in furtherance of the common purpose is competent against another conspirator even though he was not present.

8. Homicide § 25—

Evidence of defendant's participation in a conspiracy to rob resulting in the death of the victim at the hands of a co-conspirator in the attempt to perpetrate the offense *held* sufficient to overrule defendant's motion to nonsuit.

9. Criminal Law § 81e—

When there is no prejudicial error in the charge when read contextually, assignments of error thereto will not be sustained.

APPEAL by defendant Raymond Bennett from *Clement, J.*, at 18 June, 1945, Criminal Term, of GUILFORD.

Criminal prosecution upon a bill of indictment charging that "Hugh Gibson (*alias* Bob O'Connell, *alias* Bob Martin, *alias* F. H. Heater), Lacy Salmon, Herbert Carroll, Henry Hadie Agner, Clarence Norris, Sam H. Thompson and Raymond Bennett, late of the County of Guilford, on the 9th day of June, A.D. 1944, with force and arms, at and in the county aforesaid, unlawfully, wilfully, feloniously, premeditatively and deliberately and of their malice aforethought, did kill and murder R. L. (Bob) Beck, while engaged in the perpetration of the crime of robbery against the form of the statute," etc.

The defendants, and each of them, on being arraigned, pleaded not guilty. Thereafter, prior to the drawing of the jury, the solicitor announced in open court that the State takes a *nol. pros.* with leave as to defendant Hugh Gibson (*alias* Bob O'Connell, etc.). And during the progress of the trial defendant Lacy Salmon, through his counsel, entered a plea of guilty of murder in second degree, and at close of argument of counsel, defendants Henry Hadie Agner and Clarence Norris, through their counsel also pleaded guilty to murder in the second degree, and the case was submitted to the jury only as to defendants Herbert Carroll, Sam H. Thompson and Raymond Bennett. As to each of these the jury returned verdict of "Guilty of the felony of murder in the second degree as charged in the bill of indictment."

The judgment of the court is that each of the defendants, so pleading and being found guilty, be confined in the State's Central Prison, Raleigh, at hard labor for a term of not less than 25 nor more than 30 years and assigned to work under the supervision of the State Highway and Public Works Commission.

Defendant Raymond Bennett only appeals therefrom to Supreme Court and assigns error.

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

H. L. Koontz and J. A. Cannon, Jr., for defendant, appellant.

WINBORNE, J. While the assignments of error on this appeal are too numerous and extensive to admit of treatment *seriatim* within the bounds of an opinion of reasonable length, we have given careful attention to each of them and fail to find cause for disturbing the judgment on the verdict against appellant.

In this State a murder "which shall be committed in the perpetration or attempt to perpetrate any . . . robbery . . . or other felony, shall be deemed to be murder in the first degree . . ." G. S., 14-17, formerly C. S., 4200. See also *S. v. Miller,* 219 N. C., 514, 14 S. E. (2d), 522, and cases there cited.

Moreover, the record discloses that the State proceeded in the trial court upon the theory that if the defendants conspired to rob R. L. (Bob) Beck and he was shot and killed by Salmon, one of the conspirators in the attempted perpetration of the robbery, each, and all of the defendants would be guilty of murder. This is held to be a correct principle of law. *S. v. Bell,* 205 N. C., 225, 171 S. E., 50, and cases cited. See also *S. v. Stefanoff,* 206 N. C., 443, 174 S. E., 411; *S. v. Green,* 207 N. C., 369, 177 S. E., 120; *S. v. Kelly,* 216 N. C., 627, 6 S. E. (2d), 533; *S. v. Miller, supra.*

In the light of these principles of law it is deemed appropriate to treat some of the subjects in which the main points stressed by counsel for defendant have been grouped.

The first group of assignments relate to admission of testimony of officers for purpose of corroborating the witness Gibson, an original defendant, as to statements made by him to them while he was in prison in Georgia and on return trip to North Carolina several months after the death of Beck. In this connection the record discloses that without objection Gibson testified: That on 9 June, 1944, he saw defendant Carroll about 6 o'clock in the afternoon at Waco Service Station near High Point and exchanged cars with him for a few hours—letting him have a 1940 black Ford sedan and a pistol which Carroll asked for; that his car was returned about 12 o'clock that night and "Bennett was sitting in it," but the pistol was not in the car; that seeing Carroll, Bennett and Agner the next morning, he asked Carroll where his pistol was, and he replied that he had it and that it had killed Beck; that after he, the witness, had been brought from the Georgia penitentiary he asked Bennett how he got mixed up in a thing like this, and Bennett said he had Carroll's car and that Agner borrowed the car from him in order to go get Carroll and that a little later Carroll, Agner, Norris, Salmon and he, Bennett, got in the car and rode out to Beck's house, and they later came back to High Point and he and Carroll got in Carroll's car and drove away and later went to Waco Service Station.

And on cross-examination the line of questioning was apparently for impeachment of Gibson's credibility. It was, therefore, appropriate and competent to show by the officers that he had made similar consistent statements to them. *S. v. Bethea,* 186 N. C., 22, 118 S. E., 800; *S. v. Brodie,* 190 N. C., 554, 130 S. E., 205; *S. v. Gore,* 207 N. C., 618, 178 S. E., 209; *S. v. Harris,* 222 N. C., 157, 22 S. E. (2d), 229.

The appellant also challenges alleged confession made by him, and by Thompson, Norris and Agner, to the officers. In keeping with the procedure outlined in *S. v. Whitener,* 191 N. C., 659, 132 S. E., 603, the court heard evidence as to the circumstances and character of the alleged confessions, and found that same were voluntary. This finding is supported by evidence, and the record fails to show that defendants offered or requested to offer evidence, or contended otherwise. "The court's ruling thereon will not be disturbed, if supported by any competent evidence." *S. v. Smith,* 221 N. C., 400, 20 S. E. (2d), 360, and cases cited. Moreover, unless challenged, the voluntariness of a confession will be taken for granted. *S. v. Wagstaff,* 219 N. C., 15, 12 S. E. (2d), 657, and cases cited.

And the fact that defendants were under arrest and in the presence of a number of officers at the time the confessions were made, does not of itself render the confessions incompetent for lack of voluntariness. *S. v. Murray,* 216 N. C., 681, 6 S. E. (2d), 513.

The appellant further challenges the competency of the testimony of the witness, the defendant Salmon, as to conversations between him and defendants Carroll, Agner and Norris which were not expressly shown to have been in presence of defendant Bennett. These conversations appear to have been in furtherance of a common purpose or conspiracy to rob the deceased Beck, as to which the evidence is clear. "The acts and declarations of each conspirator, done or uttered in furtherance of the common, illegal design, are admissible in evidence against all." *S. v. Smith, supra,* and cases cited.

Appellant also assigns as error the refusal of the court to grant his motion for judgment as in case of nonsuit. These assignments appear to be predicated upon the exclusion of evidence to which other assignments of error relate. Hence the evidence having been properly received, it does not appear that counsel seriously contend that the assignments are well taken. Without reciting the evidence, it is sufficient to say, however, that while the evidence fails to show that Bennett was a master mind in the conspiracy, it does show that all along the line of the conspiracy he appeared at the elbow of Carroll, whom the evidence reveals as playing a leading role. Bennett, according to the record, bears the nickname of "Groundhog," and for him, if he did not know what was

going on, it is a pity that he failed to see his shadow by the light of the approaching event, and turn back.

When the charge, to which numerous assignments of error relate, is read contextually in the light of applicable principles of law, no prejudicial error is shown.

In the judgment below, there is

No error.

JAMES GRAHAM v. CURRIE SPAULDING.

(Filed 31 January, 1946.)

1. Adverse Possession § 19—

In an action involving title to timber lands, evidence that plaintiff, for a period of 27 years, listed the property for taxes, cleared and cultivated small patches, cut and removed logs and crossties, *held* sufficient to be submitted to the jury on the question of adverse possession by the continuous use of the property for the purpose of which it was susceptible.

2. Trial § 16—

Where evidence is admitted conditionally and later excluded and the jury instructed not to consider it, any error in its admission is corrected and an exception to its admission cannot be sustained.

3. Adverse Possession § 18—

In a case tried solely on the theory of adverse possession for a period of 20 years, a deed to plaintiff executed at the time he took possession but unregistered until after defendant's deed, is competent as a relevant fact in connection with other circumstances tending to show claim of title.

4. Same—

Under a claim of title by 20 years adverse possession, tax receipts, though insufficient alone, are competent in connection with other circumstances to show that plaintiff had been asserting a claim to the property.

5. Evidence § 15—

Conflict in statements in plaintiff's evidence affects its credibility but not its competency.

APPEAL by defendant from *Hamilton, Special Judge,* at February Term, 1945, of COLUMBUS.

Civil action for trespass.

The plaintiff alleges he is the owner and in possession of a 13-acre tract of land in Columbus County, described by metes and bounds in the complaint; that the defendant has trespassed thereon, after being forbidden,

and that plaintiff is entitled to injunctive relief and damages for the trespass already committed.

Plaintiff further alleges that he obtained a deed to the *locus in quo* 11 October, 1917, from Mary F. Jacobs, which deed was not recorded until 20 June, 1944; that he purchased the property in good faith and entered into possession immediately and claims title thereto by adverse possession for twenty years.

The defendant admits he cut and removed timber from the land described in the complaint, in July, 1944, but alleges he is the owner of the property, having obtained a quitclaim deed therefor, 17 June, 1944, from Eliza Pigford, the daughter and only child of Mary F. Jacobs, and her husband, W. Pigford, which deed recites a cash consideration of $30.00 and was recorded prior to plaintiff's deed.

Issues of ownership, trespass and damages were submitted to the jury and answered in favor of the plaintiff.

From judgment thereon, the defendant appealed, assigning error.

Powell & Lewis and R. H. Burns for plaintiff.

E. M. Toon and Varser, McIntyre & Henry for defendant.

DENNY, J. The appellant assigns as error the failure of the court below to sustain his motion for judgment as of nonsuit, and for a directed verdict in favor of defendant. This assignment of error cannot be sustained.

It is in evidence that the plaintiff has cultivated part of the land in controversy, and cut logs, piling poles and crossties off the premises from time to time, over a period of 27 years prior to the institution of this action. Substantially all of the land is in timber. Small patches have been cleared by the plaintiff and used during the last ten or twelve years for tobacco beds. The plaintiff has listed the property for taxes for 27 years.

We think there is sufficient evidence of adverse possession to be submitted to the jury under the decisions of this Court in *Ward v. Smith,* 223 N. C., 141, 25 S. E. (2d), 463; *Berry v. Coppersmith,* 212 N. C., 50, 193 S. E., 3; *Locklear v. Savage,* 159 N. C., 236, 74 S. E., 347; *Coxe v. Carpenter,* 157 N. C., 557, 73 S. E., 113; and *Berry v. McPherson,* 153 N. C., 4, 68 S. E., 892.

When the evidence is considered, as it must be, in the light most favorable to the plaintiff, it tends to show use and occupation by the plaintiff for the required statutory period, and that during said period the plaintiff has from time to time, continuously subjected the disputed land to the only use of which it was susceptible.

The appellant seriously contends and assigns as error the admission in evidence of plaintiff's deed from Mary F. Jacobs, notwithstanding the fact that the court at the time the deed was offered and admitted, stated that it was admitted conditionally and later excluded it and instructed the jury not to consider the deed or the evidence with respect to it. This assignment of error cannot be sustained. If the deed had been improperly admitted the error was corrected. Moreover, the appellant did not except to the introduction of the deed, but only to the testimony with respect to it after it had been introduced without objection. As a matter of fact, we think the deed was competent to show plaintiff's claim of title. Since another deed to the identical property which plaintiff claims, had been filed of record, prior to the filing of his deed, the plaintiff had a right to offer his deed, not as evidence of adverse possession, but as a relevant fact in connection with other circumstances tending to show claim of title; a claim of title, however, which under the circumstances was not a good and indefeasible one, unless the plaintiff could further show that he had held the premises which he claimed, adversely for twenty years. There is an allegation in the complaint to the effect that plaintiff has held possession of the premises for seven years adversely under his deed; however, the case was tried below upon the allegations of adverse possession for twenty years and no evidence was adduced in support of a claim for title under color. In view of the theory upon which the case was tried, the defendant would have no cause for complaint if the deed had not been excluded. For this Court said, in *Tilghman v. Hancock,* 196 N. C., 780, 147 S. E., 300: "There is no presumption of law that a purchaser takes possession under a deed. *Prevatt v. Harrelson,* 132 N. C., 250, 43 S. E., 800. Therefore, the deed of itself was not sufficient evidence of possession. As the deed was made before the controversy arose, the execution and recording thereof would be a relevant fact in connection with other sufficient evidence tending to show a claim of title and adverse possession. Though not sufficient of itself for that purpose, under the circumstances the deed would be analogous in probative weight to the listing of land and the payment of taxes thereon."

The appellant also assigns as error the admission of plaintiff's tax receipts in evidence. The plaintiff testified he had listed the property for taxes for 27 years and offered in evidence certain tax receipts. These tax receipts were admissible for the purpose of showing that the plaintiff was and had been asserting a claim to the property. They were so admitted and the jury instructed accordingly. The court further instructed the jury that payment of taxes alone was not sufficient to prove a claim of adverse possession. This Court has repeatedly held: "The listing of the land and payment of taxes is a relevant fact, in connection with

other circumstances, tending to show a claim of title and an adverse or hostile possession, though not sufficient by itself for the purpose." *Austin v. King,* 97 N. C., 339; *Ruffin v. Overby,* 105 N. C., 78, 11 S. E., 251; *Bernhardt v. Brown,* 122 N. C., 587, 29 S. E., 884; *Christman v. Hilliard,* 167 N. C., 4, 82 S. E., 949; *Belk v. Belk,* 175 N. C., 69, 94 S. E., 726; *Perry v. Alford,* 225 N. C., 146, 33 S. E. (2d), 665. This assignment of error cannot be sustained.

We have carefully considered the remaining thirty-three exceptions, thirty-two of which are to his Honor's charge, and we find none of them of sufficient merit to disturb the verdict below.

There are conflicting statements in plaintiff's evidence, but, as stated in *Ward v. Smith, supra:* "Discrepancies and contradictions, even in plaintiff's evidence, are matters for the jury, and not for the court."

In the trial below, we find

No error.

A. H. PATTERSON AND HIS WIFE, LOIS PATTERSON, v. C. T. BRANDON.

(Filed 31 January, 1946.)

1. Wills § 33c—

The law favors the early vesting of estates.

2. Same—

Testator devised real estate to his wife for life, remainder to his sister "if she looks after and takes proper care of my beloved wife," without limitation over. *Held:* Testator's sister took a vested remainder and the language of the proviso was insufficient to work a forfeiture upon the failure of the remainderman to take care of testator's wife.

APPEAL by defendant from *Carr, J.,* 30 July, 1945, in Chambers, in ALAMANCE.

This is an action brought under the Uniform Declaratory Judgment Act, G. S., Art. 26, sec. 1-253, for the purpose of interpreting the last will and testament of W. P. Ingle, deceased, to determine whether the plaintiffs have a good and indefeasible title in fee simple to the property devised in said will. It is admitted that W. P. Ingle, at the time of his death, was seized and possessed of a fee simple title to said property.

The will of W. P. Ingle was probated 19 August, 1930. The testator devised a life estate in the land in controversy to his wife, Mollie Ingle, and the remainder to his sister, Addie Shoe, in the following language: "And at my beloved wife, Mollie Ingle's death, the remainder to go to my sister, Addie Shoe, if she looks after and takes proper care of my beloved wife, Mollie Ingle."

An action was instituted 1 October, 1935, in the Superior Court of Alamance County by Mollie Ingle against Mrs. Addie Shoe and her husband, J. W. Shoe, in which the plaintiff alleged that the said Addie Shoe had not provided for her according to the terms of the will of W. P. Ingle, and praying for judgment that the defendants had forfeited all their right, title and interest in and to the W. P. Ingle property. A consent judgment was entered 9 April, 1940, reciting that a settlement had been reached in the action at May Term, 1937, whereby the said Addie Shoe and her husband, J. W. Shoe, executed and delivered to Mollie Ingle for a consideration of $1,500.00 a deed dated 26 May, 1937, conveying to her all their right, title and interest in and to said property, and providing further that in view of said settlement the parties were consenting to a nonsuit in said action.

Subsequently, Mollie Ingle conveyed the Ingle land to Dr. R. E. Brooks and wife, Lucy Brooks, by deed dated 1 January, 1940, containing full covenants and warranties. Thereafter, on 10 January, 1941, Dr. Brooks and wife conveyed said land to the plaintiffs by a deed also containing full covenants and warranties. All the above deeds are duly recorded in the office of the Register of Deeds of Alamance County.

The plaintiffs subdivided the property into lots and the defendant contracted to pay $1,400.00 for two of said lots, but refused to accept plaintiffs' deed for the property, upon the ground that the plaintiffs could not convey a good and indefeasible title thereto.

The court being of the opinion that the plaintiffs are the owners of a good and indefeasible title in fee simple to said property, and that the defendant should accept plaintiffs' deed and pay for the property according to the terms of his contract, judgment was entered accordingly, and the defendant appealed.

Thos. C. Carter for plaintiffs.

J. Elmer Long and Clarence Ross for defendant.

DENNY, J. The appellant contends that the devise of the remainder in the Ingle property to Addie Shoe, was subject to the proviso: "If she looks after and takes proper care of my beloved wife, Mollie Ingle," and that this proviso is a condition precedent, which condition was never performed and therefore title never vested in her. If this contention is correct, then the deed from Addie Shoe and her husband, J. W. Shoe, to Mollie Ingle did not convey the remainder in said property and Mollie Ingle's deed to Dr. and Mrs. Brooks conveyed nothing more than her life estate; and the deed from Dr. and Mrs. Brooks to the plaintiffs would likewise be so limited.

We do not so hold. The law favors a vesting of estates and we think Addie Shoe took a vested remainder in the land devised under the terms of the will of W. P. Ingle. And, since the will contains no limitation over upon the failure of the devisee to take care of the testator's wife, we do not think the language used in the above proviso sufficient under our decisions, to work a forfeiture of the estate upon the failure of the devisee to take care of the wife. *Oxford Orphanage v. Kittrell,* 223 N. C., 427, 27 S. E. (2d), 133; *Church v. Refining Co.,* 200 N. C., 469, 157 S. E., 438; *Marsh v. Marsh,* 200 N. C., 746, 158 S. E., 400; *Cook v. Sink,* 190 N. C., 620, 130 S. E., 714; *Hall v. Quinn,* 190 N. C., 326, 130 S. E., 18; *Askew v. Dildy,* 188 N. C., 147, 124 S. E., 124; *Allen v. Allen,* 121 N. C., 328, 28 S. E., 513; *Misenheimer v. Sifford,* 94 N. C., 592; *McNeely v. McNeely,* 82 N. C., 183.

In *McNeely v. McNeely, supra,* where the testator devised all his property to his wife for life and then devised the remainder as follows: "I give all the lands that I have to my son Billy . . . at the death of his mother, by him seeing to her." Billy predeceased his mother, but it was held that he took a vested remainder in the property and that the words, "by him seeing to her," did not operate as a condition to terminate or impair his estate. A similar conclusion was reached in the case of *Misenheimer v. Sifford, supra,* where the testator devised certain property to his son, "Provided he maintain his mother during life comfortably, and shall give her houseroom and firewood, and all necessaries of life, during her life or widowhood." Likewise, in the case of *Allen v. Allen, supra,* the will provided: "If my son R. J. Allen will agree to live at my residence that I have left my wife during her life, at her death, if my son R. J. Allen shall think proper to pay $2,000.00 for all the land and residence that I left to my wife during her life, he shall have the privilege of doing so, and he shall have a fee simple right and title to it to him and his heirs forever." This Court held the devisee, R. J. Allen, took a vested remainder in fee, charged with $2,000.00.

We need not determine whether the above proviso was sufficient to create more than a moral obligation on the part of the devisee to render aid and assistance to the widow of W. P. Ingle. We do hold, however, that it was insufficient, if broken, to divest Addie Shoe of the interest devised to her under the will of her brother, W. P. Ingle. Therefore, the deed from Addie Shoe and her husband, did convey the remainder to Mollie Ingle, the holder of the life estate, thereby giving her a good and indefeasible title to the property. Consequently, the plaintiffs, now holding the property through *mesne* conveyances from Mollie Ingle, have a good and indefeasible title in fee simple to said property.

The judgment of the court below is

Affirmed.

IN THE MATTER OF: MRS. E. T. BADGETT, ADMINISTRATRIX OF THE ESTATE OF ELMER THOMAS BADGETT, DECEASED.

(Filed 31 January, 1946.)

Descent and Distribution § 1: Master and Servant § 30b: Death § 9—

A railroad company settled a claim for wrongful death of an employee engaged in interstate commerce. The funds were paid to his administratrix. *Held:* The funds have the same status as though they had been recovered under the Federal Employer's Liability Act *in solido* without apportionment of the award by a jury, and therefore the funds should be distributed according to our statute of distribution and not apportioned among the beneficiaries of the deceased according to the pecuniary loss each sustained.

APPEAL by the administratrix from *Nettles, J.*, at September Term, 1945, of FORSYTH.

Special proceedings to require Mrs. E. T. Badgett, administratrix of the estate of Elmer Thomas Badgett, deceased, to distribute certain funds in her hands, according to the North Carolina laws of intestacy.

The deceased, a resident of Forsyth County, was killed on 2 March, 1944, by a train of the Southern Railway Company, while in the performance of his duties as an employee and while employer and employee were engaged in interstate commerce, within the meaning and intent of the Federal Employers' Liability Act. He died intestate, and his widow, Mrs. E. T. Badgett, qualified as administratrix of his estate on 11 October, 1944. She employed Bernard M. Savage, of Baltimore, Maryland, as attorney, to handle the claim for wrongful death. No suit was ever filed and the Southern Railway Company settled the claim for $15,000.00, took a release from Mrs. E. T. Badgett, as administratrix of the estate of Elmer Thomas Badgett, and issued its draft in that amount to Mrs. E. T. Badgett, administratrix of the estate of Elmer Thomas Badgett, deceased, and Bernard M. Savage, attorney. The draft was duly paid, and the proceeds, less attorney's fees, were paid over to the administratrix. The deceased left surviving him his wife, Mrs. E. T. Badgett, an eight-year-old daughter, Brenda Gray Badgett, who were dependent upon him for support and maintenance at the time of his death, and Hilda Louise Badgett Bray, a daughter by a former marriage, about 20 years of age, who neither resided with nor was dependent upon deceased at the time of his death.

In March, 1945, Hilda Louise Badgett Bray, through her next friend, John W. Badgett, filed a petition with the clerk of the Superior Court of Forsyth County, requesting that the administratrix be required to distribute the proceeds received in settlement of the aforementioned

claim for wrongful death, as provided under the laws of intestacy of the State of North Carolina. Upon a hearing, after notice, the clerk entered an order directing the administratrix to distribute the net proceeds derived from the settlement of the claim for the wrongful death of Elmer Thomas Badgett, one-third each to the widow and two daughters of the deceased. The administratrix appealed to the Superior Court and, upon appeal, his Honor, Zeb V. Nettles, judge presiding at the September Term, 1945, of Superior Court of Forsyth County, affirmed the order of the clerk of said court. The administratrix appealed from this ruling to the Supreme Court, assigning error.

Archie Elledge, Fred S. Hutchins, and H. Bryce Parker for petitioner, appellee.

James B. Lovelace for respondent, appellant.

DENNY, J. The sole question to be determined is whether the net proceeds received for the wrongful death of Elmer Thomas Badgett, while engaged in interstate commerce, shall be apportioned according to our statute of distribution. The answer must be in the affirmative. *In re Stone,* 173 N. C., 208, 97 S. E., 216.

The appellant contends that since the recovery was based upon the provisions of the Federal Employers' Liability Act, the proceeds must be apportioned among the beneficiaries of the deceased according to the pecuniary loss each has sustained. We think the overwhelming weight of authority is to the effect that in an action for wrongful death under this Act, the jury may apportion the award as contended by the appellant and that a recovery under the Act, by way of compromise, may be apportioned in a similar manner where the court supervises and approves the compromise. But, where the settlement is made in the discretion of the personal representative without the advice or approval of the court, we think the award must be distributed under the provisions of our statute of distribution.

The funds now in the hands of the administratrix have the same status such funds would have if they had been recovered in an action under the Federal Employers' Liability Act and the jury had awarded damages *in solido.*

This Court has repeatedly approved the apportionment of awards by the jury in actions brought for wrongful death under this Act. *Horton v. R. R.,* 175 N. C., 472, 95 S. E., 883; *Strunks v. Payne,* 184 N. C., 582, 114 S. E., 840; *Gerow v. R. R.,* 189 N. C., 813, 123 S. E., 473; *Wimberly v. R. R.,* 190 N. C., 444, 130 S. E., 116; *McGraw v. R. R.,* 209 N. C., 432, 184 S. E., 31. Nevertheless, there appears to be no

federal authority which requires such apportionment. The appellant contends otherwise and relies upon *Horton v. R. R., supra; Wilson v. Massagee,* 224 N. C., 705, 32 S. E. (2d), 335; and *Gulf C. & S. F. Ry. Co. v. McGinnis,* 228 U. S., 173, 33 S. Ct., 426, 57 L. Ed., 785, a Texas case. It should be noted that Texas has a statute which provides that damages awarded in an action for wrongful death may be apportioned by the jury. However, the Supreme Court of the United States held in the case of *Central Vermont Ry. C. v. White,* 238 U. S., 507, 59 L. Ed., 1433, that the decision in the *McGinnis case, supra,* means nothing more than that a jury may apportion the damages awarded and further held that there was nothing in the record in the *McGinnis case, supra,* "Which would support a ruling that a general verdict was invalid, or that the verdict could be set aside because it failed to fix the amount each beneficiary was to receive.

"Under Lord Campbell's Act (9 & 10 Vict., ch. 93, s. 2) and in a few of the American states the jury is required to apportion the damages in this class of cases. But even in those states the distribution is held to be of no concern to the defendant, and the failure to apportion the damages is held not to be reversible error. (*Norfolk & W. R. Co. v. Stevens,* 87 Va., 631 (1), 634, 46 L. R. A., 367, 34 S. E., 525; *International & G. N. R. Co. v. Lehman,* Tex. Civ. App., 72 S. W., 619,—certainly not unless the defendant can show that it has been injured by such failure. The employers' liability act is substantially like Lord Campbell's Act, except that it omits the requirement that the jury should apportion the damages. That omission clearly indicates an intention on the part of Congress to change what was the English practice so as to make the Federal statute conform to what was the rule in most of the states in which it was to operate. Those statutes, when silent on the subject, have generally been construed not to require juries to make an apportionment." See also *Kansas City S. R. Co. v. Leslie,* 238 U. S., 599, 59 L. Ed., 1478; U. S. C. A., Title 45, sec. 51, note 880, *et seq.*

In view of the conclusion reached, it is unnecessary to discuss the other questions raised and argued.

We think, upon the facts presented on this record, the judgment of the court below must be upheld.

Affirmed.

STATE v. J. L. ROBINSON.

(Filed 31 January, 1946.)

1. Homicide § 25—

Defendant's motion to nonsuit is properly denied when the evidence tends to show an intentional killing with a deadly weapon, since the credibility and sufficiency of the defendant's evidence in mitigation or excuse is for the jury to consider and decide.

2. Criminal Law § 40—

Where defendant introduces evidence of good character the State is authorized to introduce evidence of defendant's bad character, but it is reversible error to permit the State by cross-examination or otherwise to offer evidence as to particular acts of misconduct.

APPEAL by defendant from *Dixon, Special Judge,* at March Term, 1945, of MECKLENBURG.

The defendant was indicted for the murder of one Theodore Malpert. At the outset of the trial the solicitor announced he would not ask for a verdict of guilty of murder in the first degree but for a verdict of guilty of murder in the second degree or of manslaughter, as the evidence might warrant.

The State offered evidence tending to show that the defendant shot and killed the deceased in a difficulty in an automobile, and the defendant, testifying in his own behalf, admitted that he shot and killed the deceased and pleaded self-defense.

The jury returned a verdict of guilty of manslaughter, and from judgment of imprisonment predicated on the verdict defendant appealed, assigning errors.

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

G. T. Carswell, Harvey Hamilton, Jr., and Fred H. Hasty for the defendant, appellant.

SCHENCK, J. In his brief the defendant sets out as exceptive assignments of error the court's refusal of his motion to dismiss the action or for judgment of nonsuit made when the State had produced its evidence and rested its case, and renewed after all the evidence in the case was concluded (G. S., 15-173).

These assignments of error cannot be sustained. The case could not be dismissed or judgment of nonsuit entered when there was an intentional killing with a deadly weapon as in this case the law implies malice, and it is, at least, murder in the second degree, and the burden then rests

upon the prisoner to satisfy the jury of facts and circumstances in mitigation of or excuse for the homicide, the credibility of the evidence, and its sufficiency to produce this satisfaction being for the jury to consider and decide. *S. v. Johnson,* 184 N. C., 637, 113 S. E., 617; *S. v. Cagle,* 209 N. C., 114, 182 S. E., 697.

But, while this is so, we are of the opinion that the learned judge who presided at the trial committed error in permitting, over objection of the defendant, certain questions to be propounded by the solicitor to the character witnesses of the defendant, as to certain extraneous acts committed by the defendant. The defendant offered one Cupp and others who testified on direct examination that the defendant was a man of good character, whereupon the solicitor, on cross-examination, over objection of defendant, asked said character witnesses, in effect, if they knew the defendant had been convicted for driving a car drunk, and for carrying a concealed weapon, and had been charged with committing an assault on a female, and had been running around with Maude Cubley, and had married another woman right after his wife got killed and she left him on account of Maude Cubley. To all of which the witness Cupp and others replied in the negative. *S. v. Shinn,* 209 N. C., 22, 182 S. E., 721; *S. v. Shepherd,* 220 N. C., 377, 17 S. E. (2d), 469.

When the defendant availed himself of the right to introduce evidence of his good character, the State was authorized to introduce evidence of the defendant's bad character, but could not by cross-examination, or otherwise, offer evidence as to particular acts of misconduct of the defendant. The rule is just and based upon sound reason. A party charged with crime may be prepared to defend an attack upon his general character, which is a single fact, but he could not have at the trial witnesses to explain the conduct of a lifetime. *S. v. Holly,* 155 N. C., 485, 71 S. E., 450; *Barton v. Morphes,* 13 N. C., 520; *Woodie v. North Wilkesboro,* 159 N. C., 353, 74 S. E., 924.

As the defendant is entitled to a new trial in this action for error in permitting the solicitor, over objection by the defendant, to propound interrogatories to character witnesses of the defendant tending to show extraneous acts by the defendant, we deem it unnecessary to discuss the other assignments of error in the record, since the questions presented thereby are not likely to arise upon another trial of the case.

For the errors indicated there must be a

New trial.

STATE v. NEWITT W. STONE.

(Filed 31 January, 1946.)

1. Criminal Law § 79—

Exceptions not set out in appellant's brief are deemed abandoned. Rule 28.

2. Criminal Law § 85—

Where the evidence is substantially similar to that introduced at the former trial, the decision of the Supreme Court on the former appeal that the evidence was sufficient to be submitted to the jury is *res judicata* and defendant's exception to the refusal of the court to dismiss as of nonsuit is untenable.

3. Criminal Law § 42c—

While cross-examination may be pursued as a matter of right so long as it relates to facts in issue or relevant facts which were the subject of the examination-in-chief, cross-examination for the purpose of determining the interest or bias of the witness or to impeach credibility, rests in the discretion of the trial court, and the limiting of the cross-examination in the exercise of such discretion is not reviewable.

4. Criminal Law § 50a—Remark of court in sustaining objection to further cross-examination held not expression of opinion by court.

In sustaining the State's objection to further cross-examination of a witness for the purpose of impeaching her credibility the court remarked that the witness is an elderly lady suffering from high blood pressure, that the court was of the opinion she had answered the interrogations sufficiently, and that the witness said she had tried to tell the truth and did not recall all the particulars of the evidence given by her in the former trial. *Held:* The remark was not, and could not have been understood by the jury, as an expression of opinion by the court as to the truthfulness of the witness, but was solely to suggest to counsel that her answers to his question were complete, in the discharge of the court's right and duty to control the cross-examination. G. S., 1-180.

APPEAL by defendant from *Burgwyn, Special Judge,* at April Term, 1945, of ROBESON.

The jury returned a verdict of guilty of murder in the second degree, and from judgment of imprisonment, predicated on the verdict, the defendant appealed, assigning errors.

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

F. D. Hackett and Johnson, Johnson & Timberlake for defendant, appellant.

SCHENCK, J. The appellant sets out in his brief only five exceptions. Hence all other exceptions appearing in the record are taken as abandoned. Rule 28, Rules of Practice in the Supreme Court, 221 N. C., 562. The exceptions presented for our consideration may be most conveniently discussed in the order they are presented in the brief.

The first exceptions set out in the brief are Exception No. 6 and Exception No. 7, which relate to the refusal of the court of the defendant's motion to dismiss the action or for judgment of nonsuit lodged when the State had produced its evidence and rested its case, and renewed after all the evidence in the case was concluded. G. S., 15-173. These exceptions are untenable for the reason that this case was before the Court on a former appeal (*S. v. Stone,* 224 N. C., 848), and the Court then said, "We think the evidence sufficient to warrant its submission to the jury." The evidence produced at this trial is substantially similar to the evidence produced at the former trial. Under these circumstances the question of nonsuit, or the sufficiency of the evidence to be submitted to the jury, the decision of the Court on the former appeal is decisive. *S. v. Lee,* 213 N. C., 319, 195 S. E., 785. Where the question of sufficiency of evidence to go to the jury had been passed upon in a former appeal in the same case, this Court said: "This Court passed on the evidence in this case when it was here before. There is no material difference in the evidence on the former and this appeal. On this aspect, the matter is *res judicata.*" *Jernigan v. Jernigan,* 207 N. C., 831 (835), 178 S. E., 587.

The second exception set out in appellant's brief is Exception No. 1, which relates to the court's sustaining an objection by the State to an interrogatory propounded by counsel for defendant to a State's witness, Mrs. Annie Edwards, mother of the deceased. The record shows that counsel for the defendant, on cross-examination, propounded the following interrogatory to State's witness, Mrs. Annie Edwards: "Well, you didn't tell the exact truth when you made the statement on direct examination that your brother (the defendant) didn't make any reply when you charged him with killing your son, did you? You were mistaken about that, weren't you? Come on and tell me?" In *S. v. Beal,* 199 N. C., 278, at page 298, 154 S. E., 604, it is written: "Furthermore, it is an unquestioned truism that the cross-examination of a witness may be pursued by counsel as a matter of right so long as it relates to facts in issue or relevant facts which were the subject of his examination-in-chief. *Milling Co. v. Highway Com.,* 190 N. C., 692, 130 S. E., 724. When, however, it is sought to go beyond the scope of the examination-in-chief, for purposes of determining the interest or bias of the witness and to impeach his credibility, the method and duration of the cross-examination for these purposes rest largely in the discretion of the trial

court. *S. v. Patterson,* 24 N. C., 346; Wigmore on Evidence (2d Ed.), sec. 944 *et seq.;* 28 R. C. L., 445." It is apparent that the question assailed by the objection under consideration had for its purpose the determination of the interest or the bias of the witness, and to impeach her credibility, and its admission or denial, therefore, rested in the discretion of the trial court, and an exception thereto could avail the defendant nothing.

The third exceptions set out in the appellant's brief are Exception No. 2 and Exception No. 3, which relate to the contention of the defendant that the court violated G. S., 1-180, which provides that "no judge . . . shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of the jury; . . ." From the record it appears that immediately after the court sustained the objection by the solicitor to certain further cross-examination of the State's witness, the court remarked: "The Court finds that the witness is an elderly lady, suffering from high blood pressure and the Court is of the opinion she has answered interrogations of counsel as to whether or not her brother made a reply, sufficiently. (Exception No. 2.) She has insisted that she has tried to tell the truth about the matter to the best of her recollection and does not recall all the particulars of her evidence given in a former trial" (Exception No. 3). The defendant's contention for the construction of the court's statements as manifesting the opinions of the court cannot be sustained. It appears that the court meant only that the answer of the witness was complete and that the question should not be repeated. It is both the right and duty of the presiding judge to control the examination and cross-examination of witnesses, both for the purpose of conserving the time of court and of protecting the witness from prolonged and needless examination. The witness having stated that her "blood was high" and she had much trouble, but she knew she wanted "to be honest and tell the truth," it was proper for the court to suggest to counsel that her answer to his question was complete. Defendant was not prejudiced by the statement of the court, for the jury could not have understood such statement to be an opinion of the judge as to the truthfulness of her answer. *S. v. Mansell,* 192 N. C., 20, 133 S. E., 190. These assignments of error cannot be sustained.

There are other exceptions in the record but they are not set out in the appellant's brief, nor are any reasons or argument stated or authority cited therein, in support thereof and they, therefore, are taken as abandoned.

On the record we find

No error.

RALPH SMITH, JR., BY HIS NEXT FRIEND, RALPH SMITH, SR., v. EFTHIMIOS MARIAKAKIS, VIRGINIA MARIAKAKIS AND WILLIE WATSON.

(Filed 31 January, 1946.)

1. Appeal and Error § 29—

Exceptions not set out and discussed in appellant's brief are deemed abandoned.

2. Automobiles § 24c—

Evidence that the driver of the car involved in the accident had been seen by the witness working in his co-defendants' sandwich shop practically every day and that the car was owned by his co-defendants, or one of them, and license therefor issued in the name of one of them, *is held* insufficient to carry the case to the jury on the issue of *respondeat superior.*

APPEAL by plaintiff from *Harris, J.,* at June Civil Term, 1945, of ORANGE.

This is an action by the plaintiff to recover damages for personal and property injuries alleged to have been caused by the negligence of the defendants.

It is alleged and contended by the plaintiff that on 8 October, 1943, he was driving a truck, the property of H. S. Pendergraft, eastward on Highway 54, and met the defendant Willie Watson driving a Plymouth automobile westward on said highway; that said truck and said automobile collided, and as a result of said collision the plaintiff was seriously injured and said truck damaged; that the said collision was proximately caused by the negligent operation of said Plymouth automobile by said defendant Willie Watson.

The plaintiff introduced his evidence and rested his case. Whereupon the defendants moved for a judgment as in case of nonsuit and to dismiss the action. The court granted the motion as to the defendant Efthimios Mariakakis and Virginia Mariakakis, and overruled the motion as to the defendant Willie Watson. The plaintiff excepted to the sustaining of the motion as to the defendants Mariakakis, and appealed to the Supreme Court, assigning errors. The case was submitted to the jury as to the defendant Willie Watson and verdict and judgment obtained against the defendant Willie Watson, from which no appeal was taken.

L. J. Phipps for plaintiff, appellant.

Henry A. Whitfield and Fuller, Reade, Umstead & Fuller for defendants, appellees.

SCHENCK, J. The only assignment of error set out in the plaintiff appellant's brief relates to the action of the court in sustaining the motion of the defendants Efthimios Mariakakis and Virginia Mariakakis for judgment as in case of nonsuit and to dismiss the action as to said defendants, and since this is the only assignment of error discussed it is presumed that the other assignments of error are abandoned.

It is the contention of the appellees that there was no error in the ruling of the court, since all the evidence tended to show that the defendant Willie Watson was operating the automobile involved in the wreck, and the other defendants were not present at the time, and that there was no evidence of any agency existing between the defendant Watson and the other defendants to invoke the doctrine of *respondeat superior.*

On the other hand, it is the contention of the appellant that there was error in the ruling of the court, since there was sufficient evidence in the record to carry the case to the jury upon the theory that the defendant Willie Watson was at the time of the wreck the agent of the other defendants, acting within the scope of his agency, and therefore the doctrine of *respondeat superior* was applicable.

These adverse contentions of the appellant and the appellees present but the single question, namely, was there evidence in the record sufficient to carry to the jury the question as to whether the defendant Willie Watson, at the time of the wreck, was acting as the agent of the other defendants, and acting within the scope of his employment? After a careful examination of the evidence in the record, we are constrained to answer the question posed in the negative.

The only evidence in the record relating to the defendant Willie Watson was that the witness Charlie Lloyd testified that Willie Watson passed him and others on Highway No. 54 in another car about a quarter of a mile from where the wreck took place, "driving about 60 miles per hour and whipped around us"; the witness Arthur testified: "Willie Watson passed me going toward Graham in a gray Plymouth automobile on a little knoll"; the witness Mrs. Ralph Smith, Sr., testified that on 8 October, 1943, about 10 o'clock she saw Willie Watson in the Marathon Sandwich Shop, operated by Mr. Mariakakis and his wife, cleaning tables, and I saw Willie Watson there practically every day; Willie Watson, himself in an adverse examination taken and introduced in evidence by the plaintiff, testified that "I did not work any for Mr. Mariakakis, but worked for one Edwards who lived on the Mariakakis farm, helping Edwards feed the hogs there. There is also evidence to the effect that the automobile which Willie Watson was driving on the night of the wreck was owned by Efthimios Mariakakis and Virginia Mariakakis, or one of them, and that license in the name of Virginia Mariakakis was issued therefor.

In order to carry the case to the jury there must appear more than a scintilla of evidence that the defendant Willie Watson was the agent of the other defendants, appellees, acting within the scope of his authority. This evidence, in our opinion, does not appear in the record, and therefore the judgment below is

Affirmed.

GRADY A. ZIGLAR v. LORRAINE ELIZABETH ZIGLAR.

(Filed 31 January, 1946.)

1. Trial § 17—

Plaintiff instituted suit for absolute divorce on ground of adultery. Defendant set up cross-action for divorce *a mensa et thoro* alleging, *inter alia*, adultery on the part of plaintiff. At the close of the evidence defendant took a voluntary nonsuit on her cross-action. *Held:* Evidence of adultery on the part of plaintiff was competent at the time of its introduction, and in the absence of motion to strike when defendant withdrew her cross-action, plaintiff's contention that he was unduly prejudiced by its admission is untenable. Rule 21.

2. Trial § 49—

The setting aside of a verdict on the ground that it is contrary to the weight of the evidence is addressed solely to the discretion of the trial court. G. S., 1-207.

APPEAL by plaintiff from *Nettles, J.*, at September Term, 1945, of FORSYTH.

Civil action for absolute divorce on ground of adultery.

The defendant denied the allegations of the complaint, pleaded condonation, and set up a cross-action for divorce *a mensa et thoro* on the ground that plaintiff's improper relations with other women and indignities offered to the defendant were such as to render her condition intolerable and life burdensome.

The case was tried on the allegations of the complaint and the cross-action, with evidence to support each and all of the allegations.

At the close of the evidence, the defendant took a voluntary nonsuit, without prejudice, on her cross-action; whereupon the case was submitted to the jury on the allegations of the complaint.

The jury answered the issue of adultery in favor of the defendant. From judgment denying the plaintiff a divorce, he appeals, assigning errors.

John D. Slawter and Richmond Rucker for plaintiff, appellant.

Hoyle C. Ripple for defendant, appellee.

STACY, C. J. Plaintiff assails the validity of the trial on the ground that he was unduly prejudiced by the admission of testimony tending to show adultery on his part. This evidence was competent, at the time of its introduction, as it was in support of the allegations of the cross-action. *In re Southerland,* 188 N. C., 325, 124 S. E., 632; Rule 21, Rules of Practice in the Supreme Court, 221 N. C., 558. There was no motion to strike when the defendant withdrew her complaint against the plaintiff. On the record as presented, the exception cannot be held for reversible error. *S. v. Hawkins,* 214 N. C., 326, 199 S. E., 284; *S. v. Tuttle,* 207 N. C., 649, 178 S. E., 76, and cases cited.

Nor is the court's charge on the issue of adultery open to valid objection. The issue was one of fact with the evidence contradictory. The jury has answered in favor of the defendant.

True it is, the plaintiff's evidence was direct and positive, and he complains that the verdict is clearly contrary to the weight of the evidence. But this was a matter addressed to the sound discretion of the trial court. G. S., 1-207; *Goodman v. Goodman,* 201 N. C., 808, 161 S. E., 686.

We have discovered no valid exception on the record. The verdict and judgment will be upheld.

No error.

JOHN H. BENSON v. WILLIE ROBERSON, JOE WHITE AND JAKE PENDLETON.

(Filed 31 January, 1946.)

Receivers § 13—

Exceptions filed and made a part of the record are not void as a matter of law because not filed within the first three days of the term of court commencing next after the filing of the receiver's report, in the absence of motion or order, G. S., 55-153, and a judgment entered on the basis that such exceptions were not before the court for consideration will be remanded.

APPEAL by defendants and claimants from *Nettles, J.,* at October Term, 1945, of FORSYTH. Error and remanded.

Exceptions to report of receiver as to allowance of claims.

The plaintiff's claim for $775.62 was allowed, and those of other claimants were placed in second class. The receiver's report was approved and confirmed by the court. Defendants and other claimants adversely affected excepted and appealed.

Joe W. Johnson for plaintiff.

A. B. Cummings for defendants, Willie Roberson and Joe White.

E. M. Whitman for claimants, Phoebe Harrell, James R. Harrell, Lizzie Jarrett, and Rosa Lee Waiters.

DEVIN, J. This appeal arose out of the liquidation of the partnership heretofore existing between plaintiff and defendants under the name of Royal Club Beer Garden. A receiver was appointed who heard evidence of the various claimants and made report of the claims which he allowed, including that of the plaintiff for $775.62. Claims of appellants Harrell and others were allowed, but placed in the second class. G. S., 59-70. The assets are insufficient to pay more than a small percentage of claims as allowed by the receiver.

The report of the receiver's findings was filed by him 19 October, 1945, at 4:10 p.m., and copies mailed to counsel for appellants on that day. A term of Superior Court began in Forsyth County 22 October. Exceptions to the report were filed in the cause by claimants Harrell and others 26 October, and by defendants Roberson and White 27 October. Exceptions were noted to the findings and allowances of the receiver, and jury trials demanded. G. S., 55-153.

Another one-week term of the Superior Court began 29 October, and on 30 October the court entered an order holding that no objections to the receiver's report had been filed within the first three days of the term which began 22 October, and thereupon confirmed the receiver's report. Payment of claims as reported was directed to be made. Both defendants and claimants appealed.

We think the order appealed from was improvidently entered. Exceptions to the receiver's report had been filed and were a part of the record. There was no motion to strike out the exceptions, nor did the court order them stricken out. Even if not filed within the first three days of the term, they may not be held to be void as a matter of law in the absence of such motion or order, and there was error in disregarding them. The power to extend time for filing exceptions to receiver's report is expressly given by the statute. G. S., 55-153. Since the judgment below seems to have been based on the view that the exceptions not having been filed within the first three days of the term were not before the court for consideration, we think the cause should be remanded to the Superior Court for such action as may be appropriate, and it is so ordered.

Error and remanded.

L. M. GERRINGER v. WALTER GERRINGER AND MRS. LENA BARBER.

(Filed 31 January, 1946.)

Deeds § 16c—

In this action to recover for breach of contract to maintain and support plaintiff as consideration for the execution of a deed, the evidence considered in the light most favorable for plaintiff *is held* sufficient to carry the case to the jury.

APPEAL by plaintiff from *Johnson, Special Judge,* at April Term, 1945, of ALAMANCE.

This was an action to recover for breach of contract to maintain and support the plaintiff as consideration for the execution of a deed. At the close of the evidence judgment of nonsuit was entered, and plaintiff excepted and appealed.

Thos. C. Carter and A. M. Carroll for plaintiff, appellant.

P. W. Glidewell, Sr., and Thomas D. Cooper for defendants, appellees.

DEVIN, J. The parties here are the same as those in *Gerringer v. Gerringer,* 223 N. C., 818, 28 S. E. (2d), 501. In the former suit the plaintiff sought to set aside the deed which he had executed to the defendants in consideration of their promise to maintain and support him during his natural life. That suit was based upon allegations of fraud and undue influence, and judgment of nonsuit was affirmed on appeal. In the opinion by *Justice Denny* it was said: "Plaintiff's remedy, if any, appears to be, not in equity, but in a court of law for breach of contract." Thereafter plaintiff instituted this action for breach of the contract, alleging that defendants had failed to maintain and support him as they had promised to do. In the hearing below judgment of nonsuit was entered and plaintiff appealed.

After examining the record and considering the evidence in the light most favorable for the plaintiff, we reach the conclusion that he has offered sufficient evidence to carry his case to the jury, and that there was error in sustaining the motion for judgment of nonsuit.

As the case goes back for trial, we do not discuss the evidence or express any opinion as to its weight or credibility.

The judgment of nonsuit is

Reversed.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1946

W. F. LEE AND MINNIE LEAH P. LEE, HIS WIFE, v. BOARD OF ADJUSTMENT UNDER ZONING ORDINANCE OF THE CITY OF ROCKY MOUNT.

IN RE APPLICATION OF S. L. EDMONDSON FOR PERMIT TO BUILD STORE AND GASOLINE FILLING STATION IN THE CITY OF ROCKY MOUNT.

(Filed 27 February, 1946.)

1. Municipal Corporations § 37—

A decision of a municipal board of adjustment is reviewable solely for errors of law on the evidence presented by the record itself. G. S., 160-178.

2. Appeal and Error § 40a—

An exception to the judgment presents the single question whether the facts found and admitted are sufficient to support the judgment rendered.

3. Municipal Corporations § 37—

Since an optionee has no present right to erect a building on the land, the withholding of a building permit from him cannot in law impose any "undue and unnecessary hardship" upon him as a predicate for relief from an order of a municipal board of adjustment. G. S., 160-178.

4. Same—

"Unnecessary hardship" as used in G. S., 160-178, does not mean a pecuniary loss to a single owner in being denied a building permit for a nonconforming structure pursuant to zoning regulations binding upon all alike.

5. Same—

A municipal board of adjustment is an administrative agency which acts in a *quasi*-judicial capacity, and its authority to grant variance permits in exceptional cases is limited to such as are consonant with the general purpose and spirit of the zoning regulations, and it has no authority to amend the zoning regulations and permit the erection of a nonconforming structure, it being the sole function of the legislative body of the municipality to alter the zoning districts for changed conditions. G. S., 160-172, G. S., 160-178.

6. Same—

Any owner whose property is affected has the right to apply to the courts for review of an order of a municipal board of adjustment. G. S., 160-178.

APPEAL by petitioners from *Bone, J.*, at January Term, 1946, of EDGECOMBE.

Petition for writ of *certiorari* to review an order of the Board of Adjustment of the City of Rocky Mount.

Rocky Mount has a zoning ordinance which creates a district for residential purposes only, designated as Zone 5. The ordinance prohibits the erection within said zone of any structure which is "intended or designed to be used, in whole or in part, for any industrial, manufacturing, trade or commercial purpose" with certain exceptions not pertinent to this appeal.

H. H. Duke, Jr., owns a lot located at the corner of Daughtry Street and Highway 64 directly in front of the residence of petitioners and within said zone. He gave an option to purchase to S. L. Edmondson, who thereupon applied to the City Building Inspector for a permit to erect thereon buildings suitable for and to be used as a grocery store-service station. The Building Inspector declined to issue the permit for the reason that the proposed buildings are designed to be used for a nonconforming purpose. Edmondson appealed to the City Board of Adjustment.

The Board of Adjustment heard the appeal, resisted by 40-odd owners of property in Zone 5, and "concluded that to reject this permit would work a great hardship on the applicant, and that no damage would be sustained by adjoining property owners if the permit were granted." It thereupon ordered, by unanimous vote, "that permit be issued by the Building Inspector allowing the two buildings to be erected as above set out."

On application of petitioners Lee and wife, Bone, J., on 23 January, 1946, issued a writ of *certiorari* returnable before him immediately. The Board of Adjustment made immediate answer to the writ as required by the order and the cause came on for hearing 24 January, 1946,

at which time judgment was entered affirming the order of the Board of Adjustment so that "the applicant, S. L. Edmondson, be, and he is hereby authorized to immediately begin the construction of his store and service station, in accordance with the permission granted in said order of the Board of Adjustment."

It was further ordered that the "action" be dismissed at the cost of the petitioners. Petitioners excepted and appealed.

Wilkinson & King and Battle, Winslow & Merrell for plaintiffs, appellants.

F. S. Spruill for respondent, appellee.

BARNHILL, J. The statute, G. S., Art. 14, ch. 160, under authority of which Rocky Mount adopted its zoning ordinance, provides that every decision of the Board of Adjustment shall be subject to review by proceedings in the nature of *certiorari*. G. S., 160-178. But the writ of *certiorari* as permitted by this statute is a writ to bring the matter before the court upon the evidence presented by the record itself for review of alleged errors of law. *In re Pine Hill Cemeteries, Inc.*, 219 N. C., 735, 15 S. E. (2d), 1.

The decisions of the board are final, subject to the right of the courts to review errors in law and to give relief against its orders which are arbitrary, oppressive, or attended with manifest abuse of authority. *Harden v. Raleigh*, 192 N. C., 395, 135 S. E., 151; *In re Parker*, 214 N. C., 51, 197 S. E., 706; *In re Pine Hill Cemeteries, Inc., supra; Pue v. Hood*, 222 N. C., 310, 22 S. E. (2d), 896; *Mullen v. Louisburg*, 225 N. C., 53.

Likewise an exception to the judgment presents the single question whether the facts found and admitted are sufficient to support the judgment entered. *Rader v. Coach Co.*, 225 N. C., 537; *Fox v. Mills, Inc.*, 225 N. C., 580.

So then decision here must rest upon the facts as they appear upon the face of the record. These facts are as heretofore stated.

Do they disclose that (1) the conclusion of the Board of Adjustment that to reject the application for a permit to erect nonconforming buildings upon the lot, for the purchase of which applicant holds an option, would work a great hardship on him is unwarranted and erroneous as a matter of law; (2) the Board of Adjustment exceeded its authority in permitting the erection of buildings intended and designed to be used for trade and commercial purposes on a lot located within a district zoned for residences only?

These are the real questions posed for decision. We are constrained to answer each in the affirmative.

In the issuing of building permits the building inspector, a purely administrative agent, must follow the literal provisions of the zoning regulations. The statute, G. S., 160-172, authorizes and the municipal board created a Board of Adjustment so that an applicant who thinks he requires some amelioration of the strict letter of the law may have a forum in which he may be heard.

Acting upon its interpretation of the statute authorizing its creation, G. S., 160-172, the Board of Adjustment, upon the appeal of the respondent, "concluded that to reject this permit would work a great hardship on the applicant," and ordered that a permit issue. In this there was error.

An option in relation to land grants the right to elect, within a stipulated period, to buy or not to buy. The applicant optionee merely has the right of choice granted by his option. He possesses no present right to erect a building on the lot described in his contract. To withhold from him a permit to do what he has no present right to do cannot, in law, impose an "undue and unnecessary hardship" upon him.

The appellants in their brief express it in this manner: "Edmondson cannot be hurt or suffer any hardship whichever way the case goes. He uses a long-handle spoon (option) to sample the Edgemont pot. If the mixture is too hot for him he can drop the spoon." Be that as it may, the withholding of a permit to build imposes no undue hardship upon him so long as he has no present right to build.

Even if it be conceded that the applicant occupies a position which entitles him to apply for a building permit, its denial, on this record, imposes no unnecessary hardship.

"The courts have . . . gradually concluded that the deprivation of better earning by means of a nonconforming use is not an unnecessary hardship within the meaning of the law. Value is not the proper criterion." Bassett, Zoning, 127; *Elizabeth City v. Aydlett,* 201 N. C., 602, 161 S. E., 78. It is erroneous to base a conclusion that the denial of an application would work an unnecessary hardship because the applicant could earn a better income from the type of building proposed. Bassett, Zoning, 143.

The financial situation or pecuniary hardship of a single owner affords no adequate grounds for putting forth this extraordinary power affecting other property owners as well as the public. *In re Parker, supra; Prusik v. Board of Appeal,* 160 N. E., 312 (Mass.); *Thayer v. Board of Appeals,* 157 Atl., 273 (Mass.); *Norcross v. Board of Appeal,* 255 Mass., 157, 150 N. E., 887; *People v. Walsh,* 227 N. Y. S., 570; *In re Mark Block Holding Corp.,* 253 N. Y. S., 321.

"Unnecessary hardship" as used in the statute does not embrace the restriction of the desire to perform an act which would abrogate the very

intent and purpose of the ordinance, amend, if not partially repeal, an act regularly adopted by the local Legislature, and create a means by which the entire ordinance could be frustrated at will by limitless exceptions. *In re Mark Block Holding Corp., supra.* It cannot be construed to include a hardship imposed upon all alike so as to effectuate the primary purpose and intent of the legislative body. *Elizabeth City v. Aydlett, supra.*

The board of adjustment authorized in the zoning statute, G. S., 160-178, is an administrative agency, acting in a *quasi*-judicial capacity. *In re Pine Hill Cemeteries, supra.* Its main function is to grant variance permits in exceptional cases, subject to court review. G. S., 160-178. In the exercise of this discretion, however, it is not left free to make any determination whatever that appeals to its sense of justice. It must abide by and comply with the rules of conduct provided by its charter—the local ordinance enacted in accord with and by permission of the State zoning law.

Indeed the power of the board is expressly limited by the statute. It may "determine and vary" the application of the zoning regulations as set forth in the ordinance. G. S., 160-172. And upon hearing on appeal from the building inspector it may vary or modify any of the regulations and provisions of such ordinance relating to the use, construction or alteration of buildings or structures or the use of land. G. S., 160-178. However, the determination, variation or application must be "in harmony with their general purpose and intent and in accordance with general or specific rules therein contained," G. S., 160-172, "so that the spirit of the ordinance shall be observed, public safety and welfare secured, and substantial justice done." G. S., 160-178; Baker, Legal Aspects of Zoning, 98; Bassett, Zoning, 131-132.

Thus the power to "determine and vary" is limited to such variations and modifications as are in harmony with the general purpose and intent of the ordinance and do no violence to its spirit.

The plain intent and purpose of the statute is to permit, through the Board of Adjustment, the amelioration of the rigors of necessarily general zoning regulations by eliminating the necessity for a slavish adherence to the precise letter of the regulations where, in a given case, little or no good on the one side and undue hardship on the other would result from a literal enforcement.

The board cannot disregard the provisions of the statute or its regulations. It can merely "vary" them to prevent injustice when the strict letter of the provisions would work "unnecessary hardship." *People v. Clarke,* 215 N. Y. S., 190; *People v. Walsh,* 208 N. Y. S., 571; *People v. Walsh,* 195 N. Y. S., 264; *Welch v. Swasey,* 193 Mass., 364, 79 N. E., 745; Metzenbaum, Law of Zoning, 259; Bassett, Zoning, 120-121.

In the absence of a zoning ordinance a mill or junk yard, a butcher shop or factory, a paint establishment, a grocery, bakery, repair or tin shop owner may locate his business in a residential section even while that district is in its prime, and, overnight, by such intrusion, drain away a considerable portion of the value of neighboring parcels. Every residence section is open to garages and filling stations, and sometimes an entire block of houses is reduced in value and made less desirable as residence property by the advent of one of them.

Whether and to what extent such problems in a given city or town are to be met by the adoption of zoning ordinances rests peculiarly within the discretion of the legislative branch of the municipality.

But the Board of Adjustment is not a law-making body. The statute, G. S., 160-172, G. S., 160-178, cedes it no legislative authority. Hence it has no power to amend the ordinance under which it functions. *Welch v. Swasey, supra;* Baker, Legal Aspects of Zoning, 98.

No power to convert a residential section into a business district or to permit business establishments to invade residential sections is conferred. Therefore it cannot permit a type of business or building prohibited by the ordinance, for to do so would be an amendment of the law and not a variance of its regulations. *South Ozone Park Lumber & Supply Corp. v. Board of Appeals,* 241 N. Y. S., 810; *People v. Miller,* 176 N. Y. S., 206; *Heffernan v. Zoning Board of Review,* 144 Atl., 674 (R. I.); *S. v. Kansas City,* 27 S. W. (2d), 1030 (Mo.); *Civil City of Indianapolis v. Ostrom R. & Const. Co.,* 176 N. E., 226 (Ind.); *Livingston v. Peterson,* 228 N. W., 816 (N. D.).

As the new building and its use must harmonize with the spirit and purpose of the ordinance, Bassett, Zoning, 128, no variance is lawful which does precisely what a change of map would accomplish. It follows that the privilege to erect a nonconforming building or a building for a nonconforming use may not be granted under the guise of a variance permit. Bassett, Zoning, 201. Action to that effect is in direct conflict with the general purpose and intent of the ordinance and does violence to its spirit.

When such substantial changes become advisable they must be made by the legislative body of the municipality which alone can change the map and allow a business center in a residential section. It is a legislative matter and not a situation for a variance permit. Bassett, Zoning, 125.

So then the case boils down to this. The lot at the corner of Daughtry Street and Highway 64 in Rocky Mount is within a residential zone. The Board of Adjustment "rezoned" it for a business purpose. Thus it amended the ordinance. This it had no authority to do. Its action was without warrant in law and is a nullity.

This conclusion imports no imputation that the members of the Board of Adjustment, known to the writer as men of high character and sound judgment, acted arbitrarily or in bad faith. They simply misconstrued the meaning of the language used in the statute and as a consequence exceeded the authority vested in them.

While there was no motion to dismiss, the appellee suggests that the court below dismissed for the reason that petitioners have no right to challenge the action of the board or to seek a review of its ruling. This contention is not sustained by the record. The court below affirmed the order of the board and directed the issuance of the proposed permit—a decree permissible only in a properly constituted cause.

The Act provides that any aggrieved party may appeal from a ruling of the building inspector to the Board of Adjustment and that every decision of such board shall be subject to review by proceedings in the nature of *certiorari*. This necessarily implies that a property owner whose property is affected by the proposed change may seek review. Bassett, Zoning, 123, 154; *Michigan-Lake Bldg. Corp. v. Hamilton,* 172 N. E., 710 (Ill.); *Harper v. Board of Appeals,* 171 N. E., 430 (Mass.); *Breese v. Hutchins,* 165 Atl., 94 (N. J.). We have impliedly so held. *Little v. Raleigh,* 195 N. C., 793, 143 S. E., 827; *In re Pine Hill Cemeteries, Inc., supra.*

The judgment below is

Reversed.

EDWARD N. WRIGHT v. GEORGE M. ALLRED.

(Filed 27 February, 1946.)

Frauds, Statute of, § 11—

A verbal agreement to lease real property for one year with privilege of renewal thereafter for four successive years comes within the statute of frauds, G. S., 22-2, since the lease and the provision for renewals constitute but a single contract, and the full term is absolute as to the lessor.

APPEAL by defendant from *Warlick, J.,* at November Term, 1945, of BUNCOMBE. No error.

This was a summary ejectment proceeding for the possession of a store building in Black Mountain.

Plaintiff's evidence tended to show that defendant's occupancy was under a rental from month to month since January, 1944; that in July, 1945, pursuant to defendant's request for a written lease, plaintiff drew up a tentative form of lease, but this was not signed by plaintiff, nor

agreed to; that due notice to vacate was thereafter given defendant, but he continued to hold over. Defendant offered to testify that the plaintiff had orally agreed in April, 1945, to lease him the building for a year with privilege of renewal from year to year for four successive years. The statute of frauds was pleaded. The court sustained objection to this testimony, and defendant excepted.

There was verdict for plaintiff, and from judgment in accord therewith, defendant appealed.

Eugene Taylor for plaintiff, appellee.
Claude L. Love for defendant, appellant.

DEVIN, J. The question for decision, presented by this appeal, is the correctness of the ruling of the trial court that a verbal agreement to lease real property for one year with privilege of renewal thereafter for four successive years was within the statute of frauds, and that parol evidence to establish it was incompetent.

The North Carolina statute of frauds, G. S., 22-2, declares that leases and contracts for leasing land exceeding in duration three years from the making thereof shall be void unless the contract or some memorandum thereof be put in writing and signed by the party to be charged therewith. Uniformly it has been held in this jurisdiction that when the statute is specifically pleaded, testimony of such a contract or promise resting entirely in parol is incompetent and should be excluded on objection. *Jordan v. Furnace Co.,* 126 N. C., 143, 35 S. E., 247; *Henry v. Hilliard,* 155 N. C., 372, 71 S. E., 439; *Investment Co. v. Zindel,* 198 N. C., 109, 150 S. E., 704.

The exact question here presented does not seem to have been heretofore decided by this Court, but we think upon a proper interpretation of the language and manifest intent of the statute, fortified by the weight of judicial opinion in other jurisdictions, the ruling below should be upheld.

Oral leases of land exceeding in duration three years from the making are rendered unenforceable by virtue of the statute. Here the defense sought to be interposed was based upon an alleged agreement to lease which contemplated a maximum duration of five years. True, its extension beyond one year would depend upon action by the defendant lessee, but so far as the lessor is concerned, if he made such an agreement he would have been in the position of having contracted away the possession of the premises for five years. On the part of the landlord the contract is absolute. He cannot recall it for a less period than five years. He is bound for the maximum duration notwithstanding the lessee may not presently avail himself of the privilege. Under the law the purchaser of

real property takes with notice that the premises may be under parol lease for a term not exceeding three years. Beyond that period he is protected by the provision that the lease must have been in writing. If a lessor can make a valid lease by parol for a longer period by means of provisions for renewal the statute would afford the purchaser no protection. *Investment Co. v. Zindel, supra.* The lease, together with the provision for annual renewals of the lease, is but a single contract. The agreement for renewal is a part of and inseparable from the lease for the original term, and the holding for the extended term would be under the original oral lease. 37 C. J. S., 605; *Hand v. Osgood,* 107 Mich., 55. Hence the contract may not be divided so as to validate it for the initial period and disregard the other portion of the contract since the lessor has contracted for the entire period, including renewals of which the lessee may avail himself, and the promise for renewal is an integral part of the contract, constituting consideration for the lease.

This seems to be in accord with the weight of judicial opinion in other jurisdictions. "An oral lease for the full period allowed by statute with privilege of renewal for a longer time is invalid." 27 C. J., 213. "It has been held that an oral agreement to lease land for one year with privilege of extension to 3 years is within the statute prohibiting leases for more than one year, since it is apparent the agreement is for a lease for three years." 49 Am. Jur., 522. In 37 Corpus Juris Secundum, 603, the general rule is stated as follows: "A lease is within the statute of frauds where it accords a privilege or option, or makes provision, for a renewal or extension and the period for which the renewal or extension is authorized by the lease, or that period added to the original term, exceeds the period for which, under the statute, a parol lease may be made."

In *Hull v. Brown,* 225 S. W., 780 (Texas Civil Appeals), plaintiff alleged a lease from month to month and notice to quit. The lessee claimed under an oral lease for one year with option for another year. The Court held the oral agreement under which lessee claimed, if made, was unenforceable because in violation of the statute of frauds (one year in Texas). It was said that the provision for the extension of the term of the lease at the option of the lessee was treated by the Court "as a present demise for the full term to which it may be extended and not a demise for the shorter period with privilege for a new lease for the extended term," and that lessee holding over after notice held under the original lease and not under the notice. It was held that the agreement claimed by lessee under which he sought to hold was made at the time of the original contract "and the whole period being for more than one year was obnoxious to the statute of frauds, and furnished no legal right for holding over."

In *Glavin v. Simons,* 128 Conn., 616, an oral agreement to lease premises for more than one year being void, it was held that provision for renewal of the lease for an additional year was within the statute, though in that case on the ground of constructive fraud the lessor was held estopped to set up the defense of the statute. In *Cooper v. Aiello,* 93 N. J. Law, 336, a verbal agreement to lease for one year with an option of two years additional was declared "unenforceable, as being against the statute of frauds." In *Rosen v. Rose,* 34 N. Y. Sup., 467, where there was an oral agreement to execute a lease for one year with privilege of two years more, the Court said: "Such a contract relates to the leasing of land for more than one year, and, to be valid, must be in writing, subscribed by the party to be charged."

In *McGlaris v. Claude Neon Federal Co.,* 101 Ind. App., 156, 198 N. E., 462, it was said: "In the case of *Ramer v. State* (1920), 190 Ind., 124, 128 N. E., 40, the Court construed an oral lease for one year with an option to renew from year to year for a period not to exceed 15 years, and held it void under the statute of frauds in the following language: 'It is obvious that the verbal agreement for a lease, with privilege of renewal for 15 years, was void.'"

In *Skinner v. Davis,* 104 Kansas, 467, the headnote recites: "An oral lease for one year with privilege of five years, is void under the statute of frauds." The defendant in that case obtained an oral lease for one year, with privilege of five. The trial court refused to submit this defense to the jury, and the Supreme Court affirmed, citing *Willey v. Goulding,* 99 Kan., 323.

In *Hand v. Osgood,* 107 Mich., 55, the headnote correctly epitomizes the holding as follows: "A parol agreement to lease land for one year, with privilege of 3, at an annual rental, is void under the statute of frauds, and, if wholly executory, no action can be founded thereon." Said the Court: "It is within the mischief which the statute is designed to prevent. The contract contemplated a lease for 3 years, and, so far as the defendant (lessor) is concerned, it is absolute."

In *Wilson v. Adath Israel Char. & Ed. Asso'n.,* 262 Ky., 55, the original lease, which was in writing, was for one year, with privilege of two years additional. Lessee claimed a subsequent parol modification whereby he was to occupy the premises for 3 years, under certain conditions. The Court said: "Some question is made as to whether the original contract falls within the statute (of frauds), but the question is immaterial except in so far as it may relate to the validity of subsequent modification since it is in writing. Unquestionably such a lease contract comes within the quoted provision of the statute (one year) and is invalid unless in writing, because it involves a lease of real estate for

longer than one year." The modification by parol was held within the statute. See also *Warsman v. Cohen,* 157 Minn., 161.

In *Anderson v. Frye & Bruhn,* 69 Wash., 89, the Court considered an unacknowledged lease for one year with privilege of two years renewal. Under the statute there leases for more than one year must be in writing and acknowledged by the lessor. It was held in this case that the lease was within the statute. It was said that argument *contra* could only be maintained successfully on the theory that there was evidenced two separate contracts, one a lease for a year and the other an agreement for giving a new lease at the end of the year, the validity of each to be determined without reference to the other. This the Court said was untenable; that the contract of rental manifestly evidenced a single transaction, a single contract, each of its parts being related to all other parts. "We cannot say the appellant would have agreed to take the premises for one year and assume obligation to pay rent therefor during that term without the agreement on the part of the respondent for renewal. . . . Each of the covenants agreed to be performed by one party formed a part of the inducement for the other party's entering into the contract. This being a single contract, the agreement for renewal is inseparable from the lease for one year."

In *Thomas v. Nelson,* 69 N. Y., 118, decided in 1877, the landlord sued for rent. The lease was made for seven years, but the signed memorandum was ruled insufficient. The lower court ruled that the lease though invalid for seven years was valid for one year, and to this ruling there was no exception, and the point was not raised. However, the Court of Appeals said: "The statute declares that a parol contract for leasing land for a longer period than one year shall be void. While such a contract is void, yet, if the tenant enters under it and occupies, he may be compelled to pay for the use and occupation of the premises (citing cases). But it is difficult to perceive how such a contract, declared to be void by the statute, can be held valid for a single hour, or upon what principle a tenant, entering under a void lease, could be compelled, by virtue of the lease, to pay for a longer period than he actually occupied." In commenting on this case in Lewis on Law of Leases it is said: "It seems that a parol lease, void under the statute of frauds because for a longer period than one year, is not valid for that period."

In *McDowell v. Baking Co.,* 179 A., 866, the Pennsylvania Court considered a parol lease for one year "with privilege of extending the lease four more years." The appeal was from a ruling that the letting was invalid under the statute of frauds. The Court said: "If the appellant's contention is correct—that the lease, in effect, called for a term of one year with the privilege of extending the lease for a further term of four

years—then we think the court below was right . . . for the lease for four years required parol evidence to establish, and was therefore in conflict with the statute of frauds." From *Rudder v. Trice,* 236 Ala., 234, we quote: "If the arrangement by which the term of a lease is extended for more than one year is a contract within itself, it must be in writing."

From *Donovan v. Brewing Co.,* 92 Mo. App., 341, we quote: "An option in the lessee of a lease for one year to extend the term to a greater length than one year, transforms the contract into a lease for more than a year. Therefore, if the agreement for a lease in this case is not in writing, it is non-enforcible."

The defendant has cited two cases as tending to support his position, *Ward v. Hasbrouck,* 169 N. Y., 407, 62 N. E., 434, and *Falk v. Devendorf,* 172 Wis., 10, 177 N. W., 894. In the New York case, decided in 1902, there are expressions which seem *contra* to the general rule. However, from an examination of this case it appears that the suit was brought to hold Hasbrouck liable on the contract of one Webb for the payment of rent. The question was whether Hasbrouck's agreement was original or collateral. The New York statute contains provision declaring void parol promises to answer for the debt of another, contracts not to be performed in one year, and leases for more than one year, but does not include the pertinent phrase in the North Carolina statute "from the making thereof." The agreement in the first instance with Webb provided for a lease for four months, with option for extension for a period not exceeding 3 years. Hasbrouck exercised the option for one year only and was held liable as for an original undertaking, two Justices dissenting. The Court said: "In the case at bar the exercise of the option was a mere extension of the term of a lease valid at its inception. If, however, regarded as a new lease springing from the exercise of the option, it was for the term of one year . . . and need not be in writing." This is the only case cited by McAdam in his work on Landlord & Tenant in support of this view.

In the Wisconsin case the oral contract was for a lease for one year, with privilege of extension for two years. The Court said that so much of the agreement as purported to give lessee right of possession for one year was conceded by plaintiff, and was treated by the court below as effectual, but that so much of the agreement as purported to grant right of possession thereafter was void. It will be noted, however, that it was only after lessee had retained possession for one year that lessor brought suit and ejected him. The period to which the Court referred was already past. The lease for that period had expired.

After consideration of the provisions of the pertinent statute, in the light of the decisions of this Court and those of other jurisdictions, we

conclude that the alleged oral executory agreement for the lease of land in this case, under which the defendant would have had the right to retain possession of the premises for more than three years, was within the statute of frauds and unenforceable, and that parol evidence in support thereof was properly excluded.

The exception to the refusal of the court to admit in evidence, for the purpose of corroboration, an unsigned form of a written lease cannot be sustained.

In the trial we find

No error.

L. G. WHITE v. DIXIE FIRE INSURANCE COMPANY, GREENSBORO, N. C., AND THE AMERICAN INSURANCE COMPANY OF NEWARK, N. J.

(Filed 27 February, 1946.)

1. Insurance § 50—Testimony that notice of cancellation was not received is some evidence that notice was not mailed.

Insurer denied liability on the policy in suit on the ground that it had canceled the policy by mailing notice of cancellation to insured more than a month prior to the accident. Insured offered in evidence letters written by insurer's agents, one stating that the policy had been canceled and the other that the policy had been canceled by notice addressed to insured. Plaintiff testified that he had not received any notice of cancellation and did not receive the unearned part of premium until after notice of loss had been given insurer. Insurer's agent testified he mailed the notice. *Held:* Since matter properly mailed is ordinarily received, insured's testimony that he did not receive notice of cancellation is some evidence that notice had not been mailed, and therefore the question was for the jury upon the conflicting evidence, and insurer's motions to nonsuit at the close of plaintiff's evidence and at the close of all the evidence and its request for a directed verdict, were properly denied.

2. Trial § 24—

Defendant's contention that it was entitled to nonsuit for that plaintiff's own evidence established its affirmative defense that it had canceled the policy in suit by mailing notice of cancellation is untenable when plaintiff testifies that he did not receive such notice and thus raises a conflict in the evidence on the issue.

3. Trial § 29—

The party having the burden of proof upon an issue is not entitled to a peremptory instruction upon conflicting evidence.

APPEAL by defendant Dixie Fire Insurance Company, Greensboro, North Carolina, from *Harris, J.*, at September Term, 1945, of CHOWAN.

Civil action to recover on policy of insurance for damage to automobile by "collision or upset."

A demurrer filed by the American Insurance Company was sustained, and the trial proceeded against defendant, Dixie Fire Insurance Company.

The remaining parties stipulate and agree that defendant Dixie Fire Insurance Company issued and delivered to plaintiff the policy of insurance on the automobile in question—covering the actual cash value less fifty dollars; that the premium on the policy had been paid by plaintiff to the company prior to the alleged damage to the automobile; that all conditions of the policy with respect to the institution of the suit, as condition precedent thereto, were complied with by plaintiff before suit was instituted; and that the sole questions in dispute for trial in Superior Court between plaintiff and defendant Dixie Fire Insurance Company are:

"1. Was the policy cancelled prior to the alleged damage by upset or collision?

"2. If not, what amount of damages, if any, is the plaintiff entitled to recover from the Dixie Fire Insurance Company?"

In so far as this appeal is concerned, the first of the above questions is the only one involved.

The policy offered in evidence on trial below contains the name and address of plaintiff as the insured, and the following pertinent portion of condition with respect to cancellation: "This policy may be cancelled by the company by mailing to the insured at the address shown in this policy written notice stating when not less than 5 days thereafter such cancellation shall be effective. The mailing of the notice as aforesaid shall be sufficient proof of notice and the effective date and hour of date of cancellation stated in the notice shall become the end of the policy period. Delivery of such written notice either by the insured or by the company shall be equivalent to mailing. . . . If the company cancels, earned premiums shall be computed pro rata. Premium adjustment may be made at the time cancellation is effected and, if not then made, shall be made as soon as practicable after cancellation becomes effective. The company's check or the check of its representative mailed or delivered as aforesaid shall be sufficient tender of any refund of premium due to the insured."

Plaintiff alleges in his complaint, and on trial offered evidence in respect of the cancellation of the policy, tending to show substantially the following: That on 28 February, 1945, the day after his automobile was "upset" and damaged, he notified the agents of *defendants* at Suffolk, Virginia, and also notified defendant, Dixie Fire Insurance Company, at Greensboro, N. C., by letter of his attorney on 28 February, 1945,

and by mailing later an affidavit to it, setting forth the facts in full, and in full compliance with the terms of the policy; that defendants declined to recognize any liability under the terms of the policy—declaring that it had been canceled on 8 January, 1945, and plaintiff notified of cancellation; that plaintiff had not received any notice of cancellation nor did he receive the unearned part of the premium until after notice of his loss had been given to defendant—when a check dated 3 March, 1945, for the alleged unearned premium was received several days later; and that he immediately returned the check.

In connection with above, plaintiff also on the trial below offered in evidence two letters from his attorney to Dixie Fire Insurance Company, Greensboro, N. C. The first dated 28 February, 1945, in which it is stated in pertinent part that: "Mr. White to whom the above numbered policy was issued called at my office this morning and handed me the policy and stated he had called your office over long distance; that you claimed the policy was cancelled some time the past January and that you were not responsible for the destruction of his automobile by reason of the said cancellation. He also informed me you have never notified him the policy had been cancelled and have never tendered to him any part of the premium he paid in the amount of $41.00.

"The purpose of this letter is to ascertain what disposition you propose making of his claim. If you seriously contend the policy was cancelled and you had the right to cancel without notice to him and without refunding a proportionate part of the premium paid by him, it is absolutely useless to engage in a fruitless correspondence in connection therewith, as only one result can follow and that is a suit for the amount due him under terms of the policy . . ." And the second, dated 21 March, 1945, enclosing "affidavit in compliance with the terms of the above numbered policy," and concluding: "If not paid within the time limit suit will be instituted for the amount set forth therein." These two letters were admitted in evidence for the purpose of showing that they were sent, and that defendant admits receiving them.

Plaintiff also offered in evidence two other letters, one dated 3 March, 1945, to plaintiff on letterhead of American Bank & Trust Company, Insurance Department, Suffolk, Va., signed in the name of that Department of that Company by Annie S. Boyer, reading as follows: "We are enclosing our check for $26.06 covering return premium due you under your policy A152529 Dixie Fire Insurance Company by reason of this policy having been cancelled as of January 15, 1945." And the other, dated 6 March, 1945, on letterhead of American Insurance Group, Dixie Fire Insurance Company, Administrative Office, Newark 1, New Jersey, signed by E. S. Hale (E. Scott Hale), Ass't Secretary, to plaintiff's attorney, reading: "Dear Sir: Policy No. A152529. L. G. White—

M. L. Martin, Severn, N. C., Agency. Your letter of February 28 is the first notice we have received that a claim is being made hereunder, and for your information advise this policy was effectively canceled by notice addressed to Mr. L. G. White, Route 1, Edenton, North Carolina, by properly attested notice of cancellation dated January 8, 1945. In view of the foregoing we disclaim liability for any loss to property described thereunder which might have occurred subsequent to January 15, 1945. Yours very truly, etc."

On the other hand, defendant, Dixie Fire Insurance Company, in its answer, denies liability to plaintiff on account of the matters and things alleged in the complaint, and pleads as ground therefor, and as defense thereto that the policy had been canceled by it prior to the date of the damage to plaintiff's automobile. It specifically avers in Section 9 of the answer, and in the course of the trial offered evidence tending to show that on 8 January, 1945, its agent, M. L. Martin, at Severn, N. C., mailed a written notice of the cancellation of said policy to the plaintiff at his post office address as shown in the policy, in words and figures as follows:

"Date: Jan. 8th, 1945. Dixie Fire Insurance Company hereby gives written notice of cancellation effective Jan. 15th, 1945, of policy No. A152529 issued to L. G. White. This policy will be cancelled and all liability of the company under said policy will cease in accordance with the policy conditions. Upon surrender of the policy, the company will refund the excess of paid premium above the pro rata premium for the expired term. Yours truly, Agent: M. L. Martin, Agency at Severn, N. C."

And on the trial defendant introduced as its only witness one M. L. Martin, who testified, summarily stated: That he is the countersigning agent at Severn, Northampton County, North Carolina, of the Dixie Fire Insurance Company under its agency, American Bank & Trust Company, at Suffolk, Virginia; that the policy in question was delivered through the Suffolk agency and countersigned by him; that the notice of cancellation (the same as set forth in Section 9 of the answer) and form of Post Office receipt #3817 were typed in the Suffolk office and brought to him by a Mrs. Boyer, accompanied by Mr. Moore, a bookkeeper, from that office; that he signed and mailed on 8 January, 1945, the notice they brought to him; that he obtained receipt from the Post Master as follows: "Received from M. L. Martin, Severn, N. C., one piece of ordinary mail addressed to Mr. L. G. White, Route 1, Edenton, N. C. This receipt does not provide for indemnification. U. S. Government Printing Office 5-10325 Post Master," stamped and postmarked "Severn, N. C., Jan. 8, 1 P. M., 1945"; that on same day he himself signed a certificate on the bottom of a carbon copy of the notice as follows: "I hereby

certify that on January 8, 1945, I sent by first class mail a notice of cancellation, an exact carbon copy of which appears above, and that form 3817 attached hereto is receipt of same obtained from the U. S. Post Office"; that the copy has been kept in the Suffolk office; that he signed a group of notices—how many he does not know; that the lady brought them the only time she has been to his office; that he did not pay any attention to the number nor the names; that Mrs. Boyer "brought the notices to me prepared and I signed them and took them to the Post Office in person"; that the premium was sent from the insurance department at Suffolk; that he kept no record of how many policies he handled a month; and that the record is kept in the Suffolk office.

Defendant further offered in evidence the allegation of the complaint as to receipt and return of check for unearned premium.

Defendant, Dixie Fire Insurance Company, preserved exceptions to refusal of the court to grant its motions, duly made, for judgment as in case of nonsuit, and to the refusal of its prayer for instruction, "If you believe the evidence and find the facts to be as the evidence tends to show, you will answer the first issue 'Yes.'"

The case was submitted to the jury upon these issues, which were answered by the jury as shown, to wit:

"1. Did the agent of the defendant, Dixie Fire Insurance Company, mail a notice to the plaintiff, as alleged in section 9 of the answer of the said defendant? Answer: No.

"2. In what amount, if anything, is the defendant, Dixie Fire Insurance Company, indebted to the plaintiff? Answer: $795.00."

From judgment on the verdict in favor of plaintiff, defendant Dixie Fire Insurance Company appeals to Supreme Court and assigns error.

No counsel for plaintiff, appellee.
W. D. Pruden for defendant, appellant.

WINBORNE, J. Appellant contends that there is error in the judgment from which this appeal is taken in the refusal of the court (1) to sustain the motion for judgment as in case of nonsuit, and (2) to give peremptory instruction in favor of defendant on the issue as to cancellation. After full and careful consideration of the evidence shown in the record of the case on appeal we are unable to agree with these contentions.

I. Appellant predicates its first contention upon two grounds: First: Upon the theory that having introduced in evidence, without restriction or limit in purpose, the letter from the Suffolk agency in which it is stated that it was enclosing check covering return premium "By reason of this policy having been cancelled as of January 15, 1945," and the letter from the assistant secretary of defendant in which it is stated that

"this policy was effectively cancelled by notice addressed to Mr. L. G. White . . . ," as shown in the foregoing statement of facts, which are uncontroverted, plaintiff is bound by them. In support of this contention defendant relies upon the principle enunciated in *S. v. Fulcher,* 184 N. C., 663, 113 S. E., 769; *S. v. Cohoon,* 206 N. C., 388, 174 S. E., 91; *S. v. Todd,* 222 N. C., 346, 23 S. E. (2d), 47; *S. v. McNeill,* 225 N. C., 560, 35 S. E. (2d), 629, and others of like import, to the effect that when a complete defense is established by the State's or plaintiff's evidence, a defendant should be allowed to avail himself of such defense on a motion for judgment as of nonsuit. We are of opinion, however, that plaintiff's evidence does not present a complete defense of cancellation of the policy as pleaded affirmatively by defendant. It shows no more than that defendant had stated in writing to plaintiff that there was a cancellation of the policy by mailing of notice. On the other hand, such statement is not the only evidence offered by plaintiff. There is evidence that no such notice had been received by him through the mails, and that there had been no return of premium before the plaintiff filed claim on account of damage to his automobile. These are circumstances bearing upon the weight of statements of defendant. If the notice had been mailed, it would ordinarily in the usual course of mails have been delivered to plaintiff. Since there is evidence that it was not so delivered, it is a question for the jury to say, under all the circumstances in evidence, whether the notice was in fact mailed. Compare *Trust Co. v. Bank,* 166 N. C., 112, 81 S. E., 1074, and *Eagles v. R. R.,* 184 N. C., 66, 113 S. E., 512. In the *Trust Company case* it is said: "When it is shown that a letter has been 'mailed,' this establishes *prima facie* that it was received by the addressee in the usual course of the mails and his business, and when the latter introduces evidence that it was not in fact received, or, not received at the time alleged, such testimony simply raises a conflict of evidence, on which it is the exclusive province of the jury to pass."

Appellant next contends that even if it be not entitled to judgment as of nonsuit on plaintiff's evidence, the testimony of the witness M. L. Martin is not contradicted and is not in conflict with plaintiff's evidence, and hence its motion for judgment as of nonsuit at the close of all the evidence should have been granted. As to this, what is said above as to the first contention is an appropriate answer.

II. As to the refusal of the court to give the instruction to the jury as prayed: The theory of the trial below, as disclosed by the charge of the court, is that under the terms of the policy in question Dixie Fire Insurance Company had a right to cancel the policy at any time by simply mailing to plaintiff at the address given in the policy a written notice of cancellation to take effect in not less than five days and that

such mailing of notice would be sufficient proof of cancellation regardless of whether the plaintiff, as the insured, received the mailed notice. The court, in accordance with this declared theory, charged the jury that the burden on the first issue is on the defendant, through "its witnesses or plaintiff's witnesses, or both" to show that notice of cancellation was mailed, that is, placed in the post office, properly stamped and addressed to plaintiff, and if the jury should find from the evidence and by its greater weight that defendant did so mail the notice of cancellation, it would be the duty of the jury to answer the first issue "Yes," but if the jury does not so find, it will answer the issue "No."

Defendant, the appellant, takes no exception to the charge as given. Hence, we are not called upon to consider the correctness of principle involved in the theory of the trial, and we express no opinion as to it.

It is sufficient to say in respect of the request for instruction that the burden of the first issue being upon the defendant, the weight to be given to its evidence, in the light of the attendant circumstances, is for the jury. And the charge of the court has presented the case to the jury in light favorable to defendant, and under such charge the jury has failed to accept defendant's evidence. Hence, in the judgment on the verdict of the jury, we find

No error.

J. HERMAN COE v. SURRY COUNTY; M. Q. SNOW, R. P. JONES AND S. M. SMITH, COMMISSIONERS.

(Filed 27 February, 1946.)

Taxation § 3b—

During the fiscal year 1944-45 a county made funds available at a banking institution to pay its bonds, and its account was charged with the checks used therefor. The bonds were due 1 July, 1945, and the bonds were marked paid and returned to the county during July, 1945. *Held:* The indebtedness was outstanding at the end of the fiscal year 1944-45 and may not be computed as a reduction in outstanding indebtedness for that fiscal year within the meaning of Art. V, section 4, of the Constitution of North Carolina.

APPEAL by defendants from *Gwyn, J.*, resident of 21st Judicial District, in Chambers at North Wilkesboro, N. C., 18 January, 1946, of SURRY.

Civil action to enjoin issuance of bonds of Surry County for school purposes without a vote of the people.

Counsel for plaintiff and defendants, being of opinion that uncontroverted facts in this action are sufficient to raise the question of law

involved herein, submitted to the court below a statement of agreed facts, pertinent portions of which may be stated in summary as follows:

I. Defendants, Board of Commissioners of the County of Surry, a body politic and corporate, proposing to issue without a vote of the people of the county $55,000 in school building bonds of the county for the purpose of constructing a school building at Dobson, in said county, adopted a bond ordinance on 17 September, 1945, in which it is set forth that "It is necessary to erect and equip a new school building in the town of Dobson, in said county, on land now owned by the County Board of Education, in order that said County may maintain public schools in said county as an administrative agency of the Public School System of the State of North Carolina for the six months term required by the Constitution of North Carolina, and (2) it will be necessary to expend the sum of $55,000 in addition to other available funds, to finance the erection and equipment of said school building; and (3) no provision has been made by local tax or otherwise to raise said sum for said purpose, and (4) The County Board of Education of said County has certified to the Board of Commissioners its concurrence in such determinations and has requested the Board of Commissioners to raise said sum for such purpose by the issuance of bonds of said County, pursuant to the County Finance Act of North Carolina."

II. The bond ordinance also provides that "No debt shall be contracted during any fiscal year by the issuance of bonds pursuant to this bond order if the amount of such debt and all other debts contracted during such fiscal year shall exceed two-thirds of the amount by which the outstanding indebtedness of said County shall have been reduced during the next preceding fiscal year, unless the incurring of such debt shall be submitted to a vote of the people of said county and shall be approved by a majority of those who vote thereon."

III. Between 1 July, 1944, and 30 June, 1945, the County of Surry paid off and discharged bonds and indebtedness due to the State of North Carolina in total amount of $19,650. And in addition thereto, Surry County had outstanding bonds aggregating $65,000 due 1 July, 1945, for the payment of which when due provision was made for raising revenue by taxes levied under the county budget for the fiscal year ending 30 June, 1945. From the taxes as levied sufficient funds were collected to pay off and discharge the bonds due 1 July, 1945, and on 20 June, 1945, the county forwarded to National City Bank of New York and Guaranty Trust Company of New York, at which said bonds were payable, New York exchange checks aggregating $65,000, and funds necessary to pay off and discharge all of said bonds were received by said Bank and said Trust Company on 22 June, 1945, and the checks were charged against the account of Surry County on 20 June, 1945.

Of said bonds $54,000 were marked paid and canceled 2 July, 1945, $3,000 on 3 July, 1945, $2,000 on 5 July, 1945, $4,000 on 9 July, 1945, and $1,000 on each of the dates 11 July, 1945, and 14 August, 1945, and all of said bonds were surrendered to defendant after 1 July, 1945.

IV. Surry County issued no bonds during the fiscal year ending 30 June, 1945, and all debts incurred by the county during the fiscal year were paid prior to the end of such year, and Surry County has not issued any bonds or other evidences of indebtedness during the fiscal year beginning 1 July, 1945.

Upon the agreed facts counsel for plaintiff and counsel for defendants submit to the court the question whether the issuance of bonds of Surry County in the amount of $55,000 without a vote of the people is in violation of Article V, section 4, of the Constitution of North Carolina, which prohibits the issuance of bonds in excess of two-thirds of the amount by which the outstanding indebtedness of a county shall have been reduced during the preceding fiscal year.

The court being of opinion that the issuance of the bonds as proposed would be in violation of Article V, section 4, of the Constitution of North Carolina, granted restraining order as prayed by plaintiff.

Defendants appeal therefrom to Supreme Court and assign error.

Frank Freeman for plaintiff, appellee.
Fred Folger for defendants, appellants.

WINBORNE, J. This is the pivotal question for decision on this appeal: Where bonds of a county are payable at a certain banking institution on the first day of a county fiscal year, and before the close of the next preceding fiscal year the county makes available at such institution funds for payment of such bonds, are the bonds outstanding at the close of the latter year within the meaning of Article V, section 4, of the Constitution of North Carolina? The answer is "Yes." See Article V, section 4, of Constitution of North Carolina. *Royal v. Sampson County,* 214 N. C., 259, 199 S. E., 15.

Article V, section 4, of the Constitution of North Carolina, as amended in 1936, after specifying certain purposes for which the General Assembly shall have the power to contract debts and pledge the faith and credit of the State, and for which it may authorize counties and municipalities to contract debts and pledge their faith and credit, provides as follows: "For any purpose other than these enumerated, the General Assembly shall have no power, during any biennium, to contract new debts on behalf of the State to an amount in excess of two-thirds of the amount by which the State's outstanding indebtedness shall have been reduced during the next preceding biennium, unless the subject be submitted

to a vote of the people of the State; and for any purpose other than these enumerated the General Assembly shall have no power to authorize counties or municipalities to contract debts, during any fiscal year, to an amount exceeding two-thirds of the amount by which the outstanding indebtedness of the particular county or municipality shall have been reduced during the next preceding fiscal year, unless the subject be submitted to a vote of the people of the particular county or municipality."

The fiscal year as defined in the County Fiscal Control Act, G. S., 153-114, "is the annual period for the compilation of fiscal operations, and begins on the first day of July and ends on the 30th day of June."

When, then, is indebtedness outstanding within the meaning of the above constitutional provision?

Speaking thereto in the case of *Royal v. Sampson County, supra, Seawell, J.,* writing for the Court, and speaking to the "net debt theory" advanced there, and after defining the term "outstanding" as qualifying the indebtedness required to be reduced, stated: "The language used in the Constitution seems to be plain and uninvolved and does not contemplate striking a balance between liabilities and assets, even though certain sums may be earmarked for application to the debt. The transaction to which it refers must be carried out actually rather than constructively"; and, continuing, "Speaking strictly to the question presented under this head, we are of opinion that no reduction of outstanding indebtedness occurs by the mere collection of a sinking fund, but does take place when actual payment is made to the creditor out of the sinking fund or other applicable revenues, which results in the extinction of the debt and leaves the creditor without further demands on the revenues or taxing powers of the county or municipality for its satisfaction."

It seems clear, therefore, that bonds are outstanding within the meaning of the term of Article V, section 4, of the Constitution, until actually paid and canceled, or delivered to the county for cancellation.

Applying this principle to the case in hand, the $65,000 bonds were not due until 1 July, 1945, the beginning of a new fiscal year, and though funds were provided in the next preceding fiscal year, they were not actually paid to the creditors until after the first of July, 1945; nor were the bonds surrendered until after the beginning of the new fiscal year. Hence, they were outstanding at the close of the next preceding fiscal year, 30 June, 1945, and may not be taken into account in ascertaining the amount by which the county had reduced its outstanding indebtedness in that fiscal year.

The restriction of Article V, section 4, of the Constitution has been applied (1) in the case of *Hallyburton v. Board of Education* (1938), 213 N. C., 9, 195 S. E., 21, where Burke County sought to procure a loan from the State Literary Fund for the purpose of erecting and

equipping certain school buildings in the county without having submitted the question to a vote of the people; and (2) in the case of *Gill v. Charlotte* (1938), 213 N. C., 160, 195 S E., 368, where the City of Charlotte proposed to issue bonds for street and sewerage construction or extension without a vote of the people. In these cases *Barnhill, J.*, speaking for the Court, discussed the background and purpose of the constitutional provisions in the light of the factual situations in hand. What is said there is appropriate here. We quote in part from the *Hallyburton case, supra:* "It follows that the provisions of Article V, sec. 4, now constitute the dominant or controlling limitation upon the power of local units to contract debts or to issue its bonds, and its provisions are superimposed upon the limitations contained in Article VII, sec. 7, and in Article V, sec. 6, of the Constitution. To the provisions of the section under consideration the former decisions of this Court must likewise yield and are no longer authoritative except within the limitations of this section. . . . The primary duty to provide for a six months public school during each year and to furnish the necessary buildings and equipment therefor rests primarily upon the State. The State in turn is empowered to, and has, delegated to the several counties the duty to furnish the necessary buildings for the constitutional school term. The board of commissioners of a county, however, are without authority to comply with this delegation of power in violation of the provisions of the section of the Constitution under consideration without first submitting the question to a vote of the people. If the people of the county or other municipal corporation will not by their vote authorize an increase of the bonded debt beyond the prescribed limitations the State will have to devise other means to meet the requirements of the Constitution in respect to education."

The judgment below is

Affirmed.

GRACIE MAE STANLEY v. EDDIE L. STANLEY.

(Filed 27 February, 1946.)

1. Constitutional Law § 19b—

Imprisonment of the husband for failure to pay a simple judgment for debt due the wife under a separation agreement not adopted as an order of court violates Art. I, sec. 16, of the Constitution.

2. Divorce § 15a—

Alimony is an allowance made for the support of the wife out of the estate of the husband by order of court in an appropriate proceeding,

independent of any agreement between the parties which is not itself made an order of the court.

3. Divorce § 11b—

A decree of absolute divorce may not award permanent alimony, and the proviso of the statute, G. S., 50-11, that a decree of absolute divorce on the ground of two years separation should not impair or destroy the right to alimony under prior decrees relates to alimony properly allowed by decree of court and not to payments provided in a mere separation agreement.

4. Divorce § 16—Defendant may be held in contempt for failure to pay allowance to wife only if payment is ordered by decree of court.

The parties entered into a separation agreement which provided that the husband pay the wife a stipulated sum weekly, which should continue though the husband should later obtain a divorce. Thereafter the husband obtained an absolute divorce on the ground of two years separation, and the decree stipulated that it should not prejudice the wife's right to support under the separation agreement. Upon the husband's failure to make payments, the wife instituted action and obtained judgment for the amount in arrears. Thereafter, upon motion in the cause, the husband was adjudged in contempt for failure to pay the amount of the judgment and was also ordered to pay subsequent installments then due under penalty of contempt. *Held:* The provision that the husband pay the stipulated sums weekly was contained in a separation agreement which was at no time made an order of the court, since the divorce decree merely provided it should not affect the agreement and the last judgment was a simple recovery of a money demand, and therefore the attachment for contempt upon motion in the cause was erroneous.

APPEAL by defendant from *Harris, J.*, at November Term, 1945, of PASQUOTANK.

The plaintiff brought this proceeding by petition or motion in the cause to procure a citation of the defendant for contempt of court under the following circumstances:

The plaintiff and defendant were united in marriage sometime in 1920, and lived together until March, 1942. On 17 April of that year they entered into a separation agreement, in which it was provided that the husband should pay into the hands of the County Welfare Officer for the wife's support $8 per week, these payments to continue though the husband should later obtain a divorce.

Thereafter, on 20 April, 1944, the husband, present defendant, instituted an action against the wife, plaintiff herein, for absolute divorce, on the grounds of two years separation; and decree was entered in October, 1944, granting to the plaintiff (present defendant) an absolute divorce. The judgment contained the following provision: "By consent, it is further ordered, adjudged and decreed that this judgment shall in no way prejudice the defendant's rights to maintenance and support under

that certain agreement between the parties hereto, dated April 17, 1942, a copy of which is held by each party."

Thereafter, on 16 November, 1944, the divorced wife brought an action against this defendant in the Superior Court of Pasquotank County to enforce the terms of the separation agreement, in which she set up the same, alleged noncompliance on the part of defendant, and asked for judgment against the defendant for arrears of payments amounting to $240. The judgment of Dixon, J., based upon findings of fact, sets out the terms of the separation agreement, the above stated provision in the divorce decree, and the failure of defendant to make the stipulated payments, and concludes as follows: "It is thereupon on motion of George J. Spence, attorney for plaintiff, ordered, decreed by the Court that the plaintiff recover judgment against the defendant for the sum of two hundred and forty dollars and for the costs of this action." The judgment imposes no duties upon the defendant other than thus stated.

Thereafter, on 4 October, 1945, the plaintiff filed a petition or motion in the cause, reciting the rendition of the above judgment, the findings of fact that the "defendant Eddie Stanley had failed and refused to pay into the hands of A. H. Outlaw, Welfare Officer, for delivery to Gracie Mae Stanley, the sum of $240, same being for thirty weeks at the rate of $8 per week from October 4, 1944, to May 7, 1945," and adds "the same being for support, maintenance and alimony as set out in said judgment"; and the petition prays that a citation be served on the defendant to show cause why he shall not be adjudged in contempt of court for failure to comply with said judgment.

Citation was accordingly issued, and the matter came on for hearing before Harris, J., who rendered the following judgment:

"This cause coming on to be heard at this term before the Honorable W. C. Harris, Judge, upon a citation heretofore issued in this cause by Honorable C. E. Thompson, Judge of the First Judicial District of North Carolina, returnable before the undersigned and it appearing to the Court and the Court finding as facts that at the May Term, 1945, of the Superior Court of Pasquotank County, a judgment was duly signed in the above entitled action requiring the defendant, Eddie L. Stanley, to pay into the hands of A. H. Outlaw, Welfare Officer, for delivery to Gracie Mae Stanley the sum of two hundred and forty ($240.00) dollars, same being for thirty weeks at the rate of eight ($8.00) dollars a week from October 9, 1944, to May 7, 1945, the same being for the support, maintenance and alimony due the said Gracie Mae Stanley, and it further appearing to the Court that the defendant, Eddie L. Stanley, has failed and refused to pay into the hands of A. H. Outlaw, Welfare Officer, for the delivery to Gracie Mae Stanley, the sum of $240, same being for thirty weeks at the rate of $8 a week from October

9, 1944, to May 7, 1945, the same being for the support, maintenance and alimony due the said Gracie Mae Stanley;

"It is thereupon ordered, decreed and adjudged by the Court that the said Eddie L. Stanley, the defendant herein, is hereby adjudged in contempt of Court for failure to pay said sums as aforesaid, and it is further ordered, decreed and adjudged by the Court that the said Eddie L. Stanley, defendant as aforesaid, be committed to the County jail of the County of Pasquotank to be held until he shall pay said sum of $240 to the said A. H. Outlaw, Welfare Officer, for delivery to Gracie Mae Stanley, same being for thirty weeks at the rate of $8 a week from October 9, 1944, to May 7, 1945, the same being for the support, maintenance and alimony due the said Gracie Mae Stanley.

"It further appearing to the Court and the Court finding as a fact that the said Eddie L. Stanley, defendant as aforesaid, has failed to pay into the hands of A. H. Outlaw, Welfare Officer, for delivery to Gracie Mae Stanley, for her support, maintenance and alimony any sum since May 7, 1945, at which time the said sum of $240 became due, and it appearing to the Court that there is now past due twenty-six weekly installments at the rate of eight ($8.00) dollars a week amounting to $208.00:

"It is thereupon ordered, decreed and adjudged by the Court that Eddie L. Stanley be, and he is hereby ordered to at once pay to the said A. H. Outlaw, as aforesaid, the additional sum of $208 for delivery to said Gracie Mae Stanley for her support, maintenance and alimony.

"It is further ordered, decreed and adjudged by the Court that upon failure of said Eddie L. Stanley, as aforesaid, to pay the said additional sum of $208 as aforesaid to A. H. Outlaw, Welfare Officer, for Gracie Mae Stanley for maintenance, support and alimony, that the said Eddie L. Stanley shall be committed to the county jail and held therein until such time as he may pay said sum as aforesaid.

"It is further ordered that the defendant pay the costs of this action to be taxed by the Clerk."

From this judgment defendant appealed.

George J. Spence and J. Kenyon Wilson for plaintiff, appellee.
J. W. Jennette and John H. Hall for defendant, appellant.

SEAWELL, J. When the chronology, or sequence, of the several transactions involved in this controversy, both judicial and extrajudicial culminating in a citation of the defendant for contempt, is kept in mind, and the significance of each of them properly appraised, we can find no order of the court capable of implementation by a contempt proceeding. First in order was the separation agreement, in which the defendant

engaged to pay for the benefit of his wife $8 per week, and in which payments, it is alleged and adjudged, he defaulted. This agreement was an extrajudicial transaction, and although between husband and wife, and relating to the support of the wife, had no more sanction for its enforcement than any other civil contract; certainly not that of imprisonment through civil contempt for noncompliance. Such a proceeding, to escape the prohibition of Art. I, sec. 16, of the Constitution, prohibiting imprisonment for debt, is confined to the enforcement of an appropriate judicial order, made in a case where the subject under jurisdiction, and the adjudication thereupon, peculiarly justify and permit such remedy. The gist of the contempt is the willful disobedience to the court order.

Alimony, as that term is used in the law, is an allowance made for the support of the wife out of the estate of the husband by order of court in an appropriate proceeding, and is either temporary or permanent. Black's Law Dictionary; 17 Am. Jur., Divorce and Separation, S. 496; 27 C. J. S., Divorce, S. 202.

An action resulting in alimony safeguards the issue by requiring the statement of jurisdictional facts relating to the remedy sought upon which, if proven, the court acts independently of any subsisting agreement between the parties which is not itself made an order of court. Such an action is distinguishable from the suit brought upon the separation agreement before Judge Dixon, discussed *infra,* in which this motion is made.

In this State alimony, both temporary and permanent, may be awarded (1) in the statutory proceeding for alimony without divorce—G. S., 50-16; (2) in an action for divorce *a mensa et thoro*—G. S., 50-7; and (3) in an action for absolute divorce temporary alimony *pendente lite*—G. S., 50-15—but not permanent alimony may be awarded. G. S., 50-11; *Duffy v. Duffy,* 120 N. C., 346, 27 S. E., 28.

An action may be maintained for breach of the contract, of course, and judgment awarded for sums shown to be due. Such actions, however, sound in contract, and result in a money judgment without execution *in personam,* under any label known to the law, including imprisonment for contempt. Doubtless the wife, beneficiary of such a separation agreement, might, upon its breach, elect to sue for alimony, either without divorce or in a suit for divorce from bed and board, rather than upon the contract. In that event the basis of the action is willful nonsupport, not breach of the separation agreement, and upon a successful issue the order of the court, retrospective or prospective, in case of willful disobedience, might be supported by a citation for civil contempt. But not after absolute divorce, the second significant occurrence in this series, prior in time to the Dixon judgment. G. S., 50-11, *supra.*

While the Court, in an action for absolute divorce, may dispose of many incidental matters not necessary to catalogue here, it is without power to award permanent alimony incidental to the decree dissolving the relationship. G. S., 50-11, *supra.* Under the proviso in this section, a prior award of alimony is protected from annulment by a decree in absolute divorce, based on two years separation, which would otherwise probably have resulted. The proviso is as follows:

"Provided, further, that a decree of absolute divorce upon the ground of separation for two successive years as provided in Sec. 50-5 or Sec. 50-6 shall not impair or destroy the right of the wife to receive alimony under any judgment or decree of the court rendered before the commencement of the proceeding for absolute divorce." *Dyer v. Dyer,* 212 N. C., 620, 194 S. E., 278. The statute does not protect a mere separation agreement as an award of alimony. It is, therefore, not only against public policy in this State, but contrary to the statute, that permanent alimony should be the outcome of an action for divorce *a vinculo.*

Furthermore, that is not the purport of the saving provision in the decree. Upon its face it does not attempt to do more than except from the operation, or consequences, of the judgment whatever rights the defendant in the case had under the separation agreement we have set out in full, without adopting, adjudicating or recognizing any of its provisions as a judgment or order of the court. It is merely a "hands off" or negative pronouncement regarding a nonjudicial civil agreement with which the court did not desire its decree to interfere. Whether even in this aspect it has accomplished that purpose, we are not called upon to say, as the matter is academic in this case.

The judgment entered by Judge Dixon subsequent to the decree in divorce is a simple recovery upon a money demand, does not in any way adopt the terms of the separation agreement as an order of court—even had its recital been in a proceeding where that is permissible—and does not require anything of the defendant other than what the law demands of any person who has suffered a recovery in an action for debt. It is not such a judgment as can be enforced by resort to a contempt proceeding. Const., Art. I, sec. 16.

The order of Harris, J., upon petitioner's motion, is vacated and the respondent will be discharged from the rule.

The judgment is

Reversed.

JAMES H. TURPIN, ELLEN BROWN, IDA BROOKS, LOTTIE BRAMLETT, FANNIE SORRELLS, A. R. MESSER, DOCK MESSER, EMELINE M. TURPIN, COLE MESSER, J. C. GIBSON, JIM MESSER AND ALICE SNYDER v. MRS. M. Y. JARRETT AND M. Y. JARRETT.

(Filed 27 February, 1946.)

1. Deeds § 13b—

A provision following the warranty clause in a deed that if the grantee "should die without issue after her death" the land should descend to her brothers and sisters, precludes the application of the rule in *Shelley's case*, even though the *habendum* is to the grantee and "her bodily heirs."

2. Deeds § 13a—

Where a conveyance is to the grantee with limitation over in the event she should die without issue after her death, to determine the effectiveness of the limitation over the roll must be called as of the date of the death of the first taker. G. S., 41-4.

3. Same—

"Bodily heirs," when used as *descriptio personarum*, and "issue" are synonymous terms connoting and embracing children, grandchildren, and other lineal descendants.

4. Same—

The deed in question conveyed the property to the grantee with provision that should she die "without issue after her death" the lands should descend to the grantee's brothers and sisters. The grantee's sole child predeceased her but left children who survived grantee. *Held:* The grantee took a base or qualified fee, defeasible upon her death without "issue," which term embraces lineal descendants, and therefore upon the death of the grantee leaving grandchildren her surviving the fee became absolute, defeating the limitation over, and her conveyance of the property during her lifetime is binding upon her heirs.

APPEAL by plaintiffs from *Rousseau, J.*, at October Term, 1945, of JACKSON.

Civil action in ejectment and to remove cloud on title.

The case was heard on facts agreed which are in substance as follows:

On 29 June, 1885, John Messer and wife conveyed a tract of land in Jackson County to Jane Messer. The granting clause contains no words which undertake to limit or define the estate conveyed, but the *habendum* clause is "to the said Jane Messer and her bodily heirs," and immediately following the warranty clause there was inserted the following: "PROVIDED, however, that if the said Jane Messer should die without issue after her death the lands mentioned in this deed is to descend to her brothers and sisters and this is to be her full share of our estate." The grantors reserved a life estate. John Messer and wife each died prior to

21 March, 1911. There was born to Jane Messer one son, Charlie Messer, who predeceased her but left surviving him a widow and five or six children who are grandchildren and great-grandchildren of Jane Messer. On 21 March, 1911, Jane Messer conveyed to Mrs. M. Y. Jarrett, one of the defendants, the *locus in quo,* a part of the tract described in the John Messer deed, and she has been in the sole possession thereof since that date. Jane Messer died 14 February, 1941.

While not so stipulated, it is treated as a fact that the plaintiffs are the persons named in the limitation over.

The plaintiffs allege that they are the owners of the property and the claim of the defendant Mrs. Jarrett casts a cloud upon their title. They pray judgment that they are the owners of the property described in the complaint, free and clear of any claim of defendants.

The parties waived trial by jury and submitted the cause on the facts agreed. Thereupon the court adjudged that the defendant Mrs. M. Y. Jarrett is the owner and entitled to possession of the property in controversy, free and clear of any claim of plaintiffs. Plaintiffs excepted and appealed.

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

Hugh E. Monteith, E. P. Stillwell, and Dan K. Moore for defendants, appellees.

BARNHILL, J. On this record the rule in *Shelley's case* is not controlling. *Matthews v. Matthews,* 214 N. C., 204, 198 S. E., 663; *Williamson v. Cox,* 218 N. C., 177, 10 S. E. (2d), 662; *Paul v. Paul,* 199 N. C., 522, 154 S. E., 825; *Willis v. Trust Co.,* 183 N. C., 267, 111 S. E., 163; *Ford v. McBrayer,* 171 N. C., 420, 88 S. E., 736; *Dawson v. Ennett,* 151 N. C., 543, 66 S. E., 566; *Harrell v. Hagan,* 147 N. C., 111; *Hampton v. Griggs,* 184 N. C., 13, 113 S. E., 501.

The deed to Jane Messer conveyed a base or qualified fee, defeasible upon her death without "bodily heirs" or "issue," upon the happening of which event plaintiffs would become seized and possessed of the title under the limitation over. *Smith v. Lumber Co.,* 155 N. C., 389, 71 S. E., 445; *Hutchinson v. Lucas,* 181 N. C., 53, 106 S. E., 150; *Thompson v. Humphrey,* 179 N. C., 44, 101 S. E., 738; *Willis v. Trust Co., supra; James v. Griffin,* 192 N. C., 285, 134 S. E., 849; *West v. Murphy,* 197 N. C., 488, 149 S. E., 731.

To determine the effectiveness of the limitation over the roll must be called as of the date of the death of the first taker. It is so declared by statute. Ch. 7, Public Laws 1827, now G. S., 41-4; *Patterson v. McCormick,* 177 N. C., 448, 99 S. E., 401 (citing 26 prior decisions); *Perrett v. Bird,* 152 N. C., 220, 67 S. E., 507; *Smith v. Lumber Co., supra;*

Rees v. Williams, 164 N. C., 128, 80 S. E., 247; *Willis v. Trust Co., supra; Vinson v. Gardner,* 185 N. C., 193, 116 S. E., 412; *Dupree v. Daughtridge,* 188 N. C., 193, 124 S. E., 148; *Yarn Co. v. Dewstoe,* 192 N. C., 121, 133 S. E., 407; *Massengill v. Abell,* 192 N. C., 240, 134 S. E., 641; *Henderson v. Power Co.,* 200 N. C., 443, 157 S. E., 425; *Hudson v. Hudson,* 208 N. C., 338, 180 S. E., 597; *Moseley v. Knott,* 212 N. C., 651, 194 S. E., 100; *Thames v. Goode,* 217 N. C., 639, 9 S. E. (2d), 485.

So then we come to the primary question posed by this appeal: Do the terms "bodily heirs" and "issue" as used in the deed include lineal descendants other than children? Our decisions answer in the affirmative.

"Bodily heirs," when used as *descriptio personarum,* and "issue" are synonymous terms connoting and embracing children, grandchildren, and other lineal descendants. *Matthews v. Matthews, supra; Harrell v. Hagan, supra; Bowden v. Lynch,* 173 N. C., 203, 91 S. E., 957; *Albright v. Albright,* 172 N. C., 351, 90 S. E., 303; *Pugh v. Allen,* 179 N. C., 307, 102 S. E., 394; *Willis v. Trust Co., supra; Hampton v. Griggs, supra; Moseley v. Knott, supra; Brown v. Holland,* 221 N. C., 135, 19 S. E. (2d), 255; *Elledge v. Parrish,* 224 N. C., 397. For cases in other jurisdictions see 22 Words and Phrases, 742, *et seq.* See also 5 Words and Phrases, 583, *et seq.*

Discussing the question in *Matthews v. Matthews, supra,* we said: "The term 'bodily heirs' . . . is more comprehensive than the term children, and means progeny or issue, and includes children, grandchildren and other lineal descendants. It is true that in some of the cases in which this term is interpreted when used as *descriptio personarum,* it is said that it means children. However, an examination of those cases will disclose that only children were concerned and no grandchildren were involved."

The court below, it is true, held that upon the birth of Charlie Messer the condition in the deed was fulfilled and, *non constat* he predeceased Jane Messer, she thereupon became seized in fee absolute, but this was harmless error. She left surviving grandchildren. Hence the event—death without issue—upon the happening of which plaintiffs were to take, never occurred. Thus they possess no interest in or claim to the property in controversy.

The conclusion that the grantors intended to convey a fee, defeasible only upon death without lineal descendant, is fortified by the circumstances of the conveyance as disclosed by the language in the deed. The consideration was love and affection. The property was conveyed as an advancement in satisfaction of the grantee's interest in the estate of her parents. It was to descend to the other children of grantors only in the

event the grantee died without issue. Thus they wrote into the deed just what the law provides.

No reason is apparent why the grantors should cut the succession in the interest of other children and deprive the grandchildren of Jane Messer of the privilege of transmitting the inheritance. On the contrary, it clearly appears that they intended that title to the property should remain in Jane Messer's line of descent in the event there was anyone in that line to take at her death.

As her title, at her death, ripened into a fee absolute and her deed is binding upon her heirs, *Thames v. Goode, supra; Woody v. Cates,* 213 N. C., 792, 197 S. E., 561, the defendants, on their affirmative plea, were entitled to a decree that they are now the owners of the *locus* free of any claim of plaintiff. The court below so held.

The judgment is

Affirmed.

STATE v. WOODROW VADEN, JOHN DANIEL VADEN AND JULIUS VADEN.

(Filed 27 February, 1946.)

1. Homicide § 25—

Where the evidence shows an intentional killing with a deadly weapon the law implies malice, and the motion to nonsuit made by the defendant who fired the fatal shot is properly denied, the credibility and sufficiency of his evidence upon his plea of self-defense being for the determination of the jury.

2. Homicide §§ 11, 25—Where the State's evidence supports view that defendants did not quit fight when they had opportunity, nonsuit on ground of self-defense is properly denied.

The State's evidence tended to show an affray at a filling station engaged in by all defendants, that the fight was stopped but that thereafter defendants, three brothers, sought and found their antagonist at another filling station, that third parties induced them to shake hands and apparently settle their controversy and the brothers started to leave in their truck when one of them called the proprietor out and expressed dissatisfaction with the settlement, that their antagonist then came out of the filling station and the quarrel was renewed and he, armed with a knife, and one of defendants, armed with a blackjack, started fighting, and that while they were fighting another defendant shot from the truck, inflicting fatal injury. *Held:* The evidence supports the view that the second fight was but a continuation of the first and that the purported settlement of the controversy was not entered into in good faith, and that in reality defendants had not quit the fight, and therefore motion to nonsuit on the ground that the State's evidence established the defense of self-defense, was properly denied.

3. Homicide §§ 2, 25—

Upon evidence tending to show that all of defendants acted in concert in producing the first difficulty and all engaged in the fighting, and that during the second affray, which was but a continuation of the first, one of defendants fired the fatal shot while the deceased and appealing defendant were fighting, the contention of the appealing defendant that the one who inflicted the fatal injury was acting independently, is untenable.

APPEAL by the defendants, Woodrow Vaden and John Daniel Vaden, from *Armstrong, J.*, at October Term, 1945, of ROCKINGHAM.

Criminal prosecution upon indictment charging the defendants with the murder of Carl Bullins.

The evidence tends to show that on 14 February, 1945, the deceased and Julius Vaden were at the filling station of Caleb Ray, located on the highway between Mayodan and Stoneville. Carl Bullins was sitting on the air compressor box. Julius Vaden "walked up laughing and talking. Then Carl jumped off the air compressor and they started fighting and about that time Woodrow and Daniel went out there . . . Woodrow ran up and hit him while he was fighting with Julius. They were all four gathered up together. Just a kind of general row until Caleb come and ordered them all off." Carl Bullins, the deceased, thereafter cursed John Daniel Vaden and accused him of hitting him and said: "You will remember it the longest day you live."

The defendant Julius Vaden left the filling station and went toward Mayodan. The defendants Woodrow and John Daniel Vaden did not leave. The deceased and Otis Ray left and went toward Stoneville, stopping at the filling station belonging to Wesley Ray. About fifteen minutes later, the defendant Julius Vaden returned to Caleb's filling station and asked if "That G—— d—— Carl Bullins" was there. Upon being told that the deceased had gone up the road, Julius said: "By G——, I am going up the road too," and John Daniel Vaden said: "If you are going up the road I am going with you." Whereupon Julius, John Daniel and Woodrow Vaden entered the truck owned by Julius Vaden and drove up the road. They drove past the filling station of Wesley Ray, turned around and started back toward Mayodan and stopped at the station. The deceased and Otis Ray were sitting in Wesley Ray's filling station, and the deceased was remarking that it was unfair for two of the defendants to jump on him. One of the defendants walked into the filling station and the deceased attempted to make a "dive" at him, but was restrained by Otis and Wesley Ray. The other defendants entered the filling station and the deceased and the defendants, at the suggestion of Otis and Wesley Ray, shook hands and apparently became quite friendly. One of the defendants remarked that it was time for him to leave and they all went out to the truck. While

standing at the truck, the defendant Julius called Otis Ray out and told him that he had received a dirty deal. As Otis started back to the filling station, he met the deceased going toward the truck. Otis went to the door and when he returned to the truck the deceased had his knife in his hand. Otis persuaded the deceased to put his knife in his pocket, but when the deceased put his knife in his pocket, he left the blade open. Otis again went to the door of the building, and when he looked toward the truck the next time the deceased was "going into them" with his knife open and John Daniel Vaden was swinging at the deceased with a blackjack. The blackjack slipped out of the hand of John Daniel Vaden and fell to the ground, and both the deceased and John Daniel fell to the ground, scrambling for the blackjack. John Daniel seized the big end of the blackjack and the deceased got the little end, and John Daniel jerked the blackjack out of the deceased's hand. John Daniel and the deceased started to get up and the defendant Woodrow Vaden fired from the truck, wounding the deceased, and from this wound the deceased died.

Defendants offered no evidence. Motion for judgment as of nonsuit was overruled.

The jury returned a verdict of guilty of manslaughter as to all the defendants. From the several judgments imposed, John Daniel Vaden and Woodrow Vaden appeal.

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

P. W. Glidewell, Sr., for defendants.

DENNY, J. The only question presented on this appeal, is whether the trial judge committed error in refusing the defendants' motion for judgment as of nonsuit. A careful consideration of all the facts and circumstances disclosed by the evidence, leads us to the conclusion that the answer must be in the negative.

The appellants are relying upon the plea of self-defense, which defense they contend is clearly established by the State's evidence. However, since there is ample evidence tending to show that the defendant Woodrow Vaden killed the deceased with a deadly weapon, the law implies malice, and the State could not be nonsuited as against him. In the case of *S. v. Johnson,* 184 N. C., 637, 113 S. E., 617, this Court said: "We could not nonsuit the State, . . . for when there is a killing with a deadly weapon, as there was in this case, the law implies malice, and it is, at least, murder in the second degree, and the burden then rests upon the prisoner to satisfy the jury of the facts and circumstances in mitigation of or excuse for the homicide, the credibility of the evidence, and its sufficiency to produce this satisfaction being for the jury to consider

and decide." *S. v. Cagle,* 209 N. C., 114, 182 S. E., 697; *S. v. Robinson,* 213 N. C., 273, 195 S. E., 824; *S. v. Mosley,* 213 N. C., 304, 195 S. E., 830; *S. v. Bright,* 215 N. C., 537, 2 S. E. (2d), 541; *S. v. Sheek,* 219 N. C., 811, 15 S. E. (2d), 282; *S. v. Beachum,* 220 N. C., 531, 17 S. E. (2d), 674; *S. v. Rivers,* 224 N. C., 419, 30 S. E. (2d), 322. The defendants' contentions, on the plea of self-defense, were fairly and exhaustively submitted to the jury with a full explanation of the evidence and the law arising thereon, and it is evident the jury gave consideration to the defendants' contentions in mitigation of the offense, since the jury returned a verdict of guilty of manslaughter as to each of the defendants. And the appellants do not contend that any error was committed in any respect in the trial below, save and except the refusal of the court to sustain their motion for judgment as of nonsuit.

It is further contended by the appellant, John Daniel Vaden, that although he engaged in a fight with the deceased, he did not cause his death. Therefore, he insists that if it be conceded that the evidence was sufficient to warrant its submission to the jury against Woodrow Vaden, it was insufficient as to him, and cites *S. v. Greer,* 162 N. C., 640, 78 S. E., 310, in which the Court said: "Although one may have had some difficulty with the deceased, he is not liable for a homicide committed at or about the same time by a third person who was acting independently, without any conspiracy or common design, even though the altercation brought on the fatal encounter, and the third person interfered to aid him." *S. v. Orr,* 175 N. C., 773, 94 S. E., 721.

We do not think Woodrow Vaden was acting independently so as to relieve John Daniel Vaden of any liability for the homicide. Julius Vaden, Woodrow Vaden, John Daniel Vaden and the deceased had engaged in an affray that afternoon at Caleb Ray's filling station. By reason of their conduct they had been ordered to leave the premises. The deceased left. Julius Vaden also left, but returned in about fifteen minutes and asked for the deceased. After being informed that he had gone up the road, he said he was going up the road too. He was joined by his brothers, the appealing defendants. They were armed with a blackjack and a shotgun, and were looking for the deceased. After finding the deceased at a filling station, about a quarter of a mile from where the original fight took place, the deceased and the defendants, at the suggestion of Otis and Wesley Ray, shook hands and appeared to be friendly. The defendants thereafter started to leave and went out to the truck. Julius Vaden called Otis Ray out to the truck and expressed his dissatisfaction over the settlement and said "he had received a dirty deal." Then the deceased came out of the filling station and the quarrel was renewed. Whereupon, the deceased, armed with a knife, and John

Daniel Vaden, armed with a blackjack, engaged in a fight, and while they were fighting Woodrow Vaden shot and killed the deceased.

The evidence supports the view that the second fight was but a continuation of the first one, and that the purported settlement of the controversy was not entered into in good faith by the defendants, and in reality they had not quit the fight. 40 C. J. S., sec. 121, p. 995, and sec. 133, p. 1020; *S. v. Robinson, supra.* Moreover, the evidence is sufficient to support a finding by the jury that there was concert of action on the part of these defendants which culminated in the death of the deceased. *S. v. Orr, supra.*

In order to relieve one engaged in a difficulty with the deceased, of responsibility for his death, inflicted by a third party who acts independently, without any conspiracy or common design, even though the altercation brought on the fatal encounter, and the third party interposed to aid him, the third party must not have acted in concert with the one engaged in the difficulty with the deceased, in producing the difficulty. Woodrow Vaden and John Daniel Vaden actively participated in the first fight with the deceased. It is apparent from their conduct these defendants were not satisfied over the outcome of the first skirmish and were seeking a renewal thereof.

We think the evidence was properly submitted to the jury as to both appellants, and that the judgment of the court below must be upheld. *S. v. Orr, supra; S. v. Allison,* 200 N. C., 190, 156 S. E., 547.

In the trial below, we find

No error.

STATE v. TOM BULLINS.

(Filed 27 February, 1946.)

1. Rape § 19e—

In a prosecution under G. S., 14-26, the repeated use of the term "statutory rape" in the charge will not be held for prejudicial error when the charge contains a correct definition, and properly places the burden of proof on the State, as to each essential element of the offense.

2. Criminal Law § 81c—

To prevail on appeal the appellant not only must show error, he must show the error was prejudicial, and that but for the error a different result would likely have been reached.

3. Criminal Law § 53h—

The charge of the court must be read contextually.

4. Criminal Law § 53e—

The court stated the State's evidence as to the date of birth of prosecutrix and continued "so in the year 1944 she was something over 14 years of age in the month of September, at which time she testified . . ." *Held:* In using the adverb "so" the court simply stated the mathematical effect of the State's evidence, and read contextually the charge contains no statement of opinion as to whether any fact was fully or sufficiently proven.

5. Infants § 18—

In a prosecution under G. S., 110-39, a charge to the effect that defendant would be guilty if he encouraged, aided and abetted the prosecuting witness "in moral delinquency" *is held* for error, since the statute uses the term "to be adjudged a delinquent" and the two terms are not synonymous.

APPEAL by defendant from *Pless, J.,* at October Term, 1945, of ROCKINGHAM.

The defendant was charged in one bill of indictment with having unlawfully, willfully and feloniously carnally known and abused Faye Green, a female child over the age of twelve and under the age of sixteen years, she having never before had sexual intercourse with any person (G. S., 14-26), and in another bill of indictment with having unlawfully, willfully and knowingly encouraged, aided, connived at, promoted and contributed to the delinquency of a minor child, to wit: Faye Green, a female under the age of sixteen, she having been adjudged a delinquent, he, the said Tom Bullins, on and before said act, having enticed said child away from home and school, and having had sexual intercourse with said child, and having associated with said child for immoral purposes (G. S., 110-39). The two cases were, upon motion of the Solicitor, consolidated for the purpose of trial.

The jury returned a verdict of guilty on each bill of indictment, and, upon judgment predicated on the verdict being pronounced in each case, the defendant appealed, assigning errors.

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

Price & Osborne and Sharp & Sharp for defendant, appellant.

SCHENCK, J. The first assignments of error discussed in the appellant's brief, five in number, are grouped and discussed together, and relate to his Honor's reference in his charge to the offense against which the statute (G. S., 14-26) inveighs as "what we speak of as statutory rape," "or what we call statutory rape," "elements of statutory rape," "guilty of statutory rape," and "the charge of statutory rape." While it is true his Honor used the term "statutory rape" in presenting to the

jury the law governing the charge on the bill of indictment of having had unlawful and felonious carnal knowledge of a female over the age of twelve and under the age of sixteen years, who had not thereto had sexual intercourse with any other person, the offense charged in the bill and against which the statute (G. S., 14-26) inveighs was properly defined by the court, the burden of establishing the essential elements of the offense was properly placed upon the State, and each essential element of such offense was properly presented to the jury. Therefore, the use of the term "statutory rape," if error, was harmless error, since the offense against which the statute inveighs was properly charged in the bill, and properly explained in the charge; in truth, any error committed would seem to be favorable to the defendant. The jury could not have been misled by the name given the offense by the court, though not accurate. To prevail on appeal the appellant not only must show error, he must show the error was prejudicial, and that but for the error a different result would likely have been reached. *S. v. Harris,* 204 N. C., 422, 168 S. E., 498; *S. v. Beal,* 199 N. C., 278, 154 S. E., 604.

The second assignment of error discussed in appellant's brief is Assignment No. 6, which is directed to that part of the court's charge as follows: "So in the year 1944, she was something over 14 years of age in the month of September, at which time she testified that the defendant, who also lived on the same farm on which her people lived, induced her to have sexual intercourse with him; and that following that first association in that way she had intercourse with him on frequent occasions—almost every day, as she described it, her evidence tending to show that in January she pretended to get a job and that her father drove her to Mayodan and Madison and that she worked only a day or two but would meet the defendant and that they would frequently go on trips to a place across the Virginia line, near Martinsville, and to other places." It is the contention of the defendant that the court gave an opinion that a fact was fully and sufficiently proven, namely, that the prosecutrix was 14 years old at the time of her first intercourse with the defendant. We do not concur in the interpretation the defendant seeks to have placed upon the excerpt quoted. All that we gather from said excerpt is that his Honor, in using the adverb "so," simply stated in effect that according to the evidence the prosecuting witness was born in March, 1930, and that her intercourse occurred in September, 1944, and therefore, still according to the evidence, she was 14 years old when the first intercourse occurred. The deduction of the fact, made by the court, that from March, 1930, to September, 1944 (the two dates mentioned in the evidence) was 14 years was not an expression of an opinion by the court of whether a fact was fully or sufficiently proven, but simply a statement of the evidence, to which no objection was made at the time. The charge

must be read contextually and when the excerpt assailed is read in connection with the preceding words ". . . the State in this case has offered the testimony of Faye Green, who testified she was born on March 22, 1930; and her mother also testified as to the date of birth," there was no expression of opinion by the court as to any fact being fully or sufficiently proven. This assignment of error cannot be sustained.

Assignment of error No. 9, which is set out in the defendant's brief, relates to a portion of his Honor's charge upon the offense against which the statute, G. S., 110-39, inveighs and reads as follows: "Now, on the charge of contributing to delinquency of a minor the State must satisfy you beyond a reasonable doubt that the defendant assisted, encouraged, aided and abetted the prosecuting witness Faye Green, in moral delinquency, which in this instance means in lascivious and promiscuous sexual intercourse with men, she being a minor under the age of 16 at the time." We are constrained to hold that this charge was erroneous. The statute (G. S., 110-39) in its first clauses is directed at "a parent, guardian or other person having custody of a child who omits to exercise reasonable diligence in the care, protection and control of such child, causing it to be adjudged delinquent . . . ," and in its latter clauses is directed at "any such person or any other person who knowingly or willfully is responsible for . . . or who knowingly and willfully does any act to produce . . . the condition which caused such child to be adjudged delinquent . . . shall be guilty of a misdemeanor." In his charge his Honor states that the State must establish beyond a reasonable doubt that the defendant aided and abetted the prosecuting witness, Faye Green, in moral delinquency, "which in this instance means lascivious and promiscuous sexual intercourse with men, she being a minor under the age of 16 at the time"; while the statute provides that "any other person" shall be guilty of a misdemeanor if he knowingly and willfully does any act to cause such child to be adjudged a delinquent. His Honor in effect assumed that the words "in moral delinquency" and "to be adjudged a delinquent" as used in the charge and in the statute, respectively, were synonymous. Such is not the case, and since the wording of the statute must govern it follows that the charge was erroneous. In delineating the essential elements of the statutory offense with which the defendant is charged the court failed to mention the burden resting upon the State to show beyond a reasonable doubt that the defendant knowingly and willfully did some act which caused such child to be adjudged a delinquent. This was error and entitles the defendant to a new trial on the charge of violating G. S., 110-39, under Exception No. 15, which is based upon G. S., 1-180, requiring the judge to declare and explain the law arising on the evidence.

In the case wherein the defendant was found guilty of the charge of violating G. S., 14-26, having carnal knowledge of a female over twelve and under sixteen years of age, she never before having had sexual intercourse, no prejudicial error appears on the record.

In case of charge of violating G. S., 110-39,

New trial.

In case of charge of violating G. S., 14-26,

Affirmed.

MILTON HOBBS v. MARVIN T. DREWER AND EDDIE N. JOHNSON.

(Filed 27 February, 1946.)

1. Automobiles § 18g—Evidence held not to establish contributory negligence as a matter of law.

The accident in suit occurred between defendants' truck and plaintiff's bus, traveling in opposite directions, during darkness, just as plaintiff's bus was entering onto a bridge 60 feet long, with steel sides and traveled portion 17 feet wide, center line marked. Defendants moved for nonsuit and directed verdict on the ground that plaintiff was guilty of contributory negligence in failing to pause to permit the truck to emerge from the bridge before he entered thereon. The evidence considered in the light most favorable to plaintiff tended to show that the roadway on the bridge was one foot wider than the paved surface of the highway leading to the bridge, that he knew there was room for him to pass a truck 8 feet wide (G. S., 20-116), that he was traveling on his right at a moderate speed, that if each vehicle continued on its proper side there was sufficient clearance for them to pass in safety, and that plaintiff did not know the approaching vehicle was a truck until just before he was struck. *Held:* Contributory negligence was not made conclusively to appear, and defendants' motions were properly denied.

2. Negligence § 19b—

Involuntary nonsuit on the issue of contributory negligence is proper only when that conclusion is the only one which can be reasonably drawn from plaintiff's evidence, without considering defendant's evidence except in so far as it explains plaintiff's evidence and is not in conflict therewith.

3. Negligence § 20: Trial § 29b—

An instruction that defendants must have offered evidence satisfying the jury by its greater weight that plaintiff was guilty of contributory negligence in order for the jury to answer that issue in the affirmative must be held for reversible error in depriving defendants of their right to have plaintiff's admissions and the testimony of plaintiff's witnesses, as well as that elicited on cross-examination, considered by the jury on the issue.

HOBBS *v.* DREWER.

APPEAL by defendants from *Harris, J.,* at November Term, 1945, of GATES. New trial.

This was an action to recover damages for injury to plaintiff's bus resulting from collision with defendants' motor truck. The vehicles were traveling in opposite directions, and the collision occurred on or near the south end of a two-way bridge, on State Highway 17, in Camden County. The bridge was 60 feet long with the traveled portion 17 feet wide, center line marked. The paved surface of the highway leading to the bridge was 16 feet wide, straight and level. The plaintiff's bus was proceeding north and the defendants' truck south. It was early in the morning and yet dark.

Plaintiff offered evidence tending to show that he was driving his bus at the rate of 15 miles per hour on his proper side of the highway, and that defendants' truck was being operated by defendants' driver at 40 miles per hour, with undimmed lights, and that at the time of and immediately before the collision the truck was being driven two feet to the left of and over the center of the roadway. The bus was in the act of entering the bridge when struck by the truck and its side badly injured. The left front of the truck struck the left side of the bus behind the driver's seat. The steel sides of the bridge were dented by the bodies of the truck and bus, as result of the collision.

Defendants' evidence, on the other hand, tended to show the truck was proceeding at 30 to 35 miles per hour, on its right side of the roadway, with proper lights, and that it was struck by plaintiff's bus. Plaintiff was familiar with the road and bridge. Defendants pleaded the negligence of plaintiff as a bar to his action and as the basis for counterclaim for damages for injury to defendants' truck. It was contended that plaintiff should have seen that he was meeting a large truck on a narrow bridge with steel sides and that the vehicles would have to pass so close to each other as to constitute a potential hazard, and hence plaintiff should have waited for defendants' truck to pass before entering on the bridge.

Motions for judgment of nonsuit, and directed verdict were denied.

Issues of negligence, contributory negligence and damage were submitted to the jury, and answered in favor of the plaintiff. From judgment on the verdict defendants appealed.

John H. Hall for plaintiff, appellee.

W. A. Worth and J. Kenyon Wilson for defendants, appellants.

DEVIN, J. The defendants' appeal presents two principal questions: (1) Were defendants entitled to the allowance of their motion for judgment of nonsuit or directed verdict, and (2) passing that, did the court

err in the instructions to the jury on the issue of contributory negligence, entitling defendants to a new trial?

1. It was urged by defendants that the plaintiff, being familiar with the road and observing on the bridge an approaching motor vehicle the width and type of which he did not know, and aware that his own bus was 7½ feet wide, should have paused to permit the truck to emerge from the bridge before entering and attempting a passage with clearance so limited, and that his failure so to do was a proximate contributing cause of the injury to his bus.

However, it will be noted that the width of the roadway on the bridge was one foot wider than the paved surface of the highway leading to the bridge, and hence, if plaintiff could proceed at all on the paved highway when meeting a motor vehicle, the question of ordinary prudence on his part would not be foreclosed by his admission that he continued to drive at moderate speed onto the bridge where the road was level and straight and the known clearance of the bridge seventeen feet, in the absence of anything to put him on notice that the width or other characteristic of the approaching vehicle was such as to import danger. Furthermore, according to plaintiff's evidence, if each vehicle continued on its proper side of the roadway on the bridge, there was sufficient clearance for them to pass in safety, and he contends he had the right to assume that the oncoming vehicle would remain on its right side of the road. *Shirley v. Ayers,* 201 N. C., 51, 158 S. E., 840; *Cummins v. Fruit Co.,* 225 N. C., 625. Plaintiff testified he knew there was room to pass a truck eight feet wide (the maximum under G. S., 20-116), and that he did not know the approaching vehicle was a truck until just before he was struck. "I discovered it was a truck when I saw that red body (of the truck) coming into me. I did not have time to put on my brakes."

Under these circumstances, and considering the evidence for the purpose of this motion in the light most favorable for the plaintiff, we are unable to say that as a matter of law contributory negligence was made conclusively to appear. It was said in *Atkins v. Transportation Co.,* 224 N. C., 688, 32 S. E. (2d), 209: "A judgment of involuntary nonsuit on the grounds of contributory negligence will not be sustained or directed unless the evidence is so clear on that issue that no other conclusion seems permissible." See also *Cole v. Koonce,* 214 N. C., 188, 198 S. E., 637, and *Manheim v. Taxi Corp.,* 214 N. C., 689, 200 S. E., 382. "As the burden of proof upon the issue of contributory negligence was upon defendants, it is the settled rule in this jurisdiction that judgment of nonsuit on this ground can be rendered only when a single inference, leading to that conclusion, can be drawn from the evidence." *Hampton v. Hawkins,* 219 N. C., 205, 13 S. E. (2d), 227; *Hayes v. Tel. Co.,* 211 N. C., 192, 189 S. E., 499. On this motion the evidence is to be consid-

ered in accord with the rule stated in *Harrison v. R. R.,* 194 N. C., 656, 140 S. E., 598, and *Gregory v. Ins. Co.,* 223 N. C., 124, 25 S. E. (2d), 398.

We think it was a matter for the jury, and that the ruling of the court in this respect should be upheld.

2. The defendants assign error in the following instruction to the jury on the issue of contributory negligence: "The burden of that issue (the second) is on the defendant(s). Before you can answer that issue yes, which means that you find Milton Hobbs is guilty of contributory negligence, as I have explained contributory negligence to be, the defendant(s) must have offered evidence which satisfies you from the evidence and by its greater weight that Milton Hobbs was guilty of contributory negligence. If you are so satisfied you would answer the second issue yes: if you are not so satisfied you would answer it no."

The defendants insist that the trial judge unwittingly restricted their defense on this issue by instructing the jury that before they could find the plaintiff chargeable with contributory negligence the defendants must have offered evidence which should satisfy them of this fact, and that the jury was thereby precluded from considering plaintiff's admissions, and the evidence of plaintiff's witnesses, as well as that elicited on cross-examination, as bearing on this question. On the record before us this is the only instruction given the jury on this issue. We find nothing to counteract or explain or cure the prejudicial effect of the language used. We are constrained to hold there was error in this instruction. *Conley v. Pearce-Young-Angel Co.,* 224 N. C., 211; *S. v. Ellerbe,* 223 N. C., 770, 28 S. E. (2d), 519.

It is unnecessary to consider the other exceptions brought forward in the assignments of error as they may not arise on another hearing.

For the error pointed out there must be a

New trial.

T. O. MOORE, ADMINISTRATOR C. T. A. OF SALLIE SHELTON, DECEASED, v. JOHN W. JONES, ROBERT R. WILKERSON AND H. P. WILKERSON, TRADING AS WILKERSON FUNERAL HOME, AND G. W. WILLIAMS, ASSIGNEE.

(Filed 27 February, 1946.)

1. Executors and Administrators § 13a—

The personalty is primarily liable for the payment of decedent's debts, including judgments and obligations secured by mortgages, and the real estate is secondarily liable and may be resorted to only in the event the personalty is insufficient to pay all debts in full.

2. Judgments § 23—

The owner of a docketed judgment has a lien on all real estate of his debtor within the county, G. S., 1-234, and death of the judgment debtor does not destroy the right to priority but merely precludes execution and remits the judgment creditor to the personal representative whose duty it is to administer the whole estate.

3. Executors and Administrators §§ 13d, 16—

When realty is sold under order of court to make assets the personal representative takes the land in the condition in which his decedent left it, and the proceeds of sale remain real estate until all liens are discharged and must be applied to the payment of such liens in the order of their priority, and only the residue is personalty to be distributed in the order of priority prescribed by G. S., 28-105, and therefore where the land is subject to a docketed judgment and a subsequently recorded mortgage the judgment must be satisfied in full before application of any part of the proceeds to the mortgage or to the payment of other debts.

APPEAL by defendant G. W. Williams from *Pless, J.*, at November Term, 1945, of ROCKINGHAM.

Petition for advice and direction as to the order of payment of claims filed against the estate of plaintiff's testatrix.

Sometime prior to 29 January, 1944, Sallie Shelton, resident of Rockingham County, died testate. At the time of her death she owned certain personal property and a small tract of land. Plaintiff, administrator *c. t. a.*, sold the personal property for $197.27. This included a horse and wagon of the value of $133 which was embraced in a mortgage hereafter noted. As the funds received from the sale of personal property were insufficient to pay the debts and costs of administration, he procured the sale of the land to make assets as provided by statute. He now has on hand $940.65, net proceeds of said sale.

There are outstanding, in addition to the costs of administration, claims as follows:

(1) Account for funeral expenses of $193;

(2) Judgment held by appellant for $100, interest and costs, docketed 18 November, 1937;

(3) Note for $250 held by defendant John W. Jones, secured by deed of trust to I. R. Humphreys, trustee, conveying the tract of land and the horse and wagon, recorded 13 January, 1938.

The funds on hand not being sufficient to discharge said claims in full, and a controversy as to the application of the proceeds derived from the sale of the land having arisen, plaintiff filed this petition for instructions.

The court below directed the plaintiff to apply all funds in his hands, received both from the sale of personalty and realty, as follows:

(1) The cost of administration;

(2) The note and deed of trust of John W. Jones;
(3) The funeral expenses;
(4) Judgment of G. W. Williams, assignee.

In so doing it specifically held that under G. S., 28-105, the deed of trust of John W. Jones has priority over the judgment of G. W. Williams. The defendant G. W. Williams excepted and appealed.

Sharp & Sharp for defendant, appellant Williams.
No counsel contra.

BARNHILL, J. When a debtor dies his real estate descends to his heirs or vests in his devisees, and possession of his personal estate vests in his executor or administrator. The personalty is primarily liable for the payment of his debts, including judgments and obligations secured by mortgages for, though secured, they are nonetheless debts, and heirs and devisees are entitled to have them paid out of the personal estate to the exoneration of the security. *Guilford County v. Estates Administration, Inc.*, 213 N. C., 763, 197 S. E., 535; *Linker v. Linker*, 213 N. C., 351, 196 S. E., 329; *Price v. Askins*, 212 N. C., 583, 194 S. E., 284; *Lee v. Eure*, 82 N. C., 428.

The real estate is secondarily liable and may be resorted to only in the event the personal estate is insufficient to pay all debts in full. Even then it must be converted into cash—personalty—under order of court and in the manner provided by statute.

So then it clearly appears that G. S., 28-105, providing the order in which debts are to be paid by an administrator or executor, relates exclusively to the application of personal property, the only estate with which the administrator has any right to deal.

When the administrator seeks an order for the sale of real property to make assets and thus to have it converted into personalty so that he may apply it to the payment of debts, he takes the land in the condition his decedent left it. His petition to sell is a petition to convert and he can claim no more than she owned at the time of her death. *Guilford County v. Estates Administration, Inc., supra.* That is to say, when the land is sold to make assets the proceeds remain real estate until all liens are discharged and are to be applied to the payment of such liens in the order of their priority. Only the residue, if any, is payable to the administrator as personal property to be distributed in the order provided by statute. *Murchison v. Williams*, 71 N. C., 135.

Any other conclusion would run counter to reason and conflict with other provisions of our laws. The owner of a docketed judgment has a lien on all the real estate of his debtor within his county. G. S., 1-234. *Helsabeck v. Vass*, 196 N. C., 603, 146 S. E., 576; *Jackson v. Thompson*,

214 N. C., 539, 200 S. E., 16. This lien has priority over a subsequently recorded mortgage. *Duplin County v. Harrell,* 195 N. C., 445, 142 S. E., 481.

A docketed judgment fixes the lien and the debtor cannot escape it. *Moore v. Jordan,* 117 N. C., 86. Manifestly the Legislature did not intend that the death of the debtor should strike down this lien, destroy the right to priority of payment out of the land assured by statute, and reduce the claim to the status of an unsecured debt. *Guilford County v. Estates Administration, Inc., supra.*

A judgment creditor may not issue execution for the enforcement of his lien after the death of the judgment debtor. This avenue of relief is closed and he is required to look to the personal representative whose duty it is to administer the whole estate. *Sawyers v. Sawyers,* 93 N. C., 321; *Williams v. Weaver,* 94 N. C., 134; *Tuck v. Walker,* 106 N. C., 285; *Flynn v. Rumley,* 212 N. C., 25, 192 S. E., 868; Anno. 114 A. L. R., 1165. But this does not mean that when the personal representative finds it necessary to seek a conversion of the land to make assets either he or the court may disregard the rights of lienors.

A judgment is not a lien upon personal property prior to levy. *Hardware Co. v. Jones,* 222 N. C., 530, 23 S. E. (2d), 883. Hence the Legislature was at liberty to make provision for the order of its payment out of personal property without doing violence to any existing right of the creditor. However, we find nothing in this statute, G. S., 28-105, or in any other provision of the law, that indicates an intent to nullify the lien of a docketed judgment or to destroy any right acquired under the law prior to the death of the judgment debtor.

It follows that there was error in the judgment below. As the amount due on the judgment is less than the net sale price of the land it must be paid in full before any part of such proceeds is applied to the satisfaction of the mortgage or to the payment of other debts.

Reversed.

LUBERTHA BLANCHARD v. JOHN BLANCHARD.

(Filed 27 February, 1946.)

Divorce § 14—Evidence held insufficient to show abandonment as predicate for alimony without divorce.

Plaintiff's evidence tended to show that defendant struck plaintiff on two occasions, that he drank, went with another woman, forbade plaintiff to go out at night and told her she would find out what he was going to do with a pistol in his possession "if I catch you in the road at night,"

that thereafter plaintiff discovered the pistol in his overcoat pocket and left defendant. Plaintiff testified that she left the domicile because she was scared, because defendant was going with another woman and to "go away for awhile and get some rest," and that when she returned some eight months thereafter, defendant forbade her to stay. *Held:* The evidence is insufficient to show abandonment on the part of the husband, and in an action for alimony without divorce, G. S., 50-16, predicated solely on the grounds of abandonment and maliciously turning her out of doors, G. S., 50-7, (1), (2), defendant's motion for judgment as of nonsuit should have been allowed.

APPEAL by defendant from *Nimocks, J.*, at October Term, 1945, of PERQUIMANS.

This is a civil action for alimony without divorce, as provided in G. S., 50-16. The plaintiff alleges abandonment and that defendant maliciously turned her out of doors.

The plaintiff and defendant were married in 1917, and have four children. The defendant is a farmer and owns two small tracts of land. The plaintiff left the home of the defendant on 22 February, 1943, and went to the home of her brother in New Jersey, where she lived for eight months without communicating with her husband. All the children were living at the home when she left. The youngest child was 12 years of age.

On the question of abandonment, the plaintiff testified substantially as follows: The defendant had struck her on two occasions, one about a year before she left and the other a month or so before she left. Since 1940 she had clothed herself by washing clothes for her brother. The defendant drank intoxicating beverages about every week. He had been associating with Murrell Welch for several years and after he started going with her he forbade the plaintiff to go out at night. And sometime in December, 1942, he brought a pistol to the home and upon her inquiry as to what he was going to do with it, he replied, "If I catch you in the road at night, you are going to find out what I will do with it." The pistol was placed in a drawer in the home and nothing more was said about it. The plaintiff and defendant continued to live together as man and wife. On the morning of 22 February, 1943, the plaintiff discovered the pistol in her husband's overcoat pocket. He was away from home at the time and she left before he returned.

On direct examination in the trial below, the plaintiff was asked the following question: "State whether you left there for any reason other than that you were afraid of him and afraid he might do you harm?" To which she replied: "I was scared he might do me harm, and I got tired of seeing him ride with this girl so much, I thought I would go away for awhile and get some rest. I came back in October, 1943.

When I came back John told me I should not stay there and I didn't stay. He told his son to get somewhere for me to stay because I couldn't stay there. I didn't have any other home then, my son found a place for me to stay."

Defendant moved for judgment as of nonsuit at the close of plaintiff's evidence and renewed the motion at the close of all the evidence. Motion denied. Verdict for the plaintiff and judgment accordingly. Defendant appeals, assigning error.

J. H. LeRoy for plaintiff.
Robert B. Lowry and John H. Hall for defendant.

DENNY, J. It is unnecessary for a husband to depart from his home and leave his wife in order to abandon her. By cruel treatment or failure to provide for her support, he may compel her to leave him. This, under our decisions, would constitute abandonment by the husband. *Crews v. Crews,* 175 N. C., 168, 95 S. E., 149; *Dowdy v. Dowdy,* 154 N. C., 558, 70 S. E., 917; *High v. Bailey,* 107 N. C., 70, 12 S. E., 45. The plaintiff, however, in order to obtain affirmative relief under the provisions of G. S., 50-16, must meet the requirements of the statute for divorce from bed and board. G. S., 50-7; *Pollard v. Pollard,* 221 N. C., 46, 19 S. E. (2d), 1; *McManus v. McManus,* 191 N. C., 740, 133 S. E., 9.

The appellant insists that the evidence adduced in the trial below is insufficient to show abandonment and that his motion for judgment as of nonsuit should have been allowed. We think the position well taken and must be sustained.

We are not inadvertent to those cases where relief has been granted as a result of a long course of conduct constituting such indignities to the person of the other as to render his or her condition intolerable and life burdensome; but the plaintiff is relying solely upon subsections 1 and 2 of G. S., 50-7, to wit, that the defendant abandoned her and maliciously turned her out of doors. And she sums up her reasons for leaving the defendant on 22 February, 1943, in the following language: "I was scared he might do me harm, and I got tired of seeing him ride with this girl so much, I thought I would go away for awhile and get some rest." We do not think the evidence, when considered as a whole and in its most favorable light for the plaintiff, is sufficient to show abandonment by the defendant. It follows, therefore, as pointed out in *Medlin v. Medlin,* 175 N. C., 529, 95 S. E., 857, the plaintiff is not entitled to alimony.

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

Reversed.

STATE v. RUSSELL JORDAN.

(Filed 27 February, 1946.)

Burglary § 13b—

Defendant was tried upon an indictment charging burglary in the first degree, and there was evidence tending to support the allegations of the bill. The solicitor, in apt time, announced that he would not ask for a verdict of more than burglary in the second degree. The jury returned a verdict of guilty "as charged in the bill of indictment." The sentence presupposed conviction of burglary in the second degree, G. S., 14-52. *Held:* Defendant's motion to set aside the verdict should have been allowed. G. S., 14-51.

APPEAL by defendant from *Harris, J.,* at October Term, 1945, of DARE.

Criminal prosecution tried upon indictment in which it is charged that the prisoner did, about the hour of 12 in the night of 10 June, 1945, with force and arms, at and in the County of Dare, feloniously and burglariously break and enter the dwelling house of one Doris H. Twiford, then and there actually occupied by Doris H. Twiford and Iva Payne, with intent then and there to ravish and carnally know Doris H. Twiford and Iva Payne, forcibly and against their wills in the said dwelling house then and there being, against the peace and dignity of the State.

There was evidence tending to support the allegations of the bill. Iva Payne testified that she was spending the night with Doris Twiford; that they were sleeping in a room on the second floor; that she was awakened during the night by someone touching her side. When she arose to see what it was, "Doris flashed on the light, and I said, 'It is a man.' . . . I recognized him; it was Russell Jordan . . . and when the light shined on him he ran out of the room."

The solicitor, in apt time, announced that he would not ask for a verdict of more than burglary in the second degree.

The defendant offered evidence of an alibi.

Verdict: "Clerk: What say you as to the defendant, Russell Jordan? Do you find him guilty or not guilty as charged in the bill of indictment?

"Juror: We find him guilty of entering the house without permission.

"Clerk: Is he guilty or not guilty as charged in the bill of indictment?

"Juror: Russell Jordan, Guilty."

At the instance of the defendant, the jury was polled, and each by name asked: "Do you find the defendant, Russell Jordan, guilty or not guilty as charged in the bill of indictment?" Each juror replied: "Guilty."

Judgment: Imprisonment in the State's Prison for not less than 12 nor more than 18 years.

The defendant appeals, assigning error.

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

M. B. Simpson and R. Clarence Dozier for defendant.

STACY, C. J. The defendant was tried for burglary in the second degree on an indictment charging him with burglary in the first degree. G. S., 14-51. All the evidence indicates the dwelling-house was actually occupied at the time of the alleged burglarious entry. *S. v. Spain,* 201 N. C., 571, 160 S. E., 825; *S. v. Ratcliff,* 199 N. C., 9, 153 S. E., 605. The verdict, as rendered without challenge, shows the defendant was convicted of burglary in the first degree, or was found guilty "as charged in the bill of indictment." This is a capital offense. G. S., 14-52. True, the clerk certifies "That defendant Russell Jordan was found guilty of second degree burglary as charged in the bill of indictment." Such, however, seems to be the clerk's interpretation of the verdict, rather than a precise certification of it. The sentence imposed presupposes a conviction of burglary in the second degree. G. S., 14-52.

It is permissible under our practice to convict a defendant of a less degree of the crime charged, G. S., 15-170, or for which he is being tried, when there is evidence to support the milder verdict, *S. v. Smith,* 201 N. C., 494, 160 S. E., 577, with G. S., 15-171, available in burglary cases, *S. v. McLean,* 224 N. C., 704, 32 S. E. (2d), 227, but it would seem to be without precedent to try a defendant for one offense and to convict him of another and greater offense, even though the conviction be of a higher degree of the same offense for which he is being tried. The defendant's motion to set aside the verdict was well interposed.

No rulings are made on the other exceptions.

New trial.

SAMUEL H. KING ET AL. v. MARTHA RUDD ET AL.

(Filed 27 February, 1946.)

1. Judgments § 9—

Failure of plaintiffs to move promptly for judgment by default after they are entitled thereto by the lapse of the prescribed time or the expiration of the time allowed by consent order, G. S., 1-211, does not work a discontinuance of the action.

2. Same: Pleadings § 6—

Whether the executor of the deceased mortgagor and the purchaser of the property *pendente lite*, *lis pendens* having been duly filed, should be allowed to make themselves parties and file answer some eight years after time for filing answer has expired, rests in the sound discretion of the trial court.

3. Pleadings § 6—

An order of the clerk permitting the administrator of a deceased mortgagor and the purchaser of the property *pendente lite*, to make themselves parties and file answer some eight years after expiration of time therefor, entered without notice to plaintiffs, is subject to approval or disapproval by the judge.

4. Appeal and Error § 40a—

An exception to "the signing of the judgment" presents only the face of the record for inspection or review, and when the judgment is supported by the record the exception must fail.

APPEAL by defendants from *Pless, J.*, at November Term, 1945, of CASWELL.

Civil action instituted 7 January, 1936, to recover on $1,000-promissory note executed 20 September, 1928, by Mrs. Martha Rudd and J. F. Rudd and wife, Mary Rudd, and to foreclose deed of trust given as security for its payment. *Lis pendens* was duly filed at the time of the institution of the action.

On 30 January, 1936, a consent order was entered by the clerk allowing the defendants until 10 August, 1936, to file answer or demur to the complaint. No pleading has ever been filed by any of the original defendants.

On 20 December, 1941, Mrs. Martha Rudd deeded the land described in the deed of trust and notice of *lis pendens* to W. B. Nicks and wife, Ruth Rudd Nicks.

On 4 February, 1944, Mrs. Martha Rudd died, and J. C. Womack was appointed administrator *c. t. a.* of her estate.

On 4 November, 1944, upon affidavit of Ruth Nicks, the clerk signed an order setting the administrator down as a party defendant; and on the same day, an order was signed by the clerk allowing W. B. Nicks and wife, Ruth Rudd Nicks, to come in, make themselves parties defendant, and they were given 30 days in which to file answer. Answers were filed immediately by the administrator and the Nickses. These orders of the clerk were without notice to the plaintiffs.

The plaintiffs thereupon lodged motion to strike out the answers and for judgment by default final.

The defendants filed counter-motion to dismiss the action for failure to prosecute or for laches.

From judgment allowing motion of the plaintiffs, the defendants appeal, assigning as error "the signing of the foregoing judgment."

Sharp & Sharp and E. F. Upchurch for plaintiffs, appellees.

P. W. Glidewell, Sr., and R. T. Wilson for defendants, appellants.

STACY, C. J. The plaintiffs were clearly entitled to judgment by default final when the defendants omitted to answer by 10 August, 1936. G. S., 1-211. The failure of the plaintiffs to move promptly for such a judgment did not work a discontinuance of the action. *University v. Lassiter,* 83 N. C., 38.

Whether the executor, who stands in the shoes of the deceased, and the Nickses, who claim under her through purchase *pendente lite,* should be allowed to file answer at this late date was a matter resting in the sound discretion of the trial court. *O'Briant v. Bennett,* 213 N. C., 400, 196 S. E., 336; *Washington v. Hodges,* 200 N. C., 364, 156 S. E., 912; *Roberts v. Merritt,* 189 N. C., 194, 126 S. E., 513; *Church v. Church,* 158 N. C., 564, 74 S. E., 14; *Wilmington v. McDonald,* 133 N. C., 548, 45 S. E., 864; *Byrd v. Byrd,* 117 N. C., 523, 23 S. E., 324; McIntosh on Procedure, 507. No pleading has been filed by J. F. Rudd and wife, Mary Rudd. Ruth Rudd Nicks is a daughter of the deceased.

The order of the clerk, having been entered without notice to the plaintiffs, was subject to approval or disapproval by the judge. We cannot say that error appears on the face of the record. An exception to "the signing of the judgment" presents only the face of the record for inspection or review. *Rader v. Coach Co.,* 225 N. C., 537; *Crissman v. Palmer,* 225 N. C., 472; *Smith v. Smith,* 223 N. C., 433, 27 S. E. (2d), 137; *Cooper v. Cooper,* 221 N. C., 124, 10 S. E. (2d), 237; *Query v. Ins. Co.,* 218 N. C., 386, 11 S. E. (2d), 139. Obviously, the judgment is supported by the record. Hence, the exception must fail. *Ingram v. Mortgage Co.,* 208 N. C., 329, 180 S. E., 594; *Wilson v. Charlotte,* 206 N. C., 856, 175 S. E., 306.

Affirmed.

STATE v. WALTER MOUNCE.

(Filed 27 February, 1946.)

Criminal Law § 62a—

Upon a plea of *nolo contendere* to a charge of receiving cigarettes of the value of $75.00 knowing them to have been stolen, a sentence of imprisonment at hard labor for not less than three years nor more than five years is within the limits prescribed by statute, G. S., 14-1, G. S., 14-2, G. S., 14-3, G. S., 14-71, and therefore defendant's contention that the punishment imposed is excessive for the offense charged is not meritorious.

APPEAL by defendant from *Pless, J.*, at August Term, 1945, of ROCKINGHAM.

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

Glidewell & Glidewell for defendant, appellant.

SEAWELL, J. The defendant was brought before the court on a bill of indictment charging him with receiving sixty cartons of Chesterfield cigarettes of the value of seventy-five dollars, knowing them to have been stolen. When the case came on for trial, he entered a plea of *nolo contendere*. Thereupon, the court entered judgment that he be imprisoned in the State's Prison at hard labor for not less than three years nor more than five years. From this judgment the defendant appealed.

The appellant contends that the term of imprisonment imposed upon him is excessive punishment for the offense charged, and constitutes reversible error. At the same time the brief concedes, and correctly so, that the sentence is within the stated limits of the law. G. S., 14-1, G. S., 14-2, G. S., 14-3, G. S., 14-71; *S. v. Reddick,* 222 N. C., 520, 23 S. E. (2d), 909; *S. v. Harwood,* 206 N. C., 87, 173 S. E., 24; *S. v. Ritter,* 199 N. C., 116, 120, 164 S. E., 62; *S. v. Brite,* 73 N. C., 26. The exercise of the court's discretion, within the limitations of applicable statutes respecting punishment, will not be disturbed when objection is predicated solely on the ground of excessive punishment. *S. v. Levy,* 220 N. C., 812, 18 S. E. (2d), 355; *S. v. Calcutt,* 219 N. C., 545, 569, 15 S. E. (2d), 9; *S. v. Brackett,* 218 N. C., 369, 11 S. E. (2d), 146; *S. v. Harris,* 204 N. C., 422, 423, 424, 168 S. E., 498; *S. v. Rippy,* 127 N. C., 516, 517, 37 S. E., 148; *S. v. Brite, supra.*

The exception is not meritorious, and the judgment of the trial court is Affirmed.

N. T. BAILEY v. J. D. McCOTTER.

(Filed 27 February, 1946.)

Trial § 49—

A motion to set aside the verdict as contrary to the weight of the evidence is addressed to the sound discretion of the trial court.

APPEAL by plaintiff from *Carr, J.*, at September Term, 1945, of NASH.

Civil action to recover for repairs or mechanical work done on defendant's truck.

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

"What amount, if any, is the plaintiff, N. T. Bailey, entitled to recover of the defendant, J. D. McCotter? Answer: None."

From judgment on the verdict, the plaintiff appeals, assigning error.

Wilkinson & King for plaintiff, appellant.

Thorp & Thorp for defendant, appellee.

PER CURIAM. In the trial below, the case was made to turn on a controverted issue of fact. This, the jury has resolved in favor of the defendant.

The motion to set aside the verdict as contrary to the weight of the evidence was addressed to the sound discretion of the trial court. *Goodman v. Goodman,* 201 N. C., 808, 161 S. E., 686. No reversible error has been made to appear. The verdict and judgment will be upheld.

No error.

STATE v. R. S. PRESNELL.

(Filed 27 February, 1946.)

Criminal Law § 75—

When a case is not docketed within the time prescribed, Rule 5, and no application for writ of *certiorari* is made, the appeal will be dismissed, the Rules of Practice in the Supreme Court being mandatory and not directory.

APPEAL by defendant from *Warlick, J.*, at August Term, 1945, of BUNCOMBE.

The defendant, a citizen and resident of Caldwell County, was indicted in Buncombe County for selling butter in said county, which the warrant charged weighed less than represented, in violation of G. S., 81-17. The

defendant interposed a plea in abatement on the ground that if the statute had been violated the offense occurred in Caldwell and not in Buncombe County. The plea was denied. Defendant appeals, assigning error.

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

W. H. Strickland for defendant.

PER CURIAM. This appeal was due to be heard at the call of the Nineteenth District, on 4 September, 1945. Rule 5 of the Rules of Practice in the Supreme Court, 221 N. C., 546. Counsel cannot waive this rule. The rules of this Court are mandatory, and not directory. *S. v. Moore,* 210 N. C., 459, 187 S. E., 586.

The rules of practice governing the time for docketing appeals in the Supreme Court, or for applying for a writ of *certiorari,* where the case on appeal, for some cogent reason cannot be docketed within the time prescribed by the rules, has been uniformly enforced since the decision in *S. v. Farmer,* 188 N. C., 243, 124 S. E., 562. See also *Pruitt v. Wood,* 199 N. C., 788, 156 S. E., 126.

Appeal dismissed.

R. H. WALLACE v. F. B. LONGEST, TRADING AS LONGEST LUMBER COMPANY,

and

W. B. RIVENBARK v. F. B. LONGEST, TRADING AS LONGEST LUMBER COMPANY,

and

CLYDE G. HOUSE, BY SUE HOUSE, NEXT FRIEND, v. F. B. LONGEST, TRADING AS LONGEST LUMBER COMPANY.

(Filed 6 March, 1946.)

1. Appeal and Error § 40i—

In reviewing exceptions to refusal of defendant's motions to nonsuit, photographs, identified by stipulation of parties and by oral testimony, but which the record fails to show were offered in evidence, will not be considered.

2. Automobiles § 18h (2)—Evidence held sufficient for jury on questions of negligence in violation of G. S., 20-148, and proximate cause.

Evidence that, in meeting each other on the highway while traveling in opposite directions, the driver of defendant's truck was not passing on his right side of the highway and did not give to plaintiffs one-half

the main traveled portion of the roadway as nearly as possible, resulting in the collision, *is held* sufficient to be submitted to the jury on the question of negligence in the violation of G. S., 20-148, and proximate cause, and this result is not affected by defendant's contention that the evidence showed that the right front of plaintiffs' truck and left front of defendant's truck came into contact, since even so the question of whether defendant's truck was on its left side of the highway at the time of such impact would be for the jury.

3. Automobiles § 13—

The violation of G. S., 20-148, prescribing that vehicles traveling in opposite directions in passing each other on the highway should each keep to its right and give the other at least one-half of the main traveled portion of the roadway as nearly as possible, is negligence *per se* and if the proximate cause of injury is actionable.

APPEAL by defendant from *Frizzelle, J.,* at November Term, 1945, of EDGECOMBE.

Three civil actions for recovery of damages in the sums of $50,000, $30,000 and $18,000, respectively, allegedly sustained by the respective plaintiffs in a motor vehicle collision as result of actionable negligence of defendant, through its agent and employee.

These actions were begun in Superior Court of Halifax County and, upon motion of defendant, removed to and, after consolidation for purpose of trial, tried in Superior Court of Edgecombe County.

These facts appear to be uncontroverted: At about 8:30 o'clock on the morning of 29 September, 1944, the ½ ton Ford pick-up truck of plaintiff R. H. Wallace, operated by him in a northerly direction on U. S. Highway #301 between Enfield and Halifax, North Carolina, and in which plaintiffs W. B. Rivenbark and Clyde G. House were riding, and a large 1941 Mack truck and trailer owned by defendant F. B. Longest, trading as Longest Lumber Company, and operated by Prince Wiggins, agent and employee of said defendant in the scope and course of his employment, and traveling on said highway in a southerly direction toward Enfield, North Carolina, came into collision at a point on said highway about 5½ miles north of Enfield and near or within the vicinity of the residence of one J. J. Collie. And the several plaintiffs sustained personal injuries as a result of such collision.

Plaintiffs in their respective complaints allege, in substantial accord, that at the time of the collision R. H. Wallace was driving his said Ford truck in a careful and prudent manner in full compliance with the traffic laws of the State of North Carolina on his right-hand side of the paved highway; that as the Ford truck and defendant's Mack truck with trailer approached each other, when said trucks were approximately sixty feet distant from each other, driving in opposite directions, the defend-

ant's agent Prince Wiggins "in violation of the laws of the State of North Carolina and in complete disregard of the safety of others and particularly of this plaintiff, without regard for existing traffic and without warning, suddenly drove said huge Mack truck and trailer sharply over and upon his left-hand side of said paved highway and in the left lane of said highway in front of the approaching Ford truck operated by" Wallace; that plaintiff, Wallace, "confronted by the sudden emergency caused by the aforesaid unlawful and negligent action of the defendant's agent or employee, . . . attempted to drive said Ford truck out of the path of defendant's huge Mack truck and trailer by driving said Ford truck as far off the paved portion of the highway and onto the dirt shoulder to his right as possible,—there being at said place a deep ditch to the right of the shoulder of said highway"; that although plaintiff Wallace "made every effort to avoid a head-on collision as aforesaid, the defendant's said agent or employee unlawfully, negligently, recklessly and carelessly, in complete disregard of the safety of this plaintiff, continued to drive said huge lumber truck with trailer on the wrong side and in the left lane of said paved highway in violation of the laws of this State, in front of the vehicle operated by plaintiff" Wallace "and against the same, then and there striking and colliding with the vehicle operated by plaintiff, completely demolishing said Ford truck and severely, painfully and permanently injuring the plaintiff, etc."; and "that the carelessness and negligence of the defendant's said agent or employee in operating said Mack lumber truck and trailer in the aforesaid unlawful manner, on the wrong half of the public highway under such circumstances as aforesaid, without regard for the existing traffic going in the opposite direction, was the sole proximate cause of the collision herein complained of and all of the aforesaid injuries and damages to this plaintiff."

Defendant, answering, denies the above allegations of the several complaints in material aspects, and sets forth his version of how the collision took place—through no fault of his driver, Prince Wiggins, but solely as proximate result of the sudden emergency created by unexpected and unlawful act of plaintiff Wallace when at a point some 15 or 20 feet or some short distance in front of defendant's truck, and when running at speed of 40 miles per hour, in suddenly turning his Ford truck from his right side of the highway to the left, that is in a westerly direction, across the road, and colliding on the right front side of said Ford truck, with the left front end of defendant's Mack truck.

And, defendant, answering complaint of plaintiff Wallace, pleads his negligence as a contributing cause of his injury in bar of his recovery.

The statement of case on appeal to which attorneys for plaintiff and for defendant agreed shows the following: "After the pleadings were

read and before any evidence was introduced, the parties stipulated in open court, 'that the photographs marked 1 plaintiff, 2 plaintiff, 3 plaintiff, . . . are authentic photographs of the location of the accident, looking north . . . And it is further stipulated, and this stipulation is not to be considered an introduction of evidence by the defendant at this time, that the photographs marked 1 defendant, 2 defendant and 3 defendant, are authentic photographs of the Mack truck belonging to F. B. Longest involved in the accident; and that the photographs marked 4 defendant, 5 defendant and 6 defendant, are authentic photographs of the Ford pick-up truck involved in the accident,—these photographs being taken on the 14th of October, 1944, and that the pictures of the Mack truck do not include the Kingham trailer described in the complaint.'"

But it is noted here that while the photographs marked 1 plaintiff, 2 plaintiff and 3 plaintiff were referred to by plaintiff's witnesses in connection with and in illustration of their testimony, the record fails to show that they were offered in evidence.

And, furthermore, while the photographs marked 1 defendant, 2 defendant and 3 defendant were identified by one witness, as a fair representation of defendant's truck after the accident, and while the photographs marked 4 defendant, 5 defendant and 6 defendant were identified by the same witness, as a fair representation of the Wallace pick-up truck after the accident, the record fails to show any oral testimony as to the condition of the trucks after the collision, which these six photographs might have illustrated, and the record fails to show that any of these photographs were offered in evidence.

Plaintiff offered evidence tending to show this narrative of pertinent facts surrounding and pertaining to the accident: The highway at the point of collision runs about north and south. At that point there is a curve described as one "you can safely make at 60 miles an hour." The highway has a concrete surface 17½ or 18 feet in width, with black marked center line. From the north toward the point of collision there is "just a little bit of downgrade." Traveling north and approaching the point of collision, there is on the right, or east side, of the highway, a ditch running parallel with, and probably 8 or 9 feet from the hard surface. The depth of this ditch is variously estimated to be from 2½ to 4 feet. The width of it may be 2½ to 3 feet. The shoulder of the road between the hard surface and this parallel ditch is fairly level. "It tapered off down to the ditch." This parallel ditch connected with a deeper ditch which ran west into a culvert underneath the highway. There was no bridge over the latter ditch. It was open to a point about 6 or 6½ feet from the hard surface. It was 4½ or 5 feet deep, and 5 or 6 feet wide close to the top "and comes down kinder small at

bottom." "It looked more like a hole than a ditch." The collision occurred just beyond this cross ditch, that is, north of it. The Ford pick-up truck of plaintiff Wallace was of ½ ton capacity. It was carrying tools, solder, tin, a container of cement, etc., all of which weighed not over 200 or 300 pounds. Defendant's truck, compared with the pick-up truck, was much larger and heavier. It consisted of a truck or tractor, so interchangeably designated, of short wheel base, between 10 and 12 feet long, and a trailer about 21 feet long, an overall length of between 30 and 35 feet. The tractor had two sets of wheels. The trailer had a set of dual wheels underneath the rear, and it was connected with the tractor by "a fifth wheel." There were no other wheels under the trailer. The pick-up truck in which plaintiffs were riding was headed north, and defendant's truck south.

Plaintiff R. H. Wallace testified in pertinent part: ". . . I live at . . . Rocky Mount, North Carolina . . . I have a roofing and sheet metal business in Weldon. Bernice Rivenbark and Clyde House work for me . . . On the morning of September 29, 1944, I drove a Ford pick-up truck intending to go from Rocky Mount to my shop in Weldon. Mr. House was seated next to me and Mr. Rivenbark on the outside. I was taking them to work. While we were between Enfield and Halifax, about 50 or 60 feet from me, I would say, I saw a truck coming down the road, about at that distance his front wheel came over the center line, over to my side of the road, and that is when it first registered in my mind, though I might have seen the truck further down the road, but it registered in my mind then, and I got over on my side of the road more and as he got nearer me, his entire truck was over on my side of the highway. I commenced closing up and leaving the highway on my right and I got off the highway as far as I could to keep from running into a ditch which was running parallel with the highway. We both went together, the two radiators, and when we actually hit we went up kind of like that (indicating), the radiators went up like that and what happened from then on I don't know. But as the truck was approaching me the driver of the other truck was in a slumped position like this (indicating). He was in a stooped position like this (indicating); you could see his hands on the wheel, or down in position, wouldn't say they were on the wheel, but saw the wheel. I noticed him stooped over the steering wheel about 50 or 60 feet away, I judge . . . I commenced slowing up and pulled off the highway . . . At the time I first saw the truck approaching me I was driving between 30 and 35 miles an hour; . . . the ditch which goes underneath the hard surface was what I was trying to keep from getting into. . . . The last time I saw that truck the entire truck was on my side of the road. Part of the wheels of the back part of the trailer were on his side of the center line, but the entire

truck was on my side. By that truck, I mean the front part of the oncoming truck that the trailer was attached to. In other words, four wheels were on my side of the hard surface and the trailer part to the truck, the last two wheels were on, that's all. I think I was all four wheels off the paved surface. To avoid the collision I was doing my best to get in the field there but this ditch kept me from going further that way and by that time the accident had already occurred. . . . I got up just beyond this ditch that is going across the highway (indicating). All I remember is that it was just past this ditch that comes across the highway where the accident occurred . . . When I saw that truck coming around the curve here (indicating on photograph) it was somewhere close to 50 to 60 feet away. It is hard to judge on an oncoming vehicle, a car or truck, but there was time enough to take me clear off the hard surface. There was no bridge over it and my truck didn't quite cross it. In other words the ditch doesn't come into the highway. It lacks about 6 feet; you just have room between the highway and the ditch."

Mrs. J. J. Collie testified that she was in her garden on the east side of the highway at the time of the collision; that she saw the Wallace pick-up truck going toward Halifax; that she noticed this truck "leaning to the right coming off the highway, coming very slow . . . not going a bit over 30 miles an hour . . . start driving off the side of the main hard surface of the highway . . . for 150 or 200 feet"; that she heard the crash and looking up "the two radiators had already hit, you might say they were parting from each other. They contacted on the right side of the road—Mr. Wallace's right, the side I was on."

Plaintiffs further offered evidence tending to show: (1) That in the collision the pick-up truck "was knocked around" and came to rest on the east side of the highway headed south with front wheels in the ditch that runs into the culvert underneath the hard surface of the highway, and the engine hanging over it; that there was one track of automobile which came off the hard surface on to the dirt shoulder on the east side of the highway about 150 feet before the ditch that goes into the culvert is reached, and extended about two feet off the hard surface up to the point where the pick-up truck came to rest; (2) that after the collision the rear end of the trailer was about 2½ feet over on the east side of the marked black center line of the highway; and the rear wheels of the truck or tractor were on the shoulder on the west side of the highway and the front of the truck or tractor was up the bank of that side headed out into a field, but the front wheels had been torn away, and were out in the field 8 or 10 feet; (3) that after the collision (a) plaintiff Wallace was "jammed right under the wheel" and had to be pulled away, and was unconscious; (b) plaintiff Rivenbark was "under the front end of the trailer up under the edge of the bank, all mashed in the dirt" on the

west side of the highway, and (c) plaintiff House was also on the west side of the highway, lying straight up and down the ditch, about 8 or 10 feet from Rivenbark; and (4) that the tools, etc., which were in the pick-up truck were scattered all over the highway.

Plaintiff's evidence further tends to show that, before and at the time of the accident, the weather was misty and foggy; that "you could actually see,—could see the highway very plainly"; and that it rained in eight or ten minutes afterwards.

The evidence further tends to show that plaintiff Rivenbark regained consciousness about eight weeks after the accident and has no recollection of anything that happened on the day it occurred; that plaintiff House regained consciousness two or three days after the accident, but says he did not see the collision and thinks he was asleep, having been up late the previous night; and that each of the plaintiffs sustained serious and permanent injury.

Defendant offered no evidence, and preserved his exception to refusal of the court to grant his motions for judgments as in case of nonsuit.

The cases were submitted to the jury in each action upon two issues, first, as to negligence of defendant, as alleged in the complaint, and, second, as to damages. The jury answered the first issue Yes, and awarded as damages $15,000 to plaintiff Wallace, $18,000 to plaintiff Rivenbark, and $8,000 to plaintiff House. From judgments for the respective plaintiffs in accordance with the verdict, defendant appeals to Supreme Court and assigns error.

George M. Fountain, Kelly Jenkins, and V. E. Fountain for plaintiffs, appellees.

Battle, Winslow & Merrell for defendant, appellant.

WINBORNE, J. The sole question presented for decision on this appeal relates to the refusal of the court below to sustain defendant's motions for judgments as in case of nonsuit. The challenge to the propriety of such action by the court, as stated in brief of defendant, is based in the main upon contention that the oral evidence offered by plaintiffs "is manifestly unreasonable and inherently incredible when tested by commonly known physical laws in the light of incontrovertible physical facts." While the principle of law invoked in support of this theory is well established in appropriate instances, *Davis v. R. R.,* 170 N. C., 582, 87 S. E., 745; *Powers v. Sternberg,* 213 N. C., 41, 195 S. E., 88; *Austin v. Overton,* 222 N. C., 89, 21 S. E. (2d), 887; *Ingram v. Smoky Mountain Stages,* 225 N. C., 444, 35 S. E. (2d), 337; *Tysinger v. Dairy Products,* 225 N. C., 717, 36 S. E. (2d), 246, the evidence in the record

on this appeal does not present a factual situation to which it may be properly applied.

In this connection the only evidence shown in the record, almost entirely oral, is that offered by plaintiffs. The record fails to show that defendant's photographs, identified by stipulation of parties and by oral testimony, were offered in evidence. Therefore, they may not be considered as evidence. Hence, in considering the exceptions to refusal of defendant's motions for judgments as of nonsuit, we have, as above stated, only the evidence offered by plaintiffs. However, defendant concedes that he had the benefit of these photographs before the jury, as if they had been offered in evidence.

The oral evidence tends to show (1) that the driver of defendant's truck in meeting the pick-up truck in which plaintiffs were riding was not passing on his right side of the highway, and (2) that he was not giving to the oncoming truck at least one-half of the main traveled portion of the roadway as nearly as possible, in violation of the provisions of the statute relating to meeting of vehicles. G. S., 20-148. A violation of this statute would be negligence *per se*. *Hobbs v. Coach Co.*, 225 N. C., 323, 34 S. E. (2d), 211; *Tarrant v. Bottling Co.*, 221 N. C., 390, 20 S. E. (2d), 565. If such violation of this statute were the proximate cause of the injury it would be actionable. Whether it were the proximate cause is a matter for consideration of the jury under the law as declared by the court.

But if there were evidence tending to support the theory of the defendant as shown in his answer, that is, that in colliding the right front side of the Ford truck came in contact with the left front end of defendant's truck as defendant contends his photographs show, still the question as to whether defendant's truck was on its left side of the highway and, if so, whether that were the proximate cause of the collision would be for the jury.

Careful consideration of the question presented, on the record before us, fails to disclose error in the trial court submitting the case to the jury. No exception is taken to the charge. Hence, the case was largely one of fact for the jury, and the jury has spoken.

We find

No error.

IN THE MATTER OF THE ESTATE OF DR. JOHN W. SMITH, DECEASED.

(Filed 6 March, 1946.)

1. Wills § 40—

A widow is given the right to dissent from the will of her husband by statute, G. S., 30-1, upon notice given in person or by attorney duly authorized in writing, and the statute does not require previous notice to the executors or devisees.

2. Same—While motion to set aside divorce decree is pending, it is error for the court to strike out widow's dissent from will.

Appellant duly filed dissent from the will of her husband. An executor moved to strike out the dissent on the ground that the husband had obtained a decree of absolute divorce. Appellant moved in the court in which the divorce decree had been rendered to set aside the decree for want of legal service and for fraud. The executor sought and obtained an order amending *nunc pro tunc* the order of publication in the divorce action to make it conform to the statute. *Held:* While the motion to set aside the divorce decree is pending, it is error for the court to strike out the dissent from the will.

APPEAL by Mrs. Harriot B. Smith from *Nimocks, J.*, at Chambers, 19 November, 1945. From HERTFORD. Error and remanded.

From an order directing that her dissent from the will of John W. Smith be stricken from the record, Mrs. Harriot B. Smith appealed.

The pertinent facts were these: John W. Smith died testate in Hertford County, 25 February, 1945, and his will was probated 1 March, 1945, wherein he named A. W. Greene, Clerk of the Superior Court of Hertford County, and H. H. Foster as executors.

On 21 August, 1945, Elbert S. Peel, attorney for appellant, presented to Judge Nimocks holding the courts of the third Judicial District at Halifax, N. C., the written dissent from said will by Mrs. Harriot B. Smith as the widow of John W. Smith, and thereupon it was ordered that said dissent, together with the authorization therefor, be filed of record in the Superior Court of Hertford County. The dissent was filed in accordance with the order.

On 27 August A. W. Greene, one of the executors, filed exception to the order of Judge Nimocks on the ground (1) that the order was signed without notice to executors and devisees of the testator, and (2) that John W. Smith had been divorced *a vinculo* by judgment of the Superior Court in Martin County in September, 1944. Notice was given appellant's attorney of this motion, to be heard 1 October by Judge Nimocks.

On 29 September Mrs. Harriot B. Smith filed in the Superior Court of Martin County a motion to set aside the divorce judgment for want of proper service, and for fraud in attempting to secure a divorce without

notice to her, in a county other than that of the residence of plaintiff John W. Smith or his wife, where neither of them were known, and by a publication which did not give her legal or actual notice. A meritorious defense to the divorce action was alleged. The motion had been verified by appellant 19 June, 1945, but notice was not given to executors and devisees of this motion until 29 September, 1945.

The motion to strike out the dissent of Mrs. Smith was heard by Judge Nimocks 1 October, but judgment was reserved.

On 7 November notice was given by the attorney for A. W. Greene, one of the executors, that he would move before the Clerk of Martin Superior Court to amend *nunc pro tunc* the order of publication of summons in the divorce case. This was heard by the Clerk of Martin 19 November, and order entered amending the order of publication so as to conform to the statute.

On the same date, 19 November, 1945, Judge Nimocks entered the following order: "The court now being of the opinion that he was without authority in law or otherwise to accept the dissent of Hon. Elbert S. Peel, attorney for Mrs. Harriot B. Smith, and to order the same filed in the office of the Clerk of the Superior Court of Hertford County: It is now, on motion of Alvin J. Elvey, attorney for A. W. Greene, co-executor, ordered and decreed that the dissent from the will of Dr. John W. Smith, and the order accompanying same, be set aside and declared void and of no effect, and that the same be expunged from the records of Hertford County."

Mrs. Harriot B. Smith excepted and appealed.

Peel & Manning for appellant.

Alvin J. Elvey for appellee.

DEVIN, J. The right of a widow to dissent from the will of her husband is conferred upon her by statute. G. S., 30-1. She may give notice of her dissent in person, or by attorney duly authorized in writing. The dissent is thereupon filed as a record of court, and, nothing else being made to appear, the estate would be administered as to the wife as if the husband had died intestate. G. S., 30-2.

While in the case at bar the Clerk of the Superior Court of Hertford County was one of the executors of the will, the act of filing a dissent was purely ministerial and we see no reason why the clerk should have been disqualified to receive and file the written dissent. However, by reason of G. S., 2-20, counsel thought proper to present the dissent in the first instance to the judge holding the courts of the district. But in any event the judge ordered the dissent filed of record in Hertford County,

and this was done. The fact that no previous notice was given the executors or devisees is immaterial as the statute does not require notice.

The dissent having been duly filed, the moving executor sought to have it stricken out on the ground that a valid decree of divorce had dissolved the bonds of matrimony between John W. Smith and his wife, and that at the time of the death of the testator the appellant was not in law his widow. To this the appellant replied by moving in the court in which the divorce decree had been rendered to set aside the judgment for want of legal service and for fraud. *Fowler v. Fowler,* 190 N. C., 536, 130 S. E., 315; *Poole v. Poole,* 210 N. C., 536, 187 S. E., 777; G. S., 1-99; G. S., 1-100. This motion is apparently still pending in Martin County and undisposed of.

In order to meet the charge of lack of proper service in the divorce case the executor sought and obtained an order from the Clerk of Martin Superior Court permitting an amendment *nunc pro tunc* to the order of publication in the case of John W. Smith *v.* Harriot B. Smith in order to make it conform to the statute.

In this state of the case the court below ordered the dissent expunged from the records of Hertford County.

Without undertaking to determine the propriety or effect of the motions and orders in the divorce action, it is apparent on the record before us that the order striking the appellant's dissent from the files was improvidently entered, pending the determination of the status of the divorce judgment in Martin County. If the judgment is upheld it would bar Mrs. Smith from participation in the estate of John W. Smith and her dissent would be of no avail; but if the judgment be set aside she would be entitled as in cases of intestacy, the dissent having been filed within the time allowed by the statute.

Error and remanded.

RHEA PENLAND, TRADING AS BURNSVILLE CONSTRUCTION COMPANY, *v.* RED HILL METHODIST CHURCH AND RABURN YELTON, W. B. GREENE, RUSSELL WOODY, H. S. GORTNEY, WILLARD YOUNG, DONT WHITSON, WALTER GARLAND AND NATHAN YELTON, TRUSTEES AND MEMBERS OF THE BUILDING COMMITTEE OF RED HILL METHODIST CHURCH.

(Filed 6 March, 1946.)

1. Venue § 2a—

In an action to recover balance due on contract for construction of a building and for the sale of the property to satisfy the laborers' and

materialmen's lien duly filed in the county where the land is situate, defendants are entitled as a matter of right to the removal of the action from the county of plaintiff's residence to the county in which the land lies, upon their motion duly made.

2. Same—

Plaintiff may not successfully contend that his action is for a money judgment only in order to prevent removal of the action to the county wherein the land is situate when he seeks to recover not only the balance due on his contract of construction, but also seeks to enforce his laborers' and materialmen's lien by sale of the property.

APPEAL by plaintiff from *Bobbitt, J.*, at January Term, 1946, of YANCEY.

Civil action instituted in Yancey County, where the plaintiff resides, to recover the sum of $2,366.00, the alleged balance due the plaintiff on a contract for the construction of a church building for the defendants, in Mitchell County, and for an order directing the sale of said church property to satisfy the above sum, which is secured by a laborers' and materialmen's lien duly filed in the office of the Clerk of the Superior Court of Mitchell County, 28 December, 1945.

In apt time the defendants made a motion before the Clerk of the Superior Court of Yancey County to remove the cause to Mitchell County, on the ground that the latter county was the proper venue. The motion was granted and the plaintiff appealed to his Honor, the judge holding the courts of the Eighteenth Judicial District, who held that Mitchell County was the proper venue for the trial of this action, and entered an order accordingly.

Plaintiff excepted and appealed to the Supreme Court.

Watson & Fouts for plaintiff.

W. C. Berry and Charles Hutchins for defendants.

DENNY, J. The appellant insists he had the right to institute this action in Yancey County and to have the case tried there, notwithstanding the fact that the lien he seeks to foreclose was filed in Mitchell County, where the land lay. He is relying upon *Sugg v. Pollard,* 184 N. C., 494, 115 S. E., 153. There the action was brought in Lee County and the lien had been filed in Pitt County. However, it will be noted that in that case there was no motion for removal to Pitt County. The defendant was duly served with summons, filed an answer, and participated in the trial in Lee County. The validity of the judgment was thereafter challenged on the ground that Lee County was the wrong venue. This Court held that the statute does not expressly prescribe

venue for an action to foreclose a lien, therefore if the venue was wrong, the failure to demand change of venue in apt time cured the defect. The Court further pointed out that "If the action had been brought in Lee County to foreclose a mortgage upon land lying in Pitt, a decree of foreclosure appointing a commissioner to sell said land rendered in Lee, there being no motion to remove taken in apt time, would have been valid." However, the defendants herein, in apt time filed their motion for removal to the county where the lien had been filed and where the real property involved is located. And we see no essential difference in so far as an interest in real property is involved, in an action to foreclose a mortgage, a lien created by contract, and in one to foreclose a specific statutory lien on real property.

The appellant further contends, however, that his action is for a money judgment only and therefore is not analogous to an action for the foreclosure of a mortgage or an action to foreclose a lien. We cannot so hold in view of the allegations of the complaint. The balance claimed to be due is bottomed upon the alleged contract, but even so, the plaintiff is relying upon his lien for the payment thereof. He so pleads and in his prayer for relief he asks for the specific property upon which he holds his lien, to be sold to satisfy his judgment, costs, etc. Therefore, we think Mitchell County is the proper venue for the trial of this cause and that the defendants were entitled, as a matter of right, to have their motion for removal granted. *Mortgage Co. v. Long,* 205 N. C., 533, 172 S. E., 209; *Councill v. Bailey,* 154 N. C., 54, 69 S. E., 760; *Connor v. Dillard,* 129 N. C., 50, 39 S. E., 641; *Fraley v. March,* 68 N. C., 160; *cf. White v. Rankin,* 206 N. C., 104, 173 S. E., 282.

The judgment of the court below is

Affirmed.

LUTHER PHILLIPS v. BERTHA B. NESSMITH.

(Filed 6 March, 1946.)

1. Automobiles § 8e, 18h (2)—

Plaintiff's testimony that he was driving on the right side of the street with his lights burning, when defendant's truck, which had been parked at the curb, "backed out with speed" and hit plaintiff's car, *is held* sufficient to carry the case to the jury on the issue of negligence.

2. Automobiles § 18j—

Defendant's testimony was to the effect that she was backing her truck from the curb where it had been parked, that her lights, front and rear, were burning, and that she was looking backward the while, when her

truck struck plaintiff's car, and that after the impact she saw plaintiff turn on his lights, and that there was nothing to obstruct the view of either driver, but that she did not see plaintiff's car before the collision. Plaintiff testified his lights were burning throughout. *Held:* It was error for the court to refuse to submit the issue of contributory negligence.

3. Negligence § 21—

The "more than a scintilla" rule of evidence applies equally to the issues of negligence and contributory negligence, and if diverse inferences may reasonably be drawn from the evidence upon the issue of contributory negligence, some favorable to plaintiff and some favorable to defendant, the issue must be submitted to the jury.

BARNHILL, J., dissents.

APPEAL by defendant from *Phillips, J.,* at August-September Term, 1945, of POLK.

Civil action for damages to plaintiff's automobile alleged to have been caused by the negligence of the defendant in backing her truck into the side of plaintiff's car.

On the night of 11 December, 1944, plaintiff was driving his 1937 Ford V-8 along the main street in Tryon, returning from the hospital where he had taken a prisoner. He says he was on his right side of the street, which was about 30 feet wide, with his lights burning, when the defendant's truck, which had been parked in front of the Rock Grill, "backed out with speed and hit me"; *i.e.,* hit my car, tore off the back fender and otherwise damaged it.

The defendant denied liability and pleaded contributory negligence. She says: "I had come out of the Rock Grill, got in the car and started backing out slowly. . . . Was looking backward as I backed out. . . . I had my lights on both rear and front. . . . I did not see Mr. Phillips' automobile. . . . There was nothing to keep me from seeing up and down the street. . . . Something hit. . . . I saw Mr. Phillips then and he turned his lights on. . . . His lights were off when I stopped. They came on. . . . At the time I stopped my car I don't think I was quite to the center of the street. I examined the dirt knocked from the cars and most of it was on my side of the street. . . . There was nothing to obstruct Mr. Phillips' view."

The case was submitted to the jury on the issue of negligence. The court declined to submit an issue on the plaintiff's alleged contributory negligence. Exception. The jury answered the issue of negligence in favor of the plaintiff and assessed his damages at $40.

From judgment on the verdict, the defendant appealed, assigning errors.

No counsel for plaintiff.

M. R. McCown for defendant, appellant.

STACY, C. J. The plaintiff's testimony is sufficient to carry the case to the jury on the issue of defendant's alleged negligence. *Wall v. Bain,* 222 N. C., 375, 23 S. E. (2d), 330; *Lincoln v. R. R.,* 207 N. C., 787, 178 S. E., 601. Accordingly, her demurrer to the evidence was properly overruled. *Henson v. Wilson,* 225 N. C., 417, 35 S. E. (2d), 245. But we think there was error in the court's refusal to submit the issue of plaintiff's alleged contributory negligence to the jury. On this issue, the evidence is inharmonious. The defendant's testimony makes it a matter for the twelve. *Liske v. Walton,* 198 N. C., 741, 153 S. E., 318. "The rule applicable in cases of this kind is, that if diverse inferences may reasonably be drawn from the evidence, some favorable to the plaintiff and others to the defendant, the cause should be submitted to the jury for final determination." *Hobbs v. Mann,* 199 N. C., 532, 155 S. E., 163. The "more than a scintilla" rule of evidence applies equally to the issues of negligence and contributory negligence. *Sebastian v. Motor Lines,* 213 N. C., 770, 197 S. E., 539; *Pearson v. Luther,* 212 N. C., 412, 193 S. E., 739; *Moseley v. R. R.,* 197 N. C., 628, 150 S. E., 184; *Moore v. Iron Works,* 183 N. C., 438, 111 S. E., 776.

There was error in refusing to allow the jury to consider the issue of contributory negligence, which entitles the defendant to another hearing.

New trial.

BARNHILL, J., dissents.

DORA B. WARD (MRS. H. S. WARD) v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 6 March, 1946.)

Telegraph Companies § 2—

An action to recover for failure to transmit an interstate message is governed by the Federal decisions, and plaintiff may not recover damages for mental anguish, or punitive damages, or any state statutory penalty.

APPEAL by plaintiff from *Harris, J.,* at October Term, 1945, of BEAUFORT.

This was an action to recover damages for failure to transmit a message to Tallahassee, Florida, from Washington, North Carolina, and to

recover $25.00 State statutory penalty for such failure. At the close of the evidence the defendant, having first tendered judgment for $6.12, the total amount shown to have been actually expended by the plaintiff, and accrued costs, the court stated he would charge the jury that the plaintiff could not recover any sum on account of the alleged mental anguish, nor could any punitive damage alleged and prayed for be assessed against the defendant and in favor of the plaintiff. Whereupon the plaintiff in deference to the intimation of the court submitted to a voluntary nonsuit, and appealed from judgment predicated on such intimation.

H. C. Carter for plaintiff, appellant.

Francis R. Stark and Rodman & Rodman for defendant, appellee.

SCHENCK, J. If it be conceded, without being decided, that the communication involved in this action was to have been addressed to the fifteen-year-old son of the plaintiff, or to someone in his behalf in Tallahassee, Florida, the communication would have been an interstate message, and therefore governed by the Federal decisions. *Hardie v. Telegraph Co.,* 190 N. C., 45, 128 S. E., 500, and cases there cited. There could have been no recovery for mental anguish. *Western Union Telegraph Co. v. Brown,* 234 U. S., 542, 58 L. Ed., 1457; *Western Union Telegraph Co. v. Speight,* 254 U. S., 17, 65 L. Ed., 105; *Hardie v. Western Union Telegraph Co., supra;* nor could there have been any recovery of punitive damages, *Aldrich v. Western Union Telegraph Co.,* 66 Fed. (2d), 26; nor any recovery of a State statutory penalty, *Boegli v. Western Union Telegraph Co.,* 251 U. S., 315.

Since the defendant tendered judgment for $6.12, the total amount shown by the evidence to have been expended by the plaintiff, and the costs then accrued, and since there are no other damages prayed for except that due to mental anguish and that sought by way of punitive measures, and of recovery of penalty under State statute, there was no error in his Honor's intimation that he would charge the jury that the plaintiff could not in effect recover any damage other than the $6.12, and accrued costs, for which judgment was tendered by defendant.

For the reasons given the judgment below must be affirmed, and it is so ordered.

Affirmed.

S. V. TOMLINSON v. H. C. SHARPE, TRADING AND DOING BUSINESS AS DAVIS MOTOR LINES.

(Filed 20 March, 1946.)

1. Master and Servant § 22c—

An employer may not be held liable for the negligent act of his employee unless the employee at the time and in respect to the very transaction complained of was acting within the scope of his employment.

2. Same—

The same rule is applied in Virginia as in this jurisdiction with respect to the liability of the master for the torts of the servant committed in the course of his employment.

3. Same: Automobiles § 24e—Evidence held insufficient to overrule nonsuit on issue of respondeat superior.

The evidence tended to show the following circumstances: Defendant's truck was stalled on the highway, blocking traffic and forcing plaintiff's truck to stop. Defendant's drivers came over to plaintiff's truck and asked plaintiff's drivers for a tow chain, and upon being told they had none, returned to defendant's truck and attempted to start it, without success. They then came back to plaintiff's truck and asked to get in the cab, as it was extremely cold. After entering the cab of plaintiff's truck, they asked about a battery and were told there was only the one in the truck and that plaintiff's drivers did not have light or wrenches to get it out. They continued to sit some minutes conversing, fifteen minutes according to one witness, during which time they were repeatedly warned not to strike matches. Finally one of defendant's drivers struck a match to light a cigarette and threw the unextinguished match down where it ignited the gasoline saturated floor mat. *Held:* The negligent act was committed on premises over which defendant had no control, and the match was struck to light a cigarette for the personal use of defendant's employee, and therefore the act was in no way connected with any business of defendant, nor in furtherance thereof, and the evidence is insufficient to be submitted to the jury on the issue of *respondeat superior.*

APPEAL by plaintiff from *Bobbitt, J.,* at October Term, 1945, of WILKES.

This was an action to recover damages for the burning of plaintiff's motor truck, alleged to have been caused by the negligence of defendant's agents and employees while acting within the scope of their employment.

The plaintiff offered evidence tending to show that his motor truck with a load of poultry, on 3 December, 1942, was being driven north by his two drivers, Eller and Bauguess, and that near South Boston, Virginia, about 4:30 a.m., plaintiff's drivers saw defendant's truck stopped on the highway and extending across the highway so as to block passage entirely. Plaintiff's truck was stopped 50 or 60 feet away. One of

defendant's drivers came to plaintiff's truck and asked for a tow chain, and being told they had none, the man returned to defendant's truck, and tried to start the motor, without success. Then defendant's two drivers came back to plaintiff's truck, and the witness Eller described what happened as follows: "When they came back the second time they asked if they could get in the cab of the truck. We said 'yes,' because it was cold. They got in and began to ask about a battery to start the tractor. I think Bauguess told them he did not have but one and that we had no light or wrenches to get a battery out of our truck. Bauguess says, 'Boys, don't strike any matches.' I said, 'No, don't strike matches!' They sat there a few minutes. I heard them say to Bauguess, 'Let us get a battery out.' Bauguess said, 'We have no light and got no wrench.' Bauguess spoke up again and said, 'Don't strike matches.' The cab was closed. The window was closed and the door closed. One of the boys reached like he was going to get a cigarette. I said, 'Don't strike a match. The gas tank has been leaking. The floor mat is saturated with gas.' He struck it and in place of blowing it out he threw it down and it caught on fire, the floor mat did." The two employees of defendant were sitting on the seat in plaintiff's cab with Bauguess, while Eller was lying immediately back of the seat in the "sleeper."

The witness Bauguess testified: "When the two boys came to our truck they wanted to know if they could get in the truck. They got in the cab and sat down. They wanted to know about the battery. I told them I didn't have any lights or wrenches and not to strike any matches. They sat there a minute or two. Mr. Eller said something about not striking a match. I said something two or three times and the first thing I knew one struck a match to light a cigarette and throwed it on the floor. When he did it caught. These boys jumped out of the truck. . . . It was one of the two who struck the match. We had been sitting in the cab maybe ten to fifteen minutes. We had been talking after they came down there. When these boys came and sat in our truck, the engine was running. It didn't run all the time, the entire fifteen minutes we were there. I cut it off. It was awfully cold. I like to have froze. While the boys were in the truck they were both sitting on the seat with me. One struck a match. He throwed it on the floor. When he threw it down the fire blazed up. It must have been burning when he threw it down. He didn't blow it out when he threw it down."

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

Whicker & Whicker and Trivette & Holshouser for plaintiff, appellant.
Allen & Henderson for defendant, appellee.

DEVIN, J. The sole question presented is the propriety of the nonsuit.

Plaintiff's evidence tended to show that the burning of the truck was due to the action of one of defendant's employees in dropping an unextinguished match on a gasoline-saturated mat on the floor of the cab of plaintiff's truck. The match had been struck to light a cigarette. The action of defendant's employee according to this evidence was negligent and the damage to plaintiff's truck proximately resulted therefrom. But liability therefor could not be imputed to the defendant, employer, unless his employee at the time of the negligent act and in respect thereto was acting within the scope of his employment. *Rogers v. Black Mountain,* 224 N. C., 119, 29 S. E. (2d), 203; *McLamb v. Beasley,* 218 N. C., 308, 11 S. E. (2d), 294; *Liverman v. Cline,* 212 N. C., 43, 192 S. E., 849; *Parrish v. Mfg. Co.,* 211 N. C., 7, 188 S. E., 897; *Van Landingham v. Sewing Machine Co.,* 207 N. C., 355, 177 S. E., 126; *Gallop v. Clark,* 188 N. C., 186, 124 S. E., 145; *Linville v. Nissen,* 162 N. C., 95, 77 S. E., 1096; *Jackson v. Tel. Co.,* 139 N. C., 347, 51 S. E., 1015. It is only when the relation of master and servant between the wrongdoer and his employer exists at the time and in respect to the very transaction out of which the injury arose that liability therefor attaches to the employer. *Parrott v. Kantor,* 216 N. C., 584, 6 S. E. (2d), 40; *Vert v. Ins. Co.,* 342 Mo., 629; 35 Am. Jur., 985. As the injury here complained of occurred in the State of Virginia, it may be noted that the same rule is applied in that jurisdiction as here with respect to the liability of the master for the torts of the servant committed in the course of his employment. *Crowell v. Duncan,* 145 Va., 459; *Western Union v. Phelps,* 160 Va., 674; *Spence v. Oil Co.,* 171 Va., 621, 197 S. E., 468; *Power Co. v. Robertson,* 142 Va., 454.

Whether the defendant's employee, in the case at bar, was acting in the course of his employment at the time and with respect to the negligent act complained of must be determined by consideration of the evidence showing the circumstance of the employee's entry into and presence in the cab of plaintiff's truck at the time.

Defendant's truck was stalled on the highway, blocking traffic. It was the duty of defendant's employees to their employer to use all reasonable effort to move the truck. They attempted to secure from plaintiff's truck a tow chain, without success. The effort to start the motor also proved unsuccessful. It was midwinter and quite cold, 4:30 a.m. Under these circumstances defendant's employees went to plaintiff's truck, climbed in the cab and sat down on the seat and inquired about a battery to start the motor on defendant's truck. They were told by plaintiff's drivers they did not have one, and that they had no lights and wrenches to disconnect the battery on their truck. Defendant's employees continued to sit there for some minutes engaged in conversation—one witness said fifteen

minutes. At length one of defendant's employees pulled out a cigarette to indulge in a smoke. Both Eller and Bauguess warned him not to strike a match, but he did so, and negligently threw the unextinguished match on the floor. The gasoline fumes caught fire and consumed plaintiff's truck.

It will be observed that the negligent act complained of was the throwing by defendant's employee of a lighted match on the gasoline-saturated mat in plaintiff's cab. The match had been struck to light a cigarette for the personal use of defendant's employee. The tortious act was not committed on premises, nor by the use of an instrumentality over which defendant had any control. Thus, where the driver of a taxicab became intoxicated and injured a third person the employer was held liable though the drinking was for the employee's individual purposes, since he was using the employer's vehicle apparently in the course of his employment. *Crowell v. Duncan,* 145 Va., 459. And where an employee in a garage, while pouring gasoline from a drum into a smaller container, dropped a lighted match on the floor causing injury, the employer was held liable. The tort was committed on employer's premises by an employee while engaged in the work for which he was employed. *Jefferson v. Derbyshire Farmers* (1921), 2 K. B., 281. In our case the match was struck for the purpose of lighting a cigarette solely for the pleasure of the employee. The act at the time was in no way connected with any business for his employer, nor in furtherance thereof. If the man had struck a match for the purpose of affording light to enable him to obtain a battery to use on defendant's truck, a different rule might apply; but the evidence does not support that view.

The plaintiff relies on the case of *Jefferson v. Derbyshire Farmers, supra,* as an authority in support of his position. In that case the defendants were using a garage for servicing their trucks, and employed a young man named Booth to work in and about the garage. While Booth was emptying a drum of motor spirit, or benzol, into tins, he struck a match to light a cigarette and threw the match on the floor, causing a destructive fire. The Court held the defendant's employers liable on the ground that it was within the scope of Booth's employment to empty motor spirit drums in the garage, and that it was his duty to do this work with reasonable care. To smoke and throw a lighted match on the floor while doing this work was thought to be a negligent act in the performance of the work he was employed to do. In a concurring opinion it was suggested that the law cast a duty on the user of the garage to take reasonable care that no damage be occasioned by the use thereof by him or his servants; that the pouring of motor spirit involved danger, requiring special precautions, and that the act which caused damage was done while engaged in this dangerous operation. The epi-

tome of the decision is that recovery was permitted on the ground that the servant was doing the act he was employed to do, negligently.

It may be noted that the annotator of that case in 13 A. L. R., 1000, adds this criticism: "In order to justify this reasoning, the act of the servant in drawing the benzol in the presence of fire, rather than his act in throwing down a lighted match, must be regarded as the proximate cause of the injury."

In *Williams v. Jones,* 3 Hurlst & C., 256, 159 Eng. Reprint, 528, 13 A. L. R., 997, a carpenter was at work for his employer making a signboard in a shed where there were shavings. While the employee was so engaged, for the purpose of lighting his pipe, he kindled a shaving at a match and negligently dropped the burning shaving on the floor, causing fire and damage to the building. The employer was sued, but recovery was denied. It was said the master could only be held liable if the servant was negligent in using the shed for the purposes of the master and in the course of his employment; that the act of lighting the pipe was in no way for the benefit of the master nor in the furtherance of the object of his employment; that he was employed to use the shed only for the purpose of making a signboard, and when he used it for other purposes and those purposes exclusively his own, he became an independent wrongdoer. The decision rests on the ground that there was no connection between the lighting of a pipe to smoke and the making of a signboard. A dissenting opinion in that case was based on the view that the master being in control of the shed should be held liable for negligent use of it by his servant. This case was distinguished in *Jefferson v. Derbyshire Farmers, supra.* In another English case, *Heard v. Flaungan,* 10 Vict. L. R. (1), 1, the employee set fire to hay by putting a lighted pipe together with some matches in the pocket of his waistcoat while it was lying against the stack. The heat of the pipe ignited the matches and caused the fire. Recovery was denied.

The decisions of the American courts where this question has been considered are generally in support of the view that the act of striking a match to light a cigarette under the circumstances disclosed by the evidence in this case may not be considered as having been done in the course of the employment of the employee so as to impose liability on the employer for injury thereby occasioned under the doctrine of *respondeat superior.* As this question has not heretofore been considered by this Court, we cite a number of cases from other jurisdictions.

In *Shuck v. Carney,* 118 S. W. (2d), 896 (Tenn. App.), the proprietor of a garage sent his employees to remove an overturned automobile from a ditch. While so engaged one of the employees struck a match to light a cigarette and dropped the burning match on the ground where it ignited gasoline which had leaked from the overturned automobile. The auto-

mobile was burned. The Court said: "The negligent act was alone the act of Reynolds (defendant's employee) and not in the performance of any duty of his employer."

In *Kelly v. Oil Ref. Co.,* 167 Tenn., 101, defendant's employee while delivering gasoline to a merchant, went in the store to telephone his employer about a matter pertaining to the business of his employer, and while using the telephone he lighted a cigarette and tossed the unextinguished match where it set inflammable matter on fire and caused damage. The Court said: "The defendant's servant entered the Brockwell store and took his position at the telephone in furtherance of his service and was to that extent acting within the scope of his employment. But the act of lighting the cigarette was not incident to the telephoning and had no relation to it."

In *Herr v. Simplex Paper Box Corp.,* 330 Pa., 129, an employee of defendant went out of the factory to sign a receipt to the tank driver for gasoline delivered, and struck a match to light a cigarette which ignited gasoline fumes and caused damage. Recovery was denied. The Court said: "Smoking was an act in no way connected with the business of his employer or with service to it."

In *Adams v. Telephone Co.,* 295 F., 586, a repairman was sent to plaintiff's home to repair a telephone and while there emptied his pipe over the porch railing, causing damage from fire. It was held that the act of the employee, merely to serve his own pleasure or purpose, had no connection with the duties of his employment and recovery was denied.

In *Feeney v. Standard Oil Co.,* 58 Cal. App., 587, an employee of the oil company spilled gasoline on the cement floor of a garage while making delivery. After completing delivery the employee engaged in conversation and while so doing lighted a cigarette and negligently dropped the match on the floor, causing fire which destroyed the building. It was held defendant was not responsible for the servant's negligence because lighting a cigarette was no part of the transaction of defendant's business, but an independent act of the employee for his personal enjoyment and not in the course of his employment. To same effect is the holding in *Yore v. Pacific Gas & Elec. Co.,* 99 Cal. App., 81. See also *Morier v. Ry. Co.,* 31 Minn., 351; *Eaton v. Lancaster,* 79 Me., 477; *Ireton v. Ry. Co.,* 96 Kan., 480; and *Goodloe v. R. R.,* 107 Ala., 233.

In *Palmer v. Keen Forestry Asso.,* 80 N. H., 68, 112 Atl., 798, where laborers were employed to set out trees, and one of them struck a match to light a cigarette and carelessly dropped the lighted match in dry grass causing damage, nonsuit was reversed, not on the ground that smoking and dropping a lighted match was in the course of the laborer's employment, but on the ground that defendant had knowledge of the habit of the laborers of smoking while at work in the plaintiff's field, and that

the question was raised whether the act complained of was reasonably to have been apprehended by defendant. Other similar cases where recovery was permitted on the ground that the employer knew of the propensity of employees to smoke while at work near inflammable matter are *Keyser Canning Co. v. Klots Throwing Co.,* 94 W. Va., 346, and *Triplett v. Public Service Co.,* 128 Nebraska, 835. And where danger from fire was inherent in the situation if smoking was permitted on the premises, as where an employee while putting gasoline into an automobile flipped a lighted cigarette over the open tank causing fire, recovery was sustained. *Wood v. Saunders,* 238 N. Y. S., 571. In *McKinney v. Bland,* 188 Okl., 661, the driver of a harvester while harvesting wheat threw a lighted match into the wheat. Recovery was allowed, since the negligent act was committed by the employee during and in the course of his employment. To the same effect is *Vincennes Steel Corp. v. Gibson,* 194 Ark., 58.

In *Maloney Tank Mfg. Co. v. Mid-Continent Petroleum Corp.,* 49 F. (2d), 146, where an employee engaged in dismantling tanks where the ground was oil soaked caused a fire by stopping to light a cigarette and throwing the match on the ground, recovery was sustained on the ground that where the master sends out servants to do work of such nature that the master knows damage is likely to occur if the servant smokes and strikes matches, a duty devolves on the master to see that his servants exercise due care. In that case the work the employee was sent to do was said by the Court to be inherently dangerous.

These cases would seem to rest not on the principle of *respondeat superior,* but on want of due care on the part of the employer as owner of the premises or instrumentality involved under circumstances importing danger. Annotation 31 A. L. R., 294.

We think the rule applicable to the facts disclosed in the case at bar is aptly stated in Restatement Law of Agency, sec. 235, as follows: "An act of the servant is not within the scope of employment if it is done with no intention to perform it as a part of or incident to a service on account of which he is employed."

For the reasons stated we conclude that the court below has correctly ruled, and the judgment is

Affirmed.

LENORA F. HARRISON, ADMINISTRATRIX OF ZANE DALTON, DECEASED, V. R. C. CORLEY, JR., AND SOUTHEASTERN AIR SERVICE, INC., TRADING AND DOING BUSINESS AS PARTNERS IN THE NAME OF SOUTHEASTERN AIR SERVICE, INC.—ASSOCIATE BASE.

(Filed 20 March, 1946.)

1. Process § 8d: Constitutional Law § 20b—

Whether service of process on a foreign corporation by service on the Secretary of State, G. S., 55-38, is valid depends upon whether the corporation was engaged in business activities in this State at the time the cause of action arose, which is a question of due process of law under the Federal Constitution to be determined in harmony with the decisions of the Supreme Court of the United States.

2. Process § 8d—

Whether a foreign corporation is "doing business" in this State so as to subject the corporation to service of process by service on the Secretary of State, G. S., 55-38, is not susceptible to an all-embracing rule but must be determined by the facts of each case under the general rule that it is "doing business" here if it transacts some substantial part of its ordinary business in this State, the quality and nature of its activities rather than a mechanical and quantitative appraisal thereof being determinative.

3. Same—Defendant corporation held "doing business" in this State so as to subject it to service of process under G. S., 55-38.

Defendant foreign corporation was engaged in operating a chain of airports. The individual defendant negotiated leases of two airports in this State, which were approved by the corporation. Thereafter the individual defendant and the corporation entered into a contract under which the corporation agreed to "lease" to the individual certain airplanes of the type and quantity it deemed advisable, to make major repairs, to overhaul and inspect the engines periodically, to provide liability insurance, and reserved the right to ground planes it deemed not airworthy. The contract required the individual to operate the airport under the name of the corporation and according to its general plan, to give his full time to the business, to keep records on the corporation's forms subject to inspection by the company at all times, to hold the corporation harmless for his acts and the acts of his agents and employees, to furnish surety bonds for himself and each of his employees, to use only the corporation's planes, to solicit repair work and act as dealer for the corporation's supplies and equipment on a commission basis, and not to cancel or assign a lease on an airport without the written consent of the corporation. A representative of the corporation in fact visited the individual from time to time and inspected the records. There were two other airports operated in this State in the name of the corporation. *Held:* The corporation was "doing business" in this State so as to subject it to the jurisdiction of our courts, and service of process on it under G. S., 55-38, by service on the Secretary of State, was valid.

4. Same—

When a corporation comes into this State and "does business" herein without domesticating or appointing a process agent, it accepts the provisions of G. S., 55-38, as to service of process.

5. Same—

When a foreign corporation accepts the provisions of G. S., 55-38, by engaging in business here without domesticating or appointing a process agent, it may not withdraw its assent by departing this jurisdiction so as to defeat a suit instituted on a cause which arose while it was engaged in business here.

APPEAL by defendant Southeastern Air Service, Inc., from *Bobbitt, J.*, at January Term, 1946, of McDOWELL.

Civil action to recover damages for wrongful death, heard on motion by the corporate defendant, made on special appearance, to quash the summons herein and to invalidate the attempted service thereof.

The airplane accident which caused the death of plaintiff's intestate, a student pilot, occurred on 31 December, 1944. The appellant, an undomesticated foreign corporation, on 19 April, 1945, withdrew all of its property then in the State and discontinued the operation of the four airports located in this State, theretofore maintained in its name. It never had a process agent in this State.

Summons herein, issued 10 December, 1945, was served on the appellant under G. S., 55-38, by leaving a copy of the summons and complaint with the Secretary of State who mailed the same to the defendant.

The appellant made a special appearance and moved to quash the summons and dismiss the action for want of jurisdiction for that (1) defendant is an undomesticated foreign corporation which has no process agent in this State, (2) defendant, at the time of said attempted service, had no property within the State and was not engaged in business therein, (3) defendant is not now and has never been engaged in business in North Carolina, and (4) defendant Corley is not its officer, agent or employee upon whom service of summons may be had. The motion was supported by affidavits which appear of record.

After considering the affidavits filed and oral testimony offered, the court below found the facts as set out in its judgment and concluded that appellant between October, 1944, and April, 1945, and particularly on 31 December, 1944, "was doing business within the State of North Carolina, and that the service of process upon the Secretary of State was a valid service of process upon the corporate defendant." Said defendant excepted and appealed.

Paul J. Story and Proctor & Dameron for plaintiff, appellee.

Edwin S. Hartshorn and W. R. Chambers for defendant Southeastern Air Service, Inc., appellant.

BARNHILL, J. The merits of plaintiff's claim are not presented for review. The sole question posed for decision is whether the appellant,

a foreign corporation, has been brought into court by a valid service of process. If not, the court is without jurisdiction and the action as to it must be dismissed.

The answer depends upon whether appellant, on 31 December, 1944, the day the alleged liability for damages was incurred, was engaged in business activities within this State. In the last analysis the question is one of due process of law under the Constitution of the United States, U. S. Const., Amend. 14 (1), which must be determined in harmony with the decisions of the Supreme Court of the United States. *American Asphalt Roof Corp. v. Shankland,* 60 A. L. R., 986, and cases cited.

No all-embracing rule as to what is "doing business" has been formulated. 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. Insurance Co.,* 192 N. C., 115, 133 S. E., 424; *C. T. H. Corporation v. Maxwell, Comr. of Revenue,* 212 N. C., 803, 195 S. E., 36.

The general rule is that when a foreign corporation transacts some substantial part of its ordinary business in a State it is doing business therein within the meaning of the due process clause of the Constitution so as to warrant the inference that the corporation has subjected itself to the local jurisdiction. *Schoenith, Inc., v. Manufacturing Co.,* 220 N. C., 390, 17 S. E. (2d), 350; *Commercial Trust v. Gaines,* 193 N. C., 233, 136 S. E., 609; *C. T. H. Corporation v. Maxwell, Comr. of Revenue, supra; Parris v. Fischer & Co.,* 219 N. C., 292, 13 S. E. (2d), 540; *Peoples Tobacco Co. v. Am. Tobacco Co.,* 246 U. S., 79, 62 L. Ed., 587; *International Shoe Co. v. Washington,* 90 L. Ed., 109; *Consolidated Textile Corp. v. Gregory,* 289 U. S., 85, 77 L. Ed., 1047; *St. Louis S. W. R. Co. v. Alexander,* 227 U. S., 218, 57 L. Ed., 486; *American Asphalt Roof Corp. v. Shankland, supra.*

Whether due process is satisfied must depend upon the quality and nature of the activities in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure, rather than upon a mechanical and quantitative appraisal thereof. *International Shoe Co. v. Washington, supra.*

Applying these controlling general principles to the uncontroverted facts appearing on the face of this record, it clearly appears that appellant's "presence" within the State on 31 December, 1944, is fully established.

Perhaps no one circumstance is sufficient to sustain the finding of the court below. It is the combination of facts and circumstances *en masse* that makes out a case of "doing business" in this State.

The appellant operates what is known as the associate base plan of Southeastern Air Service, Inc.

Prior to 15 September, 1944, Corley was employed by the company as a flight instructor at its air bases in states other than North Carolina. Shortly thereafter he began negotiation for leases upon airports located at Marion and Morganton in the State of North Carolina. He consulted with the company in respect thereto and the lease contracts were examined and approved by the company. Thereupon Corley and the company entered into the contract which appears of record "leasing" certain airplanes to Corley "to the mutual financial benefit and advantage of both the Company and the Operator."

It is apparent from a reading of the contract that in preparing it there was a studied and somewhat labored attempt to refute any suggestion of agency or employment which would impose any liability upon the company for the negligence or other dereliction of Corley and to give it the appearance of a simple lessor-lessee agreement. It was necessary, however, for the company to impose certain terms and conditions which tend to disclose the real nature of the agreement.

Corley was required to install and carry out "The Associate Base Plan of Southeastern Air Service, Inc." and "in carrying on his business on the airport herein referred to, will use and operate under the name of Southeastern Air Service, Inc., Associate Base." In so doing he was required to devote his full time to said business and to make every effort to use the airplanes furnished to the maximum extent permissible, consistent with available business and safe operation of said airplanes. The company agreed to "furnish to the Operator the number and type of airplane which in its judgment and experience is most suitable to be used by the Operator in his flight operations on the airports," and at its own expense to make major repairs to any component part of the aircraft when such repairs require the removal of said component parts from the aircraft; to provide "in the name of the Company and the Operator" as the interest of the parties shall appear, public liability insurance with limits of $20,000 and $40,000, passenger insurance and property damage insurance with a limit of $10,000. The company likewise agreed to make at its own expense "top overhauls of engines after approximately 250 hours of use and major overhauls of engines after approximately 500 hours of use" and to replace any faulty or worn part or parts or pay the cost of such replacements when made by the operator after authorization by the company.

The company reserved the right "to ground any airplane which in its opinion at the time of any such inspection is not airworthy until such plane has been placed in an airworthy condition to the satisfaction of the Company," and required Corley to "keep full and complete records on forms prescribed and furnished by the Company showing all flying time and other pertinent information concerning each of the airplanes

furnished." All such records and forms were subject to inspection by the company at any and all times.

Corley was required to "hold the Company harmless for any and all acts of the Operator, his agents, servants, and/or employees in the control and operation of said airport"; to comply with all applicable laws, rules, and regulations governing the operation of airplanes; to furnish surety bond in favor of the company for himself and each of his employees; to use in his commercial operations on the airport or airports only the plane or planes furnished by the company; to devote his full time to said business; to solicit for the company, on a commission basis, overhaul and repair work on all aircraft and engines based on the airport and from all other prospective customers for aircraft and engine work with whom he might come in contact, and "from time to time and whenever possible solicit such other business for the Company as the Company is able to handle," on a commission basis.

Corley was bound not to assign the contract and not to cancel or assign his lease on the airport without the written consent of the company. Should he decide to cancel or terminate his lease he was required to furnish the company a copy thereof and to give it the option of accepting an assignment or, if not assignable, to aid the company to obtain a lease on the airports upon the same terms and conditions under which Corley leased the same.

The company agreed to appoint Corley dealer for whatever parts, supplies, material, and equipment it may from time to time distribute, on a commission basis, and bound Corley not to sell or solicit the sale of competitive products not handled by the company.

A representative of the company in fact went to the office of Corley in North Carolina from time to time and checked the records he was required to keep and inspected the airplanes and equipment.

In addition to the airport at Marion and the one at Morganton there were operated in North Carolina in the name of the corporate defendant two other airports, one at Wadesboro and one at Rockingham.

Looking through the form to the substance, it is apparent more than the mere relationship of lessor-lessee was contemplated. If that was all that was intended, why should the company furnish liability insurance or require surety bonds of Corley's "employees"; why such care to provide complete control over his activities and bind him to use only airplanes and equipment furnished by the lessor, and to "tie up" the leases granted in his name; why should the "lessor" require the "lessee" to operate in the name of the "lessor" and thus represent to the public at large that it was the owner and operator of the airports? These and other questions raised by a mere statement of the facts make the answer self-evident. Appellant was engaged in the business of operating in this

State a chain of airports in furtherance of the general scheme or plan of its organization, a part and parcel of the activities for which it was created.

Thus the appellant, over a period of time, enjoyed the privilege of having four airports maintained and operated in this State in its name as a part of the plan of operation which forms the basis of the objectives for which it was created. In so doing it enjoyed the benefits and protection of the laws of this commonwealth. It thereby subjected itself to the jurisdiction of the courts of this State for the purpose of litigating liabilities created during its stay here.

The provisions for the service of summons, G. S., 55-38, were a condition on which it was allowed to do business, accepted by it when it entered the State and engaged in business here without domesticating or appointing a process agent. *Anderson v. Fidelity Co.*, 174 N. C., 417, 93 S. E., 948; *International Shoe Co. v. Washington, supra.*

It cannot, by the simple expedient of closing shop and departing this jurisdiction, withdraw that assent so as to defeat a suit instituted on a cause of action which arose while it was engaged in business here. *Fisher v. Insurance Co.*, 136 N. C., 217; *Sisk v. Motor Freight, Inc.*, 222 N. C., 631, 24 S. E. (2d), 488; *Highway Comm. v. Transportation Corp.*, 225 N. C., 198; *International Shoe Co. v. Washington, supra,* and cases cited; 45 A. L. R., 1442; Anno., p. 1447.

The judgment below is

Affirmed.

IN THE MATTER OF: JAMES LYMAN DEFORD, A MINOR.

(Filed 20 March, 1946.)

1. Parent and Child § 4—

A decree directing that a minor child remain in the custody of its paternal aunt as the agent of its father in effect awards the custody to the father subject to the provision that the child be cared for in the home of its aunt, and upon proper findings such decree, entered in a contest for the custody between the father and mother, is in accord with the decisions of this State.

2. Courts § 2—

The final judgment or decree is the end for which jurisdiction is exercised, and courts will seek to maintain control over their judgments and processes in order to make them efficacious.

3. Same—

Courts have no extraterritorial jurisdiction and will not adjudicate when they cannot enforce the adjudication, and therefore a court will not enter a decree the very terms of which will divest it of jurisdiction or vest the losing litigant with power to defeat the jurisdiction.

4. Parent and Child § 4—Portion of decree permitting child whose custody is at issue to be taken from State held erroneous.

Decree was entered in the lower court awarding the custody of the child to its father, with provision that its mother might take the child to her domicile in another state each year during vacation time and that the father or his agent might go and get the child at his own expense just prior to the beginning of each school year and return it to the domicile provided by him in this State. *Held:* The portion of the judgment permitting the mother to take the child out of this jurisdiction must be stricken, and in lieu thereof the lower court, in its discretion, may make provision for the mother to visit the child within this jurisdiction.

5. Same—

The rule that the removal from the State of a child whose custody is at issue will not be permitted is not an absolute or arbitrary principle and may be departed from when it is clearly manifested that the welfare of the child requires it.

APPEAL by respondents Nettie DeFord, Cynthia DeFord Adams, and Sgt. Lyman DeFord, from *Carr, J.*, September, 1945. From JOHNSTON.

Proceeding instituted in the juvenile court of Johnston County to determine the custody of James Lyman DeFord, an infant seven years of age.

Petitioner, Mrs. Elizabeth Brown Mann, and respondent Lyman DeFord, a native of North Carolina, married 25 January, 1935, in Louisiana, of which State petitioner was then a resident. DeFord was then and is now a sergeant in the United States Army. On 1 July, 1938, James Lyman DeFord, their only child, was born.

In September, 1943, Sgt. DeFord, due to information received, went to Shreveport, La., where petitioner was then living. He found that his wife was then in jail and his child was in the custody of the juvenile court. The juvenile court awarded him temporary custody of his child, and he immediately placed it with his sister in Four Oaks, N. C., for proper care and attention, and made an allotment for its support. He likewise instituted, in Louisiana, an action for divorce in which he prayed custody of the child.

A final decree of divorce was entered 27 September, 1943. The judgment awarded custody of the infant child to its father, Lyman DeFord.

Since the divorce, petitioner has married twice and has lived in various places. She now lives with her present husband and his four children in a three-room apartment in Nederland, Texas.

On 10 August, 1945, petitioner came to North Carolina and instituted this proceeding in the juvenile court of Johnston County to obtain custody of said infant. Respondents were duly notified and the matter came on for hearing 20 August, 1945, at which time, after consideration of the evidence, oral and documentary, the juvenile judge found the facts and adjudged that the right of custody of the child should remain in the father in the home of his sister, Cynthia DeFord Adams, with the right in petitioner to visit it within this jurisdiction. Petitioner appealed.

When the cause came on for hearing in the court below it was heard by consent on the record and transcript of evidence sent up by the juvenile court. The court found certain facts, concluded that petitioner has failed to show that she "will establish a home of such permanency as to justify the Court in finding that it would be to the best interests of her child at the present time to award the custody of the child to her," and ordered "that the said child remain in the custody of Mrs. Cynthia DeFord Adams, as agent of his father, Sgt. Lyman DeFord, until ten days after the close of the school year 1945-46, at which time the mother of the child will be permitted to take the child to her home wherever she may be living and keep him in her custody during the vacation time, and until ten days before the beginning of the school year 1946-1947 in Four Oaks, North Carolina, and at that time the father of the child, or Mrs. Cynthia DeFord Adams, will be permitted to go to the home of the mother wherever she may reside at that time, and at their expense bring the child back to Four Oaks, North Carolina, and keep him during the school year 1946-1947, and it is ordered that this interchange of custody of the child, that is, that the child shall remain with Mrs. Adams as the agent of his father during the school time and with his mother during the vacation period, shall continue in effect until further orders of this Court.

"IT IS FURTHER ORDERED that the mother shall bear the expense of taking the child to her home during the vacation period and the father shall bear the expense of getting the child and returning him to the home of Mrs. Adams, as provided for in this order."

Respondents excepted and appealed.

C. G. Grady and Hooks & Mitchiner for respondent, appellants.
Lyon & Lyon for petitioner, appellee.

BARNHILL, J. When the court below directed that the infant, James Lyman DeFord, remain in the custody of Mrs. Cynthia DeFord Adams, its paternal aunt, as the agent of its father, the respondent Lyman DeFord, it in effect awarded custody to the father, subject to the pro-

vision that the child must be cared for in the home of Mrs. Adams. This part of the order entered is in accord with the decisions of this Court. *Newsome v. Bunch,* 144 N. C., 15; *In re Jones,* 153 N. C., 312, 69 S. E., 217; *Latham v. Ellis,* 116 N. C., 30; *In re Lewis,* 88 N. C., 31; *In re Turner,* 151 N. C., 474, 66 S. E., 431; *In re Fain,* 172 N. C., 790, 90 S. E., 928; *In re TenHoopen,* 202 N. C., 223, 162 S. E., 619; *Patrick v. Bryan,* 202 N. C., 62, 162 S. E., 207.

The court below, however, after awarding custody to the father, imposed a condition which permits the petitioner to take the child to her home in Texas, or wherever else she may then be residing, and to keep him during the summer and imposed upon the father the duty and expense of going for and returning it to North Carolina each year just prior to the fall session of school. It is to this part of the order the appellants except. The exception is well founded and must be sustained.

The final judgment or decree is the end for which jurisdiction is exercised and it is only through the judgment and its execution that the power of the court is made efficacious and its jurisdiction complete. 21 C. J. S., 35 (sec. 21).

"The existence of this power of a court over its judgments and processes is absolutely necessary in order to prevent the abuse of process and the oppression of suitors. . . ." 14 Am. Jur., 374.

Therefore a court will not adjudicate where it cannot enforce the adjudication, or turn its suitors over to another tribunal to obtain justice, or vest the losing litigant with the power to defeat the jurisdiction of the court and thus nullify the relief granted the successful suitor, or enter a decree by the very terms of which it will be divested of jurisdiction and left powerless to compel obedience. *Central National Bank v. Stevens,* 169 U. S., 432, 42 L. Ed., 807; *Knox Co. v. Aspinwall,* 24 How., 376, 16 L. Ed., 735; *Bankers' Trust Co. v. Greims,* 147 Atl., 290 (Conn.), 66 A. L. R., 726; 14 Am. Jur., 379.

Hence, in a proceeding of this nature, in the absence of unusual circumstances, a court should not enter an order which permits the infant to be removed from the State by one to whom unqualified custody has not been awarded. *Harris v. Harris,* 115 N. C., 587; *In re Turner,* 151 N. C., 474, 66 S. E., 431; *Page v. Page,* 166 N. C., 90, 81 S. E., 1060; *Page v. Page,* 167 N. C., 350, 83 S. E., 627; *Walker v. Walker,* 224 N. C., 751.

It is axiomatic that courts have no extraterritorial jurisdiction. 21 C. J. S., 141. It follows that so soon as the petitioner, under the permission granted in the order entered in the court below, takes the child to the State of Texas, the power of the courts of this State to exercise further control over the infant would be ousted. The courts of Texas would acquire jurisdiction and the decree awarding custody to respond-

ents would be rendered wholly ineffectual. *In re Alderman,* 157 N. C., 507, 73 S. E., 126; *Wilson v. Elliott,* 96 Tex., 472.

"It does not appear that the mother . . . is in anywise more suitable than the father. The father is domiciled in this State; the mother is a nonresident. Under these circumstances, unless more shall appear, the custody should remain with the father. The Court certainly would not, upon these facts, award the custody to a person out of the State. To award the custody alternately to the father and the nonresident mother would be to place the child out of the jurisdiction of the Court, so that it would be impossible to enforce so much of the decree as directs the return of the child to the father after the specified time. . . . The Court, under special circumstances, may allow an infant ward to go out of its jurisdiction but it will not abdicate its functions. . . ." *Harris v. Harris, supra.*

The rule that the removal from the State of a child whose custody is at issue will not be permitted is not an absolute or arbitrary principle and may be departed from when it is clearly manifested that the welfare of the child requires it.

The petitioner relies upon *In re Means,* 176 N. C., 307, 97 S. E., 39, which fairly represents a line of decisions to this effect. But nothing there said is out of harmony with our conclusion here. There the matrimonial domicile was in Rhode Island. The father, having separated from his wife, surreptitiously took the child and brought it to North Carolina. The mother instituted a proceeding here to obtain custody. It was found as a fact that she was a fit person to have custody of the infant and could offer it many of the advantages of life in a modern home surrounded by the conveniences and comforts of life, and that the father, a fugitive from justice, was not a suitable custodian. Under these unusual circumstances custody was awarded to the petitioner. In so doing the court fully executed its judgment.

So much of the judgment below as permits the mother to take the infant out of the State must be stricken. In lieu thereof the court, in its discretion, may make provision for the mother to visit her child under conditions similar to those imposed by the judge of the juvenile court.

Modified and affirmed.

STATE v. HENRY GIBSON AND AUBREY GIBSON.

(Filed 20 March, 1946.)

1. Criminal Law § 8—

Where there is plenary evidence that the defendants acted in concert in the commission of the offenses charged, each is equally guilty.

2. Burglary § 11: Trespass § 10—Evidence held insufficient on charge of attempt to commit burglary but sufficient on charge of forcible trespass.

The evidence tended to show: Some two weeks after a previous altercation defendants again met the caretaker of the premises in question, and another altercation and scuffle ensued, and the caretaker ran from defendants, eluded them, and returned to the premises. Defendants then obtained shotguns, and set out to find the caretaker. It was then late at night. They came near the main house, fired a shot in its vicinity, and then came up to the house, cursing, and calling to the caretaker to come out. One of them shook one of the doors of the house. The caretaker's wife went to one of the doors, opened it, and one of defendants came to the door, and she informed him that the mistress of the house was there, and requested quiet so as not to disturb her. Defendants continued cursing and one of them pushed against the door. The caretaker's wife closed it by force. The mistress of the house, aroused by the noise, turned on the lights and called the sheriff, and defendants left within fifteen minutes. *Held:* The evidence is insufficient to be submitted to the jury on the charge of attempt to commit burglary, but was sufficient on the charge of forcible trespass, and defendants' demurrer to the evidence on the latter charge was properly overruled.

3. Trespass § 10—

It is not necessary to constitute the crime of forcible trespass or forcible entry that the owner should have made vocal protest to the entry, it being sufficient if the aggressors have knowledge, however acquired, that their entry is against the will of the owner, and the manner and purpose of the invasion, the show of force, and the conduct of the offenders, is of such intimidating character as to put the occupants in fear and make it apparent that the ordinary means of resisting trespass would be ineffectual. G. S., 14-126.

APPEAL by defendants from *Pless, J.*, at November Term, 1945, of CASWELL.

The defendants were tried upon five bills of indictment, for offenses growing out of the same or interrelated transactions and consolidated for the purpose of trial: Two for assault with a deadly weapon, one for kidnapping, one for attempted burglary, and one for forcible trespass. They were convicted on the charges of attempted burglary and forcible trespass, and acquitted on the others.

The evidence for the State tends to show as follows:

Mrs. Marshall owned a country place in Caswell County, consisting of extensive grounds, containing the home, a near-by house occupied by

the caretaker, Jake Lowndes, and his wife and daughter, and a lake upon a small stream running through the property, which extended something like half a mile from the head of the lake upstream, and a quarter of a mile downstream below the dam.

Mrs. Marshall's husband was in the service of the United States, and was, at the time, Governor of Saipan under the Military, or Naval, occupation. Mrs. Marshall occupied the house at intervals, and when there Jake Lowndes and his wife stayed in the house in the servants' room, the latter as maid.

Some two weeks before the occurrences named in the indictments, the defendants had formed and expressed considerable ill feeling against Jake Lowndes because the latter had set nets at the head of the lake and, as they contended, stopped the run of the fish. They came by the Lowndes home, asked him out to the feed barn and wanted to know when "those damn fish were going to start running," and in leaving one of them said, "If you don't let me know when those fish start running, I'm going to raise hell."

On the night of the alleged occurrences made the subject of the indictments, Lowndes went to a neighboring store, and the defendants, with two boys, came up. It developed that they were going fishing.

There was considerable drinking of beer and wine, and Lowndes, at the invitation of defendants, rode with them in the direction of his home, all getting out of the car when they reached the home of defendants, on the way. The defendants walked on some distance with Lowndes. On the way there was a brawl amongst them, in which one of the defendants threw Lowndes to the ground and fell upon him, using profanity toward one of the boys who sought to interfere. Lowndes found it necessary to run in the direction of his home, and pursued by the defendants, finally evaded them. Later, arriving at his home, he found that his wife had gone up to Mrs. Marshall's, and followed her there.

Two boys, James Winstead and Ernest Hensley, testified that they were passing on the road, near the Marshall place, and that the defendants beset them on the way, and with profanity and at the point of guns (two shotguns) forced them to go with them first to Lowndes' house and then to the Marshall premises to call out Lowndes, whom Aubrey said they intended to kill. Henry said he had the "trick in his hands," referring to the shotgun.

The defendants went to Lowndes' home and searched it for him. They were told that Lowndes had gone up to Mrs. Marshall's, and followed him there. Here the two boys, after having witnessed much of what took place there, managed to get behind a hedge and escaped.

James Moore, witness for the State, testified: (R., p. 24.)

"I know Aubrey Gibson, Henry Gibson and Jake Lowndes. I was there on the night of the 18th of March. It was on Saturday night. While I was there that night Aubrey and Henry and James Winstead and Ernest Hensley come there. James Winstead come in. James Winstead was in front and Mr. Aubrey was behind him. They did not knock before they came in. Jake's daughter was in the room with me, two or three children were there. There was a screen door over the main door. It was closed. Aubrey had a gun with him. He didn't do anything with it when he come in the house. He said he wanted to see Jake. I told him where I thought Jake was. That he had gone up to Mrs. Marshall's house. He stayed there about three minutes, I reckon. He looked around in the other room. I heard no conversation between them. I heard them say they were going up to Mrs. Marshall's house. Mr. Aubrey said that."

Ernest Hensley, witness for the State, testified as follows: (R., p. 16.)

"When we got to Mrs. Marshall's we walked up there and around to the back, and when we got around to the back door they called Jake. I don't remember which one did the calling. He answered and they told him to come out there, they wanted to speak to him a minute. He told them he was coming out and about that time Mr. Henry walked around to the back door and James broke and run. Mr. Aubrey throwed the gun on him and told him if he run he would shoot him. James stopped and come back. Mr. Henry walked to the door and was shaking the door. And Mr. Aubrey and myself was standing on the side of the house and he walked up to the well and told me to stand back and this is when I got a chance to run. The well is about 4 or 5 yards from the door. The well is almost at the door. That is the door that Henry was shaking. Mrs. Marshall had hedges planted around there and I slid behind them and got away. He was just shaking the door. I don't know what part of the house this door opens into. I have never been in it. Henry was shaking the door."

Beatrice Lowndes, witness for the State, testified (R., pp. 17-18) that she had gone up to the Marshall place and gone to bed.

"Jake was out, but I knew he would come up there too, because she didn't have anyone to stay with her. I imagine I went to sleep and Jake come in in a little while and set down. He seemed to have mud on his shoes and he was cleaning his shoes and while he was cleaning his shoes we heard a shot and Jake says, 'Did someone shoot?' and I said, 'Sounds like it.' He got up and went out of doors. When he goes out he looks around and comes back in and goes to bed. All at once we was aroused by a loud noise coming around the house; someone was talking very loud, and saying things, and I wondered who it could be. I couldn't hear in the house and I said, 'Jake, who can that be at this time of

night?' I thought, myself, it was someone who didn't know Mrs. Marshall was in. 'Well,' I says, 'maybe someone don't know Mrs. Marshall is in.' And I said I would go to the door and speak to them and tell them Mrs. Marshall was home. I opened it and someone come up to the door and I said, 'Be quiet, Mrs. Marshall's here and don't disturb her, please,' and as I said that he come and pushed it, and he says, 'I don't care about Mrs. Marshall.' I didn't know what he meant to do. It frightened me very much and I pushed the door together and fastened it. So then I rushed to let Mrs. Marshall know that someone was coming in the house, as I rushed through to the part where she was staying I met her coming. She had heard all the noise herself and was coming down. She didn't know what it was all about either, and she was putting on the lights and they departed somewhere.

"He pushed with all his force to come in and I pushed it together. I'm talking about Mr. Henry—Henry Gibson. I heard cursing around there; Mr. Henry was doing it when he came up on the step. He said, 'I don't give a damn if she is here,' and he says, 'Where is she?' He didn't say anything further, and I closed the door. He had a gun but he was pushing. I never seen the gun pointed towards the door; he had the gun to his side and was pushing the door. There is nothing that I know about this that I haven't told. I couldn't say for sure where the gun was fired; the sound of it was near the driveway, sounded like it. Mrs. Marshall had just returned from New York that morning and the children hadn't arrived. When Mrs. Marshall came down from her room she had a shotgun. She made a telephone call. We were all so nervous and frightened and we were calling so fast and we finally got connected with the Sheriff. The telephone is in the butler's pantry. There is no other phone in the house. That is the one she used. She called Sheriff Gunn."

Jake Lowndes, a witness for the State, testified: (R., pp. 18-19.)

"I stayed in my house about ten minutes and then went up to Mrs. Marshall's. That was about 11:30 o'clock. I went on in, took a seat, pulled my clothes off and cleaned the mud off. About twenty minutes after I got there I heard a shot. I couldn't tell where it was. I got up and went outdoors and didn't see anything and didn't hear anything. I then went back to the servant's room. I didn't go to bed right then until after the boys came. I didn't hear nothing else after they left. They were coming around the house when I first heard them and got around to the window. I could tell who it was after they called me. It was the Gibson boys, Henry and Aubrey. They told me to come out there, and I said, 'Who is that?' and they said, 'You know who it is, dammit, come out, and I want to speak to you.' I told them, 'All right.' But my wife got to the door before I did, and told them they were making too much

noise, they would disturb Mrs. Marshall. She was at the door when Henry come up pushing against it. I didn't hear any knocking at the door. I could see Henry but I didn't see anybody else. I couldn't hear what he said to my wife as he came up to the door. And that is all I know about it."

In addition to this, Lowndes testified the defendants had no guns at the time he accompanied them from the store.

Mrs. Helen Marshall, witness for the State, testified (R., pp. 19, 20, 21) that she was at her home alone, with the exception of Jake and his wife, who were in the maid's room:

". . . I heard a shot. . . . It sounded near the garage. When I heard the shot, I tried to settle back in bed and I guess it was about ten minutes, probably fifteen, and then I thought I heard voices out back of the garage, and I got up and stood in the French doors in the dark, and I saw four figures behind the back wall, and just as I looked out there one of the figures broke and tried to run away from the others, and this voice, with perfectly dreadful profanity, cursed him and said if he ran he would be shot. And then I heard somebody say, still with these filthy curses—I never heard such profanity in my life. He went on to say, 'Well, if he doesn't open the door we will blow it in,' and with that I realized I had a shotgun there with two shells and that was all I had. . . . I took the gun downstairs with me and had it beside me at the telephone, and when I was calling the sheriff I said, 'If they come in the house, I am the one that is going to shoot them.' I was very frightened. The figure who tried to run came back. He broke away. He cursed him and called him, 'James, if you don't come back here I'll blow your black head off.' He came right back. When I got down to the telephone, I said, 'Well, what in the world is this?' I said, 'Somebody is trying to break in the back door. I will try to get the sheriff. If I don't get the sheriff, I will just have to shoot whoever it is.' Of course, flashing the light on upstairs seemed to have frightened them quite severely. They were still there around the back door when I got to the telephone. They probably heard me yelling to the sheriff on the telephone. I couldn't hear whether they were using obscene language. My room was all open. The well is about as far from here to the post. . . . I should say it was about 15 minutes between the time that I first discovered them until the time they left. He had obviously tried the kitchen door when he made the statement, 'If he doesn't open it we'll blow it in,' with the profanity that goes with it."

Sheriff Gunn testified: (R., p. 24.)

"On the night of the 18th of March I was called by Mrs. Marshall. Well, I had gone to bed when the phone rang. I went to the phone and it was somebody that looked to me like they were in distress. They said,

'Come quick,' somebody was about to break in their house. I finally left her talking. When I arrived down there she was pretty nervous. I did not find the Gibson boys there. We looked around and found some tracks that went out by the wood house. It had been raining that night. . . . I hung up the telephone in the lady's face while she was still talking."

The defendants put on evidence in contradiction. Henry Gibson admitted that he got the gun from home after the scuffling incident, but said Lowndes had hit him with a bottle, and he knew nothing more until he found himself at Mrs. Marshall's with the gun in his hands. He said his wife told him she tried to keep him from getting it. The defendants testified they were hunting Lowndes to find out why he had hit Henry. They denied substantial parts of the State's evidence.

The defendants at apt times demurred to the evidence and moved for judgment of nonsuit.

The jury returned a verdict of guilty as to each defendant on the indictments for forcible trespass and attempted burglary, and acquitted them on the other charges. From the ensuing sentences both appealed.

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

P. W. Glidewell, Sr., and R. T. Wilson for defendants, appellants.

SEAWELL, J. The appeal of defendants poses the question whether the evidence was sufficient to go to the jury upon either of the offenses of which they were found guilty, and as to either of defendants. However, there was sufficient evidence that they acted in concert throughout the transactions culminating in the indictments, and the cases may be discussed without distinction as to their participation.

The Court is of the opinion that the evidence on the charge of attempted burglary is not sufficient to be submitted to the jury. The judgment overruling the demurrer to the evidence and declining the motion for judgment as of nonsuit is therefore, as to that charge, reversed.

The evidence relating to the charge of forcible trespass was properly submitted to the jury. The objection of the appellants seems to be that the proof of the offense fell short of the accepted definitional standards in that the defendants were not ordered from the premises, or, at least, that the occupants or owner did not exhibit that ordinary firmness in resisting the aggression, which, unavailing, might give rise to an inference of force.

Forcible trespass, using the term as the equivalent of forcible entry under the statute, does not at all times, and under all circumstances, require the vocal protests of the owner of the invaded premises to get into

the category of punishable offenses. The manner and purpose of the invasion, the show of force, conduct calculated to intimidate the owner or lead to a breach of the peace, and the knowledge on the part of the aggressor, however acquired, that the invasion is against the will of the owner, are circumstances to be considered. G. S., 14-126; *S. v. Oxendine,* 187 N. C., 658, 122 S. E., 568; *S. v. Fleming,* 194 N. C., 42, 138 S. E., 342; *S. v. Tyndall,* 192 N. C., 559, 135 S. E., 451; *S. v. Earp,* 196 N. C., 164, 145 S. E., 23; *S. v. Davenport,* 156 N. C., 596, 72 S. E., 7; *S. v. Pollok,* 26 N. C., 305; *S. v. Jacobs,* 94 N. C., 950.

There does not seem to be any other reasonable conclusion than that the conduct of the defendants from the moment they entered the premises until they finally left was of such a lawless and intimidating character as to put the occupants of the premises, and especially the owner, Mrs. Marshall, in a state of extreme fear, and to make the ordinary means of resisting trespass unavailable.

On the charge of forcible trespass and as to each defendant, the order overruling the demurrer to the evidence was proper, and we find no error.

On the charge of attempt to commit burglary,

Error and reversed.

On the charge of forcible trespass,

No error.

STATE v. THOMAS B. HART.

(Filed 20 March, 1946.)

1. Criminal Law § 79—

Exceptions not set out in appellant's brief and in support of which no reason or argument is stated or authority cited are deemed abandoned. Rule 28.

2. Homicide § 4c—

No rule as to the length of time necessary for the mental processes of premeditation and deliberation can be laid down, it being sufficient if a fixed design to kill is formed and thereafter such intent is executed, however soon or late.

3. Homicide § 25—

Testimony of a witness that defendant got a shell, showed it to the witness and stated "this is Miss Margie's (the deceased) dose," and later stated that he had shot deceased through the head, and testimony of another witness that defendant stated that he was going to kill "everyone there" *is held* sufficient to be submitted to the jury on the question of premeditation and deliberation.

4. Criminal Law §§ 57, 81c—

In order for defendant to be entitled to a new trial as a matter of right for the reason that an officer acting as custodian of the jury was a witness for the State, defendant must show actual prejudice, and in the instant case the findings of the trial court disclose a full investigation without a finding of prejudice, and therefore its refusal to grant defendant's motion for a new trial is not held for error.

5. Criminal Law § 81a—

The findings of the trial court upon defendant's motion for a new trial on the ground that an officer acting as custodian of the jury was also a witness for the State, are conclusive on appeal.

APPEAL by defendant from *Burgwyn, Special Judge,* at October Term, 1945, of HALIFAX.

The defendant was indicted under two bills of indictment, one charging him with the murder of Marjorie Blackwood and the other with the murder of Al Preston Blackwood. Without objection, the two indictments were consolidated for the purpose of trial. The defendant was convicted of murder in the first degree upon the bill of indictment charging him with the murder of Marjorie Blackwood, and convicted of murder in the second degree upon the bill of indictment charging him with the murder of Al Preston Blackwood. Upon the conviction of first degree murder of Marjorie Blackwood the court entered judgment of death, and the defendant appealed, assigning errors. No appeal was taken by defendant from the conviction of him of second degree murder of Al Preston Blackwood.

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

E. L. Travis and W. Bernard Allsbrook for defendant, appellant.

SCHENCK, J. There are many exceptions noted in the record which are not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited. These exceptions are taken as abandoned, Rule 28, Rules of Practice in the Supreme Court, 221 N. C., 562. In fact, only two exceptions are set out in the appellant's brief, and therefore only these two exceptions will be referred to in the opinion of the Court. They are Exception No. 5, which relates to the court's refusal to grant defendant's motion for judgment as in case of nonsuit as to the charge of murder in the first degree; and Exception No. 7, which relates to the court's refusal to grant defendant's motion to set aside the verdict and order a new trial upon the ground that it was improper, unfair and prejudicial due to a witness for the State serving as officer of the jury.

Under Exception No. 5, the appellant says in his brief: "The defendant, at the close of the State's evidence, made motion of nonsuit as to murder in the first degree, the motion was overruled and defendant elected not to offer any evidence." The defendant challenges the sufficiency of the evidence to take the case to the jury as to the charge of murder in the first degree, because all of the evidence tends to show that he and the deceased got into an argument and he (defendant) killed her (deceased) within a space of fifteen or twenty minutes; that the evidence shows there was no premeditation and deliberation, and that the killing was under the influence of passion suddenly aroused, and the intent to kill, if any, was formed simultaneously with the act of killing.

As tending to show that defendant was not acting solely under the influence of passion suddenly aroused, the State's witness, Christine Blackwood, testified: "He (defendant) got one shell and said 'This is Miss Margie's dose' when he showed me the shot," and later the same witness testified the defendant said "Yes, I shot Margie through the head." The witness George Ed Blackwood testified: "Thomas Hart was in there with me and said he was going to kill every one there." This testimony, together with other evidence in the record tending to show that the defendant obtained the gun and shells and had them in his possession before shooting the deceased, was, in our opinion, sufficient to overcome the defendant's motion to nonsuit the charge of premeditation and deliberation.

". . . 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." *S. v. Wise,* 225 N. C., 746 (748), 36 S. E. (2d), 230. Applying the law as here enunciated, we are of the opinion that there was at least some evidence, enough to be submitted to the jury, upon the question of premeditation and deliberation, and this is the only question presented to us on the motion to nonsuit. Whether such evidence was sufficient to convince the jury beyond a reasonable doubt as to the existence of premeditation and deliberation was for the jury. Hence this exception, No. 5, is not tenable.

Under Exception No. 7, the appellant says in his brief: "The defendant contends that the Court erred in refusing and overruling the defend-

ant's motion to set aside the verdict and order a new trial upon the grounds that it was improper, unfair, and prejudicial error for a witness for the State, who was sworn and testified as such, to be sworn and serve as officer of the jury trying the case. J. A. Draper, a Deputy Sheriff of Halifax County, was sworn and served as officer of the jury trying the defendant's case, and the said J. A. Draper was also a witness for the State, and was sworn and testified as such, against the defendant. While it is admitted that the Court was inadvertent, at the time of tendering and swearing the witness, that he was the officer of the jury trying the case, and that the same was overlooked by counsel for the State and for the defendant, it is strongly argued that the same was improper and unfair to the defendant, and constituted prejudicial error."

This assignment of error poses the question: Does the fact that an officer, who was sworn and served as the "officer of the jury," was a witness for the State in the trial of the case, although no objection was made thereto at the time he was so sworn and tendered as a witness, entitle the defendant, as a matter of right, to have a verdict adverse to him set aside and a new trial awarded him? Similar questions have arisen in other jurisdictions, but so far as we can ascertain have never been presented to this Court. The decisions by the various courts have not been in accord, but we are now of the opinion that the weight of authority is to the effect that an officer is not necessarily disqualified from acting as custodian of a jury in a criminal case because he happens to be a witness in the case. It is our opinion, and we so hold, that actual prejudice must be shown before the result of the trial can be, as a matter of right, disturbed.

In North Carolina, in instances when the contention was made by the defendant that the jury has been improperly influenced, it has been held that it must be shown that the jury was actually prejudiced against the defendant, to avail the defendant relief from the verdict, and the findings of the trial judge upon the evidence and facts are conclusive and not reviewable. *S. v. Hill,* 225 N. C., 74, 33 S. E. (2d), 470; *S. v. DeGraffenreid,* 224 N. C., 517, 31 S. E. (2d), 523.

The question of the qualification of the officer of the jury, one J. A. Draper, a witness for the State, was brought to the attention of the court for the first time when defendant's motion to set the verdict aside and for a new trial was lodged, and the court immediately instituted an investigation into the status and actions of J. A. Draper, and found that (1) J. A. Draper was last witness for the State, (2) that the name of Draper did not appear on the bill of indictment, nor was he subpoenaed as a witness, (3) that his testimony was largely cumulative and in no wise prejudicial to the defendant except as it was cumulative of other testimony theretofore offered to the State in corroboration, (4) that the

court was inadvertent at the moment of the tendering and swearing J. A. Draper a witness that he was an officer over the jury, and the matter was entirely overruled (overlooked) by both counsel for the State and for the defendant, (5) that the court had the court stenographer furnish him with a copy of the testimony of J. A. Draper, and (6) that evidence of J. A. Draper was taken as the last witness for the State.

It would appear from the foregoing that there is no finding by the trial judge of any action of Draper prejudicial to the defendant in the trial. When it appears only that there was opportunity whereby to influence a jury, but not that the jury was influenced, mere "opportunity and chance for it, . . . a new trial is in the discretion of the presiding judge." *S. v. Brittain,* 89 N. C., 481 (505); *S. v. Tilghman,* 33 N. C., 513.

Since no prejudice to the defendant has been shown, and since the findings of the trial judge are conclusive, we are of the opinion, and so hold, that the assignment of error No. 7 is untenable, though the practice of allowing an officer, who was a witness for the prosecution, to be sworn and serve as the "Officer of the Jury" is not to be commended.

No error appearing on the record, the judgment below is affirmed.

No error.

BETTIE JERNIGAN ET AL. V. R. A. JERNIGAN ET AL.

(Filed 20 March, 1946.)

1. Partition §§ 5a, 5b—

Where, in a proceeding for partition, a respondent pleads sole seizin of a part of the *locus* under a deed from the common ancestor, and petitioners attack the validity of the deed, and the matter is transferred to the civil issue docket for trial during term, G. S., 1-399, the proceeding, for all practical purposes, is converted into an action to try title, with the burden on petitioners to show title by tenancy in common as alleged.

2. Appeal and Error § 8—

An appeal *ex necessitate* rests upon the theory of trial in the lower court.

3. Trial § 39—

A verdict may be given significance and correctly interpreted by reference to the pleadings, the facts in evidence, admissions of the parties, and the charge of the court.

4. Partition § 5f—

In this proceeding for partition a respondent pleaded sole seizin of a part of the *locus* under a deed from the common ancestor. Petitioners

attacked the deed on the ground of undue influence, and the proceeding was transferred to the civil issue docket for trial. Petitioners conceded that unless respondent's deed was obtained by undue influence it conveyed the *locus in quo*. The sole issue submitted was whether respondent's deed was obtained by undue influence. *Held:* A negative answer to the issue, interpreted in the light of the pleadings, admissions and theory of trial, is sufficient to support the judgment that the respondent is the owner of that portion of the land in question.

5. Deeds § 2c—

No presumption of undue influence arises from the mere relationship in a conveyance from a parent to her child, and when the evidence discloses only that each lived in her own home and the mother managed her own affairs, and the daughter helped her mother in the mother's old age, the evidence is insufficient to show any confidential or fiduciary relationship between them which would give rise to a presumption of fraud or undue influence.

APPEAL by petitioners from *Carr, J.*, at November Term, 1945, of JOHNSTON.

Petition to sell land for partition.

It is alleged that the *feme* petitioners and respondents, as the only children and heirs at law of Susan Jernigan, deceased, are tenants in common by inheritance of a tract of land in Johnston County, containing 88½ acres, which their mother left undevised at the time of her death, 27 October, 1943.

The respondents denied the cotenancy and pleaded sole seizin, R. A. Jernigan to part of the land under deed from his father and mother, and Minnie (Jernigan) Raynor to the remainder, consisting of 42¾ acres, under deed executed by her widowed mother 26 May, 1941, and registered the same day.

The petitioners replied and attacked the validity of both deeds on the ground of alleged undue influence in their procurement. The claim of R. A. Jernigan was settled by consent judgment. The case was then tried out on the issue raised by the *feme* respondent's plea.

The jury returned the following verdict:

"1. Was the execution of the deed from Susan Jernigan to Minnie Raynor, dated May 26, 1941, procured by undue influence exerted by the said Minnie Raynor upon the said Susan Jernigan as alleged in the plaintiffs' pleadings? Answer: No."

From judgment on the verdict adjudging the respondent, Minnie Raynor, to be the owner of the 42¾ acres in question, the petitioners appeal, assigning errors.

Parker & Lee for petitioners, appellants.

Wellons, Martin & Wellons for respondent, appellee.

STACY, C. J. The first question arises upon the challenge to the sufficiency of the record to support the judgment.

The petition to sell the land for partition among the alleged tenants in common was duly filed with the Clerk of the Superior Court of Johnston County on 20 April, 1945. The *feme* respondent denied the cotenancy and pleaded sole seizin to a part of the land under a deed from the common ancestor, dated 26 May, 1941. The petitioners replied and attacked the validity of respondent's deed. The matter was transferred to the civil issue docket for trial during term as in other special proceedings. G. S., 1-399. For all practical purposes, this converted the proceeding into an action to try title to the land claimed by the respondent, with the burden on the petitioners as in ejectment. *Gibbs v. Higgins,* 215 N. C., 201, 1 S. E. (2d), 554; *Bailey v. Hayman,* 218 N. C., 175, 10 S. E. (2d), 667; *S. c.,* 222 N. C., 58, 22 S. E. (2d), 6; *Ditmore v. Rexford,* 165 N. C., 620, 81 S. E., 994; McIntosh on Procedure, 1060. Specifically, the burden was on the petitioners to show title as alleged, *i.e.,* title by tenancy in common. *Sipe v. Herman,* 161 N. C., 108, 76 S. E., 556; *Alexander v. Gibbon,* 118 N. C., 796, 24 S. E., 748; *Huneycutt v. Brooks,* 116 N. C., 788, 21 S. E., 558. See *Bailey v. Hayman,* 220 N. C., 402, 17 S. E. (2d), 520.

When the petitioners offered the respondent's deed in evidence for purpose of attack, *Higgins v. Higgins,* 212 N. C., 219, 193 S. E., 159, and failed to make good the attack, they thereby fell short of showing the alleged tenancy in common. *Huneycutt v. Brooks, supra.* In fact, they regarded it as showing just the reverse. And while the issue submitted to the jury deals only with the allegation of undue influence in the procurement of respondent's deed, the verdict seems sufficient to support the judgment when considered in the light of the record and the theory of the trial. *McKeel v. Holloman,* 163 N. C., 132, 79 S. E., 445. It is stated in the case on appeal that, after a consent judgment was entered as to R. A. Jernigan, "the question of the sufficiency of the deed to Minnie Raynor . . . was left to be tried." This was the battle ground selected by the petitioners and accepted by the respondent. *Shipp v. Stage Lines,* 192 N. C., 475, 135 S. E., 339. Having thus proceeded in the trial court, the appeal *ex necessitate* rests upon the same premise. *Simons v. Lebrun,* 219 N. C., 42, 12 S. E. (2d), 644; *Gorham v. Ins. Co.,* 214 N. C., 526, 200 S. E., 5; *Apostle v. Ins. Co.,* 208 N. C., 95, 179 S. E., 444.

It is the rule with us, both in civil and criminal actions, that a verdict may be given significance and correctly interpreted by reference to the pleadings, the facts in evidence, admissions of the parties, and the charge of the court. *Pierce v. Carlton,* 184 N. C., 175, 114 S. E., 13; *Kannan v. Assad,* 182 N. C., 77, 108 S. E., 383; *Howell v. Pate,* 181 N. C., 117,

106 S. E., 454; *Reynolds v. Express Co.,* 172 N. C., 487, 90 S. E., 510; *Bank v. Wilson,* 168 N. C., 557, 84 S. E., 866; *S. v. Cody,* 224 N. C., 470, 31 S. E. (2d), 445; *S. v. Morris,* 215 N. C., 552, 2 S. E. (2d), 554; *S. v. Whitley,* 208 N. C., 661, 182 S. E., 338. Tested by this rule, it would seem that the exception addressed to the alleged inadequacy of the verdict to support the judgment should be overruled. *Pierce v. Carlton, supra.* It was conceded on the hearing, and at the bar here, that unless respondent's deed was procured by overreaching or undue influence, it conveys 42¾-acre tract. The petitioners say in their brief: "Under the rule applicable in an action of ejectment, when an instrument relied upon is introduced as part of the chain of title, it is then open to attack for all purposes on the general issue, regardless of whether the instrument is introduced by the plaintiff for the purpose of attack. *Higgins v. Higgins,* 212 N. C., p. 220." The verdict, then, was intended to establish, and does establish, the validity of respondent's title.

Nor is the case of *Lester v. Haward,* 173 N. C., 83, 91 S. E., 698, presently helpful to the petitioners, for, there, the single issue of sole seizin was answered against the respondents, without any further matters appearing of record to support the judgment *quod recuperet. Newbern v. Gordon,* 201 N. C., 317, 160 S. E., 182.

Secondly, the petitioners contend that they were not allowed the benefit of a factual presumption of fraud or undue influence which arises from the relationship of the parties, to wit, parent and child. *McLeod v. Bullard,* 84 N. C., 516; *Lee v. Pearce,* 68 N. C., 76; *Abbitt v. Gregory,* 201 N. C., 577, 160 S. E., 898. In answer to this position, it suffices to point out that while the adult daughter acquired the 42¾ acres of land from her mother in 1941, there is no evidence of any confidential or fiduciary relation, existing between them at the time, which would give rise to a presumption of fraud. *Gerringer v. Gerringer,* 223 N. C., 818, 28 S. E. (2d), 501; *In re Will of Atkinson,* 225 N. C., 526; *In re Craven,* 169 N. C., 561, 86 S. E., 587. The mother lived in her home; the daughter in hers a quarter of a mile away. The mother managed her own affairs; the daughter helped her in her old age. This seems to be all. *In re Craven, supra.* "The mere relation of parent and child does not raise a presumption of undue influence." *Gerringer v. Gerringer, supra.*

The law on the subject was announced in *Wessell v. Rathjohn,* 89 N. C., 377, as follows:

"It may be that there are cases where a parent conveyed property to his child in which the presumption of fact is so strongly adverse to the latter, that the court ought to instruct the jury that they ought to find against the deed, unless the child shall prove to their satisfaction that it was fairly and honestly made; but in such a case, there must be evidence

tending to show, not simply that there might have been, but that there was *mala fides.*

"The relation of parent and child, as to presumptions of fraud and the *onus* of proof to rebut the same, in business transactions between them, does not stand upon the same footing as the relation of trustee and *cestui que trust,* guardian and ward, attorney and client, principal and agent, and like relations; it belongs to a different class of fiduciary relations, in which the presumption is not so strong, nor does it arise under the same circumstances. Besides, the presumption is always against the party having the superior or dominant position or control, and this in the case of parent and child is that of the parent. *Lee v. Pearce,* 68 N. C., 76; *Wright v. Howe,* 52 N. C., 412; *Horah v. Knox,* 87 N. C., 483; *McConnell v. Caldwell,* 73 N. C., 338; Big. Fraud, 190, 264, 265; Best Presumptions, 43 *et seq.*"

A careful perusal of the record leaves us with the impression that no reversible error has been made to appear.

No error.

CEDRIC TOLER, A MINOR WITHOUT GENERAL OR TESTAMENTARY GUARDIAN, APPEARING HEREIN BY HIS DULY APPOINTED NEXT FRIEND, LLOYD F. TOLER, v. H. M. SAVAGE, DORA MAE SAVAGE, DOROTHY IONE SAVAGE AND BERTHA MAE SAVAGE, A CO-PARTNERSHIP, TRADING AS SAVAGE TAXI,

and

THURMAN TOLER, A MINOR WITHOUT GENERAL OR TESTAMENTARY GUARDIAN, APPEARING HEREIN BY HIS DULY APPOINTED NEXT FRIEND, LLOYD F. TOLER, v. H. M. SAVAGE, DORA MAE SAVAGE, DOROTHY IONE SAVAGE AND BERTHA MAE SAVAGE, A CO-PARTNERSHIP, TRADING AS SAVAGE TAXI.

(Filed 20 March, 1946.)

1. Automobiles § 24b: Master and Servant §§ 22b, 22c—

Testimony of a statement made by a partner to the effect that the truck involved in the collision belonged to the partnership, that the driver was an employee and had been sent on a trip to pull a taxi out of a ditch, together with a statement in the answers, introduced in evidence by plaintiffs, that the truck involved in the accident belonged to defendant partners, *is held* sufficient to be submitted to the jury both on the question of employment and the question of whether the employee was acting in the scope of his employment.

2. Trial § 22a—

On motion to nonsuit the evidence will be considered in the light most favorable to plaintiff.

3. Evidence § 33—

In the absence of evidence that a purported municipal ordinance had been certified, as required by G. S., 8-5, or that it had been printed in book form, as provided in G. S., 160-272, it is not error for the court to exclude testimony of the police chief as to the existence and contents of the purported ordinance, it being necessary in such instance to produce by the proper official the official municipal records to prove the ordinance.

4. Infants § 11—

In an action by a minor to recover for permanent personal injuries, a charge on the issue of damages permitting the jury to consider loss or decrease of earning capacity during minority as an element of recovery must be held for reversible error, since the father is entitled to the services and earnings of his unemancipated child during minority.

APPEAL by defendants from *Carr, J.,* at October Term, 1945, of WAYNE.

Cedric Toler and Thurman Toler, both minors, by their next friend, Lloyd F. Toler, instituted actions for personal injuries against the defendants, trading as Savage Taxi.

The cases were consolidated for trial by consent.

On 14 January, 1944, about 7:30 p.m., Cedric Toler and Thurman Toler were riding on a bicycle on Ash Street in the City of Goldsboro. There was no light on the bicycle, but Thurman Toler was holding a flashlight that reflected light in the direction they were riding. The evidence further tends to show that the plaintiffs were proceeding along the right side of Ash Street near the curb, in an easterly direction, when a truck owned by H. M. Savage, and driven by Sonny Savage, his son, in the course of his employment for the Savage Taxi, was proceeding in a westerly direction on said street. In an effort to pass two other cars proceeding in the same direction, Sonny Savage drove the truck over on the left side of the street and collided with plaintiffs' bicycle, which resulted in serious injuries to the plaintiffs.

Defendants offered no evidence, but moved for judgment as of nonsuit in each case, at the close of plaintiffs' evidence. The motions were overruled.

Verdicts for plaintiffs and judgments thereon were entered. Defendants appeal, assigning error.

Paul B. Edmundson for plaintiffs.
J. Faison Thomson for defendants.

DENNY, J. The appellants insist the evidence is insufficient to show that Sonny Savage was the agent, servant or employee of the defendants. Furthermore, they contend if it be conceded he was the agent, servant or

employee of the defendants, the plaintiffs have failed to show that he was acting within the scope of his employment at the time they sustained their injuries. We do not so interpret the evidence. In a conversation with Mr. Lloyd Toler, Mr. H. M. Savage, one of the defendants, stated "He was sorry the accident happened, that it was his truck, and his boy, and that he had been to Adamsville to pull a taxi out of a ditch." Moreover, the answers of the defendants contain the statement that the truck involved in the collision was the truck of the defendants, and the plaintiffs introduced the statement in evidence.

We think the evidence, when considered in its most favorable light for the plaintiffs, as it must be on a motion for judgment as of nonsuit, was sufficient to carry these cases to the jury.

The defendants also assign as error the refusal of his Honor to permit the Chief of Police of the City of Goldsboro to testify on cross-examination as to the existence and contents of a paper-writing which purported to be an Ordinance of the City of Goldsboro, governing the operation of bicycles on the streets of the city. This assignment of error cannot be sustained. There is no evidence on this record to the effect that the purported ordinance has been certified, as required by G. S., 8-5, or that it has been printed and published in book form by the governing body of the City of Goldsboro, as provided in G. S., 160-272. In the absence of a compliance with the above statutory provisions, it is necessary in order to prove the existence of an ordinance, over an objection, to produce by the proper official the official records of the city or town, showing its passage and the entry on the records of the ordinance itself. *S. v. Razook,* 179 N. C., 708, 103 S. E., 67.

Assignments of error numbered thirty-seven and thirty-eight are based on exceptions to the following portions of his Honor's charge: "The Court instructs you that a decrease in earning capacity is a proper element of damages if you find one's earning capacity has been decreased by reason of injury sustained. . . . You would consider compensation for pain and suffering, both mental and physical, and any decrease in earning capacity, which the plaintiff, Thurman Toler, has sustained."

These exceptions must be sustained in the case of Thurman Toler. He is not entitled to recover for any decrease in earning capacity during his minority. His Honor inadvertently failed to instruct the jury correctly as to the measure of damages in this respect. In the case of *Shipp v. Stage Lines,* 192 N. C., 475, 135 S. E., 339, *Stacy, C. J.,* in speaking for the Court, said: "It seems to be the universal holding that an unemancipated infant cannot recover, as an element of damages in an action for personal injuries, for loss of time or diminished earning capacity during his minority. *Hayes v. R. R.,* 141 N. C., 195, 31 C. J., 1114; *Comer v. Lumber Co.,* 59 W. Va., 688, 8 Anno. Cas., 1105, and note.

The father is entitled to the services and earnings of his minor child so long as the latter is legally in his custody and under his control and not emancipated. *Floyd v. R. R.,* 167 N. C., p. 59; *Williams v. R. R.,* 121 N. C., 512; 29 Cyc., 1623. The charge is defective in that it fails to limit the plaintiff's recovery to the present worth of a fair and reasonable compensation for his mental and physical pain and suffering, if any, and for his permanent injuries, if any, resulting in the impairment of his power or ability to earn money after reaching his majority. *Murphy v. Ludowici Gas and Oil Co.,* 96 Kan., 321, 150 Pac., 581; *Cincinnati, etc. Ry. Co. v. Troxwell,* 143 Ky., 765, 137 S. W., 543." *Gillis v. Transit Corp.,* 193 N. C., 346, 137 S. E., 153; *Winchester-Simmons Co. v. Cutler,* 194 N. C., 698, 140 S. E., 622.

In the case of Cedric Toler, the jury was instructed that he claimed no permanent damages and asked only for reasonable compensation for a scar on his forehead and for the pain and suffering resulting from his injuries. And no exception was entered to the instructions given in the charge on the question of damages, in the case of Cedric Toler.

We have examined the remaining exceptions and find them without sufficient merit to modify or change the conclusions herein reached.

We find no error in the trial below in the case of Cedric Toler. In the case of Thurman Toler, there must be a new trial, and it is so ordered.

In the case of Cedric Toler,

No error.

In the case of Thurman Toler,

New trial.

STATE v. LLOYD WITHERINGTON.

(Filed 20 March, 1946.)

Kidnapping §§ 1, 2—

Kidnapping is the taking and carrying away of a human being by physical force or by fraud, done unlawfully or without lawful authority, and a charge defining the offense as forcibly taking and carrying away of a human being *is held* for error as being incomplete. G. S., 14-39.

SEAWELL, J., dissents.

APPEAL by defendant from *Carr, J.,* at November Term, 1945, of WAYNE.

Criminal prosecution upon indictment charging that defendant "unlawfully, willfully and feloniously did forcibly kidnap and carry away Mary Simmons against the form of the statute in such case," etc.

Verdict: Guilty as charged in the bill of indictment.

Judgment: Confinement in the county jail for a term of two years assigned to work the roads under the supervision of the State Highway and Public Works Commission.

Defendant appeals therefrom to Supreme Court and assigns error.

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

George R. Britt and J. Faison Thomson for defendant, appellant.

WINBORNE, J. Among the assignments of error brought forward by defendant on this appeal is that directed to the following portion of the charge given by the court to the jury: "If the State has satisfied you beyond a reasonable doubt from the evidence that the defendant on the day in question, to wit, the third day of March, 1945, did forcibly take and carry away the person of the prosecuting witness, Mary Simmons, from her home some distance from her home, it would be your duty to return a verdict of guilty of kidnapping as charged in the bill of indictment." We think the exception to this charge is well taken in that the definition of the offense, as given, is not complete.

The statute relating to kidnapping, G. S., 14-39, provides, in pertinent part, that "it shall be unlawful for any person . . . to kidnap . . . any human being . . ." Thus it appears that the General Assembly in taking cognizance of the offense, has not undertaken to define the word "kidnap" nor to give it expressly its technical common law meaning. In fact, this Court in the case of *S. v. Harrison,* 145 N. C., 408, 59 S. E., 867, declined to hold as erroneous the refusal of a request for instruction in which it was sought to give to the word "kidnap," as used in the statute, a technical meaning as at common law.

The word "kidnap," as defined by Webster, means: "To carry (anyone) away by unlawful force or by fraud, and against his will, or to seize and detain him for the purpose of so carrying him away." Moreover, in American Jurisprudence, the author, in treating of the subject, states that "the generally accepted basic element of the crime of kidnapping is the taking or detaining of a person against his will and without any lawful authority." 31 Amer. Jur., 815. And in the *S. v. Harrison case, supra,* the court instructed the jury that "by kidnapping is meant the taking and carrying away of a person forcibly or fraudulently." However, reference to the record on appeal in that case discloses that the instruction as given was not the subject of an exception.

In the light of these definitions, we are of opinion that a finding that defendant "did forcibly take and carry away" the person of Mary Simmons, without more, is insufficient to constitute the crime of kidnapping with which he is charged. The word "forcibly" as so used means "ef-

fected by force used against opposition or resistance," or "obtained by compulsion or violence," that is, physical force. However, "a taking and carrying away" effected or obtained by fraud would constitute an element of the offense as completely as if effected or obtained by force. But regardless of the means used, by which the taking and carrying away is effected, there must be further finding that the taking and carrying away was unlawful or done without lawful authority, or effected by fraud.

It is fair to the learned judge, who tried this case, to say that in the first part of his charge he gave the definition of "kidnapping" which was used by the trial judge in *S. v. Harrison, supra,* as hereinabove quoted. But the portion to which exception is here taken is the last instruction, or parting word, given to the jury, and the only one in which the definition was applied to the facts. And in doing so the judge was probably influenced by the phraseology of the definition as used in the *Harrison case, supra.*

Since there must be a new trial, other exceptions are not considered as the matters to which they relate may not recur on another trial.

Let there be a

New trial.

SEAWELL, J., dissents.

STATE v. GURNEY HERRING.

(Filed 20 March, 1946.)

1. Criminal Law § 78c—

Assignments of error should be based upon exceptions briefly and clearly stated and numbered in the record, but in a capital case assignments of error not so based nevertheless may be considered. Rule 21.

2. Rape § 1b—

An indictment charging that defendant with force and arms did unlawfully, willfully and feloniously ravish and carnally know the prosecuting witness, a female, by force and against her will, *is held* sufficient to support a verdict of guilty of the capital offense and judgment of death pronounced thereon.

3. Rape § 23—

The failure of the court, in defining assault on a female, to state that the perpetrator must be a male over eighteen years of age will not be held for error on defendant's appeal, since there is a presumption that defendant is over eighteen years of age and the burden rests upon him to show the contrary.

4. Criminal Law § 42c—

In cross-examining a witness for the State, defendant is not entitled to ask a question which assumes facts which are not established or admitted.

5. Rape § 4—

In this prosecution for rape, evidence tending to show that defendant choked and beat the prosecuting witness and by the use of force had sexual intercourse with her against her will, together with testimony of an admission made by defendant to the chief of police that defendant had feloniously assaulted prosecutrix, *is held* sufficient to be submitted to the jury, and defendant's motion for a directed verdict of not guilty was properly refused.

APPEAL by defendant from *Carr, J.*, at November-December Term, 1945, of WAYNE.

The record was made complete by being made to show the arraignment of the defendant as shown by the affidavit of the Clerk of the Superior Court of Wayne County filed in this Court in response to motion of the State suggesting the diminution of the record.

The defendant was tried, convicted and sentenced to death upon a bill of indictment which charged that he, the defendant "did unlawfully, willfully and feloniously ravish and carnally know one Clarinette Brock, a female, by force and against her will, against the form of the statute in such case made and provided, and against the peace and dignity of the State."

From judgment of death by asphyxiation, the defendant appealed, assigning errors.

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

T. T. Thorne and George E. Hood for defendant, appellant.

SCHENCK, J. The assignments of error set out in the appellant's brief are not based upon exceptions briefly and clearly stated and numbered in the record, therefore they would seem not to be in compliance with Rule 21, Rules of Practice in the Supreme Court, 221 N. C., 558, yet this being a capital case wherein the life of the defendant is at stake, these assignments of error will, nevertheless, be considered.

Under the first assignment of error set out in the appellant's brief he contends he is entitled to a discharge because the bill of indictment does not properly charge the offense of rape. The bill of indictment, in part, reads: ". . . that Gurney Herring, in Wayne County, on or before the 15th day of June, 1945, with force and arms, at and in the county afore-

said, did unlawfully, willfully and feloniously ravish and carnally know one Clarinette Brock, a female, by force and against her will." The indictment is sufficient to support the verdict of guilty of the capital offense and judgment of death pronounced thereon. *S. v. Farmer,* 26 N. C., 224; *S. v. Storkey,* 63 N. C., 7; *S. v. Johnson,* 67 N. C., 55; *S. v. Jackson,* 199 N. C., 321, 154 S. E., 402. This assignment of error is not sustained.

In the second assignment of error set out in appellant's brief the defendant contends that the court erred in its charge in that in defining the offense of "Assault on female" the crime was not limited to males over the age of 18 years, and defendant argues that there is no evidence in the record tending to show the age of the defendant. This exception is without merit for the reason that if there was error committed the error was in defendant's favor as there is a presumption that the defendant was 18 years of age, and the burden rests upon him to show the contrary. *S. v. Lewis,* 224 N. C., 774, 32 S. E. (2d), 334, and cases there cited.

The third assignment of error set out in the appellant's brief is directed to the sustaining of the objection by the State to an interrogatory propounded to the prosecuting witness on cross-examination. The interrogatory was: "People said they have seen him (defendant) frequently going to your house, going in and out day and night. They are just mistaken?" The assignment of error is untenable for the reason that the question assumes facts which have not been established or admitted. 70 Corpus Juris, Witnesses, sec. 704, p. 545; *Carson v. Insurance Co.,* 171 N. C., 135 (137-8), 88 S. E., 145. And, too, it would seem that the interrogatory calls for hearsay evidence in reply.

In the fourth assignment of error set out in the defendant's brief the defendant contends that his motion for a directed verdict of not guilty should have been allowed. This contention is untenable in the face of the evidence introduced by the State; the prosecutrix testified, *inter alia,* that the defendant choked and beat her, and that by the use of force had sexual intercourse with her five or six times; the doctor, who examined the prosecutrix after the alleged assault, testified that there were marks on her throat and that her arms and legs were bruised; and, in addition, the record tends to show that the defendant admitted to the chief of police a felonious assault by him upon the prosecutrix.

The fifth assignment of error set out in the appellant's brief is directed to the judgment pronounced by the court. There can be but little, if any, discussion of this assignment. The verdict sustained the judgment, and the verdict was duly reached at the trial.

We have attentively examined and considered the exceptions as grouped, although not noted in the record, as well as the exceptions set

out in the appellant's brief, and with full realization of the result thereof, we have reached the conclusion that there exists no valid reason to disturb the judgment entered below.

No error.

STATE v. ERNEST RAYMOND SETZER.

(Filed 27 March, 1946.)

1. Criminal Law § 41h: Bigamy and Bigamous Cohabitation § 3—

Conceding that in a prosecution for bigamous cohabitation, as in a prosecution for bigamy, the wife is competent to testify against the husband to prove the fact of marriage, G. S., 8-57, her testimony is limited to proof of the fact of marriage and any testimony by her as to other incriminating facts, such as testimony tending to show that they had not been divorced, is incompetent.

2. Criminal Law § 85b—

The mere fact that in an opinion of the Supreme Court certain testimony admitted in the lower court without objection is incorporated in the recitation of the State's evidence does not constitute a holding that such testimony is competent, the competency of the testimony not being presented or decided.

3. Bigamy and Bigamous Cohabitation § 2—

In a prosecution for bigamous cohabitation based upon a second marriage in another state, the State must prove by the evidence, beyond a reasonable doubt, each of the three essential elements of the offense: (1) Marriage of defendant to a spouse still living, (2) an unlawful contract of marriage in another state which would have been punishable as bigamous if contracted here, (3) cohabitation thereafter in this State with the party of the second marriage. G. S., 14-183.

4. Marriage § 1—

Marriage is the legal contract that makes a man and woman husband and wife and is also the status or relation of a man and a woman who have been legally united as husband and wife, which status continues during the joint lives of the parties or until divorce or annulment.

5. Criminal Law § 77d—

The Supreme Court is bound by the record as filed.

6. Bigamy and Bigamous Cohabitation § 3—

In a prosecution for bigamous cohabitation based upon a second marriage in another state, an admission by the State in reference to the second marriage that the parties thereto were "lawfully married" presupposes that they were capable of entering into a legal contract of marriage, and there being no competent evidence that the parties to the first

marriage had not been divorced or the marriage annuled, the evidence fails to establish the essential element of the offense that the second marriage in the other state would be a bigamous contract of marriage if entered into in this State. G. S., 14-183.

APPEAL by defendant from *Gwyn, J.*, at August Term, 1945, of CALDWELL.

Criminal prosecution upon indictment charging in substance that defendant, being married to Lois Moore Setzer who was then living and from whom he had not been divorced, did on 4 October, 1942, unlawfully, willfully and feloniously contract a marriage with one Claudia Earl Munday in Charleston, South Carolina, which would have been punishable as bigamous if contracted in North Carolina, and did thereafter cohabit with the said Claudia Munday Setzer in Caldwell County, North Carolina, against the form of the statute in such cases made and provided, etc.

For purpose of disposing of this appeal, it is sufficient to point out that the record and case on appeal disclose:

1. That the State was permitted to show through the testimony of Mrs. Lois Setzer, wife of defendant, over objection by defendant, not only that she was married to defendant on 20 June, 1935; but that they have three children; that she was still married to him on 4 October, 1942; that she had not been divorced from him; that she "put in twice to get a divorce," once in 1943 and again in 1945; that she started to get a divorce but dropped it; and that defendant has never served any divorce papers on her.

2. That after the State had offered in evidence "certified marriage license from the State of South Carolina, . . . of defendant and Claudia Earl Munday," dated 15 September, 1942, this admission appears: "It is admitted by the State and by the defendant, through his counsel, that the defendant, Ernest Raymond Setzer, and Claudia Earl Munday were legally married in the State of South Carolina on the date shown in said marriage license and certificate."

3. That after defendant was arrested in this case he said to Deputy Sheriff White that "he was not married to this woman, Claudia Munday . . . that he had married her but that an annulment had been gotten right away after the marriage"; and that this statement was elicited as evidence through the testimony of the Deputy Sheriff as witness for the State.

4. That the State offered evidence for the purpose of showing, and which it contends is sufficient to show that defendant and Claudia Munday cohabited in Caldwell County, North Carolina, after their marriage in South Carolina.

5. That defendant and his wife Lois Setzer were living together as husband and wife at the time of the trial of this case in Superior Court.

Verdict: Guilty.

Judgment: "That defendant be confined in the State Prison at Raleigh for a term of six years. Commitment to issue to put into effect four years of the term. The remainder of the term, to wit, two years, is suspended for a period of five years, upon the following conditions," etc.

"To the judgment and rendition thereof the defendant in apt time objects and excepts and appeals to the Supreme Court," and assigns error.

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

Max C. Wilson and Mull & Patton for defendant, appellant.

WINBORNE, J. A decision on this appeal presents two questions for determination:

1. Was Lois Setzer, the wife of defendant, competent to testify against him upon indictment charging him with bigamous cohabitation with another woman?

2. Upon the evidence offered on the trial below, taken in the light most favorable to the State, was defendant entitled to judgment as of nonsuit?

As to the first: The statute, G. S., 8-57, by which the husband or the wife of defendant, in all criminal actions or proceedings is declared to be a competent witness *for the defendant,* provides, in so far as pertinent to this appeal, that "nothing herein shall render any husband or wife competent or compellable to give evidence *against each other* in any criminal action, except to prove the fact of marriage in case of bigamy." See *S. v. Melton,* 120 N. C., 591, 26 S. E., 933.

In this connection if it be conceded that since bigamy and bigamous cohabitation as defined by the General Assembly of North Carolina, are incorporated in one statute, G. S., 14-183, captioned "bigamy," the two are of such kindred nature as to render the wife of defendant a competent witness against him in prosecution of him for bigamous cohabitation, to prove the fact of marriage, as in a prosecution upon indictment charging bigamy, the testimony of Mrs. Lois Setzer, wife of defendant, went far beyond this statutory provision. Hence, under the statute her testimony, other than as to the fact of her marriage to defendant, is incompetent, and should have been excluded, and the jury should not have been permitted to consider it as evidence.

It is appropriate to note here that the testimony of Mrs. Lois Setzer in this case is strikingly similar to that of the wife of defendant, Mrs.

O. B. Williams, given in the trials in Superior Court of the case of *S. v. Williams,* 220 N. C., 445, 17 S. E. (2d), 769, 317 U. S., 287, 87 L. Ed., 279, 63 S. Ct., 207, 14 A. L. R., 1273; 222 N. C., 609, 24 S. E. (2d), 256, and 224 N. C., 183, 29 S. E. (2d), 744, 324 U. S., ..., 89 L. Ed., 1123. And the fact that in the opinion of this Court on the first appeal, the testimony of Mrs. O. B. Williams was incorporated as a part of the State's evidence offered on the trial in Superior Court, may have led to the admission of the testimony of Mrs. Lois Setzer, wife of defendant, to which exception is taken in the present action. Hence, it is now pointed out that the testimony of Mrs. O. B. Williams in the *Williams case, supra,* was admitted without objection, and no question was raised either in the Superior Court or in this Court, as to her competency to so testify as a witness *against her husband.* Therefore, the inclusion of her testimony in the statement of evidence in that case is not to be taken as holding that she was competent to testify against her husband as to any fact other than the fact of her marriage to him. The question now presented was not presented or decided in that case.

As to the second question: The statute, G. S., 14-183, under which defendant stands indicted, after having provided that "if any person, being married, shall marry any other person during the life of the former husband or wife, every such offender . . . shall be guilty of a felony," provides in pertinent part that "If any person being married, shall contract a marriage with any other person outside of this State, which marriage would be punishable as bigamous if contracted within this State, and shall thereafter cohabit with any such person within this State, he shall be guilty of a felony and shall be punished as in cases of bigamy."

The statute further provides that "Nothing contained in this section shall extend . . . to any person who at the time of such second marriage shall have been lawfully divorced from the bonds of the first marriage; nor to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction."

In the present prosecution upon the bill of indictment the burden was upon the State to prove by the evidence, beyond a reasonable doubt, each element of the offense, that is, to prove (1) the marriage of the defendant to Lois Moore Setzer, who was then living; (2) an unlawful contract of marriage with Claudia Earl Munday in South Carolina, which would have been punishable as bigamous, if contracted in North Carolina, and (3) cohabitation thereafter in this State with the said Claudia Munday Setzer.

Marriage is the legal contract that makes a man and a woman husband and wife. It is also the legal status of husband and wife. And it is defined as the status or relation of a man and a woman who have been

legally united as a husband and wife. Ordinarily the status of marriage continues during the joint lives of the parties or until divorce or annulment. 35 Am. Jur., pp. 180 and 184, Marriage, sections 1 and 7.

Applying these principles to the present case, the admission by the State and by the defendant that the defendant and Claudia Earl Munday were legally married in the State of South Carolina presupposes that they were capable of entering into a legal contract of marriage, that is, that neither of the parties was then legally married to any other person. And excluding the testimony of Mrs. Lois Setzer, wife of defendant, as to the matters to which she was an incompetent witness, there is no evidence in the record which controverts the above admission made in open court.

It is argued here that the admission made by the State relates only to the form of the ceremony by which the defendant and Claudia Earl Munday were united in marriage in South Carolina. It may be conceded that the agreement goes beyond the intent of the solicitor. However, the language used in the admission hardly admits of any contraction. We are bound by the record as it comes to us. See *S. v. Dee,* 214 N. C., 509, 199 S. E., 730; *McGuinn v. High Point,* 217 N. C., 449, 8 S. E. (2d), 462; *S. v. Starnes,* 220 N. C., 384, 17 S. E. (2d), 346; *Smith v. Bottling Co.,* 221 N. C., 202, 19 S. E. (2d), 626; *In re Will of Lomax,* 225 N. C., 31, 35 S. E. (2d), 876, and cases cited.

Hence, in the light of applicable principles applied to the case as it comes to us, the State has failed to offer evidence sufficient to take the case to the jury on the essential element of a contract of marriage between defendant and Claudia Earl Munday in South Carolina, which would be a bigamous contract of marriage if entered into in this State.

This disposition of the case renders it unnecessary to pass upon: (1) The effect of the statement of defendant as to the annulment of the South Carolina marriage, or (2) question as to sufficiency of evidence as to cohabitation between defendant and Claudia Earl Munday in Caldwell County, North Carolina, to take the case to the jury, or (3) exception to the form of judgment rendered in this case.

The judgment below is

Reversed.

BLANCHE LAWRENCE v. CARROLL LAWRENCE.

(Filed 27 March, 1946.)

1. Appeal and Error § 31b—

An appeal will not be dismissed for failure of appellant to serve statement of case on appeal, appellant being entitled to review for alleged errors appearing on the face of the record.

2. Divorce § 12—

Adultery of the wife is not a statutory bar to her right to subsistence *pendente lite*, G. S., 50-15, and conceding her misconduct may be considered, in the instant case defendant's contention that since the court refused to hear his evidence or find any facts in regard to the alleged adultery of his wife, it was without jurisdiction to order subsistence *pendente lite*, is untenable, it appearing that the order directed no payment for the use and benefit of his wife but ordered only an allowance *pendente lite* for the support of the child of the marriage and for counsel fees and a sum to the wife to defray the necessary and proper expenses of the court.

3. Same—

The fact that an action for the custody of a child is pending does not deprive the court of jurisdiction in an action for divorce *a mensa* from awarding an allowance for the support of the child *pendente lite*, since such order does not purport to adjudicate custody, but in this case the record failed to support the plea of a prior action pending.

4. Appeal and Error § 14: Divorce § 16—

An appeal from an order allowing support *pendente lite* takes the case out of the jurisdiction of the Superior Court, and the judge, pending the appeal is *functus officio*, and is without authority to adjudge defendant in contempt for failing to make the payments as directed.

APPEAL by defendant from *Thompson, J.*, at October Term, 1945, of CARTERET. Affirmed.

Plaintiff instituted an action for divorce *a mensa* in which she moved for alimony for herself and infant child and for attorney's fees *pendente lite*. At the hearing on the motion 19 October, 1945, the court entered an order requiring defendant to pay $8 per week for the support of his child, $50 for counsel fees, and $25 to plaintiff "to defray the necessary and proper expenses of the Court." No payment for the use and benefit of plaintiff was required. Defendant gave notice of appeal to this Court.

Thereafter, on 5 November, 1945, pending the appeal the defendant was adjudged in contempt for failure to make the payments required in the order of 19 October, 1945, and committed to jail. Thereupon he applied to this Court for a writ of *supersedeas* which issued 16 November, 1945.

Charles L. Abernethy, Jr., for defendant, appellant.

No counsel contra.

BARNHILL, J. The motion of plaintiff to dismiss on the grounds that defendant served no case on appeal cannot be sustained. The case is here for review of alleged error appearing on the face of the record. *Bell v. Nivens,* 225 N. C., 35.

The defendant on his appeal from the order of 19 October relies primarily on the contention that he alleged the adultery of the wife in bar of her right to alimony *pendente lite* and that the court declined to hear any evidence or to make any finding of fact in respect thereto. He asserts that without such finding the court was without jurisdiction to make the order entered.

The provision making the adultery of the wife a bar to her right to alimony is a part of G. S., 50-16, relating to subsistence without divorce. It is not included in G. S., 50-15, under which plaintiff's motion was made.

We may concede, however, that the misconduct of the wife is a matter for consideration on a motion of this nature. Even so, the plea will not avail the defendant for the simple reason the judge did not allow the plaintiff alimony *pendente lite.* He only required the payment of $8 per week for the use and benefit of defendant's infant child. In no event does the adultery of the wife discharge or bar the defendant's duty in this respect.

Nor can defendant's plea to the jurisdiction of the court for that another action for the custody of the child is now pending be sustained. The record fails to support the plea. Furthermore, the court made no order awarding custody. It merely required the defendant to contribute to the support of his child pending trial of the action. As to this he has no just cause to complain.

The appeal from the order allowing support *pendente lite* for the child took the case out of the jurisdiction of the Superior Court. Pending the appeal the judge was *functus officio.* Hence the adjudication of contempt and the order of imprisonment are void and of no effect. *Vaughan v. Vaughan,* 211 N. C., 354, 190 S. E., 492; *Ragan v. Ragan,* 214 N. C., 36, 197 S. E., 554; *Ridenhour v. Ridenhour,* 225 N. C., 508. They must be vacated.

On the main appeal the judgment below is

Affirmed.

JAMES W. PRICE AND HERSCHEL C. PRICE, TRADING AS PRICE CONSTRUCTION COMPANY, v. AL J. GOODMAN.

(Filed 10 April, 1946.)

1. Courts § 14—

An action to recover balance due on a contract for the sale and delivery of goods, consummated in another state, is governed as to its substantive features by the laws of such other state.

2. Sales § 13a—

The Uniform Sales Act has not been adopted in the State of West Virginia, where the contract in suit was consummated, and therefore the provisions of that Act in regard to warranties has no application.

3. Sales § 27—

Where, in an action to recover the balance due on an executed contract of sale, defendant sets up a counterclaim for breach of warranty, the court has the power, upon objection, to limit defendant's evidence on the issue of damages to those items alleged by him, and recovery on the counterclaim could not exceed the amount so alleged and demanded.

4. Contracts § 25a—

Only those damages may be awarded for a breach of contract which are within the reasonable contemplation of the parties as a natural and probable consequence of the breach and which are, therefore, foreseeable.

5. Same: Sales § 27—

Special damages, while most frequently applicable to executory contracts, are recoverable in proper cases for breach of executed sales contracts, but in all instances the party sought to be charged must have been duly informed at the time of making the contract of the circumstances out of which the damages may arise, and such special damages must be properly pleaded.

6. Sales § 27—

Where, in an action to recover the balance due on an executed contract of sale, defendant pleads breach of warranty, but fails to plead special damages and offers no evidence that at the time of making the contract the seller had knowledge that defendant had a contract to resell, evidence proffered by defendant to show the loss and amount of the expected profit from such resale is properly excluded.

7. Same—

In this action to recover balance due on executed contract of sale the issues submitted, without objection by defendant, were (1) the execution of the contract and the delivery of the goods, answered in the affirmative by consent, (2) the amount plaintiffs were entitled to recover, and (3) the amount, if any, defendant was entitled to recover on his counterclaim for breach of warranty. *Held:* Nothing else appearing, plaintiffs were *prima facie* entitled to recover the purchase price on the second issue

subject to diminution to its full extent by any recovery by defendant on the third issue, and defendant was not prejudiced by an instruction to answer the second issue in the amount of the contract price if the jury was satisfied by the greater weight of the evidence of the contract of sale and delivery of the goods thereunder.

8. Same—

Breach of warranty in a sales contract is an affirmative plea; whether as a defense or as ground for recovery of damages, and the seller is not required to anticipate or negative such defense, but the burden is on the purchaser pleading such defense to establish it by the greater weight of the evidence.

9. Same—

In this action to recover balance due on an executed sales contract defendant set up a counterclaim for breach of warranty and his evidence on the question of damages relating thereto was not limited except for the exclusion of evidence relating to special damages not pleaded, but the court limited recovery on the issue to the purchase price paid or agreed to be paid. Upon conflicting evidence the jury answered the issue of damages on the counterclaim "nothing." *Held:* Even though the limitation of the recovery might be more applicable to instances where the remedy sought is rescission or offset, in view of the jury's verdict defendant was not prejudiced by such limitation.

APPEAL by defendant from *Warlick, J.,* at August Term, 1945, of BUNCOMBE.

The plaintiffs brought this action to recover the balance due on the purchase price of a quantity of used or second-hand steel road forms, used in the construction of concrete roads. They allege that defendant agreed to pay for them cash on delivery at Huntington and Charleston, West Virginia, at 27½c per lineal foot, for 10,990 feet, and that they were delivered to defendant's trucks and received by him. Subsequently, defendant paid $1,500 on the purchase price, and was credited with twelve of the forms he claimed were unusable, leaving a balance due of $1,489.25.

The defendant answered, partially admitting and partially denying the allegations of the complaint, and setting up as a further defense and counterclaim in which he referred to certain "Blawknox" forms sold to him and averred that "said sale carried an implied warranty that said forms were fit and suitable for the purposes for which they were designed and manufactured, and that same were usable for said purposes as Blawknox forms," whereas they were in fact not so suitable or usable, but had no value except as junk. He therefore pleads a breach of such implied warranty and specifies his damages as a result of the breach to be as follows: $695.21 for transportation of the forms from West Virginia to Camp Claiborne, Louisiana; $1,500 paid on the purchase price,

$156.23 handling charges, totaling $2,351.44, with interest, less a credit of $500, salvage or junk value of the forms. The prayer for judgment is in accord with these alleged items of damages.

To this plaintiffs replied alleging, *inter alia,* that defendant had had the forms in his possession for more than two months without any complaint except as to the twelve forms credited, and had paid $1,500 on the purchase price; that defendant had caused an inspection to be made of the forms before closing the trade, and any defects in them were open, obvious and patent, and denied that there was any warranty, or breach thereof.

On the trial only two witnesses testified: J. W. Price on the part of the plaintiffs, and defendant in his own behalf. This, with exhibits, comprised the evidence.

Plaintiffs' evidence tended to show as follows:

Plaintiffs reside in Huntington, West Virginia, and are engaged in highway and railroad construction. Goodman called J. W. Price, of the firm, on 17 May, 1943, and asked if they had some used concrete road steel forms which they were willing to sell, and Price answered affirmatively. Asked what kind they were, Price informed of their dimensions, and they agreed on a price of 27½c per lineal foot on plaintiffs' lot in West Virginia, where defendant's trucks were to pick them up. (This was confirmed by letter of 18 May, introduced in evidence.)

Defendant offered to send his check as each truck load was picked up, but Price suggested that it might be better to wait until he got all the forms and make one payment for the whole sale, upon which they agreed.

Defendant sent his trucks and hauled away 10,900 feet of steel forms, the subject of the agreement, and plaintiffs sent him an invoice for payment on 10 June. (Invoice was introduced.) On this invoice was credited 12 forms which Goodman had reported as unusable. The invoice showed a balance due of $1,489.25. Mr. Goodman, the witness stated, understood that the forms were used forms and in no way guaranteed. Plaintiffs did not know what they were going to be used for, and nothing was said about what kind they were.

After repeated attempts to get payment for the forms by letter, and by wire, the defendant wrote a letter in which he complained that his man reported that 300 of the forms were not suitable for repair and suggested that he meet Goodman at his office on 25 August. Witness came on 26 August. At that time defendant paid $1,500 on the purchase price.

During the telephone talk referred to, Price and Goodman discussed the necessity of repairs, but Goodman did not say anything about having a customer for the forms. Plaintiffs were willing to sell the equipment because there was no opportunity for any construction work in that part of the country because of the war.

Defendant's testimony was substantially as follows:

Defendant is a resident of Asheville, North Carolina. His business is buying, overhauling, and selling road equipment. He wanted used road forms, and Mr. Price told him he had such forms—Blawknox and Heltzels. He did not have enough of one make. Mr. Price said the forms were in good, fair condition—could be made straight edge. As a result of the conversation he sent his truck drivers after them, put some men to work on them, and shipped 4,000 feet to Campbell Construction Company at Camp Claiborne, La.

(At this point defendant sought to testify that Campbell Construction Co. had agreed to take the forms subject to inspection and pay $3,600 for them, counsel asking for its admission in order to show loss of anticipated profits on this resale. The evidence was not admitted, and defendant excepted.) Witness stated that in his opinion the road forms were "junk" and had no other value.

On cross-examination:

Witness knew a man in Huntington, President of the West Virginia Tractor and Equipment Company, to whom he mentioned that he wanted a complete paving outfit for one job, for Campbell, in Louisiana, and as a result of this called Mr. Price. At his request Mr. Basham sent a man down there to inspect the forms. "After his inspection, he told me what they were and said he preferred that I look at them myself or send one of my own men. . . . That was under my authority. He went there and inspected and then I bought them." He was to get Blawknox, Heltzels, and some Hatcliff.

"Mr. Price said that he had some Blawknox and Heltzels. He said they were in good serviceable condition and Mr. Basham backed that up. . . . He didn't check every one but they looked good, but you can't tell just looking. I took that chance because we were in a hurry for them and needed them. . . . I had to take their word for them."

Defendant further testified that after alterations or additions to some of the forms, he shipped to the Louisiana people about 2,000 feet of forms, "to be in good condition," and on inspection they were refused. He said the forms, if they had been in the condition represented by Mr. Price, would have been worth 60c to 75c per foot to him for resale.

The following issues were submitted to the jury:

"1. Did the plaintiffs and defendant enter into a contract for the sale of certain steel road forms, and did the plaintiffs deliver to the defendant said 10,870 lineal feet of steel road forms at the contract price of 27½c per lineal foot?

"2. If so, what amount are plaintiffs entitled to recover of the defendant?

"3. What amount, if any, is the defendant entitled to recover of the plaintiffs on his counter-claim and/or cross-action filed?"

The first issue was answered by consent "Yes."

On the second issue the jury was instructed, *inter alia,* as follows:

"The burden of that issue is on the plaintiffs. That burden is to satisfy you from the evidence by its greater weight, or by the preponderance of the evidence, but I do peremptorily instruct you that if you find from the evidence and by its greater weight that the plaintiffs did sell to and the defendant did receive from them at the agreed price of 27½c per lineal foot, this 10,870 lineal feet of steel road forms, then if you so find from the evidence and its greater weight, your answer to the second issue would be $2,989.25." Defendant excepted. The issue was answered $2,989.25, upon which, without objection, $1,500 was credited, leaving $1,489.25.

The third issue was answered "Nothing."

From the ensuing judgment defendant appealed, assigned error.

Smathers & Meekins for plaintiffs, appellees.

T. A. Uzzell, Jr., for defendant, appellant.

SEAWELL, J. On this appeal we are dealing with an executed sales contract and an alleged breach of warranty on the part of the seller. Since the sale was consummated in West Virginia and delivery had there, the case, in its substantive features, is controlled by the West Virginia law. For that reason our references are, for the most part, to works of recognized accuracy and generally accepted rather to our own Reports, citing the latter only when believed to be in accord with West Virginia law and its legal interpretation. The Uniform Sales Act appears not to have been adopted in West Virginia, as it has not been in this State, and the case under review is free from the implications of that Act in the matter of warranties.

For the purpose of this review, the exceptions to the trial may be resolved into three objections: The exclusion of evidence relating to special damages from the loss of expected profits in a transaction alleged to have been pending between the defendant and a customer in Louisiana, and the consequent removal of that element of damages from consideration by the jury; the so-called peremptory instruction to the jury on the second issue relating to plaintiffs' recovery, which defendant contends relieved the plaintiffs from the burden resting upon them to prove the performance of the contract as it applied to them; and application of the rule restricting defendant's recovery of damages upon his counterclaim to the amount of the purchase price of the road forms.

It is important to observe in the beginning that the great latitude given the defendant in presenting his counterclaim to the jury, particularly on the question of damages, and the verdict of the jury on the disputed evidence have rendered most of the complaints of the defendant academic; and extended discussion of them would lead to the pursuit of abstract principles, which it is our purpose to avoid. There are, it is true, many anomalies presented in the case, and perhaps some irregularities, arising for the most part from a departure from the course charted by the pleadings; but they do not necessarily result in reversible error.

The defendant's pleading in setting up his counterclaim is very narrow in its scope, although in the progress of the trial little attention was given to its limitations. Pleading *ad damnum,* he itemizes his damages arising from the alleged breach of warranty, in language purporting to be comprehensive and inclusive, as $1,500 paid on the purchase price, $695.21 freight charges incurred, and $156.23 handling charges, totaling the damage at $2,351.44; and in an ensuing paragraph again alleges that his damages by reason of the breach were $2,351.44, with interest thereupon. This was in the body of the pleading. It was in the power of the court, and doubtless would have been its duty on objection, to have limited the evidence of defendant to these items, and recovery could not exceed the amount so alleged and demanded. There was no objection, however, except as to the attempted proof of loss of expected profits in the Louisiana transaction; and defendant's evidence, properly excluded on other grounds stated *infra,* is also referable to the above stated principle.

1. Only those damages may be awarded for a breach of contract which are within the reasonable contemplation of the parties as a natural and probable consequence of the breach and which are, therefore, foreseeable. *Troitino v. Goodman,* 225 N. C., 406, 412, 35 S. E. (2d), 277; Williston on Contracts, sec. 1344; Restatement, Contracts, sec. 330. Special or extraordinary damages cannot be recovered unless the person sought to be charged is at the time of making the contract informed of the special circumstances out of which they may probably arise, and they are thus brought within the principle of reasonable foreseeability. *Hadley v. Baxendale,* 9 Ex., 321; *Troitino v. Goodman, supra; Iron Works v. Cotton Oil Co.,* 192 N. C., 442, 135 S. E., 1002. Instances of such special damages are most frequently met with in executory contracts; and especially those relating to transportation, manufacture, repair of machinery, and the like, but such damages in proper cases may be recoverable for breach of an executed sales contract. There are, however, two requisites for recovery—one factual, and the other procedural; as stated above, the parties sought to be charged must have been duly informed at the time of making the contract of the special circumstances

out of which the damage may arise; *Troitino v. Goodman, supra; Raleigh Iron Works v. Cotton Oil Co., supra; Hadley v. Baxendale, supra;* and the fact of such notice and of the special damage must be adequately set forth in the complaint or pleading. Special damages "must be stated and described in the declaration or complaint." Williston on Contracts, sec. 1344A. After stating the rule as to the pleading of general damages, it is said in Southerland on Damages, p. 1365, sec. 419: "If special circumstances existed entitling the purchaser to greater damages because the default defeated a particular purpose known to the contracting parties, they must be stated and also the facts which, under the circumstances, rendered the injury greater." "Special damages are required to be stated in the declaration for notice to the defendant and to prevent surprise at the trial." *Ib.*, p. 1364. See cases under Note 47. In the case at bar it was not so pleaded, and no attempt was made on the trial to show that plaintiffs had any information or knowledge of the Louisiana transaction on which the defendant, somewhat remotely, we think, predicates loss of profit—in fact, there is a clear inference from his testimony that no such notice was given; and there was nothing in his pleading on which such special damage could be based. The objection and exceptions comprised in it are untenable.

2. The defendant excepts to the instruction given to the jury on the second issue relating to the recovery by the plaintiff of the purchase price promised for the forms. The defendant admitted the receipt of the road forms purchased from the plaintiffs, and the purchase price he agreed to pay. Moreover, he permitted this to be embodied in the first issue and consented that the issue should be answered "Yes." Nothing else appearing, the plaintiffs, upon the facts established in that issue, were *prima facie* entitled to recover the purchase price. Without objection, the partial payment which had been made by defendant was credited to him. The amount of plaintiffs' recovery so found was provisional and made subject to diminution to its full extent by any recovery made by defendant in the third issue. The defendant made no exception to the issues as so presented or to their sufficiency to completely determine the controversy; and in view of the result, this was not prejudicial to him.

The objection, however, appears to be that more proof was required of the plaintiffs to entitle them to recover—that the defendant having alleged a breach of warranty, the burden rested upon the plaintiffs to show that they had delivered to the defendant articles free from challengeable defects, or of the quality and fitness such warranty might imply.

Breach of warranty in a sales contract is an affirmative plea, whether as a defense or ground for recovery of damages, and the burden is on one who asserts it to establish it by the greater weight of the evidence.

The plaintiffs were not bound to anticipate or negative the defense or, *imprimis,* to disprove an unproven claim. The objection is without merit.

3. His Honor limited recovery by defendant on his counterclaim to the total amount of the purchase price paid or agreed to be paid. Perhaps such a rule would have been more applicable to some situations met with where the remedy sought is recision or offset connected with the transaction, which defendant's form of pleading and allegation of damage strongly suggest. However, notwithstanding any technical inaccuracy in the rule, since the defendant, on an unrestricted presentation to the jury of all the elements of damage he chose to offer (except the properly excluded special damage attributed to the Louisiana transaction), recovered nothing, the limitation did not affect him. Had the jury reached or endeavored to exceed the limitation set by the court, a different situation might have been presented. Obviously, defendant's difficulty lay with the jury, not with the court.

Our attention is called to the limitations on implied warranty growing out of the fact of inspection. We do not consider it necessary to discuss this or, indeed, other rules which might have constituted a hindrance to the defendant, because no such limitations were imposed upon him in the trial, and no exception brings the subject into question. In fact, technicalities that might have rendered defendant's recovery on his counterclaim more difficult were disregarded, and he was given practically free rein before the jury. There was sharp contradiction between his evidence and that of the plaintiffs, and the evidence of the latter prevailed with the jury.

If there was any prejudicial error in the trial, and we do not conclude that there was, it is not disclosed in the exceptions.

We find

No error.

HARRISON CLARK AND WIFE, CHARITY POOLE CLARK, v. R. C. CAGLE AND WIFE, DONNIE POOLE CAGLE.

(Filed 10 April, 1946.)

1. Appeal and Error § 40d—

Findings of fact by a referee approved by the trial judge cannot be reviewed on appeal if supported by any competent evidence.

2. Boundaries § 10—

In this reference to determine the location of the boundary lines of plaintiffs' land *it is held* there was sufficient evidence to support the referee's findings as to the location of the boundaries, and the lower court

properly overruled defendants' exception to the refusal of the referee to grant their motion for judgment as of nonsuit.

3. Reference § 9—

Exceptions to the rulings of the referee must be brought forward in order for them to be presented for determination by the judge.

4. Boundaries § 5g—

Where plaintiffs' title as heirs at law is admitted, leaving only the question of locating the boundaries for determination, the referee properly admits in evidence the record in the partition proceeding to show that land in dispute was carved out of the lands partitioned, some of which boundaries were coincidental with the boundaries to the *locus in quo* claimed by plaintiffs.

5. Appeal and Error § 29—

An exception which is not referred to in the brief or argument is deemed abandoned. Rule 28.

6. Appeal and Error § 14—

Where appeal entries are noted at the time of the signing of final judgment, the trial court is without authority at a subsequent term, and within the time allowed for service of case on appeal, to set aside the judgment and substitute another except by consent, and upon objection a substituted judgment not consented to must be stricken out.

7. Costs § 6—

After decision of the Supreme Court modifying and affirming a judgment of the Superior Court on appeal from the referee, allowances constituting items of costs may be adjusted as provided by G. S., 6-7.

APPEAL by defendants from *Phillips, J.*, at October Term, 1945, of MONTGOMERY. Modified and affirmed.

This action was instituted in 1941 to restrain defendants from cutting timber on plaintiffs' 30-acre tract of land.

The plaintiff Charity Poole Clark is one of the heirs of H. P. Poole, deceased. At the time of his death H. P. Poole owned three tracts of land, containing respectively (1) 7⅛ acres, (2) 64 acres, and (3) 60 acres. The 64-acre tract has no relation to this controversy and may be disregarded. After the death of H. P. Poole in 1927 his lands were partitioned among his heirs and to plaintiff Charity Poole Clark was allotted therefrom a tract of 30 acres, described as follows:

"Lot No. 4. Beginning on a stake formerly a corner by poplar on the old Morganton Road and runs thence N. 17 E. 4 poles to a stone pile on South side of the highway; thence with its various courses N. 80 W. 12 P. N. 85 W. 8 P. S. 86 W. 8 P. S. 79 W. 28 poles to a stake in a line of Lot No. 3; thence with its line reverse S. 20 W. 73 poles to its corner stone pile in the old line; thence with its S. 53 E. 26 poles to a

pine corner of the 7⅛-acre tract; thence with its line S. 40 W. 19 poles to its corner stake; also Cagle's corner; thence with its other line reverse N. 76½ S. (S. 76½ E.) 41½ poles to its other corner stake by pine; with and beyond its other line North about 17½ E. 104 poles to the beginning, containing 30 acres more or less."

This tract embraced the 7⅛-acre tract, and plaintiffs claim it was the eastern portion of the 60-acre tract.

At April Term, 1942, a consent judgment was entered in the cause wherein the defendants disclaimed any interest in either of the three tracts referred to, and it was adjudged that Charity Poole Clark and other heirs at law of H. P. Poole were owners in fee of said lands, and it was ordered that a survey be made of these lands to determine the location of same. The lands were described in the judgment as follows:

"First Tract: Beginning on a stake by post oak and pine, old corner of the 100-acre tract, and runs with its line reverse S. 37 E. 23 poles to a stake dogwood pts. in S. J. Smitherman's line; thence with his line S. 19 W. 30 poles to his corner; with his other line N. 76½ W. 41½ poles to a stake in the old 100-acre tract; thence with its line reverse N. 40 E. 52½ poles to the beginning, containing 7⅛ acres, more or less.

. . .

"Third Tract: Beginning at a stake by a twin pine red oak pts. Jon Bruton's fourth corner of his seventy-five-acre entry and runs with his line N. 45 E. 44 poles to his corner post oak on the North side of the Morganton Road; thence with said road 95 to Angush Martin's line; thence with his line S. 10 W. 100 poles to a stake in the old field; thence with his other line N. 80 W. 100 poles to Caldwell Poole's line; thence with his line to the beginning, containing 60 acres more or less."

No report of survey having been made, at September Term, 1944, the court appointed two surveyors to make the survey, and, as the only question remaining was one of boundary, appointed R. L. Brown, Esq., referee to determine the true location of the boundary lines of the described lands.

On the hearing before the referee plaintiffs offered in evidence the special proceeding for partition showing the allotment to the plaintiff from the lands of H. P. Poole, lot #4 containing 30 acres described as hereinbefore set out. Plaintiffs offered oral testimony as to the location of the boundary lines of the 30-acre tract. J. M. Furr, one of the surveyors, testified in substance that the boundaries of the 30-acre tract, according to plaintiffs' contention, were laid down on the map with beginning point, the northeast corner of the tract, indicated by the letter F, and that the eastern boundary line was represented by the letters F to G; the southern line from G to M; thence northeast to point "4" in the line of the 7⅛-acre tract; thence westwardly to point "T"; thence

northwardly, constituting the western boundary of the tract, to a point in the old Morganton Road designated by the letter "R"; thence for the northern boundary, along the said road to the beginning F. It was also testified by this witness that according to the survey of the 60-acre tract as laid down on the map the northwest corner of the tract on the old Morganton Road was indicated by the figure "2," and that the call thence was along said road 95 (poles) to Angus Martin's line; that if plaintiffs' contention as to the location of "2" be accepted the distance of 95 poles east along the road would give out 410 feet (24.8 poles) before reaching point F; that on the ground at the point marked F on the map there is a stump and stone; that the 30-acre tract as represented on the map is within the 60-acre tract, the eastern line F to G being the east line of the 30-acre tract.

Witness J. C. McIntyre testified that he was son-in-law of H. P. Poole, executor of his will, and a party to the partition proceeding in which the 30-acre tract was laid off and allotted to plaintiff Charity Poole Clark; that he had known these lands for more than 40 years, and was familiar with the 30-acre tract; that it is the east boundary of the 60-acre tract; that letter F is one of the corners of the 30-acre tract. "The old deed has S 10 W 100 poles to W(G) on this map; thence N. 76½ W 41½ poles that is at M; . . . thence N 40 E 16½ poles to figure '4'; thence N 52 W 26 poles. . . . The 30-acre tract goes back to the Morganton road. It goes 4 poles out to the next (new) highway in (to) the stake in the line in the third tract in the division; thence back to the stump F on the map." This witness testified he had seen H. P. Poole cultivating the 7⅛-acre tract—had seen this tract of land cultivated 30 years or more. "What is shown on the map as the beginning corner of the 30-acre tract is point F, then it goes to G, then to M, then to 4, to T, to R (on Morganton Road), then back to a stone on the highway, point F on the map." He further testified that these were the boundaries of the 30-acre tract. He also testified that on the line between the points marked F and G there was at one time a rail fence and H. P. Poole had put up a wire fence; that between the points marked G and M were sweetgum trees and a wire fence; between M and "4" a persimmon tree; between "4" and T, now cleared, "I saw this line in the new division (the partition) in 1926 and in 1936." Between the points indicated by letters T and R on the map "is a well marked line." "The Morganton road is the last line of the 30-acre tract." "There were some marks on the line from F to G." He said plaintiffs did not claim south of the line 4 to T. It was admitted that the 7⅛ acres belonged to plaintiffs and it was not controverted it was correctly located.

The defendants offered no evidence, but moved for judgment as of nonsuit, on the ground that plaintiffs had failed to offer sufficient evi-

dence of the location of the 30-acre tract. The motion was denied except in so far as it related to plaintiffs' claim for damages—none having been shown.

The referee reported findings of fact and conclusions of law in favor of plaintiffs, determining the location of the boundary lines of plaintiffs' land. Defendants excepted to each of the findings and conclusions. On the hearing in the Superior Court, the trial judge overruled defendants' exceptions, and approved and confirmed the findings of fact and conclusions of law as reported by the referee. Judgment was rendered restraining defendants from cutting timber on plaintiffs' land as described and located by the referee.

Defendants excepted and appealed to this Court.

M. E. Bolton and Ehringhaus & Ehringhaus for plaintiffs, appellees.
Bob V. Howell and J. A. Spence for defendants, appellants.

DEVIN, J. The defendants assign as error the ruling of the trial judge in approving and confirming the denial by the referee of their motion for judgment of nonsuit. It was contended that plaintiffs had not offered sufficient evidence to locate the 30-acre tract of land on which it was alleged the defendants had trespassed.

The action, which had been originally instituted to restrain timber cutting on plaintiffs' land, had resulted in a consent judgment establishing the plaintiffs' title, as heirs of H. P. Poole, to the three tracts of land described in the judgment from which the 30-acre tract had been cut off and allotted to the *feme* plaintiff in the partition of the lands of H. P. Poole, thus leaving open only the question of determining the location of the 30-acre tract.

The question of title was thus adjudicated. Only the question of locating the boundaries remained. The referee to whom the matter was referred found and reported what he concluded were the true boundary lines and determined the location of the land described. The trial judge has approved and confirmed.

It is the established rule that findings of fact by a referee approved by the trial judge cannot be reviewed on appeal if supported by any competent evidence. *Anderson v. McRae,* 211 N. C., 197, 189 S. E., 639; *Dent v. Mica Co.,* 212 N. C., 241, 193 S. E., 165; *Holder v. Mortgage Co.,* 214 N. C., 128, 198 S. E., 589.

The defendants' appeal presents the question whether there was any competent evidence to support the referee's findings as to the location of the boundary lines of the described 30-acre tract of land.

We note that the defendants admit the title to the 7⅛-acre tract and do not controvert its location. It would seem from the description of the

lands in the partition proceeding and in the judgment heretofore rendered that the 30-acre tract was cut off from the larger 60-acre tract, and that some of the lines of the 30-acre tract coincide with those of the 7⅛-acre tract and are so connected therewith as to indicate that the 7⅛-acre tract was included in and constituted the southern end of the 30-acre tract. From the testimony of a witness who said he had known these lands for many years, it appears that the boundary lines of the 30-acre tract are visible and well defined; that the northern boundary is the Morganton Road; that the eastern and southern boundaries were denoted by fences erected by H. P. Poole; that the western boundary was a well marked line; that the witness had seen the line at the time of the partition (to which he was a party) when the 30-acre tract was cut off and allotted to the plaintiff. The presence of a stump and stone at the northeast corner of the land was in evidence.

We observe also that in the partition of the lands of H. P. Poole in 1927 the 30-acre tract allotted to the plaintiff is described as beginning at a poplar and stone pile on the Morganton Road, and running thence westwardly along the old Morganton Road by various courses 56 poles, thence southwardly 73 poles to a stone; thence eastwardly 26 poles to a corner in the line of the 7⅛-acre tract; thence with its line southwest 19 poles to its corner; thence eastwardly with its line 41½ poles to its other corner; thence with and beyond its other line north about 17½ degrees east 104 poles to the beginning.

It is apparent from these descriptions that within the boundary lines of the 30-acre tract and at its southern end is located the 7⅛-acre tract. A portion of the west line of the 30-acre tract coincides with the west line of the 7⅛-acre tract; the south line of the 30-acre tract is the south line of the 7⅛-acre tract; and the east line of the 30-acre tract follows the east line of the 7⅛-acre tract as far as the latter extends, and then continues by the same course to the beginning on the old Morganton Road.

While the western boundaries of the larger 60-acre tract were not definitely pointed out by the testimony, it does appear that the northern boundary is the old Morganton Road, and that the eastern boundary, extending southward from a point on this road, was denoted by a fence—originally a rail fence and later a wire fence erected by H. P. Poole—on the line now indicated on the map by the letters F to G; and that likewise the southern boundary was evidenced by a wire fence and trees on the line now indicated on the map as G to M. From this the reasonable inference is deducible, as testified by the witness McIntyre that the 30-acre tract is the "east boundary of the old tract of land the 60-acre tract." Thus the testimony tends to locate the lines of the eastern por-

tion of the 60-acre tract which was cut off into the 30-acre tract so as to include the *locus in quo.*

Again, the description of the 60-acre tract in the deed to H. P. Poole, designates the north line as extending eastward along the Morganton Road 95 (poles) to Angus Martin's line; thence his line south ten degrees west 100 poles, with the next line running westwardly. While no evidence was offered as to the location of Angus Martin's line, this description indicates that Angus Martin's land lay to the east, and that the line running south from the Morganton Road was both the eastern boundary of the 60-acre tract and the dividing line between the lands of H. P. Poole and Angus Martin; and it was along this line (now indicated on the map by the letters F to G) that H. P. Poole erected a wire fence to replace a previously existing rail fence.

We think the plaintiffs have offered some competent evidence to determine the boundaries and locate the plaintiffs' land as found by the referee and approved by the judge. Hence the motion for judgment of nonsuit was properly denied.

At the time of the taking of the testimony before the referee, the defendants noted exceptions to the ruling of the referee in the admission of certain testimony, but in their exceptions to the report of the referee none of these were brought forward, so they could be ruled upon by the judge, except that relating to the admission of the record of the special proceeding for partition. *Pack v. Katzin,* 215 N. C., 233, 1 S. E. (2d), 566; *Anderson v. McRae,* 211 N. C., 197, 189 S. E., 639. The exception brought forward was properly overruled, for the reason that the title of the plaintiffs, as heirs of H. P. Poole, to the three tracts of land having been admitted, it was competent to offer the record of this proceeding to show that the 30-acre tract was carved out of these lands and allotted to the plaintiffs. Furthermore, this exception seems to have been abandoned as it was not referred to in brief or argument (Rule 28).

Defendants bring forward in their assignments of error exception to the action of the trial judge in attempting at a subsequent term of the Superior Court of Montgomery County to set aside the judgment previously rendered by him, and to substitute therefor another judgment, because of some inadvertence in the first. As the record shows final judgment in the cause was signed 3 October, and at the same time entries of appeal to this Court were noted, the judge was without power at a subsequent term (29 October), and within the time allowed for service of case on appeal, to set aside the judgment and substitute another, unless by consent. *Likas v. Lackey,* 186 N. C., 398, 119 S. E., 763; *Lawrence v. Lawrence, ante,* 221. Notice of the judge's intention to set aside the first judgment and substitute another was given informally shortly before the subsequent term began, but defendants did not

appear or consent, and excepted to the action of the judge. Though it appears that the only change in the judgment was in the matter of certain allowances and not as to the merits, the exception now presented on this appeal must be sustained. The substituted judgment will be stricken out, and the original judgment affirmed. Allowances constituting items of costs may be adjusted as provided by G. S., 6-7.

Modified and affirmed.

STATE v. CHARLIE CARROLL.

(Filed 10 April, 1946.)

1. Automobiles § 29—

Before the State is entitled to a conviction under G. S., 20-138, it must show beyond a reasonable doubt that the defendant was driving a motor vehicle on a public highway of this State while under the influence of intoxicating liquor or narcotic drugs.

2. Same—

A person is under the influence of intoxicating liquor or narcotic drugs, within the meaning and intent of G. S., 20-138, when he has drunk a sufficient quantity of intoxicating beverage or taken a sufficient amount of narcotic drugs, to cause him to lose the normal control of his bodily or mental faculties, or both, to such an extent that there is an appreciable impairment of either or both of these faculties.

3. Same—

An instruction that a person is under the influence of intoxicating liquor when "he has drunk a sufficient quantity of alcoholic liquor or beverage to affect, however slightly, his mind and his muscles, his mental and his physical faculties" *is held* for error.

4. Criminal Law § 79—

Assignments of error not brought forward in appellant's brief are deemed abandoned. Rule 28.

APPEAL by defendant from *Gwyn, J.,* at November Term, 1945, of CALDWELL.

Criminal prosecution tried upon two warrants, one charging reckless driving and the other with operating a motor vehicle while under the influence of liquor or narcotic drugs, in violation of G. S., 20-138. The jury returned a verdict of not guilty as to the charge of reckless driving and a verdict of guilty as to the charge of operating a motor vehicle while under the influence of liquor. From the judgment pronounced upon the verdict, the defendant appeals, assigning errors.

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

W. H. Strickland for defendant.

DENNY, J. The appellant assigns as error the following portion of his Honor's charge: "Where a person has drunk a sufficient quantity of alcoholic liquor or beverage to affect, however slightly, his mind and his muscles, his mental and his physical faculties, then he is under the influence of intoxicating liquor or beverage."

The prosecution is relying upon *S. v. Dills,* 204 N. C., 33, 167 S. E., 459; *Wilson v. Casualty Co.,* 210 N. C., 585, 188 S. E., 102; and *S. v. Harris,* 213 N. C., 648, 197 S. E., 142, to sustain this charge. It is contended that the instruction given was approved by this Court in the case of *Wilson v. Casualty Co., supra.* In that case the plaintiff, as beneficiary in an accident insurance policy, brought an action against the insurance company on the policy issued by it on the life of her husband, to recover for his accidental death. The defendant denied liability on the ground that the insured was intoxicated at the time of the injury and pleaded as a defense, a provision in the policy which contained the following language: "The insurance under this policy does not cover any loss, fatal or otherwise, sustained: while intoxicated or under the influence of or affected by, or resulting directly or indirectly from intoxicants or narcotics, . . ." On a proper issue presenting this defense, the trial judge instructed the jury as follows: "The court instructs you that, under the law, 'intoxicated' is synonymous, or practically so, with the word 'drunk'—that they mean practically, in ordinary usage, the same thing—an intoxicated person is a drunken person—a drunken man is an intoxicated man. And that means, intoxicated means, in law, that the subject must have drunk of alcoholics to such an extent as to appreciably affect and impair his mental or bodily faculties, or both. Now, the court instructs you further, that to be under the influence or affected by liquor means, that the subject must have drunk a sufficient quantity to influence or affect, however slightly, his body and his mind, his mental and physical faculties. Not that they must be appreciably impaired, not that his emotions or passions must be stimulated or excited, or aroused, and the judgment impaired, but it does mean that to be under the influence or affected by it, must to some extent, at least, affect him. He must to some extent, at least, feel it to be affected by it. If the defendant has satisfied you from the evidence, and by its greater weight, that the deceased, R. C. Wilson, was intoxicated or under the influence of, or affected by, intoxicants at the time of the fatal injury, as alleged in the answer, it will be your duty to answer that issue 'Yes.'"

Notwithstanding the above instruction, which we think was most favorable for the defendant, the jury found that the insured was not intoxicated or under the influence of or affected by intoxicants at the time of his fatal injury. The plaintiff recovered judgment for the face amount of the policy. The defendant appealed and assigned as error that portion of the charge quoted above. In passing on the exception the Court said: "We see no error in the charge, taking same as a whole, defining the condition a party must be in to avoid the policy. . . . Under the terms of the policy, the charge is favorable to the defendant."

In the instant case, we are not dealing with a contract. Nor can the instruction be construed as favorable to the appellant. We are called upon to determine whether the instruction given is proper in a criminal proceeding, where a defendant is being tried upon a warrant charging him with operating a motor vehicle while under the influence of intoxicating liquor or narcotics. The answer must be in the negative.

The meaning of the phrase "Under the influence of liquor" is defined in Black's Law Dictionary (3rd Ed.), p. 1775, as follows: "In statutes or ordinances relating to the operation of motor vehicles, it has been construed as equivalent to the words, 'in an intoxicated condition,' *State v. Dudley,* 159 La., 872, 106 So., 364, 365, and to the words, 'in a drunken or partly drunken condition,' *Daniels v. State,* 155 Tenn., 549, 296 S. W., 20, 23, but not as synonymous with the words, 'while intoxicated,' *Cannon v. State,* 91 Fla., 214, 107 So., 360, 362. The expression is said to cover not only all the well-known and easily recognized conditions and degrees of intoxication, but any abnormal mental or physical condition which is the result of indulging in any degree in intoxicating liquors and which tends to deprive the driver of that clearness of intellect and control of himself which he would otherwise possess. *Latimer v. Wilson,* 103 N. J. Law, 159, 134 A., 750, 751. It is applicable to the condition created where intoxicating liquor has so far affected the nervous system, brain, or muscles of the driver as to impair to an appreciable degree his ability to operate an automobile in a manner that an ordinarily prudent and cautious man in the full possession of his faculties, using reasonable care, would drive a similar vehicle under like conditions. *People v. Dingle,* 56 Cal. App., 445, 205 P., 705, 706; *People v. McKee,* 80 Cal. App., 200, 251 P., 675, 677."

It will be noted that in the case of *Wilson v. Casualty Co., supra,* the Court made a distinction between a person who is drunk and one under the influence of or affected by liquor. We are of the opinion the Legislature did not intend that any such distinction should be made in the interpretation and enforcement of the statute under consideration. When a person drinks a sufficient quantity of liquor or other intoxicating beverage to cause him to lose the normal control of his bodily and mental

faculties to such an extent that such loss of the normal control of these faculties is appreciable, then such person is under the influence of liquor within the meaning of the statute. And until there is some appreciable impairment of the mental or physical faculties, or both, the person is neither drunk nor under the influence of liquor within the meaning of the statute.

In *S. v. Dills, supra,* the defendant excepted to evidence to the effect that a short time before the accident the defendant was in the car, lying on the steering wheel, drunk. The Court said: "The word 'drunk' is defined as, 'Under the influence of intoxicating liquor or drugs to such an extent as to have lost the normal control of one's bodily and mental faculties,' New Standard Dictionary, and as, 'Under the influence of an intoxicant, especially an alcoholic liquor, so that the use of the faculties is materially impaired.' Webster's New International Dictionary. The definition is accepted and generally understood, and the word as used by the witness imports the statement of a fact based upon observation. In no other way could the witness more definitely have stated his conception."

In *S. v. Harris, supra,* this Court, in a *per curiam* opinion, approved the following portion of the court's charge: "If a man is under the influence of intoxicating liquor he has got enough to make him think or act or do differently from what he would think or act if he did not have it, whether it is a spoonful or a quart, whether it is a bottle of beer or a quart of liquor."

In the above instruction, the court was not defining the word "drunk," or the expression "under the influence of intoxicating liquor," but stated as a fact that "If a man is under the influence of liquor he has enough to make him think or act or do differently from what he would . . . if he did not have it." The remaining part of the charge to which the defendant objected, was to impress upon the jury the fact that it is immaterial how much or how little intoxicating liquor may be required to cause one to be under its influence. A very small quantity of intoxicating liquor might substantially affect the mental and physical faculties of one person, while such an amount might not appreciably affect some other person. The gravamen of the offense charged there, as in the case now before us, was driving a motor vehicle on a public highway, while under the influence of an intoxicant. We realize the necessity for strict enforcement of the statutes enacted for the protection and safety of the public in the use of our highways, but, before the State is entitled to a conviction under G. S., 20-138, under which the defendant has been indicted, it must be shown beyond a reasonable doubt that the defendant was driving a motor vehicle on a public highway of this State, while under the influence of intoxicating liquor or narcotic drugs. And a

person is under the influence of intoxicating liquor or narcotic drugs, within the meaning and intent of the statute, when he has drunk a sufficient quantity of intoxicating beverage or taken a sufficient amount of narcotic drugs, to cause him to lose the normal control of his bodily or mental faculties, or both, to such an extent that there is an appreciable impairment of either or both of these faculties.

Assignments of error based on exceptions numbered one, three, six and eight, are not brought forward in the defendant's brief, as required by Rule 28, Rules of Practice in the Supreme Court, 221 N. C., 562, and are considered as abandoned. The remaining assignments of error are without merit. But, for the reason herein stated, there must be a

New trial.

STATE v. ALLIGOOD KING.

(Filed 10 April, 1946.)

1. Homicide § 4c—

A homicide committed in the perpetration of the capital felony of rape is murder in the first degree, G. S., 14-17, and premeditation and deliberation is presumed and need not be proven.

2. Homicide § 17—

In a prosecution for murder in the first degree, testimony that in his voluntary confession the defendant stated he entered the house in which deceased was sleeping with the motive of raping her is competent to show that the killing was done in the perpetration or attempt to perpetrate the capital offense of rape, which would constitute murder in the first degree without proof of premeditation and deliberation.

3. Criminal Law § 29c—

It is competent for the State to show motive for the commission of the crime charged although motive does not constitute an element of the crime.

4. Criminal Law § 81c—

Any error in the admission of evidence over defendant's objection is harmless when testimony to the same effect is admitted without objection.

APPEAL by defendant from *Burney, J.*, at October Criminal Term, 1945, of LENOIR.

Criminal prosecution upon indictment charging that defendant Alligood King "feloniously, wilfully, and of malice aforethought, did kill and murder Mrs. Raymond T. Hardy, etc."

It appears from the record that while the grand jury of Lenoir County had returned three true bills of indictment, charging defendant with

committing three separate capital offenses, burglary in the first degree, rape, and murder in the first degree, he was put on trial only on the indictment charging murder in the first degree.

The case on appeal as shown by the record on this appeal, discloses that the State offered on the trial below testimony tending to show in summary these facts:

On Sunday morning, 9 September, 1945, the body of Mrs. Raymond T. Hardy, cold in death, lying face down "on the floor off the bed" in the sun-, or front, sleeping-porch of her home in Lenoir County, near the Greene County line, North Carolina, was found between quarter past five and five-thirty o'clock by her husband upon his return from the Commercial Club in Kinston, to which he had gone about ten o'clock the night before and where he had remained all night. Mrs. Hardy, mother of three small children, was in good health when her husband left home Saturday night. But, upon his return, her throat had been cut in two places, severing her windpipe and large blood vessels. The wounds had smooth edges and apparently were made with some sharp instrument. These wounds, in the opinion of a medical expert, produced her death. (It was agreed in court that the doctor's description of the wounds on her body will relate only to such wounds as may have caused her death.) Other details as to wounds need not be stated.

The officers were notified and soon arrived. In searching the house where defendant resided, the officers found a knife, a pair of dark brown pants (bearing name of defendant) which were damp and splotched, and with blood on them inside the pockets; and a pair of shorts that had blood on them in front.

Defendant, who had resided and worked on the Hardy farm, but who had lately moved of his own accord to another place in the community, was taken into custody about eight o'clock that Sunday morning. Soon thereafter, during that day, in response to questioning by the Sheriff Churchill, defendant voluntarily confessed, briefly stated, that late in the night as he was returning to his home from Kinston, by the road that passed the Hardy house—the natural course for him to go to his home—he "fooled around" the Hardy house for a while; that he saw that Mr. Hardy's automobile was gone, and he knew by that Mr. Hardy was not at home; that he then entered the house by cutting the screen on the back porch door and unhooking the latch; that he pulled the light switch; that he got a jar of fruit out of the sideboard and went to Mrs. Hardy's room, where she was apparently asleep, snoring; that he first hit her over the head with the jar of canned fruit, and then got in bed with her and cut her throat; and that he killed her to keep her from telling on him. (Other details are not essential.)

There was evidence also that the officers found that everything defendant told Sheriff Churchill and others on this Sunday "was like he said it was."

In the course of the examination of the sheriff as a witness for the State with respect to the confession made to him by the defendant, the sheriff was asked this question and gave the following answer, to wit: "Q. Sheriff, during the time that he was talking to you on this Sunday afternoon—or Sunday, anyway (we told you this morning not to tell anything only what happened pertaining to the murder trial, but I do want to ask you this much) what did he tell you, if he told you anything, of why he went in the house? What was the purpose? A. I asked him if he minded telling me why he went in the house—did he go in there to ravish her or have carnal knowledge of her,—and he said, 'I went in there to ravish her.'"

Defendant objected to the question on the ground that it probably relates to something besides murder, for which alone he is being tried. Objection overruled and defendant excepted. Defendant then objected to the answer and moved to strike it. Motion was denied and defendant excepted. These constitute defendant's exceptions 1 and 2.

Further in this connection, Deputy Sheriff Burkett testified, without objection, that he heard defendant state substantially what Sheriff Churchill said. N. H. Byrd also testified, without objection, that he was present when defendant made his confession on Sunday morning when he was arrested, and that "he said he went in there to ravish her"—and that he killed her "to keep her from telling on him." And while defendant, as witness for himself, denied that he had made such statement to Sheriff Churchill, he testified: "After a while that other fellow said 'Did you go in there to rape?' And I told him, 'Yes, sir.' I was scared."

There was also testimony that on the following Friday night defendant told the sheriff a different story, saying that he killed Mrs. Hardy, but that her husband hired him to do it and was present when it was done. And on the trial defendant so testified. On the other hand, in this connection, the State offered the husband as a witness and he denied the testimony of defendant, and any implication by him in the death of his wife. The State also offered three other witnesses who testified that they were with the husband in the Commercial Club, and that he did not leave the club after he arrived about ten o'clock Saturday night until five o'clock Sunday morning.

Verdict: "Guilty of the felony of murder in the first degree whereof he stands indicted."

Judgment: Death by inhalation of lethal gas administered in the 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.

Matt H. Allen and John G. Dawson for defendant, appellant.

WINBORNE, J. The principal assignment of error brought forward on this appeal challenges the competency of the testimony of the sheriff as to statement of defendant as to his purpose in going into the Hardy house at the time of the killing of Mrs. Hardy. The assignment is untenable for several reasons, among which are these:

First: "A murder . . . which shall be committed in the perpetration or attempt to perpetrate any . . . rape . . . burglary or other felony, shall be deemed to be murder in the first degree . . ." G. S., 14-17, formerly C. S., 4200. For application see *S. v. Bennett, ante,* 82; *S. v. Mays,* 225 N. C., 486, 35 S. E. (2d), 494; *S. v. Dunheen,* 224 N. C., 738, 32 S. E. (2d), 322; *S. v. Miller,* 219 N. C., 514, 14 S. E. (2d), 522, and numerous others.

Thus when a homicide is committed in the perpetration of the capital felony of rape, the State is not put to the proof of premeditation and deliberation. In such event the law presumes premeditation and deliberation. Applying this principle to the present case, defendant is charged with murder in first degree. Hence, it is competent for the State to show that the killing was done in the perpetration or attempt to perpetrate the capital offense of rape.

Second: The evidence is competent in any event for purpose of showing a motive for the crime. It is competent to show motive for the commission of a crime, although this does not constitute an element of the crime charged. See *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. Oxendine,* 224 N. C., 826, 32 S. E. (2d), 648; *S. v. Smith,* 225 N. C., 78, 33 S. E. (2d), 472.

Moreover, if the testimony were incompetent for any purpose, any error in its admission would be harmless for that (a) testimony to the same effect was admitted in evidence without objection, *S. v. Hudson, supra; S. v. Oxendine, supra,* and (b) for that defendant, as a witness for himself, stated, without objection, that he had made substantially the same admission to another person. *S. v. Matheson,* 225 N. C., 109, 33 S. E. (2d), 590.

All other assignments of error are of formal nature, and, in the light of the record and the case on appeal, are without merit and require no special treatment.

Finally, it is appropriate to say that counsel for defendant, in their diligence, have failed to point out error in the trial below, and, after careful consideration, none appears to us. Apparently the facts have been fairly presented to the jury under a charge to which there is no exception, and in the judgment on the verdict of the jury we find

No error.

KATIE M. WOOTEN AND HUSBAND, R. E. WOOTEN; WILLIAM A. MOSELEY AND WIFE, ADA MOSELEY; B. D. PATRICK AND WIFE, ELLA B. PATRICK; WALTER PATRICK AND WIFE, WILLIE J. PATRICK; LIZZIE J. DIXON AND HUSBAND, JOHN L. DIXON; AND MRS. RACHEL S. TULL, V. MABEL M. OUTLAND; RACHEL MOSELEY; MAMIE E. JARMAN AND HUSBAND, TOLSON JARMAN; RUTH M. VICK AND HUSBAND, JAMES G. VICK; PAULINE MOSELEY; J. LYNWOOD MOSELEY AND WIFE, RETHA MOSELEY; DAVIS E. MOSELEY, INCOMPETENT; AND BRANCH BANKING & TRUST COMPANY, ADMINISTRATOR C. T. A. OF MRS. ADDIE MOSELEY TAYLOR, DECEASED.

(Filed 10 April, 1946.)

1. Wills § 34—

The general rule in this jurisdiction is that where an equal division is directed among a class of beneficiaries, even though they may be described as heirs of deceased persons, or heirs or children of living persons, the beneficiaries take *per capita* and not *per stirpes;* but this rule does not apply if testator indicates the beneficiaries are to take by families or by classes as representatives of deceased ancestors.

2. Same—

In a bequest or devise, as well as under the statute of distributions or the canons of descent, where the beneficiaries take as representatives of an ancestor they take *per stirpes*, but when they take directly under a bequest or devise as individuals and not in a representative capacity, and the testator provides that the division or distribution shall be in equal proportions, they take *per capita.*

3. Same—

A devise of lands to be equally divided among the heirs of named aunts and uncles of testatrix, requires the division to be made *per capita* under the general rule in this jurisdiction.

APPEAL by all the defendants except the administrator, from *Bone, J.*, at September Term, 1945, of LENOIR.

This is a special proceedings instituted before the clerk of the Superior Court of Lenoir County, for the sale for partition of certain lands situate in the City of Kinston and County of Lenoir, devised by Addie Moseley

Taylor, and, for the construction of her will devising and bequeathing the residue of her property, of which said lands are a part.

The testatrix made various bequests to named beneficiaries in her will, and in Item 6 thereof, she stated: "The balance to be equally divided among the heirs of Uncle Gus Moseley, Uncle Lam Moseley, Aunt Florence Patrick, Aunt Launa Jackson and Aunt Darlie Kilpatrick."

The will is dated 15 March, 1938. At that time the two uncles and three aunts referred to in the above residuary clause, were dead. They were survived by the following number of children respectively: Lam Moseley by seven, Gus Moseley by two, Florence Patrick by two, Launa Jackson by one and Darlie Kilpatrick by one. These thirteen children are the beneficiaries under Item 6 of the will. The court below held that they take *per stirpes,* and entered judgment accordingly. All the defendants except the administrator, appealed to the Supreme Court, assigning error.

John G. Dawson for plaintiffs.
Guy Elliott, J. A. Jones, and Whitaker & Jeffress for defendants.

DENNY, J. The only question involved in this appeal is whether the beneficiaries under the residuary clause of the will of Addie Moseley Taylor take *per capita* or *per stirpes.*

The answer to this question is not an easy one. Our Court has experienced a great deal of difficulty in similar cases. In *Stow v. Ward,* 12 N. C., 67, the language construed was as follows: "It is my will, and I do allow, that all the remaining part of my estate, both real and personal, be equally divided amongst the heirs of my brother John Ford, the heirs of my sister Nancy Stow, the heirs of my sister Sally Ward deceased, and nephew Levi Ward." The Court held that under the foregoing residuary clause, the real estate should be divided *per stirpes.* The same case had been before this Court prior thereto, and its opinion reported in 10 N. C., 604, which held the beenficiaries under this residuary clause took *per capita.* When the second decision was handed down, to the effect that the beneficiaries thereunder took *per stirpes* and not *per capita,* the personal property had been divided *per capita.* Whereupon, another action was instituted by *Ward v. Stowe, et als.,* 17 N. C., 509, to compel a redistribution of the personal property *per stirpes.* The Court held that its first opinion construing this will, to the effect that the beneficiaries thereunder took *per capita,* was correct, and that its last opinion to the effect that they took *per stirpes,* was wrong, thus overruling *Stow v. Ward,* 12 N. C., 67.

In *Bryant, Admr., v. Scott,* 21 N. C., 155, in considering the question now before us, the Court said: "All the cases upon the subject were

looked into, and much considered by the Court in the recent case of *Ward v. Stowe,* 2 Dev. Eq. Ca., 509; and they clearly establish the correctness of the decree made by his Honor. The only difficulty in that case arose out of the word *heirs,* there used as the description of the donees of a residue, in which real and personal estates were complicated. We were finally of opinion, that in that will, *children,* or, at any rate, *issue,* were meant by it; and it then followed, of course, upon the authorities, as we thought, that the different families of children did not take collectively or by representation, but severally, and as individuals who came within the general description. Several Chancellors have, in cases like this, of gifts to the testator's children, and to the children of deceased children, expressed the apprehension, that, in distributing *per capita,* they did not follow the intention; but they have never been able to find a ground for holding otherwise, and have thought themselves bound to that construction, although it might not be according to the intention, rather than adopt the opposite one, which obviously does violence to the words of the testator. The intention that the grand-children should take *per stirpes,* is conjectured from the reasonableness of it, as applied to the state of most families. But when the gift is made under circumstances which exclude all reference to the statute of distribution, that conjecture must be given up; and when to that is added a direction for an *equal division* among all the donees, no court could feel safe in making an unequal division."

In *Hobbs v. Craige,* 23 N. C., 332, the residuary clause read as follows: "The balance of my property to be applied to the payment of my debts; should there be a surplus, it is my will that it be equally divided among the heirs of my deceased brother, Samuel Foster, and the heirs of David Craige." The Court held that the surplus of the testator's estate should be divided *per capita* among the heirs of the deceased brother and the children of David Craige.

In the case of *Freeman v. Knight,* 37 N. C., 72, the testator made provision for certain funds to be equally divided between his heirs. He left children and grandchildren, who were the children of a daughter who predeceased him. The Court held that "Where personal property is given *simpliciter* to 'heirs,' the statute of distributions is to be the guide, not only for ascertaining *who* succeed, and who are 'the heirs,' but *how* they succeed, or in what proportions do they respectively take. But as the donees claim not under the statute, but under the will, if the will itself directs the manner and the proportions in which they are to take, the directions of the will must be observed, and the guidance of the statute is to be followed no further than where the will refers to it—that is to say, for the ascertainment of the persons, who answer to the description therein given. The testator has here directed the manner

of distribution—the proceeds are to be 'equally divided.' The division directed by the will must be obeyed, and the children of the deceased child take equal shares with the widow and surviving children."

The general rule in this jurisdiction is to the effect that where an equal division is directed among a class of beneficiaries, even though they may be described as *heirs* of deceased persons, *heirs* or *children* of living persons, the beneficiaries take *per capita* and not *per stirpes*. *Shull v. Johnson,* 55 N. C., 202; *Hastings v. Earp,* 62 N. C., 5; *Waller v. Forsythe,* 62 N. C., 353; *Britton v. Miller,* 63 N. C., 268; *Culp v. Lee,* 109 N. C., 675, 14 S. E., 74; *Leggett v. Simpson,* 176 N. C., 3, 96 S. E., 638; *Ex parte Brogden,* 180 N. C., 157, 104 S. E., 177; *Burton v. Cahill,* 192 N. C., 505, 135 S. E., 332; *Tillman v. O'Briant,* 220 N. C., 714, 18 S. E. (2d), 131; see Annotations 16 A. L. R., 79.

This rule, however, will not control if the testator indicates the beneficiaries are to take by families or by classes as representatives of deceased ancestors. *Martin v. Gould,* 17 N. C., 305; *Spivey v. Spivey,* 37 N. C., 100; *Henderson v. Womack,* 41 N. C., 437; *Bivens v. Phifer,* 47 N. C., 436; *Lowe v. Carter,* 55 N. C., 377; *Gilliam v. Underwood,* 56 N. C., 100; *Lockhart v. Lockhart,* 56 N. C., 205; *Burgin v. Patton,* 58 N. C., 425; *Grandy v. Sawyer,* 62 N. C., 8; *Harper v. Sudderth,* 62 N. C., 279; *Howell v. Tyler,* 91 N. C., 207; *Mitchell v. Parks,* 180 N. C., 634, 105 S. E., 398.

In a bequest or devise, as well as under the statute of distributions or the canons of descent, where the beneficiaries take as representatives of an ancestor they take *per stirpes, In re Poindexter,* 221 N. C., 246, 20 S. E. (2d), 49, 140 A. L. R., 1138. But, when they take directly under a bequest or devise as individuals and not in a representative capacity, and the testator provides that the division or distribution shall be in equal proportions, they take *per capita.*

We are not inadvertent to what *Walker, J.,* said, in speaking for the Court, in *Mitchell v. Parks, supra,* to wit: "A devise or bequest to the heirs of several persons will usually go *per stirpes.*" Ordinarily that is true, where there is no language in the devise or bequest to indicate a different intent on the part of the testator. But here an equal division among the heirs of the uncles and aunts is directed by the testatrix.

It is also pointed out in *Burton v. Cahill, supra,* that where the intent is doubtful, the degree of consanguinity may be considered, citing *Kirkpatrick v. Rogers,* 41 N. C., 130, and *Ex parte Brogden, supra.* All thirteen of the beneficiaries under the residuary clause in Addie Moseley Taylor's will, were her cousins and of equal degree of consanguinity.

After carefully considering the testamentary provision before us, and the opinions herein cited, we think these beneficiaries constitute but one

class and take *per capita* as individuals, and not *per stirpes* as representatives of their respective ancestors.

The judgment of the Court below is

Reversed.

STATE v. CLARENCE B. LEWIS AND HARRY MILLS.

(Filed 10 April, 1946.)

1. Grand Jury § 3—

The grand jury is not a trial court, but an investigatory body, and it is competent to send to the grand jury as many bills of indictment as may be necessary to get before it necessary witnesses and evidence from which it may decide the propriety of submitting the accused to trial.

2. Criminal Law § 22—

No question of double jeopardy is presented by the repeated investigation by the grand jury under bills of indictment, even though there be an identity of persons and description of offenses in the bills.

3. Criminal Law § 62f—

The trial court is without power even at the time of sentencing defendant to separate the term and provide that after serving a stipulated part of the sentence the balance should be suspended for a period of five years on condition of good behavior, since such provision is in effect an anticipatory parole and it is the spirit of the Constitution that the power of pardon, parole or discharge during the term of imprisonment should be the exclusive prerogative of the Governor.

4. Criminal Law § 83—

Where the trial court separates the term of sentence and provides that after serving a stipulated part of the term the balance should be suspended upon condition of good behavior, the case will be remanded for proper judgment rather than permit the valid portion of the judgment to stand, since it cannot be determined to what extent the sentence was affected by the ameliorating provisions.

APPEAL by defendants from *Gwyn, J.*, at November Term, 1945, of CALDWELL.

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

W. H. Strickland for defendants, appellants.

SEAWELL, J. The defendants were brought to trial on three bills of indictment, respectively, (a) charging Ed Church, Clarence Lewis and

Harry Mills with raping Emmie Green; (b) charging Clarence Lewis with raping Emmie Green; and (c) charging Harry Mills with assault on Estelle Jones with intent to commit rape.

The cases were consolidated for trial with the consent of the defendants. The solicitor announced in open court that he would not ask for a verdict against any of the defendants for the capital offense, but only in each case for assault with intent to commit rape as the evidence might justify.

The trial resulted in a verdict of not guilty as to Ed Church, and a verdict of assault on a female with intent to commit rape as to each of the defendants Lewis and Mills. These defendants appealed from the sentence imposed, and assigned errors covered by exceptions taken during the trial and to the judgments rendered upon the verdict.

We do not deem it necessary to print the evidence, either in summary or in full, since we find upon careful examination that the exceptions directed to it are not meritorious. Although sharply contradicted, the evidence was sufficient to go to the jury on the question of guilt as to each of the defendants, and the motions for judgment as of nonsuit were properly overruled. We can find no error relating to the admission or exclusion of evidence, as covered by the numerous exceptions addressed thereto.

However, there are two phases of the case which claim our attention:

1. At the same term of court two bills of indictment, one charging Ed Church with committing rape upon Emmie Green, and one charging Harry Mills with committing rape upon the same person, were returned "Not a true bill." The appellants urge that in the indictments found "Not a true bill" the grand jury had already passed upon the matters concerned, and the State was thereby estopped from presentation of other bills for the same offense, and the action of the grand jury in finding the true bills was ineffective. Apart from the discrepancies obvious upon comparison of the indictments, we do not think the objection could raise a serious question in trial procedure had there been an identity of persons and description of offenses in the indictments rejected with those found a true bill.

The grand jury is not a trial court, but an investigatory body, and no question of double jeopardy is presented by its repeated investigation under the bills presented to it. The Constitution, Article I, sec. 12, requires that "No person shall be put to answer any criminal charge, except as hereinafter allowed, but by indictment, presentment or impeachment," and this sufficiently explains the function of the grand jury as a part of the court. It is competent to send to the grand jury as many bills of indictment as may be necessary to get before them neces-

sary witnesses and evidence from which they may decide the propriety of submitting the accused to trial.

2. We have some difficulty in sustaining the judgments rendered against the defendants. The power of the court to suspend judgment in a criminal action upon proper condition is both inherent and statutory, but this has been understood as applying, at least in cases where the sole punishment is by imprisonment, to the judgment as a whole. But after sentencing each of the defendants to be confined in the State's Prison for a term of four years, his Honor undertook to separate the terms of imprisonment into two parts in the following way:

"Commitment to issue to put into effect forthwith two years of the term. The remainder of the term, to wit: two years, is suspended for a period of five years on the following conditions: That the defendant be of good behavior. That he violate none of the laws of the State. That he apply himself to legitimate, gainful occupation; that he support and maintain his wife and minor child or children according to his reasonable ability."

We do not doubt the wisdom and salutary effect of a judgment of this kind; but we can find no authority for its rendition.

After a defendant has begun the service of his term, or at least when that takes place after the adjournment of the court, it is beyond the jurisdiction of the judge to alter it or interfere with it in any way. The power of pardon, parole or discharge during the term of imprisonment is by the Constitution the exclusive prerogative of the Governor. While in this case the sentence in full was pronounced during the term of court, and while the convicted person was before the judge to receive his sentence, nevertheless, the form and effect of the sentence is substantially an anticipatory parole.

While it would be difficult to assert any direct conflict with the letter of the Constitution relating to parole, we believe it to be within the spirit of that instrument and the policy of our laws to leave the whole matter of discharge or release of prisoners who have begun serving their terms, whether absolutely or upon condition, to the pardoning or parole power of the Chief Executive, to be exercised in his discretion upon the facts as they exist at the time.

There is authority for the position that where the invalidity pertains to a separable part of the sentence, in the nature of an addition not affecting its integrity, that clause may be considered as surplusage and the judgment enforced. But the duty of meting out punishment to a convicted criminal is one of the gravest and most delicate tasks imposed upon a trial judge, demanding sound judgment and foresight. We have no way of knowing how much the sense of proportion and justice in the mind of the able judge who pronounced this sentence is reflected in its

ameliorating provisions. We think it is more consistent with justice and accepted practice to remand the case, as to each of the defendants, to the Superior Court of Caldwell County to the end that proper judgments may be rendered upon the verdict. It is so ordered.

Error and remanded.

JOHN C. DAVIS v. ALONZO LOVICK AND WIFE, LAURA DAVIS LOVICK, AND JEROME LOVICK.

(Filed 10 April, 1946.)

1. Frauds, Statute of, § 1—

Any person, plaintiff or defendant, against whom enforcement is sought may plead the statute of frauds against a contract voidable under the statute.

2. Frauds, Statute of, § 4—

A party is not estopped by his pleading from asserting the defense of the statute of frauds unless the pleading asserts the voidable contract as a necessary basis for the relief sought, and the mere recital of the parol agreement in the pleading does not adopt it or ratify it or waive the right to thereafter assert the statute in subsequent pleadings.

3. Same—Complaint held to state cause in ejectment regardless of verbal agreement and plaintiff was not estopped from pleading statute in reply.

Plaintiff alleged that he was life tenant of the *locus in quo* and the *feme* defendant the remainderman, that the *feme* defendant went into possession under a parol agreement to pay a stipulated sum yearly rental to the life tenant, with proviso that the amount should be increased as his necessities might require, that he had demanded an increased rental which defendant had refused to pay, and that he had thereupon demanded possession. Defendant admitted the allegations except that relating to provision for increase of rental in the parol agreement. *Held:* The complaint is good in an action in ejectment independently of the rental contract, and plaintiff was not estopped from pleading the statute of frauds in his reply against the verbal agreement.

4. Frauds, Statute of, § 11—

An agreement by the remainderman to rent the *locus in quo* from the life tenant for the entire period of the life estate is for an indefinite term and one which may last beyond three years and therefore such agreement comes within the statute of frauds, G. S., 22-2.

5. Landlord and Tenant § 6—

Where the statute of frauds is effectively pleaded to a verbal agreement by the remainderman to rent the premises for the duration of the life

estate, the remainderman becomes a tenant at will whose occupancy may be terminated *instanter* by demand for possession.

APPEAL by plaintiff from *Bone, J.*, at September Term, 1945, of LENOIR.

The plaintiff divided his land amongst his children, including the defendant Laura Davis Lovick, an illegitimate daughter, conveying to each of them by deed in fee the remainder after reserving to himself and wife a life estate. The wife is now dead. He alleges that by parol agreement he rented his life estate in their respective shares to each of his children, upon a rental of $100 per year, with the proviso that the rental should be increased as his necessities might require; and the defendant Laura Lovick went into the possession of the premises, and with her husband has remained there since, sometimes subrenting to her codefendant, Jerome Lovick, but remaining in control.

Plaintiff alleges that he notified the defendant Laura Lovick that because of his increased need, the rent for the year 1944 and subsequent years would be increased, but that said defendant notified him that she would not pay him any additional rental. Thereupon, the plaintiff demanded possession of the land, which possession was refused. The defendant Laura Davis Lovick and her codefendants replied to the complaint, denying that the rental agreement made at the time Laura Davis Lovick was put in possession of the premises contained any provision for increase of rent, admitting, however, that she held by deed from the plaintiff, subject to his life estate, and that she went into possession under contract of rental for the entire duration of plaintiff's life estate in the land. It is admitted that the rental contract was in parol.

The plaintiff replied, reiterating his first declaration as to the terms of the parol rental contract, and pleading the statute of frauds. G. S., 22-2.

Leaving out of consideration extraneous matter immaterial to the issue, the evidence of the plaintiff recapitulates the allegations of his pleading. The defendants offered no evidence, but at the close of plaintiff's evidence moved for judgment of nonsuit, which was allowed. The plaintiff appealed.

Whitaker & Jeffress for plaintiff, appellant.

J. A. Jones for defendants, appellees.

SEAWELL, J. The decision in this case turns upon the availability to the plaintiff of his plea of the statute of frauds against the parol rental contract upon which defendants rely for their defense in retaining possession of lands reserved by plaintiff in his life estate. The defendant

appellees argue that the plaintiff has asserted the parol contract, relies upon it for his cause of action and relief, and is therefore estopped from pleading the statute or obtaining any relief through it. We are of the opinion the position is not well taken.

The plaintiff brought his action in the Superior Court after dismissal of a summary proceeding in the court of a justice of the peace based on the supposed rental agreement. The defendants' counsel, seeming to have correctly divined the nature of the action, made no plea to the jurisdiction, which should have resulted in dismissal if their present position is sound.

However informal it may be—and we do not criticize it in that respect—the complaint is good in an action of ejectment, and, independently of the rental contract, sets up all the essentials for recovery in such an action when supported by proof. In point of fact, the defendants admit all the allegations of the complaint material to plaintiff's recovery and rely solely on the parol contract.

The plea of the statute is available to any person against whom it is sought to enforce a parol agreement obnoxious to its terms, plaintiff or defendant. He may waive it or invoke it, as he sees fit—*Allison v. Steele,* 220 N. C., 318, 17 S. E. (2d), 339—but he will not be deemed to have waived it where there is no necessary reliance upon it for the relief sought in the complaint, and in the face of his express plea of the statute.

The mere recital of the parol agreement in the complaint does not adopt it or ratify it, or fix plaintiff with reliance upon it for his cause of action. *Neal v. Trust Co.,* 224 N. C., 103, 106, 29 S. E. (2d), 206; *Grantham v. Grantham,* 205 N. C., 363, 171 S. E., 331. In the instant case it was competent for the plaintiff to set up the parol agreement for the purpose of showing the circumstances under which the defendants came into possession of the land, or its invalidity as a defense to an action for its recovery. An analogous situation is presented in *Grantham v. Grantham, supra.*

The plea of the statute occurs in plaintiff's reply to the answer, in which it is independently set up. Its occurrence in this way does not alter the legal principles which we have applied. The plea of the statute was open to the plaintiff, and it was properly pleaded.

The cited statute, G. S., 22-2, provides that ". . . all . . . leases and contracts for leasing lands exceeding in duration three years from the making thereof shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith or by some other person by him thereto lawfully authorized."

While they differ in particulars not material to this review, both versions of the parol agreement—that given by the plaintiff and that

given by the defendants—bring it within this statute. The agreement clearly contemplated the leasing of the land for the entire period of the life estate, four years of which had already passed when the action began, and an indefinite period of which is yet to follow.

This statute has been repeatedly interpreted as applying to a lease for an indefinite term or for one which may last beyond the three-year period to which a parol lease is limited. *Barbee v. Lamb,* 225 N. C., 211, 34 S. E. (2d), 65; *Love v. Edmonston,* 23 N. C., 152; *Wright v. Allred, ante,* 113.

The invalidity of the rental contract leaves the defendants in the position of tenants at will, whose occupancy may be terminated *instanter* by demand for possession. *Barbee v. Lamb, supra,* p. 213, and cases cited. The demand is admitted.

It does not clearly appear upon what theory the court below ordered a nonsuit or dismissed the case. Apparently, however, it was regarded as a valid rental contract, and nonsuit seems to have been allowed on the contention of the defendants that the provision in the contract, as alleged by the plaintiff, providing for an increase in the rents, even if admitted in truth and in fact, was too vague for enforcement. At least, that is the theory presented to the Court here.

The judgment of nonsuit is reversed, and the cause is remanded for further proceedings in accordance with this opinion.

Reversed and remanded.

STATE v. EDWIN PETERSON.

(Filed 10 April, 1946.)

1. Intoxicating Liquor § 9b—

In a prosecution under G. S., 18-50, no presumption of intent to sell arises from the unlawful possession of illicit liquor, and the State must prove not only unlawful possession of illicit liquor but also the intent to sell, unaided by any presumption or rule of evidence.

2. Intoxicating Liquor § 9d—Evidence held insufficient to overrule nonsuit in prosecution for unlawful possession of illicit liquor for sale.

Evidence tending to show that officers of the law were reluctantly admitted in defendant's house, that the officers heard whispering within the house before they were admitted, that in the kitchen there were defendant, his wife, and a man with whiskey on his breath, and in the front room a man and a woman, that they found in the kitchen a half-gallon jar, with a few drops of whiskey in it, and two glasses and a five-gallon bucket of slops, nearly full, smelling of liquor, and that there was fifty cents in

change on the stove, *is held* insufficient to overrule defendant's motion for judgment as of nonsuit in a prosecution under G. S., 18-50, for unlawful possession of illicit liquor for the purpose of sale.

3. Intoxicating Liquor § 9g: Criminal Law § 60—

A conviction on insufficient evidence on a warrant charging unlawful possession of illicit liquor for the purpose of sale, G. S., 18-50, cannot be sustained on the ground that the evidence might be sufficient to sustain a conviction of possession of a quantity of nontax-paid liquor, G. S., 18-48.

Appeal by defendant from *Burney, J.*, at October Term, 1945, of SAMPSON. Reversed.

Criminal prosecution under a warrant charging the unlawful possession of illicit liquor for the purpose of sale, heard in the Superior Court on appeal from the county recorder's court.

On the night of 21 January, 1945, three police officers went to the home of defendant. Two of them went to the kitchen window to listen. They heard two or three people inside talking. In a minute or two defendant's wife opened the door and saw them. They told her to open the door and let them in. She shut the door and locked it. The officers then heard a commotion in the room and "they were whispering and talking." In a minute or two Mrs. Peterson again opened the door and let the officers in. At that time defendant and his wife and a man were in the kitchen and a man and woman were in the front room. The kitchen had the odor of liquor in it.

The officers made a search. They found a one-half gallon jar, having just a few drops of whiskey in it, behind the stove, about fifty cents in change on the stove, two glasses on the table, and a five-gallon bucket of slops almost full. The jar, the glasses, and the slops had the odor of liquor. The breath of the man in the kitchen "smelled as if he had been drinking" but there was no indication that any of the others had taken a drink.

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

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

Butler & Butler for defendant, appellant.

BARNHILL, J. The merit of defendant's assignment of error, based on his exception to the refusal of the court below to grant his motion to dismiss, G. S., 15-173, is the only question presented for consideration. We are of the opinion the motion was well advised and should have been sustained.

The provisions of our statutes concerning the possession and sale of intoxicating liquors as brought forward in chapter 18 of the General Statutes of 1943 are not codified and are so numerous they tend to confuse. Section 2, chapter 44, Public Laws 1913, G. S., 18-32 (2), makes possession of more than one gallon of spirituous liquors at any one time *prima facie* evidence of possession for the purpose of sale, and the Turlington Act, section 10, chapter 1, Public Laws 1923, G. S., 18-11, makes the unlawful possession of any quantity of intoxicants *prima facie* evidence of such intent. On the other hand, section 14 (G. S., 18-49) of the Beverage Control Act of 1937 (chapter 49, Public Laws 1937, G. S., Art. 3, chapter 18) permits, under certain conditions, the transportation of tax-paid alcoholic beverages not in excess of one gallon, which necessarily implies the right to possess such quantity in one's home as provided by G. S., 18-11, and section 15 thereof makes it unlawful to possess for the purpose of sale any quantity of liquor on which the required taxes have not been paid, but creates no presumption or rule of evidence.

However, the applicability of these sections has been clarified by decisions of this Court. *S. v. Suddreth,* 223 N. C., 610, 27 S. E. (2d), 623; *S. v. Watts,* 224 N. C., 771; *S. v. Davis,* 214 N. C., 787, 1 S. E. (2d), 104.

When, as here, the State proceeds under the last-cited section, G. S., 18-50, it is put to proof not only of unlawful possession of illicit liquor but also of the intent to sell, unaided by any presumption. If it desires the benefit of the statutory rule of evidence which makes possession *prima facie* evidence of an intent to sell, it must proceed under the statute which creates it. *S. v. McNeill,* 225 N. C., 560; *S. v. Lockey,* 214 N. C., 525, 199 S. E., 715.

The evidence offered, when considered in the light most favorable to the State, creates nothing more than a bare suspicion. Neither the quantity of liquor nor the number of containers found reasonably impels the conclusion that the possession was for commercial purposes. And there is not a scintilla of evidence that defendant sold, offered for sale, or intended to sell any quantity of liquor.

One man in defendant's home had the odor of liquor on his breath. Did he take a drink before going there or after his arrival? Did he carry it with him or was it furnished to him in the defendant's home? If in the defendant's home, by which one of the four persons present? Did he pay for it, and if so whom did he pay? On this evidence a jury may guess or surmise but it cannot answer with that degree of certainty required in criminal prosecutions.

While one of the officers standing on the outside heard someone "whispering" on the inside of the closed room, he did not hear with such

acuteness that he could give testimony of any incriminating remarks. The other circumstances are insufficient to support a conviction.

We may concede, without deciding, that there is some evidence there was a quantity of nontax-paid liquor in defendant's home. If this be a fact, and it belonged to defendant or was in his home with his knowledge and consent, he might be guilty of the violation of the provisions of G. S., 18-48. But this Court will not sustain a conviction under a warrant charging a specific criminal offense created by statute merely because the defendant, on the evidence disclosed in the record, may be guilty of a similar offense created by another section of the same statute. *S. v. McNeill, supra.*

The judgment below is

Reversed.

ROBERT H. COLEMAN v. ERNEST E. WHISNANT ET AL.

(Filed 10 April, 1946.)

1. Pleadings § 15: Trial § 21—

A demurrer to the pleadings, G. S., 1-127, and a demurrer to the evidence, G. S., 1-183, are different in purpose and effect; the first challenges the sufficiency of the pleadings, and the second the sufficiency of the evidence.

2. Contracts § 5: Seals § 4—

At common law, which still obtains in this jurisdiction, instruments under seal are generally held to be good as against a plea by one of the parties of no consideration, because the seal imports consideration or renders it unnecessary.

3. Contracts § 5—Contract held supported by valid consideration and nonsuit on plea of nudum pactum was without error.

Plaintiff and defendants executed a contract relating to patent devices invented by plaintiff. Plaintiff instituted this action attacking the contract on the ground of want of consideration. The contract was under seal and recited a consideration of one dollar and other valuable considerations and also recited money furnished by defendants to perfect invention and promise to bear expense of obtaining patent, sale and assignment of one-fourth interest in the invention to each of the two defendants, and granted free use of the invention in manufacturing processes in defendants' mill. The contract also contained mutual promises relating to sale, lease or use of the patent by others without written consent of all the parties, and agreement to share any moneys derived from the sale or licensing of the invention. The only evidence offered by plaintiff on the question of consideration was to the effect that the dollar recited in the contract had not been paid, and that even if it had, it was inadequate, and

this evidence was excluded. *Held:* The fact that the contract was under seal, without suggestion that it was not intended to be under seal, and the contractual recitations therein afford sufficient consideration to support the contract, and defendants' motion for judgment as of nonsuit was properly allowed.

4. Evidence § 39—

Recitations of a contractual nature in a written instrument may not be contradicted or varied by parol.

5. Appeal and Error § 51a—

Where it is determined on appeal that plaintiff's recovery is dependent upon his showing want of consideration to support the contract involved in the litigation, judgment of nonsuit upon the subsequent trial upon failure of proof on the issue by plaintiff, conforms to the law of the case.

APPEAL by plaintiff from *Phillips, J.,* at January Term, 1946, of CATAWBA.

Civil action to recover (1) royalties upon the use by defendants in their hosiery mill of patent devices, invented by the plaintiff, and (2) damages for wrongful interference with plaintiff's use of his invention.

From judgment of nonsuit entered at the close of plaintiff's evidence, he appeals, assigning errors.

John C. Stroupe, W. H. Strickland, and Paul B. Eaton for plaintiff, appellant.

Joseph L. Murphy, Bailey Patrick, John W. Aiken, and S. J. Ervin, Jr., for defendants, appellees.

STACY, C. J. The case was here at last term, 225 N. C., 494, 35 S. E. (2d), 647, on demurrer to plaintiff's pleadings, complaint and reply. G. S., 1-127. It is here now on demurrer to the evidence. G. S., 1-183. The two are different in purpose and result; the one challenges the sufficiency of the pleadings, the other the sufficiency of the evidence. *Montgomery v. Blades,* 222 N. C., 463, 23 S. E. (2d), 844; *Smith v. Sink,* 211 N. C., 725, 192 S. E., 108.

It was held on the former appeal that the contract executed by plaintiff on 3 October, 1939, and later assignments constitute "a barrier which he must surmount in order to proceed with his action." He assails the contract as being without consideration, *nudum pactum,* and consequently unenforceable as to him. *Hatcher v. Odom,* 19 N. C., 302.

The contract is under seal and recites a consideration of "$1.00 and other valuable considerations." Mutual promises are also recited in the contract and later assignments. It is conceded that the defendants have complied with their part of the agreement. *Exum v. Lynch,* 188 N. C., 392, 125 S. E., 15; *Mfg. Co. v. McCormick,* 175 N. C., 277, 95 S. E., 555.

The plaintiff offered to show that the $1.00, recited in the contract, was never paid to him, and even if it had been, it was inadequate. *Knott v. Cutler,* 224 N. C., 427, 31 S. E. (2d), 359. This was the whole of his evidence on the subject. It was excluded, and plaintiff assigns error. The exception appears untenable.

In the first place, the contract is under seal. At the common law, which still obtains in this jurisdiction, instruments under seal are generally held to be good as against a plea by one of the parties of no consideration, because the seal imports consideration or renders it unnecessary. *Thomason v. Bescher,* 176 N. C., 622, 97 S. E., 654, 2 A. L. R., 626. "A bond needs no consideration. The solemn act of sealing and delivering is a *deed, a thing done,* which, by the rule of the common law, has full force and effect, without any consideration. *Nudum pactum* applies only to simple contracts." *Harrell v. Watson,* 63 N. C., 454. There is no suggestion that the contract was not intended to be under seal. *Allsbrook v. Walston,* 212 N. C., 225, 193 S. E., 151; *Williams v. Turner,* 208 N. C., 202, 179 S. E., 806.

Secondly, the instrument recites "other valuable considerations." *Fawcett v. Fawcett,* 191 N. C., 679, 132 S. E., 796. These include (1) recital of money furnished by defendants to perfect invention and promise on their part to bear expense of obtaining patent; (2) sale and assignment of one-fourth interest in the invention to each of the defendants, Ernest E. and Clarence L. Whisnant; (3) grant of a free license to the defendants to use the device in the manufacture of hosiery in their mill; (4) covenant to refrain from leasing to others or disposing of any interest in the invention "without the unanimous consent of all parties to this agreement"; (5) agreement to share equally in any moneys derived from a sale of the invention or from any licenses granted to others for its use; and (6) stipulation that invention shall not be used by anyone other than the defendants at their mill in Hickory "except by the written consent of all the parties to this agreement." These recitals are contractual in nature and may not be contradicted or varied by parol. *Ins. Co. v. Morehead,* 209 N. C., 174, 183 S. E., 606; *Samonds v. Cloninger,* 189 N. C., 610, 127 S. E., 706; *Parker v. Morrill,* 98 N. C., 232, 3 S. E., 511; Anno. 100 A. L. R., 17, *et seq.;* 22 C. J., 1171-1172. Additionally, then, they may be said to afford sufficient consideration to support the contract. *Institute v. Mebane,* 165 N. C., 644, 81 S. E., 1020; *Basketeria Stores v. Indemnity Co.,* 204 N. C., 537, 168 S. E., 822; *Warren v. Bottling Co.,* 204 N. C., 288, 168 S. E., 226.

Having failed to surmount the barrier which was pointed out on the former appeal, the ruling of the trial court that plaintiff may not "proceed with his action" conforms to the law of the case. *Harrington v.*

Rawls, 136 N. C., 65, 48 S. E., 571; *S. v. Williams,* 224 N. C., 183, 29 S. E. (2d), 744.

The judgment of nonsuit will be upheld.

Affirmed.

C. C. STONESTREET v. SOUTHERN OIL CO.

(Filed 10 April, 1946.)

1. Contracts § 5—

Consideration in the law of contracts is some benefit or advantage to the promisor, or some loss or detriment to the promisee. A mere promise, without more, lacks consideration and is unenforceable.

2. Same—Plaintiff's evidence held to show want of consideration to support defendant's promise, and nonsuit was proper.

Plaintiff leased and optioned certain lands to defendant. Thereafter the parties had a well dug on the property under a written agreement that each should pay one-half the cost, and each satisfied this agreement. Defendant later exercised the option. Plaintiff instituted this action to recover the one-half cost of digging the well borne by him, alleging that at the time of executing the written agreement defendant verbally agreed to so reimburse him in the event defendant exercised the option. Plaintiff testified on cross-examination that while the well was being dug, defendant's representative came to the premises and promised plaintiff to reimburse him if the option were exercised. *Held:* Upon plaintiff's testimony the agreement to reimburse was a mere naked promise, unsupported by consideration, and defendant's motion for judgment as of nonsuit should have been allowed.

APPEAL by defendant from *Armstrong, J.,* at August Term, 1945, of CABARRUS.

Civil action to recover one-half cost of digging well on land leased and optioned by plaintiff to defendant, which the defendant later purchased by exercising option.

On 24 October, 1934, the plaintiff and his wife leased to the defendant a lot for a filling station on the Kannapolis-Concord Highway for a term of ten years with privilege of buying at any time during the term of the lease at a price of $5,000. The lease contained the following stipulation: "Said Stonestreet and wife agree to furnish Lessee with water for the station insofar as they are able to do so with their present water supply. In case said Lessor's well fails to supply ample water, they are not to be responsible, and the Lessee will be required to make their own arrangements for securing water."

In June, 1935, the lessee needed more water; whereupon plaintiff and defendant engaged C. W. Fisher to drill a well on the premises, each agreeing to pay one-half the cost. The Southern Oil Company paid its half, amounting to $329.00, and the plaintiff credited Fisher with a like amount on his grocery bill.

It is alleged that at the time C. W. Fisher was engaged to drill the well, under a written contract signed by all the parties, it was further agreed orally between plaintiff and defendant that if the lessee exercised its option to buy the premises the defendant "would repay the plaintiff his one-half paid for boring said well, but if the defendant did not exercise the option to buy, then the well would belong to plaintiff and he would not be reimbursed the one-half he had paid."

The defendant denied the alleged oral agreement, and pleaded the statute of frauds, satisfaction by the deed of conveyance, and no consideration for the alleged oral agreement to reimburse the plaintiff.

On cross-examination, the plaintiff testified as follows:

"While they were digging the well Mr. Brinson (defendant's representative) came down and talked to me and promised me, in the event he took the property under the option in the lease to pay me back whatever I put into it. He promised to pay me back the $329.00 if he exercised the option. I did not give him anything in money, or property, or make any promises in return for his promise to pay me back my one-half the cost of digging the well. I did not promise him any money, didn't give him any money, I didn't think I had to. I thought he was an honest man."

There was a verdict and judgment for plaintiff, from which the defendant appeals, assigning errors.

Hartsell & Hartsell for plaintiff, appellee.
Julian C. Franklin for defendant, appellant.

STACY, C. J. Passing the initial pleas of the statute of frauds and satisfaction by the deed of conveyance when the defendant exercised its option, it would seem that under the facts appearing of record as distinguished from the allegations of the complaint, the defendant's plea of no consideration has been made out and constitutes a bar to the plaintiff's case. *Craig v. Price,* 210 N. C., 739, 188 S. E., 321; *Williams v. Chevrolet Co.,* 209 N. C., 29, 182 S. E., 719; *Hatchell v. Odom,* 19 N. C., 302.

It may be stated as a general rule that "consideration" in the sense the term is used in legal parlance, as affecting the enforceability of simple contracts, consists of some benefit or advantage to the promisor, or of some loss or detriment to the promisee. *Exum v. Lynch,* 188

N. C., 392, 125 S. E., 15; *Cherokee County v. Meroney,* 173 N. C., 653, 92 S. E., 616; *Institute v. Mebane,* 165 N. C., 644, 81 S. E., 1020; *Findly v. Ray,* 50 N. C., 125. It has been held that "there is a consideration if the promisee, in return for the promise, does anything legal which he is not bound to do, or refrains from doing anything which he has a right to do, whether there is any actual loss or detriment to him or actual benefit to the promisor or not." 17 C. J. S., 426; *Spencer v. Bynum,* 169 N. C., 119, 85 S. E., 216; *Basketeria Stores v. Indemnity Co.,* 204 N. C., 537, 168 S. E., 822; *Grubb v. Motor Co.,* 209 N. C., 88, 182 S. E., 730, and cases cited. On the other hand, a mere promise, without more, lacks a consideration and is unenforceable. 17 C. J. S., 434-435.

It is said that when one receives a naked promise and such promise is not kept, he is no worse off than he was before the promise was made. He gave nothing for it, loses nothing by it, and upon its breach he suffers no recoverable damage. *Mitchell v. Bell,* 1 N. C., 244, 2 Am. Dec., 627; *Sweany v. Hunter,* 5 N. C., 180; *Johnson v. Johnson,* 10 N. C., 556; 12 Am. Jur., 564. For example, "A" promises to give "B" a horse at Christmastime, or to leave him a legacy in his will, and does neither. There being no consideration for the promise, "B" would have no cause of action against "A" or his estate. *Medlock v. Powell,* 96 N. C., 499, 2 S. E., 149; *Broaddus v. Bank,* 161 Md., 116, 155 Atl., 309; *In re Fisher's Estate,* 128 Or., 415, 274 Pac., 1098; 17 C. J. S., 432. A bare promise, made without consideration, creates no legal rights and imposes no legal obligations. Its fulfillment is a matter of grace or favor on the part of the one making the promise. *Picot v. Sanderson,* 12 N. C., 309. In this connection, see *Ritchie v. White,* 225 N. C., 450.

In the instant case the promise on the part of the defendant to reimburse the plaintiff "his one-half paid for boring said well" was no more than a gratuity. Plaintiff promised nothing and gave nothing in return for the defendant's promise. *Wooten v. Drug Co.,* 169 N. C., 64, 85 S. E., 140. The agreement to dig the well was in writing and its terms stated. The defendant, therefore, acquired by the exercise of its option exactly what it would have acquired had the promise of reimbursement not been given. The plaintiff lost nothing by the promise. His rights and obligations were fixed and determined by the written instruments. *Cf. Critcher v. Watson,* 146 N. C., 150, 59 S. E., 544, 18 L. R. A. (N. S.), 270, 125 Am. St. Rep., 470. The promise, if made, was without consideration to enforce it. *Building & Loan Asso. v. Swaim,* 198 N. C., 14, 150 S. E., 58. It seems that plaintiff trusted "to the mere gratuitous promise of favor from another." *Hardison v. Reel,* 154 N. C., 273, 70 S. E., 463; *Mitchell v. Bell, supra.*

The motion for judgment of nonsuit was well interposed.

Reversed.

J. A. HOWELL, C. C. HOWELL, AGENT, v. J. B. BRANSON.

(Filed 10 April, 1946.)

1. Ejectment § 4—

The jurisdiction of a justice of the peace of proceedings in summary ejectment is purely statutory, Const. N. C., Art. IV, sec. 27; G. S., 42-26, and is limited by statute to those cases in which the relationship of landlord and tenant exists and the tenant holds over after expiration of the term or otherwise violates the provisions of his lease, and it is necessary that the jurisdictional facts be alleged, G. S., 42-28.

2. Same: Courts § 2d—

The jurisdiction of the Superior Court on appeal from the justice of the peace in summary ejectment is derivative, and when the proceedings before the justice of the peace is based upon an "oath in writing" to the effect only that defendant entered into possession of the premises and refused to vacate same, without allegation of the existence of the jurisdictional relationship of landlord and tenant, the proceedings should be dismissed in the Superior Court as in case of nonsuit.

3. Appeal and Error § 40a—

When the absence of jurisdiction appears on the face of the record, such defect is presented by an exception to the judgment which challenges the correctness of the judgment.

APPEAL by defendant from *Olive, Special Judge,* at January Term, 1946, of RANDOLPH. Reversed.

This was a summary proceeding in ejectment begun before a justice of the peace, based upon affidavit that defendant had "entered into possession" of a described house and lot, and "refuses to vacate the house." Summons was issued 7 September, 1945, and judgment for plaintiff rendered 8 September. Defendant appealed to the Superior Court.

On the hearing in the Superior Court plaintiff testified that he rented the property to Mrs. J. B. Branson for $15 per month, that he gave her notice in March, 1945, that he wanted the house 1 September. The rent was paid by Mrs. Branson to that date. On 4 September, 1945, plaintiff wrote J. B. Branson that he had placed the matter in the hands of his attorney and "he will give you due notice when to vacate." The attorney wrote defendant J. B. Branson giving him until 10 September, 1945, to vacate.

There was verdict for plaintiff, and from judgment rendered thereon defendant appealed.

W. C. York for plaintiff, appellee.

J. G. Prevette for defendant, appellant.

DEVIN, J. It is apparent from an inspection of the record that the court was without jurisdiction. The proceeding summarily to remove defendant from described premises originated in the court of a justice of the peace and was based upon an oath in writing to the effect only that defendant "entered into possession" of a house and lot, and "refuses to vacate said house." In the absence of an allegation that the relationship of landlord and tenant existed between the parties and that the defendant was holding over, the justice of the peace was without jurisdiction. Art. IV, sec. 27, Cons. N. C.; *Credle v. Gibbs,* 65 N. C., 192.

The jurisdiction of a justice of the peace in summary ejectment proceedings is purely statutory, G. S., 42-26, and may be exercised only in cases where the relationship of landlord and tenant exists, and the tenant holds over after the expiration of his term, or has otherwise violated the provisions of his lease. *McDonald v. Ingram,* 124 N. C., 272, 32 S. E., 677; *Ins. Co. v. Totten,* 203 N. C., 431, 166 S. E., 316; *Simons v. Lebrun,* 219 N. C., 42, 12 S. E. (2d), 644. The remedy by summary proceedings in ejectment is restricted to those cases expressly provided by the statute. *Hauser v. Morrison,* 146 N. C., 248, 59 S. E., 693. Both the basis and the scope of the proceeding are limited by the Act. *Warren v. Breedlove,* 219 N. C., 383, 14 S. E. (2d), 43. The "oath in writing" required by the statute must allege the facts essential to confer jurisdiction. G. S., 42-28. The jurisdiction of the justice of the peace under this statute is "limited to landlords and tenants." *McDonald v. Ingram, supra.* The jurisdiction of the Superior Court was derivative only and was limited to the powers which the justice of the peace could have exercised. *Hopkins v. Barnhardt,* 223 N. C., 617, 27 S. E. (2d), 644. The defendant's exception to the judgment challenged the correctness of the judgment, as the absence of jurisdiction appeared on the face of the record. *Query v. Ins. Co.,* 218 N. C., 386, 11 S. E. (2d), 139.

The proceeding should have been dismissed as in case of nonsuit. *Ins. Co. v. Totten,* 203 N. C., 431 (434), 166 S. E., 316. This disposition of the appeal renders unnecessary discussion of defendant's exceptions to the denial of his motion for nonsuit on the ground of failure of proof, and that the action was begun before plaintiff's cause of action had accrued (*Cherry v. Whitehurst,* 216 N. C., 340, 4 S. E. [2d], 900).

Judgment reversed.

STATE v. WILBERT JOHNSON AND CHARLES PRIMUS, JR.

(Filed 17 April, 1946.)

1. Rape § 2—

An indictment for rape of a female twelve years of age or more under G. S., 14-21, which fails to charge that the offense was committed forcibly and against her will is fatally defective, it being necessary in order to support the death penalty that both these elements be alleged and proven.

2. Rape § 8—

In a prosecution for ravishing and carnally knowing or abusing a female person under the age of twelve years, neither force nor lack of consent need be alleged or proven, since by virtue of the statute such child is presumed incapable of consenting. G. S., 14-21.

3. Criminal Law § 56—

Where an indictment is fatally defective, defendants' motion in arrest of judgment, even when filed originally in the Supreme Court, must be allowed.

4. Criminal Law § 24—

Proceedings had upon an indictment which is fatally defective do not constitute jeopardy and do not preclude subsequent trial of defendants upon proper bills.

APPEAL by defendants from *Parker, J.*, at September Term, 1945, of WAKE, heard in Supreme Court upon motion in arrest of judgment.

Criminal prosecution upon the following bill of indictment:

"The jurors for the State upon their oath present, that Charles Primus, Jr., and Wilbert Johnson, male persons over 18 years of age, late of the County of Wake, on the 19th day of July in the year of our Lord one thousand nine hundred and forty five, with force and arms, at and in the county aforesaid, not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil, in and upon one Virginia Lipscomb, a female, in the peace of God and the State then and there being, unlawfully, wilfully, violently and feloniously did make an assault and her the said Virginia Lipscomb then and there violently did ravish and carnally know against the form of the statute in such case made and provided and against the peace and dignity of the State."

Verdict, as to each defendant: "Guilty of rape as in the bill of indictment charged."

Judgment, as to each defendant: Death by inhalation of lethal gas administered in the manner provided by law.

Defendants appeal therefrom to Supreme Court and assign error.

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

A. B. Breece for defendants, appellants.

WINBORNE, J. Pending hearing on appeal taken, as above stated, defendants filed originally in this Court motion in arrest of judgment upon the ground that the bill of indictment is insufficient to support a judgment of death in that it fails to charge that the offense, alleged to have been committed on the female person named, was done "forcibly" and "against her will."

In the light of the language of the statute, G. S., 14-21, pertaining to punishment for rape, as construed in several decisions of this Court, particularly *S. v. Marsh,* 132 N. C., 1000, 43 S. E., 828, where the authorities are assembled, the bill of indictment here is insufficient and fatally defective. Hence, the motion in arrest of judgment is well taken.

The statute, G. S., 14-21, provides that: "Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death."

Under the first clause of this statute, relating to the ravishing and carnally knowing of a female person who is of the age of twelve years or more, the elements of force and lack of consent must be alleged and proven before a conviction may be had on which death sentence may be imposed. Allegation is as necessary as proof. In the absence of either, death sentence may not be imposed.

On the other hand, under the second clause of the statute relating to unlawfully and carnally knowing and abusing any female child under the age of twelve years, neither force nor lack of consent need be alleged or proven, and such child is by virtue of the statute presumed incapable of consenting.

Moreover, in *S. v. Marsh, supra,* a bill of indictment, in material aspects the same as that now under consideration for insufficiency, was the subject of attack for the absence of the words "by force" and "against her will." In that connection, *Clark, C. J.,* reviewing and considering the holdings of former decisions, wrote for the Court as follows:

"The defect alleged is the absence of the words 'forcibly' and 'against her will.' As to the word 'forcibly' in *S. v. Jim,* 12 N. C., 142, it was held that an indictment omitting both terms 'forcibly' and 'against her will' was defective. In *S. v. Johnson,* 67 N. C., 55, it was held that the omission of the word 'forcibly' was not fatal when the charge was 'against her will did feloniously ravish,' the Court saying through

Reade, J., that any equivalent word would answer in lieu of 'forcibly'; that though the word 'ravish' would seem to imply force, yet that word is not an express charge of force, standing alone, but that the addition thereto of the words 'feloniously' and 'against her will' was sufficient under our statute as an express charge of force. In *S. v. Powell,* 106 N. C., 635, where both the words 'forcibly' and 'against her will' were omitted, it was held, following *S. v. Jim, supra,* that the bill was defective. . . . Thus, on a review of our authorities, it will be seen that it has been held that the absence of both 'forcibly' and 'against her will' is fatal, but that forcibly can be supplied by any equivalent word; that it is not supplied by the use of the word 'ravish,' but it is sufficiently charged by the words 'feloniously and against her will.' In all the cases above reviewed where the words 'against her will' are omitted, the bill was held defective. No doubt, the words 'against her will' can be supplied by an equivalent as well as the word 'forcibly,' but we do not find such equivalent in this bill. The words 'unlawfully, wilfully, and feloniously' did 'ravish and carnally know,' do not charge it was 'against her will,' except by implication, and it is held in *S. v. Johnson, supra,* that they do not even sufficiently charge that the act was 'forcibly' perpetrated in the absence of the words 'against her will.'"

Then, continuing, the then *Chief Justice* said: "It is a subject of regret that a trial of so serious a nature, occupying so much of the public time, should go for naught, but we do not feel at liberty to overrule the above repeated decisions of this Court," and motion in arrest of judgment was allowed.

What was said in the *Marsh case, supra,* is appropriate here. We may add that we are not at liberty to disregard the express provisions of the statute. Hence, the motion in arrest of judgment is allowed. But in keeping with the decision in *S. v. Marsh, supra,* we say here that as the prisoners have not been in jeopardy, they may still be put on trial upon proper bills.

Judgment arrested.

COUNTY OF JOHNSTON v. MRS. J. R. ELLIS AND HUSBAND, J. R. ELLIS.

(Filed 1 May, 1946.)

1. Judgments § 27d—Decree of foreclosure of mortgage, entered on motion in tax foreclosure suit held void as contrary to practice of court.

A county foreclosed the land in controversy in a tax foreclosure suit. One of the heirs at law, upon attaining his majority, moved to set aside the tax foreclosure on the ground that the suit was against the widow

and that he and the other heirs at law, who owned the land and who were minors at the time, were not parties to the suit. He was appointed next friend of his minor brothers and sisters. Pending this motion, the holder of a mortgage on the property intervened and joined in the allegations to set aside the tax foreclosure, and demanded sale of the lands to satisfy the mortgage. Judgment was thereafter entered setting aside the tax foreclosure and providing for the repayment of taxes and expenses to the purchaser at the tax sale. Upon a later hearing before the clerk, without notice, and in which the next friend did not participate, judgment was entered decreeing sale of the land to satisfy the mortgage. *Held:* The motion to foreclose the mortgage introduced a new cause of action having no relation to the tax foreclosure suit and not necessary to the determination of that cause, and its inclusion and determination without amendment of the complaint, consent of the parties, or notice, renders the judgment void as being contrary to the course and practice of the court.

2. Courts § 2—

The court is without power to entertain, within the frame of a pending action, without amendment or substitution, a new and independent cause of action unrelated in any manner to that to which its jurisdiction has attached.

3. Judgments § 25—

Where a new and independent cause is adjudicated in favor of an intervener against defendants upon a hearing before the clerk out of term and without notice, the judgment is so contrary to the course and practice of the court as to be beyond its jurisdiction and void and may be attacked by motion in the cause.

4. Judgments § 1: Infants § 14—

A guardian *ad litem*, much less a next friend of minors, cannot consent to a judgment against the minors without special authority of the court.

5. Infants § 14—

A next friend is appointed to bring or prosecute a proceeding in which the infant suitor is plaintiff or seeks to assert some positive right, while a guardian *ad litem* is appointed to defend, and the distinction between them in legal effect is substantial and not merely formal. G. S., 1-64 and 1-65.

6. Same—

While a next friend, in the prosecution of some positive relief for an infant suitor, may be called upon to defend against incidental or opposing rights, such as offsets, counterclaims, or other defenses or demands connected with the original claim, a next friend of minor heirs at law seeking to set aside a tax foreclosure is not required to defend a mortgage foreclosure asserted by an intervener in the action, and his representation of the minors in such unrelated and independent cause does not legally exist.

7. Same—

Where a next friend of minor heirs at law seeking to set aside a tax foreclosure obtains a judgment setting aside the sale and providing repay-

ment to the purchaser at the sale of taxes and expenses, his office as next friend becomes *functus officio*, and he does not legally represent the minors upon a hearing thereafter had at the instigation of an intervening mortgagee to foreclose a mortgage on the land.

8. Mortgages § 31b—

Minor heirs at law appeared by their next friend and moved to set aside a tax foreclosure on the lands on the ground that they were not made parties to the tax foreclosure suit. Pending this motion, the holder of a mortgage intervened and joined in the allegations to set aside the tax foreclosure and demanded sale of the land to satisfy the mortgage. *Held:* Upon decree setting aside the tax sale, the mortgagee should have instituted suit to foreclose and secured the appointment of a guardian *ad litem* for the minors, and a decree of foreclosure of the mortgage, entered in the tax foreclosure suit, is contrary to the course and practice of the court.

9. Clerks of Court § 3—

The jurisdiction of the clerk of the Superior Court is statutory and limited, and can be exercised only with strict observance of the statutes.

10. Same: Mortgages § 31b—

The jurisdiction of the clerk of the Superior Court to order foreclosure of a mortgage, G. S., 1-209 (e); G. S., 1-211, is conditioned upon his rendition of a default judgment in favor of the mortgage creditor against the mortgage debtor upon failure of an answer to a vertified pleading where the sum due is capable of ascertainment by computation, and where it is necessary to hear evidence to ascertain title to the mortgage debt and the amount of the debt, the clerk is without jurisdiction to order foreclosure.

11. Judgments § 26: Equity § 3—

Lapse of time is unavailing against a motion to set aside a void judgment.

12. Judgments § 26: Limitation of Actions § 7—

G. S., 1-17, has no application to a proceeding to set aside a void judgment of foreclosure.

APPEAL by movents from *Carr, J.*, at December Term, 1945, of JOHNSTON.

This proceeding began 30 December, 1930, as a tax foreclosure suit, under the current statute, chapter 221, Public Laws of 1927; chapter 204, Public Laws of 1929 (C. S., 8037); against Mrs. J. R. Ellis and her husband, J. R. Ellis, with service on Mrs. Ellis alone. The appellants are movents in that cause, asking that a certain mortgage foreclosure proceeding had in this action, and the judgment therein, be set aside for invalidity and that the Commissioner's deed made under their authority be annulled and canceled from the record, and for incidental relief.

In the tax foreclosure suit service was made only against Mrs. Ellis, the return of summons stating that J. R. Ellis was dead. In fact, he

had died intestate several years prior to the issue of summons, leaving the present petitioners, minors, as his heirs at law. While the tax foreclosure, in all phases of the proceeding, including the complaint, was against a 44½ acre tract alleged to be owned by Mrs. Ellis, she owned only a 22 acre tract, and the 22½ acre tract, the subject of the present controversy, descended to and became the property of these petitioners and other children of J. R. Ellis at his death. The deed under which J. R. Ellis held was recorded in the Johnston County Registry and had been on record since 1914, and the ownership is not disputed.

The tax foreclosure suit ran its course and resulted in the sale of the 44½ acre tract—supposedly including the tract descended to appellants—confirmation, and commissioner's deed to the purchaser, E. J. Wellons, at the purchase price of $78.21, which included the taxes claimed to be due.

On 12 June, 1934, Joe Ellis, a child of J. R. Ellis, specially appearing, with counsel, filed a motion, supported by affidavit, to set aside the decree and deed made in the tax foreclosure proceeding on the ground that the heirs at law of J. R. Ellis, all minors at the time, had not been made parties, and were not represented; that the proceeding itself was ineffectual for want of adequate description of the land in the advertisement, complaint, and deed, and for other defects, including the joinder and purported sale of petitioners' 22½ acre tract along with the 22 acre tract of Mrs. Ellis, as to the latter of which tracts the validity of the sale is not disputed. In the motion and supporting affidavit, the petitioner Ellis avers that he is acting as next friend for the minor children; and some days subsequent to the date of the affidavit and motion, he was, upon affidavit declaring his own fitness so to act, appointed next friend to act in the premises for such minor children.

Thereupon, L. G. Stevens filed an "interplea and motion" which repeats substantially the allegations of the Ellis affidavit. He further alleges that he is the holder of a note executed by J. R. Ellis and wife dated 6 April, 1921, in the sum of $1,124.96, secured by a mortgage deed conveying both the tracts of land mentioned, containing two credits, one of $165.59, 10 February, 1925, and another of $102.00, 14 November, 1925, and demands recovery of $1,124.96 alleged to be due, with interest from 6 April, 1921, subject to the credits mentioned, and that a commissioner be appointed to advertise and sell the lands.

The movent, Joe Ellis, did not answer or demur, either individually or as next friend.

E. J. Wellons, the purchaser at the tax sale, having been duly served with summons on 22 September, 1934, came in and answered the affidavit and motion of Ellis. Upon the hearing of the matter on 5 September, 1934, the clerk of the Superior Court, after finding of facts, proceeded

to enter a judgment setting aside all the orders and decrees made in the case, set aside the deed made to Wellons and provided repayment to him of all taxes and expenses paid. From this order no appeal was taken. The record discloses no further participation of Joe Ellis, either individually or as next friend, in further proceedings.

Thereafter, on 3 June, 1935, the clerk of the court entered a judgment, after a hearing "upon the evidence filed herein and upon oral evidence and upon the exhibition of the notes and mortgages hereinafter referred to," in which he found that L. G. Stevens had sold, transferred and assigned his note and mortgage to Cornelia A. Wellons, wife of E. J. Wellons, and that "she has voluntarily appeared herein and asserts her rights thereunder"; and adjudged that E. J. Wellons recover of the defendants the sum of $78.21, with interest from 2 November, 1932; that Cornelia A. Wellons recover against the defendants, naming Mrs. J. R. Ellis, the widow, and the children of J. R. Ellis, $1,124.96, with interest from 6 April, 1921, less certain credits, and ordered the land sold to satisfy the lien of the mortgage, appointing James R. Pool as commissioner for that purpose. The record discloses no appearance of the next friend of the infant children or act done by him in connection with the proceeding. Under this judgment dated 3 June, 1935, sale was made. The commissioner reported the same, and the clerk of the Superior Court confirmed the sale.

On 12 September, 1945, the present petitioners, having become 21 years of age, entered a special appearance, and moved to set aside the judgment of 3 June, 1935 (in the foreclosure proceeding) and filed a supporting affidavit, as follows:

"Now comes Kenneth Ellis, Wilson Ellis, Milton Ellis, Alma Ellis Price, and William Ellis, whose names appear as some of the defendants, and respectfully show unto the Court.

"1. That as will appear from the summons issued in the above entitled action and from the return of the sheriff made thereon none of these movents were ever served with summons in this action.

"2. That at the time the purported judgment by default was entered herein all of these movents were under 21 years of age and no proceeding for the appointment of a suitable and proper guardian *ad litem* to defend said action for them was ever instituted nor was any guardian *ad litem* appointed, as required by the General Statutes of North Carolina.

"3. That as appears from the original pleadings in this cause, this was an action to foreclose tax liens in the amount of $47.54 allegedly due the plaintiff for the year 1927, and thereafter the defendants, E. J. Wellons and wife, Cornelia A. Wellons, attempted to improperly and

unlawfully assert a cross-action not arising out of the subject of the action as set out in the complaint, the same having no relation to plaintiff's claim, which said cross-action is absolutely void in so far as these movents are concerned.

"4. That as will appear from the pleadings filed herein no right of action was alleged or asserted against these movents, although the judgment referred to allows the said E. J. Wellons and wife, Cornelia A. Wellons to recover a large sum of money against these movents and condemns their interest in the 22⅓ acres described therein to sale, along with other properties in which they have no interest, to satisfy said alleged claim, and likewise taxed them with the costs.

"5. That movents do not contest the right of plaintiff herein to assert its tax liens against the property referred to in this action, and they stand ready, able and willing to pay all taxes, costs and penalties legally levied and assessed against the 22⅓ acres of land described in said judgment.

"Wherefore, said movents, all of whom are now 21 years of age *sui juris* enter a special appearance herein and move the court to vacate and set aside said judgment and all orders and decrees incident thereto, including a purported commissioner's deed, and to remove the same from the judgment roll of this court.

"This the 12th day of September, 1945.

LEVINSON, POOL & BATTON,
Attorneys for Movents."

This was resisted by E. J. Wellons and wife by demurrer:

"E. J. Wellons and wife, Cornelia A. Wellons, demur to Motion of Kenneth Ellis, Wilson Ellis, Milton Ellis, Alma Price and William Ellis for that the same does not state any cause of action:

"1. For that the said motion shows on its face that the said movents were named as parties to said action.

"2. That the said motion shows on its face that the Court recognized said movents as properly before the Court and rendered judgment thereon.

"3. That the said motion fails to show any meritorious defense or that the said movents have been diligent in making the same.

"Wherefore, the said respondents pray that the motion be denied.

"This September 26, 1945.

LEON G. STEVENS,
Attorney for Respondents."

On 21 September, 1945, the matter was heard before H. V. Rose, clerk of the Superior Court, upon the record and evidence taken. Thereupon the clerk entered judgment reciting a history of the case and making findings of fact, adjudged that the petitioners had not been before the court in a legal sense; that the mortgage foreclosure procedure was entirely foreign to the cause of action upon which the suit was originally instituted, and that the deeds of Wellons and wife, Cornelia A. Wellons, for the 22½ acres of land described in the proceedings were ineffectual to pass title as against the minor petitioners who now appear in the cause. The judgment provides for an adjustment as to the taxes paid by Wellons and wife on the 22½ acre tract since 1927, and that they were entitled to "collect out of said lands the amount of the note and mortgage they purchased from L. G. Stevens, together with interest on the taxes and the amount due upon the note and mortgage and for all improvements they have made on the lands"; but requiring them to render an account to the petitioners for reasonable annual rent, since they have been in possession thereof.

From this judgment E. J. Wellons and wife, Mrs. Cornelia A. Wellons, excepted and appealed.

The matter came on for hearing before Judge Carr at the November Term, 1945, of Johnston County Superior Court, and upon an order that an amended motion be filed by movents, the matter was set for further hearing at December Term, 1945.

The amended motion and the answer thereto did not materially change the aspect of the controversy, and are consistent with the foregoing statement of the case. However, the further defense in the answer to the amended motion avers that the movents were properly represented by a next friend in the mortgage foreclosure proceeding; that the motion fails to show meritorious defense; that the movents have not been diligent in attacking the proceedings; wherefore, the respondents specifically plead laches; and the respondents plead the three year statute of limitations as set out in G. S., 1-17, as a bar to the motion.

At this hearing the birth dates of the several children of J. R. Ellis were ascertained to be as follows: Joseph A. Ellis, 1908; Gladys Helen Ellis, 4 February, 1909; Walter Larry Ellis, 16 October, 1910 (dead); Katie Lee Ellis, 4 November, 1912; William Jackson Ellis, 4 August, 1914; Rufus Wilson Ellis, 20 October, 1916; Milton Vick Ellis, 5 September, 1918; Elmer (Alma) Rea Ellis, 10 January, 1921; Riley K. (Kenneth) Ellis, 21 October, 1923. Of these Kenneth Ellis, Wilson Ellis, Milton Ellis, Alma Ellis Price and William J. Ellis are petitioners and present appellants.

The parties stipulated "that the hearing Judge might take the record of the case and render judgment out of term and out of the county and

district at the convenience of the court." On 4 January following, Judge Carr rendered the following judgment:

"This cause came on to be heard and was heard by the undersigned Judge of the Superior Court at the December Term, 1945, of the Superior Court of Johnston County upon an appeal by E. J. Wellons and wife, Cornelia A. Wellons, from a judgment of H. V. Rose, Clerk of the Superior Court of Johnston County, bearing date of November 3, 1945, which appears in the record. After the Court had heard argument of counsel it was agreed by counsel for all parties that the Court might take the record in the case and render judgment out of term and out of the County and District and at the convenience of the Court.

"Upon an examination of the record the Court is of the opinion that H. V. Rose, Clerk of the Superior Court of Johnston County, had jurisdiction of the parties and the subject matter referred to in his judgment in this cause dated Monday, June 3, 1935, and that, therefore, the said judgment is not void. The Court is of the opinion that the said judgment is irregular in respect to that part of said judgment which adjudges that Kenneth Ellis, Wilson Ellis, Milton Ellis and William J. Ellis, are indebted to Cornelia A. Wellons in any sum whatsoever, inasmuch as it does not appear that there were any pleadings upon which such judgment could have been rendered. It is, therefore, ORDERED AND ADJUDGED that such part of said judgment as directs a recovery of any judgment against any one of the aforesaid parties is hereby set aside and declared invalid.

"It is the opinion of the Court that if the remainder of the said judgment which adjudges the amount due on the mortgage and tax lien referred to in said judgment and orders a sale of said property for the purpose of satisfying said liens is irregular the movents, Kenneth Ellis, Wilson Ellis, Milton Ellis, Alma Ellis Price, and William J. Ellis, have not shown that they were prejudiced by the entry of said judgment or that they had a meritorious defense to the cause of action with respect to which the said judgment was entered.

"It is, therefore, accordingly ORDERED AND ADJUDGED that such part of the judgment of the said H. V. Rose, Clerk, bearing date of Monday, June 3, 1935, which adjudges the amounts due on the mortgage and tax lien referred to in said judgment and which directs a sale of the property described therein is valid and the deed from James R. Pool, Commissioner, to E. J. Wellons and wife, Cornelia A. Wellons, conveying said property is likewise valid. The judgment of the said H. V. Rose, Clerk, bearing date of November 3, 1945, is, therefore, modified to conform to this judgment.

"Let the defendants, E. J. Wellons and wife, Cornelia A. Wellons, pay the cost of this motion.

"This 4th day of January, 1946.

LEO CARR, *Judge Presiding.*"

From this judgment the movents excepted and appealed, assigning as error the setting aside of the judgment of the clerk and the signing of the judgment bearing date of 4 January, 1946. Defendants, E. J. Wellons and wife, Cornelia A. Wellons, excepted to that part of the judgment which is adverse to them, but did not bring up an appeal.

Levinson, Pool & Batton for movents, appellants.
Leon G. Stevens for respondents, appellees.

SEAWELL, J. On the facts of record the judgment of the court below holding valid and binding upon the appellants the judgment and commissioner's deed in the mortgage foreclosure proceeding cannot be sustained. The judgment is based on the theory that the foreclosure judgment attacked by the appellants, if defective at all, was at most merely irregular, and that the movents had shown no meritorious defense in their application to vacate it. We have the impression, however, that the defects of which appellants complain go to the jurisdiction: (a) Want of jurisdiction in the court to entertain the mortgage foreclosure proceeding within the frame of the tax suit, either while the latter was pending or after that controversy had ended; (b) want of legal representation of the minor children of J. R. Ellis, equitable owners of the land, when the foreclosure judgment was taken, or during any part of that proceeding; and (c) want of jurisdiction on the part of the clerk to render a default judgment upon the "interplea" or affidavits, documents and other evidence made the basis for the judgment for debt, and to adjudge the incidental foreclosure of the mortgage securing it.

Appellants' first objection applies to the court as one of general jurisdiction without reference to the limited jurisdiction of the clerk discussed *infra*. The appellants contend that the court had no inherent power to bring into an existing suit an independent cause of action, unrelated in any way to that stated in the complaint or to the relief sought in the original action, unnecessary to its investigation and determination, and raising issues only between defendants or parties called in adversely to answer or defend rights which might be affected by the original suit; or, in other words, to entertain a separate controversy exclusively between the defendants which, however justifiable in an independent action, had nothing to do with the plaintiff or its cause of action; in the case at bar, a mortgage foreclosure proceeding between

parties called in to protect their rights, if any, against the county's claim for taxes.

Objection to the power of the trial court to entertain the mortgage foreclosure suit within its already occupied jurisdiction in the tax suit must, under the facts of this case, be regarded as meritorious. The new cause of action has no relation to that to which the jurisdiction of the court had attached, nor was it necessary to its judicial determination; it was a mere episode between codefendants. *Schnepp v. Richardson,* 222 N. C., 228, 22 S. E. (2d), 555; *Wingler v. Miller,* 221 N. C., 137, 19 S. E. (2d), 247; *Clendenin v. Turner,* 96 N. C., 416, 2 S. E., 51; *Richards v. Smith,* 98 N. C., 509, 4 S. E., 625. Most of the cited cases were normal in incident, and the question was presented upon demurrer. *Non constat* that without demurrer, departure from the course of the court may not, under given circumstances, be so great or so grave as to constitute a fatal defect in jurisdiction. The court cannot by mere tolerance create within itself a jurisdiction which it has not orderly acquired. The familiar principle that parties, by common consent, may submit to the court a cause of action of which it has jurisdiction and which is properly pleaded has no application here. The following circumstances attending the progress of the case at bar deprives the situation before us of such plausibility: In the instant case there was no consent asked or given for the radical change in subject and parties which demanded the attention of the court and partnership with the tax suit in its jurisdiction. There was no amendment to the original complaint or any order respecting the new and independent cause of action outside of the inferential recognition it may have received in the judgments to which exception has been taken. There was no notice given to any interested person of this unpredictable development, although it occurred out of term; and there was no legal duty resting upon any interested party to take notice of any proceeding which might reconstitute the case or justify the presence of appellants therein in their new role. McIntosh, Civil Procedure, sec. 493. The question is whether the attempted admission of the would-be litigant and his independent cause of action into the already occupied forum, thus entertaining two separate lawsuits at the same time, and within the same procedural frame, did not over-saturate the jurisdiction of the court and result in a void judgment. Without further elaboration and confining our observation to the facts of the case at bar, we are of opinion that the judgment under review was so contrary to the course of the court as to render it invalid.

The record might be construed as indicating that the controversy over the delinquent tax had ended with the judgment setting aside all former orders and canceling the commissioner's deed before the mortgage proceeding got under way, since the tax had been paid and the purchaser at

the tax sale elected to recover it from these petitioners rather than from the County of Johnston. In that event, the plight of appellants would be no better because of a want of anything having the semblance of a pleading on their part, and the lack of representation of the minors in that anomalous proceeding.

To sustain the validity of the foreclosure judgment, appellees rely upon representation of the minors by their next friend, Joe Ellis, to bring them into court, and upon his express consent or the consent implied through some failure on his part to perform a duty of defense imposed upon him by law. The Court is of the opinion that Ellis as next friend could give no consent, and that no implication arises of a consent which he was not capable of giving. Even if his powers and duties as next friend had been comparable to those of a guardian *ad litem* —which they were not—he would have had no power to consent to a judgment of this kind without special authority of the court; *Butler v. Winston,* 223 N. C., 421, 425, 27 S. E. (2d), 124; and the judgment would have been invalid without it; but his office as next friend of his minor suitors did not extend to their general defense. There is, we are aware, a lack of uniformity in judicial decision in the several jurisdictions respecting the duties and authority of a next friend and the extent of his representation. These differences are largely due to the variation in pertinent statutes of the particular jurisdiction. We think it essential to orderly procedure, and to the better protection of the rights of infants and others *non sui juris,* to adhere to the distinctions between next friends and guardians *ad litem* or general guardians traditional in our practice and formally recognized and implied in our statutes: G. S., 1-64; G. S., 1-65 to 1-67. McIntosh, Civil Procedure, pp. 237-238, secs. 253-254. These distinctions stem mainly from the circumstance that a next friend is appointed to bring or prosecute some proceeding in which the infant suitor is plaintiff, or at least where some right is positively asserted; while a guardian *ad litem* is appointed to defend. In legal effect, the distinctions are substantial and not merely formal.

A next friend is not an all-time and all-purpose representative through whose action or failure to act his infant suitors may be bound by orders and judgments which have no connection with the purpose of his appointment, or the rights of the minors which by virtue of such appointment it is his office to assert. The scope of his representation lies within and is determined by that purpose, the necessities of its prosecution and the procedure reasonably incident thereto. In 27 Am. Jur., p. 839, sec. 118, is a summarized expression of the law as we conceive it to be here: "The next friend has full power to act for the purpose of securing the infant's rights, and may do all things that are necessary to this end, although his power is strictly limited to the performance of the precise

duty imposed upon him by law." *Roberts v. Vaughn,* 142 Tenn., 316, 219 S. W., 1034, 9 A. L. R., 1528. No doubt in the assertion of such right the next friend may have to defend against incidental or opposing rights, such as offsets, counterclaims, or other defenses or demands connected with the original claim.

The next friend came into the tax suit for the purpose of making a motion to set aside a judgment and annulling a deed in the tax suit, in which the minors were admittedly equitable owners of the property and at the time unrepresented. His appointment did not require him to defend against the foreclosure suit thrust into this proceeding in the manner stated, and his representation of the minors in that matter did not legally exist.

Moreover, the record discloses that Ellis had successfully accomplished his mission as next friend, performed all the duty imposed upon him by law, and his office as next friend had become *functus officio.* If the holder of the mortgage desired to foreclose, it was necessary to do so in an orderly proceeding, instituted for that purpose, and to secure the appointment of a guardian *ad litem* to defend the owners of the equitable estate. The judgment based on the representation and participation of Ellis as next friend is not valid or binding upon appellants.

The jurisdiction of the clerk of the Superior Court is statutory and limited, and can be exercised only with strict observance of the statute. *Beaufort County v. Bishop,* 216 N. C., 211, 4 S. E. (2d), 525. Jurisdiction to order foreclosure of mortgages is given to the clerk by G. S., 1-209 (e), in connection with G. S., 1-211, and is an incidental jurisdiction conditioned upon the rendition by the clerk of a judgment by default for the debt secured by the mortgage in favor of the mortgage creditor and against the mortgage debtor. Under the last statute named, the default judgment can be made only upon a failure to answer a verified pleading where the sum due is "capable of being ascertained therefrom by computation." The judgment under review is not of that character. Its recitals show that the motion for judgment was heard upon oral and documentary evidence, the exhibition of notes and mortgage and of affidavits in the cause. No authority is given the clerk to render a judgment by default where the title to the mortgage debt and the amount thereof must depend upon evidence taken before him, rather than by default in answering an appropriate pleading. The necessity of taking evidence upon the point is apparent from the record, but it is this very necessity that defeats the jurisdiction of the court.

Appellees have pleaded both laches and a statute of limitation, but lapse of time is unavailing against a motion to set aside a void judgment; *Monroe v. Niven,* 221 N. C., 362, 365, 20 S. E. (2d), 311.

For the reasons stated, we conclude that the judgment in the foreclosure proceeding sought to be vacated by petitioners is void and of no effect, and the commissioner's deed made in pursuance thereof is invalid. The judgment of Judge Carr, rendered as of December Term, 1945, except in so far as it relieves these appellants of the debt adjudged against them, is reversed. The scope of our review does not permit us to map out for the parties such remedies as they might have in an appropriate proceeding.

Judgment reversed.

GERTRUDE WATERS BROOKS v. CLAUDE M. BROOKS.

(Filed 1 May, 1946.)

1. Divorce § 14—

Where a complaint alleges certain acts of misconduct constituting bases for divorce, both absolute and from bed and board, with prayer for relief demanding subsistence for the plaintiff and the minor child of the marriage, and for such other relief as may be just and proper, without prayer for divorce, the cause is an action for alimony without divorce under G. S., 50-16.

2. Same—

In an action for alimony without divorce under G. S., 50-16, there is available to the wife not only the grounds specifically set forth in the statute, but also any ground that would constitute cause for divorce from bed and board under G. S., 50-7, or cause for absolute divorce under G. S., 50-5.

3. Divorce § 5c—

In an action for divorce from bed and board under G. S., 50-7, it is necessary that the complaint allege that any of the acts of misconduct constituting the basis of the action were without adequate provocation on the part of plaintiff.

4. Divorce § 5b—

In an action for absolute divorce on the ground of adultery it is not required that the complaint allege that the misconduct was without adequate provocation.

5. Divorce § 14—

Where, in an action for alimony without divorce under G. S., 50-16, the complaint alleges adultery and also sets forth acts of misconduct constituting a basis for divorce from bed and board, the failure of the complaint to allege that the misconduct was without adequate provocation is not fatal, since such allegation is not necessary in an action for absolute divorce on the ground of adultery, and this ground, independently, is sufficient to sustain the action for alimony without divorce.

6. Divorce §§ 1c, 14—

In an action for alimony without divorce the allegation of adultery forming a basis for the relief sought cannot be held fatally defective on the ground that it sets forth facts amounting to condonation when the complaint also alleges acts of misconduct committed by defendant after the reconciliation which revive the old grounds.

7. Divorce § 12—

The complaint in this action is held to state a cause of action for alimony without divorce under G. S., 50-16, and therefore was sufficient basis for the order allowing alimony *pendente lite*.

8. Divorce § 14—

In this action for alimony without divorce plaintiff set forth in the complaint that she had theretofore instituted an action for subsistence in which an order had been made, but that plaintiff secured the dismissal of this suit after defendant had begged forgiveness and promised to mend his ways. *Held:* The court was without jurisdiction to incorporate into the allowance granted plaintiff the amount supposedly due under the prior order, both because of the vagueness of the reference to the prior order in the complaint and also because of the fact that the prior action had been dismissed.

APPEAL by defendant from *Grady, Emergency Judge,* at September Term, 1945, of WAKE.

The plaintiff brought this case under G. S., 50-16, for alimony without divorce.

She complains that she and the defendant were married about twenty years before the commencement of the action, and that during that time and "throughout the married life of the plaintiff and the defendant the plaintiff has been a true, faithful and dutiful wife, and has done everything within her power to make her marriage to the defendant a success and to make their home a happy one."

Two daughters were born to the marriage, themselves now married to soldiers still in the service. The daughters were until recently inmates of the home of their father and mother. There is also a minor son.

During this time the plaintiff alleges that from a very modest beginning she had, by her own personal efforts and attention, largely contributed to the success of the defendant's business, which has been built up into an extensive enterprise, in which the defendant has become prosperous; that during the last sixteen years the defendant had become addicted to excessive drinking, gradually becoming more and more subject to intoxication, and drinking to excess on numerous occasions; that he had begun and gradually intensified his misconduct towards plaintiff, abusing her and his daughters, ordering the latter to leave his home; and openly declared that he intended to make things so hard for plaintiff

and make her life so miserable that she would be forced to leave her home.

That he has become more and more violent in his conduct to the plaintiff, on one occasion locking her up in the room and knocking her to the floor, seriously injuring her; and that plaintiff lay there until her daughters, hearing her screams, rushed down and broke open the locked door and found plaintiff prostrate on the floor.

The plaintiff further alleges in her complaint, partly on information and belief and partly of her own knowledge, that the defendant had on numerous occasions and with numerous women, been unfaithful to his marriage vows and has wasted and squandered large sums of money in his illicit association with lewd women. The plaintiff in particular names one Mrs. Alice Cox as a person with whom he had illicit relations, and particularizes the incidents relating thereto, some of which came under her observation. On one occasion plaintiff alleges that she and her daughters came upon the defendant in a parked car in a dark place on South McDowell Street with Mrs. Cox. At that time, she alleges, she asked the defendant to go home with her, but he elected to remain with Mrs. Cox. The plaintiff, unable to further tolerate or bear the misconduct of the defendant, instituted a suit against him for subsistence and support, in which an order was made, but that the defendant came to plaintiff, expressed his regret for his past misconduct, begged her to forgive him and promised not to mistreat her again, to stop his excessive drinking, and his illicit association with other women, and for that reason she secured the dismissal of the pending case.

Thereafter, the plaintiff found that the promises were insincere and fraudulent, and the defendant openly boasted that there was nothing she could now do to force him to support her. After this there were further indignities heaped upon the plaintiff; and the barbarous and cruel treatment of her at the hands of her husband, she alleges, have endangered her life, and avers that because of the violence and misconduct of the defendant, if she is left alone at his mercy her life will be in danger.

Wherefore, she petitions for the allowance of support *pendente lite* and for counsel fees in this proceeding.

The defendant denies the material allegations of the complaint, sets up condonation on the part of the plaintiff, and asks for dismissal of the suit. He further alleges that the plaintiff was addicted to the use of intoxicating liquors, and while under the influence of an intoxicant became angry with the defendant, in which she was encouraged by her two daughters; and attributes the domestic difficulties, such as they are, to this cause.

At a regular term of Wake County Superior Court the petition of the defendant for alimony *pendente lite* and counsel fees came on for a hear-

ing before Judge Grady in chambers. The plaintiff was heard upon affidavits, and the defendant presented no evidence.

Judge Grady made an order based upon the facts as they appeared to him, expressing the hope therein that a reconciliation between the two might be effected and that the domestic life of the two might be free from interference on the part of the daughters.

The order provides that the defendant pay into the office of the clerk of the court for the use and benefit of the plaintiff $40.00 on each Monday, beginning with 8 October, 1945, and that these payments continue until the order is modified by the court; that he pay to the clerk for the use and benefit of plaintiff's counsel the sum of $100.00. The order further provides that the defendant shall pay all sums due under the order of 2 October, 1944, which was referred to in plaintiff's complaint as having been made in the former proceeding, dismissed at the instance of the plaintiff.

From this order the defendant appealed, and subsequently filed with the court a grouping of exceptions and assignment of error, substantially as follows:

That the complaint does not state facts sufficient to constitute a cause of action; first, in that there are not sufficient grounds alleged to sustain a divorce from bed and board, and an order for the payment of alimony could not be based thereon; and that the complaint contains no allegation with respect to plaintiff's own conduct, which omission it is contended rendered the complaint fatally defective; second, that the court found as a fact that the conduct of defendant had been condoned by plaintiff "with the exception of certain things which have occurred rather recently," whereas there is no allegation of those things "occurring rather recently"; and third, that there is no allegation in the complaint upon which the order for payment of sums due under "the order of October 2, 1944," could be based.

Burgess & Baker and Thomas W. Ruffin for plaintiff, appellee.
Douglass & Douglass for defendant, appellant.

SEAWELL, J. The appeal challenges the validity of the order allowing to the plaintiff support and counsel fees *pendente lite.* Objection is advanced on the theory that the action is brought under and based entirely on G. S., 50-7 (4)—a subsection of the statute relating to divorce from bed and board, which names as one of the grounds for such divorce "such indignities to the person of the other as to render his or her condition intolerable and life burdensome." It is pointed out as a fatal defect in the pleading that plaintiff does not, in particularizing the acts or misconduct of the defendant said to have had that effect further allege

that the conduct was without adequate provocation on her part, *ergo* fails to state a cause of action. If plaintiff's action, or rather her grounds for relief, can be put into that category, ignoring all other available statutory grounds for relief, the established standards of pleading and practice, as found in our decisions, might support appellant's view. *McManus v. McManus,* 191 N. C., 740, 133 S. E., 9; *Pearce v. Pearce,* 225 N. C., 572, 35 S. E. (2d), 636; *Howell v. Howell,* 223 N. C., 62, 25 S. E. (2d), 169; *Pollard v. Pollard,* 221 N. C., 46, 19 S. E. (2d), 1; *Carnes v. Carnes,* 204 N. C., 636, 169 S. E., 222; *O'Connor v. O'Connor,* 109 N. C., 139, 13 S. E., 887; *Jackson v. Jackson,* 105 N. C., 433, 11 S. E., 173. But we do not concede that the major premise is sound: The statute, G. S., 50-16, relating to alimony without divorce, and plaintiff's pleading of the grounds therein recognized as cause for the relief sought are both broader than that assumption implies.

Since the plaintiff does not ask for divorce, but merely adds to the prayer a request for "such other and further relief as might appear just and proper," the court will refer the proceeding to G. S., 50-16, as an action for alimony without divorce, as was no doubt intended. We quote the pertinent part of that action, italicizing the phrase which appellant's counsel contend ties in the proceeding with an action for divorce *a mensa* under G. S., 50-7, and especially with subsection 4 of that law as above stated:

"If any husband shall separate himself from his wife and fail to provide her and the children of the marriage with the necessary subsistence according to his means and condition in life, or if he shall be a drunkard or spendthrift, *or be guilty of any misconduct or acts that would be or constitute cause for divorce, either absolute or from bed and board,* the wife may institute an action in the superior court of the county in which the cause of action arose to have a reasonable subsistence and counsel fees allotted and paid or secured to her from the estate or earnings of her husband."

It will appear, then, that there is available to the wife in an action for alimony without divorce not only the grounds independently stated in the quoted statute, but, by inclusive reference, any ground that would constitute cause of divorce, either absolute or from bed and board.

In lodging his objection appellant might have said, with strict accuracy, that the rule suggested has been applied to most of the other grounds for divorce *a mensa* named in the statute with the practical effect that the grounds borrowed from the statute relating to divorce from bed and board cannot be successfully asserted without the corresponding denial of adequate provocation; even extending to abandonment, which imports *willfullness,* and *maliciously* turning the spouse out of doors, and *cruel* and *barbarous* treatment endangering life; as to all of which the

excuse of "adequate provocation" is somewhat remote. *McManus v. McManus, supra;* McIntosh, Civil Procedure, p. 407.

Referring more especially to subsection 4, relating to indignities to the person, the origin and propriety of requiring allegation and proof that there was no adequate provocation rests in the difficulty of defining more precisely the acts which might come under condemnation of the law, coupled with the deference traditionally shown to the necessity of mutual forbearance in the marital venture. In a measure, the device controls the extent to which the law is willing to invade that field with judicial remedies, resulting in separation. For extension of the rule to other more specifically defined conduct, we must refer to the history, rather than the logic, of the law. But there are less relative acts of the husband upon which alimony without divorce may be granted, stated as violations of positive requirements which, as we view them in the light of the decided cases, do not suggest the necessity of applying the principle of domestic balances. It is not necessary to couple the allegation of such misconduct with a denial of provocation. Such, at least, is adultery. The statute also mentions independently as grounds for alimony that the husband is a spendthrift or a drunkard; and there is a substantial difference between G. S., 50-16, and G. S., 50-7 (5), in phraseology and implication as to drunkenness.

The complaint is somewhat informal, and the incidents alleged as grounds for relief mainly fall under G. S., 50-7 (4), as indignities to the person, or other subsections of the statute relating to divorce from bed and board; and many of these allegations are defective, as contended for by the appellant, in failing to comply with the above mentioned rule; but not all of the allegations of the complaint are affected with this invalidity. In alleging that the defendant had illicit relations with numerous lewd women, and especially with Alice Cox, there is a sufficient charge of adultery. The complaint also charges that he has become addicted to drunkenness, and that he has wasted large sums of money upon the subjects of his amours. We refrain from pushing through the mill of definition the terms used in the statute—"drunkard" and "spendthrift"—and comparing them with the allegations of the complaint, and we make no decision with respect to them. However, upon the analysis we have given, we are of opinion that the complaint does state a cause of action, and so hold. The practical result of its partial invalidity would be that the plaintiff on the trial, and upon timely objection, cannot, without amendment, rely on the causes of action pointed out, which have been heretofore held by numerous decisions of this Court to be fatally defective.

The question of condonation cannot be determined adversely to the complaint as a matter of law, since there is sufficient allegation of con-

duct which might revive the old grounds for relief, whatever they are. *Lassiter v. Lassiter,* 92 N. C., 130; *Jones v. Jones,* 173 N. C., 279, 91 S. E., 960; *Page v. Page,* 167 N. C., 346, 347, 83 S. E., 625; *Gordon v. Gordon,* 88 N. C., 45; *Collier v. Collier,* 16 N. C., 352.

We conclude that the order for alimony and counsel fees *pendente lite,* having been made in a valid proceeding, is valid and binding upon the defendant; subject, however, to the modification hereinafter made.

We are of opinion that the order of the judge requiring the defendant to pay sums supposed to be due under the previous order dated 2 October, 1944, in the action previously dismissed, was, inadvertently we are sure, beyond his jurisdiction, both because of the vagueness of the reference in the complaint and because of the dismissal of that action before final judgment.

As thus modified, the judgment is affirmed.

Modified and affirmed.

STATE v. BRUCE TAYLOR.

(Filed 1 May, 1946.)

1. Homicide § 16—

Defendant's contention that he was on his own premises at the time of the homicide relates to his duty to retreat and avoid the difficulty and is material only on his plea of self-defense. Hence the burden of proof is on him.

2. Homicide § 11—

When defendant testifies that he was part owner of the filling station, the scene of the fatal encounter, but the State offers evidence that the filling station was a public filling station operated in the sole name of defendant's brother and that all licenses were issued in the brother's name and that defendant was a farmer living some distance away, defendant's contention that he was on his own premises is an open question for the jury on the conflicting evidence.

3. Homicide § 27f—

When the question of whether defendant was on his own premises at the time of the fatal encounter is an open question for the jury on conflicting evidence, the court, in the discharge of its duty to explain and apply the law to all material phases of the testimony, properly explains the law both upon the duty to retreat ordinarily prevailing, and the right of a person to stand his ground if without fault and on his own premises, and defendant's contention that the explanation of the duty to retreat was inapplicable to the evidence and prejudicial is without merit.

4. Criminal Law § 50e (4)—Permitting jury to view material exhibit which could not be brought into courtroom held not error.

The State's evidence tended to show that defendant shot deceased when deceased was standing at the door of his automobile and that one of the bullets creased the metal part of the door and cut a groove in the top of the door glass. Defendant's evidence was to the effect that he shot the deceased in self-defense as deceased was making an attack on him some distance from the car. *Held:* The automobile was an exhibit material to the State's case, and the court's action in permitting the jury to retire to the courtyard in custody of a deputy sheriff to examine the automobile, is not held for error, there being no suggestion of misconduct on the part of the officer or the jury and it not appearing that the judge or the defendant was absent at the time.

5. Criminal Law §§ 50e (3), 81c—

The fact that the officer having the jury in custody in conducting it to the courthouse lawn to view a material exhibit was also a witness for the State, is not sufficient, standing alone, to justify a new trial in the absence of evidence of some fact or circumstance tending to show misconduct on the part of the officer or the jury, but such practice is not approved.

APPEAL by defendant from *Carr, J.*, at November Term, 1945, of WAYNE. No error.

Criminal prosecution on bill of indictment which charges that defendant did kill and murder one Hubert Carraway, the charge of murder in the first degree being waived by the solicitor.

All the testimony tends to show that on the night of 17 August, 1945, defendant's car stalled at his sister's home. He started to find help and met a car occupied by Hubert Carraway, David Eatman, George Mozingo, and a Negro called Lightning. Some difficulty arose in which Hubert Carraway and his companions assaulted defendant. Defendant's evidence tends to show that they accused him of reporting their still, that they struck him with a piece of iron, "beat him up" severely and threatened to kill him. He escaped and they pursued him to his sister's home where he escaped through the back door. Carraway then said they would get him before the next night.

The evidence for the State tends to show that on the next day, 18 August, about 5:00 p.m., Carraway, David Eatman, Marvin Carraway, George Mozingo, Lightning and another Negro called Badeye were on a two-door Ford coach going to Mount Olive. They stopped at a filling station operated by J. L. Taylor, brother of defendant, to get some beer. Having ascertained that no beer was available, they were in the act of getting back in the automobile when defendant came out of the station, approached Carraway, who was standing at the door of the automobile, punched him and said, "You are the s.o.b. that slapped me last night,

ain't you," and shot him two or three times. One bullet grazed the metal part of the door and one entered Carraway just below the shoulder blade on the left side and passed out of his body near his right nipple. Carraway fell in the foot of the car.

Testimony for defendant tends to show that defendant is part owner of the filling station and was there as part owner on 18 August. Having been told that Carraway and companions were looking for him he got a pistol from behind the counter and put it in his pocket for protection. About 5:00 o'clock he started to go to town. As he walked out the screen door he heard someone say, "There is the s.o.b., let's get him now." He then saw Carraway approaching with his companions following behind. Carraway picked up an armature and made a motion as if to strike him. Defendant said, "You had better not come on me with that," and reached for his gun "right quick." It caught in his pocket and fell to the ground. As defendant picked it up Carraway was in the act of hitting him with the armature and defendant shot. Carraway whirled around and again started to hit him, and defendant shot a second time. Carraway staggered off and defendant returned to the filling station. All this occurred some distance from the automobile.

There was evidence that defendant is a man of good reputation and that Carraway was generally reputed to be dangerous and violent.

It is admitted that Carraway died as a result of the gunshot wounds inflicted by defendant.

There was a verdict of guilty of murder in the second degree. The court pronounced judgment on the verdict and defendant appealed.

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

J. Faison Thomson, Rivers D. Johnson, and N. W. Outlaw for defendant, appellant.

BARNHILL, J. A careful examination of the exceptions relating to the admission or exclusion of testimony fails to disclose any material error. No one of them presents any question of such moment as would seem to require discussion.

In its charge the court, on the defendant's plea of self-defense, instructed the jury as to the duty of one who is assaulted to retreat, explaining the law as to the absence of that duty when the person assaulted is without fault and on his own premises. Both the general rule and the exception were fairly explained.

But the defendant insists that he was on his own premises, that the doctrine of retreat had no application to any aspect of the testimony in this case, and that in instructing the jury that the duty to retreat in any

event rested on him, the court committed error. He does not challenge the correctness of the statement but contends that as the general rule was not applicable the more fully it was discussed the more harmful it became.

The record fails to sustain defendant's position in this respect. It does not appear that the solicitor admitted or conceded that the defendant was part owner of the filling station. On the contrary, the State developed testimony tending to show that this was a public filling station, that it was operated by J. L. Taylor, that a sign, "J. L. Taylor," was on the building, that the beer and other licenses were issued in the name of J. W. Taylor, and that defendant is a tenant farmer living some distance away.

Whether the defendant was or was not on his own premises at the time of the homicide was a fact material only on his plea of self-defense. On that issue the burden was on him. There was evidence of facts and circumstances as indicated which tended to impeach his statement and render it an open question for the jury to decide.

It was the duty of the court to explain and apply the law to all material phases of the testimony. In compliance with this requirement it explained under what conditions it would have been the duty of defendant to retreat and attempt to avoid the difficulty. In so doing it instructed the jury that the defendant, if without fault and on his own premises, was under no duty to retreat "for when he is . . . on his own premises he is deemed in law to have retreated as far as the law requires him to retreat." Thus the charge on the plea of self-defense, considered contextually and in the light of the conflicting phases of the testimony, was in accord with the decisions of this Court. Exceptions thereto cannot be sustained.

The other exceptions to the charge brought forward and discussed in defendant's brief are without merit.

During the trial the solicitor offered in evidence the automobile used by deceased on the day of the homicide and moved the court that the jury be permitted to view the exhibit which was then parked behind the courthouse. The motion was allowed and the jury was permitted to retire to the courtyard in the custody of Deputy Sheriff Precise for that purpose. The defendant excepted.

There was testimony that one of the bullets fired by defendant creased the metal part of the door and cut a groove in the top of the door glass of the automobile in question. This testimony, if true, tended strongly to corroborate the evidence offered by the State. The exhibit was therefore material to the State's case. It could not be produced in court. The court followed the only alternative, practical, common-sense course open to it. It directed that the jury retire and examine the automobile

to be identified by the witness who had given testimony concerning the markings. There is no suggestion of any misconduct on the part of the jury or the officer. Nor does it appear that either the judge or the defendant was absent at the time the automobile was inspected. Hence we are unable to perceive any reasonable objection to the procedure followed.

But the defendant insists that there is another phase of the occurrence which was highly prejudicial to him. The officer who was designated to conduct the jury to the courthouse lawn to view the exhibit was a witness for the State.

The practice of putting the jury in the custody of an officer who has actively investigated the evidence or has become a witness for the State is not to be approved. While, in the absence of evidence of some fact or circumstance tending to show misconduct on the part of the officer or the jury, we hesitate to make it alone the grounds for a new trial, we do stress the need for trial judges to be extremely careful to avoid such incidents.

However circumspect the officer and jurors may be when placed in such a situation, these occurrences always, as here, tend to bring the trial into disrepute and produce suspicion and criticism to which good men should not be subjected. *S. v. Hart, ante,* 200.

In reality this cause boiled down to a rather simple issue of fact. If the homicide occurred in the manner indicated by the testimony of the State, defendant is fortunate to have escaped prosecution for a capital felony. If it occurred as the testimony for defendant tends to show, the jury well might have returned a verdict of not guilty. It accepted the version of the State. Exceptions brought forward and discussed in defendant's brief fail to point out any substantial or prejudicial error. The judgment therefore must be affirmed.

No error.

D. L. PHILLIPS AND WIFE, LOUISE E. PHILLIPS, v. R. M. WEARN.

(Filed 1 May, 1946.)

1. Deeds § 16—

The owner of a tract of land sold a number of lots, scattered throughout the development, by deeds containing covenants restricting the use of the lots to residential purposes, and during the same period sold a number of lots, also scattered throughout the development, without restrictions. *Held:* There was no evidence that the development was subject to a general scheme or plan, and therefore the restrictions cannot be enforced by the grantees *inter se*.

2. Same—When there is no general scheme of development, purchaser of part of locus in quo may not impose restrictions on that part.

Lots scattered throughout a development and constituting a part of the tract of land were sold, some by deeds containing restrictive covenants and some by deeds without restrictions, so that there was no general scheme or plan of development. A corporation became the owner of the balance of the land by deed containing no restrictive covenants, and executed a deed of trust to another corporation, which deed of trust contained a number of restrictive covenants. This deed of trust was foreclosed, and the land purchased at the sale by the corporate *cestui que trust*, which sold same to plaintiffs, the deed to the *cestui* and the deed to plaintiffs both containing the same restrictions which were recited in the deed of trust. *Held:* Since the *locus in quo* was never subject to a general scheme or plan of development, the restrictions placed on a part of the property by the corporate owners were not enforceable except as covenants personal to the grantors, and became unenforceable when the corporations were dissolved and liquidated, and plaintiffs could convey without restrictions.

3. Same—

Restrictive covenants, including a covenant against occupancy by persons of the Negro race, were placed upon the land by vendors' predecessor in title. Vendors contracted to convey free from restrictions except against occupancy by Negroes. It was adjudicated that the restrictive covenants were unenforceable because of want of a general plan of development. *Held:* The purchasers are nevertheless bound to accept deed with covenant against occupancy by Negroes by virtue of the agreement contained in the contract to convey.

APPEAL by defendant from *Hamilton, Special Judge,* at February Term, 1946, of MECKLENBURG.

The essential parts of the agreed statement of facts upon which this controversy was submitted to the court below, are as follows:

1. Prior to the year 1913, Paul Chatham acquired a tract of land partly lying in the eastern section of the City of Charlotte and partly outside, and caused a map thereof to be made, said map showing 53 blocks and known as Chantilly.

2. Prior to the year 1913, Paul Chatham and wife executed a deed of trust on said property to A. T. Summey, Trustee, which deed of trust is duly recorded. The said deed of trust contained no conditions or restrictions affecting or limiting the use of the property, and the property was not subject to any conditions or limitations affecting its use prior thereto.

3. On 8 July, 1913, Paul Chatham and wife conveyed all of said property shown on the aforesaid map to the Greater Charlotte Finance & Realty Company, by deed recorded in the Mecklenburg County Registry in Book 312, page 338, except Blocks Nos. 1, 2 and 44, which were

retained by the grantors. The Greater Charlotte Finance & Realty Company caused said map to be recorded in Book 230, pages 248 and 249, in the office of the Register of Deeds for Mecklenburg County, North Carolina.

4. During the years 1913, 1914, 1915, 1916, 1917 and 1918, the Greater Charlotte Finance & Realty Company sold 262 lots, located in 26 different blocks, in said development as shown on said map to various purchasers, and the deeds conveying said lots contained no restrictions or conditions limiting or restricting the use and occupancy of said property to residential purposes only.

5. During the years from 1913 to 1918 inclusive, the Greater Charlotte Finance & Realty Company conveyed to various purchasers 433 lots of land in said development, and the deeds to said lots contained restrictions and conditions limiting the use and occupancy of said lots for residential purposes only; said deeds contained also provision that any of said property could be released from said restrictions with the written consent of the grantor and then owner of any lot or lots. The lots so conveyed were located in 31 different blocks of the development. During this period the grantor also sold lots in 16 of the same blocks without restrictions.

6. All of the above lots were released by A. T. Summey, Trustee, from the deed of trust referred to herein; during the months of January and February, 1918, the said deed of trust executed by Paul Chatham and wife to A. T. Summey, Trustee, aforesaid, was foreclosed and the said A. T. Summey, Trustee, executed a deed dated 13 February, 1918, to H. L. Taylor, said deed conveying all lots covered by said deed of trust which had not theretofore been released. The said deed to H. L. Taylor conveyed approximately 380 lots, including the *locus in quo* described in Sales Contract marked "Exhibit A" attached to the complaint in this action. Said deed contained no conditions or restrictions limiting or affecting the use or occupancy of said property.

7. By deed dated 13 February, 1918, H. L. Taylor conveyed the aforesaid lots to the Oakhurst Land Company, said deed being duly recorded. This deed contained no conditions or restrictions limiting or affecting the use or occupancy of said property.

8. Oakhurst Land Company, on 15 February, 1932, executed a deed of trust on said lots to W. B. McClintock, Trustee, securing an indebtedness to the Charlotte National Bank of Charlotte, North Carolina. This deed of trust is duly recorded and contains restrictive covenants as follows: (a) Property not to be owned or occupied by persons of the Negro race; (b) Building located on said property to be located not less than 25 feet from the front property line; (c) Said property to be used for residential purposes only; (d) Building to cost not less than $3,000.00.

9. The aforesaid deed of trust executed to W. B. McClintock, Trustee, was foreclosed by civil action and W. B. McClintock was appointed commissioner to sell the said property and deed was executed by the said W. B. McClintock, Commissioner, to the Charlotte National Bank of Charlotte, North Carolina. The said deed contained restrictive covenants as above set out in paragraph 8.

10. By deed dated 10 April, 1937, the Charlotte National Bank of Charlotte, North Carolina, conveyed said property to D. L. Phillips and wife, Louise E. Phillips, the plaintiffs, said deed being recorded in the Mecklenburg County Registry, in Book 919, page 36. This deed contains the same restrictive provisions as set forth in paragraph 8 above.

11. The Oakhurst Land Company, a corporation and former owner of said property, has been dissolved for a period of more than ten years and has no interest in any property in the development known as Chantilly.

12. In none of the deeds conveying lots in the development known as Chantilly shown on the map hereinabove referred to was there any clause providing for a forfeiture or reverter of title to said lots or any clause of defeasance or for re-entry in event of breach of or failure to perform the conditions or restrictions as set forth in said deeds.

13. The Charlotte National Bank of Charlotte, North Carolina, a banking corporation, has been liquidated more than three years and has no interest in any of the property in said development known as Chantilly.

14. There are approximately 25 business establishments now located within this development, including drug stores, pressing clubs, grocery stores, hardware stores, a moving picture show, gasoline oil station, and other businesses of similar character. In addition to the above business establishments, there is one church and an industrial plant located in the development.

15. It has been agreed by and between the parties to this action that the plaintiffs are seized of a good and indefeasible fee simple title to the *locus in quo,* except in so far as such title may be limited or affected by the conditions and restrictions purporting to limit the use and occupancy to residential purposes only, as set forth in the plaintiffs' deed. And it is further agreed by and between the parties hereto that if the court be of the opinion that the plaintiffs' title to the *locus in quo* is unrestricted as to its use and occupancy for residential purposes only, and that the deed to the defendant from the plaintiffs will vest in the defendant the right to the use and occupancy for business or other purposes, free and clear from any conditions and restrictions limiting or affecting such use and occupancy other than that they shall not be owned or occupied by persons of the Negro race, and if the court shall so hold, then the plain-

tiffs are entitled to a decree of specific performance of said sales contract, otherwise not: Provided that either party may appeal to the Supreme Court from any judgment entered in this cause by the Superior Court.

From a judgment holding the plaintiffs are empowered to convey the *locus in quo* to the defendant, free from any restrictions as to its use, except that the same cannot be owned or occupied by persons of the Negro race, the defendant excepts and appeals to the Supreme Court, assigning error.

W. C. Davis for plaintiffs.
James L. DeLaney for defendant.

DENNY, J. The appellant challenges the correctness of the judgment below. The challenge must fail. The facts presented on this appeal clearly show that the development known as Chantilly is not the result of a general plan or scheme of development of an exclusive residential community. *Snyder v. Heath,* 185 N. C., 362, 117 S. E., 294; *Davis v. Robinson,* 189 N. C., 589, 127 S. E., 697; *Ivey v. Blythe,* 193 N. C., 705, 138 S. E., 2; *DeLaney v. Hart,* 198 N. C., 96, 150 S. E., 702; *Eason v. Buffaloe,* 198 N. C., 520, 152 S. E., 496.

The original owners of the development never sold any of the lots subject to limitations as to use or occupancy. The Greater Charlotte Finance & Realty Company sold 262 lots in 26 different blocks of the development and the deeds conveying said lots contained no restrictions or conditions limiting or restricting the use and occupancy of the property. During the same period in which this corporation sold the above lots without restrictions, it also sold 433 lots in 31 of the blocks of the development, restricting the use of the property for residential purposes only. The lots sold without restrictive covenants in the deeds, as well as those sold subject to restrictions, were scattered throughout the development. There is no evidence to support the veiw that this development was ever subject to any general plan or scheme whereby the restrictive covenants in the deeds referred to above could have been enforced by the grantees *inter se. Humphrey v. Beall,* 215 N. C., 15, 200 S. E., 918.

Since the *locus in quo* has never been subject to any general plan of development, the restrictions contained in the conveyances of the Oakhurst Land Company and the Charlotte National Bank, which the plaintiffs contend are null and void, were never enforceable, except as covenants personal to the grantors, and those covenants became unenforceable with the final dissolution and liquidation of the aforesaid corporations. *Snyder v. Heath, supra; Thomas v. Rogers,* 191 N. C., 736, 133 S. E., 18; *DeLaney v. Hart, supra.*

The appellant admits that his contract of purchase provides for the retention of the restriction prohibiting any person or persons of the Negro race to own or occupy the *locus in quo,* but he contends that if the property is not subject to a general plan or scheme for its development as residential property, then this restriction also is unenforceable. The position would be well taken if the appellant had contracted to accept a deed free and clear of all restrictions, but he did not do so. He has agreed to accept a deed that will vest in him a good, indefeasible, fee simple title to the *locus in quo* "free and clear from any conditions and restrictions limiting or affecting such use and occupancy other than that they shall not be owned or occupied by persons of the Negro race." Therefore, not by virtue of a general plan or scheme, but by agreement, the parties hereto have created a restrictive covenant which is enforceable between the parties. 14 Am. Jur., sec. 309, p. 651.

There is no error in the judgment below, and it is

Affirmed.

STATE v. JOHN BALDWIN.

(Filed 1 May, 1946.)

1. Burglary § 11—

Evidence tending to show that officers searched a car owned by defendant and to which defendant had the key, and found therein implements which, in combination, as a matter of common knowledge, are implements of housebreaking, *is held* sufficient to overrule defendant's motion to nonsuit in a prosecution under G. S., 14-55.

2. Burglary § 6: Criminal Law § 28b—

Although a Stillson wrench, a brace, drills of varying sizes, detonating caps, flashlight batteries, gloves, dynamite, bullets, a drill chuck key, and other like articles, are articles having legitimate uses, the court will take judicial knowledge that they are, in combination, implements of housebreaking.

3. Criminal Law § 27—

Testimony by a witness for the State that defendant made a declaration of innocence does not entitle defendant to judgment as of nonsuit, since such self-serving declaration does not rebut any proof by the State. Such case is distinguishable from instances in which the State by positive evidence establishes a complete defense, or in which the State's evidence is entirely negative and defendant's evidence, without being in conflict therewith, explains away such negative evidence. G. S., 15-173.

4. Burglary § 6—

The offense of being armed with any dangerous weapon with intent to break and enter a dwelling or other building and commit a felony therein,

and the offense of possessing, without lawful excuse, implements of housebreaking, are separate and distinct offenses, G. S., 14-55, the first requiring a presently existing intent to break and enter, and the second mere possession, without lawful excuse, of implements of housebreaking, which infers no personal intent but rather the purpose for which the implements are kept.

5. Criminal Law §§ 19, 52b—

Where the indictments contain two separate charges and the State takes a voluntary nonsuit upon the first count, defendant's contention that the nonsuit established his innocence of acts charged under that count which also constituted essential elements of the offense charged in the second count, must be presented by a plea of former jeopardy or former acquittal, and not by motion for judgment as of nonsuit, G. S., 15-173, and the failure of a plea of former jeopardy amounts to a waiver of his rights in the premises.

APPEAL by defendant from *Parker, J.*, at November Term, 1945, of WAKE.

This was a criminal action wherein the defendant was tried and convicted upon a bill of indictment which contained two counts: The first count charged that the defendant "unlawfully, wilfully and feloniously was found armed with and having in his possession without lawful excuse certain dangerous and offensive weapons, to wit: One 18′ Stillson wrench, one brace #4310, one ½″ drill, one 5/16″ drill, one 3/16″ drill, one 7/32″ drill, five detonating caps, two flashlight batteries Ray O Vac, one burgess super service battery, ″2 cell, one pair brown gloves, one way pack pickle jar containing two sticks of dynamite, four .32 calibre bullets, one drill chuck key, one bottle containing paregoric and other implements of dangerous and offensive nature fitted and designed for use in burglary or other house breakings or for the use in burglary with explosives with intent to so use said implements for the purpose of unlawfully and feloniously breaking and entering a dwelling or other building against the form of the statute in such case made and provided. . . ." The second count charged that the defendant "was found and did then and there unlawfully, wilfully and feloniously have in his possession without lawful excuse certain implements of house breaking, to wit: One 18′ Stillson wrench, one brace #4310, one ½″ drill, one 5/16″ drill, one 3/16″ drill, one 7/32″ drill, five detonating caps, two flashlight batteries RayO Vac, one burgess super service battery, ″2 cell, one pair brown gloves, one way pack pickle jar containing two sticks of dynamite, four .32 calibre bullets, one drill chuck key, one bottle containing paregoric and other implements of dangerous and offensive nature fitted and designed for use in burglary or other house breakings or for use in burglary with explosives against the form of the statute . . ."

The solicitor took a voluntary nonsuit as to the first count in the bill of indictment, and after the close of the evidence, the arguments for the State and defendant and charge of the court, the jury returned a verdict of guilty as charged in the second count of the bill of indictment, whereupon judgment of imprisonment was pronounced from which the defendant appealed, assigning errors.

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

Walter D. Siler and K. R. Hoyle for defendant, appellant.

SCHENCK, J. The first assignments of error set out in the appellant's brief relate to the court's refusal to allow defendant's motion for judgment as in case of nonsuit on the second count duly lodged under G. S., 15-173, and presented to the court at various times and ways during the course of the trial. It was first contended by the defendant that the evidence was insufficient to be submitted to the jury. We think but a casual consideration of the evidence clearly demonstrates its sufficiency to overthrow the motion. It tends to show that the defendant owned the car to which he had in his possession a key, and upon search of the car most of the articles, if not all, mentioned in the bill of indictment were found therein, that while these articles may have had legitimate uses, they were also such articles as were commonly used in blowing safes, burglary and in house breaking; and if any further argument as to the sufficiency of the evidence was needed it is furnished in *S. v. Vick*, 213 N. C., 235, 195 S. E., 779, where *Mr. Justice Barnhill* writes: "There are many facts of which the Court may take judicial notice, and they should take notice of whatever is, or ought to be, generally known within the limits of their jurisdiction, for justice does not require that courts profess to be more ignorant than the rest of mankind. 15 R. C. L., 1057. It is not unusual for the Court to take judicial notice that certain weapons not specifically described in the statute are deadly weapons. They likewise take notice of other like generally known facts. While each of the articles found in the possession of the defendant has its legitimate use, it cannot be said that taken in combination these articles are tools of any legitimate trade or calling. There is no legitimate purpose for which this defendant and his companion could have the combination of articles found in their possession. On the other hand, taken in combination, they are the instruments and tools usually possessed and used by housebreakers. Section 4237-A expressly recognizes nitroglycerin, dynamite, gunpowder, and other explosives as instruments of housebreaking."

It is contended by the appellant that the declarations attributed to him, the defendant, as testified to by a witness introduced by the State, to the effect that the defendant first denied that he knew the articles were in the car and for what they were intended, entitled him to a judgment of nonsuit, since the State was precluded from contradicting such declarations since they were introduced by it. The Court does not hold that any self-serving declaration of the defendant rebuts any proof of the State, although introduced by the State. The case is not to be confused with cases in which the State by its positive evidence establishes a complete defense, *S. v. Hedden,* 187 N. C., 803, 123 S. E., 65, nor with cases in which the State's evidence is entirely negative and the defendants' evidence, without conflicting with this negative evidence, explains it away. *S. v. Oldham,* 224 N. C., 415, 30 S. E. (2d), 318. We are of the opinion, and so hold, that this contention of the defendant is without merit.

It is then contended by the defendant that when the solicitor took a voluntary nonsuit on the first count in the bill of indictment it was tantamount to a judgment that the defendant Baldwin was not guilty of constituent facts and acts therein charged, and since some, at least, of these facts and acts are charged in the second count, and it having been found or admitted that the said facts and acts did not exist on the first count, it followed that the same facts and acts did not exist on the second count, and these being necessary elements of the offense charged in the second count, it followed that the second count was not sustained and the motion thereon for judgment as in case of nonsuit should have been allowed.

The bill of indictment upon which the defendant was tried was drawn under G. S., 14-55, which reads: "If any person shall be found armed with any dangerous or offensive weapon, with intent to break and enter a dwelling, or other building whatsoever, and to commit a felony or other infamous crime therein; or shall be found having in his possession, without lawful excuse, any pick lock, key, bit or other implement of house breaking; or shall be found in any such building, with intent to commit a felony or other infamous crime therein, such person shall be guilty of a felony and punished by fine or imprisonment. . . ." The defendant is confusing an essential element of a criminal offense with a method of determining what amounts to a particular type of instrument or implement. The offense condemned by the first portion of G. S., 14-55, is the possession of a dangerous or offensive weapon with the presently existing intent to break or enter a dwelling or other building to commit a felony or other infamous crime therein. Intent, as used here, means a present, specific intent in the mind of the person who possesses the weapon. This is the crime charged in the first count of the bill of indictment and as to which the court entered a judgment as of

nonsuit. The intent in the definition of an implement of housebreaking does not mean a specific, present intent to break or enter a dwelling. It means, rather, the purpose for which the tools are kept. However, irrespective of whether the offense charged in the first count and in the second count were or were not the same in law and in fact, if the defendant's contention that a voluntary nonsuit taken on the first count was tantamount also to a verdict of not guilty on the second count, was correct, the defendant should have entered a plea of former jeopardy or prior acquittal, and his failure so to do amounts to a waiver of his rights in the premises. *S. v. Davis,* 223 N. C., 54, 25 S. E. (2d), 164; *S. v. King,* 195 N. C., 621, 145 S. E., 140.

For the reasons given we are of the opinion, and so hold, that the assignments of error made by the defendant based upon the refusal of the court to allow the motion for judgment as in case of nonsuit are without merit.

There are in the record many exceptions lodged to the contentions by the State given in his Honor's charge and these exceptions are preserved in the assignments of error, and some of them are set out in the appellant's brief, but in no instance did the defendant object to the statement of such contentions at the time they were given, and objections thereto for the first time being made upon appeal in this Court would seem to be untenable. *S. v. Smith,* 225 N. C., 78, and cases there cited.

We have carefully considered the exceptions in the record lodged to the admission of evidence and found no merit therein. Many of these exceptions were taken where the evidence was admitted upon redirect examination of a witness to explain evidence elicited on cross-examination. There was no error thereby committed. *S. v. Britt,* 225 N. C., 364.

It would appear there was legally sufficient evidence and a trial free from error, and that the judgment below should be affirmed. It is so ordered.

No error.

STATE v. FAB STEWART.

(Filed 1 May, 1946.)

1. Homicide § 21—

Premeditation and deliberation are not presumed from a killing with a deadly weapon, but may be shown by circumstances, and all the circumstances under which the homicide was committed may be considered, one such circumstance being the entire absence of legal provocation.

2. Homicide § 4c—

If a person forms a fixed design to kill, and thereafter executes such intent, however soon or late, there is sufficient premeditation and deliberation to warrant the jury in finding him guilty of murder in the first degree.

3. Homicide § 25—Evidence of premeditation and deliberation held sufficient to sustain conviction of murder in the first degree.

The State's evidence tended to show the following circumstances: Defendant was searching for a man whom he had seen with his wife. In his search he entered a house, and in response to questioning, the owner of the house declared he did not know where the person, the object of defendant's search, had gone. Defendant started to leave, but then demanded of a visitor in the house the same information, and received a negative reply. Defendant then said, "You is a damn lie, you have saw him," and again received a negative reply. Defendant cursed him again and received a reply in kind, whereupon defendant said, "You call me a G—— d—— lie and I'll shoot hell out of you," and pulled a pistol from his pocket and shot and killed him. *Held:* The evidence is sufficient to show premeditation and deliberation and sustain a verdict of guilty of murder in the first degree.

APPEAL by defendant from *Bone, J.*, at January Term, 1946, of WAKE.

Criminal prosecution upon indictment charging the defendant with the murder of one Ernest Jones, Jr. The evidence tends to show: That on the afternoon of 15 December, 1945, about 1:00 o'clock, the defendant and his wife had a quarrel. His wife left home and stated she was going to the home of her mother at 706 Carroll's Alley, in the City of Raleigh. A short time thereafter the defendant went to the home of his wife's mother and his wife was not there. He later went to the home of James Harris and saw his wife, and a man by the name of Lee McQueen coming out of the toilet. He engaged in a fight with his wife. Immediately thereafter he obtained a pistol and went in search of McQueen. He went to the home of Clyde Wright, who lived at 712 Carroll's Alley. He entered the front door of the house in which Clyde Wright and the deceased were. He did not speak to either of them until after he had walked through the room and into an adjoining room. When he came back into the room, he inquired of Wright if he had seen Lee McQueen. Wright answered that he had, but that he could not tell him where he had gone. The defendant said, "I caught that s.o.b. with my wife today."

The defendant turned as if to leave by the door he had entered and then made inquiry of Ernest Jones, Jr., who was a Sergeant in the Army and was home on furlough, if he had seen Lee McQueen. The deceased answered that he had not. The defendant said: "You is a damn lie, you have saw him." The deceased said: "I haven't." The defendant said: "You is a G—— d—— lie, you did see him," and the deceased replied:

"You are another G—— d—— lie, I haven't saw him." Whereupon, the defendant said: "You call me a G—— d—— lie and I'll shoot hell out of you," and he pulled a pistol out of his pocket and shot him, killing him instantly.

Just prior to his arrest, several hours after the fatal shooting, the defendant made the statement: "I killed the G—— d—— negro," or "The G—— d—— negro is dead," or "out of the way." After his arrest, he told the officers he was looking for Lee McQueen and the deceased denied having seen McQueen, when he thought he had, "So he cursed him and shot him." One of the officers testified that the defendant said: "He shot this boy when he was actually looking for Lee, if he had just gotten Lee, been able to find Lee, he would have been willing to smell the gas."

Verdict: Guilty of murder in the first degree.

Judgment: Death by asphyxiation.

Defendant appeals to the Supreme Court, and assigns error.

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

Harvey Jones and Brassfield & Maupin for defendant.

DENNY, J. The only question presented upon this appeal is whether the evidence tending to show premeditation and deliberation is sufficient to sustain a verdict of murder in the first degree.

The defendant contends that there is no evidence to show that he knew the deceased or that he had ever seen him prior to the afternoon of the killing; that he killed the deceased in the heat of passion, caused by the vile language used by the deceased, at a time when he was already mad; therefore, at most, he is only guilty of murder in the second degree. The defendant is relying principally upon *S. v. Thomas,* 118 N. C., 1113, 24 S. E., 431, and *S. v. Rhyne,* 124 N. C., 847, 33 S. E., 128.

In *S. v. Thomas, supra,* there was no evidence of the use of a deadly weapon, and the Court said: "In any aspect of the evidence, there was error, to take the view most favorable of the charge, in omitting to explain to the jury the application of the testimony to the theory of murder in the second degree, when the prisoner's counsel was maintaining that the prisoner ought to be convicted of no higher crime. For this error there must be a *venire de novo.*" While in the case of *S. v. Rhyne, supra,* there was legal provocation, to wit, an assault and battery.

The defendant, by his own admission to the officers, was looking for Lee McQueen at the time he killed the deceased, and he said he shot him because he thought the deceased was withholding information as to the

whereabouts of McQueen. He never contended that he shot the deceased in the heat of passion because of any vile language used by the deceased. In fact, the record discloses that the deceased had twice stated that he had not seen McQueen. The defendant had cursed him twice before the deceased replied in kind. Whereupon, the defendant said: "You call me a G—— d—— lie, and I'll shoot hell out of you," and he pulled a pistol out of his pocket and shot him.

Premeditation and deliberation are not presumed from a killing with a deadly weapon. However, "Premeditation and deliberation, like any other fact, may be shown by circumstances, and in determining as to whether there was such premeditation and deliberation the jury may consider the entire absence of provocation and all the circumstances under which the homicide is committed. *S. v. Roberson,* 150 N. C., 837; Carr on Homicide, sec. 72. If the circumstances show a formed design to take the life of the deceased, the crime is murder in the first degree." *S. v. Walker,* 173 N. C., 780, 92 S. E., 327. *S. v. Benson,* 183 N. C., 795, 111 S. E., 869; *S. v. Steele,* 190 N. C., 506, 130 S. E., 308; *S. v. Newsome,* 195 N. C., 552, 143 S. E., 187; *S. v. Evans,* 198 N. C., 82, 150 S. E., 678; *S. v. Matheson,* 225 N. C., 109, 33 S. E. (2d), 590.

In *S. v. Newsome, supra,* this Court said: "Deliberation and premeditation, if relied upon by the State, as constituting the homicide murder in the first degree, under the statute, must always be proved by the evidence, beyond a reasonable doubt. In such case, under the statute as construed by this Court, it is for the jury and not the judge to find the fact of deliberation and premeditation, from the evidence, and beyond a reasonable doubt. Premeditation and deliberation are always matters of fact to be determined by the jury, and not matters of law to be determined by the judge."

In the case of *S. v. Evans, supra, Stacy, C. J.,* speaking for the Court, said: "In determining the question of premeditation and deliberation, it is proper for the jury to take into consideration the conduct of the prisoner, before and after, as well as at the time of, the homicide, and all the attendant circumstances. If the killing took place simultaneously with the formation of the intent to kill, there would be no premeditation. Nor would flight be evidence of it. *S. v. Steele, supra.* But if the prisoner weighed the purpose of killing long enough to form a fixed design, and at a subsequent time, no matter how soon or how remote, put it into execution, there would be sufficient premeditation and deliberation to warrant the jury in finding him guilty of murder in the first degree. *S. v. Teachey,* 138 N. C., 587, 50 S. E., 232; *S. v. Dowden,* 118 N. C., 1145, 24 S. E., 722. It is immaterial, in determining the degree of murder, how soon after resolving to kill, the prisoner carried his purpose into execution. *S. v. Covington,* 117 N. C., 834, 23 S. E., 337. Pre-

meditation means 'thought of beforehand' for some length of time, however short, but no particular time is required for the mental process of premeditation. *S. v. Benson, supra.* Deliberation means that the act is done in a cool state of the blood, in furtherance of some fixed design. *S. v. Walker,* 173 N. C., 780, 92 S. E., 327."

If the defendant intended to kill the deceased and did so for revenge, because he thought the deceased was withholding information as to the whereabouts of McQueen, even though the fixed design to kill was formed immediately before he fired the fatal shot, he is guilty of murder in the first degree. Or if the defendant armed himself with a pistol and determined to find McQueen, and determined to kill anyone whom he thought was withholding information as to McQueen's whereabouts, and actually did kill the deceased for that reason, he is guilty of murder in the first degree. No legal provocation in mitigation of the defendant's conduct is shown in this record. *S. v. McDowell,* 145 N. C., 563, 59 S. E., 690.

We are not prepared to hold, in the light of our decisions, that all the facts and attendant circumstances are insufficient to sustain the verdict of murder in the first degree.

In the trial below, there is

No error.

FRANK F. JONES v. PALACE REALTY COMPANY.

(Filed 1 May, 1946.)

1. Contracts § 8—

If there be no dispute in respect of the terms of a contract, and they are plain and unambiguous, there is no room for construction. The contract is to be interpreted as written.

2. Same—

If the words employed in a contract are capable of more than one meaning, the meaning to be given is that which it is apparent the parties intended them to have, and the practical interpretation of the agreement by the parties *ante litem motam* will control.

3. Same—

An ambiguity in a written contract is to be inclined against the party who prepared the writing.

4. Contracts §§ 10, 11b—

The general rule is to the effect that the use of such words as "when," "after," "as soon as," and the like, gives clear indication that a promise is not to be performed except upon the happening of a stated event, and it can make no difference whether the event be called a contingency or the

time of performance, since in neither case may performance be exacted unless or until the event transpires.

5. Brokers § 11—Agreement to pay commissions "when the deal is closed . . . out of the sale price" is enforceable only upon consummation of sale.

This action was instituted to recover brokerage commissions based upon an agreement set forth in a letter written by plaintiff broker which stated that the commissions were to be paid "when the deal is closed up . . . out of the sale price." The evidence tended to show that plaintiff procured a purchaser who contracted to buy at a price agreed, but that the sale was not consummated because the purchaser thereafter became financially unable to comply. *Held:* The contract is to be interpreted as written, and under its terms the broker is not entitled to recover commissions upon the facts and judgment of nonsuit was proper, there being no evidence to support plaintiff's contention that the failure to close the deal was due to defendant's own default or his contention of waiver.

APPEAL by plaintiff from *Bobbitt, J.*, at November Extra Term, 1945, of MECKLENBURG.

Civil action by broker to recover commission for procuring purchaser ready, able and willing to buy land on terms authorized.

The plaintiff is a licensed real estate broker in the City of Charlotte. In August, 1944, he was given the exclusive right, for thirty days, to sell the old Charlotte Sanatorium property at a price satisfactory to the owner—commission to be paid "out of the proceeds." On 1 September, 1944, the plaintiff prepared a letter for signature by the Palace Realty Company, addressed to Mr. U. A. Zimmerman, in which the owner agreed to sell to the addressee the Sanatorium property at a price of $100,000—"Deed to be made up at once, and the transaction to be finally closed up soon as your attorney investigates title to the property."

This letter concludes with the statement: "When the deal is closed up we will pay Frank F. Jones his commission of 5% . . . out of the sale price of the property."

Following the signature of the Palace Realty Company by A. M. Whisnant, President, appears the acceptance in writing by U. A. Zimmerman, and also the signature of Frank F. Jones, agent for Palace Realty Company.

Negotiations ensued looking to a consummation of the sale, but on 18 October, 1944, large Federal tax liens were levied against U. A. Zimmerman in consequence of which he "became unable to comply with his contract." The deal, therefore, was never "closed up" and the purchase price never paid.

In his testimony the plaintiff says: "The Palace Realty Company has never given me a commission for the sale of this property. I waited for

weeks and weeks for him (Dr. Whisnant) to close it up. I didn't want to make any demand on him for my commission until it was closed up."

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

Taliaferro & Clarkson and Joseph W. Grier, Jr., for plaintiff, appellant.

Robinson & Jones for defendant, appellee.

STACY, C. J. The question for decision is whether the promise to pay the plaintiff's commission, as set out in the letter of 1 September, 1944, from Palace Realty Company to U. A. Zimmerman, binds the defendant absolutely or conditionally. The trial court interpreted the stipulation as a promise to pay plaintiff's commission "when"—and only when—"the deal is closed up," and then "out of the sale price of the property." The view seems to accord with the terms of the agreement as prepared by the plaintiff. Anno. 20 A. L. R., 289.

It will be noted the judgment of nonsuit is grounded on the special contract, prepared by plaintiff, where the sale failed because of the inability of the purchaser procured by the broker to complete it. *Watson v. Odell,* 58 Utah, 276, 198 Pac., 772, 20 A. L. R., 280. The case is not like the usual broker's action where a responsible purchaser is procured by his efforts under a general contract, express or implied. *White v. Pleasants,* 225 N. C., 760; *Lindsey v. Speight,* 224 N. C., 453, 31 S. E. (2d), 371; Anno. 73 A. L. R., 926. Nor is it an instance where the sale failed of consummation because of some default on the part of the owner. *Colvin v. Post Mtg. & Land Co.,* 225 N. Y., 510, 122 N. E., 454.

The heart of a contract is the intention of the parties. *Bank v. Page,* 206 N. C., 18, 173 S. E., 312; 12 Am. Jur., 760. This intention is to be gathered from the entire instrument, viewing it from its four corners. *Krites v. Plott,* 222 N. C., 679, 24 S. E. (2d), 531; *Simmons v. Groom,* 167 N. C., 271, 83 S. E., 471; *Whitley v. Arenson,* 219 N. C., 121, 12 S. E. (2d), 906. If there be no dispute in respect of the terms of the contract, and they are plain and unambiguous, there is no room for construction. The contract is to be interpreted as written. *Potato Co. v. Jenette,* 172 N. C., 1, 89 S. E., 791. "If the words employed are capable of more than one meaning, the meaning to be given is that which it is apparent the parties intended them to have." *King v. Davis,* 190 N. C., 737, 130 S. E., 707. It is also a rule of construction that an ambiguity in a written contract is to be inclined against the party who prepared the writing. *Wilkie v. Ins. Co.,* 146 N. C., 513, 60 S. E., 427. Then, too, the *ante litem motam* practical interpretation of the parties is a safe guide in the interpretation of contracts. *Cole v. Fibre Co.,* 200 N. C.,

484, 157 S. E., 857. The present case stands or falls on the proper construction of the written agreement between the parties. *Jones v. Casstevens,* 222 N. C., 411, 23 S. E. (2d), 303.

The plaintiff takes the position that when he procured a purchaser ready, able and willing to buy the property on terms satisfactory to the owner and a binding contract of sale was entered into, "his commission" was thereupon earned, and the stipulation that it should be paid "when the deal is closed up" has reference to the time of payment rather than to the happening of an event upon which its payment would depend. *Crowell v. Parker,* 171 N. C., 392, 88 S. E., 497; *S. c.,* 175 N. C., 717, 95 S. E., 188; *Harrison v. Brown,* 222 N. C., 610, 27 S. E. (2d), 470; Anno. 51 A. L. R., 1390. To this the defendant replies, "such might have been the contract, but it is not so nominated in the special agreement."

It can make no difference whether the event be called a contingency or the time of performance. Certainly, under either construction, the result would be the same; since, if the event does not befall, or a time coincident with the happening of the event does not arrive, in neither case may performance be exacted. Nor will it do to say that a promise to pay "when the deal is closed up" is a promise to pay when it ought to be closed up according to the terms of the contract. Such is not the meaning of the words used. It is the event itself, and not the date of its expected or contemplated happening, that makes the promise to pay performable. *Amies v. Wesnofske,* 255 N. Y., 156, 174 N. E., 436, 73 A. L. R., 918.

The weight of authority is to the effect that the use of such words as "when," "after," "as soon as," and the like, gives clear indication that a promise is not to be performed except upon the happening of a stated event. 12 Am. Jur., 849. It has been held that promises to pay commissions to brokers, for the procurement of sales of real estate, are conditional when expressed to be performable "on the day of passing title" (*Leschziner v. Bouman,* 83 N. J. L., 743, 85 Atl., 205); "when the sale is completed" (*Sams v. Olympia Holding Co.,* 153 Wash., 254, 279 P., 575); "upon delivery of the deed and payment of the consideration" (*Tarbell v. Bomes,* 48 R. I., 86, 135 A., 604, 51 A. L. R., 1386); "at settlement" of total consideration (*Simon v. Myers,* 284 Pa., 3, 130 A., 256); "when the sale is consummated" (*Alison v. Chapman,* 36 Cal. App., 759, 173 P., 389); "at the date of passing title" (*Baum v. Goldblatt,* 81 Pa. Supr. Ct., 233); "at the time of the consummation" of the sale (*Morse v. Conley,* 83 N. J. L., 416, 85 A., 196); "out of the first money received" from the sale (*Lindley v. Fay,* 119 Cal., 239, 51 P., 333); "out of the proceeds of said deal" (*Kiam v. Turner,* 21 Tex. Civ. App., 417, 52 S. W., 1043); "2½ per cent. of the amount you receive"

from the sale (*Lee v. Greenwood Agency Co.,* 123 Miss., 823, 86 So., 449); "out of the payments as made" (*Murray v. Rickard,* 103 Va., 132, 48 S. E., 871); and in the case at bar the broker's commission is payable "when the deal is closed up," and then "out of the sale price of the property."

"A commission agent employed to negotiate a sale upon the terms that he is to be paid a commission on the amount of purchase money, or on the happening of a certain event, will not be entitled to any commissions until the purchase money has been received or the event has happened, unless there has been fraudulent delay or willful neglect on the part of the employer." 2 Addison on Contracts, sec. 925.

It is alleged in the instant complaint that the failure to close the deal was due to the defendant's own default. However, the evidence adduced on the hearing is insufficient to support the allegation. The question of waiver was also advanced by the plaintiff, but this, too, is unsupported by the record. Hence, tested by the weight of authority and our own decisions, it would seem that we have here a promise to pay plaintiff's commission upon a condition which has not been fulfilled and "out of the sale price of the property" which has not been received because of the inability of the purchaser to comply with his contract. The result is an affirmance of the judgment of nonsuit.

Affirmed.

ALTON K. PEARCE v. INEZ M. PEARCE.

(Filed 1 May, 1946.)

1. Pleadings § 15—

Upon demurrer the pleading will be liberally construed and the demurrer overruled if facts sufficient to entitle the pleader to some relief can be gathered from the pleading.

2. Same—

A demurrer to an answer should be overruled if sufficient facts can be gathered from the pleading to entitle defendant to some relief, notwithstanding that the answer fails to state separately the cause or causes relied on for affirmative relief and the matters relied on as defenses, as required by G. S., 1-138 and Rule 20 (2).

3. Husband and Wife § 12d (1): Divorce § 5b—

A deed of separation which is not executed as required by G. S., 52-12, G. S., 52-13, is void *ab initio* and does not in law exist, and therefore no claim can be asserted by the husband thereunder, and where the execution of such void agreement appears from the pleadings in the husband's

action for divorce on the ground of two years separation, the allegations of the wife's answer must be weighed in the light of this fact.

4. Divorce § 5b—

Allegations that the husband cohabited and committed adultery with another woman and that these illicit relations continued over a period of time notwithstanding the protestations and pleas of the wife, states a cause of action for absolute divorce. G. S., 50-5 (1).

5. Same: Divorce § 1—

Allegations to the effect that the husband, to the great humiliation of the wife, had been living in adultery, that he repeatedly avowed his loss of affection for and his desire to be rid of his wife, had ejected her from his bed, and finally ordered her from his home, saying that he never intended to live with her again as husband and wife, states a cause of action in the wife's favor for divorce from bed and board. G. S., 50-7 (4).

6. Same—

Under G. S., 50-7 (4), allegation of actual physical violence is not required.

7. Divorce § 2½—

In a divorce action, an answer which alleges causes for divorce against plaintiff interposes a plea of recrimination in defense.

APPEAL by plaintiff from *Parker, J.*, at December Civil Term, 1945, of WAKE. Affirmed.

Civil action for divorce heard on demurrer to the further defense and cross action pleaded in defendant's answer.

This case was here on former appeal. *Pearce v. Pearce,* 225 N. C., 571. After the cause was remanded the defendant filed an amended answer in which she pleads a revised further defense and cross action.

The plaintiff demurred for that the facts alleged, in view of defendant's admissions, are not sufficient to constitute (1) a cross action or (2) a valid defense. The demurrer was overruled and plaintiff appealed.

Douglass & Douglass for plaintiff, appellant.

Thos. W. Ruffin for defendant, appellee.

BARNHILL, J. The further defense and the cross action or actions upon which defendant apparently relies are not separately stated as required by statute and by the Rules of Practice adopted by this Court. G. S., 1-138, Rule 20 (2), 221 N. C., 557. Numerous facts are alleged in a series of paragraphs without any satisfactory attempt to indicate which are relied upon in defense and which as a basis for affirmative relief. Hence it does not appear with any degree of certainty just what

affirmative defense and which cause or causes for divorce she seeks to assert.

Even so, on demurrer the defendant is entitled to have her pleadings liberally construed. *Sparrow v. Morrell & Co.,* 215 N. C., 452, 2 S. E. (2d), 365. The demurrer will not be sustained if facts sufficient to entitle her to some relief can be gathered therefrom. *Hoke v. Glenn,* 167 N. C., 594, 83 S. E., 807; *Lumber Co. v. Edwards,* 217 N. C., 251, 7 S. E. (2d), 497.

The defendant denies that there has been a voluntary separation and alleges that plaintiff, since June, 1941, has maintained an apartment in Richmond for another woman with whom he has lived in illicit relations; that he has repeatedly committed acts of adultery with this woman; that since said time he has become cold and indifferent toward defendant, has excluded her from his bedroom, and has continuously and repeatedly told her that he did not give a damn about her, did not want her, and that he never expected to live with her as husband and wife again; that he has since that time refused to live with her as husband and wife; that she has repeatedly, for the sake of her children, attempted to persuade plaintiff to cease his misconduct and live the normal, peaceful life they had lived before he began his illicit relations with the woman in Richmond; that notwithstanding such attempts on her part the plaintiff has persisted in his repeated insults and humiliation of her and, finally, shortly before 19 August, 1942, ordered defendant to leave his home; that thereupon under his persuasion she signed a separation agreement in writing in which the plaintiff agreed to pay her $100 per month in lieu of alimony "and thus the defendant wife separated herself from the plaintiff"; that said agreement was void in its inception for the reason that it was not executed in the manner required by G. S., 52-12 and 52-13; that at the time she was without property or income with which to discharge her ordinary living expenses and is now unable to defray the expenses of this litigation or to pay counsel to conduct her defense herein; that plaintiff, upon learning that said agreement was void, ceased to make the payments therein required and has not since August, 1945, made any contribution whatsoever toward her support; and that plaintiff's conduct as alleged has rendered her condition intolerable and her life burdensome. She further alleges that the misconduct of plaintiff was without any provocation on her part.

She prays (1) a decree of divorce *a mensa et thoro,* (2) an order for alimony *pendente lite* and counsel fees, (3) an order for alimony, and (4) for general relief.

It must be noted at the threshold of this case that the asserted written agreement of separation is void *ab initio.* G. S., 52-12, 52-13; *Daughtry v. Daughtry,* 225 N. C., 358; *Pearce v. Pearce,* 225 N. C., 571. In law

it does not exist. Hence the plaintiff has no right to claim the benefit of any of its provisions. The allegations in the answer must be weighed in the light of this fact.

Defendant alleges that plaintiff cohabited and committed adultery with another woman and that these illicit relations continued over a period of time notwithstanding the protestations and pleas of defendant. Thus she states a cause of action for absolute divorce. G. S., 50-5 (1).

It is likewise alleged that plaintiff, to the great humiliation of defendant, has been living in adultery, that he has repeatedly avowed his loss of affection and his desire to be rid of defendant, ejected her from his bed, and finally ordered her from his home, stating that he never intended to live with her again as husband and wife.

Such flagrant infidelity, humiliation and insult, repeated and persisted in, might well send the broken heart of a refined and sensitive woman to the grave. Allegation thereof sufficiently states a cause of action under G. S., 50-7 (4); *Jackson v. Jackson,* 105 N. C., 433; *Green v. Green,* 131 N. C., 533; *Coble v. Coble,* 55 N. C., 392. Under this section of the code allegation of actual physical violence is not required. *Coble v. Coble, supra; Green v. Green, supra;* 14 L. R. A., 685n; 18 L. R. A. (N. S.), 309n.

As the defendant has pleaded two causes of action for divorce, it follows that she has interposed a plea of recrimination in defense. *Taylor v. Taylor,* 225 N. C., 80; *Pharr v. Pharr,* 223 N. C., 115, 25 S. E. (2d), 471; *Byers v. Byers,* 223 N. C., 85, 25 S. E. (2d), 466; *Brown v. Brown,* 213 N. C., 347, 196 S. E., 333; *Page v. Page,* 161 N. C., 170, 76 S. E., 619.

The judgment overruling the demurrer is

Affirmed.

STATE v. DR. G. D. GARDNER.

(Filed 1 May, 1946.)

1. Criminal Law § 51—

The legal sufficiency of evidence to go to the jury is for the court; its credibility, weight and significance are for the jury, upon appropriate instruction by the court respecting the degree, or intensity of proof required to convict.

2. Homicide § 25—

Evidence of defendant's guilt of manslaughter in an attempt at criminal abortion *held* sufficient to be submitted to the jury, but as a new trial is ordered on an exception relating to the admission of evidence, recitation of the evidence is not necessary.

3. Criminal Law §§ 42c, 81c—Admission of entire news articles, without proper correlation for purpose of impeaching witness, held error.

Two witnesses for defendant testified, in corroboration of testimony of defendant, that they saw a taxi leave the defendant's residence at the time in question, in conformity with defendant's statement as published in articles in the local papers. The articles referred to did not contain any statement relating to a taxi. The State, over objection offered in evidence the entire articles for the purpose of contradicting and impeaching the witnesses. *Held:* Since the statements of the witnesses and the news stories were not sufficiently correlated for the purpose of contradiction and impeachment, the admission of the entire news articles, which constituted second-hand evidence of the events recorded therein, was error, and since the articles contained statements prejudicial to defendant beyond those admitted by defendant in his testimony, the admission of the news articles cannot be held harmless.

APPEAL by defendant from *Sink, J.,* at January, 1946, Term of BUNCOMBE.

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

Jones & Ward and Henry Fisher for defendant, appellant.

SEAWELL, J. The defendant was convicted of manslaughter in an attempt at criminal abortion, and sentenced to State Prison for a term of not less than three nor more than ten years. The appeal brings up his demurrer to the sufficiency of the evidence and objection to the admission of exceptive matter during the trial.

In one instance the exception to the admission of evidence seems to merit a new trial. Since the whole ground must be gone over again, we see no sufficient reason, in considering the motion for judgment as of nonsuit, to perpetuate in full in our reports tragic and morbid details, however necessary it may be to present them to the trial court. An analysis of the evidence, pointing out the inferences which may be drawn from it, is not desirable, and it is the practice of the Court to avoid it unless the exigencies of decision clearly require it.

The legal sufficiency of evidence to go to the jury is for the court; its credibility, weight and significance are for the jury, upon appropriate instruction by the court respecting the degree, or intensity of proof required to convict. Applying this rule in the present review, we are of the opinion that the evidence was properly submitted to the jury.

We direct our attention to the admission in evidence of the news accounts of defendant's arrest, and incidental circumstances contained in the *Asheville Times* and *Asheville Citizen* respectively in the issues of 25 October, 1945.

The defendant had testified in his own behalf that Mrs. Cordell, alleged victim of the criminal abortion at his hands, had been found by him upon the steps of his home in a weak condition and desperately sick about 7:00 o'clock in the morning, apparently having been brought by a taxi which he said drove rapidly out of his driveway and down the street before he could get any information about her or why she had been brought. The woman herself, he testified, was too weak and sick to give that information. He testified that he made no examination of her, and did not know what was the matter with her, but did the best he could for her until her death in his place about 1:00 o'clock the same day. The autopsy indicated instrumentation at the cervix of the uterus, and the infliction of a wound in the anterior wall of the uterus extending in a ragged tear from the cervix to the top caused, in the opinion of the testifying experts, by the use of a curette in an attempt to produce abortion. The woman was about four months advanced in pregnancy. Opinion evidence tended to show that Mrs. Cordell could not have survived the infliction of this wound for a longer period than twenty or thirty minutes.

In this situation the following took place:

Arthur Ford, for the defense, testified that he saw a taxi coming out of Dr. Gardner's driveway between a quarter to 7:00 and 7:30 pretty fast, going down Mitchell Avenue. That he had read Dr. Gardner's statement in the paper about the taxi and discussed it with his wife—read the statement to her and told her, "One thing he did tell the truth about the taxi." Witness stated he also talked about seeing the taxi to a Mr. Crook. That Dr. Gardner came to his house, and at his request he went to the office of Dr. Gardner's lawyer and talked to him about it. Dr. Gardner's statement in the paper, witness said, mentioned the taxi. Witness was uncertain about the date he read it in the paper, whether the 23, 24 or 25; but it was sometime after Tuesday; in his opinion Wednesday evening.

C. L. Crook testified that he also read the statement of Dr. Gardner about the taxi bringing the woman to his place, and had a conversation with witness Ford about it, and Ford said, "You know I seen that taxi coming out of there, I believe it was yesterday morning or when the paper said it was." Witness said he'd read it in the paper the night before.

The State in rebuttal identified news stories concerning the arrest of Dr. Gardner appearing in the *Asheville Citizen* and the *Asheville Times* of 25 October. C. R. Sumner testified that he had written the first account of the arrest appearing on the front page of the *Citizen* of that date. The articles in the *Times* and *Citizen* were introduced in their entirety over objection and exception by defendant. They do not con-

tain a statement by Dr. Gardner such as the witness Ford claimed to have seen and commented upon with reference to the appearance of the taxi. The purpose of the introduction of the documents was to impeach the witnesses on a supposedly vital point, although the evidence appears to have been admitted without restriction to that effect.

If the State had succeeded in laying an exact basis for the evidence, so that the statement of the witnesses and the news stories could be sufficiently correlated for the purpose of contradiction and impeachment, and if the newspaper accounts had been free from prejudicial statements, the evidence might have been either admissible or harmless; but it does not clearly appear that either of these conditions actually prevailed. The State argues here that defendant had already admitted the main facts of his history contained in the articles—his conviction of crime and service in the Atlanta Penitentiary, loss of his license to practice as a physician and other damaging facts. But we have the impression that there were other statements in the news stories which were not free from prejudicial inferences, and that the summary they contained might have affected the result in a way not contemplated in their introduction, and so have fallen under the ban as second-hand evidence of the events recorded.

For error in the admission of this evidence, the defendant is entitled to a new trial. It is so ordered.

New trial.

ETHEL BUFFALOE AND R. CARLTON STUART, EXECUTORS OF THE ESTATE OF DAVID THOMAS BARNES, DECEASED, v. ZELDA BARNES, ROSSIE MAE BARNES, MRS. NANCY BARNES STUART, ETHEL BUFFALOE. MRS. RUTH BUFFALOE WILSON, KATIE BUFFALOE AND NORMAN B. BUFFALOE.

(Filed 8 May, 1946.)

1. Gifts § 1—

In order to constitute a gift *inter vivos* there must be an intent to presently pass title, and this intention must be consummated by delivery, actual or constructive, with consequent loss by the donor of dominion over the property given.

2. Same—

Ordinarily, when the purchaser of shares of stock has the certificate issued in the name of another, and so registered on the books of the corporation, though retaining possession of the certificate, the transaction constitutes a gift *inter vivos* consummated by constructive delivery, but such transaction does not operate as a gift *inter vivos* when the name of such other is inserted for the convenience of the purchaser, donative

intent is not established, or where the donor has not divested himself of right and title to the stock and of all dominion and control over it.

3. Partition § 1a—

The right to partition, G. S., 46-42, applies to joint tenants as well as to tenants in common, and the owner of stock as joint tenant has the right at any time to have his interest therein segregated by partition.

4. Gifts § 1—

The fact that the purchaser of stock has the certificate issued in the name of himself and another with words purporting to create a joint tenancy with right of survivorship, does not conclusively establish donative intent which is essential to a valid gift *inter vivos*, but such intent must be determined by consideration of all the attendant facts and circumstances.

5. Same: Executors and Administrators § 9—Act of uncle in having stock certificate issued in name of himself and niece held not to show as matter of law, upon facts agreed, donative intent and delivery.

The facts agreed disclosed the following: Testator paid for certain stock with his own funds and had the certificates issued to himself and niece "as joint tenants with right of survivorship, and not as tenants in common." Testator received a dividend on the stock and had the certificates in his exclusive possession at the time of his death. *Held:* The testator had the right at any time to segregate his interest therein by partition, and he thus retained control over the shares of stock, at least as to one-half interest therein, and the facts agreed are insufficient to support, as a conclusion of law, that a present gift was intended at the time of the issuance of the certificates, and therefore the facts agreed are insufficient to uphold, upon the ground of a gift *inter vivos*, the trial court's conclusion that the niece was the sole owner of the stock.

6. Wills § 3: Gifts § 4: Trusts § 3a—

The facts agreed disclosed that testator paid for certain stock with his own funds and had the certificates issued to himself and niece as joint tenants with right of survivorship, but had the stock in his exclusive possession at the time of his death. *Held:* The transaction does not constitute a testamentary disposition of the stock, nor a gift *causa mortis*, nor create a trust.

7. Same: Brokers § 3—

Testator purchased certain stock through a broker and directed the broker to have the certificate issued in the name of himself and niece with right of survivorship, but died before the stock was issued by the transfer agent. *Held:* The agency of the broker was revoked by the death of his principal, and the transaction not having been consummated, the executor is entitled to the stock as against the niece.

8. Executors and Administrators § 15k—

In the absence of a contrary testamentary provision, Federal Estate taxes should be paid out of the general funds of the estate and not charged against the individual beneficiaries.

BUFFALOE *v.* BARNES.

9. Executors and Administrators § 15m: Wills § 46—

The cost of repairs to real property which are ordered by testator or by his authorized agent, and which are completed prior to his death, are chargeable against the executors; but other repairs made after testator's death when title had vested in the devisees, in the absence of a finding or evidence that they had been contracted for by testator or someone authorized by him, are chargeable against the devisees.

BARNHILL, J., dissenting in part.

SEAWELL, J., concurs in dissent.

APPEAL by defendants Ruth Buffaloe Wilson, Katie Buffaloe and Norman B. Buffaloe from *Grady, Emergency Judge,* at September Term, 1945, of WAKE. Modified and affirmed.

This was an action by the executors of the will of David T. Barnes, deceased, under the Declaratory Judgment Act, for advice and direction in the administration of the estate. The devisees and legatees are made parties defendant. All are of full age.

The cause was submitted to the court for decision of certain questions of law based upon an agreed statement of facts. The admitted facts pertinent to the inquiry were substantially these:

David T. Barnes died 23 August, 1944, leaving a last will and testament wherein he named the plaintiffs executors, and made numerous devises and bequests to his nieces and a nephew of his real and personal property. The residuary legatees were the appellants, Ruth Buffaloe Wilson, Katie Buffaloe, Norman B. Buffaloe, and the plaintiff Ethel Buffaloe. Advice of the court was sought as to five specific matters, as follows:

1. On 14 June, 1944, the testator with his own funds purchased 70 shares of the preferred stock of the Carolina Power & Light Co. for $8,261 and had the stock certificates issued to "David T. Barnes and Rossie Mae Barnes as joint tenants with right of survivorship, and not as tenants in common." The certificates were delivered to the testator and by him placed in his safety deposit box. A dividend paid on the stock was received by the testator. Rossie Mae Barnes now claims these shares of stock free of any claim of the executors.

2. On 16 August, 1944, the testator authorized a broker to purchase for him 15 additional shares of the preferred stock of Carolina Power & Light Co. and issued his check in payment therefor $1,777.50 with instructions that the certificate be issued in name of "David T. Barnes and Rossie Mae Barnes as joint tenants with right of survivorship and not as tenants in common." The broker purchased the shares 18 August, and later mailed the old certificate to the Wachovia Bank & Trust Co., the transfer agent, for issuance of new certificate as instructed. The old

certificate reached the transfer agent 23 August, at which time it was ascertained that David T. Barnes was dead, and the transfer agent notified the broker the certificate could not be issued as directed. Subsequently the broker, who had delivered the old certificate to the transfer agent, instructed the transfer agent to issue the new certificate to Rossie Mae Barnes, which was done. Rossie Mae Barnes refuses to surrender the 15 shares of stock, claiming them as her own.

3. The third question presented was whether the devise of a certain store house and lot carried with it the adjoining lot which was originally included in the deed to the testator. It was held that the lot was included in the devise, and no exception having been noted, this item may be eliminated from further consideration.

4. The fourth question was whether the amount of the Federal Estate tax of $604 should be paid by the executors out of general funds of the estate, or charged against the individual beneficiaries. The North Carolina inheritance tax was admittedly chargeable against the individual beneficiaries.

5. Repairs upon real property of testator which passed under his will to named devisees were undertaken as follows:

(a) To house on Bloodworth Street ordered 16 August, 1944, materials furnished 21 August, $136.20, other materials furnished 31 August and 1 September, $29.68. Work started 28 August, completed 1 September; cost of labor $142.60.

(b) Painting house on Bloodworth Street, ordered 19 August, 1944, work started 28 August, completed 1 September—cost $195.00.

(c) Concrete sidewalk and driveway to house on Bloodworth Street, ordered 21 August, 1944, started 28 August, 1944, completed 31 August, cost $138.50.

(d) Concrete sidewalk and driveway to lot on Harrington and Jones Streets, ordered 18 August, started 21 August, completed 22 August, cost $164.00.

(e) Repairs to house on Lane Street, ordered 21 August, completed 23 August, cost $6.50.

Total cost of repairs $812.48.

Upon the facts so agreed, the court was of opinion, and so adjudged:

1. That the 70 shares of preferred stock referred to were the sole property of Rossie Mae Barnes.

2. That the 15 shares of preferred stock were the sole property of Rossie Mae Barnes.

3. That the devise of the house and lot referred to in the third question included the entire lot originally conveyed to the testator. No exception was noted to this ruling.

4. That the Federal Estate tax be paid by the executors out of the funds of the estate.

5. That all the repairs upon property of testator be paid by executors out of the general funds.

It was admitted that if the court's rulings prevailed there would be no residuum but a deficit in the estate. The appellants, the residuary legatees, excepted to the rulings of the court as to (1) the 70 shares of stock, (2) the 15 shares of stock, (3) the Federal Estate tax, and (4) the charges for repairs.

From the judgment rendered defendants, Ruth Buffaloe Wilson, Katie Buffaloe and Norman B. Buffaloe, appealed.

J. L. Emanuel and W. Carey Parker for Executors of Estate of David T. Barnes.

Brassfield & Maupin for Rossie Mae Barnes, appellee.

T. Lacy Williams for Ruth Buffaloe Wilson, Katie Buffaloe and Norman B. Buffaloe, appellants.

DEVIN, J. The judgment appealed from was rendered upon an agreed statement of facts in an action for advice and direction in the administration of the estate of David T. Barnes under his will. The appellants, who are the residuary legatees named in the will, assign error in the judgment in four particulars, which will be considered in order.

1. The trial judge was of opinion and so adjudged upon the facts agreed that upon the death of David T. Barnes the defendant Rossie Mae Barnes became the sole owner of 70 shares of preferred stock in the Carolina Power & Light Co., the certificates representing these shares having been issued in the names of "David T. Barnes and Rossie Mae Barnes as joint tenants with right of survivorship, and not as tenants in common."

It was admitted the testator paid for the shares from his own funds and had the certificates in his exclusive possession at the time of his death. No other fact appears in addition to the admission that the certificates were issued in accordance with the expressed instructions of the testator. There was no consideration from Rossie Mae Barnes; nor agreement between the parties in relation to the stock. A dividend on the shares of stock was received by the testator.

Rossie Mae Barnes bases her claim to the 70 shares of stock on the ground that the transfer of these shares under the circumstances constituted a gift *inter vivos*, and that upon the death of David T. Barnes in accord with the stipulation appearing on the face of the certificate she became sole owner by survivorship. The appeal presents the question

whether the facts agreed are sufficient to establish her ownership of these shares consequent upon a valid gift *inter vivos.*

To constitute a gift there must be an intention to give, and the intention must be consummated by a delivery of, and loss of dominion over, the property given, on the part of the donor. *Jones v. Fullbright,* 197 N. C., 274, 148 S. E., 229; *Nannie v. Pollard,* 205 N. C., 362, 171 S. E., 341. To complete a gift *inter vivos* there must be first the intention to give and then the delivery "as it is the inflexible rule that there can be no gift either *inter vivos* or *causa mortis* without the intention to give and the delivery." *Newman v. Bost,* 122 N. C., 524, 29 S. E., 848; *Bynum v. Bank,* 221 N. C., 101, 19 S. E. (2d), 121. "In order to a valid gift of personal property *inter vivos* there must be an actual or constructive delivery with present intent to pass the title." *Parker v. Mott,* 181 N. C., 435, 107 S. E., 500. Donative intent is an essential element. 24 A. J., 738, 770. To constitute delivery of shares of stock as the consummation of a valid gift *inter vivos* the donor must divest himself of all right and title to the stock and of all dominion over it. *Phillips v. Plastridge,* 107 Vt., 267; 99 A. L. R., 1074; *Payne v. Tobacco Trading Corp.,* 179 Va., 156, 18 S. E. (2d), 281; *Pomerantz v. Pomerantz,* 19 A. (2d), 713 (Md.). There must be an intention to make a present gift accompanied by a delivery of the thing given or the means of obtaining it. *Payne v. Tobacco Trading Corp., supra; Pomerantz v. Pomerantz, supra.* It cannot be made to take effect in the future. *Askew v. Matthews,* 175 N. C., 187, 95 S. E., 163. The transaction must show a completely executed transfer to the donee of the present right of property and the possession. *Thomas v. Houston,* 181 N. C., 91, 106 S. E., 466. Doubts must be resolved against the gift. *Figuers v. Sherrell,* 178 S. W. (2d), 629. In *Grissom v. Sternberger,* 10 F. (2d), 764, the certificates, with proper assignment, were delivered to the donee.

The general rule is that where the owner or purchaser of shares of stock has the certificate therefor issued in the name of another, and so registered on the books of the corporation, though retaining possession of the certificate, nothing else appearing, the transaction is regarded as a gift completed by constructive delivery. *Simonton v. Dwyer,* 167 Or., 50; 99 A. L. R., 1080, and cases cited. But the rule is otherwise where the name of another is inserted in the certificate for the owner's convenience, *Getchel v. Bank,* 94 Me., 452; 24 A. J., 771; or where the donor has not divested himself of right and title to the stock and of all dominion and control over it, *Phillips v. Plastridge, supra; Payne v. Tobacco Trading Corp., supra; Schoenheit v. Lucas,* 44 F. (2d), 476 (484); *Decker v. Fowler,* 199 Wash., 549; or where donative intent is not established. *Southern Industrial Institute v. Marsh,* 15 F. (2d), 347; *Trenton Savings Fund Society v. Byrnes,* 110 N. J. Eq., 617;

Hudgens v. Tilman, 227 Ala., 672; *Jones v. Jones,* 201 S. W., 557; *Frazier v. Okl. Gas & E. Co.,* 178 Okl., 512; *Hart v. Hart,* 272 Ky., 488; *Figuers v. Sherrell, supra,* 152 A. L. R., 429.

From an examination of the facts agreed in the case at bar, upon which alone the judgment was based, it would not seem to follow as a necessary conclusion of law that a present gift was intended. The interest in the stock which might accrue to Rossie Mae Barnes depended upon a contingency. The donor retained possession of the certificates, the evidence of title, and received the dividends. Though the certificates were in the names of both as joint tenants, the testator had the right at any time to segregate his interest therein by partition. G. S., 46-42. This statute applies to joint tenants as well as tenants in common. The right of control over the shares of stock at least as to one-half interest therein was retained by the testator.

Somewhat similar questions relating to gifts *inter vivos* of shares of stock were considered by this Court in *Jones v. Waldroup,* 217 N. C., 178, 7 S. E. (2d), 366. In that case Waldroup had the certificate for shares of stock in Blue Ridge Building and Loan Association issued in name of "R. M. and H. L. Waldroup (his wife), either or survivor," and delivered the certificate to his wife. After Waldroup's death his administrator brought suit for these and other shares of stock. The trial court's peremptory instructions to the jury in favor of the husband's administrator were held for error and a new trial was awarded. It was said by *Justice Seawell,* writing the opinion for the Court, that while survivorship as a legal incident to a joint tenancy was abolished by statute (G. S., 41-2), that did not prevent persons from making agreements as to personalty such as to make the future rights of the parties depend upon the fact of survivorship, citing *Taylor v. Smith,* 116 N. C., 531, 21 S. E., 202. It was said that the position of the wife was stronger because Waldroup had required the issue of new certificates of stock to himself and wife and had them so registered on the books of the corporation "under circumstances which might be evidence of a gift *inter vivos,* creating an estate for the common enjoyment of himself and wife, with right of survivorship upon the death of one of them." In the case at bar, however, we have neither the verdict of a jury nor other definite determination of permissible inferences of fact which would compel a conclusion in accord with the appellee's contention. *Rewis v. Ins. Co., post,* 325.

In *Gwinn v. Commissioner of Internal Revenue,* 287 U. S., 222, referring to a joint tenancy in property in a tax case, the Court said: "Although the property here involved was held under a joint tenancy with the right of survivorship created by the 1915 transfer, the rights of the possible survivor were not then irrevocably fixed since under the state

law the joint estate might have been terminated through voluntary conveyance by either party, through proceedings for partition, or by an involuntary alienation under an execution." The decisions in *Ervin v. Conn* and *Bank v. Frederickson,* 225 N. C., 267, relating to provisions for payment of U. S. Bonds, were controlled by the pertinent Acts of Congress under the Federal Constitution.

This subject was discussed in a recent case decided by the Supreme Court of Oregon, *Manning v. U. S. National Bank of Portland,* 148 P. (2d), 255. In that case it appeared that Edward D. Hendricks endorsed on old certificates an assignment of 100 shares of stock "to Edward D. Hendricks and Margaret M. Hendricks," and instructed the issue of a new certificate in the names of "Edward D. Hendricks and Margaret M. Hendricks, and upon the death of either, the survivor of either." The new certificate, issued as instructed, was read over and delivered to Mr. and Mrs. Hendricks, and both signed the receipt therefor. The certificate was handed to Mr. Hendricks and he and his wife left the bank, he saying, "I will put this away." After the death of Mr. Hendricks the title of Mrs. Hendricks to the shares of stock was upheld as a gift *inter vivos.* The Court said: "There is uncontradicted oral evidence tending to indicate that the stock was transferred with donative intent, but we consider the written instruments decisive on that issue. . . . The execution of the joint receipt constitutes evidence of delivery to and acceptance by both." The distinction between the facts in that case and in our case is apparent.

In *Matthew v. Moncrief,* 135 F. (2d), 645, involving a joint savings account, the gift was upheld upon the ground that there was an agreement contractual in form signed by donor and donee at the inception of the deposit.

The donative intent, which is uniformly held to be one of the necessary elements to constitute a valid gift *inter vivos,* is not conclusively established by the use of words in the face of a certificate of stock purporting to create a joint tenancy with right of survivorship. To determine the requisite intent to make a present gift of a joint interest requires consideration of all the facts attendant upon the creation of the purported interest. *Ball v. Forbes,* 314 Mass., 200. This view is in accord with decisions from other jurisdictions.

In *Southern Industrial Institute v. Marsh,* 15 F. (2d), 347, it appeared that Marsh, the owner of certain shares of stock, directed that the certificate therefor be issued to the plaintiff Institute but returned to him, expressing the wish to make the delivery in person and to retain right to dividends. It was held that the transfer on the books of the corporation was only *prima facie* evidence of delivery and that it was still within his power to have the stock transferred back to himself without

consent of the Institute, and that under the evidence there was no intention unconditionally to surrender the stock.

In *Trenton Savings Fund Society v. Byrnes,* 110 N. J. Eq., 617, it was said: "The elements necessary to constitute a completed gift *inter vivos* are three; intent, delivery and acceptance." There the facts disclosed that a deposit was made in the bank in the name of depositor or her niece, with signature card reciting the money belonged "to us as joint tenants," with survivorship. It was held, upon the death of the original depositor, that the account did not pass to the niece as a gift, since the evidence did not show a donative intent *in praesenti* at time of the deposit. To the same effect is the decision in *Ball v. Forbes,* 314 Mass., 200.

In *Besson v. Stevens,* 94 N. J. Eq., 549 (568), it was held that an alleged gift *inter vivos* failed on account of absence of sufficient evidence of donative intent.

In *Hudgens v. Tillman,* 227 Ala., 672, where Hudgens had 60 shares of stock reissued in the name of his daughter and retained possession of the certificate, it was held the mere transfer of the stock on the books of the corporation was ineffectual to perfect the gift *inter partes* in the absence of proof of donative intent and constructive delivery.

In *Jones v. Jones,* 201 S. W. (Mo.), 557, where a father had certificate of shares of stock issued in the name of his son but retained the certificate, questions of donative intent and delivery were raised and these were decided by the jury in favor of the donee. While affirming the result the Court said it was not a sufficient delivery of stock for a party merely to have the stock transferred to the name of transferee, but in addition to this an actual or constructive delivery of the stock to the transferee was necessary to be shown.

In *Getchell v. Bank,* 94 Me., 452, where the husband had certificate for shares of stock issued in name of his wife, but kept the certificate, drawing the dividends, it was held this was not a gift made effectual by delivery. To the same effect is the holding in *Bowles v. Rutroff,* 216 Ky., 557.

From an examination of the record in the case at bar we are of opinion, and so decide, that the facts agreed, upon which the ruling appealed from was predicated, were insufficient to support the conclusion reached by the learned trial judge that Rossie Mae Barnes was the sole owner of the 70 shares of stock and that the executors had no interest therein. Nor can her claim be upheld as an attempted testamentary disposition of this property. *Stevenson v. Earl,* 65 N. J. Eq., 721. The transaction did not constitute a gift *causa mortis,* nor create a trust. *Manning v. U. S. Bank,* 148 P. (2d), 255.

We note that the appellants concede that Rossie Mae Barnes was entitled to one-half interest in the 70 shares of stock, upon the view that the statute (G. S., 41-2) converted the joint tenancy into tenancy in common, and that by virtue of his right to partition under G. S., 46-42, the testator retained control over the property to the extent of his interest therein.

The action of the executors in exchanging these shares of stock for another issue of preferred stock of the Carolina Power & Light Co., as tending to the advantage of those who should be adjudged the owners of the stock, was approved by the trial judge. No exception was taken to this ruling.

2. The testator purchased 15 additional shares of stock in the Carolina Power & Light Co. through a broker and directed the broker to have new certificate issued in the same manner and form as the 70 shares hereinbefore referred to, but died before the transaction was completed. The agency of the broker was revoked by the death of his principal, and the broker thereafter was without authority to direct the transfer agent to issue the certificate to Rossie Mae Barnes so as to divest the beneficial title of the executors to those shares which had been purchased by the testator. The transaction never reached the stage where the testator was in position to make a gift and the consummation of his expressed desire and the fulfillment of his instructions were prevented by his death. The executors were entitled to have the certificate for the 15 shares delivered to them by Rossie Mae Barnes. 38 C. J. S., 804.

3. The ruling of the trial judge that the Federal Estate tax should be paid out of the general funds of the estate is affirmed. *Riggs v. Del Drago*, 317 U. S., 95. The general rule, in the absence of contrary testamentary provision, is that the ultimate burden of an estate tax falls on the residuary estate. 142 A. L. R., 1137, and cases cited.

4. Appellants' fourth exception is taken to the ruling of the court below that the cost of installations and repairs to real property devised under the will should be paid by the executors out of the general funds of the estate. This ruling was based on the ground that these repairs had been ordered prior to the death of the testator. In the facts agreed it is stated merely that these repairs were "ordered." But an inspection of the pleadings shows the orders for repairs were alleged to have come from R. Carlton Stuart, now one of the executors, who contended he had been authorized by the decedent. It appears that the construction of sidewalk and driveway to the property at corner of Harrington and Jones Streets, the repairs to roof of house on Lane Street, the furnishing of some materials for repairs to roof of home on Bloodworth Street, at an aggregate cost of $306.70, were all ordered and completed before the death of testator, and may be presumed to have been done with his con-

sent and for his benefit. But the cost of repairs to real property which had then vested in the devisees, made after his death, in the absence of a finding or evidence that the work had been contracted for by the testator or by one authorized by him to do so, would not be chargeable to the executors, but to those to whom the title to the property had descended. The court's ruling on this point is to this extent modified.

We conclude that the judgment below as modified in the respects and as to the particulars herein pointed out should be affirmed, and it is so ordered.

Modified and affirmed.

BARNHILL, J., dissenting in part: I am concerned only about the first question presented by this appeal and the disposition thereof by the majority. If I interpret the opinion correctly it, in effect, directs judgment that the 70 shares of preferred stock in the Carolina Power & Light Company are the property of the estate, free of any claim of Rossie Mae Barnes, except as to the one-half interest conceded by appellees. I am unable to concur in this disposition of that phase of the case.

While judgment for the executor will inure to the benefit of the other defendants, the only persons having a legal interest in this stock are the executor and Rossie Mae Barnes. Judgment as to the stock was entered in favor of Miss Barnes. The executor did not appeal. This would seem to settle the question.

If, however, the other defendants have such interest as entitles them to contest the ownership, then it is to be noted that they concede that Miss Barnes is entitled to one-half of the stock. This concedes donative intent and delivery and leaves for decision only one question: Is a joint tenancy created by contract enforceable in this State? This question is answered in *Taylor v. Smith,* 116 N. C., 531. *Jones v. Waldroup,* 217 N. C., 178, 7 S. E. (2d), 366.

The stock as transferred on the books of the company creates an estate for the common enjoyment of the joint tenants with the right of survivorship upon the death of either. When the testator directed that it be purchased and so transferred he put it beyond his power to recall the gift or to sell, pledge, or give it away without the consent of the other joint owner.

"There is a complete gift of corporate stock where, by the direction of its owner, it has been transferred to the donee on the books of the corporation, and a new certificate issued in the name of the donee, or a certificate is issued in the first instance in the name of the donee, although the certificate so issued is retained by the donor or the corporation and not delivered to the donee." Cases cited, Anno. 99 A. L. R., 1080. Wherever it has been held to the contrary, decision was made to turn upon some

additional, unusual circumstance which definitely disclosed that the donor at the time had no present intent to make a gift.

If, however, the inference of constructive delivery with donative intent does not follow as a matter of law, it is strongly indicated as an ultimate fact. Certainly the facts and circumstances are such as to permit that conclusion.

In this connection, in my opinion, the fact the testator had the right to petition for partition has no bearing on the question of delivery and does not vary the general rule that transfer on the books of the company constitutes constructive delivery. The right to partition is purely statutory and not contractual. It resided in the testator so long as he lived whether he held the certificate or not and without regard to the portion of the purchase price paid by him. The estate created and not the retention of the certificate gave him the right.

Nor is the receipt of a dividend significant. It was payable to the joint owners, was endorsed by the donee, and by her delivered to the testator.

Putting all else aside and coming to the disposition made of this part of the case we have this situation. The executor of an estate comes into court seeking advice and counsel respecting conflicting claims which have arisen in the administration of the estate. He and the devisees who are the only interested parties agree on and stipulate certain facts. In so doing they fail to stipulate as to the crucial, decisive, ultimate fact to be inferred from the facts agreed.

Did the testator with donative intent make actual or constructive delivery of the Carolina Power & Light stock? This is the decisive question. The answer is an inference of fact, *pro* or *con,* to be drawn from the facts and circumstances surrounding the transaction. As to this there is no stipulation.

The majority conclude that "it would not seem to follow as a necessary conclusion of law that a present gift was intended." It is then said, "We have neither the verdict of a jury nor other definite determination of permissible inferences of fact which would compel a conclusion in accord with the appellee's contention."

Having thus conceded that there are permissible inferences favorable to appellee yet undetermined, the Court strikes down the judgment in her favor and closes the door against her, not because the facts are against her but because sufficient facts to support a definite decision on the question presented were not stipulated.

This is not in accord with the procedure in such cases heretofore established by this Court. The cause should be remanded for further proceedings to the end the true facts may be fully ascertained and the executor correctly advised as to the ownership of the stock involved.

In principle, *Trustees v. Banking Co.*, 182 N. C., 298, 109 S. E., 6, is on all fours with this case. There the action was brought to recover the value of bonds delivered to defendant as bailee. Plaintiff alleged that defendant negligently failed to account therefor. The parties stipulated the facts and circumstances surrounding the bailment and the failure to account therefor, but failed to stipulate as to the crucial ultimate fact of negligence. The cause was remanded for further stipulation or trial by jury.

In *Briggs v. Developers,* 191 N. C., 784, 133 S. E., 3, heard on facts agreed, *Stacy, C. J.*, says: "We think the facts agreed are insufficient to warrant the court in declaring, as a matter of law, that the title offered is good and indefeasible." Judgment was not rendered or directed for defendants. The cause was remanded for further proceedings. See also *Weinstein v. Raleigh,* 218 N. C., 549, 11 S. E. (2d), 560.

If we are not to affirm, then we should follow the procedure established by these and other decisions of this Court and remand. I so vote.

SEAWELL, J., concurs in dissent.

BESSIE ROGERS REWIS v. NEW YORK LIFE INS. CO., ET AL.

(Filed 8 May, 1946.)

1. Master and Servant § 40c—

An injury "arises out of" the employment when it occurs in the course of the employment and is a natural and probable consequence or incident of it, so that there is some causal relation between the accident and the performance of some service of the employment.

2. Same—

Acts which are necessary to the health and comfort of an employee while at work, though personal to himself and not technically acts of service, such as visits to the washroom, are incidental to the employment.

3. Same—Evidence held sufficient to support finding of Industrial Commission that accident arose out of the employment.

Evidence tending to show that the employee was suffering from a disease which weakened him and subjected him to frequent fainting spells, that, during the course of his employment he went to the men's washroom, and that while there felt faint, and in seeking fresh air, went to the open window, slipped on the tile floor, and fell through the window to his death, *is held* sufficient to support the finding of the Industrial Commission that his death was the result of an accident arising out of and in the course of his employment.

4. Master and Servant § 40b—

Proof of the accidental character of an injury, and how it occurred, may be made by circumstantial as well as direct evidence.

5. Same—Circumstances held to support conclusion that death of employee was the result of an accident.

The evidence disclosed the following circumstances: The employee had a disease which weakened him and subjected him to frequent fainting spells. While he was in the men's washroom, he called to the person in the adjacent booth, "Please help me to the window, I am about to faint." The floor of the washroom was of tile and very slick when wet. It was washed each morning. Two windows were open 37 inches from the front of the booth occupied by the employee. The employee was afterwards found on the roof of the adjacent building, directly beneath the open windows. *Held:* The circumstances permit the inference drawn by the Industrial Commission that the employee slipped and fell to his death, even though other inferences may appear equally plausible.

6. Master and Servant § 55d—

Where the evidence is such that several inferences appear equally plausible, the finding of the Industrial Commission is conclusive on appeal. The courts are not at liberty to reweigh the evidence and set aside the finding simply because other conclusions might have been reached.

BARNHILL, J., dissenting.

APPEAL by defendants from *Grady, Emergency Judge,* at January Term, 1946, of WAKE.

Proceeding under Workmen's Compensation Act to determine liability of New York Life Insurance Company (Employer) and Travelers Insurance Company (Carrier) to Mrs. Bessie Rogers Rewis, widow and only surviving dependent of Millard Rewis, deceased employee.

In addition to the jurisdictional determinations, the essential findings of the Industrial Commission follow:

Millard Rewis was employed by the New York Life Insurance Company as an agency organizer. In the mid-afternoon of 28 December, 1943, he had occasion to go to the eleventh floor of the Security Bank Building, Raleigh, N. C., on business of his employer. While there he found it necessary to visit the men's washroom. Shortly after entering the washroom, feeling faint from idiopathic ulcerative colitis, which had plagued him for several years, and in an effort to get some fresh air, he went to one of the open windows in the washroom, slipped on the slick tile and fell through the window to the roof of the adjoining building nine stories below. He died as a result of the fall.

No one saw the deceased fall to his death, but while he was in one of the stalls, where his coat and overcoat were afterwards found hanging, he called to a person in an adjacent booth and said: "Please help me to the

window, I am about to faint." Two windows were open directly in front of the stall used by the deceased. They were 32 inches from the floor, 35 inches wide; 28 inches from the sill to the top of the lower section of the window; the sills were approximately 15 inches thick; and the distance from the front of the stall to the window was approximately 37 inches. The floor of the washroom is of tile, very slick, and was washed in the morning of each day. The body of the deceased was found directly beneath the open window.

The Commission found as a fact that the deceased sustained an injury by accident, which arose out of and in the course of his employment, when he accidentally fell from the window of the men's washroom on the eleventh floor of the Security Bank Building; that his "feet slipped on the slick tile when he sought comfort at the open window"; that the fall was the proximate cause of his death; that his pre-existing idiopathic condition was not the cause of his death, and that the deceased did not commit suicide. Whereupon compensation was awarded.

On appeal to the Superior Court, the award of the Commission was upheld. From this latter ruling, the defendants appeal, assigning errors.

Ruark & Ruark for plaintiff, appellee.

Bailey, Holding, Lassiter & Langston for defendants, appellants.

STACY, C. J. The question here posed is whether the record permits the inference that decedent's death resulted from an injury by accident arising out of and in the course of his employment. An affirmative answer would uphold the judgment; a negative reply would reverse it.

That the accident occurred in the course of the employment is conceded. Whether it arose out of the employment is the mooted question. An injury is said to "arise out of" the employment when it occurs in the course of the employment and is a natural or probable consequence or incident of it. *Harden v. Furniture Co.*, 199 N. C., 733, 155 S. E., 728. "There must be some causal relation between the employment and the injury; but if the injury is one which, after the event, may be seen to have had its origin in the employment, it need not be shown that it is one which ought to have been foreseen or expected." *Conrad v. Foundry Co.*, 198 N. C., 723, 153 S. E., 266. In general terms, an accident may be said to arise out of the employment when there is a causal connection between it and the performance of some service of the employment. *Ashley v. Chevrolet Co.*, 222 N. C., 25, 21 S. E. (2d), 834. The accident arises out of the employment when it occurs in the course of the employment and is the result of a risk involved in the employment or incident to it, or to the conditions under which it is required to be performed.

Bryan v. Loving Co., 222 N. C., 724, 24 S. E. (2d), 751; *Marchiatello v. Lynch Realty Co.,* 94 Conn., 260, 108 Atl., 799.

An employee, while about his employer's business, may do those things which are necessary to his own health and comfort, even though personal to himself, and such acts are regarded as incidental to the employment. *Steel Sales Corp. v. Ind. Com.,* 293 Ill., 435, 127 N. E., 698, 14 A. L. R., 274; *Employers Mut. Ins. Co. v. Ind. Com.,* 76 Colo., 84, 230 P., 394.

"Such acts as are necessary to the life, comfort and convenience of the workman while at work, though personal to himself, and not technically acts of service, are incidental to the service; and an accident occurring in the performance of such acts is deemed to have arisen out of the employment. Such acts are regarded as inevitable incidents of the employment, and accidents happening in the performance of such acts are regarded as arising out of and in the course of the employment." *Holland v. Shraluka,* 64 Ind. App., 545.

Here, the Commission has found that decedent's death was the result of a fall occasioned by his "slipping on the slick tile" when he was intent on restoring his physical condition to where he might continue with his work. If this be a permissible inference from the facts in evidence, it would seem that the judgment should be upheld. To say that his death was due to a cause not connected with his employment would be to reject the legitimate inferences which support the fact-finding body. *Hegler v. Cannon Mills,* 224 N. C., 669, 31 S. E. (2d), 918; *Kearns v. Furniture Co.,* 222 N. C., 438, 23 S. E. (2d), 310. Where the record is such as to permit either finding, the determination of the Industrial Commission is conclusive on appeal. *Buchanan v. Highway Com.,* 217 N. C., 173, 7 S. E. (2d), 382; *Lockey v. Cohen, Goldman & Co.,* 213 N. C., 356, 196 S. E., 342.

The deceased was in the course of his employment. He was at a place where his work carried him. He had become faint from a pre-existing idiopathic condition. He fell to his death by reason of an accident in slipping on the slick tile. At the time of the fall he was endeavoring to get himself into conditon so as to be able to continue his employment. Such an act is regarded as an incident of the employment. Hence, there was a causal connection between the employment and the injury. It would seem the Commission was justified in concluding "as a matter of fact and law" that the deceased sustained an injury by accident arising out of and in the course of his employment; that the fall was the proximate cause of his death; that Rewis' employment required him to go to the 11th floor of the Security Bank Building on the afternoon in question, and that his feet slipped on the slick tile when he sought comfort at the open window. *Rockford Hotel Co. v. Ind. Com.,* 300 Ill., 87, 132 N. E., 759, 19 A. L. R., 80.

In the case last cited a workman, while in the discharge of his regular duties, was seized with an epileptic fit and fell into an ash pit, where hot cinders had been thrown as he removed them from a furnace, and he was burned to death. It was held in conformity with the findings of the Industrial Commission that the workman did not die from epilepsy or pre-existing disease, but from the burns he received when he fell into the pit, the court saying: "Some cases hold that, where an employee is seized with a fit and falls to his death, the employer is not liable, because the injury did not arise out of the employment (citing authorities); but a majority of the courts, American and English, hold that, if the injury was due to the fall, the employer is liable, even though the fall was caused by the pre-existing idiopathic condition."

This view is supported by decisions in a number of jurisdictions. *Gonier v. Chase Companies* (Chase Metal Works), 97 Conn., 46, 115 A., 677, 19 A. L. R., 83 (painter while working fell to his death from scaffold when seized with attack of vertigo); *Cusick's Case,* 260 Mass., 421, 157 N. E., 596 (employee fell down flight of stairs in course of employment and sustained fatal injuries—fall occurred during attack of epilepsy); *Barath v. Arnold Paint Co.,* 238 N. Y., 625, 144 N. E., 918 (workman in course of employment fell from scaffold to his death following apoplectic stroke); *Wicks v. Dowell Co.,* 2 K. B. (Eng.), 225, 2 Ann. Cas., 732 (workman while unloading coal from ship was seized with epileptic fit and fell down hatchway near which he was required to stand); and additional cases may be found of similar import. See *Aetna Life Ins. Co. v. Ind. Com.,* 81 Colo., 233, 254 Pac., 995.

In *Robinson v. State,* 93 Conn., 49, 104 A., 491, Robinson left his work of supervising the repair of a highway, and while crossing the highway to speak to a friend who had hailed him, he was struck by a touring car and killed. *Held,* compensable death, as deceased, when hit, was engaged in his employment, or something reasonably incidental to it, and the injury arose out of the employment.

The defendants, on the other hand, contend that the real cause of the injury here was the decedent's pre-existing idiopathic condition; that "a fall by an employee while at work, where neither the cause of the fall nor the resulting injury bears any special relation to his work or to the conditions under which it was performed, though it arises 'in the course of' the employment, does not arise 'out of' the employment within the meaning of the statute" *(Rozek's Case,* 294 Mass., 205), and that the finding of the Commission that the deceased slipped on the slick tile is unsupported by the evidence and rests only in conjecture. *Plemmons v. White's Service, Inc.,* 213 N. C., 148, 195 S. E., 370; *Joseph v. United Kimono Co.,* 185 N. Y. S., 700 (194 App. Div., 568); *Cinmino's Case,* 251 Mass., 158; *Cox v. Kansas City Refining Co.,* 108 Kan., 320, 195

Pac., 863, 19 A. L. R., 90; *Van Gorder v. Packard Motor Co.*, 195 Mich., 588, 162 N. W., 107, L. R. A., 1917 E, 522; *Geo. L. Eastman Co. v. Ind. Acci. Com.*, 186 Cal., 587, 200 Pac., 17.

It is true that no one saw the deceased slip on the tile, and in fact no one saw him fall to his death. But proof of the accidental character of the injury, and how it occurred, may be made by direct or circumstantial evidence. *Steel Sales Corp. v. Ind. Com., supra;* 20 Am. Jur., 258. "A fact can be proved by both circumstantial and direct evidence." *Lumber Co. v. Power Co.*, 206 N. C., 515, 174 S. E., 427; *Sink v. Lexington*, 214 N. C., 548, 200 S. E., 4. The proof adduced at the hearing would seem to permit the inferences drawn by the Commission, even though other inferences may appear equally plausible. *Fields v. Plumbing Co.*, 224 N. C., 841, 32 S. E. (2d), 652; *Brown v. Aluminum Co.*, 224 N. C., 766, 32 S. E. (2d), 320; *Lassiter v. Tel. Co.*, 215 N. C., 227, 1 S. E. (2d), 542. The courts are not at liberty to reweigh the evidence and to set aside the findings of the Commission, simply because other inferences could have been drawn and different conclusions might have been reached. *Tenant v. R. R.*, 321 U. S., 35, 88 L. Ed., 525.

It is conceded that the subject case is without precedent in this jurisdiction. It poses a close question for decision. Authorities elsewhere may be found which seem to support either conclusion. It is thought that here the majority view would look with favor upon an award of compensation. However, the cases cited by the defendants from California, Kansas, Michigan and New York, apparently point in the opposite direction.

We are inclined to the opinion, and so hold, that upon the record as presented, the judgment of the Superior Court should be upheld.

Affirmed.

BARNHILL, J., dissenting: I am unable to concur in the conclusion that the evidence in this case is sufficient to sustain a finding that the accident which caused the death of the employee arose out of his employment. In my opinion all the evidence tends to show that it was attributable to and arose out of his serious physical condition.

That an injury caused by accident is compensable only when the risk which resulted in injury was incident to the employment is now accepted law in this jurisdiction. Even so, an employee's visits to a rest room in the course of his employment are to be anticipated by the employer. If in the course of such a trip he suffer an accident, nothing else appearing, the accident arises out of a risk incident to his employment. This may be conceded.

But something more appears on this record. The deceased was afflicted with idiopathic ulcerative colitis; his blood count was very

low; he was in a weakened condition; he was subject to dizzy spells and was likely to faint at any time. This condition frequently made him feel the need of fresh air. While in the rest room, due to his condition, he felt as though he was going to faint—one of the effects of his disease. He tried to get to a window for fresh air. In some manner he fell out the window. Thus his syncopic condition caused him to leave the stall and rush to the window—his ailment and not his employment carried him to the place of danger. It follows in my opinion that the risk out of which the injury arose was not incident to the trip to the rest room or to his employment. It is traceable, instead, directly and exclusively to his physical condition. *Lockey v. Cohen, Goldman & Co.,* 213 N. C., 356, 196 S. E., 342; *Bryan v. T. A. Loving Co.,* 222 N. C., 724, 24 S. E. (2d), 751; *Robbins v. Hosiery Mills,* 220 N. C., 246, 17 S. E. (2d), 20; *Plemmons v. White's Service, Inc.,* 213 N. C., 148, 195 S. E., 370.

When an employee, in the course of his employment, falls from the roof of a building or from a ladder or other place of danger where his employment places him, the accident arises out of the employment even though illness may have been a contributing cause of the fall. There are many cases, such as those cited in the majority opinion, which so hold. It seems to me that they are so clearly distinguishable discussion thereof is unnecessary. See *Cox v. Kansas City Refining Co.,* 19 A. L. R., 90, and Anno., *ibid.,* 95.

There is another reason why I am unwilling to concur in the affirmance of the judgment below. The opinion of the hearing commissioner contains the following:

"Prior to the date of the last hearing in this case, the undersigned Commissioner visited the men's washroom on the 11th floor of the Security Bank Building and found that the door to the men's room was not latched; that it closed very slowly and this accounts for the reason why the deceased did not return to the office of Attorney Powers to borrow the key again; that the floor of the men's washroom was of tile and that it was very slick."

And later:

". . . the Commission is convinced from all the facts and circumstances that Rewis' feet slipped on the slick tile when he sought comfort at the open window."

The testimony is to the effect that the rest room has a tile floor; that tile is somewhat slicker than a wood floor; that when moist it was "liable" to be slick; that the floor was cleaned between 9:00 and 10:00 a.m. each day and that the accident occurred between 4:00 and 5:00 p.m.

I can find in the testimony no evidence that deceased in going from the stall to the window slipped and fell. There was no noise of slipping

or of a fall and no evidence that at the time the tile was moist and therefore slick.

There is, therefore, no evidence in the record to sustain these findings. The "very slick" condition of the tile floor, made a basic fact in support of the award, and the otherwise unexplained manner in which the deceased gained entrance to the rest room are made to appear by conditions "found" by the hearing commissioner on his private trip of inspection more than ten months after the accident.

These "findings" were approved by the full Commission. As approved they are found sufficient to support the conclusions of law made by the Commission and to support an award. I am unwilling to join in the affirmance of an award based on facts thus ascertained and "found" by the hearing commissioner and adopted by the full Commission.

D. A. S. HOKE, ANCILLARY ADMINISTRATOR OF THE ESTATE OF MARY GAY MOORES SHARPE, v. ATLANTIC GREYHOUND CORPORATION, YATES CLYDE FARRIS AND GEORGE W. SHARPE.

(Filed 8 May, 1946.)

1. Common Law § 1: Abatement and Revival §§ 11, 12—

So much of the common law as has not been repealed or abrogated by statute is in full force and effect in this State, G. S., 4-1; and since at common law, causes of action for wrongful injury, whether resulting in death or not, did not survive the injured party, the survival of such actions is solely by virtue of statute.

2. Abatement and Revival § 12—

Public Laws of 1915, ch. 38, which amended the survival statutes (now G. S., 28-172, and G. S., 28-175) by striking out the words "or other injuries to the person, where such injury does not cause death of the injured party" from the exceptions to the causes of action which survive, has the effect of prescribing that causes of action for wrongful injury do survive the death of the injured party. The history of the survival statutes in relation to the wrongful death statutes set forth by *Mr. Justice Winborne*.

3. Statutes § 5f—

The legal effect of an amendment is the re-enactment of the old statute with the amendment incorporated in it, and the amendment, from its adoption, has the same effect as if it had been a part of the statute when first enacted.

4. Death § 4—

The wrongful death statutes, G. S., 28-173; G. S., 28-174, confer a new right of action with damages limited to fair and just compensation for the

pecuniary injury resulting from death, recoverable by the personal representative for the benefit of the next of kin.

5. Death § 3: Executors and Administrators § 5: Abatement and Revival §§ 11, 12—

Where a person injured by the negligence of another, lives for a period of time (in the instant case 31 days), but thereafter dies as a result of the injuries, his personal representative may recover (1) as an asset of the estate those damages sustained by the injured person during his lifetime, and (2) for the benefit of the next of kin the pecuniary injury resulting from death, the amounts recoverable being determinable upon separate issues without overlapping.

6. Damages § 13b—

Recovery for pain and suffering and for hospital and medical expenses, consequent to wrongful injury, relate to a single cause of action and should be submitted upon a single issue of damages.

APPEAL by plaintiff from *Hamilton, Special Judge,* at February Extra Term, 1946, of MECKLENBURG.

Civil action to recover damages resulting from alleged actionable negligence of defendants. The plaintiff, in his complaint, sets forth three separate causes of action allegedly proximately resulting from the same acts of negligence of defendants: The first cause of action is to recover damages for wrongful death of intestate; the second, to recover damages for pain and suffering sustained by intestate during thirty-one days between date of her injury and date of her death; and the third, to recover for expenses incurred for medical and hospital attention during said time between date of her injury and date of her death.

Defendant, George W. Sharpe, moved to strike "all the so-called second cause of action" and "all the so-called third cause of action," and corresponding prayers for relief, as "irrelevant and redundant" and "prejudicial and harmful to this defendant," and also for that it appears upon the face of the complaint that plaintiff's intestate died as a result of the injuries alleged and that plaintiff is suing for damages for wrongful death; and hence may not maintain the so-called second and third causes of action for that they do not survive the plaintiff's intestate, and for that upon the allegations in the alleged first cause of action plaintiff's sole and exclusive remedy is an action for wrongful death.

When the cause came on for hearing in Superior Court, upon the foregoing motion of defendant, George W. Sharpe—the motion being by agreement treated as a demurrer to, as well as a motion to strike, the second and third causes of action, the court sustained the demurrer and allowed the motion to strike, and entered order in accordance with such ruling.

Plaintiff appeals therefrom to Supreme Court and assigns error.

McDougle, Ervin & Fairley for plaintiff, appellant.
Goebel Porter and Frank H. Kennedy for defendant, appellee.

WINBORNE, J. This appeal presents for decision this basic question: Where a person is injured by the negligence of another, and, after time has elapsed, dies as a result of such injuries, does a cause of action for consequential damages sustained by the injured person between the date of the injury and the date of his death survive to the personal representative of such deceased person?

The answer to this question depends on the legal effect the 1915 amendment, Public Laws 1915, chapter 38, had upon the survival statutes, then sections 156 and 157 of The Revisal of 1905, now G. S., 28-172, and G. S., 28-175, considered in connection with the wrongful death statutes, G. S., 28-173, and G. S., 28-174.

While the Circuit Court of Appeals, Fourth Circuit, in the case of *James Baird Co. v. Boyd,* 41 F. (2d), 578, in a similar case to that stated above, has given an affirmative answer, and while in this Court in the case of *Fuquay v. R. R.,* 199 N. C., 499, 155 S. E., 167, there is *obiter dicta* of similar import, the question, in the light of the existing statutes, has not been the subject of decision by this Court.

It is appropriate, therefore, to review the history of the statutes involved.

At common law a person injured by the negligence of another had a right of action to recover consequential damages. But at common law such right of action did not survive the death of the injured person, that is, it died with the person; and if the injured person died as a result of the wrongful act of another, there was at common law no right of action for such death. And so much of the common law as has not been repealed or abrogated by statute is in full force and effect in this jurisdiction. G. S., 4-1. Hence, if the right of action for recovery of damages for wrongful injury, whether resulting in death or not, survives the death of the injured person, it must do so purely by statutory power. In order, therefore, to provide a remedy for death caused by wrongful act the General Assembly of this State in 1854 passed the first act, patterned after the Lord Campbell's Act, 9 and 10 Victoria, to give a right of action in certain cases where death was by neglect, default or wrongful act. Laws of 1854-5, chapter 39. And later the General Assembly, at its 1868-9 session, enacted the survival statutes and a redraft of the wrongful death statutes, as parts of the same act, entitled "An act concerning the settlement of the estates of deceased persons," relating more particularly to the "general powers and duties of executors, administrators and collectors, and actions by and against them." Public Laws 1868-9, chapter 113, sub-chapter VII.

Sections 63 and 64 of this Act of 1868-9 related specifically to survival of rights of action. Section 63, which was entitled "Rights in action survive to and against personal representative," read as follows: "Upon the death of any person, all demands whatsoever, and rights to prosecute or defend any action or special proceeding, existing in favor or against such person, except as hereinafter provided, shall survive to and against the executor, administrator or collector of his estate." This section became in almost identical words section 1490 of The Code of 1883, and has remained unchanged, and been brought forward in subsequent codifications as Revisal, section 156, C. S., 159, and now as G. S., 28-172. Section 64, which was entitled "Exceptions: Rights which die with the persons," read as follows: "The following rights in action do not survive," among others, "2. Causes of action for false imprisonment, assault and battery, or other injuries to the person where such injury does not cause the death of the injured party." This quoted portion of the section almost *verbatim* became subsection "2" of section 1491 of the Code of 1883, and then Revisal subsection 2 of section 157. Thus it is seen that section 63 provided for survival of "all demands whatsoever and rights to prosecute or defend any action" existing in favor of a person who has died, and section 64 enumerated the rights of action which were excepted from the all-inclusive provisions of section 63. And the General Assembly of 1915 amended this subsection "2" of section 157 of the Revisal, by striking from the enumerated exceptions the clause "or other injuries to the person where such injury does not cause the death of the injured party." Public Laws 1915, chapter 38. As so amended this subsection was made to relate only to "causes of action for false imprisonment and assault and battery," and later became C. S., 162 (2), and is now G. S., 28-175 (2).

On the other hand, sections 70, 71 and 72 of the 1868-9 Act related specifically to actions for wrongful death. Section 70, which was entitled, "Action for wrongful act or neglect causing death," read as follows: "Whenever the death of a person is caused by a wrongful act, neglect, or default of another, such as would, if the injured party had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their executors, administrators, collectors or successors, shall be liable to an action for damages, to be brought within one year after such death, by the executor, administrator or collector of the decedent; and this notwithstanding the death, and although the wrongful act, neglect or default, causing the death, amount in law to a felony." Section 71, which was entitled "Measure of Damages," read as follows: "The plaintiff in such action may recover such damages as are a fair and just compensation for the pecuniary injury resulting from such death." And section 72, which

was entitled, "How Recovery to Be Applied," read as follows: "The amount recovered in such action is not liable to be applied as assets, in the payment of debts or legacies, but shall be disposed of as provided in this act for the distribution of personal property in case of intestacy." These sections 70, 71 and 72 became in exact wording sections 1498, 1499 and 1500, respectively, of the Code of 1883. But in the Revisal of 1905, sections 70 and 72, combined, became section 59, and later, with amendment not material here, became C. S., 160 (2), and now, with amendment as to payment of funeral expenses, is the present G. S., 28-173 (2). And section 71, as Code section 1499, became section 60 of the Revisal of 1905, later C. S., 161, and now G. S., 28-174. Thus it is seen that by these sections the General Assembly created a right of action for wrongful death, specified the measure of damages therefor, exempted the recovery from debts of decedent and provided for distribution of amount recovered to and among next of kin of decedent.

This Court, in interpreting the provisions of sections 63 and 64 of the original act, unaffected by the 1915 amendment, has uniformly held that the clause in subsection 2 of section 64 of the act of 1868-9, brought forward in succeeding codifications as above shown, reading "or other injuries to the person where such injury does not cause the death of the injured party" excepted from the provisions for survival of actions contained in section 63 all causes of action for personal injuries, irrespective of whether the death was caused or was not caused by the wrongful injury. That is, that the right to recover for personal injuries belonged to the injured person, and terminated at his death. In *Bolick v. R. R.*, 138 N. C., 370, 50 S. E., 689, it was held that the clause "where such injury does not cause the death of the injured party" means simply "unless such injury shall cause" the death of the injured party—the Court saying: "We understand the words in Code section 1491 (2), providing for the abatement of actions for injuries to the person, 'where such injuries do not cause the death of the injured party,' not as a provision by implication that such actions survive, but as a recognition that (under The Code, sec. 1498) (now G. S., 28-172) in case of the death of the injured person from such injuries an action is now expressly given by statute."

Therefore, when the General Assembly of 1915 by amendment struck from subsection 2 of section 64 of the original act, then Revisal 157 (2), the clause reading "or other injuries to the person, where such injury does not cause the death of the injured party," rights of action for injuries to the person were eliminated from those rights of action which do not survive, and which were excepted from the provisions of section 63 of the original act. The legal effect of the amendment is to reduce the causes of action excepted from the provisions of section 63, and to include

within its provisions rights to prosecute or defend any action existing in favor of or against a person, since deceased, for injuries to the person. This is in accordance with this principle of law: "The legal effect of an amendment is the reenactment of the old statute with the amendment incorporated in it, and the amendment, from its adoption, has the same effect as if it had been a part of the statute when first enacted." *S. v. Moon,* 178 N. C., 715, 100 S. E., 614, citing *Nichols v. Edenton,* 125 N. C., 13, 34 S. E., 71. Thus, if the clause that causes of action for "other injuries of the person where the injury does not cause the death of the injured party" had not been included among the exceptions to the causes of action that do survive, it seems to us that there would be no doubt as to the intention of the General Assembly that causes of action for personal injury should survive. And since at a subsequent session the General Assembly has by positive action stricken out the exception, the manifest legislative intent is no less clear.

Furthermore, this Court has uniformly held that the wrongful death statutes confer a new right of action, which did not exist before, and which at death of injured person accrued to the personal representative of the decedent for the benefit of a specific class of beneficiaries. And the Court has uniformly applied the rule for admeasurement of damages as is prescribed by the General Assembly, that is, "such damages as are a fair and just compensation for the pecuniary injury resulting from such death." See *Carpenter v. Power Co.,* 191 N. C., 130, 131 S. E., 400, and cases cited, and numerous other cases.

On the other hand, the right of an injured person to sue for personal injuries of any kind is entirely separate and distinct from the right of his personal representative to sue under authority of the wrongful death statute. And any damage sustained by such person during his lifetime are personal to him, and, if proximately caused by wrongful act of another, could be recovered by him. Hence, upon his death, if the right of action therefor survives, the recovery would be an asset of his estate, to be administered as any other personal property owned and possessed by him at his death.

Moreover, while both the right of action for the recovery of consequential damages sustained between date of injury and date of death, and the right of action to recover damages resulting from such death have as basis the same wrongful act, there is no overlapping of amounts recoverable. But such consequential damages as flow from the wrongful act would be recoverable—by the personal representative—those sustained by the injured party during his lifetime, for benefit of his estate, and those resulting from his death, for benefit of his next of kin—determinable upon separate issues.

However, in the present case it would seem that the second and third causes of action while stated separately are in reality but one, and that such damages as are alleged would properly be submitted upon a single issue of damages.

For reasons appearing hereinabove, the order of the court below in sustaining demurrer to, and striking out second and third causes of action is

Reversed.

E. H. McCORKLE, ROBERT L. McCORKLE AND SARA L. McCORKLE v. KEITH M. BEATTY AND WIFE, KATHLEEN BEATTY.

(Filed 8 May, 1946.)

1. Evidence § 21—

Even when the financial inability of plaintiff to prevent foreclosure of a mortgage executed by him is relevant and competent, a question as to his "financial shape and the reason for it" is too broad.

2. Appeal and Error § 39e—

Where the record fails to show what the answer of the witness would have been if permitted to answer, the exclusion of the testimony cannot be held prejudicial.

3. Contracts § 22l—

Ordinarily, evidence of all the facts and circumstances surrounding the parties at the time of the making of a contract, which are necessary to be known to properly understand their conduct and motives or to weigh the reasonableness of their contentions, is relevant and admissible.

4. Trusts § 2h: Appeal and Error § 39d—

In an action to establish a parol express trust based upon an alleged agreement to purchase property at the foreclosure sale for the benefit of the plaintiff, the mortgage debtor, financial distress of the plaintiff and evidence of the real value of the property are competent to establish the reasonableness of plaintiff's contention that he sought the agreement. But where defendants admit that plaintiff sought the agreement, the exclusion of such evidence is not prejudicial, particularly where the price is to be fixed by the high bid.

5. Evidence § 42d—

In the absence of competent evidence tending to establish the fact of agency, declarations of the alleged agent, even if material, are incompetent.

6. Evidence § 22—

The extent to which cross-examination for impeachment is to be permitted rests largely in the discretion of the trial judge, and an exception to the extent of the cross-examination upon legitimate subjects of inquiry will not be sustained when the record fails to show abuse.

7. Trusts § 2b—

The burden is upon plaintiffs to establish an alleged parol trust asserted by them by clear, strong and convincing proof.

8. Same: Evidence § 7d: Trial § 31d—

Where the burden is on plaintiffs to establish their cause by clear, strong and convincing proof, the court may instruct the jury as to the dictionary definitions of these terms, since "clear," "strong" and "convincing" are used in the ordinary and accepted sense.

APPEAL by plaintiffs from *Sink, J.*, at October Term, 1945, of MECKLENBURG. No error.

Civil action for a decree that under the terms of an express parol contract defendant Keith M. Beatty holds title to certain lands as trustee for plaintiffs. Here on former appeal. *McCorkle v. Beatty*, 225 N. C., 178.

There are three tracts of land. Two belonged to plaintiff R. L. McCorkle and one to plaintiff Sara L. McCorkle. On 9 September, 1940, they, together with E. H. McCorkle, husband of Sara, executed a trust deed conveying said property as security for the payment of a note to the Mutual Building & Loan Association. There was default and the trustee proceeded to foreclose the trust deed. The bid at the first sale was raised and the property was resold. Plaintiff E. H. McCorkle then appealed to defendant Keith M. Beatty for assistance, offering him $25 to furnish the deposit to raise the bid.

The testimony for plaintiffs tends to show that Beatty agreed to raise the bid, buy in the property, and hold title until plaintiffs could raise the money to pay the debt and reimburse defendant for expenses incurred; that he did buy in and took title to the property; and that plaintiffs tendered the full amount due, including expenses, but that defendant denied the agreement and declined to convey.

Beatty admits that McCorkle appealed to him to raise the bid so that plaintiffs would have more time in which to procure the necessary funds; that he agreed thereto and furnished the deposit for that purpose. The testimony for defendants tends to show further that at the same time Beatty told McCorkle that he was not interested in a $25 proposition; that he would not bid in the property for the plaintiffs; and that if the property was actually resold he would bid for himself.

On this conflicting testimony issues were submitted to and answered by the jury in favor of defendants. The court entered judgment on the verdict and the plaintiffs appealed.

Uhlman S. Alexander and Jones & Smathers for plaintiffs, appellants.

W. C. Davis and Paul R. Ervin for defendants, appellees.

Barnhill, J. During the direct examination of E. H. McCorkle the following occurred:

"Q. Now, Mr. McCorkle, you have made the statement that in September, 1941, you were in financial distress so that you could not raise this $315.00 to raise the bid or pay off the mortgage. May I ask you to explain to the jury your financial shape and the reason for it?

"Objection by defendants—sustained—Exception No. 5.

"Court: The Court instructs you, Gentlemen of the Jury, that the plaintiff had the legal right to request someone to make the advanced bid for him, or to furnish the money therefor, and the question you have to determine is whether there was an agreement, and if so, what was that agreement. The Court instructs you now that the parties had the legal right, whether the witness was financially distressed or otherwise, to enter into such an agreement, and the defendant had the legal right to enter into such an agreement, as they desired, within the law, and the law provides for a parol trust. Now, whether there was a parol trust here is one of the issues that you gentlemen have to determine.

"Plaintiffs object and except to the above instructions of the Court. Exception No. 6."

This witness likewise sought to give evidence as to the value of the property described in the trust deed. On objection this evidence was excluded and plaintiffs excepted.

These and similar exceptions pose this question: In an action to have the defendant declared trustee for plaintiffs under an express parol agreement is evidence of the value of the property and of the financial distress of the plaintiffs competent and admissible?

The exception to the quoted question is without merit. The question itself is too broad and the record fails to disclose what the witness would have said if permitted to answer. Furthermore, there is considerable evidence in the record tending to show that McCorkle at the time was in very straitened financial circumstances. Hence the exception, apart from the special instructions of the court to the jury at the time, would not command our serious attention.

Perhaps we might pass the instruction, repeated in the general charge, with the comment that the court merely explained the legal right of the parties to make the contract at issue. But this is not the point. The court, in effect, instructed the jury that evidence of McCorkle's financial distress was irrelevant and immaterial and was not to be considered by them. Thus the court instructed the jury that other evidence in the record tending to show his financial embarrassment was not to be considered.

Ordinarily evidence of all the facts and circumstances surrounding the parties at the time of the making of a contract, which are necessary to

be known to properly understand their conduct and motives or to weigh the reasonableness of their contentions, is relevant and admissible. *Henley v. Holt,* 214 N. C., 384, 199 S. E., 383; *Bank v. Stack,* 179 N. C., 514, 103 S. E., 6; *Cunningham v. Long,* 186 N. C., 526, 120 S. E., 81; 65 C. J., 321, sec. 83.

The imminent forced sale of property under mortgage at a price considerably less than its real market value and financial distress which renders the mortgagor incapable of protecting the equity therein are circumstances which usually impel a person to seek aid from a friend. McCorkle testified that he went out to find a friend to help him raise the bid and to buy in the property. The evidence plaintiffs sought to develop was competent as tending to establish the reasonableness of this statement.

Even so, we are constrained to hold, on this record, that its exclusion and the error in the remarks of the court at the time were rendered harmless by later developments in the trial. The defendant testified in his own behalf. In so doing he admitted that McCorkle came to him and endeavored to get him to raise the bid and purchase the property for the plaintiffs. Thus the very fact the excluded evidence would tend to prove is admitted.

For the reason stated the exclusion of evidence of the value of the property was likewise harmless error. The property was to be sold at public sale under mortgage. The sale price was to be fixed by the high bidder at the sale. Whether Beatty agreed to buy for McCorkle or insisted he would buy only for himself he was to purchase, if at all, as the high bidder at the sale. This is an admitted fact. Hence the excluded testimony as to the real value of the property was material only as it tended to show the reasonableness of McCorkle's statement that he sought aid from defendant. As that fact was admitted the plaintiffs suffered no disadvantage by the exclusion of the testimony.

The court below did not deny plaintiffs the right to show that Taylor, the lawyer who was conducting the sale for the building and loan association, was the agent and attorney for Beatty in respect to the transactions between plaintiffs and defendant. He denied them the right to do so in the manner attempted. In the rulings of the court in this respect we find no error.

In the absence of competent evidence that Taylor was attorney for defendant his declarations, even if material, were incompetent.

The extent to which cross-examination for impeachment is to be permitted rests largely in the discretion of the trial judge. *S. v. Roberson,* 215 N. C., 784, 3 S. E. (2d), 277; *Foxman v. Hanes,* 218 N. C., 722, 12 S. E. (2d), 258; *Bank v. Motor Co.,* 216 N. C., 432, 5 S. E. (2d), 318; *S. v. Cloninger,* 149 N. C., 567; *S. v. Bailey,* 179 N. C., 724, 102

S. E., 406; *S. v. Beal,* 199 N. C., 278, 154 S. E., 604. The matters about which McCorkle was cross-examined were legitimate subjects of inquiry bearing upon his credibility. Plaintiffs' exceptions to questions permitted in the course thereof fail to disclose any abuse of this discretion.

The burden rested upon plaintiffs to establish the alleged parol agreement by clear, strong, and convincing testimony. *Boone v. Lee,* 175 N. C., 383, 95 S. E., 659; *Avery v. Stewart,* 136 N. C., 426; *Grimes v. Andrews,* 170 N. C., 515, 87 S. E., 341; *Anderson v. Anderson,* 177 N. C., 401, 99 S. E., 106; *McFarland v. Harrington,* 178 N. C., 189, 100 S. E., 257; *Cunningham v. Long, supra; Jones v. Coleman,* 188 N. C., 631, 125 S. E., 406; *Peterson v. Taylor,* 203 N. C., 673, 166 S. E., 800; *Henley v. Holt, supra.*

There is nothing in the rule or in the application thereof by this Court to indicate or suggest that the words "clear," "strong," and "convincing" are employed in any unusual or exceptional sense. They are words of everyday language and mean what they are generally understood to mean. Hence the court committed no error in instructing the jury as to the dictionary definitions of the terms.

This cause narrows down to one issue of fact. Did Beatty agree to purchase the property at the sale for and in behalf of the plaintiffs or did he decline to do so and notify McCorkle that he would bid for himself? Twice a jury has answered in favor of defendants. As we find no prejudicial or reversible error, the verdict and judgment must stand.

No error.

MRS. W. E. WEBB v. STATESVILLE THEATRE CORPORATION.

(Filed 8 May, 1946.)

1. Negligence § 18: Appeal and Error § 39d—

In an action to recover for injuries sustained by a patron of a theatre in a fall on the foyer floor, allegedly as a result of some foreign, slippery substance on the floor, the admission of evidence, over objection, that there were approximately 230 other patrons of the theatre that day and that none of them fell while walking on the foyer floor, even if such negative evidence is incompetent, does not constitute prejudicial error when it appears that the circumstance relied on by defendant was established by other testimony admitted without objection.

2. Trial § 31b—

The failure of the court to charge the jury upon the principle of *respondeat superior* cannot be held for error as failing to declare and explain the law arising on the evidence when it appears that defendant admitted the existence of the relationship of master and servant between

itself and the alleged tort-feasor and its liability for any negligence on his part, and that the case was tried throughout on this theory. G. S., 1-180.

3. Trial § 49—

A motion to set aside the verdict is addressed to the discretion of the trial court, and its ruling thereon is not reviewable in the absence of abuse of such discretion.

APPEAL by plaintiff from *Phillips, J.*, at November Term, 1945, of IREDELL.

This is an action to recover damage for personal injuries alleged to have been caused by the negligence of the agent of the defendant in allowing oil, grease, water or other substance to be placed on and remain upon the floor of the foyer or walkway leading from the ticket office to the door of the theatre operated by the defendant in Statesville, N. C., thereby causing plaintiff, a patron of the theatre and an invitee of the defendant, to slip and fall in said foyer or walkway to her great damage and injury.

The case was tried upon three issues, to wit: "1. Was the plaintiff injured by the negligence of the defendant as alleged in the complaint? 2. If so, did the plaintiff by her own negligence contribute to her injury, as alleged in the answer? 3. What damages, if any, is the plaintiff entitled to recover of the defendant?"

The jury answered the first issue in the negative, whereupon the court signed judgment to the effect that the plaintiff recover nothing, and that she be taxed with the costs of the action. From this judgment the plaintiff appealed, assigning errors.

Burke & Burke and Lewis & Lewis for plaintiff, appellant.

Adams, Dearman & Winberry for defendant, appellee.

SCHENCK, J. In view of the negative answer made to the first issue, it is only necessary that we notice the assignments of error bearing upon this issue, namely, "Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint?"

The first assignment of error is to the court's admitting, over objection by the plaintiff, evidence as to the number of tickets sold and passes issued the day of the alleged incident, and admitting in evidence a record of the defendant giving this information. The plaintiff noted exceptions to the admission of all of this evidence, tending to show that there were as many as 230 patrons of the show who were in the theatre the day plaintiff fell, and that none of them, while walking in the foyer where plaintiff fell, had fallen. In 2 Jones Commentaries on Evidence, sec.

683, the author says: "The authorities are divided as to the relevancy of showing that other persons have passed over the same walk or street without injury, the weight being against the admissibility of such evidence," *Anderson v. Amusement Co.,* 213 N. C., 130, 195 S. E., 386. In the case at bar the defendant was permitted to offer evidence tending to show that 230 persons entered the theatre the day plaintiff is alleged to have fallen, and the plaintiff testified she had seen the patrons going in the theatre walking over the same area. From the entire record it is apparent that a "fair number" of people passed over the foyer the day the accident occurred, and only the plaintiff fell. This evidence was offered for the purpose of refuting the theory that some slick substance had been by the defendant's servant negligently allowed to accumulate on the floor. Even if it be conceded that the evidence was incompetent the defendant had the full benefit of every inference which could be drawn therefrom from other evidence in the record without objection. Therefore, in view of the evidence properly admitted, we are unable to say that the admission of the evidence assailed under the circumstances was prejudicial, or that it affected the result. *Anderson v. Amusement Co., supra.* These assignments of error, in our opinion, do not justify an order directing a retrial of the case.

The second group of assignments of error set out in the appellant's brief relates to the question as to whether the court erred in the charge to the jury in that it failed to state in a plain and correct manner the evidence in the case and to declare and explain the law arising thereon, as required by G. S., 1-180 (C. S., 564). The appellant contends that the court fell short of the requirements of the statute in that it failed to explain the liabilities of the defendant arising out of the relationship of master and servant; failed to explain the doctrine of *respondeat superior,* in other words, the court failed to tell the jury that the defendant would be liable for the negligence of its servants in the course and scope of their employment. And examination of the charge reveals the facts that his Honor nowhere therein referred to the doctrine of *respondeat superior* or charged upon the relationship of master and servant, notwithstanding the fact that the plaintiff's alleged cause of action is bottomed upon an allegation that she was injured by the negligence of the servant of the defendant in allowing some slick substance to accumulate on the floor of the foyer of the defendant's theatre, which caused her, an invitee, to slip and fall to her great injury.

The defendant, appellee, states in its brief, with which we agree, that the question posed by these assignments of error is: "Was the plaintiff prejudiced by the failure of His Honor to more fully charge the jury with reference to the question of the master and servant relationship?" In the light of the trial we are of the opinion, and so hold, that the

question should be answered in the negative. Indeed, there were no issuable facts for the reason that the relationship of master and servant existed between the defendant and the witness Levi Moss, the janitor at the theatre, was admitted by both sides, and was tried by the court upon that theory. Even though it be conceded that the doctrine of *respondeat superior* was a substantive feature on which the court is required to give instructions, the court sufficiently instructed with reference to the question involved.

It is the defendant's position that his Honor fully charged the jury with reference to the master and servant relationship. The only evidence from which the jury could infer that the servants and employees of the defendant corporation were negligent was that of the statement made by the janitor, Levi Moss, to Mrs. Webb, in answer to her question, "What is that slippery substance on the floor?" to which the janitor replied, "It is what I was cleaning the floor with." Therefore, if this is evidence from which negligence can be inferred, his Honor throughout his charge fully and amply instructed the jury that it was the janitor of the defendant corporation who was responsible for the negligence. The parties and his Honor tried this case upon the admission and contention of the defendant that Levi Moss was the agent, servant and employee of the defendant corporation, and that it was liable for his negligence.

The remaining assignments of error set out in the appellant's brief relate to the court's overruling plaintiff's motion to set aside the verdict, and in signing the judgment. These assignments of error are formal. The motions were directed to the discretion of the court and its rulings thereon are not reviewable in the absence of abuse of such discretion. *Bailey v. Mineral Co.*, 183 N. C., 525, 112 S. E., 29, and cases there cited. These assignments of error are therefore without merit.

The verdict sustains the judgment.

No error.

LULA JOHNSON, ADMX., ET AL., v. J. BUREN SIDBURY, ADMR.

(Filed 8 May, 1946.)

Appeal and Error § 6a—When cause is tried upon theory insisted upon by defendant he may not complain of the result.

In this action for specific performance and for damages for tortuous eviction, plaintiff obtained judgment by default and inquiry. Answer was filed pending decision on appeal reversing judgment setting aside the default judgment. At the execution of the inquiry plaintiff waived the cause on contract. Defendant persisted in trying the matter on the complaint and answer, and offered evidence to sustain his position under the

contract. Under instructions from the court, damages were awarded as for breach of contract. *Held:* Conceding the measure of damages was in excess of the scope of the inquiry, having invited the court to entertain his answer and evidence, defendant is in no position to complain.

BARNHILL, J., concurring.

APPEAL by defendant from *Williams, J.*, at December Term, 1945, of NEW HANOVER.

Civil action for specific performance and damages for tortuous eviction.

Summons was issued 12 June, 1944, and complaint filed simultaneously therewith. It is alleged that on 18 December, 1933, V. Sidbury sold to George Johnson house and lot, known as the Streeter Place, and executed bond for title; that all payments were duly made thereunder and the full purchase price tendered in accordance with the terms of the contract, but no deed was delivered because, in the meantime, V. Sidbury had wrongfully conveyed the property to his son, K. C. Sidbury; that the said K. C. Sidbury, as agent of his father, tortuously and wrongfully evicted the said George Johnson from the premises to his great injury and damage. Wherefore plaintiffs asked for damages and for execution of deed to the land in question.

On 14 July, 1944, no answer having been filed by the defendant, and it "appearing to the court that this is an action in tort for recovery of damages for breach of contract and resultant damages to real property," judgment by default and inquiry was entered, and the inquiry ordered to be executed at the next succeeding term of court.

Motion to set aside this default judgment for excusable neglect was allowed and subsequently reversed on appeal. 225 N. C., 208, 34 S. E. (2d), 67.

On 3 January, 1945, the defendant filed answer and denied the material allegations of the complaint.

Execution of the inquiry came on for hearing at the December Term, 1945, New Hanover Superior Court, and resulted in award of damages to the plaintiff in the amount of $1,725.00.

From judgment thereon, the defendant appeals, assigning errors.

Rodgers & Rodgers and J. H. Ferguson for plaintiffs, appellees.

Clayton C. Holmes and Carr, James & Carr for defendant, appellant.

STACY, C. J. The execution of the present inquiry seems to have been on the complaint and answer, and plaintiff was allowed to recover the difference between the purchase price of the land as fixed in the bond for title and its reasonable market value at the time of the breach, less

the sum "due and owing upon the contract," plus "such sum as you (jury) find necessary to fully compensate the plaintiff for any injury sustained by him, directly flowing from, and proximately caused by, the wrongful act of the defendant." See *Troitino v. Goodman,* 225 N. C., 406, 35 S. E. (2d), 277; 27 R. C. L., 619 and 631.

If it be conceded that the measure of damages, as thus stated, was in excess of the scope of the inquiry as fixed by the default judgment, *DeHoff v. Black,* 206 N. C., 687, 175 S. E., 179, it is not perceived wherein the defendant can complain, if the judgment is to be considered a final disposition of the whole matter. The case was tried on the pleadings, and largely upon the defendant's evidence. Having thus invited the court to entertain his answer and evidence in support thereof, the defendant is hardly in position to quarrel with the result. *Buie v. Buie,* 24 N. C., 87. The theory and scope of the inquiry was advanced by the defendant, and the jury apparently accepted his figures in arriving at the amount of damages.

It is true the plaintiff stated on the hearing that he would waive his cause of action on contract and proceed in tort (52 Am. Jur., 380, sec. 27)—consistent with the execution of the inquiry under the default judgment—but the defendant thereafter persisted in trying the matter on the complaint and answer and offered evidence to sustain his position under the contract. If this were error, it seems to have been invited by the defendant. *Carruthers v. R. R.,* 218 N. C., 377, 11 S. E. (2d), 157; *Kelly v. Traction Co.,* 132 N. C., 368, 43 S. E., 923.

On the record, as presented, we are disposed to uphold the judgment.

No error.

BARNHILL, J., concurring: The cause was submitted to the jury on the issue of damages only. When plaintiffs rested defendants offered evidence in rebuttal. This testimony is to the effect that the reasonable market value of the property was $2,500 and that there is due on the contract "$600 or $700." The jury accepted their theory of the case and their testimony as to the facts and returned verdict for $1,725.

It follows that the errors committed in the admission of testimony and in the charge of the court failed to harm defendants or to prejudice their defense. Since the verdict does not exceed the amount they have shown to be due they have no just cause for complaint.

STATE v. FRED DEATON.

(Filed 8 May, 1946.)

1. Homicide § 27c: Criminal Law § 81c—

The use of the phrase "premeditation *or* deliberation" in the charge *held* not prejudicial error in view of the fact that immediately thereafter the court repeatedly and correctly instructed the jury that both these elements were essential for a conviction of first degree murder.

2. Homicide § 27f—

Where the State's evidence tends to show a deliberate, premeditated killing with a deadly weapon, and there is no evidence in the case constituting any basis that the killing was in self-defense, defendant having offered no evidence, the failure of the court to instruct the jury upon the right of self-defense will not be held for error.

APPEAL by defendant from *Sink, J.*, at October Term, 1945, of GASTON.

The defendant was tried for and convicted of the first degree murder of Walt A. Clark, and was sentenced to death by asphyxiation. From the judgment imposed the defendant appealed, assigning errors.

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

Ernest R. Warren and O. A. Warren for defendant, appellant.

SCHENCK, J. At the outset of the defendant's brief it is stated that "all exceptions are abandoned except Exceptions Numbers Four and Five."

Exception No. 4 is to that portion of his Honor's charge which reads: "Now, gentlemen of the jury, intoxication is no excuse for crime by erasing a specific intent, and I charge you, as I have heretofore, a specific intent is essential to conviction of crime of murder in the first degree, is essential to the criminality of the action or there must be premeditation or deliberation as to which terms have been defined to you as some mental process of the kind in order to determine the degree of the crime."

The defendant in his brief states that: "Both premeditation and deliberation are essential elements of the crime of first degree murder, and to instruct the jury that it was only necessary to prove one of the necessary elements of first degree murder was error," still the State contends that while the court may have inadvertently used the alternative "or" instead of the conjunction "and" between the words "premeditation" and "deliberation," that any error committed by such inadvertence was cured in subsequent portions of the charge. It is true that following the portion of the charge assailed his Honor did several times instruct the

jury correctly, telling them that both premeditation and deliberation were essential elements of the offense, and, in effect, must each be proven by the State beyond a reasonable doubt to sustain a conviction of first degree murder. In view of the fact that the error assailed was later corrected by unmistakable words, we perceive no harm as having come to the defendant in this respect, and since we are therefore of the opinion that the objection is without merit, it can avail the appellant nothing. *S. v. Rogers,* 216 N. C., 731, 6 S. E. (2d), 499, and cases there cited.

Exception No. 5 in the Assignments of Error is in the following language, to wit: "The defendant excepts for that His Honor, the Trial Judge, in giving the foregoing charge did not state in a plain and correct manner the evidence given in the case as to the right of self defense, and did not declare and explain the law arising thereon, as provided by G. S., 1-180."

The evidence, if believed, does not disclose any facts which would support a charge on the right of self-defense. Notwithstanding the fact that the burden of showing matters in mitigation of the presumption of at least murder in the second degree arising from the intentional killing with a deadly weapon rested upon him, the defendant did not offer any evidence, electing to rest his fate upon the evidence of the State. The testimony of the State's witnesses, who were in the cafe at the time of the fatal shooting of the deceased by the defendant, tended to show not a word was spoken between the defendant and deceased, and all the evidence tended to show the defendant had procured the gun from the wife of a neighbor and gone directly to where the deceased was, and shot him without warning of any kind, and that defendant had said before the shooting that "he was going to shoot him," although the witness did not know to whom the defendant referred, and that the defendant a few minutes later, after Clark had been shot, came back and said, "I got him." Since we find nothing in the evidence whereon to base a charge on the right of self-defense, the absence of such a charge cannot be held for reversible error.

No error.

SAMUEL R. IRELAND v. THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

(Filed 22 May, 1946.)

1. Trial § 22a—

On motion to nonsuit the evidence must be taken in the light most favorable to plaintiff.

2. Insurance § 34a—Evidence held insufficient to be submitted to the jury on question of insured's permanent and total disability.

Plaintiff testified that he was a farmer and had become totally and permanently disabled by disease from doing any farm work. But plaintiff also testified that he operated the farms owned by himself and wife by the use of tenants and hired labor. On cross-examination he identified bank ledger sheets showing deposits aggregating more than $75,000 made by him during the five years after the alleged commencement of disability, checks issued for business transactions, averaging more than one a day, all of which were issued in his name but some of which were signed by his wife, financial statements made by him showing an increase of over $7,000 in net worth during a period of less than three years. Plaintiff also testified to the effect that while his physical condition made walking difficult, he drove his automobile as well as his truck on frequent trips in transacting business matters relating to the farming operations. *Held:* Plaintiff's own evidence reveals that during the period of claimed disability he actively engaged continuously in business transactions in connection with the operation of the farms, and insurer's motion to nonsuit should have been allowed in his action on a life insurance policy providing for benefits if insured should become "totally and permanently disabled by bodily injury or disease" so as to prevent him from "performing any work for compensation, gain or profit."

APPEAL by defendant from *Bone, J.*, at September Term, 1945, of SAMPSON.

Civil action to recover on six policies of insurance for total and permanent disability.

Plaintiff alleges in his complaint and amended complaint that defendant issued and delivered to him six certain policies of life insurance, three on 1 August, 1921, and three on 17 August, 1921, in each of which provision is made for payment of certain benefits in the event he should become totally and permanently disabled as set forth in said policies; that during the month of April, 1937, he became totally and permanently disabled by disease so that he was then, and is now, and hereafter will be permanently, continuously and wholly prevented thereby from performing any work for compensation, gain or profit, and from following any gainful occupation; that he filed with defendant his due proof of such disability on 9 September, 1940; that under the terms of the said policies he is entitled to receive from defendant, and defendant is due to pay to him certain amounts as total and permanent disability benefits; and that defendant has refused to pay same after demand.

Defendant in its answer and amended answer to plaintiff's complaint and amended complaint admits that it issued to plaintiff six certain policies of insurance on the dates alleged "with such phraseology as to disability and other matters as are incorporated in said policies," all of which are now and have been since the date of issuance in full force and

that the premiums have been paid; but defendant denies (1) that plaintiff has become totally and permanently disabled as he alleges, or (2) that he has furnished at any time due proof of his alleged total and permanent disability, in accordance with the provisions and conditions of said policies, or (3) that it is indebted to plaintiff for disability benefits as alleged by him.

The record of the evidence offered upon the trial below is too voluminous to be incorporated in detail within the confines of an opinion of reasonable length. Hence, only the salient features need be stated. (*S. v. Lea,* 203 N. C., 13, 164 S. E., 737.)

Plaintiff offered in evidence the six certain policies of insurance sued upon, each of which contains the following pertinent provisions:

"(a) If the insured, after payment of premiums for at least one full year, shall before attaining the age of sixty years and provided all past due premiums have been fully paid and this policy is in full force and effect, furnish due proof to the Company at its Home Office either (a) that he has become totally and permanently disabled by bodily injury or disease, so that he is, and will be permanently, continuously and wholly prevented thereby from performing any work for compensation, gain or profit, and from following any gainful occupation.

"(b) The Company will, during the continuance of such disability, pay to the insured a monthly income at the rate of ten dollars for each one thousand dollars of the face amount of this policy (but not including dividend additions), etc."

Plaintiff, as witness for himself, testified that he has resided in Sampson County, North Carolina, all of his life and is and has been for thirty-five years a farmer; that he is not equipped physically and mentally to do any other kind of work; that he became sixty years of age on 1 May, 1945; that in each application for the policies of insurance sued on he gave his occupation as a farmer; that it was in 1937 that he first became ill, from which he claims disability; that in early spring of that year, while emptying a sack of chicken feed, he was stricken with a sharp pain over, or in his right hip, and could not finish emptying the sack, and hobbled to the house, and was laid up for the rest of the evening; that the condition remained with him and he did not leave the house for about two weeks; that after two and a half months he went to Winston-Salem to see his brother-in-law, a doctor, for examination and treatment; that though treated by this and other doctors his condition gradually grew worse; that he has arthritis and other complications, affecting his knee and other joints, and he suffers pain constantly; that while before he became ill he did every kind of work that a farmer does, plowing, disking and gathering crops, hauling and loading potatoes, etc., he has not done, has not been physically able to do any kind of farm work since 9 Sep-

tember, 1940—describing in detail his physical condition; that prior to that date he kept his books, but now his wife keeps all the records, crop records and everything; that he has not been physically able at any time to direct, superintend or manage his farm, saying "I cannot get out and attend to it"; and that since that time his wife has been directing, superintending and managing his farm and farm operations.

Plaintiff further testified that in April, 1941, he filled out and mailed to defendant "Insured's Statement of Disability" on form obtained from defendant, in which among other questions he answered these pertinent ones as follows: "5. What date do you claim that you became unable to follow any occupation as a result of your disability? 9th day of September, 1940. 6. Have you had medical advice respecting the nature and cause of claim of disability? Yes. 7. What was the medical diagnosis? Arthritis and other complications. 8. Have you been wholly and continuously prevented from following any occupation since the date given in answer to Question 5? Physically, yes. 9. If your answer to Question 8 is 'no' what are the details of any occupation you have engaged in and were they manual, mental or supervisory? Mental and supervisory. Occupation . . . Farmer. Exact nature of duties . . . General farming. From . . . as needed in farming . . . to . . . 11. What was your occupation and the name of your employer on the date given in your answer to Question 5? Manager and owner of farm. Name of employer . . . Myself. 14. What date do you expect to resume your occupation or take up a new occupation? None—day of—none—19..... none"; that on 2 June, 1941, defendant through its manager wrote plaintiff that "with further reference to your claim for disability, the proofs which have been submitted to this company in your behalf, in our opinion, are not sufficient to show you to be totally and permanently disabled within the meaning of the terms of the policies; neither has the company obtained other information which shows you to be totally and permanently disabled. The above statement of our reasons for failing to allow disability benefits is, of course, made without prejudice to the right of the company to assert other reasons for disallowing the claim at this time . . ."; and that on 17 June, 1941, defendant through its manager, again wrote plaintiff: "The Home Office advised that they have carefully reviewed the information in their file and do not feel that any change in the Company's action as outlined in our letter of June 2, 1941, is warranted, etc."

On the other hand, evidence offered by plaintiff tended to show that he lives at Erin in Piney Grove Township, Sampson County, North Carolina, on a farm inherited by him from his father and sister, containing about 800 acres, of which 150 acres are tillable and in cultivation, and that his wife owns a farm in Duplin County, containing ap-

proximately 331 acres, of which about 119 acres are cultivable, and same were cultivated by tenants and by hired labor.

And in this connection, plaintiff, under cross-examination, testified: "We operate these two farms, you might say, as a partnership, since we file a joint income tax"; that one bank account in his name was kept in the Bank at Mt. Olive; that all deposits were put into that account, and all expenditures were paid by check drawn on that account; and that, in his language, "I wrote and signed the checks for the farm and whenever the necessity arose I applied to the bank and borrowed money. My principal duties were to provide funds for the operation of the farm. I have already testified that I did the banking business, looked after the deposits and loans with the Bank of Mt. Olive."

Plaintiff, continuing, on cross-examination, identified bank ledger sheets of his account showing the amounts deposited each month and totaling more than $75,000, during the period beginning 1 September, 1940, and ending 1 September, 1945; and it is admitted of record that the amount deposited is made up of the following: $6,902.40 in September, October, November, and December, 1940; $18,964.46 in 1941; $14,685.70 in 1942; $12,865.35 in 1943; $13,948.84 in 1944; and $9,874.45 in the first eight months of 1945.

Plaintiff further identified various checks drawn on his account: (1) those given by him in September, 1940, beginning with the 4th day, and ending the 30th, approximately forty-two in number, pertaining to business transactions connected with his farm, some at home, others in Mt. Olive and in Goldsboro; (2) those given by him in October, 1940, the first on the 2nd day and the last on the 31st, approximately thirty-nine in number, as to which he testified: "Looking at the October checks, I wrote checks for business transactions practically every day . . . Everything I did was paid with checks. I wrote all of these checks. They were for some definite purpose . . . They all represent money I was paying out in connection with the operation of my farm or my wife's"; (3) those given by him in November, 1940, the first on the first day and the last on the 25th day, as to which he testified: "These checks you have asked me about are checks for business transactions in the month of November, 1940. I won't say I signed one every day, but I signed the checks and there are 54 of them"; and (4) those given by him in December, 1940, the first on the 2nd day and the last on the 27th, as to which he testified: "The 38 checks you show me were all signed in December, 1940. They represent almost one business transaction a day. In addition to those, I think I was having some building done in November and December. The checks in the cover marked 'West End House Material and Labor' . . . were signed by me. They must have been for labor or some material."

Plaintiff further identified, and it was agreed that he issued 544 checks in 1941, 389 in 1942, 375 in 1943, 465 in 1944, and 291 in the first eight months of 1945, covering transactions similar to those concerning which he had already testified. Testifying further in more detail as to the above checks, plaintiff stated that while all checks were signed in his name, part of them were signed by his wife. "It is just a question of whether I was there."

And the record shows that the parties stipulated that the checks of S. R. Ireland issued from September, 1940, to September, 1945, may be correctly summarized as being principally for the following: Farm supplies, farm machinery, cattle, livestock, fertilizer, seed, feed, groceries, gasoline, oil, labor, auto and truck and tractor supplies, parts and repairs, lumber and building supplies, and material for home and farm dwellings and buildings, weekly settlements for labor on farm, final settlements with tenants, payment of notes to bank, payments to Land Bank, settlement for farm products, loans, cash, etc.

Plaintiff also identified various notes executed by him for loans, and in relation to other business transactions in connection with the operation of his farm in the years 1941, 1942, 1943, 1944 and 1945, and various other notes executed by him and his wife jointly for loans in the same years, as to all of which plaintiff testified that these notes represent business transactions for the purpose of carrying on operations on his farm and on that of his wife. And, speaking of notes given in 1943, plaintiff testified: "Whether originals or renewals, I paid them, and that was part of my carrying on my farming operations and transactions for 1943 . . . having borrowed the money from both banks, it was deposited in the Bank of Mt. Olive from time to time and paid off with proceeds of the crop, all that we borrowed, and all of the notes show that after they were borrowed I later went back and paid them"; and that notes given in 1945 have been paid.

Plaintiff also identified two financial statements made by him to the Bank of Mt. Olive in connection with loans from the bank. One dated 21 April, 1941, showing as liabilities "Notes payable to Bk. $300.00; Mortgages on 565 a. to F L Bk.—$8000.00, and Net Worth $28,800.00, exclusive of $6,000.00 as life insurance," and the other dated 16 December, 1943, showing as liabilities "Notes payable to Bank, $500.00; Accts. payable to various $350.00; Mortgages on 800 a. Fed. Land Bk. $1,500.00; Net Worth $36,550.00," exclusive of life insurance as an asset.

Plaintiff also identified applications to War Price and Rationing Board signed by him and by his wife in 1942 and 1943 for gasoline for use in operation of automobile, truck and tractor in connection with farm operations—it being stated in the application of his wife, among other things, that husband, "due to his physical condition . . . has to use

it everywhere, even to go around the farms . . . He's Assistant Regis. Draft Board, Piney Grove, and Judge of Elections, Piney Grove. These are just samples of necessary trips known . . .," and that the mileage on this vehicle last thirty days is 1,200 miles.

Further the testimony of plaintiff, in connection with the business transactions to which the checks and notes relate, reveals his varied continuous activities, duties and accomplishments in the operation of his farm and that of his wife, among others: That while on account of his physical condition he had difficulty in walking and in getting in and out of his automobile, he could and did drive his automobile as well as his truck, but that on long trips he usually had someone to drive for him; that in making purchases and in selling livestock, marketing eggs, tobacco, cotton and other farm products, in attending sales in stockyard at Goldsboro and tobacco market, in conducting financial transactions, and in transacting various other business matters pertaining to the operation of his farm, plaintiff made numerous trips to Goldsboro, Mt. Olive, Faison, Clinton, Lumberton and other places; that (quoting him) "Sometimes I did not attend the sales in stockyard at Goldsboro but as a rule I went to buy or sell"; that in 1941, 1942, 1943, 1944 and 1945 he "sometimes regularly attended" the tobacco market in Lumberton where "we sell."

Plaintiff further offered testimony of numerous persons who expressed opinion that from their knowledge and observation of him, he has not been able since 9 September, 1940, to carry on regularly the duties of a farmer. These witnesses further gave testimony that plaintiff, who studied agriculture at State College, has a bright and excellent mind, and is a man of good character, fine intelligence, and scientific knowledge and ability, and is a good business man and a good executive.

And plaintiff further offered evidence tending to show many activities of his wife in carrying on and sharing the duties and responsibilities of their farm operations.

The court, having overruled its motion for judgment as of nonsuit at the close of plaintiff's evidence, defendant, preserving exception thereto, offered evidence as follows: (1) The bank ledger sheets, the checks, notes, financial statements, and applications for gasoline, identified by plaintiff, as hereinabove set forth, and (2) oral testimony tending to show activities of plaintiff in connection with his farming operations since 1940, and as to his mental alertness and ability to direct farming operations and arrange for financing of same.

Motion of defendant for judgment as of nonsuit at close of all the evidence was overruled, and defendant excepted.

It being agreed that the court might answer the third issue as a matter of law, dependent upon the jury's answer to the first two issues,

the case was submitted upon these issues, which the jury answered as shown:

"1. Has the plaintiff, Samuel R. Ireland, since September 9, 1940, been totally and permanently disabled by bodily injury or disease so that he is and will be permanently, continuously and wholly prevented thereby from performing any work for compensation, gain or profit, and from following any gainful occupation? Answer: Yes.

"2. Did the plaintiff, Samuel R. Ireland, submit to The Mutual Life Insurance Company of New York, prior to the institution of this action, due proof of total and permanent disability as provided by the terms of his policies? Answer: Yes.

"3. If so, what amount is plaintiff entitled to recover of the defendant? Answer: Full amount due under policies with interest."

From judgment for plaintiff on verdict rendered, defendant appeals to Supreme Court and assigns error.

P. D. Herring and Faircloth & Faircloth for plaintiff, appellee.

Varser, McIntyre & Henry and Louis W. Dawson for defendant, appellant.

WINBORNE, J. This question is decisive of this appeal: Is the evidence, offered upon the trial below, taken in the light most favorable to plaintiff, as must be done in considering motion for judgment as in case of nonsuit, sufficient to support an affirmative answer to the issue as to whether plaintiff "has become totally and permanently disabled by bodily injury or disease, so that he is, and will be permanently, continuously and wholly prevented from performing any work for compensation, gain or profit, and from following any gainful occupation," that is, within the express provisions of the policies upon which suit is based? A negative answer comes from the decisions of this Court in these cases: *Buckner v. Ins. Co.,* 172 N. C., 762, 90 S. E., 897; *Thigpen v. Ins. Co.,* 204 N. C., 551, 168 S. E., 845; *Boozer v. Assurance Society,* 206 N. C., 848, 175 S. E., 175; *Hill v. Ins. Co.,* 207 N. C., 166, 176 S. E., 269; *Carter v. Ins. Co.,* 208 N. C., 665, 182 S. E., 106; *Whiteside v. Assurance Society,* 209 N. C., 536, 183 S. E., 754; *Lee v. Assurance Society,* 211 N. C., 182, 189 S. E., 626; *Mertens v. Ins. Co.,* 216 N. C., 741, 6 S. E. (2d), 496; *Medlin v. Ins. Co.,* 220 N. C., 334, 17 S. E. (2d), 463; *Jenkins v. Ins. Co.,* 222 N. C., 83, 21 S. E. (2d), 832; *Ford v. Ins. Co.,* 222 N. C., 154, 22 S. E. (2d), 235.

Thus in keeping with these decisions defendant's exception to the refusal of its motion, at the close of all the evidence, for judgment as in case of nonsuit is well taken. And in view of the pronouncements

so recently made by this Court in these cases, further treatment of the subject here would be unnecessarily repetitious.

It is sufficient to say that as plaintiff has agreed, so shall he be bound. Even though there is much opinion evidence as to plaintiff's physical disability, the facts remain, as revealed by his own testimony, that through the years he has been actively engaged continuously in business transactions of various kinds in connection with the operation of his farm and that of his wife. These negative total and permanent disability within the meaning of the provisions of the policies upon which he sues. Adverting to a similarly factual situation in the *Thigpen case, supra, Brogden, J.,* aptly said: "The law is designed to be a practical science, and it would seem manifest that a plain, everyday fact, uncontroverted and established, ought not to be overthrown by the vagaries of opinion or by scientific speculation."

The present case is distinguishable in factual situation from those in this line of cases: *Lee v. Ins. Co.,* 188 N. C., 538, 125 S. E., 186; *Brinson v. Ins. Co.,* 195 N. C., 332, 142 S. E., 1; *Bulluck v. Ins. Co.,* 200 N. C., 642, 158 S. E., 185; *Smith v. Assurance Society,* 205 N. C., 387, 171 S. E., 346; *Misskelley v. Ins. Co.,* 205 N. C., 496, 171 S. E., 862; *Guy v. Ins. Co.,* 206 N. C., 118, 172 S. E., 885; *Leonard v. Ins. Co.,* 209 N. C., 523, 183 S. E., 723; *S. c.,* 212 N. C., 151, 193 S. E., 166; *Fore v. Assurance Society,* 209 N. C., 548, 184 S. E., 1; *Blankenship v. Assurance Society,* 210 N. C., 471, 187 S. E., 59.

The judgment below is

Reversed.

J. C. WELCH, JR., v. WACHOVIA BANK & TRUST COMPANY, ADMINISTRATOR, D. B. N., C. T. A., OF THE ESTATE OF J. C. WELCH, SR., DECEASED, AND AS TRUSTEE UNDER THE WILL OF THE SAID J. C. WELCH, SR., ALLIE WELCH FOISTER, LENA WELCH PENNY AND HER HUSBAND, GEORGE T. PENNY; AND ELIZABETH WELCH BURCHFIELD AND HUSBAND, D. C. BURCHFIELD; WILLIAM T. FOISTER AND THOMAS W. FOISTER, MINOR, AND J. A. CANNON, JR., GUARDIAN AD LITEM OF THOMAS W. FOISTER, MINOR.

(Filed 22 May, 1946.)

1. Trusts § 14: Executors and Administrators § 10—

The will in suit set up a trust and named an executor and executrix to handle the estate, giving them or the survivor of them the power to sell or improve unproductive real estate, to invest the personalty or the proceeds of sale of realty in Government bonds or in the improvement of realty, in their discretion, with provision that upon the death of either,

the powers therein delegated should be exercised by the survivor, and upon the death of both, the trust should terminate and the *corpus* divided. *Held:* The powers conferred by the will were personal and discretionary.

2. Same—

Where the powers conferred upon the executor or trustee named in a will are personal and discretionary, such powers, as a general rule, cannot be exercised by a substitute or successor, nor can the court appoint another in the event of the death, incompetency or other failure of the designated person.

3. Same: Trusts § 30—

The will in this case set up a trust and conferred personal and discretionary powers upon the executor and executrix named therein, with provision that upon the death of both of them the *corpus* should be divided among named beneficiaries. The executrix died, and the executor was removed for cause. *Held:* Since the powers cannot be exercised by a substitute or successor, the removal of the executor has the same effect in regard to the trust as though he had died, and the trust is terminable.

4. Trusts § 29—

Where a will sets up a trust and provides that the net income should be divided among named beneficiaries, and upon the termination of the trust, the *corpus* divided among them, without limitation over, *held* the death of a beneficiary terminates the trust as to her share, and such share descends to her heirs at law.

5. Wills § 33d—

The will in suit set up a trust and provided that the net income should be divided among testator's wife and children, and upon termination of the trust upon the death of both trustees that a second trust with a corporate trustee be set up for the share of one daughter, A, and the balance of the *corpus* divided among the other children. There was no provision for any limitation over. *Held:* Upon the death of one of the children without issue, "A" took her *pro rata* part by inheritance unaffected by the second trust.

APPEAL by defendant, Wachovia Bank and Trust Company, Administrator *d. b. n., c. t. a.*, of the estate of J. C. Welch, Sr., deceased, from *Nettles, J.*, at February Civil Term, 1946, of GUILFORD (Greensboro Division).

Civil action for termination of testamentary trust and for final settlement of administration of estate of J. C. Welch, Sr., deceased, to which defendant Wachovia Bank and Trust Company, as administrator *d. b. n., c. t. a.*, of estate of J. C. Welch, Sr., deceased, and as Trustee under his last will and testament, by permission of court filed cross action for declaratory judgment, as to questions of law as hereinafter shown, upon which cross action the case was heard and determined in Superior Court.

The cause coming on for hearing the court found, and all the parties admitted substantially these pertinent facts as alleged in the cross action aforesaid:

I. That J. C. Welch, Sr., of Guilford County, North Carolina, died on 19 July, 1920, leaving a last will and testament, which was duly probated and recorded in said county on 14 August, 1920, pertinent portions of which are as follows: "After payment of my just debts and funeral expenses, I declare that my property shall be managed and disposed of as hereinafter directed:

"1. I constitute and appoint my wife, Mary Welch, and my son in law, George T. Penny, executor and executrix respectively of this my last will and I give them, or in case of the death of either of them, the survivor, full power and authority to manage, invest, reinvest and to sell both real and personal estate by public auction or by private sale and to convey the same by such deeds or other instruments as may be necessary to present the legal title thereto . . .

"3. I direct that my said executrix and executor or either of them shall collect all interest and other income after paying all expenses, properly chargeable to income, to pay over the balance or net income in monthly payments as follows: (1) one-sixth to my wife, Mary Welch, during her natural life and at her death the said one-sixth shall be paid equally to all of my children or their representatives. (2) One-sixth to my daughter, Lena E. Penny. (3) One-sixth to my daughter, Ruth Welch. (4) One-sixth to my daughter, Lizzie Welch. (5) One-sixth to my wife, Mary Welch, for the use and benefit of my son, J. C. Welch, Jr., during his minority and to my son, J. C. Welch, Jr., I direct the said one-sixth to be paid after his arriving at his majority and thereafter. (6) The remaining one-sixth I direct to be paid to my daughter, Allie Foster, wife of J. T. Foster, during her natural life, to her sole and separate use and upon her individual receipt, to be free from the control, interference, direction or debts of her husband and at the death of my said daughter, Allie Foster, I direct that the said one-sixth income shall go to and be paid to the children of my said daughter, Allie Foster, but if she dies leaving no children or issue of such, then her share shall go and be paid in equal shares to her mother, if living, and her brother and sisters or their heirs.

"4. I direct that in the management of my estate that my executrix and my executor or either of them shall improve or sell all of the unproductive real estate in their, his or her sound discretion and with the proceeds from such sale either improve such real estate as seems best or invest the same in Government Bonds.

"It is my desire and I so direct that all personal property of which I shall die possessed shall be invested either in Government bonds or in

the improvement of my real estate. It is my intention and direction that my estate be managed as above outlined during the life or lives of my executrix or executor and at the death of either of them that the powers herein enumerated shall be exercised by the survivor. At the death of both my executrix and executor, it is my desire and I do direct that my estate be divided into five equal shares and that one share each be given to my daughters, Lena Welch Penny, Ruth Welch and Lizzie Welch and to my son, J. C. Welch, Jr., the remaining share of one-fifth I direct to be paid over to the Wachovia Bank & Trust Company, Winston-Salem, North Carolina, as Trustee, to be held in trust and invested and the net income derived therefrom to be paid over semi-annually or more frequently if practicable to my daughter, Allie Welch Foster, during her natural life, to her sole and separate use and upon her individual receipt to be free from the control, interference, direction or debts of her husband and at the death of my daughter, Allie Foster, the said income from the said one-fifth share shall be paid to the child or children of my said daughter until the youngest child arrives at the age of twenty-one years, at which time the said share of one-fifth, discharged of all trust, shall go and be paid to the child or children of my said daughter, Allie Foster, but if she die leaving no child or children or an issue of such, then the said share of one-fifth shall go and be paid in equal shares to my daughters, Lena E. Penny, Ruth Welch, and Lizzie Welch and to my son, J. C. Welch, Jr., or their heirs."

II. That at the time his will was made and executed, and at the time of his death, J. C. Welch, Sr., had a wife, Mary F. Welch, a minor son, J. C. Welch, Jr., and four daughters, Lena E. (Welch) Penny, Ruth Welch, Elizabeth (Lizzie) Welch, now Elizabeth Welch Burchfield, and Allie Welch Foister; that J. C. Welch, Jr., was not of age and was inexperienced and untried in business affairs; that the four daughters likewise were young and had no business training; that testator had two sons-in-law, J. T. Foister and George T. Penny, the former being *"non grata persona,"* and the latter being "highly regarded and esteemed by the testator as an experienced, able and successful business man . . . and . . . had the trust and confidence of said testator," and testator "had great confidence and trust in his wife . . ., who was acquainted with his affairs to a considerable extent, and aware of his desires and wishes in respect of his estate."

III. That Mary F. Welch and George T. Penny duly qualified as Executrix and Executor of the said will of J. C. Welch, Sr., on 14 August, 1920, and entered upon the execution of the said will and of the trust therein set forth.

IV. That Mary F. Welch died on 12 September, 1933, and George T. Penny was removed as Executor of the will of J. C. Welch, Sr., by order of Clerk of Superior Court of Guilford County, on 7 December, 1935.

V. That, in the order removing George T. Penny as aforesaid, "defendant, Wachovia Bank and Trust Company, was appointed Administrator *de bonis non, cum testamento annexo* of said estate, and was clothed and vested with all the powers, duties and authority set out in said will of J. C. Welch, Sr., deceased, and vested in it by law," and thereupon said Bank and Trust Company duly qualified and has since been acting as such administrator, and discharging the duties charged upon the executrix and executor by said last will and testament, and holds the assets of said estate, which principally consists of improved productive business real estate.

VI. That Ruth Welch, one of the five children, and a beneficiary under the will of J. C. Welch, Sr., died intestate on 19 October, 1933, without issue and without ever having been married, leaving as her only heirs at law her brother, J. C. Welch, Jr., and sisters, Allie Welch Foister, Lena Welch Penny and Elizabeth Welch Burchfield, the remaining four beneficiaries mentioned in item four of the will.

VII. That since the death of Mary F. Welch, the widow, and of Ruth Welch, the daughter, occurred prior to the appointment and qualification of Wachovia Bank and Trust Company, as administrator *d. b. n., c. t. a.,* of said estate, and since J. C. Welch, Jr., is now of full age, the said administrator *d. b. n., c. t. a.,* has been paying the net income of the estate in monthly payments of one-fourth each to Lena Welch Penny, Elizabeth Welch Burchfield, Allie Welch Foister and J. C. Welch, Jr.

VIII. That at the time of the removal of George T. Penny as executor, as above stated, the estate was considerably in debt, and embarrassed by mortgages, delinquent taxes and street paving assessments, but by careful and prudent management of the administrator *d. b. n., c. t. a.,* the remaining properties of the estate, of the estimated value of $225,000 in real estate, $4,200 in United States Government Bonds of various kinds, and $6,000 in cash, have recently become free from encumbrances; and that all acts and things done by the administrator *d. b. n., c. t. a.,* have been in good faith, and with consent and at request of beneficiaries, who thereby have benefited and profited.

IX. That in view of the foregoing facts, these questions have arisen relative to the construction and legal effect of certain of the provisions, devises and trusts contained in item four of the will:

"(a) Whether under the intent and meaning of said will the legal effect of the removal of the surviving executor named in said will, George T. Penny, was equivalent to the natural death of the said George T. Penny, and, therefore, whether the first of the trusts, which is mentioned in Items Third and Fourth of said will, is presently terminable, and whether the shares of said Lena Welch Penny, Elizabeth Welch

Burchfield and J. C. Welch, Jr., are now vested in them free of said trusts.

"(b) Whether the death of said Ruth Welch had the effect of terminating the said trust of Items Third and Fourth as to her share and interest.

"(c) Whether the share of Ruth Welch, deceased, upon the termination of the first trust (either as to her share by her death or as to the whole trust estate by the removal of said George T. Penny, as Executor) should be divided equally among her brother and sisters, to wit, the said Lena Welch Penny, Elizabeth Welch Burchfield, J. C. Welch, Jr., and Allie Welch Foister, or whether the portion of Allie Welch Foister of said Ruth Welch's share should be added to the one-fifth (1/5) of said estate directed to be paid over to Wachovia Bank & Trust Company, as Trustee under the last section of Item Fourth of said will of J. C. Welch, Sr., deceased."

In respect of the foregoing questions the court concluded as matters of law:

"1. Under the intent and meaning of said will of J. C. Welch, Sr., deceased, the trust vested therein in the said surviving executor, George T. Penny, was personal to said George T. Penny; that the legal effect of the removal of the said surviving executor, George T. Penny, is equivalent to the natural death of said George T. Penny under the intent and meaning of said will; and that the first of the trusts set up in said will, which is mentioned in Items Third and Fourth of said will, is presently terminable, and the shares of Lena Welch Penny, Elizabeth Welch Burchfield and J. C. Welch, Jr., are now available to them upon demand upon said Wachovia Bank & Trust Company, Administrator *d. b. n., c. t. a.*

"2. That the death of said Ruth Welch, one of the devisees and beneficiaries under said will, as well as the removal of said George T. Penny as surviving executor, had the effect of terminating the said trust in Items Third and Fourth as to her share and interest; that the share and interest of said Ruth Welch, deceased, in said estate now vests in her surviving brother and sisters, to wit, J. C. Welch, Jr., Lena Welch Penny, Elizabeth Welch Burchfield and Allie Welch Foister, share and share alike under the pertinent statutes governing the estates of persons dying intestate in North Carolina.

"3. That the portion of Allie Welch Foister derived as aforesaid of said Ruth Welch's the decedent's, share under said testator's will is not affected by the trust set up in the said will for the original share of said Allie Welch Foister in the will of said J. C. Welch, Sr., deceased, and the said Allie Welch Foister is entitled to have her proper and equal portion of the share of Ruth Welch, deceased, under said will paid and

delivered to her absolutely, free and discharged of the said trust provided in said will for her original one-fifth (1/5) share of said estate of J. C. Welch, Sr., deceased.

"4. That the Wachovia Bank & Trust Company, as Trustee under the last section of Item Fourth of said will of J. C. Welch, Sr., deceased, is authorized to hold and retain the original one-fifth (1/5) share of Allie Welch Foister to be held in trust in accordance with the terms of the last portion of Item Fourth of said will."

5. That all parties are bound and concluded by the acts and things done by defendant Wachovia Bank and Trust Company, as administrator *d. b. n., c. t. a.,* in the administration of the provisions of the will of J. C. Welch, Sr., and that upon accounting and distribution of the property and funds of the trust estate as above authorized, it shall be discharged and acquitted of any and all further liability in connection with the administration of said trust estate, except as to the remaining trust for the benefit of Allie Welch Foister, as above set forth.

Judgment was thereupon entered in accordance with the above conclusions of law.

Defendant Wachovia Bank and Trust Company, administrator *d. b. n., c. t. a.,* of the estate of J. C. Welch, Sr., excepts to conclusions of law 1, 2 and 3, and to the signing of the judgment, and appeals to the Supreme Court.

Clifford Frazier for plaintiff, appellee.

Rupert T. Pickens for defendant, appellant.

WINBORNE, J. The exceptions to the conclusions of law, assigned by appellant as errors in the judgment below, raise several questions—the primary one being whether the powers vested in the executrix and the executor, or the survivor of them, under the provisions of the will of J. C. Welch, Sr., are personal to, and discretionary with them. If so, whether such powers may be exercised by an administrator *de bonis non, cum testamento annexo.* As to these the ruling of the court below seems to be in accord with pertinent legal principles.

The powers of an executor, or trustee, are personal in their relation to him when the testator or trustor manifests an intention that, under no circumstances, should such powers be exercised by anyone else. 54 Am. Jur., 221, 232, Trusts, sections 281, 292. Whether the powers are personal in character is to be ascertained from a consideration of the will as a whole, and from the nature and objects of the trust created thereby, in the light of surrounding circumstances. 54 Am. Jur., 231, 232, Trusts, sections 291, 292.

The powers of an executor, or trustee, are discretionary when they cannot be duly exercised without the application of a certain degree of prudence and judgment. Black's Law Dictionary. If the executor, or trustee, can decide to exercise or not to exercise, within his discretion, powers given to him, the powers are discretionary. 54 Am. Jur., 231, Trusts, section 290.

Thus when the provisions of the will of J. C. Welch, Sr., are considered in the light of these principles of law, it is clear that the powers conferred upon the executrix, his wife, and the executor, his son-in-law, in whom he was well pleased, or the survivor, are personal to them, and to be exercised in their discretion. The provisions directing (1) that in the management of his estate his executrix and his executor or either of them "shall improve or sell all of the unproductive real estate in their, his or her sound discretion, and with the proceeds from such sale either improve such real estate as seems best or invest same in Government Bonds," and (2) "that all personal property . . . shall be invested in Government Bonds or in the improvement of my estate," coupled with the expressed intention and direction "that my estate be managed as above outlined during the life or lives of my executrix or executor and at the death of either of them that the powers herein enumerated shall be exercised by the survivor," and that "at the death of both my executrix and executor, it is my desire and I do direct that my estate be divided, etc.," indicate the testator's personal confidence in the sound judgment and discretion of his named executrix and executor, or of the survivor, and his trust in their exercise of the discretionary powers enumerated, but to continue only so long as the survivor should live.

And it is a general rule of law that purely personal and discretionary powers of an executor or trustee cannot be exercised by a substitute or successor, nor can a court appoint another in the event of the death, incompetency, or other failure of the designated person. 54 Am. Jur., 106, 221, Trusts, sections 122, 281. *Re Doe's Will,* 232 Wis., 34, 285 N. W., 764, 126 A. L. R., 926. This principle is recognized in this State by opinions in these cases: *Young v. Young,* 97 N. C., 132, 2 S. E., 78; *Creech v. Grainger,* 106 N. C., 213, 10 S. E., 1032; *McAfee v. Green,* 143 N. C., 411, 55 S. E., 828; *Trust Co. v. Drug Co.,* 217 N. C., 502, 8 S. E. (2d), 593.

In the *Young case, supra,* this headnote epitomizes the principle, "Where a power is to be exercised entirely at the discretion of the donee of the power, courts of equity have no jurisdiction to force him to act, and if he has died without exercising the power, they cannot confer it upon a trustee appointed by the court."

Also, in the *Creech case, supra,* the Court held that trusts personal to and discretionary with the executor became extinct at his death, and

could not be judicially prolonged and vested either in the administrator *c. t. a.* or in a substituted trustee.

And in the *Trust Co. case, supra,* the Court held that the power given to an executor, exercised as such or only as trustee, in the event of death or removal of trustee, passes by virtue of statutes—(now G. S., 28-24, and G. S., 28-97)—to and is exercisable by the administrator with will annexed, "unless it clearly appears that the executor named is made the donee of a special trust, given by reason only of peculiar or special confidence in him, or that the testator by the language of the will definitely limited the exercise of the power to the person named as executor."

Therefore, in the present case, the executrix having died, and the surviving executor having been removed for cause, the personal confidence imposed by the testator had run its course and spent its force, just as effectively and completely as if the survivor had died, and the trust created came to an end.

Appellant next challenges the ruling of the court that the death of Ruth Welch, one of the devisees and beneficiaries under the will of J. C. Welch, had the effect of terminating the trusts in items three and four as to her share and interest in the estate, and that such share vested in her surviving brother and sisters. However, it is conceded in brief of appellant that if the removal of the surviving executor had the effect of terminating the trust, and that consequently the time has arrived for dividing the estate as directed in the will, the second conclusion of law, and the portion of the judgment based thereon, are correct. Nevertheless, see *Baker v. McAden,* 118 N. C., 740, 24 S. E., 531; and *Fisher v. Fisher,* 218 N. C., 42, 9 S. E. (2d), 493. The *Baker case, supra,* is very similar to the one in hand. There the Court held that the death of a beneficiary terminated the trust as to her share in the estate. And in the *Fisher case, supra,* it is held that in such event, there being no limitation over, title would descend to heirs at law of the beneficiary.

Lastly, the appellant challenges the correctness of the third conclusion of law which holds that the portion of the Ruth Welch share of the J. C. Welch estate, which her sister Allie Welch Foister inherited from her, is not affected by the provisions of the trust which J. C. Welch, Sr., set up in his will for Allie Welch Foister, and that she, Allie Welch Foister, is entitled to receive same freed and discharged of the provision of the trust so set up by J. C. Welch, Sr., in his will. A reading of the will clearly shows that the trust set up by him for his daughter Allie Welch Foister is well defined, and that in no view does it affect anything Allie Welch Foister takes from her sister by inheritance.

The judgment is

Affirmed.

R. C. REDWINE; CLARA CLODFELTER; BESSIE WALTON; CHARLES R. REDWINE, INDIVIDUALLY AND AS EXECUTOR AND TRUSTEE; DAVID T. REDWINE, INDIVIDUALLY AND AS EXECUTOR AND TRUSTEE; H. O. CLODFELTER, INDIVIDUALLY AND AS EXECUTOR AND TRUSTEE; CASSIE REDWINE; HAZEL H. REDWINE; ALDA REDWINE; R. E. WALTON; HATTIE REDWINE; HENRIETTA CLODFELTER; CATHERINE CLODFELTER; SARAH ZACHARY; MARTHA REDWINE; WILLIAM ZACHARY; MILDRED DINWIDDIE; J. D. REDWINE, JR.; EDGAR L. DINWIDDIE AND CATHERINE REDWINE v. ROBERT F. CLODFELTER; DAVID CLODFELTER; PATRICIA ANN WALTON; BETTY WALTON; JERRY WALTON; MOLLIE WALTON; THE UNBORN ISSUE OF CHARLES R. REDWINE; THE UNBORN ISSUE OF DAVID T. REDWINE; THE UNBORN ISSUE OF CLARA CLODFELTER; AND THE UNBORN ISSUE OF BESSIE WALTON.

(Filed 22 May, 1946.)

1. Appeal and Error § 40a—

An exception to the signing of the judgment presents the single question whether the court correctly applied the law to the facts found.

2. Executors and Administrators § 24—

Family agreements for the settlement of *bona fide* disputes and controversies in regard to estates, not involving the rights of infants, when approved by the court, are valid and binding, and when fairly made, are favorites of the law.

3. Same—

Where there is a testamentary trust and the rights of infants are affected: (1) A family agreement will not be allowed to amend, defeat, or revoke the trust, but will be approved only to preserve the trust; (2) The rule that the law looks with favor on family agreements does not prevail, but the maxim applies that equity looks with a jealous eye on contracts materially affecting the rights of infants and that their welfare is the guiding star in determining its reasonableness; (3) The trust will not be modified on technical objections, but there must be some exigency, contingency, or emergency which makes action of the court indispensable to the preservation of the trust and the protection of the infants.

4. Same—Approval of family agreement held without error upon facts found in this case.

The findings of fact by the court disclosed the following situation: The will in question set up a trust with provision for the payment of income to designated beneficiaries and the division of the *corpus* to the children of the named beneficiaries upon the death of their parent. Some of the beneficiaries were preparing to file in good faith a caveat to litigate *bona fide* disputes. The result of such litigation would be uncertain and such litigation would be long, costly and would tend to disrupt and divide the family. The adult beneficiaries reached an agreement for the distribution of the estate, which agreement provided for setting aside a sum in trust, income of which to accumulate and become a part of the principal, for the

benefit of the ultimate takers, in an amount estimated to net them approximately as much as they would receive under the original trust. Infants *in esse* and *in posse* were made parties and duly represented by guardians *ad litem*. *Held:* The trial court had discretionary power to approve the family settlement and its judgment approving and directing the execution of the agreement is affirmed.

APPEAL by defendants from *Olive, Special Judge,* at April Term, 1946, of DAVIDSON.

Petition for approval of a family settlement of a controversy respecting an estate devised in trust and for instructions.

On 28 September, 1945, J. D. Redwine died leaving a last will and testament in which he devised the bulk of his estate, of the net value of approximately $115,000, in trust. He directed his trustees to pay (1) One-sixth of the income of the trust estate to the two children of a deceased son until their 45th birthday when they were to receive the principal. Each was to draw $3,000 on his 35th birthday and a like amount on his 40th birthday; (2) One-sixth of said income to his son, R. G. Redwine for life, with provision for maintaining a minimum monthly payment; at his death one-sixth of the principal was to be distributed among his named grandchildren; and (3) The balance of the income to each of four other children, one-fourth (one-sixth of the total) to each during his or her life. Upon the death of any one of said children one-sixth of the principal estate was to be paid over to the children of such child.

Certain of the children became dissatisfied. In respect thereto the court made the following finding, to wit:

"That one of the heirs, R. G. Redwine, has threatened and intended to file a caveat to the will of J. D. Redwine; that the said R. G. Redwine has employed some, and retained other, attorneys to represent him in said proceeding; that said attorneys have actually prepared the necessary papers to begin said proceeding; that some 44 substantial and highly regarded citizens of Davidson County have signed a paper indicating that they would give testimony favorable to the caveator; that the Executors have employed attorneys and have made arrangements to employ other attorneys in the event said caveat is filed; and that some of the other heirs, devisees and legatees have indicated that when said caveat is filed that they would become caveators. The Court finds as facts that the disputes involved in the threatened litigation are *bona fide* disputes, the parties thereto making adverse contentions in good faith; that the determination of the rights of the parties by litigation would be long, expensive and wasteful; that the result of a trial in the Superior Court would be uncertain; that the losing parties would doubtless appeal

to the Supreme Court; that further trials might be necessary before reaching a conclusion of the litigation; and that said will is ambiguous and would be difficult to administer without frequently resorting to the courts for judicial interpretation and construction, thereby creating additional expense against the estate." (Finding of Fact No. IX.)

"That if said caveat proceeding were begun, it would act as a constant barrier to the establishment of family peace; that the trial of said case would doubtless attract wide attention and publicity and would tend to expose to the public gaze intimate family affairs which should be guarded within the family circle; that such a trial would further disrupt and tend to destroy the peace, honor and dignity of the family, resulting in the embarrassment and humiliation of the members thereof; and that such a trial would plunge the family into litigation which would doubtless extend for a long period of time and be attended with an enormous amount of expense, uncertainty and risk, thereby either defeating or seriously jeopardizing said trust." (Finding of Fact No. X.)

When it became apparent that long and costly litigation over the validity of the will was imminent, members of the family sought an amicable and friendly adjustment of the family differences and a settlement of the estate acceptable to all. The conferences which followed resulted in a family agreement executed by all the adult children and grandchildren, parties in interest, both those who are immediate beneficiaries under the trust and ultimate takers.

The trust agreement provides that $40,000 shall be set apart and invested by the trustees for the use and benefit of the five sets of grandchildren named in the will, to be paid one-fifth to each set upon the death of their parent, child of testator. The income is to accumulate and become part of the principal estate. The balance is to be divided as provided in the agreement. It is estimated that the principal and income of this trust, when subject to disbursement, will net the ultimate takers approximately as much as they would receive under the original trust.

Thereupon the executors, joined by all the adult parties in interest, instituted this action to obtain the approval of the proposed family settlement. All the issue, of the children of testator, *in esse* and *in posse*, are made parties defendant and are duly represented by guardians *ad litem*.

At the hearing the court below, after finding the material facts, concluded:

"That under the circumstances now existing, the Court finds that the settlement herein proposed is for the best interest of all the parties, including all the present, prospective and contingent beneficiaries; that

such settlement would prevent dissipation and waste and would more nearly accomplish the primary objectives and effectuate the real intentions of the creator of said trust than could be hoped for by a rejection of said settlement and a relegation of the parties to a bitter family strife and long drawn out litigation; that the trust created by the testator should be modified according to the exigencies of the situation; and that if the creator of said trust had anticipated such exigencies that he would approve said modification."

It thereupon entered its decree approving the proposed settlement, adjudging that it is binding upon all parties in interest, including all infants both *in esse* and *in posse,* and directing the executors to make settlement of the estate in accord therewith. The guardians *ad litem* excepted and appealed.

Clifford Frazier, Paul G. Stoner, Don A. Walser, and Charles W. Mauze for plaintiffs, appellees.

McCrary & DeLapp for P. V. Critcher, guardian ad litem for infant defendants in esse.

J. Lee Wilson for Turner S. Wall, Jr., guardian ad litem for infant defendants in posse.

BARNHILL, J. The only exception in the record is to the signing of the judgment. This exception presents the single question whether the facts found by the court are sufficient to support the judgment, or, stated differently, whether the court correctly applied the law to the facts found. *Rader v. Coach Co.,* 225 N. C., 537; *Fox v. Mills, Inc.,* 225 N. C., 580; *Lee v. Board of Adjustment, ante,* 107; *King v. Rudd, ante,* 156; *Shuford v. Building & Loan Asso.,* 210 N. C., 237, 186 S. E., 352.

"Family agreements looking to the advantageous settlement of estates or to the adjustment of family differences, disputes or controversies, when approved by the court, are valid and binding. They are bottomed on a sound public policy which seeks to preserve estates and to promote and encourage family accord. *Spencer v. McCleneghan,* 202 N. C., 662, 163 S. E., 753; *In re Estate of Wright,* 204 N. C., 465, 168 S. E., 664; *Reynolds v. Reynolds,* 208 N. C., 578, 182 S. E., 341; *Bohannon v. Trotman,* 214 N. C., 706, 200 S. E., 852; Schouler, Wills, Executors and Administrators (6d), sec. 3103." *Fish v. Hanson,* 223 N. C., 143, 25 S. E. (2d), 461; *Bailey v. McLain,* 215 N. C., 150, 1 S. E. (2d), 372. When fairly made they are favorites of the law. *Tise v. Hicks,* 191 N. C., 609, 132 S. E., 560; *Bohannon v. Trotman, supra; In re Will of McLelland,* 207 N. C., 375, 177 S. E., 19.

When, however, the settlement relates to a testamentary trust and the rights of infants are affected the following basic legal considerations are controlling:

(1) The will creating the trust is not to be treated as an instrument to be amended or revoked at the will of devisees or to be sustained *sub modo* only after something has been sweated out of it for the heirs at law. *Bailey v. McLain, supra.* The power of the court is exercised not to defeat or destroy the trust but to preserve it. *Cutter v. Trust Co.,* 213 N. C., 686, 197 S. E., 542; *Penick v. Bank,* 218 N. C., 686, 12 S. E. (2d), 253; *Duffy v. Duffy,* 221 N. C., 521, 20 S. E. (2d), 835.

(2) The rule that the law looks with favor upon family agreements does not prevail when the rights of infants are involved. A court of equity looks with a jealous eye on a contract that materially affects the rights of infants. Their welfare is the guiding star in determining its reasonableness and validity. *In re Reynolds,* 206 N. C., 276, 173 S. E., 789.

(3) A court of equity will not modify or permit the modification of a trust on technical objections, merely because its terms are objectionable to interested parties or their welfare will be served thereby. It must be made to appear that some exigency, contingency, or emergency has arisen which makes the action of the court indispensable to the preservation of the trust and the protection of infants. *Reynolds v. Reynolds, supra; Cutter v. Trust Co., supra;* 65 C. J., 683, sec. 549.

Weighing the facts found in the light of these considerations we are of the opinion that they are fully sufficient to sustain the decision of the court below.

There was an impending caveat, based on substantial evidence, which would disrupt the family and, in all probability, involve long, costly, and asset-consuming litigation. This created an exigency not contemplated by the testator which seriously affected the welfare of the infants and threatened to impair materially, if not to destroy, their inheritance. The interested parties reached an agreement, the terms of which satisfied the demands of the dissident children and at the same time preserved the trust to the extent that the infant parties will finally realize benefits substantially equal to those accruing under the original devise.

The trial judge, exercising the judicial discretion of a chancellor in the supervision of trusts and estates of infants, approved the settlement and directed its execution. The discretion was his. No cause for disturbing his decree is made to appear. Hence the judgment is

Affirmed.

STATE HIGHWAY & PUBLIC WORKS COMMISSION OF NORTH CAROLINA, AN AGENCY OF THE STATE OF NORTH CAROLINA, v. DIAMOND STEAMSHIP TRANSPORTATION CORPORATION.

(Filed 22 May, 1946.)

1. Trial § 22a—

On motion to nonsuit the evidence must be considered in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every fact and inference of fact reasonably deducible therefrom.

2. Negligence § 1a—

Actionable negligence is the failure to perform some duty which under the circumstances one owes to another, which failure results in injury to the latter.

3. Pilots § 2—

A contract under which a pilot mounts the bridge and is in complete command of a vessel in its maneuvers up a navigable stream, notwithstanding a tug is used in addition to the vessel's own power, is not merely a contract of towage but also of pilotage, and the pilot is an independent contractor.

4. Master and Servant § 12—

A contractee may be held liable for a negligent injury to property of a third person in the performance of the work by an independent contractor if the injury is the result of the contractee's own negligence or its own negligence co-operates with that of the independent contractor.

5. Pilots § 5—

A ship owner in employing a pilot for a maneuver up a navigable stream is under duty to exercise due care to avoid injury to others which can be reasonably foreseen, and in the discharge of this duty, to advise the pilot of dangers due to faulty maneuverability of the vessel of which it had knowledge and of which the pilot is apparently unaware.

6. Same—

While the owner of a vessel has the right to assume that a pilot is familiar with the river and its waters and has knowledge of vessels of standard types, in this case a turret type vessel, it may not assume knowledge on the part of the pilot of peculiarities and faulty equipment not common to all vessels of the type, importing danger in the navigation contracted for.

7. Same—Evidence that vessel had peculiarities not common to all of its type, and inferences of defective equipment held sufficient for jury on question of negligence of owner in failing to warn pilot.

This action was instituted by the State Highway and Public Works Commission to recover damages resulting from the collision of a vessel with the fender piling of a drawbridge. The vessel was being maneuvered upstream under a contract of pilotage, the pilot using a tug in addition to the vessel's own power. The vessel was turret type, with old type fore and aft compound engine. There was testimony that this type vessel is

awkward and hard to handle. Plaintiff introduced the testimony of experienced pilots to the effect that they had handled this particular vessel and that she was hard to manage and would take unexpected sheers. The pilot in charge testified that the collision occurred when the vessel took an unexpected sheer to the left, that he immediately ordered the helm put hard to the right, that when the vessel did not respond he ordered the engine reversed, but that he did not feel the engine or rudder take hold and that the vessel hit the fender piling "before the wheel had turned over." The pilot further testified that he had not been told the vessel was hard to manage and that if he had been so advised he would have used another tug aft which would have avoided the sheer. *Held:* Considering only plaintiff's evidence in the light most favorable to it, there is some evidence that the vessel had peculiarities not common to all of its type which caused it to be particularly difficult to manage, and also evidence from which it may be inferred it had defective equipment, and therefore the evidence should have been submitted to the jury on the question of the owner's negligence in failing to warn the pilot of such peculiarities which imported danger under the circumstances.

8. Pilots § 3—

The authority of the master of a vessel is not in complete abeyance while the pilot is in the discharge of his functions, and he is under duty to give timely warning when he is aware that the ship is being operated in a manner likely to cause injury to third persons.

9. Pilots § 5—

The presumption of negligence arising when a vessel strikes a stationary object is not applicable against the owner when the maneuver is under the control of a pilot.

10. Same—

The owner of a ship is not under duty to equip it with engines capable of counteracting an unexpected action on the part of the pilot in time to avoid injury to the property of third persons.

11. Appeal and Error § 40i—

In determining an exception to the granting of defendant's motion to nonsuit the province of the Supreme Court is solely to determine whether there is sufficient evidence to carry the case to the jury.

12. Limitation of Actions § 16—

Upon motion to nonsuit for that plaintiff's cause is barred by a specified statute of limitations, the burden is on plaintiff to show that its action was begun within the time allowed by law.

13. Limitation of Actions § 11—

Where plaintiff shows that shortly after the collision, proceedings were instituted in admiralty in the United States District Court, in which it was ordered that all suits arising out of the collision be stayed, that plaintiff filed its claim therein, and immediately after its claim was dismissed in the United States Court for want of jurisdiction, it instituted this action, plaintiff's evidence is sufficient to overrule the motion to nonsuit on the ground of the bar of the statute of limitations. G. S., 1-23 and 1-25.

HIGHWAY COMM. *v.* TRANSPORTATION CORP.

APPEAL by plaintiff from *Williams, J.*, at December Term, 1945, of NEW HANOVER. Reversed.

This was an action to recover damages for injury to the State Highway bridge spanning the Cape Fear River, near Wilmington, alleged to have been caused by the negligence of the defendant in the movement of its steamship *Severance.*

The former appeal in this case, reported in 225 N. C., 198, involved only a question of service of process. On the trial following it was not controverted that in attempting to pass through the draw the ship collided with the fender piling erected in connection with the drawbridge, causing damages to structures in the amount of $9,950. This occurred 23 November, 1940.

The plaintiff's evidence tended to show that the defendant desiring to move the ship from the anchorage basin in Wilmington to Navassa, several miles up the Cape Fear River, to unload a cargo of sulphur, requested the assistance of R. R. Stone, trading as Stone Towing Line. Pursuant thereto F. G. Dosher, a licensed pilot and docking master for Stone, "was sent to the *Severance* to accompany her up the river, and had complete charge of her navigation." In connection with the operation Mr. Dosher used a Tug Stone No. 6, placed ahead of the *Severance* with a hawser running from the stern of the Tug to the bow bits of the *Severance,* 125 to 150 feet, but the ship moved under her own power. Dosher went on the bridge at 11 a.m., ordered anchor heaved up and caused the ship to move on her way. The State Highway bridge was about a mile up stream. The width of the draw was 120 feet and the channel before reaching the draw was 175 to 200 feet wide. There was little wind, the tide was near low, water slack. There had been a freshet up river, but it had passed. The ship was 366 feet long and 53 feet beam. As the ship approached the draw, at speed of two miles per hour, and about the length of the hawser away, it suddenly sheered to the left. As soon as the pilot saw the bow going that way he had the helm put hard right, but she did not respond and then he ordered the engine reversed, but "did not feel the engine or rudder take hold or start to pull back at all. The ship had hit the fender before the wheel ever turned over." It was then too late to use anchors, and the ship crashed into the fender piling. The Tug, which was 85 feet long, 200 horsepower, observing the direction of the ship, attempted to pull it out of the sheer, but was unable to do so and the line parted. The ship struck the pilings, received a hole in her bottom, and sank, but was later raised.

It appeared that the ship was an old English built vessel, turret type, with old type fore and aft compound engine. Dosher testified, "When you reverse the engine before the engine will take hold to go astern it is necessary to rock that lever several times to pick up the water on the

wheel. It is a slow acting ship, several minutes slower than up-to-date engines. Neither the captain nor any member of the crew advised me it was equipped with this kind of an engine until afterward." Dosher had never piloted that type of vessel before. He said he knew she was a turret type ship but not her maneuverability; that he had heard since that they are clumsy, sluggish, slow handling ships; did not know its engine was the rocker type until afterward, and had not heard the *Severance* was a cranky ship. He further testified that if the captain had told him she was a cranky ship he would have used two tugs instead of one. By having a tug on the starboard quarter as well as the Stone 6 on the bow the sheer would have been prevented. These tugs when it started to sheer would have kept her straight and prevented the sheer.

The witness Debnam, an experienced master and pilot, testified he knew the *Severance* and had docked her many times; that she was a very old boat of an unusual type known as a turret ship; that "the *Severance* with a very small rudder, an old type ship, awkward, lazy, loggish—will not respond at times to what we expect."

Witness Cudworth, an experienced tug master and tug pilot, who had navigated the *Severance* on a few occasions, testified he found her a lazy, sluggish, loggy ship in maneuvering and steering; that she had taken different sheers at different times while he was navigating her; that on several occasions he had to drop anchor to break the sheers; that he had asked to be relieved of piloting the *Severance* because she was an awkward ship to handle.

Witness Peders testified that he piloted the *Severance* in and out of Charleston and up the Cape Fear River from the bar to Wilmington, and had difficulty in steering her. He said it was impossible to keep her straight, there was no way of telling when she was going to take one of those sheers; that he did not know what sort of steering apparatus she had; knew she had chains leading aft of the quarters. He further testified that when she arrived in Wilmington he made the statement she was the hardest steering ship he had ever known. "If there are any peculiarities general to the turret type vessel I don't know them." "It was impossible to keep her straight on her course." Witness Keith testified, in corroboration, that Capt. Peders said after he came off the *Severance* the day before the collision, "She was one of the meanest damn ships he ever piloted on to handle or steer."

Summons in this action was issued 26 January, 1944. The defendant pleaded the statute of limitations. It was made to appear, however, that shortly after the collision the owner of the cargo laden on board the *Severance* and the present defendant Diamond Steamship Transportation Corporation filed libel in admiralty *in personam* in the U. S. District Court against R. R. Stone, trading as Stone Towing Line.

The owner of the Tug Stone 6 intervened on a petition for limitation of liability. Thereupon it was ordered by the court that the institution and prosecution of all suits be stayed except in that proceeding, and directed that a monition issue against all persons claiming damages for injury to property occasioned by the collision, and citing them to present all claims to an appointed commissioner. The notice was served on plaintiff. The restraining order restrained the institution of any claim, suit or legal proceeding of any nature whatsoever in respect to any damages or injuries to property or destruction claimed to have arisen out of or resulted from or connected with the collision aforesaid, until the hearing and determination of the proceedings in the District Court. The plaintiff herein filed its claim for damages to the bridge against both the defendant and Stone. Thereafter in January, 1944, the U. S. Court entered an order dismissing the claim of the plaintiff, on the ground that the damage claimed was for an injury to a land structure and not within the jurisdiction of the U. S. Court in admiralty. Thereupon summons in this action in Superior Court of New Hanover County issued 26 January, 1944.

The defendant offered no evidence.

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

George B. Patton, General Counsel; and Isaac C. Wright, Special Counsel, for plaintiff, appellant.

Rountree & Rountree for defendant, appellee.

DEVIN, J. The plaintiff, appellant, assigns error in the ruling of the trial court in allowing defendant's motion for judgment of nonsuit at the close of the plaintiff's evidence. The motion was based on two grounds, (1) that the plaintiff's evidence was insufficient to show negligence on the part of the defendant, and (2) that plaintiff's action was barred by the statute of limitations, G. S., 1-52.

1. Determination of the propriety of the motion on the ground of failure of proof requires that the evidence offered be considered in the light most favorable for the plaintiff. On demurrer to the evidence the plaintiff is entitled to the benefit of every fact and inference of fact pertaining to the question involved which reasonably may be deduced from the evidence. *Plumidies v. Smith,* 222 N. C., 326, 22 S. E. (2d), 713.

Applying this rule the decision depends on whether there was any substantial evidence, competent to be considered, of negligence on the part of the defendant proximately causing or contributing to the injury

alleged. Of primary significance in the law of negligence is the failure to perform some duty which under the circumstances one owes to another as result of which the latter sustains an injury. As was said in *Richmond v. Warren,* 307 Mass., 483: "There can be negligence only with relation to a duty to exercise care."

Out of the circumstances shown by the evidence in this case certain relationships and corresponding duties and obligations are made to appear.

The movement of the steamship *Severance* which collided with plaintiff's structures was controlled by Mr. Dosher, the docking master and pilot employed by the Stone Towing Line. The contract by which the services of Dosher were engaged was not merely a contract of towage but also of pilotage. As such, Dosher was in complete command of the navigation of the ship. In undertaking at the request of the defendant to pilot the ship up the river and through the draw of the highway bridge, Dosher, representing the Stone Towing Line, was exercising an independent employment. *The West Eldara,* 104 F. (2d), 670; *Young v. Lumber Co.,* 147 N. C., 26, 60 S. E., 654. He testified he had full charge of the maneuver, and there is no evidence the defendant had right to or exercised control over the steering and handling of the vessel on this occasion. *The Oregon,* 158 U. S., 186; *Union Shipping and Trading Co. v. U. S.,* 127 F. (2d), 771. But the employment of an independent contractor did not absolve the defendant of liability if the injury complained of was proximately caused by its own negligence, or its own negligence co-operated with the negligence of the independent contractor. 27 A. J., 509; 30 A. L. R., 1508; 44 A. L. R., 962. The doctrine of the employer's non-liability for the acts of an independent contractor does not apply when the circumstances are such as to impose a duty on the part of the employer to exercise due care to avoid injury. *Evans v. Lumber Co.,* 174 N. C., 31, 93 S. E., 430; *Davis v. Summerfield,* 133 N. C., 325, 45 S. E., 654. The employer is answerable for injuries occasioned by nonperformance of duties which are incidental to the work and which have not devolved upon the contractor; or where the employer's negligence co-operates with that of the contractor, *Hunter v. R. R.,* 152 N. C., 682, 68 S. E., 237; or where the employer's act or failure to act was negligent when tested by the standard of reasonable care, *Beninghoff v. Futterer,* 176 Ill. App., 579, 30 A. L. R., 1508; or he has furnished dangerous appliances for the use of the contractor. *Brady v. Jay,* 111 La., 1071. Notwithstanding the employment of a licensed and experienced pilot, it was still obligatory upon the defendant, in the performance of its duty to exercise due care to avoid an injury to others which reasonably could have been foreseen, to advise the pilot of dangers in the movement of so large a ship through a narrow draw, dangers due to

faulty maneuverability, of which it had knowledge and of which the pilot was apparently unaware.

While the defendant had the right to assume that the pilot was familiar with the river and its waters, and also that he knew how to handle and steer turret type vessels, it could not, under the circumstances here appearing, reasonably impute to the pilot knowledge of the peculiarities and faulty equipment of the *Severance,* which imported danger when navigated in narrow waters, peculiarities which were not common to all vessels of that type.

In view of the unpredictable tendency of the ship to sheer and the difficulty of keeping her on her course, together with the unfamiliarity of the pilot with these characteristics, the evidence would seem to furnish the basis for the imposition of a duty on the defendant, before attempting to move the ship through the draw, to advise the pilot of these circumstances, so that he might take measures to execute the maneuver with safety. He testified if he had been told she was a cranky ship he would have used another tug in the manner described, and thus prevented the sheer. There is evidence that turret type vessels as a rule were awkward, slow and loggish, but there is some evidence here that the tendency of the ship suddenly to change direction without apparent reason was peculiar to the *Severance.* The pilot who brought her up the Cape Fear River from the bar to Wilmington characterized her as the hardest steering ship he had ever known. In his picturesque language, "she was one of the meanest damn ships he ever piloted on to handle or steer." Another pilot who had had experience with her had asked to be relieved of handling her. The testimony of the pilot on the occasion of the collision that the failure of the ship to respond to the helm, or the engine to take hold upon his order to reverse, would seem to suggest the inference of defective equipment or fault in the defendant's engine room. The plaintiff's evidence, which alone we are considering, does not warrant the definite conclusion as a matter of law that the collision was solely due to the negligence of the pilot.

The authority of the master of a vessel is not in complete abeyance while a pilot is in the discharge of his functions. *Union Shipping & Trading Co. v. U. S., supra.* The ship owner is not exempt from liability where his negligence or that of his agent proximately contributes to the injury, *Matheson v. Norfolk & North American Steamshipping,* 73 F. (2d), 177; and where the master is aware that under the direction of the pilot the ship is being operated so that it will likely cause injury to another, a duty devolves upon the master to give timely warning. *Jure v. United Fruit Co.,* 6 F. (2d), 6; *The Gypsum King,* 279 F., 297. The ship owner has the duty to take measures which are apparently necessary to prevent injury which in the exercise of due care could have been fore-

seen. *Robins Dry Dock & Repair Co. v. Navigazione Libera Triestina,* 32 F. (2d), 209; *Orhanovich v. Steam Tug America,* 4 F., 337.

The principle that the collision between a vessel in motion and a stationary object raises the presumption of negligence applies to the one in control of the movement, and, in the absence of evidence that defendant was in actual control of the navigation of the *Severance* at the time of the collision, this rule does not aid the plaintiff here. *The Cromwell,* 259 F., 166; *U. S. v. Norfolk-Berkley Bridge Corp.,* 29 F. (2d), 115. Nor may it be said that it was the duty of the owner to equip its ship with engines capable of such quick action as to be able to counteract unexpected action on the part of the Towing Company's pilot. *Calzavaro v. Planet S. S. Corp.,* 31 F. (2d), 885.

We think there was some competent evidence to support the plaintiff's allegation of negligence on the part of the defendant in the respects pointed out, and that the plaintiff was entitled to have its case submitted to the jury under appropriate instructions. In discussing the effect of pertinent portions of the testimony offered by plaintiff, we express no opinion as to the credibility of the testimony or the weight to be given it. Our only province in the premises is to determine whether there be competent evidence sufficient to carry the case to the jury, under the rule in this jurisdiction.

We note that in the U. S. District Court in the case in which the owners of the *Severance* and of the cargo sought recovery against R. R. Stone, trading as Stone Towing Line, the decision in favor of the defendant was reversed on appeal by the Circuit Court of Appeals, Fourth Circuit (*The Severance,* 152 F. [2d], 916). In the opinion in that case by *Circuit Judge Dobie* it is said: "Appellees attempt to explain the collision on the ground that the *Severance* was a cranky vessel and difficult to handle, that her engine response was faulty and her steering gear defective. We are not impressed by these contentions. . . . The testimony of Captains Dosher, Peders and Cudworth is far from convincing. This was more than offset by the testimony of the officers and crew of the *Severance.*" It will be noted that this decision was based on testimony heard in the Federal Court and not on that appearing in the record here, and that in that jurisdiction in admiralty the court determined the facts without a jury. Here we consider only the question whether there was any competent evidence of negligence on the part of the ship owner, the defendant here.

2. Under the pleadings the burden was on the plaintiff to show that its action was begun within the time allowed by law. This, we think, it has done by showing that shortly after the injury was sustained it was enjoined by the U. S. Court from proceeding except in that jurisdiction; that it there filed its claim, promptly, against this defendant; that as

soon as its claim was dismissed from that court for want of jurisdiction (*Louis-Dreyfus v. Paterson Steamships,* 43 F. [2d], 824), it caused summons to issue in the present action on the same claim.

We think under the rule in this jurisdiction based upon our statutes, G. S., 1-23 and 1-25, the plaintiff's action was brought in time and was not barred by the statute of limitations. *Blades v. R. R.,* 218 N. C., 702, 12 S. E. (2d), 553; *Harris v. Davenport,* 132 N. C., 697, 44 S. E., 406.

For the reasons stated we think the motion for the judgment of nonsuit was improvidently allowed, and that the judgment of dismissing the action must be

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, PARTNERS TRADING AND DOING BUSINESS UNDER THE FIRM NAME OF NATIONAL EXPRESS, AND ROBERT WILLIAMS.

(Filed 22 May, 1946.)

1. Death § 8—

The measure of damages for wrongful death is the present value of the accumulations of the income which would have been derived from the person's own exertions after deducting the probable cost of his own living and ordinary expenses, based upon the person's life expectancy.

2. Same—

While the rule of admeasurement of damages for wrongful death is more difficult of application in the case of an infant under ten years of age, since the mortuary tables do not afford evidence of life expectancy of one so young, the rule is the same, and the expectancy of life may be determined by the jury upon consideration of the evidence of the constitution, health and habits of the infant under proper instructions from the court. G. S., 8-46.

3. Appeal and Error § 38—

Appellant has the burden not only to show error but also that the alleged error was prejudicial to the extent that the verdict of the jury was probably influenced thereby.

4. Appeal and Error § 39e: Death § 8—

This action was instituted to recover damages for wrongful death of a child nine years of age. For the purpose of illustrating the rule for the admeasurement of damages, the trial court used the figures 50 and 20 in referring to the life expectancy, but properly charged the jury to determine the life expectancy from the evidence of the constitution, health, habits, etc., of the child. *Held:* While the use of definite figures for the purpose of illustrating the use of the rule is not approved, construing the

charge as a whole, the use of the illustrations is not held prejudicial upon the record in this case.

5. Damages § 14—

The action of the trial court in offering to reduce the verdict, if agreed to, for the purpose of putting an end to the case, does not amount to a finding that the verdict was excessive, is not an abuse of discretion, and is not held for error.

APPEAL by defendants from *Hamilton, Special Judge,* at January Term, 1946, of MECKLENBURG. No error.

This was an action for damages for wrongful death of plaintiff's intestate, alleged to have been caused by the negligence of the defendants in the operation of a motor truck.

This case was here at Fall Term, 1945, and is reported in 225 N. C., 575, where the pertinent facts are stated. A new trial was awarded for error in the judge's instructions to the jury on the issue of damages.

On the second trial the defendants admitted negligence, and only the issue as to the amount of damages was submitted to the jury. Exception was noted to the following portion of the judge's charge:

"There is no yardstick by which, with any degree of accuracy, any jury can measure the value of a human life. A jury can do only as men of prudence and of discretion and common sense and reason are supposed to do: Consider the life itself, the age of the life before decease, the probability of fair development leading to prolonged life, and the consequences flowing from such developments of a natural life. The law, in effect, says that where a human life has been lost as a result of the actionable negligence of another person, the measure of damages is the present value of the pecuniary worth of the life of the deceased, to be ascertained by determining the probable net gross income of that life from his or her own labors or exertions, and by deducting from that probable cost of living and probable expenditures, and then estimating what is the reasonable value, present value, in dollars and cents of the accumulations resulting from that net gross income after those deductions of probable cost and probable expenditures. And those things you would ascertain and estimate on the basis of life's expectancy. That's a very material element which would enter into your computations and the estimates and ascertainments, the probable length of prolonged life of the one whose life has been taken. As I started to say before, as simply as I can state the rule it would be to say that where it is in evidence, as in this case, that the age of the deceased is definite and certain, you first would consider how much longer, in all probability, that life would have been extended or prolonged, or what was the reasonable expectation of prolonged life. If in your fair judgment you should determine that

the fair and reasonable expectancy would be fifty years, then, of course, your computations would be based upon a probably greater net gross income than if you should fairly ascertain that the probabilities were that the life would be extended—not fifty, but only twenty years. But after that has been fairly determined, then you would consider how much would have been the income from the labors, the exertions of the person, that is, the net gross income during the period of life, and then from that you would deduct what you'd find to be the probable reasonable cost of living, and the probable (personal) expenditures other than the cost of living, and deduct those things from what you fairly find to be a net gross income, and then figure the value in present-day terms of dollars and cents, as of the time of your computations."

The jury answered the issue in the sum of $15,000, and from judgment on the verdict, the defendants appealed.

G. T. Carswell and John M. Robinson for plaintiff.
Jones & Smathers for defendants.

DEVIN, J. Upon the admission that the negligence of the defendants proximately caused the death of the plaintiff's intestate, the trial below resolved itself into an inquiry of damages.

The plaintiff's evidence, which was uncontradicted, tended to show that intestate was a girl nine years of age; that she was a normal healthy child, bright and intelligent; regular in her attendance at school, happy and unusually attractive; of normal physical development for her age, and slightly above the average in size. No evidence of expectancy according to any mortuary table was offered.

Our statute, G. S., 28-174, permits the recovery for wrongful death of such damages as are a fair and just compensation for the pecuniary injury resulting from such death, and the measure of damages has been declared to be the present value of the accumulations of income which would have been derived from the person's own exertions, after deducting the probable cost of his own living and ordinary expenses, based upon the person's life expectancy; that is, for the period it is determined he would have continued to live if his life had not been cut off by the defendants' wrongful act or neglect. *Gurley v. Power Co.,* 172 N. C., 690, 90 S. E., 943; *Purnell v. R. R.,* 190 N. C., 573, 130 S. E., 313; *Carpenter v. Power Co.,* 191 N. C., 130, 131 S. E., 400; *Coach Co. v. Lee,* 218 N. C., 320, 11 S. E. (2d), 341. While the application of this rule necessarily involves an element of speculation, it affords the only available method for determining just compensation for the pecuniary injury to his estate resulting from the person's death, or as it has been expressed "the reasonable expectation of pecuniary advantage from the continued

life of the deceased." *Kesler v. Smith,* 66 N. C., 154. But the difficulty in determining fair and just compensation for the pecuniary injury increases when we consider the question of damages for the wrongful death of a child. This was expressed by *Douglas, J.,* in *Russell v. Steamboat Co.,* 126 N. C., 961, 36 S. E., 191, where it was said: "We see no distinction in the law, nor reason for distinction, between the death of a child and of an adult. The measure of damages is the same, but we frankly admit that the difficulty of its application is greatly increased in the case of an infant. Still, the jury must do the best they can, taking into consideration all the circumstances surrounding the life that is lost, and relying upon their common knowledge and common sense to determine the weight and effect of the evidence."

In their brief the defendants apparently concede that the rule of damages laid down by the court in this action was substantially in accord with our decisions, but it is argued that in case of a child sufficient data is not available to justify application of the rule, and that in this case plaintiff did not offer any table of probable expectancy as a basis for the ascertainment of the amount of damages recoverable. However, as pointed out by *Justice Barnhill* in the former opinion, the tables set out in G. S., 8-46, do not afford evidence of the life expectancy of a child under ten years of age. But said the Court: "This does not leave the plaintiff destitute of proof. The jury may consider evidence as to the constitution, health, vigor, habits, and the life of the deceased as a basis for determining her probable expectancy of life."

On the argument the defendants further contended that when the trial judge, for the purpose of illustrating the rule, used the figures fifty and twenty in referring to life expectancy, the suggestion was prejudicial to the defendants. The judge said: "If in your fair judgment you should determine that the fair and reasonable expectancy would be fifty years, then, of course your computations would be based upon a probably greater net gross income than if you should fairly ascertain that the probabilities were that the life would be extended not fifty, but only twenty years. But after that (her life expectancy) has been fairly determined then you would consider how much would have been the income from the labors, the exertions of the person."

And, again, in the judge's final reference to this matter, he said: "So, gentlemen, even at the risk of redundancy or repetition, I remind you that you do have a right to consider the health of the child, its environment, her habits, the brightness or dullness of her mind, . . . consider all those things in determining the probable expectancy of life, that is how much longer she would or might have lived."

In explaining legal principles to a lay jury the trial judge's use of illustrations should be carefully guarded to avoid suggestions susceptible

of inferences as to the facts beyond that intended. And this Court has on occasion awarded new trials where illustrations or hypothetical references were deemed to constitute prejudicial error. *Vance v. Guy,* 223 N. C., 409 (414), 27 S. E. (2d), 117; 64 C. J., 556.

However, while this practice in the presentation of questions to the jury is not approved, since it may afford opportunity for misunderstanding, under the circumstances of this case we do not regard the use of the language quoted as prejudicial or of such materiality as to require vacating the verdict and judgment, and ordering another trial. It is an established rule of appellate practice that the burden is on the appellant not only to show error but also to show that he was prejudiced to the extent that the verdict of the jury was thereby probably influenced against him. *Smith v. Steen,* 225 N. C., 644; *Collins v. Lamb,* 215 N. C., 719, 2 S. E. (2d), 863; *In re Ross,* 182 N. C., 477, 109 S. E., 365. The error must be "material and prejudicial amounting to the denial of some substantial right." *Wilson v. Lumber Co.,* 186 N. C., 56, 118 S. E., 797.

Here the jury was instructed in effect that they must determine as best they could from the facts in evidence, which were recited, how much longer in all probability the deceased would have lived. The jury is presumed to have been composed of men of intelligence and character, and capable of applying the principles of law to the facts as they found them. It is a matter of common knowledge that in recent years human life has been rendered less precarious and its span measurably increased. Even the Psalmist's suggestion of the limit of three score years and ten might be extended "by reason of strength."

The jury had been instructed that their computation of the present value of the accumulation of net income, under the rule, should be based upon the life expectancy of the deceased, and we do not think they were influenced to the prejudice of the defendants by the suggestion, in illustration of the rule, that if they should determine the reasonable expectancy would be fifty years the computation would be based upon a probably greater total of income than if the expectancy were only twenty years. This was in reference to a person nine years of age.

Two juries have awarded damages for the untimely death of plaintiff's intestate, a vigorous and healthy young girl, and we are not disposed to order another trial upon the exception to the charge which has been brought forward.

The exception to the action of the judge in offering to reduce the verdict, if agreed to, for the purpose of putting an end to the case, may not be held for error. The offer not having been accepted by the defendants, judgment on the verdict was rendered. This could not be considered as a finding that the amount was excessive, or as an abuse of discretion.

No error.

STATE v. DUNCAN THOMAS.

(Filed 22 May, 1946.)

Criminal Law § 78e—

An exception to the charge for failure to "charge the law and facts relative to this case" is an unpointed broadside exception.

APPEAL by defendant from *Burney, J.*, at November Term, 1945, of HOKE. Motion to affirm the judgment allowed.

The defendant was charged in two bills of indictment with receiving stolen goods knowing them to have been stolen. From judgment upon verdict of guilty in both cases, the defendant appealed.

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

Franklin S. Clark and H. S. Kirkpatrick for defendant, appellant.

PER CURIAM. The defendant's only exception was to the charge of the court for failure to "charge the law and facts relative to this case." As frankly admitted in defendant's brief this is unpointed broadside. *Rawls v. Lupton,* 193 N. C., 428, 137 S. E., 175. The record shows the trial free from error. The Attorney-General moves in this Court that the judgment below be affirmed. The defendant does not resist the motion.

The motion is allowed, and the judgment

Affirmed.

STATE v. FRANK (F. P.) CLOUGH.

(Filed 22 May, 1946.)

Criminal Law § 77a—

Where the record fails to show the organization of the lower court and contains no indictment nor verdict, the appeal will be dismissed on motion of the Attorney-General.

APPEAL by defendant from *Olive, Special Judge,* at November Term, 1945, of DAVIDSON.

Criminal prosecution on charge of issuing checks in violation of the worthless check statute.

The Attorney-General moved to dismiss for the reasons set forth in written motion filed.

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

Paul R. Raper for defendant, appellant.

PER CURIAM. The organization of the court below is not made to appear. *S. v. Golden,* 203 N. C., 440, 166 S. E., 311; *S. v. McLamb,* 214 N. C., 322, 199 S. E., 81. No bill of indictment or trial in an inferior court from which defendant appealed, vesting the Superior Court with jurisdiction, is disclosed. *S. v. Patterson,* 222 N. C., 179, 22 S. E. (2d), 267. There is no verdict in the record. *Riggan v. Harrison,* 203 N. C., 191, 165 S. E., 358; *S. v. Golden, supra.* The motion of the Attorney-General to dismiss must be allowed.

Appeal dismissed.

R. F. CROTTS AND G. L. CROTTS v. J. B. THOMAS AND WIFE, MRS. J. B. THOMAS.

(Filed 22 May, 1946.)

1. Seals § 4—

Instruments under seal require no consideration to support them.

2. Vendor and Purchaser § 5a—

An option in a lease, which gives the lessee the right to purchase the leased premises at any time before the expiration of the lease, is a continuing offer to sell on the terms set forth in the option, and may not be withdrawn by the lessor within the time limited.

3. Vendor and Purchaser § 3—

The lease is a sufficient consideration to support specific performance of the option to purchase granted therein.

4. Vendor and Purchaser § 19a—

Where the purchaser is ready, able and willing to pay the price stipulated, and notifies the vendor of his election to exercise the option, the vendor is under duty to prepare and tender good and sufficient deed, and the purchaser is not required to tender the purchase price before delivery of the deed.

5. Vendor and Purchaser § 8—

The option in suit described the *locus in quo* by metes and bounds, containing "30 acres more or less," and provided for the payment of a stipulated price per acre. *Held:* The description was sufficiently definite, since in the event of any real controversy as to the acreage contained therein the maxim *id certum est quod certum reddi potest* applies, and upon tender by the purchaser of the purchase price for 30 acres plus a sum to take care of any overage, the vendor's contention that the acceptance was not in accord with the offer is untenable.

6. Vendor and Purchaser § 7—

Where an option obligates the vendor to sell at a price to be agreed upon but not to exceed a stated sum, such sum may be accepted by the optionee as the purchase price without further negotiation.

APPEAL by plaintiffs from *Armstrong, J.*, at February Term, 1946, of STANLY.

This is an action for specific performance.

On 8 August, 1935, J. B. Thomas, who was then unmarried, leased to the plaintiffs for a period of ten years, beginning 1 January, 1936, for an annual rental of $200.00, a tract of land described by metes and bounds, situate in Stanly County near the City of Albemarle, containing 30 acres more or less. The lease provided for the rent to be payable $100.00 on or before 1 July, 1936, and $100.00 on or before the first days of January and July of each year thereafter, during the term of the lease. The rent has been paid through 1 July, 1945.

The plaintiffs leased the property for the purpose of establishing and maintaining a golf course thereon. A golf course was laid out and used as such until about two years ago; when, on account of the war, it was discontinued temporarily.

The lease contained an option in the following language: "It is understood and agreed and the said J. B. Thomas, party of the first part, does hereby specifically agree that at any time after the signing of this indenture, during the term of this lease, that he will sell and convey by a good and sufficient deed the lands herein described to the parties of the second part, their heirs and assigns, at a price to be agreed upon, which price in no event shall be more than at the rate of $150.00 per acre for said land and to the performance of this agreement, the said J. B. Thomas, party of the first part does hereby bind himself, his heirs, executors and administrators."

The lease was executed under seal, duly acknowledged and recorded in the office of the Register of Deeds for Stanly County on 12 August, 1935.

In April, 1945, the plaintiffs notified the defendants of their intention to exercise the option to purchase the property and on 7 July, 1945, the plaintiffs tendered $4,500.00 to the defendants as the purchase price of 30 acres and an additional $750.00, to cover any excess in the acreage which might be determined by a survey. The defendants have at all times refused to convey the property to the plaintiffs.

At the close of plaintiffs' evidence, the defendants moved for judgment as of nonsuit. The motion was granted, and the plaintiffs appeal to the Supreme Court, assigning error.

W. L. Mann, Helms & Mulliss, and Brown & Mauney for plaintiffs.
Morton & Williams and R. L. Smith & Son for defendants.

DENNY, J. The plaintiffs challenge the correctness of his Honor's ruling in sustaining the defendants' motion for judgment as of nonsuit.

The defendants contend the judgment below should be sustained for the following reasons: (1) The option was not supported by a consideration; (2) the offer was withdrawn; (3) acceptance was not in accord with offer; and (4) the option is too indefinite as to the sale price, to be enforceable.

It is the law in this jurisdiction that instruments under seal require no consideration to support them. *Thomason v. Bescher,* 176 N. C., 622, 97 S. E., 654; *Samonds v. Cloninger,* 189 N. C., 610, 127 S. E., 706; *Basketeria Stores, Inc., v. Indemnity Co.,* 204 N. C., 537, 168 S. E., 822; *Coleman v. Whisnant, ante,* 258, 37 S. E. (2d), 693. "At common law a promise under seal, but without any consideration, is binding because no consideration is required in such a case, or, as is sometimes said, because the seal imports, or gives rise to a presumption of consideration. It has been said that the solemnity of a sealed instrument imports consideration or, to speak more accurately, estops a covenantor from denying a consideration except for fraud." 12 Am. Jur., 567, citing many authorities, among them, *Thomason v. Bescher, supra;* 2 A. L. R., 626; *Kaplan v. Suher,* 254 Mass., 180, 150 N. E., 9, 42 A. L. R., 1142; and *Storm v. U. S.,* 94 U. S., 76, 24 L. Ed., 42.

In April, 1945, the plaintiffs informed the defendants of their intention to exercise the option contained in the lease. The defendant, J. B. Thomas, at that time, informed the plaintiffs that he did not want to sell and that he would not make a deed for the *locus in quo.*

An option in a lease, which gives the lessee the right to purchase the leased premises at any time before the expiration of the lease, is a continuing offer to sell on the terms set forth in the option, and may not be withdrawn by the lessor within the time limited. The lease is a sufficient consideration to support specific performance of the option of purchase granted therein. *Pearson v. Millard,* 150 N. C., 303, 63 S. E., 1053; *Thomason v. Bescher, supra; Willard v. Taylor,* 75 U. S., 557, 19 L. Ed., 501, 49 Am. Jur., 141, sec. 120. Moreover, the real consideration in an agreement to convey land is the contract price. *Ward v. Albertson,* 165 N. C., 218, 81 S. E., 168.

The third contention of the defendants is to the effect that since the *locus in quo* was described by metes and bounds as containing 30 acres more or less, the tender of $4,500.00 for 30 acres and $750.00 to cover any excess in the acreage which might be determined by a survey, the acceptance was not in accord with the terms of the option. There is no

merit in this contention. The plaintiffs were not required to make tender. The defendants stated in open court for the record, at the trial below, as well as in their answer which was introduced in evidence, that they have at all times refused to execute a deed to the plaintiffs in response to their notice and demand for such deed. *Phelps v. Davenport,* 151 N. C., 22, 65 S. E., 459; *Gallimore v. Grubb,* 156 N. C., 575, 72 S. E., 628; *Gaylord v. McCoy,* 161 N. C., 686, 77 S. E., 959; *Cunningham v. Long,* 186 N. C., 526, 120 S. E., 81. Therefore, when the plaintiffs notified the defendant, J. B. Thomas, of their election to purchase the property at $150.00 per acre, if the plaintiffs were ready, able and willing to pay that sum for the property, it was the duty of the defendants to prepare and tender a good and sufficient deed for the correct acreage contained within the boundaries set forth in the option. *Phelps v. Davenport, supra; Henofer v. Realty Co.,* 178 N. C., 584, 101 S. E., 265; 153 A. L. R., 13 N; *Duffy v. Phipps,* 180 N. C., 313, 104 S. E., 655; *Patrick v. Worthington,* 201 N. C., 483, 160 S. E., 483, and since the *locus in quo* is described by metes and bounds if there is any real controversy as to the acreage contained therein, the maxim *id certum est quod certum reddi potest* applies. *Peel v. Calais,* 223 N. C., 368, 26 S. E. (2d), 916.

The fourth contention of the defendants that no price has been agreed upon, is likewise without merit. The defendant, J. B. Thomas, who at the time of the execution of the lease and option was unmarried, bound himself, his heirs, executors and administrators, to convey the *locus in quo* to the plaintiffs at any time during the term of the lease, "at a price to be agreed upon, which price in no event shall be more than at the rate of $150.00 per acre for said land."

In an option to purchase at a price to be agreed upon, but not to exceed a stated sum, such sum may be accepted by the optionee as the purchase price without further negotiations. 49 Am. Jur., 41, 117 A. L. R., 1097 Anno.; *Wright v. Kaynor,* 150 Mich., 7, 113 N. W., 779; *Kastens v. Ruland,* 94 N. J. Eq., 451, 120 A., 21; *Heyward v. Willmarth,* 87 App. Div., 125, 84 N. Y. S., 75; *Hunter v. Farrell,* 42 N. B., 323, 14 D. L. R., 556; *Condon v. Arizona Housing Corp.* (Ariz.) (25 June, 1945), 160 Pac. (2d), 342.

For the reasons herein stated, the ruling of the court below in sustaining the defendants' motion for judgment as of nonsuit, is

Reversed.

THELMA L. LOVE v. T. R. ZIMMERMAN.

(Filed 22 May, 1946.)

1. Trial § 22a—

On motion to nonsuit plaintiff is entitled to the benefit of every fact and inference of fact pertaining to the issues involved which may be reasonably deduced from the evidence.

2. Physicians and Surgeons § 18—

Where, in an action for malpractice, plaintiff alleges that defendant failed to use reasonable care and diligence in the practice of his profession and alleges that he failed to use his best judgment in the treatment of the case, either allegation, when supported by competent evidence, is sufficient to carry the case to the jury on the issue of negligence, and allegation of incompetency on the part of the defendant to practice his profession is not necessary.

3. Physicians and Surgeons § 20—Evidence of negligence of dentist in treatment of case after tooth extraction held sufficient for jury.

Plaintiff's evidence tended to show the following circumstances. Defendant dentist, in attempting to extract a tooth, broke it off even with the gum and then attempted to remove the roots. Thereafter, he was notified on three or four occasions and over a considerable time that plaintiff's jaw was not healing properly. On plaintiff's third visit defendant took an X-ray but found nothing but a dry socket. Plaintiff then went to another dentist who took another X-ray and removed a particle of root and a "lot of little dead bone." *Held:* The evidence was sufficient to be submitted to the jury on the issue of negligence and the granting of defendant's motion to nonsuit was error.

APPEAL by plaintiff from *Bone, J.*, at February Term, 1946, of GUILFORD.

Civil action to recover damages for alleged negligence on the part of the defendant in extracting one of plaintiff's teeth and in the subsequent treatment of the case.

The defendant is a dentist in the City of High Point. On 27 August, 1945, the plaintiff went to the office of the defendant, told him she had a tooth that was paining her very much and that she "wanted it pulled." The defendant said, "all right"; whereupon the plaintiff asked the defendant "to be careful," as he had extracted a tooth for her about a year before and "had broken it off." The defendant deadened the gum with novocaine, and in about five minutes he extracted the upper left bicuspid. He seemed very nervous and exclaimed, "My goodness." The plaintiff remarked, "You broke it." He said "Yes" and then went to getting the pieces out. The tooth was broken even with the gum. The defendant tried to remove the roots with "a chisel and hammer." He got out two little pieces of root and told the plaintiff to come back if it

continued to hurt her. Two days later plaintiff's husband called the defendant and informed him that his wife's jaw was greatly swollen, looked red and was running pus. Defendant sent a prescription which was filled and taken without any beneficial results. The plaintiff continued to get "worse and worse every day." In about a week she returned to the defendant's office and asked to see him. The nurse said, "I can pack your jaw as good as he can," which she did and the plaintiff went home. The plaintiff then kept getting worse and went back to see the defendant. She said to the nurse, "I believe there is something in my jaw." Whereupon defendant's brother came in and looked at it. The nurse acquainted him with the plaintiff's fears. He said, "Did we tell you we got it all out?" The plaintiff replied, "Yes," and he said, "If we said we got it out, we got it out." Plaintiff then said she would like to have an X-ray; whereupon he said, "If you got money to throw away, we will X-ray it." Plaintiff replied that she had no money to throw away; the nurse again packed it with something and the plaintiff returned to her home.

Later the plaintiff went back to the defendant's office and he X-rayed it. The nurse developed it and said, "There is nothing in it." She packed it with cotton gauze or something before the defendant took the X-ray. The defendant said, "It is just a dry socket" and did nothing more.

Plaintiff testifies that she "was nearly crazy" from her suffering. She had Dr. Hester to take an X-ray, and then she went to Dr. Adams who also took an X-ray. "He went to work down in there and brought out bone and stuff and brought out flesh. . . . He got four or five pieces of bone out."

The plaintiff then went to the hospital. After leaving the hospital she had the two adjacent teeth—the eye tooth and the second bicuspid—also removed. The defendant told Dr. Adams that he was going to see the plaintiff while she was in the hospital, but he never did.

Dr. Hester testified that the X-ray he made showed "a suspicious looking area where that mark is—it looks to me like that particular tooth is one of the particular teeth in the mouth that has two roots on it and it looks like there might be a little piece of root—I couldn't say definitely about that, but it leads me to believe, since I marked it, that there possibly is a little piece of root there—that is just my opinion."

Dr. Adams testified that when the plaintiff came to see him she was in great pain. "I deadened the jaw with novocaine and took my little elevators and lifted out just a little particle of the end of a root of tooth. I didn't do that so easy. It took quite a while. . . . In the meantime I saw a lot of little dead bone, you call that necrotic, and I curated that out too."

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

Walser & Wright and C. N. Cox for plaintiff, appellant.
Sapp & Moore for defendant, appellee.

STACY, C. J. The question for decision is whether the case as made, taken in its most favorable light for the plaintiff, survives the demurrer. We are disposed to think it does.

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. *State Highway & Public Works Com. v. Diamond Steamship Transportation Corp., ante,* 371, herewith decided; *Davis v. Wilmerding,* 222 N. C., 639, 24 S. E. (2d), 337; *Diamond v. Service Stores,* 211 N. C., 632, 191 S. E., 355.

Here, a dentist who had, on a previous occasion, broken one of plaintiff's teeth when extracting it, was asked to be careful lest he break another in extracting it. He does break it off even with the gum. He then undertakes to remove the roots with a chisel and hammer. He fails to remove all the root and leaves some broken bone in the cavity. Two days later the defendant is notified that plaintiff's jaw was greatly swollen and was running pus. He sends a prescription which was filled and taken without beneficial result. In about a week, the plaintiff returns to defendant's office and his nurse packs her jaw and sends her home. Continuing to grow worse, the plaintiff again returns to defendant's office and states that she thinks there is something in her jaw and suggests that an X-ray be taken. Defendant's brother assures her there is nothing in it, and that an X-ray would only be a waste of money. The nurse again packs it with something and plaintiff returns home. Later the plaintiff returns, for the third time, to defendant's office and he takes an X-ray and finds nothing but a dry socket.

The plaintiff then goes to another dentist who examines her swollen jaw and removes "a little particle of the end of a root of tooth" and "a lot of little dead bone."

Viewing this evidence with that degree of liberality required on demurrer, we think the permissible inferences are such as to make the issue of liability one for the jury. *Mullinax v. Hord,* 174 N. C., 607, 94 S. E., 426; *McCracken v. Smathers,* 122 N. C., 799, 29 S. E., 354; *S. c.,* 119 N. C., 617, 26 S. E., 157.

It is true there is no allegation of incompetency on the part of the defendant to practice his profession. It is alleged, however, (1) that in the plaintiff's case the defendant omitted to use reasonable care and diligence in the practice of his art, or (2) that he failed to exercise his

best judgment in the treatment of the case. Either allegation, if supported by competent evidence, suffices to carry the case to the jury on the issue of negligence. *Nash v. Royster,* 189 N. C., 408, 127 S. E., 356.

Under the circumstances here disclosed, it is contended that reasonable prevision and foresight would have called for more attention and better care on the part of the defendant in the treatment of plaintiff's case. He was notified on three or four occasions and over a considerable length of time, that plaintiff's jaw was not healing properly; that the constant and growing pain indicated to the plaintiff and should have indicated to the defendant, the presence of some deleterious substance; that a proper examination or diagnosis would have disclosed and did disclose to Dr. Adams, the presence of hurtful bacteria. These contentions apparently find support in the evidence, at least enough to raise an issue of due care. *Brewer v. Ring and Valk,* 177 N. C., 476, 99 S. E., 358.

The case is not like *Smith v. McClung,* 201 N. C., 648, 161 S. E., 91, where the dentist wanted to do more, and the patient demurred, or *Scott v. Ins. Co.,* 208 N. C., 160, 179 S. E., 434, where the skill, competency and proper attention on the part of the dentist were all conceded. The present case, it seems to us, is controlled by the principles announced in *Long v. Austin,* 153 N. C., 508, 69 S. E., 500, and *McCracken v. Smathers, supra.* See 41 Am. Jur., 200; 48 C. J., 1121, *et seq.*

The result is a reversal of the judgment of nonsuit.

Reversed.

L. F. BARNARD, TRADING AS GATE CITY TRANSIT LINES, v. HOWARD SOBER, INC.

(Filed 22 May, 1946.)

1. Carriers § 10: Bailment § 3—

A printed receipt form, acknowledging receipt of items listed on its reverse side, signed by defendant's agent, having on its back a typewritten list of articles followed by the words "Con't on next page," and having the next printed page of the form filled out with model and serial numbers of plaintiff's bus, chassis and engine, includes the bus engine in the list of articles receipted for.

2. Same—Evidence of delivery of engine in good condition to common carrier or bailee for hire held sufficient.

Defendant's agent undertook to transport plaintiff's bus under its own power from a body company in another state for delivery to plaintiff. Plaintiff's evidence tended to show that when the bus was delivered to the body company for the construction of a new body the engine was in good condition, that defendant's agent signed a receipt stating that articles listed, including the engine, were in good condition, and that a rule of the

Interstate Commerce Commission, by which defendant is licensed, provides that a carrier will not accept a vehicle for transportation under its own power if, in its judgment, the mechanical condition is such that it cannot be operated in that manner. The engine of the bus burned out while being driven by defendant's agent on the trip. *Held:* There was sufficient competent evidence that when the vehicle was delivered to defendant the engine was in good condition, and defendant's motion to nonsuit should have been overruled regardless whether defendant be regarded as a common carrier or a bailee for hire.

APPEAL by plaintiff from *Alley, J.*, at November Term, 1945 (Greensboro Division), of GUILFORD.

Civil action to recover damages from the defendant for alleged negligence in the transportation of a bus, which the defendant contracted to drive from Richmond, Ind., to Greensboro, N. C.; the defendant being a Michigan corporation duly licensed by the Interstate Commerce Commission to do business through the Motor Carriers Division.

The evidence tends to show that the plaintiff delivered a 1941 Ford bus to the Wayne Works, a body company of Richmond, Ind., in January, 1944, for the purpose of having a new body built thereon. The motor was in good condition at the time of delivery to the Wayne Works. On 1 June, 1944, the 1941 Ford, with the new body thereon, was delivered to the defendant for transportation from Richmond, Ind., to Greensboro, N. C., by the method designated in the Rules and Regulations of the Interstate Commerce Commission as "Single Driving Service," which is defined as "the movement of a single vehicle, under its own power, over the highways, from a point of origin to a point of destination." Other rules governing such shipment were introduced in evidence and the pertinent parts are as follows:

"Carrier will not accept for transportation under its own power, any vehicle which due to its mechanical condition, in the judgment of the carrier, cannot be operated in that manner or which cannot, due to size or special construction, be safely handled by the carrier in full compliance with all state laws and regulations of the Interstate Commerce Commission."

"Shipper or consignee will be charged for all expense incurred by mechanical or tire failures, beyond the control of carrier, in the transportation of vehicle, in addition to rates and charges otherwise provided in this tariff."

"Rates named herein include addition of necessary gasoline, grease and oil to transport shipments to destination."

The agent of the defendant signed a receipt in the following language: "I have counted and inspected all units and pieces of the property described on the reverse side of this form, and I find same to be identical

in number, size and description as there indicated. All of the same are delivered to the undersigned in good condition and as set forth. Receipt of the said property from The Wayne Works is hereby acknowledged at Richmond, Indiana, on the 1st day of June, 1944. (Signed) Howard Sober, Inc., By C. L. Bierie."

The above receipt is printed at the bottom of a form of the Wayne Works, and on the back of the receipt is a typewritten list of items. At the end of the list the following appears: "(Con't on next page)". On the next page the printed form is filled out, giving the following information: "Body Model: 49042S Serial No. 37988. Make Chassis: Ford. Wheelbase: 158. Chassis Serial No. 293471. Engine No. 44 B 44. Tools: 0. Spare Rim or Wheel 0 Spare Tires 0 Gas Gauge Reading 0 Misc. 0."

The defendant's driver, after signing the above receipt, took possession of the bus and started on the trip to Greensboro, N. C. In or near Chillicothe, Ohio, the motor of the bus burned out and the bus was left with the Lynch Motor Car Co., in that city.

The plaintiff alleges, the damage to the engine of the bus was the result of the failure of the defendant's agent to keep sufficient lubricating oil in the engine and the excessive rate of speed at which the bus was driven from Richmond, Ind., to Chillicothe, Ohio.

The plaintiff was required to spend a considerable sum to replace the motor; for other expenses incident to making the necessary repairs, and the cost of transporting the bus from Chillicothe, Ohio, to Greensboro, N. C.

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

Smith, Wharton & Jordan for plaintiff.
Sapp & Moore for defendant.

DENNY, J. The primary question involved on this appeal is whether the plaintiff in the trial below, offered any competent evidence tending to show that the engine in the plaintiff's 1941 Ford bus was in good condition when delivered to the agent of the defendant on 1 June, 1944, at Richmond, Ind., for transportation to Greensboro, N. C.

The defendant insists that the receipt given the Wayne Works, to the effect that the property delivered to its agent was in good condition, is limited to the items described on the reverse side of the receipt and does not include the chassis or the engine of the bus. We do not so hold, in view of the fact that the itemized list on the reverse of the receipt states that it is continued on the next page and on the next page information is

given as to the body, model, chassis and engine of the bus. We think the engine was included in the list of items for which the defendant issued its receipt and stated therein that, "all of the same are delivered to the undersigned in good condition and as set forth." *Merchant v. Lassiter,* 224 N. C., 343, 30 S. E. (2d), 217; *Hutchins v. Taylor-Buick Co.,* 198 N. C., 777, 153 S. E., 397; *Brown v. Express Co.,* 192 N. C., 25, 133 S. E., 414; *Beck v. Wilkins,* 179 N. C., 231, 102 S. E., 313. Moreover, under the Rules and Regulations governing a shipment of this character, among other things, it is provided: "Carrier will not accept for transportation under its own power, any vehicle which due to its mechanical condition, in the judgment of the carrier, cannot be operated in that manner or which cannot, due to size or special construction, be safely handled by the carrier in full compliance with all state laws and regulations of the Interstate Commerce Commission."

The defendant denies that it is a common carrier and while there is evidence tending to show otherwise, we need not decide on this appeal whether the defendant is a common carrier or a bailee for hire. In either event, we think the evidence sufficient to carry the case to the jury. The judgment of the court below is

Reversed.

R. O. STARNES, ADMR., v. HENRY G. TYSON.

(Filed 22 May, 1946.)

1. Death § 8—

The mortuary table is merely evidence of life expectancy to be considered with other evidence as to the health, constitution and habits of the deceased, G. S., 8-46, and an instruction having the effect of making the expectancy set out in the statute definitive and conclusive not only violates this rule, but also the prohibition against expression of opinion "whether a fact is fully or sufficiently proven." G. S., 1-180.

2. Appeal and Error § 48: Courts § 4b—

Whether the Superior Court, in sustaining exceptions relating solely to the issue of damages on defendant's appeal from the Municipal Court, should limit the new trial to the issue of damages, rests solely in the discretion of that court, and the Supreme Court, on further appeal, will not entertain plaintiff's request that the new trial be so limited.

3. Appeal and Error § 3a—

When the Superior Court on defendant's appeal from the Municipal Court, grants a new trial on two exceptions and overrules the others, and the Supreme Court on plaintiff's appeal from this ruling sustains the ruling granting a new trial, defendant's appeal from the action of the

STARNES *v.* TYSON.

Superior Court in overruling its other exceptions will be dismissed, since defendant having been granted a new trial is not the "party aggrieved."

APPEALS by plaintiff and defendant from *Bone, J.*, at 4 February, 1946, Civil Term. From GUILFORD.

Civil action instituted in the Municipal Court of the City of High Point to recover damages for the death of plaintiff's intestate alleged to have been caused by the wrongful act, neglect or default of the defendant.

It is in evidence that on the morning of 5 June, 1944, Paul Collins, age 11, and his brother, LeRoy Collins, age 15, were walking along the Jacksonville-New Bern Highway in Onslow County when they were both struck and seriously injured—Paul Collins fatally—by defendant's oil truck, which was being operated at the time by his agent and in furtherance of his business.

The defendant denied liability and when the case came on for trial, the jury answered the issues of negligence and contributory negligence in favor of the plaintiff, and assessed the damages at $15,000.00.

From judgment on the verdict, the defendant appealed to the Superior Court of Guilford County for errors assigned in matters of law as provided by statute on such appeals. See *Cecil v. Lumber Co.*, 197 N. C., 81, 147 S. E., 735; *Hendrix v. R. R.*, 202 N. C., 579, 163 S. E., 752; *Lewellyn v. Lewellyn*, 203 N. C., 575, 166 S. E., 737; *Brown v. Lipe*, 210 N. C., 199, 185 S. E., 681.

Two of these assignments of error were directed to the following portions of the charge:

1. "Now, what you are called upon to consider, and the rule by which you do arrive at an answer to this issue, if you come to answer it, is based upon what he might have earned during his expected life, and there has been introduced in evidence here a portion of the North Carolina statute which we call the mortuary tables, and that provides—where they have it all figured out as to what the expectancy of a person's life is—that a young man eleven years old would live 48.1 years more." Exception No. 14.

2. "Now, gentlemen, you will take into consideration this boy's health, his condition, his aptitude for doing work, his age and his expectancy. His expectancy is 48.1 years; that means, being eleven years old, he had, according to the mortuary table, and according to his expectancy, 48.1 more years to live." Exception No. 17.

On the hearing in the Superior Court, the defendant's exceptions, 25 in number, were overruled, save and except the 14th and 17th, above set out, which were sustained, and the cause was thereupon remanded to the Municipal Court of the City of High Point for new trial.

From the judgment of the Superior Court sustaining two of the defendant's exceptions and granting a new trial, the plaintiff appeals, assigning errors; and from so much of the judgment of the Superior Court as overruled his other exceptions and assignments of error, the defendant appeals, assigning errors.

J. M. Broughton, Harriss H. Jarrell, and James B. Lovelace for plaintiff, appellant-appellee.

Ehringhaus & Ehringhaus and Gold, McAnally & Gold for defendant, appellant-appellee.

STACY, C. J. In the Superior Court, on appeal by the defendant from the Municipal Court of the City of High Point for errors assigned in matters of law, all of the exceptions were overruled, save and except Nos. 14 and 17, which were sustained, and the cause was thereupon remanded to the Municipal Court for a new trial. *Jenkins v. Castelloe,* 208 N. C., 406, 181 S. E., 266. From a procedural standpoint, the case apparently parallels *Brown v. Lipe,* 210 N. C., 199, 185 S. E., 681; *Trust Co. v. Greyhound Lines,* 210 N. C., 293, 186 S. E., 320; *Williams v. Charles Stores Co.,* 209 N. C., 591, 184 S. E., 496.

I. THE PLAINTIFF'S APPEAL.

By his appeal to this Court, the plaintiff challenges the correctness of the judgment of the Superior Court in sustaining defendant's exceptions Nos. 14 and 17, and remanding the cause for another hearing. In these two exceptions, it is pointed out that the trial court made definitive and conclusive the expectancy of the plaintiff's intestate as 48.1 years. The gravamen of exception 14 is that the court said to the jury "there has been introduced in evidence here a portion of the North Carolina statute which we call the mortuary tables, and that provides . . . that a young man eleven years old would live 48.1 years more." And in exception 17, the court seems to have been a little more specific and direct: "His expectancy is 48.1 years; that means, being eleven years old, he had, according to the mortuary table, and according to his expectancy, 48.1 years to live."

The Superior Court was constrained to hold these expressions for error under authority of what was said in *Sebastian v. Motor Lines,* 213 N. C., 770, 197 S. E., 539; *Hancock v. Wilson,* 211 N. C., 129, 189 S. E., 631; *Trust Co. v. Greyhound Lines,* 210 N. C., 293, 186 S. E., 320; *Hubbard v. R. R.,* 203 N. C., 675, 166 S. E., 802; *Young v. Wood,* 196 N. C., 435, 146 S. E., 70; *Taylor v. Const. Co.,* 193 N. C., 775, 138 S. E., 129; *Odom v. Canfield Lumber Co.,* 173 N. C., 134, 91 S. E.,

716; *Sledge v. Lumber Co.,* 140 N. C., 459, 53 S. E., 295. These cases support the judgment of the Superior Court. The mortuary table is competent as evidence, but only as evidence, which is to be considered with the "other evidence as to the health, constitution, and habits" of the deceased. G. S., 8-46; *Russell v. Steamboat Co.,* 126 N. C., 961, 36 S. E., 191. For the court to make the mortuary table definitive and conclusive not only violates the evidence rule, but also the prohibition against expression of opinion "whether a fact is fully or sufficiently proven." G. S., 1-180; *Cogdill v. Hardwood Co.,* 194 N. C., 745, 140 S. E., 732.

Finally, the plaintiff asks that the new trial, if sustained, be limited to the issue of damages. It does not appear that such request was lodged below; or that the judgment is challenged on this ground. The order for a new trial was made by the Superior Court. It did not originate here. The matter was entirely discretionary with the court making the order. *Lumber Co. v. Branch,* 158 N. C., 251, 73 S. E., 164.

No error has been made to appear on plaintiff's appeal.

II. THE DEFENDANT'S APPEAL

The defendant having been granted a new trial in the Superior Court on two of his exceptions, is not entitled to have the rulings upon his other exceptions reviewed unless and until reversible error has been made to appear on plaintiff's appeal. *Trust Co. v. Greyhound Lines, supra; Williams v. Charles Stores Co., supra; Letterman v. Miller,* 209 N. C., 709, 184 S. E., 525. So long as the judgment of the Superior Court is in his favor, denies him no substantial right, and remains undisturbed, it would seem that the defendant could hardly be called the "party aggrieved" within the meaning of the appeal statute. G. S., 1-271; *Yadkin Co. v. High Point,* 219 N. C., 94, 13 S. E. (2d), 71. "A 'party aggrieved' is one whose right has been directly and injuriously affected by the action of the court." McIntosh on Procedure, 767. See *Robinson v. McAlhaney,* 216 N. C., 674, 6 S. E. (2d), 517; *S. c.,* 214 N. C., 263, 199 S. E., 26, and 214 N. C., 180, 198 S. E., 647.

The rulings in the Superior Court on defendant's remaining 23 exceptions, which were there overruled, might become hurtful should error be found here in the rulings on the exceptions which were there sustained. But prior to the happening of this event, the defendant may not insist upon further hearing in this Court on his other exceptions. This would amount to a second appellate review on these exceptions on appeal from an order granting him a new trial, which he neither challenges nor wants vacated. *McCullock v. R. R.,* 146 N. C., 316 (defendant's appeal at page

320), 59 S. E., 882; *Pritchard v. Spring Co.,* 151 N. C., 249, 65 S. E., 968; *Smith v. Miller,* 155 N. C., 242, 71 S. E., 353.

Plaintiff's appeal, Affirmed.

Defendant's appeal, Dismissed.

MRS. HARVEY JAMES v. EMORY JAMES.

(Filed 22 May, 1946.)

1. Pleadings § 22—

In claim and delivery instituted by a widow on the ground of ownership of the property in suit by allotment to her in her year's allowance, an amendment permitting her to allege title by gift *inter vivos* from her husband does not change the nature of the action but merely affects the source of title, and the court has the discretionary power to permit such amendment.

2. Claim and Delivery § 14: Gifts § 1—

This action was instituted in replevin by a widow to recover possession of an automobile from her father-in-law. Plaintiff's evidence that the car had been purchased by her husband and that he had made a valid gift *inter vivos* of the car to her *is held* sufficient to overrule defendant's motions to nonsuit.

3. Parent and Child § 4c—

Where a minor son purchases a car with his own earnings, the fact that his father had full knowledge of the transaction and acquiesced therein, with other pertinent evidence, may be considered upon the question of emancipation in derogation of the father's claim to the car on the ground that he was entitled to the son's earnings during minority.

4. Claim and Delivery § 14: Trial § 31—Charge held for error as expression of opinion on weight and sufficiency of evidence.

This action in replevin was instituted by a widow to obtain possession of an automobile from her father-in-law. There was conflicting evidence as to whether the car had been purchased by defendant or plaintiff's husband. Plaintiff introduced letters from her husband disclosing that he regarded the car as his and intended making a gift *inter vivos* of it to her. After charging upon the evidence of title, the court, in charging upon the evidence of gift instructed the jury to answer the issue in plaintiff's favor if they were satisfied by the greater weight of the evidence of the elements of a gift *inter vivos. Held:* The court inadvertently overlooked the fact that title was still in issue, and the instruction must be held for error as an expression as to the weight and sufficiency of the evidence on the question of title. G. S., 1-180.

APPEAL by defendant from *Olive, Special Judge,* at October Civil Term, 1945, of DAVIDSON.

(Pertinent facts are stated in the opinion.)

Don A. Walser and Charles W. Mauze for defendant, appellant.
Phillips & Bower for plaintiff, appellee.

SEAWELL, J. This is an action in replevin to recover a Ford automobile alleged to be the property of plaintiff and to be wrongfully detained by defendant. Claim and delivery proceedings were issued, and defendant gave bond and retained possession of the property. The trial resulted in a jury verdict unfavorable to the defendant, and he appealed from the judgment awarding the car to plaintiff.

In her original complaint, the plaintiff claimed ownership by virtue of an allotment of the automobile to her in her year's allowance as widow of her husband. Over objection by defendant, she was permitted to strengthen her claim by alleging title by gift *inter vivos*. The amendment does not change the nature of the action, but merely affects the source of title. It was within the discretion of the court, and the objection is without merit.

The plaintiff is the widow of Harvey James, a young soldier who died in Italy during the Allied invasion. He was a son of the defendant. The plaintiff was under twenty-one years of age when this action began, but reached her majority during its pendency. She and young James had been going together for several years, and were married in 1943, after his induction into the Service and while he was home on a furlough. Harvey was soon thereafter called overseas. The automobile was purchased prior to the marriage and while Harvey was a minor, about eighteen years of age, living with his father, but employed elsewhere. He was using an old Chevrolet car to drive to and from the mills where he was employed. The evidence for the plaintiff tends to show that the purchase of the Ford automobile was made by Harvey James with the knowledge and permission of his father.

The dealer from whom the car was purchased testified that the transaction was with Harvey, who bought the car, but the papers were put in the name of the father and title registered in his name at the dealer's suggestion because the young man was under age. The difference between the amount allowed for the Chevrolet (which was $35.00 according to the father's statement) and the total price of the Ford was paid in cash. H. W. Craver, from whom the money was borrowed, said that he loaned Harvey the money to pay for the car, which was around $200.00, and this Harvey subsequently paid back to him in thirty-one weekly installments. He testified that the installments were all paid by Harvey, and none of them by the defendant, and defendant did not claim

the car. He delivered all the papers to Harvey upon the payment of the last installment.

There was further evidence to the effect that after the marriage, Harvey and his wife stayed one while at his father's and sometime at the home of his father-in-law; that the car was stored in a shed at Emory James' place because there was no place for it at the home of the father-in-law—that it was blocked up there and covered with a canvas.

There was also evidence that the son sent money from Europe to his father to have repairs made on the car, or have it "fixed up." Several witnesses testified that the defendant on several occasions had stated that the car was Harvey's.

A number of letters written by Harvey James and received by his wife here before her husband was killed were introduced in evidence as indicating that Harvey intended a gift of the car to his wife. Some of them are as follows:

(November 1, 1943)

"Dearest Darling:

Well, darling, I guess my Ford is still covered up for me when I get back home to use it."

Signed: "Love, Harvey."

(December 19, 1943)

"My darling wife and baby:

I said hello and be good darling I will send you some money soon and you can spend it or keep it, and now I am going to send my daddy some too for fixing my Ford for me."

Signed: "Love, Harvey."

(May 4, 1944)

"Dearest Darling:

I was glad to hear from you darling. You said every time you saw my Ford I am bound to be there. Well, I wish I was and hope to see you soon. . . . Darling, you said you were going to learn to drive and get my Ford. Well, I wish you would learn to drive, when I was home. But you see my Ford is your Ford, for I give it to you and I am going to have it put in your name as soon as I can."

Signed: "With love, love forever, Harvey."

The defendant testified that at the time of the purchase Harvey James was a minor. He worked at the cotton mill and at home, and defendant

boarded and clothed him. Witness testified that he traded cars with Essick—a 1928 Chevrolet for a 1935 Ford—and agreed to pay $300.00 "except with the car for said 1935 Ford." Title to the car was in witness' name, and the son did not own any part of it. Witness said his son paid part on the car, but counting the 1928 car, witness paid around half of it. The trade, defendant stated, was made by him and the papers delivered to him by Craver when the car was paid for.

The conditional sales agreement was put in evidence, signed by Emory James, and showing a note for $200.52, balance on purchase price of $225.00.

Witness stated that he had two other cars beside the Ford, the title to which Ford was delivered to him by Craver.

Witness denied that his son had sent him any money. Said he had sent wife of witness some. He stated Essick did not mention Harvey being under age, that he traded in his own behalf. Said he had repaired the car at his own expense, costing around $140.00.

Baxter Weaver, brother-in-law of defendant, testified the trade was made with Emory James.

The defendant at apt times demurred to the evidence and moved for judgment as of nonsuit. The motions were properly overruled.

In addition to other objections, not now necessary to discuss, the defendant argues that during the period covered by the installments alleged to have been paid by his son, the latter was a minor and that defendant was by law entitled to his earnings. If that principle can be extended to property purchased by the earnings of the son under the circumstances here outlined, the fact that the father, with the full knowledge of the facts and acquiescence therein, permitted the expenditure and purchase, if the evidence should so disclose upon a second trial, may, with other pertinent evidence, be taken into consideration upon the question of emancipation. *Jolley v. Telegraph Co.*, 204 N. C., 136, 138, 167 S. E., 575; *Holland v. Hartley,* 171 N. C., 376, 88 S. E., 507; *Lowrie v. Oxendine,* 153 N. C., 267, 69 S. E., 131; 46 C. J., p. 1341, *et seq.;* 39 Am. Jur., Parent and Child, sec. 64. The objection is not conclusive here.

However, referring to a portion of the plaintiff's evidence, respecting the gift *inter vivos* from Harvey to plaintiff, the judge charged the jury that if they were satisfied by the greater weight of the evidence of the truth of it, they should find in favor of the plaintiff or answer the first issue as to ownership "Yes."

This inadvertently ignores the fact that the title to the ownership of the car in Harvey was still at issue, and may be taken as assuming the fact that it was sufficiently proved or as expressing an opinion on the weight and sufficiency of the evidence. G. S., 1-180. *S. v. Kline,* 190 N. C., 177, 129 S. E., 417; *Morris v. Kramer Bros. Co.,* 182 N. C., 87,

90, 108 S. E., 381; *Speed v. Perry,* 167 N. C., 122, 83 S. E., 176; *Withers v. Lane,* 144 N. C., 184, 187, 56 S. E., 855.

Since the standard we are required to apply does not yield to occasion, the case must stand for a rehearing. The defendant is entitled to a new trial. It is so ordered.

New trial.

STATE v. WILLIAM MALPASS.

(Filed 22 May, 1946.)

1. Mayhem §§ 1, 2—

In order to support a conviction of violation of G. S., 14-29, it is necessary that the injury be permanent, and upon evidence tending only to show a temporary injury to the privy parts of prosecuting witness the defendant's motion to nonsuit should be allowed. "To maim" as distinguished from "to wound" imports permanent injury.

2. Criminal Law § 79—

Exceptions not brought forward in appellant's brief are deemed abandoned. Rule 28.

3. Criminal Law § 83—

Where defendant is sentenced to serve a term in the State's Prison upon a general verdict of guilty on an indictment containing two counts, one charging a felony and the other a misdemeanor, and on appeal it is determined that defendant's motion to nonsuit should have been allowed on the count charging a felony, the cause must be remanded for proper judgment upon the conviction of the misdemeanor, since the sentence is not supported by the conviction on that count.

APPEAL by defendant from *Williams, J.,* at November Term, 1945, of COLUMBUS.

The defendant was tried, convicted and sentenced to imprisonment in the State's Prison upon a bill of indictment charging that he (1) "did unlawfully, willfully, and feloniously and on purpose, but without malice aforethought, maim or disfigure the privy members of S. L. Purvis, to wit, his testicle or testicles, with intent to maim, disfigure, disable or render impotent the said S. L. Purvis, contrary to the form of the statute"; and that he, defendant, on the day and year aforesaid, did (2) "in and upon one S. L. Purvis unlawfully and willfully make an assault, and he, the said William Malpass then and there unlawfully did beat and wound and thereby seriously damage and injure S. L. Purvis, against the form of the statute . . ." The jury returned the verdict "that William Malpass is guilty as charged in the bill of indictment."

Motion was duly made by the defendant for judgment as of nonsuit on the evidence, which was overruled by the court and defendant noted an exception. Motion was made and allowed that judgment be continued until the November Term, 1945. The case came on for hearing before Williams, J., at the November Term, of Columbus, and on 17 November, 1945, the defendant being present, the solicitor prayed judgment and judgment was pronounced "that the defendant be confined in the State Prison for a term of not less than 2 years nor more than 5 years to be worked under the supervision of the State Highway and Public Works Commission." From this judgment the defendant appealed, assigning errors.

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

Nathan Cole and Lyon & Lyon for defendant, appellant.

SCHENCK, J. The first three exceptive assignments of error set out in the appellant's brief have their origin in his Honor's refusal to allow the defendant's motion to dismiss the action on the first count in the bill of indictment, namely, violation of G. S., 14-29, duly lodged when the State had produced its evidence and rested its case, and duly renewed after all the evidence in the case was concluded. G. S., 15-173.

It is contended by the defendant that when the statute speaks of disablement or disfigurement of a limb or member of the body as a maiming, a permanent injury is contemplated, such as at common law would constitute mayhem. "To wound" is distinguished from "to maim" in that the latter implies a permanent injury to a member of the body or renders a person lame or defective in bodily vigor. Black's Law Dictionary (Second Edition), p. 746; 16 A. L. R., 959. In the case at bar the first count in the bill of indictment charges only the maiming of the privy members of the prosecuting witness. There is no evidence of any permanent injury to the testicles or private parts of Purvis, no evidence of any castration or of any injury that might cause impotency. The evidence offered by Purvis was to the effect that his injury was not permanent—the State's witness, the physician, Dr. Walton, testified that he recalled no injury to the testicles. With these contentions of the defendant, notwithstanding the variance of the authorities, we concur, and since there was no evidence of permanent injury to the privy parts of the prosecuting witness, we are of the opinion that it was error of the court to submit to the jury the question of the guilt of the defendant under the statute, G. S., 14-29.

We are of the opinion, and so hold, that the court did err in refusing to allow the motion of the defendant to dismiss the action on the first

count made when the State had rested its case and renewed when the case was concluded, and therefore it is ordered that the judgment in so far as it relates to the offense of the violation of G. S., 14-29, is reversed.

In so far as the second count in the bill of indictment, the charge being an assault wherein serious damage was inflicted, is concerned, there appear in the appellant's brief no exceptions taken in connection with the trial on the second count, such being the case, even if there should be such exceptions taken in the record, they are deemed abandoned. Rule 28, Rules of Practice in the Supreme Court, 221 N. C., 562.

The jury returned a verdict of "Guilty as charged in the bill of indictment," whereupon the court adjudged "that the defendant be confined in the State Prison for a term of not less than 2 years nor more than 5 years to be worked under the supervision of the State Highway and Public Works Commission." There was no apportionment of the punishment adjudged between the conviction of the offense charged in the first count and the conviction of the offense charged in the second count. In view of the fact that that portion of the punishment adjudged which might be attributable to the first count is rendered nugatory by the reversal of the action of the court in submitting such count to the jury, the question is posed, does the conviction alone on the second count support the judgment as rendered? We are constrained to answer in the negative. The offense charged in the second count, an assault wherein serious damage is inflicted is a misdemeanor and conviction thereof does not support a judgment of imprisonment in the State's Prison from two to five years. Therefore the case is remanded for a proper judgment upon a conviction on the second count, a misdemeanor. *S. v. Graham,* 224 N. C., 347, 30 S. E. (2d), 151.

Error and remanded.

HENRY KASS, R. E. WILKINS, COLVERT STEPHENS, T. M. CRAWFORD, DR. GATES McKAUGHAN, L. J. HUNTLEY, E. A. ALLEN, JR., ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED WHO MAY COME IN AND MAKE THEMSELVES PARTIES HERETO AND CONTRIBUTE TO THE EXPENSE THEREOF, v. ROMULUS A. HEDGPETH.

(Filed 22 May, 1946.)

1. Municipal Corporations § 37—

Neither a zoning ordinance nor an amendment thereto which is not adopted in accordance with the enabling provisions of statute, G. S., 160-175 and 160-176, is valid and effective as a zoning regulation.

2. Nuisances § 1—

A tobacco warehouse may not be held to be a nuisance in the absence of a finding that its operation would injuriously affect the health, safety, morals, good order or general welfare of the community, or infringe upon the property rights of individual complainants.

3. Municipal Corporations § 36—

Municipalities have no inherent police powers and can exercise only those conferred by statute strictly construed.

4. Municipal Corporations § 37—

This action was instituted by property owners against a tobacco warehouseman to restrain him from constructing an addition to his warehouse. The municipality had issued a building permit for the addition. The lower court found that defendant's warehouse does not constitute a nuisance, and that the amendment to a zoning ordinance prohibiting such structure was invalid as a zoning regulation, and plaintiffs did not show that power was conferred upon the city by general statute (G. S., 160-200) or by its charter to prohibit such structure. *Held:* Upon the record, there was error in continuing the restraining order to the hearing.

APPEAL by defendant from *Williams, J.*, at February Term, 1946, of ROBESON. Error.

This was an action to restrain the defendant from constructing an addition to his tobacco warehouse in the City of Lumberton.

It was alleged that the construction of buildings for business purposes within the area in which defendant intends to erect an addition to his warehouse was prohibited by city ordinance; and that the operation, at that place, of a warehouse for the auction sale of leaf tobacco would attract undesirable persons and practices and injuriously affect the comfort, welfare and property rights of the plaintiffs, residents and property owners in the vicinity. Temporary restraining order was issued on the facts alleged in the complaint.

The defendant denied that any valid ordinance prohibited his proposed construction, or that the addition of 100 feet to the warehouse which he had operated there for several years would constitute a nuisance or injuriously affect any property or other rights of plaintiffs. It was further alleged that the city had expressly authorized issuance of building permit for the construction of the proposed addition to his warehouse. The city was not a party to the action.

The judge, who heard the matter below upon the pleadings, affidavits and minutes of the City Board found that the ordinance and amendment thereto referred to in the pleadings did not constitute a valid exercise of the powers conferred upon cities and towns by G. S., 160-172, for establishing zoning regulations; and that the defendant's warehouse as now located was not and had not been conducted so as to constitute a nuisance.

However, it was held that the City Commissioners were without lawful authority to cause the issuance of a building permit for the proposed construction, and it was adjudged and decreed that the restraining order restraining defendant from making the proposed addition to his warehouse be continued to the hearing.

Defendant excepted and appealed.

Frank D. Hackett and McKinnon & Seawell for plaintiffs, appellees.
Varser, McIntyre & Henry for defendant, appellant.

DEVIN, J. The findings of fact made by the judge below were in accord with the evidence presented and we are not disposed to disturb them, but we do not reach the conclusion therefrom that the restraining order should have been continued to the hearing.

It was properly found that neither the original zoning ordinance, which did not include defendant's land within the area prohibited for business structures, nor the amendment thereto which purported to do so, was adopted in accordance with the enabling provisions of G. S., 160-175 and 160-176, and that these ordinances were therefore invalid and ineffective as zoning regulations. *Eldridge v. Mangum,* 216 N. C., 532, 5 S. E. (2d), 721; *Lee v. Board of Adjustment, ante,* 107.

It also appeared that subsequent to the adoption of the amendment the Board of Commissioners had authorized the issuance of a building permit for the construction in question, and had thereafter reaffirmed its action by unanimous vote of the board.

It was also found that defendant's warehouse at this place was not being, and had not been, conducted so as to create a nuisance; nor was the evidence sufficient to have justified a finding that it would likely become so. Tobacco warehouses under the present auction system are essential to the orderly marketing of one of the State's most valuable and important agricultural products, and the structures where the growers and the buyers of these products are brought together at the invitation and under the supervision of the warehousemen, may not be held to be nuisances, in the absence of finding that their operation would injuriously affect the health, safety, morals, good order or general welfare of the community, or infringe upon the property rights of individual complainants.

Since there was no valid ordinance prohibiting the erection of this addition to defendant's warehouse, but on the contrary an affirmative authorization by the Board of a building permit therefor, we perceive no sufficient reason for denying the defendant's right to proceed with his undertaking.

The case of *Shuford v. Waynesville,* 214 N. C., 135, 198 S. E., 585, is cited as authority for the position that notwithstanding the failure of the ordinance and amendment to comply with the zoning statutes, they should be upheld as having been adopted in the valid exercise of the police power conferred by the General Assembly upon municipalities. G. S., 160-200. But that case involved the power of the Town of Waynesville to prohibit the erection of a gasoline filling station in a restricted area, and it was held that, while it was within the police power conferred by statute to regulate gasoline stations, the ordinance must operate uniformly and not be unreasonable or arbitrary. See cases cited by *Justice Barnhill* in the opinion in that case. But it must be borne in mind that municipal corporations have no inherent police powers and can exercise only those conferred by statute. *S. v. Dannenberg,* 150 N. C., 799, 63 S. E., 946. Such powers as are conferred are subject to strict construction. *Rhodes, Inc., v. Raleigh,* 217 N. C., 627, 9 S. E. (2d), 389.

Here, on the facts shown, it does not appear that either by the general statutes or by its charter was power conferred upon the City of Lumberton to prohibit the erection of the addition to defendant's warehouse in its present location, in the absence of zoning regulations ordained in conformity with the statutes. *Lee v. Board of Adjustment, supra.*

On the record before us we conclude that there was error in continuing the restraining order to the hearing.

Error.

W. C. SAMPLE v. LEM JACKSON AND W. L. THOMPSON, SHERIFF OF PASQUOTANK COUNTY, N. C.

(Filed 22 May, 1946.)

Homestead § 9—

In bankruptcy proceedings homestead was allotted in certain lands, subject to a specified judgment. *Held:* As against this judgment there was no determination of the extent of debtor's homestead in the lands, and the judgment creditor was not remitted to reallotment of homestead either by suit in equity or by application to the clerk under G. S., 1-373, but could proceed by levy of execution and allotment of homestead.

APPEAL by plaintiff from *Thompson, Resident Judge* of First Judicial District of North Carolina, in Chambers at Elizabeth City. From PASQUOTANK.

Civil action to restrain defendants, their agents, employees and servants from selling under execution certain lands described in the com-

plaint for that it is alleged that same is covered by existing homestead allotted to plaintiff. For other actions relating to judgment under which present execution issued, see 223 N. C., 335, 26 S. E. (2d), 876, and 225 N. C., 380, 35 S. E. (2d), 236.

The plaintiff here alleges in his complaint substantially these facts:

That on 19 October, 1932, plaintiff filed, in the United States District Court for the Eastern District of North Carolina, voluntary petition in bankruptcy and, in due course thereafter, was adjudged bankrupt; that in this bankruptcy proceeding there was allotted as his homestead that certain tract of land upon which he did then and does now reside in Mount Hermon Township, Pasquotank County, North Carolina, containing 110 acres, more or less, more particularly described as therein set forth; that said land was allotted to plaintiff as his homestead subject, however, to that certain judgment which was acquired by defendant, Lem Jackson, on 20 June, 1932, against the plaintiff for the amount of $1,000; that after execution issued upon said judgment had been levied upon said land, and after attempt to allot to plaintiff homestead in said land, defendant Lem Jackson caused the said land to be advertised on 29 November, 1945, for sale to the highest bidder for cash at the courthouse door of Pasquotank County, in Elizabeth City, N. C., on 31 December, 1945; and that the said attempted reallotment of homestead to plaintiff is void and of no effect for the reason that defendant Jackson has failed to comply with the requirements of the General Statutes of North Carolina, that is, G. S., 1-373. And upon these allegations plaintiff prayed judgment that defendants, their agents, employees, and servants, be permanently restrained from levying upon, advertising and selling said lands covered by homestead allotted as above set forth. Temporary restraining order was signed by judge resident of the district, with notice to defendants to appear and show cause, if any they have, why the relief demanded in the complaint should not be granted. Upon hearing on such notice, defendants moved for dissolution of the restraining order. The motion was allowed, and order dissolving the restraining order was signed.

Defendants appeal therefrom to Supreme Court and assign error.

J. D. Winslow, J. W. Jennette, and John H. Hall for plaintiff, appellant.

Robt. B. Lowry and M. B. Simpson for defendants, appellees.

WINBORNE, J. As determinative of this appeal the appellant states this question: "Where a judgment debtor's homestead has been allotted, can the judgment creditor have the homestead reallotted merely upon a

new execution or are the provisions of G. S., 1-373, mandatory and exclusive?"

This question is predicated upon the assumption that in present case judgment creditor is restricted to a proceeding for reallotment of homestead. If such were the case, it is true that the creditor would be required to pursue his remedy by an action in equity, as in *Vanstory v. Thornton,* 110 N. C., 10, 14 S. E., 637, or by application to the clerk of Superior Court under provisions of G. S., 1-373. See *McCaskill v. McKinnon,* 125 N. C., 179, 34 S. E., 273.

But such is not the case in the present action. Here it is not a matter of reallotment of homestead. The homestead which has been allotted to plaintiff, as he alleges in his complaint, was subject to the judgment under which defendant Jackson is proceeding. As against this judgment, there has been no determination of the extent of plaintiff's homestead in the lands in question. Hence, the judgment creditor had the right to proceed originally for allotment of homestead, which is not in conflict with decisions on appeals in former actions, *supra.*

Therefore, the order dissolving the injunction was properly entered.

Affirmed.

STATE v. AMOS LOCKLEAR.

(Filed 22 May, 1946.)

1. Criminal Law § 19—

Where upon the trial under an indictment charging burglary in the first degree, the solicitor announces he would not ask for a verdict of first degree burglary but only of second degree burglary on the indictment, it is tantamount to taking a *nolle prosequi* with leave on the capital charge.

2. Burglary § 13b: Criminal Law § 54c—

Where upon the trial of defendant on an indictment charging burglary in the first degree, the solicitor takes a *nolle prosequi* as to the capital charge, but all the evidence shows that the dwelling was occupied, *held:* there is no evidence of guilt of burglary in the second degree, and no charge remained in the bill of indictment to support such verdict, and defendant's motion to set aside the verdict should have been allowed. G. S., 15-170, 15-171.

3. Criminal Law § 85a—

Where on appeal from a verdict of guilty of burglary in the second degree, it is determined that defendant's motion to set aside the verdict should have been allowed for want of evidence of defendant's guilt of second degree burglary and want of charge of second degree burglary in the indictment, upon the new trial ordered defendant may be tried upon

the original bill of burglary in the first degree, or upon an indictment charging breaking and entering otherwise than burglariously, with intent to commit a felony or other infamous crime therein. G. S., 14-54.

APPEAL by defendant from *Williams, J.*, at January Term, 1946, of ROBESON.

Criminal prosecution tried upon an indictment in which it is charged that the prisoner, a male person over 18 years of age, did, about the hour of twelve on the night of 25 October, 1945, with force and arms, at and in the County of Robeson, feloniously and burglariously break and enter the dwelling house of one Joe Chavis, then and there occupied by Alice Chavis, wife of Joe Chavis, "with the felonious intent the goods and chattels of the said Joe Chavis, in the said dwelling house then and there being, then and there feloniously and burglariously to steal, take and carry away, against the peace and dignity of the State, and did feloniously and burglariously break and enter the said dwelling house, of Joe Chavis, as aforesaid, with the felonious intent then and there in said dwelling house, to rape, ravish, and carnally know the said Alice Chavis, a female person, violently, forcibly and against her will, contrary to the form of the statute in such case made and provided, and against the dignity of the State."

When the case was called for trial the solicitor announced that he would not ask for a verdict of first degree burglary, but would only ask for second degree burglary on the indictment.

The evidence tends to support the allegations of the bill. Alice Chavis testified that she and her three children were sleeping in the bedroom next to the kitchen; that the screen door was latched and the door closed; a lamp on the kitchen table was left burning. "When I woke up this Amos Locklear, the defendant, was sitting in there right by my bedside . . ., he had the lamp in one hand and a pistol in the other . . ., I hollered for my little girl . . . he hopped over in the bed on me . . . the pistol fired . . . and the ball went out through the side of the house." A struggle followed, another shot was fired and she managed to escape to a neighbor's house, leaving her assailant in the home.

Defendant moved for judgment as of nonsuit at the close of the State's evidence, and renewed the motion at the close of all the evidence. Motion denied.

Verdict: Guilty of burglary in the second degree.

Defendant in apt time moved to set aside the verdict. Motion denied and the defendant excepted.

Judgment: Imprisonment in the State's Prison for 25 years.

Defendant appealed to the Supreme Court, assigning error.

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

J. E. Carpenter and McLean & Stacy for defendant.

DENNY, J. The defendant was charged with burglary in the first degree in the bill of indictment. And when the solicitor stated that he would not ask for a verdict of first degree burglary, but would only ask for a verdict of second degree burglary on the indictment, it was tantamount to taking a *nolle prosequi* with leave on the capital charge. *S. v. Spain,* 201 N. C., 571, 160 S. E., 825; *S. v. Hunt,* 128 N. C., 584, 38 S. E., 473.

In the case of *S. v. Jordan, ante,* 155, 37 S. E. (2d), 111, *Stacy, C. J.,* in speaking for the Court, said: "It is permissible under our practice to convict a defendant of a less degree of the crime charged, G. S., 15-170, or for which he is being tried, when there is evidence to support the milder verdict, *S. v. Smith,* 201 N. C., 494, 160 S. E., 577, with G. S., 15-171, available in burglary cases, *S. v. McLean,* 224 N. C., 704, 32 S. E. (2d), 227." But on this record there is no evidence to support a milder verdict. Moreover, when a *nolle prosequi* was taken as to the capital charge, there remained no charge in the bill of indictment to support a verdict of burglary in the second degree.

The motion to set aside the verdict should have been sustained.

The defendant may be tried upon the original bill of burglary in the first degree, or upon an indictment on the charge of breaking and entering the dwelling house in question, other than burglariously, with intent to commit a felony or other infamous crime therein, contrary to the provisions of G. S., 14-54. *S. v. Spain, supra; S. v. Chambers,* 218 N. C., 442, 11 S. E. (2d), 280.

New trial.

IN THE MATTER OF PAUL COLLINS, DECEASED.

(Filed 22 May, 1946.)

Appeal and Error § 40a—

An exception to the judgment presents the single question whether the facts found and admitted are sufficient to support the judgment and does not present for decision whether the findings are supported by evidence, and therefore when the findings of fact support the judgment, the judgment will be affirmed.

APPEAL by petitioner from *Bone, J.,* at February Term, 1946, of GUILFORD (High Point Division).

IN RE COLLINS.

This is a proceeding brought by the petitioner, Henry G. Tyson, against the respondent, R. O. Starnes, wherein the said petitioner seeks to have revoked letters of administration on the estate of Paul Collins, deceased, issued to said respondent by the clerk of the Superior Court of Guilford County. The said clerk, after considering the evidence adduced before him, appointed said Starnes such administrator. After hearing the petition for revocation of the letters of administration, the clerk dismissed the petition and the judge, upon appeal to him, affirmed the dismissal of the petition by the clerk. From the judgment of the judge, affirming the action of the clerk, the petitioner appealed to the Supreme Court for errors assigned and to be assigned. Upon appeal to the Supreme Court the petitioner makes but the single assignment of error, "1. For that His Honor signed and rendered the judgment in favor of the respondent as set forth in the petitioner's Exception No. 1."

Ehringhaus & Ehringhaus and Gold, McAnally & Gold for petitioner, appellant.

J. M. Broughton, Harriss H. Jarrell, and James B. Lovelace for respondent, appellee.

SCHENCK, J. The one exception to the judgment presents but the single question, whether the facts found and admitted are sufficient to support the judgment. *Shuford v. Building & Loan Asso.*, 210 N. C., 237, 186 S. E., 352; *Wilson v. Charlotte,* 206 N. C., 856, 175 S. E., 926.

It is insufficient to bring up for review the findings of fact or the evidence upon which such facts are based. 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.,* 225 N. C., 537, 35 S. E. (2d), 609. An exception to the judgment affirming the judgment below 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 law. *Fox v. Mills, Inc.*, 225 N. C., 580, 35 S. E. (2d), 869. An exception to the judgment presents the single question whether the facts found and admitted are sufficient to support the judgment rendered. *Lee v. Board of Adjustment, ante,* 107. The findings of fact by the judge below are binding on the Supreme Court where supported by evidence, and where it is claimed that such findings are not supported by any evidence the exceptions and assignments of error must so specify, otherwise the question is not presented for decision of the Supreme Court. *Wilson v. Robinson,* 224 N. C., 851, 32 S. E. (2d), 601. There are in the record no exceptions taken by the appellant pointing out any specific error. The judgment is based on the findings by his Honor below and are presumed, in the

absence of specific exceptions, to be supported by the evidence and are binding upon this Court. *Wilson v. Robinson, supra;* and since an exception to the signing of the judgment presents only the face of the record for inspection and review, and when the judgment is supported by the record the exception must fail. *King v. Rudd, ante,* 156. We have examined it in the instant case and are of the opinion, and so hold, that the findings of fact in the record support the judgment.

For the reasons stated, the judgment below is

Affirmed.

STATE v. CLARENCE MORGAN.

(Filed 22 May, 1946.)

1. Indictment § 9—

No indictment, whether at common law or under a statute, can be good if it does not accurately and clearly allege all the constituent elements of the offense charged.

2. Criminal Law § 12—

A valid warrant or indictment is an essential of jurisdiction.

3. Criminal Law § 56—

Where no crime is charged in the warrant or bill of indictment upon which the defendant has been tried and convicted the judgment must be arrested.

4. Bastards § 4—

Under G. S., 49-2, the neglect or refusal to support an illegitimate child must be willful, and it must be so charged in the warrant or bill of indictment.

5. Criminal Law §§ 22, 79, 83—

Where defendant does not bring forward his exception to the denial of his motion in arrest of judgment, but it appears on the face of the record that the warrant is fatally defective in failing to charge any crime, the Supreme Court *ex mero motu* will arrest the judgment, and such action does not prejudice defendant since a void warrant will not support a plea of former jeopardy upon a subsequent trial.

APPEAL by defendant from *Alley, J.,* at December Term, 1945, of GUILFORD.

Criminal prosecution under warrant which purports to charge a violation of G. S., 49-2, relating to the support of illegitimate children, in the following language:

"Did unlawfully beget upon Juanita Cobb a bastard child said child being born, and he neglect and refuse to supply adequate support for said child in contrary to Chapter 228, Public Laws of 1933, contrary to the form of the statute and against the peace and dignity of the State."

There was a verdict of guilty. The defendant moved in arrest of judgment. The motion was denied. Judgment was pronounced and defendant appealed.

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

Wm. E. Comer for defendant, appellant.

BARNHILL, J. The defendant does not bring forward his exception to the denial of his motion in arrest of judgment. Even so it raises a jurisdictional question which compels our attention. *S. v. Clarke,* 220 N. C., 392, 17 S. E. (2d), 468.

It is a universal rule that no indictment, whether at common law or under a statute, can be good if it does not accurately and clearly allege all the constituent elements of the offense charged. *S. v. Johnson,* 188 N. C., 591, 125 S. E., 183.

A valid warrant or indictment is an essential of jurisdiction. *S. v. Beasley,* 208 N. C., 318, 180 S. E., 598; *S. v. Rawls,* 203 N. C., 436, 166 S. E., 332; *S. v. Banks,* 206 N. C., 479, 174 S. E., 806. Hence, where no crime is charged in the warrant or bill of indictment upon which the defendant has been tried and convicted the judgment must be arrested. *S. v. Johnson, ante,* 266; *S. v. Vanderlip,* 225 N. C., 610; *S. v. Clarke, supra; S. v. McLamb,* 214 N. C., 322, 199 S. E., 81; *S. v. Tarlton,* 208 N. C., 734, 182 S. E., 481; *S. v. Tyson,* 208 N. C., 231, 180 S. E., 85; *S. v. Cook,* 207 N. C., 261, 176 S. E., 757; *S. v. Lewis,* 194 N. C., 620, 140 S. E., 434; *S. v. Anderson,* 196 N. C., 771, 147 S. E., 305; *S. v. Brady,* 177 N. C., 587, 99 S. E., 7; *S. v. McKnight,* 196 N. C., 259, 145 S. E., 281.

Under G. S., 49-2, the neglect or refusal to support an illegitimate child must be willful and it must be so charged in the warrant or bill of indictment. The omission of such allegation is fatal. *S. v. Vanderlip, supra; S. v. Hayden,* 224 N. C., 779; *S. v. McLamb, supra; S. v. Clarke, supra; S. v. Tarlton, supra; S. v. Tyson, supra; S. v. Cook, supra.*

When a fatal defect disclosing want of jurisdiction appears on the face of the record this Court, in the absence of a motion, will stay further proceedings *ex mero motu. S. v. Clarke, supra; Shepard v. Leonard,* 223 N. C., 110, 25 S. E. (2d), 445.

Such action does not prejudice the defendant, for a void warrant will not support a plea of former jeopardy upon a subsequent trial. *S. v.*

Ellis, 200 N. C., 77, 156 S. E., 157; *S. v. Bell,* 205 N. C., 225, 171 S. E., 50; *S. v. Beasley, supra.*

The State did not exercise its right to amend. *S. v. Goff,* 205 N. C., 545, 172 S. E., 407; *S. v. Walker,* 179 N. C., 730, 102 S. E., 404; *S. v. Hunt,* 197 N. C., 707, 150 S. E., 353. The warrant as it appears in the record charges no criminal offense. Hence the court below was without power or authority to pronounce judgment.

Judgment arrested.

THE COMMERCIAL NATIONAL BANK OF CHARLOTTE, NORTH CAROLINA, EXECUTOR OF THE WILL OF ALBERT B. CLARK, DECEASED, v. THE CHARLOTTE SUPPLY COMPANY, A CORPORATION, EUGENE B. GRAHAM, EUGENE B. GRAHAM, JR., PALMER G. BLACK, T. P. GRAHAM, W. A. GRAHAM AND W. R. ADKINS.

(Filed 5 June, 1946.)

1. Contracts § 13—

Where the question of whether a second contract dealing with the same subject matter rescinds or abrogates a prior contract between the parties depends solely upon the legal effect of the latter instrument the question is one of law for the court.

2. Same—

A prior contract is not abrogated by a second contract between the parties dealing with the same subject matter unless the second contract is so comprehensive and complete as to raise the legal inference of substitution or unless the second contract presents such inconsistencies that the two cannot in any respect stand together or unless the intent of rescission or substitution clearly appears.

3. Contracts § 8—

Where a second contract dealing with the same subject matter does not constitute a rescission of the first the two instruments must be read and construed together in determining the intent of the parties and in ascertaining to what extent the second contract modifies the first.

4. Contracts § 13—

In ascertaining whether the parties intend that a second contract abrogate a prior contract dealing with the same subject matter the circumstances surrounding the execution of the contracts, the relationship of the parties and the objectives to be accomplished should be considered when not in conflict with the written instruments.

5. Contracts §§ 13, 17—

Testator entered into a contract with a corporation and its other stockholders under which the corporation agreed to purchase the testator's 643 shares, comprising a majority of the stock, at testator's death. Thereafter the corporation obtained a judgment by default against testator and

the parties entered into a subsequent agreement for the cancellation of the judgment upon the conveyance to the corporation by testator of a certain number of the shares. At his death testator owned 500 shares, which comprise less than a majority of the stock. The corporation was a close corporation and its profits were distributed largely by salaries to its officer-stockholders rather than by dividends. *Held:* The acquisition of corporate control was not such a paramount consideration of the parties that its acquisition under the second contract dealt so comprehensively with the subject matter as to raise the legal inference of substitution, since preventing the stock from falling into the hands of strangers was of prime importance to the defendants and the acquisition of a market for the stock was of prime importance to the testator, and under the circumstances the tender of 500 shares of stock constituted substantial performance.

6. Corporations § 15—Second contract relating to sale of shares of stock of close corporation held not to rescind prior contract.

Plaintiff's testator was the majority stockholder in a close corporation. The corporation took out several policies of insurance on his life. Testator executed an agreement with the corporation and other shareholders which provided that upon his death the corporation should purchase the shares at a price to be determined by arbitration, using the insurance money to pay part of the purchase price and the balance from corporate surplus. Thereafter the corporation obtained a judgment by default against testator and in ancillary proceedings had his stock held by a receiver. The parties then made an agreement under which testator conveyed to the corporation a certain number of shares in consideration of the cancellation of the judgment, the lifting of the receivership and the payment to plaintiff of a stipulated salary so long as he should hold 40 per cent of the outstanding stock. Upon testator's death his executor tendered the 500 shares of stock constituting more than 40 per cent of the outstanding stock, which testator had retained, and demanded performance under the original contract. *Held:* The second contract did not abrogate or rescind the first, the two contracts not being inconsistent and the intent to rescind not being apparent.

7. Contracts § 8—

The intent of a contract is perforce the mutual intent of the parties, and therefore where the instrument must be construed to ascertain its intent a unilateral purpose will not be given effect in derogation of a mutual intent inferable from the instrument.

8. Contracts § 18—

A party who by his own act prevents complete performance of a contract by the other party may not take advantage of his own act and insist upon complete performance when the other party has tendered the substantial performance remaining in his power.

9. Estoppel § 6a—Corporation held estopped from claiming proceeds of insurance on life of officer-stockholder as a general corporate asset.

Plaintiff's testator was an officer-stockholder in a close corporation which distributed its profits largely through salaries to officer-stockholders rather than through dividends. Testator entered into an agreement with

the defendant and other stockholders under which the corporation obligated itself to continue payment of premiums on policies taken out by it on testator's life and to use the proceeds in the purchase of testator's stock upon his death. Upon testator's death the corporation collected the insurance and deposited the proceeds in a separate trust fund. *Held:* During his life plaintiff's remuneration from the corporation was decreased proportionately by the expenditure of corporate funds to pay the insurance premiums, and at his death the corporation and the other stockholders are estopped from claiming the proceeds of the insurance as a general corporate asset.

10. Contracts § 8—

In determining the intent of the parties to a contract it will not be assumed that one of them has acted unreasonably or inequitably when a contrary inference is permissible.

11. Same—

Acts of the parties indicating the manner in which they themselves construed the contract will be given primary consideration by the courts.

APPEAL by defendants from *Hamilton, Special Judge,* at Extra February Term, 1946, of MECKLENBURG.

The corporate executor of the will of Albert B. Clark brought this action to enforce a contract for the purchase of the stock of its testate in the defendant corporation, made by said corporation and individual stockholders. The Supply Company and the individual defendant stockholders claim that the contract has been abrogated by a subsequent contract dealing with the subject matter, and that they are under no obligation to comply with plaintiff's demands.

The contract was made under the following circumstances and conditions as disclosed by admissions in the pleadings and the evidence taken upon the trial:

The stockholders of the defendant corporation had been few in number and the largest stockholders, other than plaintiff's testate, were family relatives. The practice had been adopted and followed to make nearly all of the stockholders, including Clark, who held a majority of the stock, directors and officers and to distribute the corporate profits by means of salaries to these stockholder-officers rather than by dividends on stock. This practice had obtained since the beginning of business, or certainly for sometime prior to 1928. There was no outside market for the stock, and only those whom the small number of stockholders desired to let in were permitted to buy. The number so admitted through holdings of stock are negligible. The stock at the time of making the first contract of 1928 was held as follows: A. B. Clark, H. W. Eddy, E. B. Graham, P. G. Black and J. H. Denny. Present officers of the company and their

salaries are: E. B. Graham, President, $7,500 a year; Palmer G. Black, Vice-President, $7,500 a year; E. B. Graham, Jr., Secretary-Treasurer, $7,500 a year; W. A. Graham, Assistant Treasurer, $3,000 a year. The same practice existed during the years 1936-1945, with salaries ranging from $2,700 to $8,000. At the hearing of the cause, it appeared that only one dividend—of 5%—had been made in ten years. The company was referred to by the President in his testimony as "our firm" and it was in evidence that its affairs were managed pretty much as a partnership.

For sometime prior to 1939, the defendant corporation had carried a substantial amount of insurance on the life of its President, Albert B. Clark, which, with other insurance, became in part the subject of the agreement set out below.

Under these circumstances the following contract was entered into between plaintiff's testate Clark on the one hand and the corporate defendant and other individual stockholders:

"NORTH CAROLINA
MECKLENBURG COUNTY

"THIS MEMORANDUM OF CONTRACT entered into and made this 18th day of August, 1928, by and between The Charlotte Supply Company, a corporation duly created and organized under the laws of the State of North Carolina, with its principal office in the City of Charlotte in said State, and A. B. Clark, H. W. Eddy, E. B. Graham, P. G. Black and J. H. Denny, owners and holders of the entire capital stock of the said corporation, THE CHARLOTTE SUPPLY COMPANY:

"WITNESSETH: That whereas the said Charlotte Supply Company has procured two policies of life insurance, one for $50,000 and the other for $35,000, aggregating the sum of $85,000 upon the life of the said A. B. Clark, who is president of the said Company, in the Lincoln National Life Insurance Company of Indiana, each of said policies being payable to The Charlotte Supply Company as the beneficiary thereof, the premiums upon the said policies to be paid by the said company:

"AND WHEREAS it has been agreed between the said Company and the said A. B. Clark and the other individual parties above named that upon the death of the said A. B. Clark the proceeds of the said policies shall be collected and placed in the treasury of the Company and shall be used for the uses and purposes hereinafter set forth:

"NOW, THEREFORE, in the consideration of the premises and for the further consideration of the sum of one ($1.00) dollar to each of said parties paid by the other and of the mutual promises and agreements

hereinafter set forth, the said corporation and individual parties hereto do hereby covenant and agree to and with each other as follows:

"1. That the said premiums upon the said life insurance policies shall be duly kept up and paid by The Charlotte Supply Company during the effective term of the said policies and each of them; that upon the death of the said A. B. Clark, The Charlotte Supply Company shall collect the proceeds of each of said policies and shall place the same in the treasury of the corporation.

"2. That the said A. B. Clark, being the owner of six hundred and forty-three (643) shares of the capital stock of The Charlotte Supply Company, covenants and agrees that upon his death the executor or administrator of his estate shall sell, assign and transfer to The Charlotte Supply Company the said six hundred and forty-three (643) shares of its capital stock at a price to be fixed by an appraisal thereof carried out and effectuated in accordance with the plan hereinafter set forth, it being understood that in the appraisal of the said stock the proceeds of the said life insurance policies shall be considered as a part of the assets of the said corporation.

"3. That the proceeds of the said life insurance policies shall by appropriate corporate action be paid over to the executor or administrator of the said A. B. Clark's estate in part payment of the purchase price of the said six hundred and forty-three (643) shares of the capital stock of the Charlotte Supply Company and that the balance of the purchase price of the said stock shall be paid by The Charlotte Supply Company out of its surplus, and The Charlotte Supply Company shall have the option of paying the said balance of the purchase price of the said stock in cash or in equal annual installments spread out over a period of ten (10) years or such less time as The Charlotte Supply Company may elect, all deferred payments to bear interest at the rate of six (6) per cent per annum and The Charlotte Supply Company shall have the right to anticipate the payment of any or all installments.

"4. The appraisal of the value of the said stock shall be made within the period of thirty (30) days after the death of the said A. B. Clark by a board consisting of three competent and disinterested appraisers, one of whom shall be selected by the executor or administrator of the said Clark's estate, and another of whom shall be selected by the Board of Directors of The Charlotte Supply Company and these two appraisers so selected shall appoint the third appraiser, and the appraisal or ward of the said three appraisers, or a majority of them, of the value of the said six hundred and forty-three (643) shares of the capital stock of the said company shall be construed as conclusively fixing the value thereof and shall be binding upon all of the parties hereto and the executor or administrator of the estate of the said Clark.

"5. It is the further purpose and plan of the parties hereto that $15,000 additional insurance shall be procured upon the life of the said A. B. Clark, making a total of $100,000 and it is understood and agreed that if and when the policy for the $15,000 additional insurance is procured, the premiums thereon shall be kept up and paid by The Charlotte Supply Company, and the said policy and the proceeds thereof shall be subject to the terms and provisions of this contract.

"IN WITNESS WHEREOF, The Charlotte Supply Company has caused this instrument to be duly executed by its President and attested by its Secretary and its corporate seal to be hereto affixed, and the said individual parties herein named have hereunto set their hands and seal the day and year first above written.

THE CHARLOTTE SUPPLY COMPANY,
By A. B. CLARK, *President*

Attest:
H. W. EDDY, Secretary

A. B. CLARK (SEAL)
H. W. EDDY (SEAL)
E. B. GRAHAM (SEAL)
P. G. BLACK (SEAL)
J. H. DENNY (SEAL)."

The defendant corporation complied with this contract, paid premiums and kept up insurance on the life of Clark as agreed, with the exception of one policy of $35,000 which was allowed to lapse, and also took over under the same agreement $8,000 of insurance on Clark's life which he had theretofore carried and paid the premiums thereon. The Supply Co. collected the insurance upon the death of Clark and deposited it in the bank in a special fund, where it still remains. The total of insurance so collected is $73,171.34. Sometime in 1939 the corporation obtained a default judgment against Albert B. Clark in the amount of $12,735.45, and in a proceeding supplemental to execution caused the stock of the said Clark to be put into receivership. Clark had meantime purchased 71 additional shares of stock from Eddy, making his holdings 714 shares.

Several propositions were made to Clark for adjustment of his indebtedness. In order to prevent the stock from being sold under the receivership, and at the insistence of the individual stockholders named, Clark entered into the following contract:

"NORTH CAROLINA
MECKLENBURG COUNTY

"THIS INSTRUMENT, executed this the 29th day of April, 1939, by and between The Charlotte Supply Company, a North Carolina corporation

with its principal office and place of business in the City of Charlotte, Mecklenburg County, North Carolina, party of the first part, Albert B. Clark, of Mecklenburg County, North Carolina, party of the second part, and Eugene B. Graham and Palmer G. Black, of Mecklenburg County, North Carolina, parties of the third part:

"WITNESSETH: That for and in consideration of the mutual promises and covenants hereinafter set forth, the parties above named do hereby agree and contract as follows:

"The Charlotte Supply Company, party of the first part, does hereby promise and agree immediately to cancel the judgment which it now holds of record against Albert B. Clark, the party of the second part, and to submit to a nonsuit and dismissal of that certain action now pending in the Superior Court of Mecklenburg County entitled, 'The Charlotte Supply Company, a corporation, plaintiff, v. Albert B. Clark, defendant,' and to request the discharge of the receiver appointed in said action and to request and to instruct the said receiver to deliver and return to Albert B. Clark, the party of the second part, all shares of stock which have heretofore been taken into possession by the said receiver, and in all respects completely to rescind and terminate the supplemental proceedings instituted in said action and all other measures and proceedings instituted for the purpose of collecting upon the judgment referred to.

"Albert B. Clark, party of the second part, does hereby promise and agree immediately to assign, endorse, transfer, convey and deliver unto the Charlotte Supply Company, party of the first part, the following certificates of stock and all right, title and interest which he, the said Albert B. Clark, party of the second part, has in and with respect to the shares of ownership in The Charlotte Supply Company represented by said certificates of stock:

Stock Certificate No. 64, issued August 1, 1918, for 107 shares of common stock of The Charlotte Supply Company.
Stock Certificate No. 68, issued February 7, 1922, for 10 shares of common stock of The Charlotte Supply Company.
Stock Certificate No. 69, issued February 7, 1922, for 26 shares of common stock of The Charlotte Supply Company.
Stock Certificate No. 84, issued February 18, 1937, for 71 shares of common stock of The Charlotte Supply Company.

"IT IS STIPULATED AND AGREED by and between all of the parties hereto that henceforth, The Charlotte Supply Company, party of the first part, shall pay to Albert B. Clark, party of the second part, a monthly salary which shall be equivalent to the monthly salary paid by The Charlotte Supply Company to Eugene B. Graham or to Palmer G. Black, whichever shall be the greater.

"It is stipulated and agreed that such salary shall be paid to Albert B. Clark only so long as he shall continue to own at least forty (40%) per cent of the outstanding common stock of The Charlotte Supply Company; and it is stipulated and agreed that except with the consent of Albert B. Clark, no further or additional shares of common stock shall be issued by The Charlotte Supply Company.

"IT IS STIPULATED AND AGREED that after the transfer by Albert B. Clark to The Charlotte Supply Company of the certificates of stock hereinabove designated, Eugene B. Graham and Palmer G. Black or either of them shall have the right and privilege to purchase the shares of stock represented by said certificates or any part thereof at a price of $61.60 per share and shall have the right to pay for the same by the cancellation of indebtedness which the books and records of The Charlotte Supply Company show to be due at the present time by The Charlotte Supply Company to Eugene B. Graham and Palmer G. Black. To the extent that such indebtedness shall not be sufficient to pay for as many of said shares of stock as Eugene B. Graham and Palmer G. Black or either of them may desire to purchase at the rate of $61.60 per share, then and beyond that point, Eugene B. Graham and Palmer G. Black, or either of them, shall pay for said shares of stock in cash at the rate of $61.60 per share.

"IT IS STIPULATED AND AGREED that at any time within twelve months from this date, upon demand by Albert B. Clark, The Charlotte Supply Company or Eugene B. Graham and Palmer G. Black shall sell, transfer and deliver to Albert B. Clark 100 shares of the common stock of The Charlotte Supply Company upon payment in cash by Albert B. Clark therefor at the rate of $61.60 per share.

"IT IS STIPULATED AND AGREED that Albert B. Clark shall pay all court costs which have accrued in the legal action and proceedings referred to above and shall further pay the fee or charge of the receiver referred to above.

"IN WITNESS WHEREOF, the parties above named have hereunto set their hands and seals, this the day and year first above written.

THE CHARLOTTE SUPPLY COMPANY
By: (s) PALMER G. BLACK
Party of the first Part.
(Corporate Seal)
ALBERT B. CLARK
Party of the Second Part.
(s) EUGENE B. GRAHAM (SEAL)
(s) PALMER G. BLACK (SEAL)
Parties of the Third Part.

"NORTH CAROLINA
MECKLENBURG COUNTY

"We, the undersigned, owners and holders of stock in The Charlotte Supply Company, do hereby join in the foregoing contract and agreement for the purpose of binding ourselves by the terms thereof; and we do hereby consent and agree that the terms of the foregoing contract are acceptable to us and we do hereby agree that the provisions of said contract shall be fully carried out as set forth therein. And we do hereby waive any and all rights we may have as stockholders of The Charlotte Supply Company or otherwise which may be inconsistent with the terms of the foregoing contract or which may in anywise interfere with the full execution thereof.

"Witness our hands and seals, this the 29th day of April, 1939.

(s) EUGENE B. GRAHAM, JR. (SEAL)
(s) THOS. R. PEGRAM (SEAL)

Witness:
(s) ALICE C. MOORE."

The Supply Company carried out this contract with Clark as respects his salary, which ceased at his death.

Of the 214 shares transferred by Clark to the corporation, 107 shares were taken by Black and E. B. Graham at $61.60 per share; and 7 additional shares were sold to T. R. Pegram at the same price, leaving 100 shares still in the treasury of the corporation. Later, in July and August, 1945, 45 shares each were issued to E. B. Graham and Palmer G. Black, which transactions plaintiff claims were without authority, and contrary to corporate law.

By this transaction the stock of A. B. Clark was reduced to 500 shares.

Upon several demands of the plaintiff executor that defendants carry out the 1928 contract by purchasing the remaining Clark stock and applying thereon the $73,171.34 in accordance with said agreement, the defendants declined to take any action, contending that the 1939 agreement in legal effect abrogated the 1928 agreement, and that Clark by the transfer of 214 shares to the corporation, with options permitting its acquisition by certain of the defendants, had made it impossible for Clark to perform his part of the contract by delivering the 643 shares named therein. The plaintiff contended that the effect of the 1939 contract was merely to modify the 1928 contract, leaving its more important considerations and engagements unimpaired, and that in equity these remaining provisions, as they apply to the stock of Clark, should be carried out; otherwise, it was contended, the stock will be made worthless because of the circumstances, and this was well understood by the parties

to the contract at the time it was made, and that these conditions still exist. Amongst these circumstances, plaintiff stressed the fact that the Supply Co. is a close corporation, that there is no outside market for the stock; that the practice of distributing the profits through salaries to the office-holding stockholders, without declaring dividends, will destroy the utility and the value of plaintiff's stock and make it to all intents and purposes worthless, while at the same time having a nominal book value; and that it would be contrary to the intent of these contracts—construed together, and inequitable; that equity demands the enforcement of the original contract with respect to the purchase of the stock, and the application thereto of the insurance money as a trust fund; and that under the circumstances adequate compensation as damages for breach of contract cannot be afforded plaintiff.

Upon the hearing the appraisal of the 500 shares of the Clark stock as of the end of thirty days after his death was determined by the trial judge, in accordance with stipulations of the parties, without the intervention of the jury, and the value found to be $102,500.

The case was submitted to the jury on issues mainly involving propositions of law, and, on instruction by the court, the issues were answered favorably to plaintiff.

Judgment was awarded declaring the insurance collected on the life of Clark a trust fund, and directing its application upon the purchase price of the 500 shares of stock at the court appraised value, and that it be kept pending the final termination of the litigation and used in no other way; that the balance of the purchase price be paid out of other corporate funds; that immediate payment of the said purchase price and interest thereon be made by the defendant Charlotte Supply Co. and its officers in its behalf upon presentation of the stock certificates appropriately endorsed. Defendants appealed.

Robinson & Jones for plaintiff, appellee.
Guthrie, Pierce & Blakeney for defendants, appellants.

SEAWELL, J. We have two transactions to consider on appeal—the 1928 contract respecting the sale of Clark's stock to the defendant corporation, still not fully performed, and the 1939 contract under which the corporation acquired a portion of the stock theretofore promised it. The appeal raises the question whether the 1928 contract was abrogated or merely modified by the subsequent agreement and incidental transfer of stock, and if modified, to what extent; and specifically whether the provisions of the 1928 contract respecting the purchase of the Clark stock and application thereto of the insurance on Clark's life still subsist and are applicable to the 500 shares of stock now in the hands of the plaintiff.

In the court below this question was determined on pertinent issues by the jury, but on instruction by the court to which defendants excepted. The exception, however, does not seem to be directed to the form of the instruction, but to the supposed error in law in implying that the plaintiff was entitled to recover at all upon the facts. In fact, the appellants do not raise the question whether it was the intention of the parties to rescind the existing contract and substitute a new agreement for it—except as might be deduced from the legal effect of the later instrument, which is not a jury question.

The second instrument, touching only in part the subject matter of the first, does not contain any express agreement from which the purpose of the parties can be ascertained. In its face, the 1928 contract is not mentioned at all. We are left to determine the effect of the later contract upon the former from the implications contained in the instruments and relevant circumstances competent to aid in interpretation. *Redding v. Vogt,* 140 N. C., 562, 564, 567, 53 S. E., 337; 12 Am. Jur., p. 1013, sec. 433; 17 C. J. S., p. 885, ss. 394, 395.

The making of a second contract dealing with the subject matter of an earlier one does not necessarily abrogate the former contract. To have the effect of rescission, it must either deal with the subject matter of the former contract so comprehensively as to be complete within itself and to raise the legal inference of substitution (*Redding v. Vogt, supra,* and citations), or it must present such inconsistencies with the first contract that the two cannot in any substantial respect stand together. *Redding v. Vogt, supra; Myers v. Carnahan,* 61 W. Va., 414, 57 S. E., 134; Am. Law Inst., Rest., Contracts, Vol. 2, p. 408; 2 Black on Rescission and Cancellation, p. 530. Where, upon inspection of the instruments and consideration of the circumstances under which they were executed, it appears that rescission has not taken place, those provisions of the former instrument which are not substantially involved in the contradictions and thereby revoked still subsist and may be enforced. Rest., Contracts, *supra,* Vol. 2, sec. 408; 17 C. J. S., p. 886, sec. 395, *supra;* 13 C. J., pp. 603 and 604, sec. 628. Before the new contract can be accepted as discharging the old, the fact that such was the intention of the parties must clearly appear. *Menefee v. Rankins,* 158 Ky., 78, 82, 164 S. W., 365. If upon comparison it should be found that rescission has not been effected, the two instruments must be read and construed together in ascertaining the intent of the parties and in determining what portions of the agreement are still enforceable. In such construction the rules applied to interpretation of a single contract are applicable, perhaps with added propriety. We must, of course, keep within the bounds of the writings, but the circumstances surrounding their execution, the relation of the parties and the object to be accom-

plished, are all to be consulted in arriving at the intent. *Lumberton v. Hood,* 204 N. C., 171, 167 S. E., 641; *McMahan v. R. R.,* 170 N. C., 456, 87 S. E., 237.

The appellants present their argument for rescission in somewhat inconsistent formulas: First, that Clark, having disposed of a substantial part of his stock in a later transaction, made it impossible for his executor to deliver the quantity of stock contracted for; and second, that Clark having complied with the main purpose of the contract sought to be enforced under a new and different agreement, and for a new consideration, the latter is necessarily substituted for the former and works its abrogation.

In the first place, the appellants rely on the broad proposition of law that Clark by the voluntary transfer of 214 shares of stock to defendants (including 71 shares acquired subsequently to the original agreement), thereby reducing his total stock to 500 shares, had rendered it impossible for his executor to deliver the 643 shares promised, and that the substantial difference between the number of shares promised and the number of shares tendered amounts in law to a complete failure in performance, discharging the defendants from the obligation to purchase. *Edgerton v. Taylor,* 184 N. C., 571, 115 S. E., 156; *Wade v. Lutterloh,* 196 N. C., 116, 144 S. E., 694; *Seed Co. v. Jennette Bros. Co.,* 195 N. C., 173, 141 S. E., 542; *West v. Ins. Co.,* 210 N. C., 234, 186 S. E., 263; *Supply Co. v. Roofing Co.,* 160 N. C., 443, 76 S. E., 498; *Ducker v. Cochrane,* 92 N. C., 597. That might be consistently argued and maintained under the cited authorities if the transaction had been between outsiders and at arms length, and if it had been simply one of purchase of stock on the open market as an investment, and if the transfer involved no more than payment of the purchase price. But these negative conditions are not present and the existing positive conditions are all *contra.* Both transactions were with the defendant corporation, in which Clark was a stockholder. The later agreement resulted in the immediate transfer to it of a portion of the stock originally promised, albeit defendants' contend upon a new consideration. The circumstances under which the contracts were made enter into their interpretation, strongly repelling the application and conclusiveness of the principle appellants regard as decisive.

An inspection of the 1928 contract, now under immediate discussion, and the facts of record bearing on it, convince us that the *identity* of the stock held by Clark more importantly engaged the attention of the contracting parties than its *quantity* in working out the mutual protection which was the gist of the agreement, and that it is at present more deeply involved in the equities of decision. The contract contemplates the purchase of all of Clark's stock en bloc, referring to it by specific description. It was referred to specifically and given a character by a formal listing

of each share as constituting the stock held by Clark; but, which is of more importance, the stock had a relation to the end to be accomplished which necessitated its treatment as an entirety. The purpose, in the light of the admitted facts, was to prevent Clark's stock from going into outside hands at his death and to provide a market for it in that event which his widow could not otherwise enjoy. The *purchase* of the stock, its *acquisition* by the corporation was the *desideratum,* and not its investment value. This more clearly appears when we note that no purchase price was named, but only a method provided for ascertaining its value after Clark's death, which was to be its purchase price. The whole contract faces toward Clark's death and the consequences that might follow upon that event—the effect on a business in which almost all the stockholders in the corporation were officers receiving salaries with little or no regard for the character or extent of the service performed. It was primarily intended to protect the *status quo* from outside interference. On the one part it was necessary to see that the stock did not fall into the hands of strangers through sale at the death of Clark, and on the other it was necessary to see that the stock left to Clark's widow should not, in the process of affording protection to his associates, be left without a market, and while having a value on the books, become worthless to his widow as an income producing investment. The alternative for Clark was obvious; sale of his entire stock in the only market available, that is, within the confines of the corporation. With these considerations before us, it is clear that the sale of the 214 shares of stock under the 1939 agreement to the corporation to which it had been previously contracted cannot be regarded as an independent, unrelated transaction, *ipso facto* releasing defendants from the obligation of purchasing the remaining stock.

In this outline may also be found the answer to the view urged by counsel that *corporate control* was the thing bargained for in the 1928 contract, and that this, having been surrendered by Clark and acquired by defendants upon a new consideration in 1939, no further performance on their part is required. The position is expressed in the brief:

"Upon the slightest consideration of this case, it is apparent that the purpose of the individual defendants in entering into the 1928 contract was that upon Clark's death, they would be assured of becoming the majority stockholders of the defendant Company instead of Clark's controlling interest in the Company passing into alien hands—with all the hazards which that would imply for the jobs and fortunes of these defendants. The essential thing of value in the 1928 contract for them was the securing of hold on a sufficient number of shares to constitute, with that they already held, control of the defendant Company. . . . This brings us to the crux of the case: In 1939, Clark, for a new and

separate consideration and value, conveyed to the defendants that which had been for them the essential thing of value in the 1928 contract, namely, a quantity of stock representing controlling interest in the Company. Thus Clark in effect, in 1939, lifted the heart out of the 1928 contract and for a newly given value, conveyed it to the defendants. Thereby, he incapacitated his executor from now delivering to the defendants the very essence and substance of what the 1928 contract stipulated his executor would deliver."

It may be that some of the individual stockholders signing the 1928 contract with the corporation had the ultimate purpose of exercising corporate control by combining their holdings after the purchase of the Clark stock had been consummated. But this was not within the terms of the instrument; it could follow only from understanding or action *dehors* the contract and with which it has nothing to do. The corporation agreed to purchase the stock and all of the stockholders signed in token of assent. Corporate control was not in terms or in legal effect bargained to any stockholder or group of stockholders. A contract to convey to the corporation its own stock, although a majority in amount, does not have that effect and cannot be so construed.

In fact, the shifting of corporate control to any individual or group within the circle of stockholders does not appear to have been a matter of importance to any of the contracting parties at the time. The most favorable inference with respect to the significance of corporate control to be drawn from the circumstances under which the contract was made and the conditions sought to be met falls short of appellants' postulated defense. The inference is that it would be an additional, but by no means the whole, embarrassment if Clark's stock went into outside hands at his death. The holding of that amount of stock, or any considerable amount, by strangers who might be dissatisfied with the manner of conducting the corporation, and the probability of resort to legal redress, was serious enough to induce the contract and of sufficient substance to repel the suggested defense that the purpose of the original contract had been accomplished under a new agreement. On the other hand, the fact that Clark's stock carried with it corporate control was necessary to its protection in case of his death and was the only thing that would open a way for an outside market in that event. The advantage was mutual, and the mutual protection was the basis of the agreement. There is not sufficient reason in the bare facts of the 1939 contract to infer that the parties had in mind to abrogate it. We can see no satisfactory principle upon which the 1928 contract can be brought into comparison with the subsequent transaction other than that which we have already stated; that its primary and controlling purpose was to keep the stock out of the

hands of strangers and afford Clark a market for his stock, which his widow might not have been able otherwise to obtain.

The intent of a contract, unlike that of a will, is necessarily composite, often concessive, essentially dual. There can be no unilateral purpose in a bilateral contract. When the purpose is once brought into the contractual relation, it becomes relative, falls into the legal perspective. Therefore, we cannot, without destroying the intent of the instrument, segregate and paramount an incidental advantage moving to either party in derogation of the correlative rights of the other.

The supposed inconsistencies raised between the two instruments by the 1939 contract are unsubstantial. It is argued that the new considerations given for the purchase of the 214 shares of stock are inconsistent with the provisions of the prior agreement, and have the effect of abrogation. The variant considerations are pointed out as: (a) The discharge of the judgment amounting to $12,735.45 held by the corporation against Clark in payment for the 214 shares transferred to the company; (b) the agreement to pay to Clark a substantial salary so long as he held 40% of the stock in the company; (c) lifting the receivership from his property.

On scrutiny it will be found that the monetary consideration was not substantially different in source and character from that which he had been promised in the 1928 contract and that which he had theretofore enjoyed as a holder of stock, and to which he was entitled by reason of their method of distributing profits; and that the termination of the receivership was a mere incident of payment of the judgment. To regard it as more would not be advantageous to appellants on equitable grounds. It would merely add to the impression that the action taken by the corporation and its stockholders was in the nature of a designed prevention of performance.

As to the price paid for the stock, it came from the surplus assets of the corporation, just as was originally intended. The 1928 contract contemplated that the insurance fund would not be sufficient to pay for the stock, and that it should be supplemented by the surplus funds of the corporation. There is this difference, however, which moved to the advantage of the defendants: Under the 1939 agreement the price fixed upon the stock was approximately $61.60 per share, while the ascertained value for the 500 shares of stock as of Clark's death was $102,500, resulting in a large saving to the purchasers at that time.

The salary promised Clark was merely a continuance of the method of distributing the profits of the corporation through salaries and was proportionately no greater than that paid other officer-stockholders whose services were neither obligatory nor significant, and the salary was comparable to that he had previously enjoyed. Appellants have claimed for this provision the significance it would have had if paid to a stranger

for an entirely new performance; it cannot be given that effect. The mere continuation of a former practice cannot have that effect.

In other respects, the provisions with respect to Clark's salary are significant. There was no agreement that it should be paid up to the time of his death, but only so long as he held 40% of the stock, that being the amount he then held. Its effect, therefore, was to freeze the stock in his possession so that he could not sell any of the stock on the outside market, even had there been one; and this tended to strengthen rather than defeat the objects of the original contract.

On the whole, the later transaction may be consistently regarded as a partial performance of the original contract on both sides, intended to establish a *modus vivendi* under the new conditions presented until the corporation should have the funds with which to complete the purchase—thus anticipating *pro tanto* the final delivery.

Although, as we have seen, the 1939 contract can be reconciled with the substantial provisions of the 1928 contract without abrogation of that instrument, another circumstance connected with the execution of the later instrument must receive consideration.

The record shows that the 1939 contract, under which Clark transferred to the Corporation part of the stock he had contracted to deliver, was induced and brought about by the act of the defendants themselves or those who were then concerned in the purchase of the stock, and that they admittedly received the benefit of the stock transferred. While there is some difference in the factual situations in cited cases and in the phraseology employed in the opinions on the subject, the controlling principle in all of them is clear: Where complete performance is rendered impossible by a party to a contract who has the duty of counter performance, the latter cannot take advantage of his own act and refuse performance on his part. *Whitlock v. Lumber Co.*, 145 N. C., 120, 58 S. E., 909; *Harris v. Wright*, 118 N. C., 422, 24 S. E., 751; *Navigation Co. v. Wilcox*, 52 N. C., 481; *Harwood v. Shoe*, 141 N. C., 161, 53 S. E., 616; 12 Am. Jur., p. 885; 12 Am. Jur., p. 958, Text and Notes, 1415; Rest., Contracts, sec. 295; *Morrison v. Walker*, 179 N. C., 587, 103 S. E., 139; Willison on Contracts, sec. 668.

In delivering the opinion of the Court in *Navigation Co. v. Wilcox, supra,* and citing *Lord Coke's* illustration of the rule, *Chief Justice Pearson* stated the principle in this language: "One who prevents the performance of a condition or makes it impossible by his own act shall not take advantage of the nonperformance."

Justice Brown, speaking for the Court in *Harwood v. Shoe, supra,* says: "This rule applies with especial fitness where the party is impelled by personal interest."

But apart from this consideration, there is little or nothing in the 1939 contract that would lead to the conclusion that the parties to the new contract intended otherwise than to create an *ad interim* arrangement adjusted to the new conditions until final compliance with the terms of the original contract became possible. Under the 1928 contract, and corporate approval thereof, the insurance upon Clark's life was set apart as a trust fund, to be applied to the purchase of his stock after his death. He contributed to that fund more than one-half for the eleven years preceding that contract, and the very substantial sum of 40% from the making of that contract to his death. Looking at the situation as it affected his widow, the corporate assets which would otherwise have been hers were constantly depleted in the creation of this fund down to the time of her husband's death. Meantime, the character of that trust fund remained the same, without any attempted corporate action to change it, and with no notice whatever to Clark of any intention to do so. The defendants are now estopped from claiming it as a part of the general corporate assets, freed from any commitment to the purpose of its creation.

As we have seen, it is incumbent upon the proponents of rescission to make it clear that the second instrument was so intended or has that effect. In passing upon that question, we are not required to assume that men have acted unreasonably or inequitably, when the contrary inference is apparent.

The purchase of Clark's stock under the 1928 contract was by far the most important and outstanding engagement of the company, inevitably inviting attention of those making the new contract if the purpose was thereby to terminate it. It is hardly likely that business men, if they had intended that the 1939 instrument should discharge the obligation of such an important nature, would have failed to give some expression of this intention in the instrument which appellants now contend has that effect. The inference is that they did not so intend.

The conduct of the parties in dealing with the contract indicating the manner in which they themselves construe it is important, sometimes said to be controlling in its construction by the court. *Smith v. Paper Co., ante,* 47; *Hood v. Davidson,* 207 N. C., 329, 177 S. E., 5; *Wearn v. R. R.,* 191 N. C., 575, 132 S. E., 576; *Old Colony Trust Co. v. Omaha,* 230 U. S., 100, 57 L. Ed., 1410. For eleven years prior to 1939, Clark held all of the stock in readiness to comply with his part of the bargain, and the defendants carried out theirs, paying the premiums on the insurance in contemplation of the purchase of the stock. After the 1939 contract they continued to pay the insurance with no indication, as we have noted, that it was not regarded as a trust fund for the purchase of the stock and with no corporate action attempting to change its charac-

ter, and when the insurance was collected it was deposited in a special fund. The facts of the case strongly indicate that the obligation to purchase the stock was regarded as still outstanding.

We conclude that rescission of the 1928 contract was not in contemplation of the parties in the making of the 1939 agreement, and that no abrogation or rescission has been made of its substantially mutual obligations with respect to the purchase and sale of the stock. The obligation created by the earlier contract still applies to the 500 shares of stock now in the hands of the plaintiff executor, to be performed in accordance with the provisions of the contract.

The question presented to us upon appeal has been that of rescission or modification; the defendants raised no question as to the nature of the remedy sought. The very able argument of the contentions on both sides must account for the length of this discussion.

It is our conclusion that the result reached in the trial is in accord with the applicable principles of law and is justified by the facts of record.

We find

No error.

MRS. NANCY HAYES DEATON, ADMINISTRATRIX OF THE ESTATE OF EDWIN I. HAYES, DECEASED, v. BOARD OF TRUSTEES OF ELON COLLEGE.

(Filed 5 June, 1946.)

1. Trial § 22a—

On motion to nonsuit, the evidence is to be considered in the light most favorable to plaintiff, and defendant's evidence which tends to impeach or contradict plaintiff's evidence will not be considered.

2. Appeal and Error § 40i—

On appeal from the granting of defendant's motion to nonsuit, exceptions to the admission of evidence offered by defendant are without merit, since defendant's evidence in derogation of plaintiff's evidence is not considered in determining the sufficiency of the evidence.

3. Appeal and Error § 39d—

The exclusion of evidence, even if competent, cannot be held harmful when the ultimate fact sought to be proven thereby is fully established by other evidence.

4. Master and Servant § 55i: Judgments § 32—

Judgment was entered in a proceeding under the Workmen's Compensation Act denying recovery on the ground that deceased workman was an independent contractor and not an employee. Thereafter this action for wrongful death was instituted. The beneficiaries of the estate and the claimants in the former proceeding are the same. *Held:* The prior judg-

ment is *res judicata* as to the *status* of the workman but does not bar the action for wrongful death.

5. Master and Servant § 11—

The contractee is not liable for injury sustained by an independent contractor in the performance of the work unless the injury is the result of latent dangers of which the contractee knew or should have known and of which the contractor had no knowledge and could not reasonably have discovered.

6. Electricity § 6—

In the handling of live wires by an electrician ordinary care means the highest degree of care.

7. Master and Servant § 11: Electricity § 10—Electrician's want of care for own safety held sole or contributing proximate cause of injury.

Plaintiff's evidence disclosed the following circumstances: Plaintiff's intestate, an experienced electrician, was employed as an independent contractor to replace six poles, involving the transfer of five wires from the old to the new poles. Intestate knew that two of the wires were light circuit wires and three were high tension wires. One of the high tension wires was fastened to the side of the poles with house brackets in a manner usually employed for low tension wires solely. Intestate could have had the current turned off, and also had rubber gloves which would have protected him from injury, but caught hold of the high tension wire with his bare hands, while standing on wet ground, and was electrocuted. *Held:* Intestate's failure to follow either of the safe courses open to him, and his adoption of a patently dangerous and unsafe method, which would have resulted in serious injury, at least, even if the wire had been a light circuit wire, was the sole or a contributing proximate cause of his injury and death, precluding recovery regardless of whether defendant was negligent in failing to warn him of the unusual position of the high tension wire.

APPEAL by plaintiff from *Williams, J.,* at September Term, 1945, of ALAMANCE. Affirmed.

Civil action to recover damages for wrongful death.

One phase of the controversy involved on this appeal was here on a former appeal. *Hayes v. Elon College,* 224 N. C., 11. Many of the facts are there stated. At the risk of repetition we add the following, gleaned from plaintiff's evidence, as being material here:

A part of defendant's local electric light system—six poles and wires attached thereto—was, as alleged by plaintiff, in a dangerous and defective condition. The deceased and his associates, Grimes Moore and Joe Dixon, were engaged to make the necessary repairs thereto. They were to replace six old poles with new poles and transfer the five wires from the old poles to the new poles.

Three of the wires carried 2,300 volts of electric current each and two carried 110 volts each. All the wires were strung on cross arms

until they reached the fourth pole. There one dropped below the cross arms and was strung on house brackets attached to the poles for the distance of two poles and was then again raised to and strung on the cross arms.

At the time deceased and his associates contracted to do the work they knew that three of the wires were high tension and two were light circuit wires, but they did not know which were high tension and which were low voltage. Defendant failed to advise or warn them in respect thereto.

If a person is standing on wet ground and comes in contact with live electric current the current becomes more violent and dangerous and if a person is standing on wet ground and comes in contact with 110 volts with no insulation he may suffer death therefrom, though it is possible to release him from the wire before it becomes fatal.

When working on live wires skilled linemen usually use rubber equipment, rubber gloves, insulated hooks and snakes which furnish protection from electricity up to 10,000 volts, and deceased had rubber gloves available at the time of the accident which caused his death.

The customary practice prevailing as to "electric power lines" governing the installation and maintenance of electric transmission wires requires that a wire installed and maintained upon house brackets located below the cross arms carry only 110 volts of current, but witnesses for plaintiff were not advised whether such practice prevailed for local plants such as that of defendant. However, a skilled electrician, seeing wires strung on house brackets, would believe and conclude that they were low voltage wires. He could not determine how much current a wire carried by merely looking at it.

When deceased and his associates reported on the premises of defendant to begin the work they had a conversation with a Mr. Lovett, agent of the defendant.

"Mr. Lovett stayed and talked a little and then went back to the office, but we had a conversation about cutting off the current when we first got there. I do not remember whether I asked or Mr. Hayes asked. Mr. Lovett said that we could have it off but that he would like for us to keep it on as long as we possibly could on account of the heating and cooking, and Mr. Hayes and I decided to set the poles before we cut off the current, and Mr. Lovett did not have anything to do with that. He just said leave it on as long as possible for heating. . . . He told us who to see to cut it off, a man who worked there. . . . We were both experienced linemen and we knew the current was on those lines." After Mr. Lovett had gone back into the building, deceased and his associates decided to set the poles before they cut off the current.

The contractors proceeded to set the poles without transferring the wires until they came to the fifth pole. "Mr. Hayes said we could go ahead and put the poles in the holes and come back and tamp them and then cut off the current; that it would be safer . . ." When they came to the fifth pole they found it was necessary to detach the wire hung on house brackets on the fourth and fifth poles in order to set the fifth pole properly. Moore went to get his climbers and safety belt so as to climb the pole and detach the wires. He relates what happened thereafter as follows:

"Well, I came back (from the car) and asked Mr. Hayes if he knew what was on that wire and he said he did not think there was anything and to wait and he would look, and he walked down another span and hollered back and said he thought that was a control wire going into the kitchen and for me to go ahead and throw it down and I untied it on that pole and let down the telephone—and let it down and then these two. . . . We had not tested it out then and could not tell whether the wire dropping down had 2,300 volts. . . . We had not looked and still could not tell which carried the 2,300 volts, and we had not looked when we came to the fifth pole. . . . The only thing I did was ask Mr. Hayes about taking the line down, and he said to take it down, that it was a control line, when, if he had walked on nearer, he would have seen that it was 2,300 on that wire that I asked Mr. Hayes about. . . . We both had our gloves with us. We were not going to unhitch the wires until we had all the poles set and that is the reason we did not carry the gloves out there. We both had pairs of rubber gloves in the automobile . . . the reason Mr. Hayes and I did not take our gloves out of the car was that we had not intended to monkey with the wires until we had the poles all set, and when we got to the fifth pole and had to change the wires I do not know why I did not go and get my gloves."

As related by another witness:

"Mr. Moore or Mr. Hayes, one, wondered if there was anything on that wire, and Mr. Hayes did not know. He said he would step back and look it over. . . . When Mr. Moore said 'I wonder if anything is on that wire,' Mr. Hayes said, 'I will look.' "

When Moore untied and dropped the wire on the fifth pole, deceased, while standing on the wet ground, caught hold of it in his right hand to pull it out of the way. He received a severe electric shock. His associates had the current cut off and got him loose from the wire, but he died from the shock. If he had used rubber gloves he would not have been hurt.

At the conclusion of all the evidence the defendant renewed its motion to dismiss as in case of nonsuit, first entered when plaintiff rested. The motion was allowed and judgment of nonsuit was entered. The plaintiff excepted and appealed.

Smith, Wharton & Jordan, Luke Wright, and Thomas C. Carter for plaintiff, appellant.

C. L. Shuping and L. P. McLendon for defendant, appellee.

BARNHILL, J. On plaintiff's exception to the judgment dismissing the action as in case of nonsuit, the familiar rule which requires that the evidence be considered in the light most favorable to the plaintiff prevails. Evidence of the defendant, whether competent or incompetent, which tends to impeach or contradict the testimony offered by plaintiff, is not to be considered. It follows that the assignment of error based on the exceptions to the admission of testimony is without substance.

The exclusion of testimony respecting alleged burns on the trees near the electric line, offered by plaintiff for the purpose of showing that defendant had notice of the defective condition of its line, if competent, does not constitute harmful error. Plaintiff alleges that the poles were rotted and splintered and the wires were of sundry gauges, were spliced together in numerous places and the insulation thereon was badly frayed and worn, by reason of which said poles and wires were in a highly dangerous and defective condition. They were experienced electricians and were aware of the dangerous situation created by such defective and worn condition. Furthermore, "the burns" were visible to the naked eye. If they tended to give notice to the defendant they likewise served to put plaintiff's intestate and his associates on guard.

The widow and children of the deceased were the claimants in the former proceeding. *Hayes v. Elon College,* 224 N. C., 11. They are the ultimate beneficiaries in case of recovery in this action. Hence the former decision of this Court is *res judicata* as to the status of deceased as an independent contractor in his relations with defendant. *Current v. Webb,* 220 N. C., 425, 17 S. E. (2d), 614. It does not, however, bar plaintiff's right to maintain this action. In the former proceeding recovery depended upon the existence or nonexistence of the master-servant relationship. Here the alleged negligence of the defendant is the gravamen of plaintiff's cause of action. The issues involved are not the same. *Odum v. Oil Co.,* 213 N. C., 478, 196 S. E., 823.

So then, we come to the one primary question posed for decision. Did plaintiff offer any testimony which, when considered in the light most favorable to her, tends to show that the death of her intestate was proximately caused by the negligence of defendant, and, if so, does her testimony further show as a matter of law that deceased failed to exercise ordinary care for his own safety?

Many of the authorities cited both by plaintiff and defendant involve the master-servant relationship which imposes upon the master duties in

excess of those which an owner-contractee owes to an independent contractor. So then, while helpful, they are not directly in point.

Ordinarily an employer of an independent contractor may not be held liable for injuries which have been sustained in the performance of the contract by the contractor himself. 35 Am. Jur., 588; *Arizona Binghampton Copper Co. v. Dickson,* 195 Pac., 538, 44 A. L. R., 881; *Roddy v. Mo. P. R. Co.,* 15 S. W., 1112, 12 L. R. A., 746, 24 Am. St. Rep., 333, Anno. 44 A. L. R., 891.

Since independent contractors are not servants of the contractee a contractee, in the absence of some special circumstance or circumstances imposing liability, is not liable as master for injuries sustained by an independent contractor, the contractee's liability, if any, being the same as that imposed on him with respect to third persons generally. 39 C. J., 1349, sec. 1567.

Although there are decisions *contra,* it is generally held that one who is having work done on his premises by an independent contractor is under the obligation to exercise ordinary care to furnish reasonable protection against the consequences of hidden dangers known, or which ought to be known, to the proprietor and not to the contractor or his servants. 39 C. J., 1345, sec. 1562.

The rule applies only to latent dangers which the contractor or his servants could not reasonably have discovered and of which the owner knew or should have known. 39 C. J., 1348, sec. 1566; 2 Shearman & Redfield, Negligence, 689 (Rev. Ed.); 3 Cooley, Torts (4th Ed.), 426.

The owner is not responsible to an independent contractor for injuries from defects or dangers of which the contractor knew or should have known, "but if the defect or danger is hidden and known to the owner, and neither known to the contractor, nor such as he ought to know, it is the duty of the owner to warn the contractor, and if he does not do this he is liable for resultant injury." *Douglass v. Peck & L. Co.,* 89 Conn., 662, 95 Atl., 22; *Arizona Binghampton Copper Co. v. Dickson, supra; Gowing v. Henry Field Co.,* 281 N. W., 281; Anno. 44 A. L. R., 894; *Steele v. Grahl-Peterson Co.,* 109 N. W., 882. See also *Highway Comm. v. Transportation Corp., ante,* 371.

"It has been repeatedly held that where one knowingly places himself in a place of danger which he might easily have avoided he assumes all risks incident thereto." *Dreier v. McDermott,* 141 N. W., 315, 50 L. R. A. (N. S.), 566; *Gowing v. Henry Field Co., supra.* And the owner-contractee is not liable for injuries resulting from conditions obviously dangerous and known by the contractor to be so. *Highway Comm. v. Transportation Corp., supra; Gowing v. Henry Field Co., supra.*

It follows that plaintiff's one material allegation of negligence is to the effect that the stringing of a high tension wire on house brackets

below the cross arms on the poles constituted a substandard and improper installation and maintenance of high tension wires; that such improper installation created a latent, perilous and highly dangerous condition "of which the plaintiff's intestate did not have and could not have had any prior notice"; and that the defendant negligently and wrongfully failed to notify or warn plaintiff's intestate thereof.

Whether plaintiff offered any evidence which tends to sustain the allegation is seriously debated. He first said he knew the voltage on this wire and then undertook to investigate to make sure. But he either failed to go where he could see or, having seen, disregarded the information thus obtained. Hence it is urged that he did not rely upon any implied representation as to the voltage of the wire arising out of the manner of its maintenance, and therefore defendant's failure to give warning was not, and could not be held to constitute, a proximate cause of his death.

This we need not now decide, for we are of the opinion that the failure of the deceased to exercise ordinary care for his own safety, as disclosed by plaintiff's evidence, whether denominated primary or contributory negligence, was such as to induce the one reasonable conclusion that his own lack of due care proximately caused or contributed to his injury and death.

In appraising his conduct we may assume, without deciding, that the opinion evidence tendered by plaintiff was competent and that the maintenance of the wire partly on house brackets reasonably led deceased to believe it was a low voltage wire. At the same time we must bear in mind that to constitute want of due care on his part it is not required that he should have anticipated that the peril was a deadly one. It is sufficient if he knew or should have known that substantial injury was likely to result from handling a low tension wire in such manner under the conditions then existing. *Rushing v. Utilities Co.*, 203 N. C., 434, 166 S. E., 300: Furthermore, in respect to the work being performed by him, ordinary care means the highest degree of care. *Ellis v. Power Co.*, 193 N. C., 357, 137 S. E., 163; *Calhoun v. Light Co.*, 216 N. C., 256, 4 S. E. (2d), 858; *McAllister v. Pryor*, 187 N. C., 832, 123 S. E., 92; *Turner v. Power Co.*, 154 N. C., 131, 69 S. E., 767; *Haynes v. Gas Co.*, 114 N. C., 203.

The condition of bad repair was a moving cause for engaging the deceased and his associates to do the work contemplated by their contract. Deceased was not a servant ordered by defendant to do what he did. He was an expert exercising his specialized knowledge according to his own judgment and with his own devices. He knew the danger inherent in the condition of bad repair as well as the peril incident to handling live wires with the naked hand while standing on wet ground. He was

aware of the fact that the danger of handling high tension and low voltage wires under such conditions differed in degree only and that, whether the wire was high tension or low tension, it was dangerous to attempt to handle it without using the protective devices he had at hand.

He knew it was a live wire but did not know the quantity of current it carried. Means of ascertainment were at hand. By tracing the wire a short distance in either direction he could have discovered it was a high tension wire. He likewise had at hand adequate means of protection. He could have used his rubber gloves or he could have directed that the current be cut off. By pursuing either of these courses he could have handled the wire in perfect safety.

Thus it appears that the danger was obvious. *Rushing v. Utilities Co., supra; Perry v. Herrin,* 225 N. C., 601; *Benton v. Building Co.,* 223 N. C., 809, 28 S. E. (2d), 491; *Morrison v. Mills Co.,* 223 N. C., 387, 26 S. E. (2d), 857; *King v. Mills Co.,* 210 N. C., 204, 185 S. E., 647; *Scott v. Telegraph Co.,* 198 N. C., 795, 153 S. E., 413; *Lunsford v. Mfg. Co.,* 196 N. C., 510, 146 S. E., 129; 38 Am. Jur., 750, sec. 91; 45 C. J., 875, sec. 306 (6).

At least two perfectly safe courses were open to the deceased, and yet he chose to proceed to handle a live wire with his bare hands while he was standing on wet ground. He discarded the safe and chose instead the patently dangerous and unsafe method of handling a dangerous instrumentality. *Covington v. Furniture Co.,* 138 N. C., 374; *Groome v. Statesville,* 207 N. C., 538, 177 S. E., 638; *Williams v. Mfg. Co.,* 180 N. C., 64, 104 S. E., 31; *Clements v. Power Co.,* 178 N. C., 52, 100 S. E., 189; *Dunnevant v. R. R.,* 167 N. C., 232, 83 S. E., 347; *Dermid v. R. R.,* 148 N. C., 180; 29 C. J. S., 608, sec. 53; 45 C. J., 961; 38 Am. Jur., 873, sec. 193. His conduct in so doing evidenced a failure to use ordinary care for his own safety which, if not the sole proximate cause of his injury and death, was at least a direct contributing proximate cause thereof.

We have carefully examined the authorities cited and relied on by plaintiff, including *Mack v. Marshall Field & Co.,* 218 N. C., 697, 12 S. E. (2d), 235. They are not at variance with the conclusion here reached. On the other hand, *Rushing v. Utilities Co., supra,* is in point. See also *Piedmont Elec. Illuminating Co. v. Patterson's Adm'x.,* 84 Va., 747, 6 S. E., 4; *Anderson v. Light Co.,* 46 Atl., 593; *Barnett v. Electric Co.,* 10 Fed. (2d), 111.

For the reasons stated the judgment below must be

Affirmed.

JEFFERSON STANDARD LIFE INSURANCE COMPANY v. GUILFORD COUNTY.

(Filed 5 June, 1946.)

1. Fraud § 8—

While legal fraud has not been precisely defined, it rests upon public policy and does not necessarily involve the conscience or moral dereliction.

2. Fraud § 6—

In order to be actionable, legal fraud, as well as moral fraud, must involve some detriment resulting from the fraud suffered by the party seeking relief, or some inequitable advantage taken by the party against whom the relief is sought.

3. Counties § 22—

In its business transactions a county is held to the same rules of equitable dealing that apply to all persons, natural or corporate, in so far as this may be done while respecting its municipal character and the laws regulating its business and commercial transactions.

4. Equity § 2a—

The maxim that he who seeks equity must do equity is not a precept for moral observance but an enforceable rule of law.

5. Counties § 22: Reformation of Instruments § 5—County may not seek reformation of instrument for fraud and at same time seek to retain benefits.

The owner of land conveyed same and took a deed of trust for the purchase price. The purchaser transferred same to defendant county subject to the deed of trust, the entire transaction being for the purpose of evading the constitutional and statutory provisions relative to the incurrence of debt by the county, the purchaser of the land purporting to be the agent of the county in obtaining the property. In an action to foreclose the deed of trust the county set up a cross action to reform and cancel the deed of trust, to strike out the debt assumption agreement in the deed to it and to substitute the county as the grantee in the original deed, alleging legal and moral fraud in the transaction. *Held:* The assumption of the debt by the county in contravention of constitutional and statutory prohibitions is void as a matter of law without the necessity of invoking fraud, but the county is not entitled to reform the instruments so as to acquire the property free from encumbrance and thereby retain the benefits of the very transaction attacked by it, and the trustor is entitled to foreclose.

6. Counties § 23—

The rule that a county is not required to restore the *status quo* or compensate for benefits received under a void contract where to do so would be tantamount to annulling constitutional or statutory prohibitions, has no application where the county obtains nothing under the void transaction.

7. Counties § 21—

A transaction by which a county seeks to obtain title to property and assume the debt for the purchase price in contravention of constitutional and statutory prohibitions is void, and since the county is without power or capacity to execute the transaction it is also incapable of ratifying it.

8. Same: Principal and Agent § 2—

A county is subject to the general rule that where it has no capacity to do a contemplated act it is without power to appoint an agent for that purpose.

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

APPEAL by defendant from *Alley, J.*, at 3 December, 1945, Term, of GUILFORD (Greensboro Division).

This case was here on appeal at the Spring Term, 1945, of the Court, and the result is reported in 225 N. C., at page 293, 34 S. E. (2d), 430. The statement of the case in that report covers the essential facts involved in the present appeal, and the full opinion of the Court is so related to the subsequent procedure and the scope of this review that both the statement of the case and the full opinion are referred to as a part of this statement. Matters occurring since the opinion was handed down are further noted.

On the former trial the plaintiff, amongst other demands, sought relief on equitable grounds, asking that it be recompensed or that restitution be made to it with respect to money used by the defendant on an attempted assumption of debt thereafter declared to be void. In reviewing the judgment this Court, speaking through *Mr. Justice Winborne,* said:

"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* (225 N. C.), 18."

The remedy at law pointed out by the Court was the enforcement of the C. Clair Conner note and deed of trust securing it as the individual act of Conner. The opinion proceeds:

". . . 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 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."

The Court held that the provision in the deed of Conner to Guilford County, in which the county undertook to assume and pay the indebtedness to plaintiff, secured by the deed of trust, was not enforceable as an express contract, referring to Article VII, sec. 7, and Article V, sec. 4, of the Constitution. Article VII, sec. 7, of the Constitution forbids the creation of debt other than for a necessary purpose without authorization by popular vote; Article V, sec. 4, prohibits counties from contracting debt during any fiscal year to an amount exceeding two-thirds of the amount by which the outstanding indebtedness of the county shall have been reduced during the preceding fiscal year, without an approving vote of the people. The project had not been declared a necessary purpose; and the debt of Guilford County had not been reduced at all during the preceding fiscal year.

After the opinion and decision in *Insurance Co. v. Guilford County, supra,* were filed in the lower court, the case was formally reconstituted in so far as became necessary to meet the suggestion of the appellate Court respecting the remedy and the defense, and readied for trial. The plaintiff brought in as defendants C. Clair Conner, grantee in the Bradshaw deed and subsequent encumbrancer in the trust deed, and Julian Price, Trustee therein. Appropriate amendments were made to the pleadings, the plaintiff seeking its remedy of foreclosure against Conner under the trust deed, the defendant Guilford County opposing, and seeking to have the Bradshaw deed to Conner, the trust deed of Conner to Price, and the deed of Conner and wife to Guilford County, each reformed in the particulars stated *infra.* The defendant county sought to reform the Bradshaw deed to Conner by striking out in the premises "C. Clair Conner, unmarried," and inserting in lieu thereof, "to Guilford County, party of the second part"; to have the deed of trust executed to Julian Price and the note purporting to be secured thereby reformed so

as to read "C. Clair Conner, Agent for Guilford County" wherever the signature appears in said deed of trust and note, and thereupon to have the deed of trust and note canceled and annulled; to have the deed of Conner and wife to Guilford County reformed by striking out the clause making it subject to the Jefferson Standard Life Insurance Company debt and deed of trust. The right to reformation in all these respects is grounded upon the allegation of fraud and conspiracy of former members of the County Board of Commissioners, C. Clair Conner and representatives of the plaintiff to cause a debt to be created against Guilford County in violation of the constitutional prohibitions recited and in contravention of public policy. The allegations of fraud are based on the agreement evidenced by resolution of the Board of County Commissioners on 16 November, 1936 (appearing in full in *Ins. Co. v. Guilford County, supra,* on page 297), and upon the acts of the several parties named in pursuance thereof, culminating in the execution of the above instruments, all of which are included in the stipulations of fact in the case now under review.

As on the former trial, the controversy was submitted to the trial judge by consent without the intervention of a jury, on a stipulation of fact as above noted.

Upon the stipulated facts, the appellant asked the court below to find that the whole plan set forth in the stipulation of fact had for its end and purpose the nullification of the statutes and Constitution of North Carolina relative to the incurrence of debt by counties; that it was an attempt to create a debt by Guilford County on property acquired by it for governmental purposes, and that the deed of trust and note executed in connection with it were against public policy, and that the plaintiff seeks the aid of equity in defeating constitutional and statutory provisions, and therefore has no standing in a court of equity; that the erection of the county building in High Point was not a necessary expense within the meaning of the North Carolina Constitution, Article VII, sec. 7; that at the time the loan was attempted to be made Guilford County was prohibited by the Constitution, Article V, sec. 4, from incurring any debt. "That the substance and object of the plan and scheme shown in said Stipulation of Facts, being contrary to public policy, the form of said plan and scheme should be disregarded and the matter treated as it really was, *i.e.,* the purported or attempted loan of money by the plaintiff to Guilford County; and the purchase of the Bradshaw property therewith, the county using moneys from its general funds to contribute thereto; and an attempt by the then Commissioners of Guilford County to execute a note and a deed of trust upon said property, through an agent, C. Clair Conner." Further conclusions of law asked for by the defendant county are: "That the plaintiff is not entitled to

recover upon a *quantum meruit* or implied contract." "That the defendant is not estopped to deny that it owes the alleged debt." Defendant then tendered a judgment providing for the reformation of the instruments in the respects requested and denying foreclosure, which the court declined to render.

At the conclusion of the hearing and argument the trial judge found the facts to be as stipulated, and further that in all the transactions involved the parties thereto had acted in good faith.

Among pertinent conclusions of law are the following:

"The note dated December 1, 1936, in the original amount of $100,000, executed by C. Clair Conner and payable to the order of Jefferson Standard Life Insurance Company is valid, and in all respects a legal, binding and enforceable obligation; that there is now justly due, owing and unpaid, upon said note the sum of $79,674.45 with interest thereon at the rate of 4% per annum, payable semi-annually from and after June 1, 1941; and that the Jefferson Standard Life Insurance Company is the lawful owner and holder of said note.

"The deed of trust dated December 1, 1936, from C. Clair Conner to Julian Price, Trustee, given as security for the payment of the aforesaid note, and recorded in the Office of the Register of Deeds of Guilford County in Book 797, at page 211, is, in all respects, legal and valid, and is a first and prior lien upon the property therein described.

"The defendant, Guilford County is not entitled to have said note and deed of trust, or the deed from Mrs. Sallie Bradshaw to C. Clair Conner, reformed as alleged in said defendant's answer.

"The Board of County Commissioners of Guilford County, in meeting duly assembled on July 23, 1945, having adopted a resolution declaring that the acquisition of the Bradshaw land and the Public County Building erected thereon in the City of High Point, described in the aforesaid deed of trust to Julian Price, Trustee, a necessary governmental expense of Guilford County, and that it is necessary to have said County Building in the City of High Point, the Court is of the opinion and so holds, that the purchase of the Bradshaw property and the erection of the County Public Building thereon in the City of High Point were and are necessary expenses of Guilford County."

In conformity with these conclusions, the court entered judgment for the amount due on Conner's note, decreed foreclosure, and adjudged that any surplus arising from the sale be paid to the County of Guilford.

The defendant county appealed.

Smith, Wharton & Jordan for plaintiff, appellee.

Thomas C. Hoyle and Rupert T. Pickens for defendant, appellant.

SEAWELL, J. The decision on the former appeal, *Insurance Co. v. Guilford County,* 225 N. C., 293, 34 S. E. (2d), 430, which became, and continues to be, the law of the case has so narrowed the controversy that the scope of this review is properly confined and directed to the action of the trial court in denying the reformation of the several deeds to the Bradshaw property and the validity and propriety of the ensuing judgment decreeing foreclosure.

The crux of the case as here presented may be summarily stated: The court below found as a fact that all the parties to the various transactions alleged to be fraudulent acted in good faith, declined to decree reformation as demanded, and ordered foreclosure. The appellant insists that the conduct of the parties constituted at least legal fraud, regardless of the question of good faith, entitling it to the relief demanded; and that the court had no alternative on the facts to find otherwise or to refuse a positive finding to that effect, and thereupon to reform the instruments as demanded and deny foreclosure.

Legal fraud does not necessarily involve the conscience or moral dereliction, but may in instances where it is recognized as actionable serve as the basis of appropriate relief. 33 Am. Jur., p. 756, sec. 4. If the trial court was wrong in assuming that the acts of which defendant complained did not constitute such fraud, the finding that they were done in good faith might be inconclusive.

A precise definition of legal fraud, serviceable on all occasions, has not so far been formulated. Its characteristics must be gathered from the several individual instances and situations in which it has been predicated as a matter of public policy, most often applied to some breach of duty in a fiduciary relationship. 37 C. J. S., pp. 211-213, sec. 2 (c) (2). There are so many of the elements of constructive fraud absent in the whole complex of incidents brought into the evidence that we are of opinion they do not constitute either moral or legal fraud. However this may be, legal fraud, to be actionable, must include fraud in the defendant and damage to the plaintiff—using the terms "plaintiff" and "defendant" as causes are usually constituted. Some right of the party seeking relief must have been injuriously affected by the fraud or some inequitable advantage taken; 37 C. J. S., p. 215, sec. 3; *Brooks v. Greenville Banking & Trust Co.,* 206 N. C., 436, 174 S. E., 29; and there must be some causal connection between the fraud and the injury alleged, and some relevancy between them and the relief demanded. The Court would not undertake, on grounds of fraud, to reform an instrument executed between strangers, except to establish some right of the petitioner which has been defeated or injuriously affected by the fraud.

In the case at bar, the appealing defendant had no property or property right in the Bradshaw property unless it acquired that right through

the agency of Conner, and to assert that agency would be to ratify the fraud it has successfully denounced, or, to put it in terms more consonant with the facts, an agency it had no capacity to create.

The defendant had no connection with the Bradshaw purchase except through Conner. He was commissioned to buy the property with money borrowed from plaintiff on the credit of defendant, and purportedly did so. The character of that transaction cannot now be changed by *nunc pro tunc* amendment to read into it an innocent purchase by the county out of surplus funds available for the purpose. The county, on the facts of record, did not contribute anything to the purchase, although it repaid a part of the loan made by plaintiff to Conner and spent a considerable sum of money in completing the building and improvements on the property. If defendant has any right of redress for these expenditures, it must take some other form. They cannot be confused with the purchase price paid for the property, nor by legal fiction imported into that transaction so as to make the agency lawful or invoke its aid in the attempt to establish a trust with respect to any money contributed to the purchase. The transaction, as far as the attempted participation of the county therein is concerned, was violative of two unyielding prohibitions of the Constitution, as well as a body of statute law, and the result, as affecting the county, is void.

Even if fraud should be found in the several transactions contemplated in the plan of financing adopted, it does not necessarily follow that defendant was thereby brought into position to avail itself of the fraud in the peculiar manner proposed, or to demand the suggested relief. Assuming, contrary to our opinion, that the conduct of all parties to the transactions was fraudulent, what is the grievance of the county, and what may it equitably demand? The fruits of the fraud? Or, rather, to be removed from its atmosphere unhurt?

Guilford County retains its corporate entity, or perhaps we should say has a continuing identity throughout all the changes in personnel of its governing boards. The responsibility of its officers to the county for dereliction of duty is one thing, and the liability of the county for its dealings with others is quite another. In the latter relation it is held to the same rules of equitable dealing that apply to all persons, natural or corporate, in so far as that may be done while respecting its municipal character and the laws regulating its business and commercial transactions. In its cross action for equitable relief these rules must be observed. The maxim that he who seeks equity must do equity is not a precept for moral observance, but an enforceable rule of law. Pomeroy, Equity Jurisdiction, Vol. 2, sec. 385, p. 51, *et seq.; Hairston v. Keswick Corp.*, 214 N. C., 678, 200 S. E., 384. We are not addressing this

observation to the question of restitution—which the judgment under review has eliminated from the authorized procedure. We refer to the objective defendant seeks to reach through reformation of the several deeds.

The allegations of fraud upon which defendant seeks reformation serve to clothe all the incidents to which they refer in the same sheath of iniquity. The outstanding transactions denounced as fraudulent and conspiratorial are all peas in the same pod. But the scheme of reformation would (a) reform and cancel the deed of trust to Jefferson Standard Life Ins. Co.; (b) strike out the condition of encumbrance in Conner's deed to the county; (c) substitute the county for Conner as grantee in the Bradshaw deed on the strength of his agency and a contribution by the county to the purchase out of surplus funds; all converging to put the title in the county to a valuable property now used by it, and hereafter to be used, for the most necessary purposes of local and county government without, it is insisted, any obligation to pay for it or any forum in which redress may be sought. Certainly there is no rule of equity which privileges one who seeks equity on grounds of fraud to strike down only those transactions which are unfavorable to him and preserve from a like fate those from which he would take an advantage, although equally obnoxious to the law, thus blowing hot upon his fingers and cold upon his porridge.

Many authorities are cited to us in support of the proposition that a municipality is not required to restore the *status quo* or compensate for benefits received under a void contract where to do so would be tantamount to annulling the statute or doing by indirection that which the municipality was not permitted to do directly. While we do not doubt the propriety of such a rule, the rationale of our decision does not require us to discuss it, since the defendant could not have acquired anything under the Conner transaction which might be made the subject of such a dispute.

When a transaction is in direct violation of the Constitution and laws, it is not necessary to invoke fraud, or contravention of public policy, or any other indirection to establish its invalidity. The law does that. And it has the merit of applying itself analytically and impartially to the offending incidents in whatever relation they are found. We have referred to the invalidity of the attempted appointment of Conner to act as agent of the county in the series of transactions admittedly intended to evade the Constitution and create a county debt by indirection, and the inseparability from that purpose of the acts he was commissioned to perform. Article V, sec. 4, and Article VII, sec. 7, of the Constitution are addressed to the counties and municipalities as such, rather than to their officers, and deprive them of the capacity to contract

under the admitted conditions. There is no reason why the salutary rule applied to natural persons under such circumstances should not apply to a corporation or a municipality: Where the intended principal has no capacity to do the act if present, he is without power to appoint an agent for that purpose. Rest., Agency, sec. 20; 2 C. J. S., Agency, sec. 13, and citations. Since there has been no change in the fundamental law investing the defendant with power or capacity to do the act at this time, it cannot ratify or adopt the act purportedly done in its behalf. Rest., Agency, sec. 86; 2 Am. Jur., Agency, sec. 216; *Norton v. Shelby County,* 118 U. S., 425, 30 L. Ed., 178, 190. Since the transaction under review was unambiguous in its character, in violation of constitutional provisions and in contravention of public policy, and would still be unlawful, it is incapable of ratification.

We reach the conclusion that the defendant acquired no interest in the Bradshaw property through the agency of Conner or by any contribution made to its purchase price, and the refusal of the court to reform the Bradshaw deed by substituting Guilford County as the grantee was proper. The refusal to make the further reformations and cancellation demanded in defendant's cross action was justified under the facts. The defendant having failed to secure the reformation of the deeds as pointed out in *Ins. Co. v. Guilford County, supra,* the case reverts to the controlling principles there announced.

We note from the record that by resolution the County Commissioners have declared that the purchase of the property in controversy is a necessary governmental expense; and the same resolution discloses that the county has on hand a surplus fund legally available for that purpose. The judgment correctly declares that the restraining order in the case of *Hill v. Stansbury,* 224 N. C., 356, 30 S. E. (2d), 150, because of its exceptive provisions, does not apply to the present controversy, and would be no barrier to such action as the county desires to take in the premises. The judgment, which we are constrained to affirm, will not, therefore, of necessity put the county out of doors or cause it any grave inconvenience in the protection of its investment in property it took *cum onere.*

The judgment of the court below was in accord with applicable legal principles and justified by the facts found, and it is

Affirmed.

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

CHARLES ARTHUR CRAVER AND LUNA L. CRAVER v. WM. E. SPAUGH, ADMINISTRATOR OF LAURA HANES, DECEASED.

(Filed 5 June, 1946.)

1. Judgments § 27a—

The calendaring of a cause is notice thereof to the litigants, but when a cause is calendared for both the first and third weeks of a term, and counsel, having been advised that opposing counsel would seek to have it calendared for the third week, notes that it is so calendared, and so advises his clients, the oversight in failing to see that the case was calendared for the first week, at which time the case was called, will not be held against the clients.

2. Executors and Administrators § 19—

Where a claim against an estate is not referred, G. S., 28-111, and is rejected, action thereon is barred if not instituted within six months of receipt of written notice of the rejection, and the burden of proof is on claimants.

3. Judgments § 27a—

In order for plaintiff to be entitled to set aside a judgment of nonsuit on the ground of excusable neglect he must show the existence of a meritorious cause of action.

4. Same—

Plaintiffs instituted this action on a claim against an estate more than six months after receipt of written notice of rejection. Defendant pleaded G. S., 28-112, in bar. Plaintiffs alleged in their reply that defendant had agreed not to plead the statute, but offered no evidence in support thereof. Defendant testified he made no such agreement. *Held:* Using plaintiffs' verified pleading as evidence on this point, it is not conclusive or irrebuttable, and the trial court's finding upon the conflicting evidence that plaintiff had no meritorious cause is conclusive on appeal.

5. Judgments § 14—

Where plaintiff is not present when his cause is called for trial and defendant makes no demand for affirmative relief, judgment that plaintiff recover nothing is essentially a judgment of nonsuit or dismissal, and the fact that the court heard defendant's evidence and submitted issues to the jury is not so irregular as to constitute a fatal defect.

DEVIN, J., dissenting.

APPEAL by plaintiffs from *Pless, J.*, at March Term, 1946, of FORSYTH. Affirmed.

Civil action heard on motion under G. S., 1-220, to set aside final judgment entered at a former term.

Plaintiffs instituted this action on three alleged causes of action: (1) for personal services to the defendant's intestate, (2) for the value of

certain securities delivered to defendant, and (3) for services rendered defendant. The defendant, answering, denies the material allegations in the complaint and pleads the bar of the statute. G. S., 28-112. The plaintiffs in reply admit their claim was filed and that they waited until 8 August, 1945, to institute an action on their claim, but allege there was no agreement to refer and defendant agreed not to plead any statute of limitations.

The suit instituted 8 August, 1945, was dismissed by judgment of voluntary nonsuit at the September Term, 1945. This action was instituted 21 November, 1945. It was calendared for trial 21 January, 1946, and was called 30 January, 1946. After some discussion it was continued to be set at the next term. The cause was then calendared for trial during the first week and also during the third week of the February Term. Counsel for plaintiffs received a copy of the calendar and noted the setting during the third week but failed to note the first week setting. They advised their clients to prepare for trial during the third week.

The case was duly reached and called for trial during the first week. The court made a diligent effort to contact counsel for plaintiffs but was unable to do so for the reason that he was necessarily out of the State on other business. It proceeded to trial and entered judgment that plaintiffs recover nothing.

Upon his return, counsel, discovering that judgment had been entered in his absence, promptly filed this motion to vacate for excusable neglect.

Upon the hearing the court upon the evidence offered found and concluded: (1) that the neglect of plaintiffs was not excusable, and (2) plaintiffs do not have a meritorious cause of action. It thereupon entered judgment denying the motion, and plaintiffs appealed.

Walser & Wright for plaintiffs, appellants.

Ratcliff, Vaughn, Hudson & Ferrell for defendant, appellee.

BARNHILL, J. We have held that it is the duty of a litigant to keep himself advised as to the time his cause is calendared for trial, and, when it is so calendared, he is fixed with notice thereof. *Cahoon v. Brinkley,* 176 N. C., 5, 96 S. E., 650. Even so, plaintiffs here employed well-known and capable counsel who regularly practice in the courts of Forsyth County. They were notified by counsel that the cause was calendared for the third week. They relied on this information. So then, it might well be conceded that the oversight of counsel is not to be held against them.

But that is not the decisive fact here. The defendant offered evidence tending to show that plaintiffs, on 21 July, 1942, filed with him a verified

statement of their claim; that on 25 July, 1942, plaintiffs were notified in writing of the rejection thereof; that the claim was not referred, G. S., 28-111, and that plaintiffs did not institute suit on said claim until 21 November, 1945, more than six months after written notice of the rejection thereof. This evidence tends to establish a complete plea in bar. G. S., 28-112. The burden of proof was on the plaintiffs. Yet they did not attempt to refute this testimony. Nor did they offer any evidence of an agreement by defendant not to plead the statute, G. S., 28-112, other than the bare statement contained in their reply, although defendant went on the stand and swore he made no such agreement. Upon this and the other evidence offered, the court below found and concluded: "Plaintiffs do not have a meritorious cause of action, and have no reasonable hope of successfully prosecuting their alleged claims."

Existence of a meritorious cause of action is a prerequisite to relief on the motion to vacate the former judgment. *Roediger v. Sapos,* 217 N. C., 95, 6 S. E. (2d), 801; *Garrett v. Trent,* 216 N. C., 162, 4 S. E. (2d), 319; *Cayton v. Clark,* 212 N. C., 374, 193 S. E., 404; *Hooks v. Neighbors,* 211 N. C., 382, 190 S. E., 236; *Parham v. Hinnant,* 206 N. C., 200, 173 S. E., 26; *Parham v. Morgan,* 206 N. C., 201, 173 S. E., 27; *Bowie v. Tucker,* 197 N. C., 671, 150 S. E., 200; *Cahoon v. Brinkley, supra.*

The finding that plaintiffs have no meritorious cause of action is supported by competent evidence and is conclusive on appeal. *Kerr v. Bank,* 205 N. C., 410, 171 S. E., 367; *Carter v. Anderson,* 208 N. C., 529, 181 S. E., 750; *Crye v. Stoltz,* 193 N. C., 802, 138 S. E., 167; *Allen v. McPherson,* 168 N. C., 435, 84 S. E., 766: It is binding on us. *Turner v. Grain Co.,* 190 N. C., 331, 129 S. E., 775; *Gaster v. Thomas,* 188 N. C., 346, 124 S. E., 609.

On motions of this kind the movent is out of court by judgment entered. He is seeking to have the court exercise its discretionary power to relieve him of the results of his own or his counsel's negligence. He must then and there satisfy the judge that he has a cause of action or defense upon which he should be heard. While the verified complaint may be used as evidence on this point, the allegations therein are not conclusive or irrebuttable. Neither will they override a finding of the judge made on conflicting testimony. The judge decides the question after consideration of all the evidence and, having decided, his finding is conclusive.

While the court at the February Term proceeded to hear evidence and submit issues there was nothing to be heard. The plaintiffs were not present and, of course, offered no evidence, and there was no demand by defendants for affirmative relief. Yet the judgment is essentially a

judgment of nonsuit or dismissal. The irregular proceeding does not affect its essential nature as such or constitute a fatal defect therein.

For the reasons stated the judgment below is

Affirmed.

DEVIN, J., dissenting: The decision is made to turn upon the failure of the plaintiffs to show that their cause of action was brought within the time allowed by the statute of limitations pleaded by the defendant. G. S., 28-112. But the plaintiffs have filed a verified reply to the defendant's answer in which they allege that pending negotiations between plaintiffs and the defendant for a settlement of the plaintiffs' claim "the defendant agreed that he would not plead any statute or statutes of limitation which might arise . . . until all negotiations as to a settlement of the claim or claims of plaintiffs against defendant were concluded, and that said negotiations extended to the date of the bringing of the action, and plaintiffs plead this agreement in bar of defendant's plea of the statute of limitations." Plaintiffs allege that in reliance upon this agreement, and pending negotiations, they delayed action.

The question is not determined by the judge's finding on plaintiffs' motion to set aside the judgment that plaintiffs do not have a meritorious cause of action. Admittedly plaintiffs alleged a good cause of action in their complaint. The trial judge could not determine the cause by a finding on a material fact which was at issue, and this Court is not bound by his finding. All he could do was to determine whether a cause of action had been alleged. If so, and the plaintiffs were not inexcusably negligent, they were entitled to have the judgment set aside, and remain in court.

I do not think the judge's action in denying the motion because he was of opinion the plaintiffs did not have a meritorious cause of action should now preclude the plaintiffs from an opportunity to prove the facts which they had alleged. On this motion, the question is not one of evidence to be decided by the judge, but of pleadings. The plaintiffs' right to stay in court at this stage of the litigation must be determined by what they have alleged. *Gaylord v. Berry,* 169 N. C., 733, 86 S. E., 623.

The plaintiffs' failure to appear at the previous term having been shown to be due to no culpable negligence on their part, the question remaining is this: Did the plaintiffs allege sufficient facts which if true would entitle them to present their evidence to the jury? If so, they have set out a meritorious cause of action. I think the plaintiffs' motion should have been allowed.

JOHN J. INGLE v. STATE BOARD OF ELECTIONS.

(Filed 5 June, 1946.)

1. Pleadings § 28—

A motion for judgment on the pleadings admits, for the purpose of the motion, the allegations in the pleading of the adverse party.

2. Elections § 25—

Where there are two vacancies for the office of Associate Justice of the Supreme Court to be filled at the general election, a notice of candidacy for the nomination of a party which does not specify to which of the vacancies the candidate is asking the nomination is fatally defective. G. S., 163-147.

3. Same—

G. S., 163-147, requiring that in any primary where there are two or more vacancies for Chief Justice and Associate Justices of the Supreme Court to be filled by nomination, a candidate must designate to which vacancy he is asking the nomination, *held* not to contravene Art. IV, sec. 21, of the State Constitution requiring Justices to be elected in the same manner as members of the General Assembly, since the method of selection of nominees does not reach into and control the general election.

4. Same: Mandamus § 2d—

Mandamus will not lie to compel the State Board of Elections to place on the official ballot, G. S., 163-128, the name of petitioner as the nominee of his party to the office of Associate Justice of the Supreme Court when his notice of candidacy for the nomination is fatally defective in failing to designate to which of two vacancies he is seeking the nomination.

5. Mandamus § 1—

Mandamus lies only to enforce a clear legal right at the instance of a party having a right to demand it, and the party to be coerced must be under legal obligation to perform the act sought to be enforced.

6. Same—

It is rarely, if ever, proper to award a *mandamus* where it can be done only by declaring an Act of Assembly unconstitutional.

BARNHILL and WINBORNE, JJ., took no part in the consideration or decision of this case.

APPEAL by petitioner from *Harris, J.*, at May Term, 1946, of WAKE.

Petition for writ of *mandamus* to require respondents to proceed in lawful manner to cause petitioner's name to be placed on the official ballot as candidate or nominee of the Republican Party for the office of Associate Justice of the Supreme Court of North Carolina to be voted on in the general election to be held 5 November, 1946.

The substance of the petition is, that on 15 March, 1946, the petitioner duly filed with the State Board of Elections notice of his candidacy for

the nomination by the Republican Party as its nominee for the office of Associate Justice of the Supreme Court of North Carolina; that notwithstanding his due compliance with the requirements of law in filing notice of his candidacy, the State Board of Elections, through its Executive Secretary, notified petitioner on 20 March, 1946, that his notice of candidacy was defective in that it failed to state for which vacancy he was asking the nomination and that since "it was not a legal filing, the Board could not accept same"; that the Board accordingly rejected and returned to petitioner his written notice and filing fee; that the petitioner and another are the only two candidates of the Republican Party as its nominees for the two vacancies for Associate Justices of the Supreme Court of North Carolina, which are to be filled in the general election to be held on 5 November, 1946; that in the discharge of its ministerial duties the State Board of Elections has no discretion in the matter, since the notice was filed in accordance with law, and that petitioner is entitled to be certified by the State Board of Elections as the nominee of the Republican Party for the office of Associate Justice of the Supreme Court of North Carolina and to have his name appear on the official ballot at the ensuing general election. Wherefore, petitioner prays for writ of *mandamus* to require the respondents to carry out their duties in the premises.

It is further alleged in an amendment to the petition that the action of the respondents in refusing to certify petitioner as the nominee of the Republican Party for the office aforesaid deprives him of fundamental rights guaranteed by the Constitutions of North Carolina and the United States.

The respondents answered the complaint of the petitioner and denied that he had filed notice of candidacy as required by law. They further set up their version of the facts in "a more complete defense," which may be summarized as follows:

1. That among other State offices to be filled at the general election in November, 1946, are two vacancies in the offices of Associate Justice of the Supreme Court of North Carolina, occurring by reason of the expiration of the terms of office of Associate Justices M. V. Barnhill and J. Wallace Winborne. That the present incumbents of these offices have duly qualified as candidates of the Democratic Party to succeed themselves in their respective offices. No other vacancy on the Supreme Court is to be filled at the forthcoming general election.

2. That under the law governing the selection of party candidates to fill such vacancies, it is provided that candidates of each political party shall file written notice of candidacy and cause the same to be delivered into the hands of the State Board of Elections not later than 6 o'clock p.m. on the tenth Saturday preceding the date of the primary, which

closing hour for filing notice of candidacy in the present year was 6 o'clock p.m. Saturday, 16 March, 1946.

3. That one minute before the expiration of the filing time, to wit, at 5:59 o'clock p.m. Saturday, 16 March, 1946, petitioner's "Notice of Candidacy" and filing fee reached the State Board of Elections through the United States mail, but said notice failed to designate which of the two vacancies the petitioner was asking the nomination as required by G. S., 163-147.

4. That Herbert F. Seawell, Jr., had theretofore filed notice of candidacy as the nominee of the Republican Party for the vacancy occurring by reason of the expiration of the term of office presently occupied by Associate Justice Winborne. That no other notice of candidacy as nominee of the Republican Party for a vacancy in the office of Associate Justice of the Supreme Court was filed by any person.

5. That upon receipt of petitioner's purported notice of candidacy, the State Board of Elections, by resolution, duly received the same subject to the ruling of the Attorney-General of the State as to its legality or sufficiency under the law.

6. Thereafter, the Attorney-General, in response to advice sought, ruled that the filing was not in accordance with the statute, and the same was thereupon rejected by unanimous vote of the State Board of Elections.

In answer to the constitutional matters raised by the amendment to the petition, the respondents denied any infringement of constitutional rights.

The petitioner moved for judgment on the pleadings—demanding writ of *mandamus* as prayed—which was denied, and he appeals, assigning error.

Briggs & West and Ingle, Rucker & Ingle for petitioner, appellant.

Attorney-General McMullan and Assistant Attorney-General Moody for respondents, appellees.

STACY, C. J. The question for decision is whether the notice of candidacy filed by the petitioner with the State Board of Elections complies with the provisions of the Primary Election Law. The trial court answered in the negative, and we approve.

It is provided by G. S., 163-147, that in any primary election when there are two or more vacancies for Chief Justice and Associate Justices of the Supreme Court to be filled by nominations, "all candidates shall file with the state board of elections at the time of filing notice of candidacy a notice designating to which of said vacancies the respective

candidate is asking the nomination." And further: "All votes cast for any candidate shall be effective only for the vacancy for which he has given notice of candidacy, as provided herein."

The motion for judgment on the pleadings admits, for the purpose, the allegation in the answer that at the time of filing notice of candidacy the petitioner failed to designate to which of the two vacancies he was asking the Republican nomination. *Barnes v. Comrs.,* 135 N. C., 27, 47 S. E., 737. This constitutes a fatal defect in his notice of candidacy. *McLean v. Board of Elections,* 222 N. C., 6, 21 S. E. (2d), 842.

The very real quandary presented to the State Board of Elections was, that if the petitioner were asking the Republican nomination for the vacancy occurring by reason of the expiration of the term of office presently occupied by Associate Justice Winborne, an election would be necessary to determine the nominee as between the petitioner and Herbert F. Seawell, Jr., who had previously given notice of his candidacy as nominee of the Republican Party for the same vacancy. On the other hand, if the petitioner were seeking the Republican nomination for the vacancy occurring by reason of the expiration of the term of office presently occupied by Associate Justice Barnhill, no party election would be necessary as no other person had given notice of his candidacy as nominee of the Republican Party for this vacancy. G. S., 163-128. The problem thus presented was one which the statute required the petitioner to solve at the time of filing notice of his candidacy. It is conceded that in this respect his notice falls short of the statutory requirements.

It is contended, however, that the provisions of the Primary Law run afoul of Art. IV, sec. 21, of the Constitution, which provides that the Justices of the Supreme Court shall be elected by the qualified voters of the State, "as is provided for the election of members of the General Assembly." The basis of the contention is, that the nomination constitutes an integral part of the election, *Nixon v. Herndon,* 273 U. S., 536, and that the regulation in question does not apply to the nomination of members of the General Assembly. Even so, the Justices of the Supreme Court are voted on in the general election in the same manner as members of the General Assembly. The method of selection of nominees, which applies alike to all political parties, does not purport to reach into and control the general election. It goes only to the official ballot. G. S., 163-128. The constitutionality of the Primary Election Law was assailed and sustained in *McLean v. Board of Elections, supra.* A similar result must follow here. The present statute was enacted in 1921, and all candidates of all political parties for nominations to vacancies occurring on the Supreme Court have consistently observed its provisions since its enactment. It was born of experiences in the Democratic primary of 1920 when two vacancies on the Supreme Court were to be

filled and both nominations were required to be voted upon, albeit there was but a single candidate seeking the nomination for one of the vacancies and a number of candidates seeking the other. The enactment was intended to avoid similar situations and to clarify the regulations governing primary elections when two or more vacancies on the Supreme Court are to be filled by nominations in the same primary.

Finally, it is to be remembered that *mandamus* lies only to enforce a clear legal right, and not a doubtful one. The party seeking the writ must have a clear legal right to demand it, and the party to be coerced must be under a legal obligation to perform the act sought to be enforced. *Poole v. Board of Examiners,* 221 N. C., 199, 19 S. E. (2d), 635; *Warren v. Maxwell,* 223 N. C., 604, 27 S. E. (2d), 721; *White v. Comrs. of Johnston,* 217 N. C., 329, 7 S. E. (2d), 825; *Hayes v. Benton,* 193 N. C., 379, 137 S. E., 169; *Umstead v. Board of Elections,* 192 N. C., 139, 134 S. E., 409. It is rarely, if ever, proper to award a *mandamus* where it can be done only by declaring an Act of Assembly unconstitutional. *Person v. Doughton,* 186 N. C., 723, 120 S. E., 481; McIntosh on Practice, 1079, *et seq.* In the instant case the writ was properly denied. The petitioner has failed to make manifest his right to the relief sought.

The judgment appealed from will be upheld.

Affirmed.

BARNHILL and WINBORNE, JJ., took no part in the consideration or decision of this case.

STATE v. GEORGE WALKER.

(Filed 5 June, 1946.)

1. Rape § 4—

Evidence that prosecutrix, a thirteen-year-old girl, had been criminally assaulted and ravished by force, and evidence identifying defendant as the perpetrator of the crime *held* sufficient to be submitted to the jury upon the question of defendant's guilt of the capital crime of rape.

2. Criminal Law § 48b—

Where evidence competent for the purpose of corroboration is admitted generally, and defendant fails at the time of its admission to request that its purpose be restricted, his exception to the admission of the testimony cannot be sustained. *S. v. Parker,* 134 N. C., 209, modified in this particular. Rule of Practice in the Supreme Court, No. 21.

3. Criminal Law § 41d—

The sheriff was permitted to testify as to statements made by prosecutrix to him in describing her assailant for the purpose of corroborating

her testimony at the trial in regard thereto. *Held:* Slight variance in her statements and her testimony, mainly as to whether the assailant had a gold tooth, does not render the corroborating testimony inadmissible but affects only its credibility, which is for the determination of the jury. The rule that a party will not be permitted to impeach his own witness is not applicable.

4. Criminal Law § 31c—

Evidence that footprints at the scene of the crime were made by shoes owned by defendant and led to defendant's tobacco barn and thence to defendant's home, is competent.

APPEAL by defendant from *Carr, J.,* at November Term, 1945, of HARNETT.

Criminal prosecution tried upon an indictment charging the defendant with rape.

The evidence tends to show that the prosecuting witness, a 13-year-old girl, left her home on Sunday morning, 22 July, 1945, with her father and brother. She carried a small pail with her so she could pick some grapes. After picking the grapes, her father and brother went for a walk, and she started to return home. Before she reached home, the defendant stopped her and forced her to accompany him in the woods. There the defendant, by the use of force and by threatening to kill the prosecutrix, had sexual intercourse with her.

The prosecutrix identified the defendant as the man who raped her. The pail and spilled grapes were found by the officers near the place where the crime is alleged to have been committed. The officers also found part of the clothing of the child, which she testified the defendant removed forcibly from her. Shoe tracks of a peculiar character led from the place where the crime is alleged to have been committed, into and across a creek to the barn and home of the defendant, and corresponded with tracks around his home which he admitted were his. Shoes which fit the footprints leading from the scene of the alleged crime, together with a shirt and pair of pants, were found on the floor of his home at the time of his arrest. The shoes were wet and shirt was damp. The defendant testified that he had removed them earlier in the morning because he got them wet while hauling wood and looking for something in the field. A physical examination of the prosecutrix by a physician disclosed that she had been criminally assaulted.

Verdict: "Guilty of rape as charged in the bill of indictment." Judgment: Death by asphyxiation.

The defendant appeals, assigning errors.

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

J. R. Hood for defendant.

DENNY, J. The defendant excepts and assigns as error the refusal of his Honor to sustain his motion for judgment as of nonsuit, lodged at the close of the State's evidence and renewed at the close of all the evidence. The exception cannot be sustained. The evidence disclosed on the record is ample to carry the case to the jury. *S. v. Jackson,* 199 N. C., 321, 154 S. E., 402.

The appellant also excepts and assigns as error, the admission of certain testimony on behalf of the State, by Mr. Salmon, Sheriff of Harnett County, over the objection of the defendant, on the ground that the testimony was hearsay evidence and was competent only for the purpose of corroborating the prosecutrix, Geraldine Butler, provided it did corroborate her, and for no other purpose; but the court failed to so restrict it, citing *S. v. Parker,* 134 N. C., 209, 46 S. E., 511.

The above decision has been modified in the particular respect upon which the appellant is relying. Rule 21 of the Rules of Practice in the Supreme Court, 221 N. C., 558, among other things, provides: "Nor will it be a ground of exception that evidence competent for some purposes but not for all, is admitted generally unless appellant asks, at the time of admission, that its purpose shall be restricted." Therefore, this exception cannot be sustained. *Hill v. Bean,* 150 N. C., 436, 64 S. E., 212; *Tise v. Thomasville,* 151 N. C., 281, 65 S. E., 1007; *S. v. McGlammery,* 173 N. C., 748, 91 S. E., 371; *Beck v. Tanning Co.,* 179 N. C., 123, 101 S. E., 498; *S. v. Steele,* 190 N. C., 506, 130 S. E., 308; *S. v. Jackson, supra; S. v. Tuttle,* 207 N. C., 649, 178 S. E., 76; *S. v. Johnson,* 218 N. C., 604, 12 S. E. (2d), 278; *S. v. McKinnon,* 223 N. C., 160, 25 S. E. (2d), 606; *S. v. Ham,* 224 N. C., 128, 29 S. E. (2d), 449.

The defendant challenges the admissibility of the Sheriff's testimony on another ground, and is relying on *S. v. Melvin,* 194 N. C., 394, 139 S. E., 762, to sustain his position. He contends there is such a variance between the statements made to the Sheriff of Harnett County by the prosecutrix, in describing her assailant and her testimony in this respect, given at the trial, that the Sheriff's testimony is not corroborative, and therefore purely hearsay and inadmissible as pointed out in the above case. We do not so hold. Sheriff Salmon testified that the prosecutrix told him, she had been attacked by a colored person, and "She said he had a gold tooth, one tooth out in front . . . She said the best she could remember he had on a light shirt and brown pants and was wearing a white straw hat with a broken bill in front." The prosecutrix testified at the trial below, "The defendant had on a light shirt and dark pants, the shirt had short sleeves . . . He had on a straw hat . . . He had one tooth missing. It was in front, right along here (indicating)." On cross-examination she testified, she was sure the defendant was the man who assaulted her. . . . "I thought he had one tooth out, and I thought

he had gold in his teeth." The evidence discloses that the defendant had a front tooth out but had no gold in his teeth.

In the case of *S. v. Melvin, supra,* it was held the State could not introduce in evidence the testimony of a witness and then undertake to impeach its own witness by the introduction "of previous, dissimilar and contradictory statements" made by the witness. The above case is not in point. Here there is very little variance in the testimony of the Sheriff as to what the prosecutrix told him about her assailant and what she testified to in this respect at the trial. Certainly there is no such variance in the testimony complained of as to render it inadmissible, and its credibility was for the jury. *S. v. Ham, supra.*

Assignment of error No. 6 is based on an exception to the action of the trial court in allowing a Deputy Sheriff to testify that near the scene of the attack footprints were seen which the officers followed to a tobacco barn at which the defendant said he had been curing tobacco. From the tobacco barn the footprints led to the defendant's home. The right-hand print was made by a shoe which was broken across the toe. The left-hand print was made by a smooth shoe with a worn heel containing two tacks. Shoes found at the home of the defendant were fitted into these prints at various places between the home of the defendant and the place of the alleged assault.

The evidence which tended to show that the tracks into which the shoes of the defendant were fitted, were made by him, was competent. *S. v. Mays,* 225 N. C., 486, 35 S. E. (2d), 494; *S. v. McLeod,* 198 N. C., 649, 152 S. E., 895; *S. v. Spencer,* 176 N. C., 709, 97 S. E., 155; *S. v. Lowry,* 170 N. C., 730, 87 S. E., 62; *S. v. Hunter,* 143 N. C., 607, 56 S. E., 547; *S. v. Reitz,* 83 N. C., 634; *S. v. Graham,* 74 N. C., 646.

In the case of *S. v. McLeod, supra, Stacy, C. J.,* speaking for the Court, said: "The evidence as to the identity of the tracks was competent. *S. v. Lowry,* 170 N. C., 730, 87 S. E., 62. Indeed, it may be stated as a general rule that the correspondence of tracks, footprints, or ground marks, found in connection with a crime, with the track, footprints, or shoe mark of the accused of the crime, or with the track, footprint, or shoe mark of his horse, or with the track, tread, or wheel mark of his wagon, buggy, or automobile, is admissible in evidence as tending to identify the accused as the perpetrator of the crime, the probative value of such evidence, of course, depending upon the attendant circumstances."

The remaining exceptions have been abandoned.

We find no error in the trial below.

No error.

STATE v. WADDELL McNAIR.

(Filed 5 June, 1946.)

1. Larceny § 7—

Evidence tending to show that title to the automobile in question was taken in the name of prosecuting witness, that defendant was allowed by her to drive it at times with the understanding that he would not take it out of town, that defendant borrowed the car, took it out of town and refused to bring it back or surrender its possession, with sharp conflict in the evidence as to whether defendant or prosecuting witness paid for the car, *is held* sufficient to take the case to the jury, the *bona fides* of defendant's asserted belief of ownership being for the jury.

2. Criminal Law §§ 30, 42e—

Permitting the solicitor to cross-examine defendant in regard to an allegation made by defendant in his complaint in a prior civil action for the purpose of impeaching defendant's testimony during the prosecution, by showing that defendant had made two contradictory statements about the matter, both of which the solicitor contended were incorrect, does not impinge G. S., 1-149, since the purpose and effect is not to prove the fact alleged in the pleading, but to the contrary.

3. Criminal Law § 78e—

An error in stating the contentions of a party, or in recapitulating the evidence, should be called to the court's attention in time to afford an opportunity of correction, otherwise it may be regarded as waived or as a harmless inadvertence. Usually the most convenient time for correctional requests is just before the jury retires to make up its verdict.

APPEAL by defendant from *Pless, J.*, at January Term, 1946, of FORSYTH.

Criminal prosecution upon several indictments charging the defendant, among cognate crimes, with the larceny of an automobile of the value of $1,500, the property of one Hattie C. Burner.

It is in evidence that on 19 June, 1945, Hattie C. Burner purchased a Buick sedan from Hill & Phelps Motor Company of Winston-Salem. She secured part of the purchase money from State Finance Company with the defendant, Waddell McNair, as surety. Title to the car was taken in her name, and the defendant was allowed to drive it at times with the understanding that he would not take it out of town. The defendant borrowed the car on 3 August, 1945, and failed to return it. Investigation disclosed that he had driven it to Washington, D. C. He refused to bring it back or to surrender its possession.

On 25 August, 1945, the defendant instituted suit in the Superior Court of Forsyth County to obtain possession of the car from Hattie C. Burner, alleging that he bought the car "from Clyde Myers, an automobile dealer in the City of Winston-Salem," paid for it with his own

funds and allowed title to be taken in the name of the prosecuting witness only for financing purposes.

The evidence is in sharp conflict as to who paid for the car and whose money was used in its purchase. The signatures of "Waddell his × mark McNair" and "Hattie C. Burner" both appear on the conditional sales contract and the note of the State Finance Company as purchasers and principals respectively.

When the defendant was on the witness stand, the solicitor, over objection, was allowed to cross-examine him about his complaint in the civil action brought against Hattie C. Burner to obtain possession of the car. This is brought forward and assigned as error.

Verdict: Guilty of larceny.

Judgment: Imprisonment in the State's Prison for not less than 18 months nor more than 3 years.

The defendant appeals, assigning errors.

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

W. T. Wilson for defendant.

STACY, C. J. The case as made readily survives the demurrer to the evidence. Whether the defendant acted under a *bona fide* belief that the car belonged to him was for the jury. The testimony of the prosecuting witness pointed in one direction; that of the defendant in another.

The only exceptions which seem to merit attention are those addressed to the cross-examination of the defendant concerning the gravamen of his complaint in the civil action brought by him against Hattie C. Burner to obtain possession of the car, and perhaps one in respect of the charge.

It is provided by G. S., 1-149, that no pleading in a civil action "can be used in a criminal prosecution against the party as proof of a fact admitted or alleged in it." *S. v. Wilson,* 217 N. C., 123, 7 S. E. (2d), 11; *S. v. Ray,* 206 N. C., 736, 175 S. E., 109. See *S. v. Stephenson,* 218 N. C., 258, 10 S. E. (2d), 819, and *S. v. Dula,* 204 N. C., 535, 168 S. E., 836.

The solicitor announced that the object of the cross-examination relative to the complaint in the civil action, was "to impeach the witness or to contradict him," and not to prove any of the facts alleged therein, as they were at variance with the theory of the State's case. The purpose of the solicitor was to use the allegations of the complaint in the

civil action, not "as proof of a fact admitted or alleged in it," but to show that the defendant had made two contradictory statements about the matter, neither of which was correct. To offer an allegation in a pleading simply as evidence of its existence, or that it was made, is not necessarily to use the pleading as proof of any fact therein alleged. The motive of the solicitor was quite the opposite in the instant case. He was seeking to discredit the testimony of the defendant given on the trial by showing that the defendant had made a different statement about the same matter on a prior occasion. The solicitor contended, however, that the defendant's prior statement, as well as his testimony on the trial, was inaccurate. Thus it appears that no impingement upon the statute was intended or resulted from the cross-examination.

The defendant also assigns as error a *lapsus linguæ* of the court in misstating to the jury that the defendant declined to tell where the car was until he was ordered into custody by Judge Nettles at the December Term, Forsyth Superior Court; whereas the record discloses that on the preliminary hearing in the municipal court the defendant informed counsel for the prosecution the car was at 414 Street, Washington, D. C. It does not appear that this misstatement of the evidence was called to the attention of the court before the jury retired, or at any time during the trial. It is required under the rules of practice that this be done in order to give the court an opportunity to correct the inadvertence. *Ward v. R. R.*, 224 N. C., 696, 32 S. E. (2d), 221; *S. v. Baker*, 212 N. C., 233, 193 S. E., 22; *S. v. Steele*, 190 N. C., 506, 130 S. E., 308, and cases cited. It is settled practice in this jurisdiction that "any substantial errors, made by the court in the statement of the evidence or in the statement of the contentions of the parties, must be called to the attention of the court at the time they are made, in order to give opportunity to make correction, and the failure to so call them to the court's attention is a waiver of any right to object and except thereto on appeal." *Mfg. Co. v. R. R.* (7th syllabus), 222 N. C., 330, 23 S. E. (2d), 32.

An error in stating the contentions of a party, or in recapitulating the evidence, should be called to the court's attention in time to afford an opportunity of correction, otherwise it may be regarded as waived or as a harmless inadvertence. *Vance v. Guy*, 224 N. C., 607, 31 S. E. (2d), 766; *S. v. Smith*, 221 N. C., 400, 20 S. E. (2d), 360; *S. v. Johnson*, 219 N. C., 759, 14 S. E. (2d), 792; *S. v. King*, 219 N. C., 667, 14 S. E. (2d), 803; *S. v. Johnson*, 193 N. C., 701, 138 S. E., 19; *S. v. Sinodis*, 189 N. C., 565, 127 S. E., 601. "If the recitals of the court were incorrect as to the facts of the case, it was the duty of the defendant to call the court's attention to it, so that the correction could be made then and there. If this was not done at the time, the defendant cannot complain and wait and except when the case is made up on appeal." *S. v. Barn-*

hill, 186 N. C., 446, 119 S. E., 894. Usually the most convenient time for correctional requests is just before the jury retires to make up its verdict. *S. v. Steele, supra.* Indeed, in many instances, the court pauses as the case is about to be given to the jury and asks if there are any requests or suggestions. See *Daughtry v. Cline,* 224 N. C., 381 (at p. 388), 30 S. E. (2d), 322.

The case is not like *S. v. Isaac,* 225 N. C., 310, 34 S. E. (2d), 410, or *S. v. Wyont,* 218 N. C., 505, 11 S. E. (2d), 473, or *S. v. Love,* 187 N. C., 32, 121 S. E., 20, and others of similar import, where excluded evidence was placed before the jury as sworn testimony without opportunity on the part of the defendant to answer it or in any way to meet it. This, of course, if material, would constitute prejudicial error. *Smith v. Hosiery Mill,* 212 N. C., 661, 194 S. E., 83.

On the record, as presented, the validity of the trial will be upheld.

No error.

R. C. GARDNER v. BOARD OF TRUSTEES OF NORTH CAROLINA LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM.

(Filed 5 June, 1946.)

1. Retirement System § 9—

A policeman, who is a member of and entitled to the benefits of the Law Enforcement Officers' Benefit and Retirement Fund, G. S., 143-166, is not also eligible to become a member of the Local Governmental Employees' Retirement System. G. S., 128-24 (2).

2. Retirement System § 18: Criminal Law § 66—

The additional cost in criminal cases provided by G. S., 143-166, is not intended to be used to compensate the officers who make the arrests or participate in the prosecutions, but is to be paid to the State Treasurer and by him received, G. S., 147-68, as public funds for disbursement under the provisions of the statute for the purposes of the Law Enforcement Officers' Retirement Fund.

3. State § 1c—

Moneys paid into the hands of the State Treasurer by virtue of a State law become public funds for which the Treasurer is responsible, and may be disbursed only in accordance with legislative authority. State Constitution, Art. XIV, sec. 3.

APPEAL by plaintiff from *Bobbitt, J.,* 6 April, 1946. From MECKLENBURG. Affirmed.

Petition for *mandamus* to require defendant to accept and enroll plaintiff as a member of its retirement system.

Judgment was rendered on the pleadings for defendant and the plaintiff appealed.

John D. Shaw for plaintiff, appellant.

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

DEVIN, J. The question presented by this appeal is whether a city policeman, who is a member of and entitled to the benefits of the Law Enforcement Officers' Benefit and Retirement Fund, is also eligible to become a member of the Local Governmental Employees' Retirement System.

The court below held that plaintiff was excluded from membership in the Local Governmental Employees' Retirement System by reason of the express provisions of the statute, G. S., 128-24 (2).

It was admitted in the pleadings that the plaintiff is and has been for a number of years a member of the police department of the City of Charlotte, and as such is a member in good standing in the Law Enforcement Officers' Benefit and Retirement Fund, a corporate body created and established by ch. 349, Public Laws 1937, now G. S., 143-166.

On 15 February, 1946, the plaintiff signified his desire to become also a member of the Local Governmental Employees' Retirement System, a corporate body created by statute, now codified as G. S., 128-24. The plaintiff's employer, the City of Charlotte, now participating in the Local Governmental Employees' Retirement System, thereupon deducted the proper amount from plaintiff's salary and transmitted it, together with the added amount from the city's funds, as provided by the statute, to the defendant. The defendant declined to accept plaintiff as a member of its system and returned the contribution. This action was based on the ground that plaintiff was excluded from membership in the Local Governmental Employees' Retirement System by the following provision in the statute: "Persons who are or who shall become members of any existing retirement system and who are or who may be thereby entitled to benefits by existing laws providing for retirement allowances for employees wholly or partly at the expense of funds drawn from the treasury of the State of North Carolina or of any political subdivision thereof, shall not be members." G. S., 128-24 (2).

It is conceded that the plaintiff as an employee of the City of Charlotte would be entitled to make contributions and receive the benefits provided for local governmental employees by G. S., 128-24, unless he is rendered ineligible therefor because of his membership in the Law Enforcement Officers' Benefit and Retirement Fund and his right as such

member to receive retirement allowances which are provided "wholly or partly at the expense of funds drawn from the treasury of the state."

The funds for retirement allowances and other benefits under the Law Enforcement Officers' System are obtained in part by deductions from members' salaries, but more largely are provided by State law, G. S., 143-166, from the following source:

"In every criminal case finally disposed of in the criminal courts of this state, wherein the defendant is convicted . . . and is assessed with the payment of costs . . . there shall be assessed against said convicted person . . . two dollars ($2.00) additional cost to be collected and paid over to the treasurer of North Carolina and held in a special fund for the purposes of this article." It is further declared in the statute that "No state employee participating in the benefits of this article shall be eligible to participate in the retirement benefits provided by the Teachers' and State Employees' Retirement System Act." Highway patrolmen were permitted to make election between membership in the Teachers' and State Employees' Retirement System and the Law Enforcement Officers' Fund by ch. 120, Public Laws 1943.

The additional cost in criminal cases provided by G. S., 143-166, is not intended to be used to compensate the officers who make the arrests or participate in the prosecution, but is paid to the State Treasurer and by him disbursed under the statute for the purposes of the Law Enforcement Officers' Retirement Act. The money is obtained under the power of the State to enforce collection, and is placed in the hands of the State Treasurer to be handled by him in accordance with the provisions of a State law. Thus the money used to finance the Law Enforcement Officers' Benefit and Retirement Fund, in part, is paid by the State Treasurer out of a special fund in the treasury of the State, accumulated from collections enforced by law.

We do not think the exclusion from membership in the defendant's system, as expressed in the statute, should be interpreted to apply only to those receiving retirement allowances from the general funds in the State Treasury derived from general taxation, but should be understood as applicable to those entitled to benefits from any funds coming into the hands of the State Treasurer by virtue of a State law. This seems to be the intent and purpose of the Act.

The plaintiff calls attention to the language of the two statutes and argues that the statute, G. S., 128-24 (2), denies membership in the defendant's system only to persons who are entitled to benefits at the expense of funds drawn from the "treasury," whereas the amounts available for the Law Enforcement Officers' Retirement Fund derived from the additional costs in criminal cases under G. S., 143-166, are required to be paid to the State "treasurer" and by him held in a special fund for

the purposes of the Act. However, we do not regard this as controlling, since it is the duty of the State Treasurer "to receive all monies which shall from time to time be paid into the treasury of this state." G. S., 147-68. And once in the treasury "No money shall be drawn from the treasury but in consequence of appropriations made by law." Cons., Art. XIV, sec. 3. Moneys paid into the hands of the State Treasurer by virtue of a State law become public funds for which the Treasurer is responsible and may be disbursed only in accordance with legislative authority. A treasurer is one in charge of a treasury, and a treasury is a place where public funds are deposited, kept and disbursed. Webster.

An examination of the pertinent statutes now in force leads to the conclusion that a local police officer may become a member of either retirement system, but may not belong to both.

The constitutionality of G. S., 143-166, is not presented by this appeal and is not decided by the disposition of this case.

For the reasons stated, we think the court below has ruled correctly, and that the judgment should be

Affirmed.

C. L. LINDSAY v. S. C. BRAWLEY AND R. M. GANTT.

(Filed 5 June, 1946.)

1. Appeal and Error §§ 10e, 13c—

Ordinarily, no supervision can be exercised over the judge in the settlement of case on appeal except to see that the duty is performed, G. S., 1-283, and asserted errors in omitting certain matters from the case on appeal cannot be brought up on exception taken at the time the case is settled, the sole remedy being by motion for *certiorari*.

2. Appeal and Error §§ 1, 40d—

An exception to the approval by the court of the referee's findings of fact raises the question whether there is any evidence to support the findings, the findings being conclusive in the Supreme Court if they are supported by evidence.

3. Same—

Where the referee, in making a finding of fact upon conflicting evidence, applies an erroneous rule as to which party has the burden of proof, an exception to the approval of the finding by the court raises a question of law and legal inference reviewable by the Supreme Court, and since the error of law may have seriously prejudiced appellant, the cause will be remanded for appropriate proceedings.

4. Compromise and Settlement § 3—

In an action on a claim, defendants' assertion that the matter had been settled in a prior agreement between the parties, is a matter of defense, upon which defendants have the burden of proof.

APPEAL by plaintiff from *Hamilton, Special Judge,* at October Term, 1945, of DURHAM.

The plaintiff, Lindsay, brought this suit against the defendants, Brawley and Gantt, to recover a sum alleged to be due by them upon various transactions had between the parties lasting over a period of many years.

During this time Brawley and Gantt were employed as attorneys for the plaintiff and handled for him extensive matters involving real estate transactions, suits in court, collection of substantial sums of money, and professional advice, and at times a retainer. During the same period other nonprofessional business relations existed between the parties, resulting in loans made by the plaintiff to the defendants, the creation of obligations by defendants to the plaintiff by way of notes and endorsements and in other ways. These transactions, beginning in the early twenties, extended over a period of nearly twenty years, finally resulting in a disagreement between the parties as to amounts due on the various items and the balance upon the total indebtedness. During the period of negotiation, the plaintiff received from the defendants a statement of account, from their viewpoint, accompanied by a check for $300 of $474.20 claimed by defendants to be due to the plaintiff as a balance from their mutual dealings and upon a collection from Dr. and Mrs. W. P. Few. The defendants withheld $174.20 because of an alleged agreement involving that amount as an indemnity. The plaintiff, being of opinion that the defendants owed him more than that amount, declined to receive the check.

The defendants claim that during the later period of the controversy the matters were gone over between the parties and a full accord was reached with regard to the matters in controversy, including the Few collection. This the plaintiff denied.

Negotiations having failed, the plaintiff brought suit setting up his claim against the defendants in two items: First, the sum of $2,150, with interest from 15 February, 1934, a balance of moneys alleged to have been collected by defendants as attorneys for the plaintiff in an action brought against Dr. and Mrs. W. P. Few; second, $750, with interest, as the balance due on a $2,000 note executed by the defendants to the plaintiff under date of 9 October, 1929.

The defendants filed an answer denying the indebtedness and alleging that the amounts due the plaintiff had been paid and satisfied by charg-

ing the plaintiff's account with balance due them for personal services. As a cross action for affirmative relief, the defendants demanded the payment of $1,500 due under an alleged assignment to them of an amount due on a contract between plaintiff and C. C. Edwards. Plaintiff replied, setting up an amount alleged to be due him by assignment of an obligation of defendants to Edwards.

The suit coming on for trial before his Honor, Grady, Judge, at October Term, 1942, Durham Superior Court, upon the issues joined, the matters in controversy were referred to Robert P. Burns, Esq., as Referee, under G. S., 1-188—1-195, neither of the parties preserving the right to a trial by jury.

Evidence was taken before the Referee, including various exhibits and the testimony of the parties. From the tendered evidence were excluded certain items consisting of specialties found to be involved in other suits, and to this plaintiff excepted.

The evidence tended to show that a conference had been held between the parties in the spring of 1934, relating to the differences between them and the balance due from defendants to the plaintiff. There was also evidence tending to show that in that conference the Few collection, upon which separately was based the plaintiff's first prayer for relief, was considered. With reference thereto the Referee in his report made his finding and indicated his method of arriving thereat as follows:

"It is found as a fact that in the conference between the plaintiff and the defendants held in the spring of 1934 all matters in difference between the plaintiff and the defendants relating to this first cause of action were settled; that the parties then adjusted and agreed upon all matters in controversy therein and that final settlement was made between the parties. The testimony respecting this conference and the settlement is not particularly clear and convincing on the part of either plaintiff or defendant but the Referee cannot find by the greater weight of the evidence which the plaintiff must bear that complete settlement was not made, particularly in view of the fact that he made no further demands upon the defendants until about seven years thereafter."

The Referee duly filed his report containing his findings of fact and conclusions of law. To the findings of fact the plaintiff excepted, apparently on the ground that they were not supported by the evidence, and excepted to the conclusions of law based thereupon.

Upon review of the Referee's report at October, 1945, Term of Durham Superior Court, Judge Hamilton entered judgment approving and affirming the Referee's report in all respects and taxed plaintiff with the costs.

The plaintiff excepted and appealed, assigning errors.

R. O. Everett for plaintiff, appellant.

James R. Patton, Jr., Fuller, Reade, Umstead & Fuller for defendants, appellees.

SEAWELL, J. The plaintiff complains that in settling the case on appeal the judge improperly excluded therefrom certain matters occurring on the trial which he is entitled to have included for the purpose of this review, and addresses an exception to that exclusion.

G. S., 1-284, requires the Clerk of the Superior Court to prepare a transcript of the judgment roll or record proper which is sent up on appeal. Under G. S., 1-283, the judge is given power to settle the case on appeal. Ordinarily, the only supervision which may be exercised over the judge charged with this duty is to see that it is performed. *S. v. Gooch,* 94 N. C., 982. Errors and omissions in the case on appeal are corrected upon *certiorari* and cannot be brought up on exception taken at the time the case is settled. Appellant has made no motion for *certiorari,* and the matter is not reviewable on the present record.

We have carefully examined the report of the Referee, his findings of fact and conclusions of law. The exceptions raised by the plaintiff with respect to the findings of fact and to the approval thereof by the presiding judge raise the question here whether there was any evidence to support them. We find that there is such evidence, and the findings and approval thereof are ordinarily conclusive upon us in appellate review, although the court below had more extensive powers. G. S., 1-194; *Boyle v. Stallings,* 140 N. C., 524, 51 S. E., 346; *Cummings v. Swepson,* 124 N. C., 579, 32 S. E., 966; *Dent v. English Mica Co.,* 212 N. C., 241, 193 S. E., 165; *Wallace v. Benner,* 200 N. C., 124, 156 S. E., 795; *Thigpen v. Trust Co.,* 203 N. C., 291, 165 S. E., 720.

But whenever it becomes apparent that the Referee, in weighing conflicting evidence bearing on the subject of the finding, erroneously shifted the burden of proof to the prejudice of either party, and the finding and conclusion of law is approved by the trial court, the finding will be reviewed on appeal as a matter involving a question of law and legal inference. Reference to the above statement will show that the finding of fact by the Referee in the respect mentioned was based upon the erroneous view that the burden was upon the plaintiff to show that at the conference mentioned there had been no settlement between the parties; whereas, such settlement was a matter of defense, and the burden of proof rested upon the defendants. The comprehensive approval of the findings of fact and conclusions of law by the trial judge is affected with the same error. There was no trial by jury, of course, but the Referee has laid bare the manner in which he arrived at his finding, and it may have seriously prejudiced the rights of plaintiff.

For this error the cause must be remanded to the Superior Court for appropriate proceedings. It is so ordered.

Error and remanded.

W. A. FOSTER AND WIFE, MABEL FOSTER, v. J. WILSON ATWATER.

(Filed 5 June, 1946.)

1. Dedication § 4—

When land is divided into lots according to a map thereof, showing streets, alleys and parks, and lots are sold with reference to the map, the owner thereby dedicates the streets, alleys and parks to the use of those who purchase the lots, and also under some circumstances to the public.

2. Dedication § 6—

Where land impliedly dedicated has not been actually opened or used nor public or private easement claimed therein for twenty years, and the land is not necessary for ingress, egress or regress to lots sold, a declaration of withdrawal from dedication in accordance with G. S., 136-96, on the part of those holding under the original owner, is effective, and no claim of public or private easement under the dedication may thereafter be enforced.

APPEAL by defendant from *Frizzelle, J.*, at April Term, 1946, of ALAMANCE. Affirmed.

Action for specific performance of contract to purchase land. Payment was resisted on the ground that plaintiffs could not convey a good title.

From judgment holding the title good, and decreeing that defendant accept the tendered deed and pay the agreed price, defendant appealed.

Long & Long, J. Elmer Long, and Clarence Ross for plaintiffs, appellees.

C. C. Cates, Jr., for defendant, appellant.

DEVIN, J. The defendant based his refusal to pay the purchase price for the land described in the contract upon the ground that the land, consisting of four acres unimproved land, was included in a larger area which had been by a former owner subdivided into lots and streets, according to a recorded map, and that this constituted a dedication of the land in controversy to public use or private easement as a parkway.

Plaintiffs insisted, however, that on the described land no streets or lots had been laid off, and that on the map the four-acre tract was desig-

nated only as "Willowbrook"; and further that plaintiffs as successors in title had duly filed and recorded a declaration of withdrawal of the four acres from dedication, in accord with the statute, G. S., 136-96.

The judgment below in favor of the plaintiffs was predicated upon an agreed statement of facts. From this it appears that in 1925 the Mebane Real Estate & Trust Co., the owner of a tract of land (including the four acres described), subdivided it into lots and streets and platted it under the name of "Central Heights." At that time this property was situated outside the corporate limits of the City of Burlington but by recent extension is now within the city limits. No part of the 4 acres was subdivided into lots, nor has it been laid out or referred to as a park, or otherwise than as "Willowbrook." In 1927 the Mebane Real Estate & Trust Co. executed a deed of trust on the 4 acres to a corporate trustee to secure certain notes, and subsequently both the Mebane Company and the trustee became bankrupt, and the property in question was sold under direction of the U. S. Court, and by *mesne* conveyances title thereto passed to the plaintiffs. No park has ever been laid out, planned or constructed on this land, or used or developed for public or private use, nor has anyone sought to enforce or claim any easement thereon. No part of this land is necessary for ingress or egress to or from any other part of the real property shown in the subdivisions. Plaintiffs and their predecessors in title have used the premises for their own purposes, openly and adversely without objection, either public or private. If the inclusion of the four acres in the tract of land, of which a portion was subdivided, be understood to indicate its possible use as a park, if accepted and developed, the plaintiffs in accordance with the statute have now filed formal declaration of withdrawal from dedication, the land not having been actually opened or used by the public within twenty years from the recording of the map.

The principle is well settled that when land is divided into lots according to a map thereof, showing streets, alleys and parks, and lots are sold with reference to the map, the owner thereby dedicates the streets, alleys and parks to the use of those who purchase the lots, and also under some circumstances to the public. *Sexton v. Elizabeth City,* 169 N. C., 385, 86 S. E., 344; *Elizabeth City v. Commander,* 176 N. C., 26, 96 S. E., 736; *Stephens Co. v. Homes Co.,* 181 N. C., 335, 107 S. E., 233; *Irwin v. Charlotte,* 193 N. C., 109, 136 S. E., 368; *Somersette v. Stanaland,* 202 N. C., 685, 163 S. E., 804. But where the land so impliedly dedicated has not been actually opened or used for twenty years, and no person has asserted public or private easement thereon within the period fixed by the statute, or at any other time, and the land is not necessary for ingress, egress or regress to lots sold, effect is given by statute to the filing of a declaration of withdrawal of the land from

dedication on the part of those holding under the original owner, and the dedication of the land is conclusively presumed to have been abandoned, and no claim of easement, public or private, may thereafter be enforced. *Sheets v. Walsh,* 217 N. C., 32, 6 S. E. (2d), 817; *Irwin v. Charlotte,* 193 N. C., 109, 136 S. E., 368.

It will also be observed that it does not appear that on the four acres of land in question any streets or alleys were ever laid off or that the land itself was designated on the map or otherwise held out as a park.

We think the court below, upon the facts agreed, correctly ruled that the plaintiffs could convey a good title to the land in question, unencumbered by public or private easement, and the judgment is

Affirmed.

E. E. ERICSON v. INA ERICSON.

(Filed 5 June, 1946.)

1. Divorce § 14—

A cross action for alimony without divorce, G. S., 50-16, cannot be maintained nor a consent judgment based upon such cross action entered in the husband's action for divorce on the ground of two years separation. But in the instant case the record fails to contain the complaint in the cross action, and since its nature does not appear the validity of the consent judgment is not considered or determined, but the appeal is dismissed.

2. Appeal and Error § 19—

The pleadings are a necessary part of the record proper upon appeal, and where the pleadings are omitted from the record, the appeal must be dismissed. Rule of Practice in the Supreme Court, No. 19, sec. 1. Nor will memoranda of the pleadings suffice. Rule 20.

3. Appeal and Error § 22—

Judicial knowledge arises only from what properly appears on the record.

APPEAL by plaintiff from *Stevens, J.,* at December Term, 1945, of ORANGE.

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

The record on this appeal consists of:

(1) Notice of defendant's motion in the cause served upon plaintiff.

(2) Defendant's verified petition and motion in the cause for order adjudging plaintiff in contempt of court for willful disobedience of an order requiring him to pay to defendant $100 per month for her support and maintenance so long as she remains unmarried, in accordance with

provisions of a consent judgment dated 10 June, 1940, entered upon her cross complaint in this action at June Term, 1940, of Superior Court of Orange County, North Carolina—copy of the consent judgment and copy of judgment of absolute divorce declared to be concurrent with the consent judgment and also entered at said June Term, 1940, of said court, being attached as exhibits.

(3) Verified answer of plaintiff to defendant's petition and motion in the cause, in which he denies material allegations thereof and prays "that ruling requiring him to show cause be discharged, and that the allowance of $100 per month to be paid to the defendant by the terms of the consent judgment above referred to be stricken out or that it be reduced to an amount commensurate with his financial condition and ability to pay."

(4) Statement of evidence offered by plaintiff and by defendant upon hearing on defendant's said petition and motion in the cause.

(5) Judgment and order upon the motion in which the court found as facts, among others, that plaintiff "has wilfully failed and refused to comply with the provisions of said judgment of June 10th, 1940, with respect to payments due . . .," and that "his disobedience to the terms thereof was willful and contumacious, constituting an intentional resistance to a lawful order of the court . . .," and ordered "that plaintiff be confined to the common jail of Orange County until he has made all payments required of him under the judgment of June 10, 1940, and until he complies with the orders of the court or is otherwise discharged according to law."

Plaintiff excepted to the action of the court in refusing to modify consent judgment as a matter of law and to the judgment as signed by the court, and assigns same as errors, and appeals to the Supreme Court.

Fuller, Reade, Umstead & Fuller for plaintiff, appellant.
Victor S. Bryant for defendant, appellee.

WINBORNE, J. The questions presented on this appeal constitute fundamentally a challenge to the jurisdiction of the court to enter in this action the consent judgment upon which the contempt proceeding against plaintiff is predicated. This makes it necessary to consider the nature of the pleading on defendant's cross action upon which the consent judgment appears to rest.

If alimony without divorce, under G. S., 50-16, formerly C. S., 1667, were the nature and purpose of the pleading, it could not be maintained by cross action in a suit for divorce instituted by the husband. See *Silver v. Silver,* 220 N. C., 191, 16 S. E. (2d), 834; *Shore v. Shore,* 220 N. C., 802, 18 S. E. (2d), 353, and cases cited.

However, it is noted at the threshold of this appeal that the pleadings are not contained in the record filed in this Court. Only memoranda of the purport of the pleadings are shown. Hence, while it may be doubted that any of plaintiff's assignments of error is tenable, we are precluded from considering or determining them. *Goodman v. Goodman,* 208 N. C., 416, 181 S. E., 328. The pleadings are essential in order that we may be advised as to the nature of the action or proceeding. *Waters v. Waters,* 199 N. C., 667, 155 S. E., 564; *S. v. Lumber Co.,* 207 N. C., 47, 175 S. E., 713; *Ins. Co. v. Bullard,* 207 N. C., 652, 178 S. E., 113; *Goodman v. Goodman, supra; Bank v. McCullers,* 211 N. C., 327, 190 S. E., 217; *Washington County v. Land Co.,* 222 N. C., 637, 24 S. E. (2d), 338. "The pleadings are a necessary part of the record proper upon appeal, and where the pleadings are omitted from the record, the appeal must be dismissed," headnote epitomizing the holding in *S. v. Lumber Co., supra.* See also *Plott v. Construction Co.,* 198 N. C., 782, 153 S. E., 396; *Waters v. Waters, supra; Pruitt v. Wood,* 199 N. C., 788, 156 S. E., 126; *Everett v. Fair Association,* 202 N. C., 838, 162 S. E., 896; *Riggan v. Harrison,* 203 N. C., 191, 165 S. E., 358; *Armstrong v. Service Stores,* 203 N. C., 231, 165 S. E., 680; *Parks v. Seagraves,* 203 N. C., 647, 166 S. E., 747; *Payne v. Brown,* 205 N. C., 785, 172 S. E., 348; *Ins. Co. v. Bullard, supra; Goodman v. Goodman, supra; Bank v. McCullers, supra; Washington County v. Land Co., supra.* Such is the uniform practice.

Rule 19, section 1, of the Rules of Practice in the Supreme Court, 221 N. C., 544, at page 533, requires "that the pleadings on which the case is tried, the issues, and judgment appealed from shall be a part of the transcript in all cases."

And Rule 20 of Rules of Practice provides that "memoranda of pleadings will not be received or recognized in the Supreme Court as pleadings, even by consent." See *Plott v. Construction Co., supra; Bank v. McCullers, supra.*

Judicial knowledge arises only from what properly appears on the record. *Walton v. McKesson,* 101 N. C., 428, 7 S. E., 566; *Goodman v. Goodman, supra; S. v. Lumber Co., supra.*

Appeal dismissed.

JAMES W. SHAW, ON BEHALF OF HIMSELF AND ALL OTHER INTERESTED TAXPAYERS, v. LIGGETT & MYERS TOBACCO COMPANY.

(Filed 5 June, 1946.)

Municipal Corporations § 25b—

A citizen who is a general taxpayer but not a landowner may not maintain a suit to enjoin the closing of a by-street in accordance with authorization granted by municipal resolution.

APPEAL by plaintiff from *Frizzelle, J.*, at Chambers in Durham, N. C., 1 May, 1946. From DURHAM.

Civil action instituted by the plaintiff on behalf of himself and all other interested taxpayers of the City and County of Durham, to restrain the defendant from erecting a building in and across a portion of Fuller Street in the City of Durham.

The one block of said street which the defendant proposes to close, is bounded on the east and on the west by lands belonging to the defendant; on the north by West Main Street, one of the public streets of the City of Durham; and on the south by the northerly line of the right of way of the North Carolina Railroad Company, now leased to the Southern Railway Company.

All owners of property abutting on Fuller Street in the City of Durham have acquiesced in the proposal to close the one block of said street, lying at the southern end thereof, and have expressed their approval either by the execution of quitclaim deeds or by giving their written consent thereto.

The City Council of the City of Durham, on 18 February, 1946, passed a resolution authorizing the defendant to close the above described portion of said street.

From an order dissolving the temporary restraining order issued against the defendant to enjoin the erection of a building across said street, plaintiff appeals to the Supreme Court and assigns error.

W. C. Purcell for plaintiff.

Fuller, Reade, Umstead & Fuller for defendant.

DENNY, J. It was admitted in the oral argument before this Court that the plaintiff has no interest in the subject matter of this action, except as an interested taxpayer of the City and County of Durham.

The action of a city or town in authorizing the closing of a street, cannot be successfully challenged in a civil suit instituted by a private citizen whose only interest therein is that of a general taxpayer of the

city or town. Such action, if maintainable at all, must be instituted by a landowner whose property is affected by the change, and who will suffer some peculiar and special injury by reason of it; an injury not suffered by the public generally. *Moore v. Meroney,* 154 N. C., 158, 69 S. E., 838; *Trotter v. Franklin,* 146 N. C., 554, 60 S. E., 509; *Pedrick v. R. R.,* 143 N. C., 485, 55 S. E., 877. *Cf. Stratford v. Greensboro,* 124 N. C., 127, 32 S. E., 394; *Sanders v. R. R.,* 216 N. C., 312, 4 S. E. (2d), 902; and *Sanders v. Smithfield,* 221 N. C., 166, 19 S. E. (2d), 630.

In *Trotter v. Franklin, supra,* the appeal was from an order dissolving a restraining order theretofore issued at the instance of the plaintiff, a taxpayer of the Town of Franklin, to prevent the town authorities from closing a street on which the plaintiff owned no property. The holding of this Court is succinctly stated in the syllabus of the opinion, as follows: "Matters relating to closing by-streets of a town are of a ministerial character, exclusively within the proper action of the town authorities, and not subject to regulation by the court at the suit of one upon the ground that he is a taxpayer."

It appears from the record herein that all persons, firms and corporations, now having any interest in property fronting on Fuller Street, in the City of Durham, have given their written consent to the closing of that part of the street which the defendant proposes to close. Therefore, for the reason herein stated, the order dissolving the temporary restraining order will be upheld.

Affirmed.

STATE v. JESSIE FARRAR.

(Filed 5 June, 1946.)

Criminal Law §§ 63, 68b—

No appeal lies from an order that a suspended judgment be executed upon findings that defendant had violated the conditions upon which judgment was suspended.

APPEAL by defendant from *Frizzelle, J.,* at March Term, 1946, of ORANGE.

Criminal prosecution upon warrant issued out of the recorder's court of Chapel Hill, North Carolina, charging defendant with unlawful possession of "non tax paid liquor" "for the purpose of sale," etc. Upon trial defendant was found guilty and sentenced to jail for specified term—the judgment being suspended upon conditions stated. Thereafter, upon hearing on "order to show cause," the judge of recorder's

court, finding as a fact that defendant had violated the conditions upon which the said judgment was suspended, ordered the jail sentence into effect. Defendant, in open court, gave notice of appeal. The court, being of opinion that no appeal is provided in such case, denied the motion. Whereupon, defendant started serving the sentence, and was released upon *habeas corpus*. She then gave bond for appearance in Superior Court of Orange County. On hearing there the presiding judge approved and confirmed the judgment of recorder's court, and ordered same into execution. Defendant appeals therefrom to the Supreme Court. And the Attorney-General for the State moves to dismiss the appeal for lack of jurisdiction.

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

A. A. McDonald for defendant, appellant.

PER CURIAM. On the record as it appears in this Court, the motion of the State to dismiss the appeal is allowed on authority of *S. v. Miller*, 225 N. C., 213, 34 S. E. (2d), 143, and cases cited, including *S. v. King*, 222 N. C., 137, 22 S. E. (2d), 241.

Appeal dismissed.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1946

CELI FLOWERS LOFTON AND HUSBAND, JAMES LOFTON; ALICE FLOWERS MOORE AND HUSBAND, ISRAEL MOORE, v. ALEX W. BARBER AND WIFE, MAUDE E. BARBER; ANNIE MAY WILLIS AND HUSBAND, LEO WILLIS; C. C. ARCHBELL AND JOE COLLINS.

(Filed 18 September, 1946.)

1. Deeds § 11—

Ordinarily the intent of the parties as expressed in the deed must prevail and in seeking the intent the deed must be construed by its four corners, taking all of its provisions together.

2. Adverse Possession § 9a—

A deed which is regular on its face and purports to convey title to land constitutes color of title even though void for matters *dehors* the record, such as want of title in the grantor. G. S., 1-38.

3. Same—

A deed otherwise sufficient in form to convey the fee contained a paragraph between the description and the *habendum* clause "after the death of me (the grantee) and my wife . . . this land to be divided between my two daughters . . ." The grantee and his wife executed a mortgage thereon purporting to convey the fee as security, without the joinder of the daughters. Defendants claim by *mesne* conveyance under the foreclosure. *Held:* Deed to defendants purporting to convey the fee is color of title regardless of whether or not the deed to the mortgagors conveyed to them only a life estate with remainder to their daughters.

4. Adverse Possession § 13a—

Where the life tenant executes an instrument purporting to convey the fee, the right of action of the remaindermen against those possessing and claiming under such instrument by *mesne* conveyances accrues as of the date of the death of the life tenant.

5. Adverse Possession § 4d—

The rule that the possession of the tenant is the possession of the landlord, precluding adverse possession by the tenant without first surrendering the possession he has under the lease, obtains only when the tenant seeks to assert a title adverse to that of the landlord or assumes an attitude of hostility to that title, and does not apply where the tenant or those claiming under him assert title derived from the landlord and therefore rely upon and claim under such title. G. S., 1-43.

6. Same—

Where a tenant acquires the title of his landlord by deed from the purchaser at the foreclosure sale of a mortgage executed by the landlord, and thus acquires a title derived from the landlord, G. S., 1-43 is not applicable, and the tenant's deed purporting to convey the fee is color of title, and adverse possession thereunder for seven years is sufficient to ripen the title in the grantee as against those claiming as remaindermen upon their contention that the landlord mortgagor had only a life estate in the lands.

7. Same—

Where a tenant acquires the title of his landlord, his leasehold estate merges in the greater estate conveyed by his deed, and the tenant is thereafter under no obligation to recognize his former landlord as such or surrender possession to him before asserting the title thus acquired. G. S., 1-43.

8. Adverse Possession § 9a—

The grantee under an inoperative tax foreclosure deed may convey colorable title.

APPEAL by plaintiffs from *Thompson, J.*, at February Term, 1946, of BEAUFORT.

Civil action in common law ejectment.

On 25 October, 1909, W. A. T. Litchfield conveyed thirty-five acres of land in Beaufort County to Ned Flowers. The granting clause in the deed is "to said Ned Flowers, his heirs and assigns." The *habendum* clause is "to the said Ned Flowers and wife, Caroline Flowers, their heirs and assigns." The covenant clause is to like effect.

Between the description and the *habendum* clause the following paragraph appears:

"After the death of me and my wife, Caroline Flowers, then this land to be equally divided to be divided between my two daughters, Alice Flowers to have the house and the west side of the land, Celi Flowers to have the remainder, and then to the heirs."

When this deed from Litchfield to Flowers was recorded, the names of Ned Flowers, Caroline Flowers, Celi Flowers, and Alice Flowers were all listed in the index as grantees.

On 11 December, 1919, Flowers and wife conveyed said land to W. H. Hooker by mortgage deed, which purports to convey a fee, to secure a

loan of $115. This mortgage deed was foreclosed 30 April, 1925, and the land was purchased by C. C. Archbell. Foreclosure deed was executed 19 May, 1925.

The land was sold to satisfy unpaid taxes 5 October, 1925, and purchased at said sale by C. C. Archbell. A tax foreclosure deed, dated 8 November, 1926, was delivered to him. Archbell purchased at the two sales for Joe Collins, tenant of Ned Flowers.

Archbell, on 27 July, 1925, conveyed the land to Joe Collins and Joe Collins on 31 August, 1926, conveyed it to Mary Brown, who went into possession. She and her children, heirs at law, have remained in possession thereof, since said date, claiming title thereto under said deed. Ned Flowers died 10 November, 1928. His wife Caroline was then dead.

This action was instituted 21 September, 1945. At the time of the death of Ned Flowers in 1928 his two daughters, plaintiffs herein, were of full age, the younger daughter now being 51 years of age.

The court below submitted the following issue: "Are the plaintiffs the owners and entitled to possession of the land described in the complaint?" and directed a verdict in favor of defendants. The jury answered the issue "no." There was judgment on the verdict and plaintiffs appealed.

J. H. Bonner for plaintiffs, appellants.
Carter & Carter for defendants, appellees.

BARNHILL, J. Plaintiffs make no attack on the mortgage deed from Flowers to Hooker or upon the deed executed in foreclosure thereof other than to assert that they convey at most only an estate for the life of Ned Flowers. They rely primarily upon the contention that the language in the paragraph immediately following the description in the Litchfield deed limits the title conveyed to Ned Flowers to an estate for life and vests title in remainder in them.

Ordinarily the intent of the parties as expressed in the deed must prevail and in seeking the intent the deed must be construed by its four corners, taking all of its provisions together. *Krites v. Plott,* 222 N. C., 679, 24 S. E. (2d), 531.

When the language used in the Litchfield deed is so considered it readily appears that *Jefferson v. Jefferson,* 219 N. C., 333, 13 S. E. (2d), 745, and *Krites v. Plott, supra,* are distinguishable. In both the *Jefferson* and the *Krites cases,* there was language expressly limiting the estate of the first taker and of grant or conveyance to those who claimed title in remainder. Such is not the case here.

Whether the absence of such language renders the paragraph relied upon by plaintiffs nugatory and ineffectual we need not now decide, for

the deed from Collins to Brown, if not a valid conveyance of a fee simple estate, is at least effective as color of title.

Want of title in the grantor does not nullify the effectiveness of a deed as color. *Glass v. Shoe Co.,* 212 N. C., 70, 192 S. E., 899; *Dorman v. Goodman,* 213 N. C., 406, 196 S. E., 352; *Nichols v. York,* 219 N. C., 262, 13 S. E. (2d), 565; *Berry v. Cedar Works,* 184 N. C., 187, 113 S. E., 772; *Fisher v. Toxaway,* 165 N. C., 663, 81 S. E., 925; *Burns v. Stewart,* 162 N. C., 360, 78 S. E., 321; *Barnett v. Amaker,* 198 N. C., 168, 150 S. E., 878.

When the deed is regular upon its face and purports to convey title to the land in controversy, it constitutes color of title even though void for matters *dehors* the record. It is immaterial whether the conveyance actually passes the title. It is sufficient if it appears to do so. *Alsworth v. Cedar Works,* 172 N. C., 17, 89 S. E., 1008; *Vance v. Guy,* 224 N. C., 607, 31 S. E. (2d), 766.

So then the seven-year statute, G. S., 1-38, has no reference to titles good in themselves, but is intended to protect apparent titles void in law. *Perry v. Bassenger,* 219 N. C., 838, 15 S. E. (2d), 365.

Here the deed from Collins to Brown is regular upon its face and purports to convey title without limitation, reservation or exception. As such it is at least color of title to the entire interest in the land it purports to convey. *Vance v. Guy,* 223 N. C., 409, 27 S. E. (2d), 117. This deed was executed 31 August, 1926. The grantee immediately went into possession and she and those claiming under her have been in the exclusive possession thereof since said date, claiming it as their own. So the record indicates.

Conceding but not deciding that plaintiffs acquired title in remainder under the Litchfield deed, their right of action accrued at the death of the life tenant, 10 November, 1928. *Hauser v. Craft,* 134 N. C., 319. Yet for "12 or 15 years" they made no inquiry or investigation and they took no action to challenge the possession of those claiming under the Collins deed until 21 September, 1945. In the meantime the defendants by their adverse possession under color, if not by their deed, have acquired a title which the plaintiffs cannot now assail.

But plaintiffs insist that the record discloses Collins was a tenant of Ned Flowers, that the tenant's possession is the possession of the landlord, G. S., 1-43, and that a tenant under lease may not maintain an action against his landlord involving title during the period of lease without first surrendering the possession he has under the lease.

The rule thus stated is sound in principle and has always been rigidly enforced in this jurisdiction. *Lawrence v. Eller,* 169 N. C., 211, 85 S. E., 291.

The position does not obtain, however, where after renting the title of the landlord has terminated or has been transferred either to a third

person or the tenant himself, for, under the doctrine as it now prevails, the loyalty required is to the title, not to the person of the landlord. There must be a precedent surrender of possession only when the tenant seeks to assert a title adverse to that of the landlord or to assume an attitude of hostility to his title or claim of title. 32 Am. Jur., Landlord and Tenant, sec. 114, 115, 117; *Lawrence v. Eller, supra; Murphy v. Taylor,* 214 N. C., 393, 199 S. E., 382; *Insurance Co. v. Totten,* 203 N. C., 431, 166 S. E., 316; *Hargrove v. Cox,* 180 N. C., 360, 104 S. E., 757; *Abbott v. Cromartie,* 72 N. C., 292; *Murrell v. Roberts,* 33 N. C., 424.

Thus the doctrine has no application here. Those claiming under Collins do not assert title hostile to that of Ned Flowers, the landlord. They are acknowledging, asserting, and relying upon that title, as acquired in due course by Collins and through Collins by them. The strength of his title is the foundation of their claim.

Furthermore, when Collins acquired the title of his landlord his leasehold estate was merged in the greater estate conveyed by his deed. *Trust Co. v. Watkins,* 215 N. C., 292, 1 S. E. (2d), 853. Thereafter he was under no obligation to recognize his former landlord as such or to surrender possession to him before asserting the title thus acquired.

It follows that Collins was not a tenant in the sense that it required twenty years' possession under color by him and those claiming under him to perfect his title as contended by plaintiffs.

In view of our conclusion regarding the Collins deed we need not consider the tax foreclosure deed further than to say that the grantee under an inoperative sheriff's deed may convey colorable title. *Everett v. Smith,* 44 N. C., 303; *Murrell v. Roberts, supra.*

The charge of the court below is sustained by the record. Exception thereto is without merit. Hence the judgment must be

Affirmed.

TOWN OF BELHAVEN v. LONNIE L. HODGES, CLAUDE D. HODGES, ZELMA N. HODGES AND EUNICE R. HODGES.

(Filed 18 September, 1946.)

1. Boundaries § 5h—

Ordinarily a corner or line called for in a junior deed will not be controlling in establishing a corner or line in a prior deed, if the corner or line can be ascertained from the description in the prior deed.

2. Same: Boundaries § 5d: Appeal and Error § 39e—

Testimony as to declarations made by a deceased owner of land adjacent to the land of plaintiff as to the location of the corner between their

lands, which corner was material in establishing the corner between the lands of plaintiff and defendants by reversing the first call in plaintiff's deed, even though such testimony is incompetent because decedent's deed was junior to that of plaintiff, cannot be held harmful when it appears that decedent at that time pointed out the iron stake as marking the corner of the plaintiff's property, and that other witnesses for both plaintiff and defendants testified without objection as to the location of the line between decedent and plaintiff.

3. Boundaries § 3c—

Where the beginning corner is not marked and is in dispute, it is permissible for the surveyor to begin at the second corner when it is known or established and reverse the first call in the deed in order to locate the beginning corner. Appellants' contention in this case that the second corner was neither known nor established is untenable.

4. Boundaries § 10—

In this processioning proceeding, plaintiff's evidence tending to establish the dividing line as contended for by him, between his land and that of the defendants, *is held* sufficient to sustain the verdict of the jury in plaintiff's favor.

APPEAL by defendants from *Thompson, J.*, at February Term, 1946, of BEAUFORT.

This action was tried as a processioning proceeding to establish the boundary line between adjacent lands of the Town of Belhaven and the defendants.

The defendants were restrained from using the property now in dispute, 15 January, 1945.

The pertinent facts are as follows:

The respective parties claim title from a common source, namely, W. J. Bullock.

The lot now owned by defendants was conveyed to one George L. Swindell, 20 September, 1901, and described by metes and bounds as follows: "Beginning on Front Street 50 feet from the L. Latham Northwest corner, running with said Street North 43 West 50 feet to L. W. Cox line; thence South 47 West with said Cox line to the deep waters of Pantego Creek; thence South 43 East 50 feet; thence North 47 East to Front Street, the Beginning; it being the westwardly half of a lot purchased by J. M. Lupton of L. W. Cox and wife, May 28, 1901."

Swindell conveyed this lot to Thos. E. Adams and Adams conveyed it to Anna M. Montgomery in 1925, and described it as follows: Located in the Town of Belhaven, Beginning on Front Street 50 feet from L. Latham's Northwest corner; running with said street North 43 West 50 feet to the line of the Town of Belhaven; thence South 47 West with said line, etc.

W. O. Montgomery and wife, Anna M. Montgomery, conveyed the property to Reuben Williams in 1926, and Reuben Williams and wife

conveyed the property to the defendants in 1940, and described the property as follows: "Commencing at an iron stake on the South side of Front Street, on a line between the Montgomery property and the property of J. M. Lupton Estate; thence running South 47 degrees West along the Lupton line to Pantego Creek; thence in a northerly direction following the meanders of Pantego Creek to the line of the Town Dock property; thence North 47 degrees East to Front Street, to the beginning. It being the same property which was conveyed to the said Reuben Williams by W. O. Montgomery and wife by deed dated April 26, 1926, and duly recorded in the office of the Register of Deeds of Beaufort County, in Book 256, at page 195, to which reference is made for a more complete description."

On 30 April, 1907, William T. Kirk and wife conveyed to the Town of Belhaven a lot described by metes and bounds as follows: "Beginning on Front Street at George L. Swindell's northwest corner and running North 43 West with said street a distance of 80 feet; thence South 47 West to Pantego Creek; thence along and with the waters of said Creek 80 feet in a southerly direction; thence North 47 East with George L. Swindell's line to the Beginning; it being the same lot or parcel of land conveyed by Alice K. Smith and others to William T. Kirk, by deed dated August 12, 1905, and duly recorded in the Register's office of Beaufort County in Book 132, page 496, to which reference is hereby made."

H. R. Keaton, on 3 November, 1925, purchased a lot adjoining the property of the Town of Belhaven described as follows: "Adjoining the lands of William T. Kirk on the North, and others, bounded as follows, viz.: Beginning at William T. Kirk's Northwest corner at Front Street; running with the said street 125 feet to a stake set up at the road leading to W. E. Muir's Oyster House; thence with said road South 47 West 200 feet to a stake set up; thence about Southwest 80 feet; thence 47 West to the Channel of Pantego Creek; thence Southeast 50 feet or to the line of William T. Kirk; thence with said line North 47 East to the Beginning at Front Street."

The deeds from the original grantor, as well as those to the present owners, including *mesne* conveyances for the respective properties involved herein, were introduced in evidence.

The defendants are the present owners of the property described above as the Swindell lot and Mrs. J. M. Lupton is the owner of a lot having a frontage of 50 feet on Front Street adjacent to the East of the Swindell lot. The defendants own other property to the east of the Lupton property and adjacent thereto, fronting on Front Street.

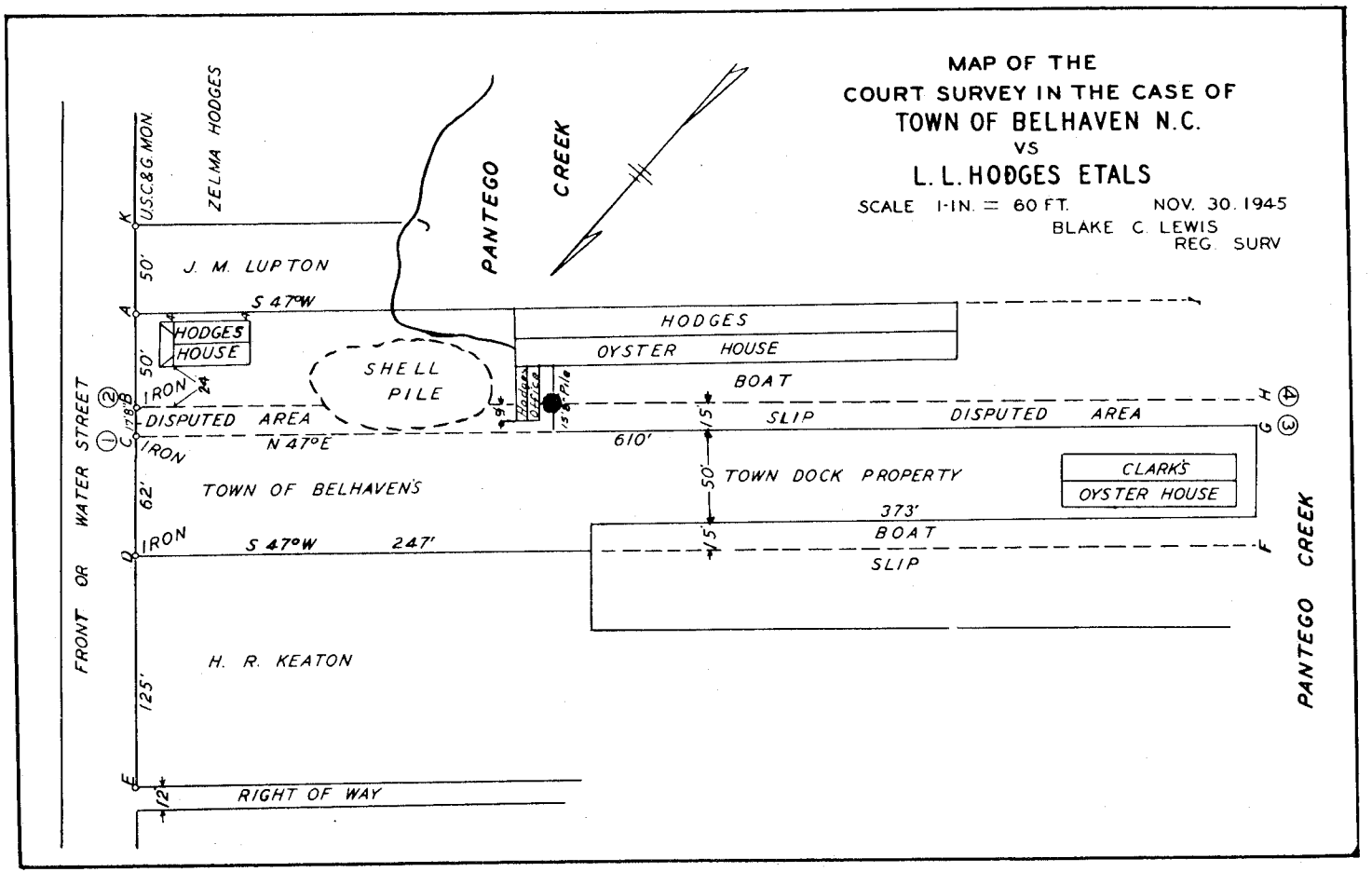
H. L. Rayburn, a registered surveyor, witness for the plaintiff, testified that he made a survey for the defendants of their property in 1943, and one for the Town of Belhaven of its Town Dock lot in 1944. He

further testified he collaborated with Blake C. Lewis, registered surveyor, in the preparation of a map showing the measurements of the properties involved and the contention of the parties, for use in the trial of this cause; and that there was no difference in the measurements on the Lewis map and his surveys in 1943 and 1944.

The Lewis map, bearing the date 30 November, 1945, designates by the letter K. the northwest corner of the Latham property, now the property of the defendants, lying east of the Lupton property, and the northeast corner on Front Street of the Lupton property, at which point is a U. S. Coastal Geodetic monument. The map designates by the letter A. a point in the southern margin of Front Street 50 feet west of the point designated by the letter K., as the northeast corner of the Swindell or Hodges lot, which lies west of the Lupton property. The letter B. is shown on the map at an iron stake in the margin of Front Street, 50 feet west of the point designated by the letter A. The letter C. designates a point at an iron stake in the margin of Front Street 17.8 feet west of the point designated by the letter B.

There is an iron stake in the margin of Front Street 79.8 feet west of the point designated on the map by the letter B. and 62 feet west of the point designated by the letter C., which iron stake the Town of Belhaven claims is its northwest corner and H. R. Keaton's northeast corner. The respective parties are claiming the land which lies between the points designated on the map by the letter B., and the letter C. on Front Street, 17.8 feet in width and extending 610 feet to Pantego Creek. The eastern line of this strip is designated on the map by a line from the letter B. to the letter H. and the western line by a line from the letter C. to the letter G.

The witness Rayburn testified that in making his survey of the properties owned by the defendants in 1943, that the defendant Claude D. Hodges and Mrs. J. M. Lupton agreed that Mrs. Lupton owned the 50 feet on Front Street, beginning at the point designated by the letter K., the location of the U. S. Coastal Geodetic monument. That he started at the point designated by the letter K., and placed a stake at the point designated by the letter A., 50 feet West of the point designated by the letter K., and then ran north 43 west 50 feet to the line of the Town of Belhaven, which line is designated on the map by the letter B. In 1944, he surveyed the Town lot, and no marker having been placed at the northeast corner of the Hodges property, the point designated as the beginning point in the Town's deed, he began at the point designated on the court map by the letter D., the second corner of the Town's property, the beginning corner in the description of the Keaton lot, and reversed the first call in the Town's deed, which fixed the northeast corner of the Town's lot at the point designated on the map by the letter B., a distance of 80 feet from the point designated by the letter D. This


MAP OF THE
COURT SURVEY IN THE CASE OF
TOWN OF BELHAVEN N.C.
VS
L. L. HODGES ETALS
SCALE 1-IN. = 60 FT.
NOV. 30. 1945
BLAKE C. LEWIS
REG. SURV
ZELMA HODGES
USC&G MON
PANTEGO
CREEK
J. M. LUPTON
S 47°W
HODGES
HOUSE
HODGES
OYSTER HOUSE
SHELL
PILE
IRON
DISPUTED AREA
N 47°E
610'
BOAT
SLIP
DISPUTED AREA
IRON
TOWN OF BELHAVEN'S
TOWN DOCK PROPERTY
CLARK'S
OYSTER HOUSE
373'
IRON
S 47°W
247'
BOAT
SLIP
FRONT OR WATER STREET
H. R. KEATON
PANTEGO CREEK
RIGHT OF WAY
50'
62'
125'
15'
12'

witness testified that the iron stake, designated by the letter D. on the court map was pointed out to him by H. R. Keaton, who is now dead, as his northeast corner and as the northwest corner of the Town Dock property.

Evidence was introduced to the effect that predecessors in title to the Hodges lot paid rent to the Town of Belhaven over a long period of time for the strip of land now in dispute. The last rental payments were made to the town in July, 1937.

W. O. Montgomery erected a small building partly on the strip of land now in dispute and partly on the land of the defendants. This building is now used by the defendants as an office building.

We deem it unnecessary to quote other evidence in the statement of facts, since the defendants have abandoned all their exceptions except those directed to the testimony of H. L. Rayburn, as to statements made by H. R. Keaton to him as to the location of the dividing line between the plaintiff and Keaton and the survey based thereon.

The jury found the true dividing line between the lands of the plaintiff and the lands of the defendants to be as indicated by the line running from the point designated by the letter B. to the letter H., on the map made by Blake C. Lewis, registered surveyor, on 30 November, 1945. Judgment was entered accordingly. Defendants appeal, assigning error.

D. D. Topping and Rodman & Rodman for plaintiff.
Carter & Carter for defendants.

DENNY, J. The appellants present only two questions for our consideration and determination: (1) Is the testimony of H. L. Rayburn, as to the statement made to him by H. R. Keaton, now deceased, as to the location of the dividing line between the lands of the Town of Belhaven and H. R. Keaton competent? (2) Can a surveyor disregard the beginning point in a deed and start his survey at the second call of the deed, when such point is neither known nor established, and is his testimony based upon such survey competent evidence?

Ordinarily a corner or line called for in a junior deed will not be controlling in establishing a corner or line in a prior deed, if the corner or line can be ascertained from the description in the prior deed. *Thomas v. Hipp,* 223 N. C., 515, 27 S. E. (2d), 528; *Jarvis v. Swain,* 173 N. C., 9, 91 S. E., 358.

We do not think, however, exception to the testimony of Mr. Rayburn, the surveyor, relative to statements made to him by Mr. Keaton, as to the location of his northeast corner can be sustained. Mr. Keaton, according to the testimony of Mr. Rayburn, also pointed out to him the iron stake, designated on the court map by the letter D., as the northwest

corner of the Town Dock lot. Moreover, witnesses for the plaintiff and the defendants testified without objection, as to the location of the line between the Keaton lot and the Town Dock lot. In fact, it does not appear on this record that there is any dispute as to the location of the northwest corner of the property of the Town of Belhaven. Therefore, if we consider the evidence relative to the statements made by Keaton as to his own corner, was erroneously admitted, it was harmless error in the light of other testimony admitted without objection. *Yadkin Motor Co. v. Insurance Co.,* 220 N. C., 168, 16 S. E. (2d), 847; *Edwards v. Junior Order,* 220 N. C., 41, 16 S. E. (2d), 466; *McKay v. Bullard,* 219 N. C., 589, 14 S. E. (2d), 657; *Teseneer v. Mills Co.,* 209 N. C., 615, 184 S. E., 535; *Shelton v. R. R.,* 193 N. C., 670, 139 S. E., 232; *Hamilton v. Lumber Co.,* 160 N. C., 47, 75 S. E., 1087.

In considering the second question presented, we think the appellants are in error in assuming that the surveyor, in making the survey of the property of the Town of Belhaven, started at a point that is neither known nor established.

The sole question for the jury to determine upon the evidence in this case was which one of the lines in dispute is the dividing line between the property of the plaintiff and the defendants. In order to correctly decide the issue it became necessary for the jury to ascertain the true location of the beginning corner of the property of the Town of Belhaven, which is the northwest corner of the property of the defendants. The location of the beginning corner, not being marked and in dispute, it was permissible for the surveyor to reverse the first call in the Town's deed, beginning at what is known or established as the northwest corner of the Town Dock lot, in order to locate the beginning corner. This Court said, in *Cowles v. Reavis,* 109 N. C., 417, 13 S. E., 930: "It is too clear to need citation of authorities that if the beginning corner has been destroyed, as in this case, it is competent, in order to ascertain the true boundary to survey the land by beginning at any known corner or point from which the boundaries may be located." *Norwood v. Crawford,* 114 N. C., 513, 19 S. E. 349. And in *Jarvis v. Swain, supra,* the Court said: "The rule is, in running the calls of a deed, to begin at the beginning corner if it is known or established, and to follow the calls in their regular order, and it is said in *Harry v. Graham,* 18 N. C., 76, and approved in *Gunter v. Mfg. Co.,* 166 N. C., 166, that there is no case in our reports where the Court has given its sanction to the correctness of a survey made by reversing the lines from a *known* beginning corner; but it is equally well established that if the beginning corner is uncertain and the second corner is known or established, that the first line may be reversed in order to find the beginning; and the same rule prevails as to the other corners and lines. *Dobson v. Finley,* 53 N. C., 495; *Norwood v. Crawford,* 114 N. C., 513; *Clark v. Moore,* 126 N. C., 1; *Hanstein*

v. Ferrall, 149 N. C., 240." See also *Cornelison v. Hammond,* 224 N. C., 757, 32 S. E. (2d), 326, and the cases cited therein.

Furthermore, it is disclosed by the documentary and oral testimony that the Swindell lot, now the property of these defendants, and the Lupton lot, have a frontage on Front Street of only 50 feet each, and the northwest corner of the Swindell lot, according to the documentary evidence, is north 43 west 100 feet from the U. S. Coastal Geodetic monument, designated on the court map by the letter K. Also, Mr. Rayburn testified that the point on the map designated by the letter B., is the point shown as the line of the Town lot in his 1943 survey, measuring from the point designated by the letter K., or the U. S. Coastal Geodetic monument, which was pointed out as the northeast corner of the Lupton property by Mrs. Lupton and one of the defendants, and the point designated by the letter B. is the same point located as the beginning point of the Town lot in his 1944 survey by reversing the first call in the town's deed.

It will be noted that the town's deed calls for the northwest corner of the defendants' property as its beginning corner, and the defendants' deed merely calls for the property lying between the Lupton property and the property of the Town of Belhaven; nevertheless, the deeds to all their predecessors in title, beginning with the deed to Anna M. Montgomery, and prior thereto, call for a frontage of only 50 feet on Front Street beginning at a point 50 feet from the L. Latham corner, now designated as the U. S. Coastal Geodetic monument, or the letter K.

While the evidence is conflicting as to which is the true dividing line between the properties of the respective parties, we think there is ample evidence to sustain the verdict of the jury and we find no prejudicial error in the trial below.

No error.

BINGHAM M. SPEIGHT v. VAN B. ANDERSON.

(Filed 18 September, 1946.)

1. Highways § 11—

There is no legislative sanction or provision for the establishment of a neighborhood road, a term ordinarily used to designate a private way which serves a neighborhood as an outlet to a public road.

2. Same—

Ch. 183, Public Laws 1941, which amends ch. 302, Public Laws 1933, by enlarging the definition of neighborhood public roads to include "all other roads or streets . . . which serve the public . . . whether same have ever been a portion of any county or State road systems" refers to traveled

ways which were at that time established easements or roads or streets in a legal sense, and brings such roads or streets within the procedure prescribed by ch. 448, Public Laws 1931, and it will not be assumed that the Act of 1941 intended to create a public or private way over the lands of any citizen by legislative fiat, since to do so would be a taking of private property without just compensation.

3. Same—

Neither a way of egress or ingress over the lands of another existing by consent of the landowner, nor one obtained by prescription, is a neighborhood public road, G. S., 136-67. Such road is not a public road and does not come within the provisions of ch. 302, Public Laws 1933, since it is not an abandoned public road, nor within the provisions of ch. 183, Public Laws 1941, since it was not at the time an established easement or road in a legal sense, and further such easement comes within the proviso of the Act of 1941, since it is essentially a way for private use.

4. Easements § 3—

To establish a private way by prescription, the user for twenty years must be confined to a definite and specific line of travel, and while slight deviations are not fatal if the way is substantially identical, where only the termini are identical and the old way is in the form of an arc with portions thereof several hundred feet distant from the new straight way, user of the old way cannot be tacked to the user of the new straight way. Whether one adverse user can tack the period of use by his predecessor in title, *quære.*

5. Same—

Where the evidence both for plaintiff and defendant tends to show that a new way across the lands of plaintiff was constructed and was commenced to be used less than twenty years prior to the institution of the action, the testimony of one witness, who had not gone on the premises prior to construction of the new way, cannot be construed as tending to show that the line of travel along the new way had been in use prior to the construction referred to, and thus make out a *prima facie* case, when his testimony is ambiguous and not necessarily in conflict with the evidence that the old way was in exclusive use prior to the construction of the new.

6. Same—

Permissive use is presumed until the contrary is made to appear, and on the present record testimony of the husband and predecessor in title to the servient tenement that the use of the way across plaintiff's lands was permissive, if error, was not prejudicial.

7. Trespass § 6: Judgments § 17b—

Plaintiff alleged a cause of action in trespass. Defendant denied the trespass and set up a prescriptive right to cross plaintiff's land. The issues submitted related solely to the asserted prescriptive right. *Held:* An issue of trespass was raised by the pleadings, and upon the jury's verdict in plaintiff's favor, a provision of the judgment that defendant be restrained from crossing the land of plaintiff must be stricken and a new

trial ordered, since defendant's user is presumed permissive and the judgment based upon a contrary assumption without a verdict is unwarranted in law.

APPEAL by defendant from *Bone, J.*, at April Term, 1946, of EDGECOMBE. Modified and affirmed.

Action in trespass *quare clausum fregit* and for injunctive relief in which the defendant, answering, denies any trespass, asserts an easement in the nature of a public or private way, and pleads user thereof as a matter of right.

For a number of years the owners of the Anderson property had been using a vehicular road or cartway over and across the lands of plaintiff as a means of ingress and egress. Plaintiff blocked the road. The obstruction was removed and defendant continued to use the same. Thereupon this action was instituted and temporary restraining order was issued.

The evidence discloses the following facts:

Fountain Street and Sunset Avenue in the Town of Tarboro extend in a westerly direction to the town limits. Plaintiff owns a farm adjoining the town limits and immediately west of the terminus of Sunset Avenue. The farm of the defendant lies west of the property of plaintiff.

For many years prior to 1933 there was a cartway or road which began at the terminus of Fountain Street and extended south along the city limits across and at right angles to the terminus of Sunset Avenue. Some distance south of Sunset Avenue it bore sharply to the right or west and ran to or near the main dwelling on the Speight land, thence to an old oak. There it forked, one branch going to a tenant house on the Speight land and the other across the Murdock tract (now owned by defendant) to the dwelling on the Anderson or Martin land. This road or way was used as one of the available means of ingress and egress by the defendant's predecessors in title.

In 1932 or 1933 the Anderson land was purchased by Sheriff Martin. He, with the consent and assistance of plaintiff's immediate predecessors in title, extended Sunset Avenue in a direct line westerly to the defendant's property. Since said time the owners of the Martin-Anderson property have used this way at will for the purpose of ingress and egress. Members of the public have also used it.

The termini of the relocated way are substantially identical with those of the old road. However, the new way extends in a direct line while the old is arc-like. At some points they are several hundred feet apart.

The court below submitted issues as follows:

"1. Was the road described and mentioned in the pleadings dedicated to the public use?

"2. Has the defendant acquired an easement in the road mentioned and described in the pleadings?

"3. Is the road mentioned and described in the pleadings a neighborhood public road?"

It directed a verdict on the issues submitted in favor of the plaintiff. The jury answered each issue "no" as directed. Thereupon the court entered judgment (1) that the defendant be permanently enjoined and restrained from entering upon or crossing over the land of the plaintiff, and (2) that defendant has no title, easement or right of way in and to the path or road across the plaintiff's property. Defendant excepted and appealed.

Bond & Leggett for plaintiff, appellee.

H. H. Philips and Geo. M. Fountain for defendant, appellant.

BARNHILL, J. There is no evidence in the record sufficient to support a finding that either the old or the relocated way of ingress and egress is a public road. *Chesson v. Jordan,* 224 N. C., 289, 29 S. E. (2d), 906; *Collins v. Patterson,* 119 N. C., 602.

Our statutes provide for the establishment of private cartways, tramways, railways, cable cars, chutes, flumes, G. S., 136-69, and church roads, G. S., 136-71. There is no legislative sanction, or provision for the establishment, of a neighborhood road, a term ordinarily used to designate a private way which serves a neighborhood as an outlet to a public road. See *Collins v. Patterson, supra.*

In 1931 the General Assembly, by ch. 145, Public Laws 1931, provided that the exclusive control, management and responsibility for all roads in the several counties should be vested in the State Highway Commission. The State Highway Commission was vested with authority to decline to take over and assume control of roads and parts of roads which had theretofore formed part of the several county road systems. This was to be evidenced by the omission of such roads from the map prepared and posted in the several counties.

In 1933 the Legislature created and defined "neighborhood public roads" by amendment of ch. 448, Public Laws 1931 (now a part of G. S., ch. 136, Art. 4, which deals with cartways, church roads and like easements). Ch. 302, Public Laws 1933. That Act provides that "all those portions of the public road system of the State which have not been taken over and placed under maintenance or which have been abandoned by the State Highway Commission, but which remain open and in general use by the public, and all those roads that have been laid out, constructed, or reconstructed with unemployment relief funds under the supervision of the Department of Public Welfare, are hereby declared to be neighborhood public roads . . ." In 1941 this Act was amended

by inserting after the words "Public Welfare" a further classification as follows: "and all other roads or streets or portions of roads or streets whatsoever outside of the boundaries of any incorporated city or town in the State which serve a public use regardless of whether the same have ever been a portion of any State or county road system." Ch. 183, Public Laws 1941. This latter Act contained a proviso, however, as follows: "Provided, that this definition of neighborhood public roads shall not be construed to embrace any street, road or driveway that serves an essentially private use."

The way at issue is no part of an abandoned public road. Hence the question arises as to whether it comes within the terms of the 1941 amendment.

The General Assembly is without authority to create a public or private way over the lands of any citizen by legislative fiat, for, to do so, would be taking private property without just compensation. *Lea v. Johnson,* 31 N. C., 15. In construing the amendment, therefore, we may not assume that such was its intent. It follows that the 1941 Act, ch. 183, Public Laws 1941, necessarily refers to traveled ways which were at the time established easements or roads or streets in a legal sense. It cannot be construed to include ways of ingress and egress existing by consent of the landowner as a courtesy to a neighbor, nor to those adversely used for a time insufficient to create an easement.

Its purpose was to bring the designated roads within the procedure prescribed in the original Act, ch. 448, Public Laws 1931, now a part of G. S., 136-53.

Furthermore the proviso expressly excludes streets and roads which serve an essentially private use. While there is evidence that the mail carrier used the old road during 1906 and 1907 and that members of the public traveled both the old and the new road, all the evidence tends to show that the road was laid out and maintained primarily as a convenience for those who resided on the Speight and Anderson tracts, an essentially private purpose. No continuous use for a public purpose is disclosed.

Conceding without deciding that defendant has shown something more than mere permissive use of a cartway across the land of plaintiff, *S. v. Norris,* 174 N. C., 808, 93 S. E., 950; *Darr v. Aluminum Co.,* 215 N. C., 768, 3 S. E. (2d), 434, the evidence fails to disclose continuous user for a period of twenty years, such as is required to raise a presumption of dedication or grant and create an easement.

To establish a private way by prescription, the user for twenty years must be confined to a definite and specific line. While there may be slight deviations in the line of travel there must be a substantial identity of the thing enjoyed. *Hemphill v. Board of Aldermen,* 212 N. C., 185,

193 S. E., 153; *Cahoon v. Roughton,* 215 N. C., 116, 1 S. E. (2d), 362; Anno. 143 A. L. R., 1403.

"One who uses one path or track for a portion of the prescriptive period and thereafter abandons all or nearly all of such path or track and uses another cannot tack the period of the use of the new way onto that of the use of the old way in order to acquire a way by prescription." Anno. 143 A. L. R., 1404.

Quœre: Can one who claims an easement, outside his own deed and across the lands of another, by adverse user, tack the period of the use by his predecessor in title to the period of his own use in order to acquire a way by prescription?

But the defendant insists that the testimony of the witness Howard is sufficient to make out a *prima facie case.* We cannot so hold. He never went on the premises prior to the death of Sheriff Martin in 1935, and, on this record, his testimony is uncertain, indefinite and ambiguous. He says there was a road "here" which "went from the extension of Sunset Avenue out to the house, out on the farm here." "I don't know whose house it was, but I think Mr. Martin lived there at the time."

All the testimony tends to show that the road in controversy was constructed after the Martin purchase in 1932 or 1933. Defendant himself testified this new road was constructed and straightened out after Mr. Martin bought the Hedge's farm. He offered a number of witnesses who testified to like effect. Defendant has failed to show that Howard's testimony was in contradiction thereof.

On this record, the admission of the testimony of W. L. Speight, plaintiff's husband and predecessor in title, if error, was not prejudicial. His testimony merely tends to show the construction and use of the new way by permission of the landowner. Permissive use is presumed until the contrary is made to appear. *Perry v. White,* 185 N. C., 79, 116 S. E., 84; *Darr v. Aluminum Co., supra.*

The plaintiff alleges trespass by defendant as the gravamen of her cause of action. The allegation is denied by defendant. The issue thus raised was not submitted to the jury and there has been no finding thereon. *Griffin v. Insurance Co.,* 225 N. C., 684. Even so, the judgment entered permanently enjoins and restrains defendant from "entering upon or crossing over the land of the plaintiff . . ." This provision is unsupported by the verdict. It must be stricken and a new trial had on plaintiff's cause of action.

It is true defendant admits he entered upon the land of the plaintiff, but this entry may have been permissive. Indeed, as we have heretofore noted, it is so presumed. A judgment based on a contrary assumption and without a verdict is unwarranted in law.

We have examined the other exceptive assignments of error and find in them no cause for disturbing the verdict.

As the primary cause of controversy between plaintiff and defendant is now put at rest by the verdict herein, a spirit of good will and neighborly co-operation might well dictate an end to the case on the basis of the judgment herein directed. However, it is for the plaintiff to decide whether she wishes to pursue her case further.

The judgment below must be modified in accord with this opinion. As so modified, it is affirmed.

Modified and affirmed.

IN THE MATTER OF THE LAST WILL AND TESTAMENT OF MAGGIE NIPSON LOMAX, DECEASED.

(Filed 18 September, 1946.)

1. Wills § 17—

A caveat proceeding is *in rem* and many of the ordinary rules relating to order of proof and argument do not obtain.

2. Wills § 23½a—

Caveators by admitting the due execution of the will and its probate in common form cannot deprive the court of its discretionary control over the order of proof or complain that propounders were permitted to open the evidence to prove the formal execution of the will *per testes* in solemn form, nor are caveators prejudiced or deprived of any substantial right if propounders exceed the necessity of a *prima facie* case by introducing competent evidence on the issue of mental capacity.

3. Wills § 24½—

Where both propounders and caveators introduce evidence, the right to the opening and concluding arguments is within the discretion of the trial judge, and further, since propounders have the burden of the issue, the concluding argument is appropriately theirs.

4. Wills § 23b: Evidence § 32—

G. S., 8-51, applies to caveat proceedings notwithstanding that they are *in rem*, with the exception that beneficiaries under the will are competent to testify as to transactions with deceased testator solely upon the issue of testamentary capacity.

5. Wills § 23c: Evidence § 32—

The prohibition against a beneficiary testifying as to transactions with deceased testator on the question of undue influence relates solely to transactions with the deceased, and a beneficiary is competent to testify as to circumstances tending to show undue influence on the part of the propounder unrelated to any transaction which the witness had with testator. G. S., 8-51.

6. Wills § 25: Appeal and Error § 39f—

Evidence of undue influence is usually of a circumstantial nature, and therefore an instruction which withdraws from the consideration of the jury competent testimony upon the issue must be held for prejudicial error, since the testimony may have substantial and material bearing upon the issue when considered with the other circumstances adduced by the testimony in the case. Further, the instruction that the jury should not consider the testimony of named witnesses upon the issue of undue influence, but might consider their testimony upon the issue of testamentary capacity *is held* too indefinite.

APPEAL by caveators from *Alley, J.*, at April Term, 1946, of BUNCOMBE.

Cecil C. Jackson, George F. Meadows, and W. W. Candler for caveators, appellants.

Carl W. Greene and Smathers & Meekins for propounders, appellees.

SEAWELL, J. This is the fourth time the present case has been here on appeal. It is beginning to look as if the shade of Maggie Nipson Lomax, whose purported will has so long vexed the courts, may be as hard to down as Banquo's ghost. She left only a small estate, valued at some $12,000.00, accumulated by thrift and frugality while chambermaid at a hotel in Asheville. Counsel for the propounders, currently the winner, admonishes us that unless the litigation is stopped somewhere, "there is not going to be anything left for anybody finally," and adjures us "not to send the Lomax will case back." We may as well confess a growing sympathy with that view, but we are at a loss to know how to make it a principle of decision. Even a harried Court must salve its conscience.

The three former appeals are reported as follows: *In re Will of Lomax,* 224 N. C., 459, 31 S. E. (2d), 381; *In re Will of Lomax,* 225 N. C., 31, 33 S. E. (2d), 63; *In re Will of Lomax,* 225 N. C., 592, 35 S. E. (2d), 876.

Reference is made to the preliminary statement of the case in 224 N. C., 459, *supra,* for the constitutive facts of this case and the scope of the controversy. We add only that the caveators attacked the validity of the will on the ground of undue influence, as well as mental incapacity, and separate issues involving these questions, as well as the issue *devisavit vel non,* were submitted to the jury on the trial now under review. With this understood, we confine our attention to the incidents of trial immediately bearing on the decision.

The appellants assign as error that notwithstanding their admission at the beginning of the trial that the purported will had been properly signed and witnessed, and had been admitted to probate in common form,

(a) the propounders had been permitted to "go to the bat" with their evidence first, thus getting the advantage of a first impression on the jury; and (b) that their counsel was permitted to conclude the argument to the jury.

Neither objection is meritorious. The proceeding is *in rem,* and in many of its incidents beyond the control of the litigant parties and outside the rules pertaining to ordinary controversies respecting the rights of persons arrayed as parties plaintiff and parties defendant. *In re Haygood's Will,* 101 N. C., 574, 578, 8 S. E., 222; *In re Will of Westfeldt,* 188 N. C., 702, 125 S. E., 531. When the issue of *devisavit vel non* is raised, the propounder may, *prima facie* at least, carry the burden resting upon him by producing the will and proving its formal execution *per testes* in solemn form. *In re Hedgepeth,* 150 N. C., 245, 63 S. E., 1025; *In re Rowland,* 202 N. C., 373, 375, 162 S. E., 897. The order in which the evidence is taken is largely within the discretion of the court, and the caveators could not by their voluntary admission deprive the court of that discretion and, so to speak, take charge of proceedings. 68 C. J., Wills, sec. 882 (2). For a like reason, although the propounders may have exceeded the necessities of a *prima facie* case in introducing competent evidence on the issue of mental capacity, caveators were not deprived of any substantial right or prejudiced thereby.

(b) Since both sides introduced evidence, the opening and conclusion was within the discretion of the trial judge. Moreover, since, as stated, the burden of establishing the will was upon the propounders, the conclusion of the argument was appropriately theirs.

We have attempted to clarify this feature of the trial, since a like situation may recur.

The caveators took 134 exceptions to the trial. Many of them are without merit, others marginal; and we are compelled to regard others as disclosing prejudicial error.

The appellants direct our attention to a rather sweeping statement of the trial judge during the course of his charge, the effect of which is to eliminate from consideration by the jury certain material evidence upon the question of undue influence, on the theory that certain witnesses testifying on that issue were not competent to give testimony by reason of their relation to the case. We quote the exceptive passages:

"I call your attention again to the witnesses that I mentioned this morning, Maggie Nesbitt, Frank Stevens and Sadie Smith, who were offered by the caveators and permitted to testify about the question of the mental capacity of Maggie Lomax and about the conduct of Quick.

"I instructed you this morning that part of the evidence is competent and part is not competent. Anything that any of them may have said that tended to show any undue influence on the part of Quick would not be competent, and it was admitted by inadvertence, the Court under-

standing at the time that it was offered, that while they were relatives, that they were not beneficiaries under the Will. Later the Court was advised that they were beneficiaries under the Will, and so my instruction to you is that you will not consider any part of the evidence of those three witnesses that tends to show any undue influence or other conduct tending to show that Quick had any influence, or exerted any influence over Maggie Lomax.

"As to B. R. Quick, who has been attacked by the caveators, and charged with having procured Maggie Lomax to make this Will by reason of undue influence exerted over her, it will be proper for you to consider his testimony in denial of the charge, . . . Counsel for both sides were frank and candid, having called the Court's attention to this inadvertence, and it was agreed by all that I would give this instruction that you would not consider the testimony tending to show undue influence except the testimony of Quick, but that you would consider the testimony of all of them that bears on the question of sufficient mental capacity of Maggie Lomax to make a Will."

These instructions must have been very confusing to the jury on a vital part of the controversy. The very general designation of the evidence supposed to be admitted and that supposed to be excluded was too indefinite as a chart and compass to lead the jury back through the maze of testimony offered to a satisfactory result.

If the court intended the jury to understand that beneficiaries under the will were, by reason of their interest, incompetent as witnesses upon the question of undue influence, which was doubtless his purpose, the instruction was erroneous in law.

It has been frequently held that as between the propounder or an interested executor and a person who is interested in the result of the trial, the statute now known as G. S., 8-51, rendering an interested survivor incompetent as a witness to a personal transaction with a deceased person, applies in a contest over a will, notwithstanding the proceeding is *in rem*. *In re Will of Brown* (Byron Brown), 203 N. C., 347, 166 S. E., 72; *In re Will of Brown* (George H. Brown), 194 N. C., 583, 595, 140 S. E., 192; *In re Hinton,* 180 N. C., 206, 104 S. E., 341. There is an exception when the evidence is directed solely towards the question or issue of mental condition or testamentary capacity. In that case, it is competent for the interested witness to give testimony of such transaction or conversation, solely, however, as a basis for the opinion formed as to the mental condition or capacity of the deceased. *McLeary v. Norment,* 84 N. C., 235; *In re Will of Brown, supra; In re Will of Brown,* 194 N. C., 583, *supra.* But as noted, the inhibition in its very nature can only apply to testimony as to a personal transaction with the deceased testator or testatrix.

It is only necessary to say that the witnesses excluded by this ruling of the court, several of them by name (including Sadie Smith, who was not a beneficiary under the will), had given testimony tending to show undue influence on the part of Quick, the propounder, not relating to any transaction which the witness had with the testatrix, but as to the conduct of the propounder and circumstances of at least some substantial bearing upon this issue.

Evidence of undue influence is usually of a circumstantial nature; *In re Will of Everett,* 153 N. C., 83, 68 S. E., 924; *In re Will of Stephens,* 189 N. C., 267, 126 S. E., 738; *In re Will of Hurdle,* 190 N. C., 221, 129 S. E., 589; Page on Wills, sec. 811; and "must, except in extreme cases, take a very wide range." Page, *supra,* sec. 812. Almost necessarily the proof must cover a multitude of facts or circumstances going into the pattern, in the making of which the evidence of many witnesses may have separate, but interrelated, parts, shading from light to heavy. We cannot judge of the importance of the bit of mosaic being laid at the time or the part of the pattern being woven except in connection with the whole design. So judged, we are convinced that at least some of the excluded evidence was competent, substantial and relevant to the issue.

In this exclusion there was error, and the caveators are entitled to a new trial.

Error and remanded.

TOWN OF BATH v. DR. JOSEPH H. NORMAN AND WIFE, MRS. JOSEPH H. NORMAN, AND L. R. SMITH, KATHRYN CLAIRE CATON AND HANNAH LEENS BONNER.

(Filed 18 September, 1946.)

1. Judgments § 1—

A consent judgment depends for its validity upon the consent of both parties, without which it is wholly void.

2. Judgments §§ 4, 27b: Municipal Corporations § 11c—

In this jurisdiction, a showing of merit either as to the cause of action or defense, is not required in order to vacate a void judgment.

3. Judgments § 27b: Municipal Corporations § 11c—

In this action by a municipality, a consent judgment was entered abandoning the municipality's claim to the property in litigation. Thereafter, the municipality moved to vacate the consent judgment on the ground of want of authority in the attorney for the municipality who signed the judgment. *Held:* The municipality could consent to the judgment only upon

authorization granted by official action of its board of commissioners, and upon evidence tending to show at most authorization of the attorney by the mayor in a personal conversation, it was error to deny its motion to vacate.

4. Same: Attorney and Client § 6—

An attorney, perforce an attorney for a municipality, has no inherent or imputed power to enter a consent judgment which abandons the claim of the client, or to make any other substantial compromise of his client's rights.

APPEAL by plaintiff from *Thompson, J.,* 21 March, 1946 (as of February Term, 1946), of BEAUFORT.

The Town of Bath brought an action against the named defendant and others afterward admitted as defendants for the recovery of water front lots along Bath Town Creek, now in the possession of defendants, filed its complaint, in which the lots are described, and asked to be declared the owner thereof and to be put into possession. The defendants answered, denying plaintiff's ownership, and claimed title in themselves.

Subsequently, the town entered a disclaimer to the land described in the complaint as lot 1, and it is not now involved in the litigation.

After the case had been pending sometime, no settlement of the controversy having been reached, it was set for trial. When it came on to be heard before Judge Frizzelle at May Term, 1945, a judgment, purporting to be by consent, was rendered, adjudging that the plaintiff had no right, title or interest in the lands then in controversy, and that the defendants were the owners thereof. Consent to the rendition of the judgment was purportedly given by Mr. Daniel, counsel for the town, who signed the judgment in token thereof.

Subsequently, partition proceedings were instituted by certain of the defendants as to their portion of the land, and prosecuted to sale for division. The plaintiff herein at this point moved to set aside the judgment rendered at the May Term upon the ground that Daniel was not authorized by the plaintiff to consent thereto, and that the judgment is therefore void. Meantime, appropriate action was taken to stay the further progress of the partition proceeding, which is not involved in this appeal.

The motion to set aside the Frizzelle judgment was heard by Thompson, J., at February, 1946, Term of Beaufort Superior Court upon affidavits.

The mayor and commissioners of the town testified that none of them, directly or indirectly, had authorized Mr. Daniel to consent to the Frizzelle judgment, and that they had never heard of it until their attention was called to it through advertisements in the later partition proceeding. The affidavit of Daniel denies this, stating affirmatively that he had

talked it over with Mayor Tankard and asked him to notify the commissioners.

The affidavits of various parties and attorneys contain much matter relating to the history of the case, negotiations between attorneys, and especially title to the property and want of merit in plaintiff's claim. We can only include in the statement matters necessary to an understanding of the appeal and relevant to the decision.

It is not contended by the respondents that any action was taken by the governing board of the town except as above appears.

Judge Thompson made very extensive findings of fact, largely respecting the state of the title. With respect to the authority of counsel to consent to the Frizzelle judgment, Judge Thompson finds:

"Mr. Tankard, the Mayor of the Town, saw Mr. Daniel and told Daniel to make the settlement proposed by Grimes. Acting under this authority, Mr. Daniel agreed that settlement would be made."

The judgment concludes:

"Upon the foregoing findings the Court being of the opinion that to vacate and set aside the judgment would be a vain act since upon the admissions made and an examination of the law under which plaintiff asserts its right to ownership, it is apparent that the plaintiff is not the owner of the property in controversy, it is ADJUDGED AND DECREED that the motion to vacate said judgment be and the same is denied."

From this judgment the plaintiff appealed.

H. S. Ward for plaintiff, appellant.

J. D. Grimes and Rodman & Rodman for defendants, appellees.

SEAWELL, J. The movent has attacked the judgment of May Term, 1945, purporting to be by consent, on the ground that the signatory party had no authority to give such consent in its behalf. If it can make good on that challenge, all other matters brought forward in the record are irrelevant. In fact, it is, and was, the only point for consideration on the motion initially and throughout the hearing, since absence of authority to consent would deprive the judgment of any sort of validity. A careful consideration and analysis of the record leads us to the conclusion that denial of plaintiff's motion to vacate the judgment was erroneous.

Upon the hearing of the motion, the trial judge frankly proceeded on the theory that the Frizzelle judgment could, at the worst, be only irregular, devolving on the moving party the burden of showing its claim was meritorious. Counsel for appellees admit this in their brief and so contend here, citing (a) *Perry v. Surety Co.*, 190 N. C., 284, 129 S. E., 721; *Daniel v. Power Co.*, 201 N. C., 680, 161 S. E., 210; (b) *Harris*

v. Bennett, 160 N. C., 339, 76 S. E., 217; *Duffer v. Brunson,* 188 N. C., 789, 125 S. E., 619; *Crye v. Stoltz,* 193 N. C., 802, 138 S. E., 167.

A consent judgment, however, depends for its validity upon the consent, without which it is wholly void. *King v. King,* 225 N. C., 639, 35 S. E. (2d), 893; *Rodriguez v. Rodriguez,* 224 N. C., 275, 29 S. E. (2d), 901; *Deitz v. Bolch,* 209 N. C., 202, 183 S. E., 384; *Bizzell v. Equipment Co.,* 182 N. C., 98, 108 S. E., 439. A purported consent by one having no authority is in law no consent. *Johnston County v. Ellis, ante,* 269, 278, 279, 38 S. E. (2d), 31.

In this jurisdiction, a showing of merit either as to the cause of action or defense is not required in order to vacate a void judgment. *Flowers v. King,* 145 N. C., 234, 58 S. E., 1074; *Monroe v. Niven,* 221 N. C., 362, 365, 20 S. E. (2d), 311. Whether their adversary has been fenced in, or fenced out, as contended by counsel for defendants, is a matter which must await the proverbial "day in court" for its determination.

Conceding that the burden is on the moving party to show want of authority in Daniel to consent to the judgment in question, the plaintiff has been materially aided in carrying that burden by defendants' affidavits, which purport to tell just what occurred. From a perusal of this evidence, it becomes clear that the governing body of the town took no official action in the matter toward authorizing the consent or terminating the litigation through the judgment entered.

The only thing in the findings of fact approaching an affirmation of any action by the commissioners is the statement: "Mr. Daniel informed Mr. Grimes that Mr. Tankard, who had been authorized by the governing officials of the town to handle the matter," etc., as appears in finding No. 11. If this is to be construed as indicating that there was an official delegation of authority, it is unsupported by the evidence.

We are not required here to draw a sharp line between incidental matters which a municipality, as other clients, in the handling of a lawsuit must needs leave to the discretion of its attorney, guided by such informal counsel as personal contact may supply, and matters more importantly affecting the rights of the client and the objectives of the suit. We do say that authority to consent to a judgment which gives away the whole *corpus* of the controversy—not only abandons title to lands claimed in good faith by the municipality, but puts that title in an adversary—should rest on official action of the board rather than casual personal assent of its members, even if that assent could be found to exist. *Burgin v. Board of Election,* 214 N. C., 146, 198 S. E., 573; *O'Neal v. Wake County,* 196 N. C., 184, 145 S. E., 28; *Realty Co. v. Charlotte,* 198 N. C., 564, 152 S. E., 686; *Ins. Co. v. Guilford County,* 225 N. C., 293, 34 S. E. (2d), 430; *London v. Commissioners,* 193 N. C., 100, 136 S. E., 356; 37 Am. Jur., "Municipal Corporations," sec. 54.

It is suggested that the judgment may be sustained on some principle other than consent of the parties; that it was within the power of the court to render a judgment of this sort without such consent. Beyond a simple nonsuit for failure to prosecute the action, we know no appropriate judgment which the court may have rendered. The suggestion that the course taken by Mr. Daniel was within some general or inherent or imputed power of an attorney by reason of his retainer and official connection with the case, by the exercise of which, however disastrous, the client is bound, is without merit. In this State, as generally throughout the Union, the client, municipal or otherwise, is bound by many acts of his attorney incidental to the ordinary conduct of the case, often of great importance. But that power does not extend to an act of the sort under review, or to any other substantial compromise of the client's right, and is not of a character to avail the defendants in the present case. *Hall v. Presnell,* 157 N. C., 290, 294, 295, 72 S. E., 985; *Hairston v. Garwood,* 123 N. C., 345, 349, 31 S. E., 653; *Bank v. McEwen,* 160 N. C., 414, 420, 421, 76 S. E., 222; 5 Am. Jur., 317, sec. 96, *et seq.*

We have arrived at the conclusion that although Mr. Daniel acted in the utmost good faith and with the best of motives, he was, upon the record, without legal authority to consent to the challenged judgment.

The judgment of Thompson, J., rendered as of February Term, 1946, Beaufort County Superior Court, is, therefore, reversed; and the judgment rendered by Judge Frizzelle at May Term, 1945, is vacated. The cause is remanded for further proceeding.

Reversed and remanded.

DR. JOHN W. SMITH v. MRS. HARRIOT B. SMITH.

(Filed 18 September, 1946.)

1. Appeal and Error § 40a—

An exception to the signing of a judgment presents only the face of the record for inspection or review, and when the judgment is supported by the record the exception must fail.

2. Divorce § 3—

The requirement of G. S., 50-3, that in proceedings for divorce the summons shall be returnable to the court of the county in which either the plaintiff or defendant resides, is not jurisdictional but relates to venue, and the right to have the cause tried in the proper county is waived by failure of defendant to make demand in writing before time of answering expires.

3. Process § 6—

G. S., 1-99, does not specifically require that the order for publication of notice of summons state that the newspaper in which the publication is ordered to be printed is the one "most likely to give notice to the person to be served."

4. Same—

Since an order for publication of notice of summons is made by a court of record, there is a presumption in favor of the rightfulness of its decrees, and it will be presumed that the statutory findings and determination have been made without specific adjudication in the order to that effect.

5. Process § 3—

The court has the power to allow an amendment *nunc pro tunc* to an original order of publication of the summons so as to conform with the facts as to the newspaper in which the order was published and the number of times of publication therein.

APPEAL by defendant from *Bone, J.,* at March Term, 1946, of MARTIN.

Civil action for absolute divorce upon ground of two years separation —heard upon motion of defendant to set aside judgment rendered in favor of plaintiff on verdict returned at September Term, 1944, of Superior Court of Martin County.

The motion of defendant, dated 19 June, 1945, is based in the main on these contentions:

That after the marriage of plaintiff and defendant they had lived together at Norlina in the State of North Carolina, and had never resided in Martin County; that at the time of the institution of the action in Martin County plaintiff was a resident of Hertford County, and defendant was "not living in the State of North Carolina"; that the publication of notice of summons in a newspaper in Martin County was not in compliance with the statutory direction (a) that the publication be in "one or two newspapers to be designated as most likely to give notice to the person to be served," and (b) that the order for publication of notice of summons failed to designate any particular newspaper, and failed to state the length of time deemed reasonable, "not less than . . . once a week for four successive weeks, giving the title and purpose of the action, and requiring the defendant to appear and answer or demur to the complaint at a time and place therein mentioned"; that she had no knowledge of the action until after judgment was rendered; that plaintiff had died on 25 February, 1945; and that she had a meritorious defense.

The record discloses (1) that the affidavit, upon which plaintiff prayed that service of notice of the action be published, "as required by law," contains the essential facts; (2) that the order of the clerk, after reciting the essential facts contained in the affidavit, directed "that summons be

served by publication in some newspaper published in Martin County as required by law"; (3) that the notice published, dated 16 June, 1944, gave the title and purpose of the action, and required defendant "to appear at the office of the Clerk of the Superior Court of Martin County, in the courthouse in Williamston, North Carolina, within 30 days after the 16th day of June, 1944, and answer or demur to the complaint in said action, or the plaintiff will apply to the court for the relief demanded in the complaint," and (4) that the manager of *The Enterprise,* a newspaper published in Martin County and State of North Carolina, made affidavit that the said notice of the action "was duly published in the aforesaid paper once a week for four weeks, beginning with the issue dated the 16th day of June, 1944."

The record further discloses that, after defendant had filed her motion as aforesaid, the Clerk of Superior Court, upon motion of executor of plaintiff, finding these facts (a) that the court actually delivered the notice of summons to *"The Enterprise* for publication," (b) that upon the instruction of the court the same was duly and regularly published for four successive weeks in *The Enterprise,* and (c) that affidavit of publication was duly filed by *The Enterprise* showing the publication thereof, entered an order on 19 November, 1945, amending the original order, *nunc pro tunc,* directing that summons be served on defendant by publication, and "to that end that notice of this action be published once a week for four successive weeks in *The Enterprise,* a newspaper published in Martin County, Town of Williamston, North Carolina, setting forth the title of the action, the purpose of the same, and requiring the defendant to appear," etc., substantially as set forth in the original notice.

Thereafter, on hearing of defendant's motion in Superior Court, upon the record and affidavits filed, the judge presiding found in substance these facts:

That plaintiff and defendant were married in June, 1932; that plaintiff commenced this action for divorce in the Superior Court of Martin County on 14 June, 1944; that at the time of the commencement of the action plaintiff and defendant had lived separate and apart for more than two years within the meaning of the statute which makes two years' separation a ground for absolute divorce and the allegations of plaintiff's complaint and affidavit were not false and fraudulent; that at that time plaintiff was a resident of Hertford County, North Carolina, and the defendant was a nonresident of the State; that plaintiff brought this action in Martin County upon advice of counsel for the purpose of expediting the trial and not for the purpose of preventing defendant from discovering same; that the clerk's order for the publication of summons did not designate the newspaper in which the notice of summons was to be published but that said clerk personally took said notice

to the publishers of *The Enterprise,* one of two newspapers published in Martin County, and directed that the same be published in said newspaper and same was published therein once a week for four successive weeks, and "subsequently the clerk amended the order of publication so that it would direct the doing of that which had already been done"; that at September, 1944, Term of Martin Superior Court issues were submitted to a jury and upon the verdict rendered a decree of absolute divorce was entered by the presiding judge; and that plaintiff, having died on 25 February, 1945, his executors have responded to defendant's motion which was filed 29 September, 1945. Thereupon, on these facts, the court denied defendant's motion to set aside the judgment of divorce, and in accordance therewith entered judgment.

Defendant appeals therefrom to Supreme Court and assigns error.

Alvin J. Eley for appellees.
Peel & Manning for defendant, appellant.

WINBORNE, J. The only exception brought forward on this appeal is to the signing of the judgment from which appeal is taken. This presents only the face of the record for inspection or review, and when the judgment is supported by the record the exception must fail. See *King v. Rudd, ante,* 156, 37 S. E. (2d), 116, citing among others *Rader v. Coach Co.,* 225 N. C., 537, 35 S. E. (2d), 609. See also *Fox v. Mills, Inc.,* 225 N. C., 580, 35 S. E. (2d), 869; *Lee v. Board of Adjustment, ante,* 107, 37 S. E. (2d), 127; *Redwine v. Clodfelter, ante,* 366, 38 S. E. (2d), 203; *In re Collins, ante,* 412, 38 S. E. (2d), 160.

Applying this rule of law to the present appeal, upon the facts found, which are supported by the record, the exception must fail, and the judgment be upheld.

The provision of the statute, G. S., 50-3, that in all proceedings for divorce the summons shall be returnable to the court of the county in which either the plaintiff or defendant resides, is not jurisdictional, but relates to venue, and may be waived. If an action for divorce be instituted in any other county in the State, the action may be tried therein, unless the defendant before the time of answering expires demands in writing that the trial be had in the proper county. See *Davis v. Davis,* 179 N. C., 185, 102 S. E., 270.

Also, there is no specific requirement of the statute, G. S., 1-99, that an order for the publication of notice of summons state that the newspaper in which the publication is ordered to be printed is the one "most likely to give notice to the person to be served." Moreover, an order for publication of notice of summons being made by a court of record there is a presumption in favor of the rightfulness of its decrees, and it will be presumed that the statutory findings and determination had been

made without specific adjudication in the order to that effect. See headnote in *Elias v. Comrs. of Buncombe,* 198 N. C., 733, 153 S. E., 323.

Furthermore, the court had the power to allow the amendment *nunc pro tunc* to the original order for publication of the summons so as to "direct the doing of that which had already been done," that is, to conform with the facts as to what had been done. See the statute, G. S., 1-163, relating to amendments in discretion of court.

Affirmed.

L. V. LONG v. GORDON TRANTHAM AND WIFE, HELEN TRANTHAM.

(Filed 18 September, 1946.)

Estoppel § 6d—Defendants held bound by equitable estoppel in pais by conduct which would make denial of existence of fact unjust to plaintiff.

Three separate landowners filed a petition for the establishment of a cartway over the lands of respondents, setting out the necessity of egress to and ingress from a public road to "their property" and that the most economical route was an old cartway across the lands of respondents, which respondents had closed. The county commissioners so established the cartway. The old cartway ran across the land of respondents and two of petitioners and served the lands of all three. Thereafter two of the petitioners sold their lands to respondents, who again obstructed the cartway. The third petitioner, who owned the land furthest from the public road, instituted this action to compel the removal of the obstruction. *Held:* The other petitioners would be estopped to deny plaintiff the use of the old road across their lands to get to the cartway established across the lands of respondents, and respondents, being in privity of title to them, are likewise estopped.

APPEAL by plaintiff from *Nettles, J.,* at March Civil Term, 1946, of BUNCOMBE.

Civil action for mandatory injunction for removal of obstruction of cartway and for permanent injunction against interference of use of cartway.

Plaintiff alleges in his complaint substantially this factual situation: Plaintiff on the dates hereinafter stated owned and now owns a 10-acre tract of land in Fairview Township, Buncombe County, North Carolina, which does not abut on any public road. Adjoining it, and between it and the nearest public road—the Brush Creek public road—there is land owned by defendants. As the only means of ingress and egress to and from said land of plaintiff across intervening lands to the public road, there was an old road used by plaintiff, "his friends, neighbors and acquaintances," and his predecessors in title "always" or "for 50 years or more." In the fall of 1943, the defendants obstructed same or caused

it to be obstructed by constructing a fence across same. Whereupon, on 13 October, 1943, in a proceeding instituted upon petition of "P. S. Bagwell, Woodrow Dillingham and L. V. Long" (the last being plaintiff in present action), *v.* "Gordon Trantham and Mrs. Gordon Trantham" (present defendants), the Board of Commissioners of Buncombe County entered a judgment establishing "a cartway from the petitioners' property to the Brush Creek Road across the property of the respondents, to be located along the line of the present road as the same now runs, or did run across the Trantham property before it was obstructed with fence and otherwise," and assessed damages at $25.00 to be paid by petitioners to respondents, which amount has been tendered by plaintiff and refused by respondents, and then paid into the office of the Clerk of Superior Court for the use and benefit of the respondents. Thereafter, plaintiff requested the respondents to remove the obstruction from the cartway so that he could use same. Nevertheless, the defendants have failed to remove the fence. The location of the cartway so established is well known and defined through the property of the defendants to the public road and the obstruction of it is unlawful.

Defendants, answering, deny the material allegations of the complaint and as further answer aver that in the purported proceedings of the Board of Commissioners of Buncombe County "no attempt was made to lay out a cartway over the lands of P. S. Bagwell and Woodrow Dillingham, or any of said petitioners; that prior to the date of the institution of this action, the defendants herein purchased the lands of the said P. S. Bagwell and Woodrow Dillingham, and, in the event the court should find that there was a lawful cartway laid out over the lands owned by the defendants, at the date of said purported proceedings, that the same could not exceed in length 250 feet" across the lands then owned by defendants, and in no event could same be constructed to reach the lands of the petitioners.

Plaintiff in reply denies the averments of the further answer of defendants and alleges that the petition for cartway instituted before the Board of Commissioners was in the name of R. W. Dillingham, P. S. Bagwell and L. V. Long as petitioners, and was for a cartway to the Brush Creek public road and was signed and executed by all of said petitioners; that Dillingham and Bagwell, by their action in joining with plaintiff in the petition and requesting the establishment of the cartway at a definite location to the Brush Creek Road, consented and acquiesced in a cartway over their lands to the land of the plaintiff, and, by so doing, are estopped to deny the existence of a cartway over and across their said lands to the plaintiff's land, and the defendants having actual knowledge of the proceeding and its contents, and standing in privity of title to Dillingham and Bagwell, are likewise estopped to deny the existence of a cartway over the lands which Dillingham and Bagwell

owned at date of the petition; and that the original petition, notice, order and other papers filed in said proceeding before said commissioners are made a part of the reply and are pleaded as an estoppel to the defendants' further answer and defense.

Upon the trial in the court below plaintiff offered evidence, documentary and oral, tending to show among other things these facts:

(1) That in pertinent part the original petition to the Board of Commissioners of Buncombe County for the cartway, the petitioners R. W. Dillingham, P. S. Bagwell and L. V. Long set forth their ownership of land in Fairview Township, Buncombe County, North Carolina, "and that there is no public road, cartway or right of way leading from their property to any public road, other than the one road that has served this property for the past 25 years and at present time is closed"; that for them to enjoy the use of their property it is necessary for a cartway to be established leading from their property to a public road; "that the most economic route which could be followed in the opinion of the petitioners in the establishment of a cartway would be to open the present road which has been closed"; and pray that "in accordance with Chapter 328 of Public-Local Laws of 1923," the board "take such action as is necessary to establish a cartway to their property." (2) That, after notice and hearing, the Board of Commissioners established "a cartway from the petitioners' property to the Brush Creek Road across the property of the respondents, to be located along the line of the present road as the same now runs, or did run, across the Trantham property before it was obstructed by fence and otherwise," and "as damages for the laying out of this cartway across the lands of the respondents" assessed $25.00 "to be paid by the petitioners to the respondents," and adjudged that "upon payment of the damages aforementioned by the petitioners to the respondents, the right of the petitioners to use and enjoy the benefits of said cartway shall be consummate." (3) That at the time the petition was filed and the order of the board entered for the cartway as above stated, plaintiff L. V. Long individually owned a 10-acre tract of land, and east of it was a tract owned by Woodrow Dillingham and P. S. Bagwell, and immediately east of the Dillingham and Bagwell tract the defendants Trantham owned a tract extending east to the Brush Creek Road; that the old road extended from Brush Creek Road in front of the Trantham house across the Trantham land, through the Dillingham and Bagwell land and "onto" the land of plaintiff; and that the cartway laid off in the order of the Board of Commissioners was along this old road.

Plaintiff testified without objection that "the cartway begun in front of Mr. Trantham's house on the opposite side of the Brush Creek Road, and went through his land and through Dillingham's and Bagwell's up to my property and on out into the field, it is an old road . . . Woodrow Dillingham, P. S. Bagwell and I were working together as petitioners to

secure the laying off and establishment of this cartway by the Board of County Commissioners,—I meant the cartway as described in the papers introduced. Gordon Trantham . . . after this cartway was established, purchased the Dillingham and Bagwell property. After he purchased it he put up another fence nearly at my line; neither of those fences has ever been removed."

Defendants introduced as evidence the deed from Woodrow Dillingham and wife and Bagwell and wife dated 18 March, 1944, which contained full covenants of seizin, right to convey, freedom from encumbrances and general warranty.

The court allowed motion for judgment as of nonsuit at close of all the evidence, and rendered judgment in accordance therewith.

The plaintiff excepted, assigned error, and appeals to the Supreme Court.

Don C. Young for plaintiff, appellant.

J. W. Haynes for defendant, appellee.

WINBORNE, J. Decision on this appeal requires consideration only of plaintiff's exception to the judgment as of nonsuit entered in the trial court. This exception is pivoted on the question as to whether Dillingham and Bagwell were equitably estopped by the petition and judgment in the cartway proceedings from thereafter asserting that their co-petitioner L. V. Long was not entitled to cross their land on the old road to get to the land of Trantham, over which clearly the Board of Commissioners laid off and established cartway. They are precluded if their conduct would make such assertion obviously unjust to Long. The facts revealed in the record lead to an affirmative answer to the question. See *Thomas v. Conyers,* 198 N. C., 229, 151 S. E., 270; *Henning v. Warner,* 109 N. C., 406, 14 S. E., 317; *Harris v. Carter,* 189 N. C., 295, 127 S. E., 1; *McNeely v. Walters,* 211 N. C., 112, 189 S. E., 114; *In re Young,* 222 N. C., 708, 24 S. E. (2d), 539; *McDaniel v. Leggett,* 224 N. C., 806, 32 S. E. (2d), 602.

The applicable principle is stated by *Adams, J.,* in *Thomas v. Conyers, supra,* in this manner: "Equitable estoppel *in pais* owes its origin and development to the notion of justice promulgated by courts of chancery. It embraces estoppel by conduct which rests upon the necessity of compelling the observance of good faith . . . 'This estoppel arises when any one, by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist, and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts.' "

"The doctrine of equitable estoppel is based on an application of the golden rule to the every day affairs of men. It requires that one should do unto others as, in equity and good conscience, he would have them do unto him, if their positions were reversed . . . Its compulsion is one of fair play." *Stacy, C. J.*, in *McNeely v. Walters, supra.*

In the light of this principle and bearing in mind that the land of Long was separate and apart from that of Dillingham and Bagwell, it is significant that in the joint petition of Dillingham and Bagwell and Long they pray for a cartway to "their property," and they say that "their property" has been served for 25 years by the road that was then closed and which they sought to have opened. The words "their property" as so used necessarily included the separate property of Long as well as that of Dillingham and Bagwell. Moreover, the petitioners jointly say that in their opinion the most economical route for the cartway "would be to open the present road that has been closed." This is tantamount to saying that the old road as it ran from Long's land across that of Dillingham and Bagwell served both, and that the obstacle in the way was the obstruction placed by Trantham. Under these circumstances it would be manifestly unjust to Long for them to deny to him the use of the old road across their land to get to the cartway established across Trantham's property. This they may not do. The defendants Trantham having thereafter purchased the land of Dillingham and Bagwell stand in privity of title to them and would likewise be estopped to deny the right of Long to use the old road. See *Dillingham v. Gardner,* 222 N. C., 79, 21 S. E. (2d), 898.

In the light of these principles the judgment of nonsuit is

Reversed.

CHARLES LEE KENNEDY v. W. H. SMITH, TRADING AS BLOUNT FLORAL COMPANY (BLOUNT FLOWER SHOP, INC.), AND W. H. SMITH, PERSONALLY.

(Filed 18 September, 1946.)

1. Automobiles § 8i—

The statutory rule that a vehicle approaching an intersection has the right of way over a vehicle approaching the intersection from its left applies when the two vehicles approach or enter the intersection at approximately the same time, and a driver has no right to proceed on his way upon the assumption that the vehicle to his left will stop in time to avoid collision if, in the exercise of reasonable prudence, he ascertains that the vehicle on his left has already entered the intersection. G. S., 20-155.

2. Automobiles § 18h—

Testimony of the driver that in approaching an intersection he saw the headlights of a vehicle approaching the intersection from his left, that he

proceeded on his way assuming the other vehicle would stop, and that the front of his car struck the side of the other vehicle "full broadsided," *is held* to raise the issue of contributory negligence for the determination of the jury in the absence of evidence that the other vehicle was traveling at excessive speed, since the evidence affords ground for the deduction that the other vehicle had preceded plaintiff's car into the intersection.

3. Same—

While the burden of proving contributory negligence is on defendant, if there is any competent evidence tending to establish this defense, whether from the plaintiff or defendant, or inferences of fact are fairly deducible therefrom tending to support this affirmative defense, defendant is entitled to have the issue submitted to the jury under appropriate instructions, and a peremptory instruction for plaintiff on the issue is reversible error.

APPEAL by defendant Blount Flower Shop, Inc., from *Bone, J.*, at April Term, 1946, of NASH. New trial.

This was an action to recover damages for personal injury alleged to have been caused by the negligence of the defendants in the operation of a motor truck.

The plaintiff offered evidence tending to show that on 7 March, 1942, about 11 o'clock p.m., at a street intersection in the City of Rocky Mount, the automobile which plaintiff was driving collided with a truck driven by the corporate defendant's employee, and that as result of the collision plaintiff suffered injury.

Motion for judgment of nonsuit as to W. H. Smith individually was sustained.

Issues of negligence, contributory negligence and damage were submitted to the jury, and answered in favor of the plaintiff. From judgment on the verdict the corporate defendant appealed.

Cooley & May for plaintiff, appellee.

Wilkinson & King for defendant, appellant.

DEVIN, J. The determinative question presented here is whether there was any evidence of contributory negligence on the part of the plaintiff. The court below, being of opinion there was no such evidence, instructed the jury to answer that issue "no."

The material evidence on this point came from the plaintiff. He testified he was driving west on Thomas Street in Rocky Mount at the rate of 25 miles per hour, and that defendant's truck was proceeding north on Howell Street; that as he approached the intersection, he met a car traveling east on Thomas Street and at same time he saw the lights of defendant's truck approaching from the south, on plaintiff's left; that he saw the truck before he met and passed the eastbound car, and that he

knew the truck was moving in on the intersection, but he thought the truck was supposed to stop; plaintiff made no effort to stop his automobile, though he did slow down from 25 to 20 miles per hour, and struck the truck "full broadsided," the front of plaintiff's automobile "went right up against the middle of the truck." He did not testify as to the speed of the truck. Plaintiff was driving on the right side of the street, and his automobile was equipped with adequate brakes.

The plaintiff relied upon the statute, G. S., 20-155, which gave him the right of way over a vehicle approaching the intersection from his left, and contended that he was under no duty to stop or slow down to permit the other vehicle to pass, and had the right to proceed on his way, on the assumption that the driver of the truck would stop in time to avoid collision. However, this statutory rule is based upon the assumption that the two vehicles approach or enter the intersection at approximately the same time, and does not apply if the driver on the right, at the time he approaches the intersection and before reaching it, in the exercise of reasonable prudence ascertains that the vehicle on his left has already entered the intersection. *Cab Co. v. Sanders,* 223 N. C., 626, 27 S. E. (2d), 631; *Stewart v. Cab Co.,* 225 N. C., 654, 36 S. E. (2d), 256; *Davis v. Long,* 189 N. C., 129, 126 S. E., 321; *Piner v. Richter,* 202 N. C., 573, 163 S. E., 561; *Sebastian v. Motor Lines,* 213 N. C., 770, 197 S. E., 539; *Swinson v. Nance,* 219 N. C., 772, 15 S. E. (2d), 284.

While the evidence on this point is not entirely clear, we think from the circumstances detailed there are inferences which fairly may be drawn pointing to lack of due care on the part of the plaintiff constituting one of the proximate causes of his injury. Plaintiff's evidence that while driving on the right side of the street he struck the defendant's truck in the intersection "full broadsided" with the front of his automobile would seem to afford ground for the deduction, in the absence of evidence that the speed of the truck was in excess of that of the plaintiff, that the truck already had preceded the automobile into the intersection at the time the plaintiff approached the zone of danger. If so, this would present a question for the jury as to whether under all the circumstances plaintiff exercised proper care.

True, there was other evidence on the part of plaintiff, and the burden of proof on the issue of contributory negligence was on the defendant, but if there was any competent evidence tending to establish this defense, whether from the plaintiff or defendant, or inferences of fact fairly deducible therefrom tending to support the defendant's affirmative defense, the defendant was entitled to have the issue submitted to the jury with appropriate instructions from the court.

We think there was error in giving the peremptory instruction in favor of the plaintiff on the issue of contributory negligence, necessitating a new trial.

As there must be another trial, we have not deemed it necessary to consider other assignments of error brought forward in defendant's appeal, as they may not again arise.

New trial.

CLAUDE STRICKLAND v. W. H. SMITH, TRADING AS BLOUNT FLORAL COMPANY (BLOUNT FLOWER SHOP, INC.), AND W. H. SMITH, PERSONALLY.

(Filed 18 September, 1946.)

Automobiles § 22—

Where, in an action by a passenger in an automobile to recover for injuries sustained in collision with a truck, there is no evidence upon which contributory negligence of the driver of the car can be imputed to the plaintiff, a peremptory instruction in plaintiff's favor upon the issue of contributory negligence is without error.

APPEAL by the corporate defendant from *Bone, J.*, at April Term, 1946, of NASH. No error.

Motion for judgment of nonsuit as to W. H. Smith individually was sustained. There was verdict in favor of plaintiff on issues submitted, and from judgment thereon the corporate defendant appealed.

Cooley & May for plaintiff, appellee.

Wilkinson & King for defendant, appellant.

DEVIN, J. This case and the case of *Kennedy v. Smith, ante,* 514, grew out of the same facts, and the two cases were tried together. The facts are set out in the *Kennedy case.* However, it appeared in this case that plaintiff Strickland was a passenger in the automobile driven by Kennedy at the time of the collision with defendant's truck. There was no evidence upon which contributory negligence could be imputed to this plaintiff, and the court properly so instructed the jury.

An examination of the other assignments of error brought forward in defendant's appeal fails to disclose prejudicial error. In the trial we find

No error.

OSCAR C. PRESSLEY v. THE GREAT ATLANTIC & PACIFIC TEA COMPANY, A CORPORATION.

(Filed 18 September, 1946.)

1. Pleadings § 2—

G. S., 1-123, will be liberally construed to the end that all justiciable controversies between the parties may be consolidated when the facts as to all may be stated as a connected whole, are so related in scope that they may be examined in connection with each other, and are connected with the same subject matter which constitutes one general right.

2. Same—

The fact that a connected story may be told of the transactions between the parties constituting the bases of several causes of action is not alone sufficient to justify the consolidation of the causes in the complaint, but it is also necessary that the causes be connected with the same subject of action.

3. Same: Pleadings § 19b—

The complaint alleged that plaintiff employee was injured by the negligence of defendant employer, that when plaintiff had partially recovered he returned and requested light work, that defendant demanded that plaintiff sign a release for the negligent injury, and that upon plaintiff's refusal, defendant discharged him. *Held:* The cause of action for negligent injury and the cause of action for wrongful discharge have no interdependent connection and are not connected with the same subject matter, and defendant's demurrer for misjoinder should have been allowed.

4. Pleadings § 15—

Even when two causes of action are improperly joined in the complaint, the action need not be dismissed upon demurrer. G. S., 1-132.

APPEAL by defendant from *Alley, J.*, at April Term, 1946, of BUNCOMBE. Reversed.

Civil action to recover damages (1) for personal injuries caused by the alleged negligence of defendant, and (2) for wrongful breach of contract of employment, heard on demurrer for misjoinder of causes of action.

In his complaint plaintiff alleges as a first cause of action that in May, 1944, he was employed by defendant, that in the course of said employment and while about his master's business he suffered certain personal injuries as a proximate result of the negligence of the defendant.

For a second cause of action he alleges that after he had in some measure recovered from his injuries he reported to defendant's manager for "light work," and that said manager advised him that in order "to continue his employment and be reinstated upon the payroll, the plaintiff would have to sign a release exonerating and discharging the defendant" from liability for said injuries, "whereupon the plaintiff declined to sign

a release, and the defendant wrongfully and unlawfully discharged the plaintiff."

The defendant demurred for that there is a misjoinder of causes of action. The demurrer was overruled and defendant appealed.

Carl W. Greene and Guy Weaver for plaintiff, appellee.

Williams, Cocke & Williams for defendant, appellant.

BARNHILL, J. "The plaintiff may unite in the same complaint several causes of action, of legal or equitable nature, or both, where they all arise out of—

"1. The same transaction, or transactions connected with the same subject of action." G. S., 1-123. This section has been liberally construed to the end that justiciable controversies may be expeditiously adjusted by judicial decree at a minimum of cost to the litigants and the public.

To that end we have held that "If the grounds of the bill be not entirely distinct and wholly unconnected; if they arise out of one and the same transaction or series of transactions, forming one course of dealing and tending to one end; if one connected story can be told of the whole," the complaint is not subject to attack by demurrer for misjoinder of causes of action. *Bedsole v. Monroe,* 40 N. C., 313; *Taylor v. Ins. Co.,* 182 N. C., 120, 108 S. E., 502.

" 'The plaintiff may unite in the same complaint several causes of action . . . when they all arise out of—1. The same transaction, or transactions connected with the same subject of action,' etc. The purpose being to extend the right of the plaintiffs to join actions, not merely by including equitable as well as legal causes of action, but to make the ground broad enough to cover all causes of action which a plaintiff may have against a defendant arising out of the same *subject* of action, so that the Court may not be forced 'to take two bites at a cherry,' but may dispose of the whole subject of controversy and its incidents and corollaries in one action." *Hamlin v. Tucker,* 72 N. C., 502; *Taylor v. Ins. Co., supra.*

This does not mean, however, that we may disregard the plain and unambiguous language of the statute which defines and limits the causes that may be united in one action.

That a connected story of the several transactions may be told is not alone sufficient. They must be *connected with the same subject of action. Hamlin v. Tucker, supra; Taylor v. Ins. Co., supra.*

Each cause of action must relate to one general right. *Daniels v. Fowler,* 120 N. C., 14; *Lee v. Thornton,* 171 N. C., 209, 88 S. E., 232;

Cotton Mills v. Maslin, 195 N. C., 12, 141 S. E., 348; *Trust Co. v. Peirce,* 195 N. C., 717, 143 S. E., 524. Each must be so germane to it as to be regarded really as a part thereof. McIntosh, P. & P., sec. 418, p. 430.

The complaint is multifarious unless all the causes of action alleged therein arose out of one and the same transaction or series of transactions forming one course of dealing, and all tending to one end. *Fisher v. Trust Co.,* 138 N. C., 224.

"There must be at least substantial identity between the causes of action before they can be united in one suit, because, if there is not, the several causes of action may, for their decision, depend upon very different facts and principles of law, which would tend to confusion and uncertainty in the trial of the case and result in great prejudice to some, if not all, of the parties." *R. R. v. Hardware Co.,* 135 N. C., 73.

The purpose of the statute is to permit the consolidation of causes of action when the facts as to all may be stated as a connected whole, are so restricted in scope that they may be examined in relation to each other, and are directed to the same *subject matter* which constitutes *one general right.*

While there is a casual relation between the two incidents alleged in the complaint, there is no causal or interdependent connection. They are not so connected that the circumstances surrounding both must be detailed in order to tell a complete story as to each. Recital of the facts on which the first cause of action is based does not require or permit the inclusion of those forming the basis of the second. Those of the first constitute no proper part of the second. Instead, the second begins where the first ends.

It is true a connected story may be told. Plaintiff was injured while in the employ of defendant. When he had partly recovered he returned and requested light work. A release was demanded and refused. Thereupon he was discharged. But the story thus told is not connected with the same subject matter and does not tend to prove a single general right. One is for injury to the person. The other is for a later wrongful breach of the contract. The first relates to the alleged failure of defendant to discharge its duty towards an employee. The second asserts the wrongful discontinuance of employment.

Thus *Hamlin v. Tucker, supra,* and *Peitzman v. Zebulon,* 219 N. C., 473, 14 S. E. (2d), 416, cited and relied on by plaintiff, are distinguishable. In the *Hamlin case* the primary or basic wrong was a violation of plaintiff's conjugal rights and each cause of action alleged was germane to the charge that defendant enticed plaintiff's wife to abandon him. In the *Peitzman case* the subject of the action was the right of plaintiff to compensation for work done.

It follows that the two causes of action alleged in the complaint are improperly joined. Even so, the action need not be dismissed. G. S., 1-132; *R. R. v. Hardware Co., supra.*

The judgment below is

Reversed.

STATE v. GRADY OWENBY, JR.

(Filed 18 September, 1946.)

1. Indictment § 9—

In drawing an indictment it is always better to adhere to the established practice.

2. Criminal Law § 50d—New trial awarded for remarks of court impeaching credibility of witness and intimating that fact had not been established.

In this prosecution for carnal knowledge of a female between the ages of twelve and sixteen, a witness for the defendant testified to the effect that prosecutrix had a bad reputation and that he himself had had carnal knowledge of her before the time specified in the indictment. The trial court, in the presence of the jury, made derogatory remarks concerning the witness, and stated that it appeared that the prosecuting witness was not a delinquent. *Held:* The remarks, though inadvertently made in the presence of the jury, impinge the statutory prohibition against the court at any time during the course of the trial casting doubt upon the testimony of a witness or impeaching his credibility, and the prohibition against the court at any time during the progress of the trial intimating whether a fact has been fully or sufficiently established, G. S., 1-180, and defendant is entitled to a new trial.

APPEAL by defendant from *Sink, J.,* at April Term, 1946, of BUNCOMBE.

Criminal prosecution upon indictment charging that on 15 September, 1945, the defendant did "wilfully and feloniously abuse and have carnal knowledge with one Dorothy Medford, she being over twelve years and under sixteen years of age and having never heretofore had sexual relation with any other person," contrary to the statute in such cases made and provided, etc.

The prosecuting witness testified that she was 12 years old on 15 September, 1945; that the defendant carnally knew her on that date, and further: "No, I did not have intercourse with any man except the defendant."

Clarence Cody, a witness for the defendant, testified that the prosecuting witness had a bad reputation; that she had had several dates with

him in his own house, when his wife was away; and that he had advised her she was too young and that she should go home, etc.

Following the evidence of this witness in the late afternoon on Monday after the jury had been given the case, the court ordered the witness held for grand-jury action on a charge of contributing to the delinquency of a minor.

On Tuesday morning, the jury was in the box at the opening of court to request further instructions on the defendant's alibi. In the presence of the jury, the court reviewed what had taken place the day before, "made considerable comment derogatory of Cody," and announced that as "it appears that the minor involved in this case is not a delinquent," the bill heretofore sent to the grand jury in this matter will be recalled and the named defendant Cody discharged. Exception by the defendant.

Verdict: Guilty as charged in the bill of indictment.

Judgment: Imprisonment in the State's Prison for not less than one nor more than two years.

Defendant appeals, assigning errors.

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

James E. Rector for defendant.

STACY, C. J. The sufficiency of the indictment is challenged, both by motion to quash the bill and by motion in arrest of judgment. But as a new trial is to be had for reasons hereafter stated, the solicitor can easily eliminate any objection by sending a new bill to the grand jury. It is always better in criminal matters to adhere to the established practice and to follow the beaten path. *S. v. Johnson, ante,* 266.

The disparagement of the defendant's witness, Cody, and the expression of opinion that the minor in the case was not a delinquent, though inadvertently made in the presence of the jury, would seem to entitle the defendant to another hearing. G. S., 1-180; *S. v. Auston,* 223 N. C., 203, 25 S. E. (2d), 613; *S. v. Wyont,* 218 N. C., 505, 11 S. E. (2d), 473.

No judge at any time during the trial of a cause is permitted to cast doubt upon the testimony of a witness or to impeach his credibility. *S. v. Winckler,* 210 N. C., 556, 187 S. E., 792; *S. v. Rhinehart,* 209 N. C., 150, 183 S. E., 388; *Morris v. Kramer,* 182 N. C., 87, 108 S. E., 381; *S. v. Rogers,* 173 N. C., 755, 91 S. E., 854; *Chance v. Ice Co.,* 166 N. C., 495, 82 S. E., 845; *Ray v. Patterson,* 165 N. C., 512, 81 S. E., 773. "The slightest intimation from a judge as to the strength of the evidence or as to the credibility of a witness will always have great weight with the jury, and, therefore, we must be careful to see that neither party is unduly prejudiced by an expression from the bench

which is likely to prevent a fair and impartial trial"—*Walker, J.*, in *S. v. Ownby,* 146 N. C., 677, 61 S. E., 630.

Nor is it permissible for the judge in charging the jury or at any time during the trial, to intimate whether a material fact has been fully or sufficiently established, it being the true office and province of the jury to weigh the testimony and to decide upon its adequacy to prove any issuable fact. It is the duty of the judge, under the provisions of the statute, to state in a plain and correct manner the evidence given in the case and to declare and explain the law arising thereon, without expressing any opinion upon the facts. G. S., 1-180; *S. v. Hart,* 186 N. C., 582, 120 S. E., 345. It can make no difference in what way or when the opinion of the judge is conveyed to the jury, whether directly or indirectly, or by the general tone and tenor of the trial. The statute forbids an intimation of his opinion in any form whatever, it being the intent of the law to insure to each and every litigant a fair and impartial trial before the jury. "Every suitor is entitled by the law to have his cause considered with the 'cold neutrality of the impartial judge' and the equally unbiased mind of a properly instructed jury." *Withers v. Lane,* 144 N. C., p. 192, 56 S. E., 855.

For the errors as indicated, the defendant is entitled to a new trial. It is so ordered.

New trial.

STATE v. MACK DONALD GRIMES.

(Filed 18 September, 1946.)

1. Rape § 23: Assault § 15—

An assault on a female where no deadly weapon is used and no serious damage is done is punishable by a fine of not more than fifty dollars or imprisonment not in excess of thirty days, unless the assault is committed by a man or boy over eighteen years of age, in which case the punishment is in the discretion of the court as for a general misdemeanor, G. S., 14-33, but in order to support the sentence as for a general misdemeanor it is required that the jury determine in its verdict specifically or by reference to the charge, that defendant is a male and was over eighteen years of age at the time of the assault.

2. Same: Indictment and Warrant § 15—

The trial court has the discretionary power to permit an amendment to a warrant charging assault on a female *simpliciter* so as to charge an assault on a female by a man or boy over eighteen years of age.

3. Rape § 23: Criminal Law § 60—

Defendant was convicted upon a warrant charging an assault upon a female, and no more. After verdict the court permitted an amendment to charge an assault upon a female by a man or boy over eighteen years of

age, and sentenced defendant to eighteen months on the roads. *Held:* There being no finding by the jury that defendant was a man or boy over eighteen years of age at the time of the assault, and the amendment after verdict being ineffectual to supply this deficiency, the judgment is not supported by the verdict, and a *venire de novo* must be ordered.

APPEAL by defendant from *Bone, J.*, at March Term, 1946, of NASH.

Criminal prosecution upon a warrant charging the defendant with "assault on Mrs. J. C. Perkins, a female," contrary to law.

The case was first tried in the Recorder's Court of Rocky Mount on 7 December, 1945, and resulted in conviction and sentence of 18 months on the roads. On appeal to the Superior Court of Nash County, the matter was heard *de novo* at the March Term, 1946.

It was in evidence that the defendant followed the prosecuting witness in the nighttime, beat her and caused her face to bleed.

Verdict: "Guilty of an assault on a female as charged in the warrant."

After verdict and before judgment, the solicitor moved to amend the warrant so as to charge an assault on a female by a man or boy over eighteen years of age. Objection by defendant; overruled; exception.

Judgment: 18 months on the roads.

The defendant appeals, assigning errors.

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

T. T. Thorne for defendant.

STACY, C. J. The question for decision is whether the record supports the judgment.

The warrant, as originally drawn, charges an assault on a female, and no more. There is no allegation that a deadly weapon was used or that any serious damage was done. Nor was it alleged that the defendant is a "man or boy over eighteen years old." G. S., 14-33. It is this warrant to which the verdict speaks. The subsequent amendment relating to the age of the defendant was not before the jury, and the verdict is silent on the subject of the amendment. Just the reverse was true in *S. v. Lewis,* 224 N. C., 774, 32 S. E. (2d), 334.

It is the contention of the defendant that the punishment in such a case is restricted to a fine of not more than fifty dollars or imprisonment not in excess of thirty days. *S. v. Nash,* 109 N. C., 824, 13 S. E., 874.

Speaking to a similar situation in *S. v. Lefler,* 202 N. C., 700, 163 S. E., 873, *Adams, J.*, delivering the opinion of the Court, said: "To justify the sentence imposed (imprisonment for a term of twelve months) the defendant must have been over the age of eighteen years, and as to this there is no finding by the jury. If he was over eighteen years of age

the punishment would not be restricted to a fine of fifty dollars or imprisonment not exceeding thirty days, although a deadly weapon was not used and serious injury was not inflicted. In the absence of a finding as to the defendant's age, we must award a new trial."

It will be noted that in the *Lefler case, supra,* the indictment was for an assault on a female resulting in serious and permanent injury. Under such a bill and the record there presented, it was permissible to convict the defendant of "a less degree of the same crime charged," G. S., 15-170, which would include an assault on a female by a man or boy over 18 years old, as well as by a boy under that age or by a female of any age. A bill for a more serious offense is regarded as containing charges of all "less degrees" of the same crime, without specifying the elements of these "less degrees." Hence, speaking to a bill which charged a more serious offense, it was said that the elements of the "less degrees" of the same crime need not be alleged, albeit the jury would be required to find the degree of the crime in its verdict. *S. v. Bentley,* 223 N. C., 563, 27 S. E. (2d), 738.

Here, the verdict pronounces the defendant guilty of an assault on a female, *simpliciter.* No deadly weapon was used and no serious damage was done. Whether the permissible punishment is restricted, or in the discretion of the court, depends upon the age and sex of the defendant. These must appear in order to support a judgment as for an aggravated assault. *S. v. Smith,* 157 N. C., 578, 72 S. E., 853. When a defendant is convicted of an assault and there are circumstances of aggravation, and the circumstances of aggravation are that the defendant is a man or boy over 18 years of age and the assaulted person is a female, the punishment for the offense may be by fine or imprisonment, or both, at the discretion of the court. G. S., 14-33; *S. v. Bentley, supra.* True, there is a presumption that the defendant was over 18 years of age. *S. v. Herring, ante,* 213. But this is only a presumption. *S. v. Lefler, supra.*

Generally, in charges of assault or assault and battery with varying degrees of aggravation, the jury may convict of the assault or assault and battery and acquit, in whole or in part, of the circumstances of aggravation. *S. v. Bentley, supra.* Questions of jurisdiction and limitation of punishment are dependent upon the offense charged and the plea of the defendant or the finding of the jury. G. S., 7-129; 7-63; 7-64; 14-33; *S. v. Johnson,* 94 N. C., 863; *S. v. Smith,* 174 N. C., 804, 93 S. E., 910. To this general rule, however, there seems to be at least one exception. When a "man or boy over 18 years old" commits an assault or assault and battery on "any female person," even though no deadly weapon be used and no serious damage is done, the case is regarded as a general misdemeanor and the punishment is in the discretion of the court. *S. v. Jackson, ante,* 66, 36 S. E. (2d), 706. Hence, to

take the case out of the general rule and place it in the exception, the jury should determine in its verdict, specifically or by reference to the charge, the circumstances of aggravation which make the offense a general misdemeanor. *S. v. Lefler, supra; S. v. Lewis, supra.*

In other words, it all comes to this: a simple assault on a female by a boy not over 18 years old or by another female is restricted in punishment to a fine not exceeding $50 or imprisonment for not more than 30 days. The same assault, if committed by a man or boy over 18 years of age, would be punishable in the discretion of the court.

The question we are now considering was not in focus, or mooted, in the cases of *S. v. Jackson, ante,* 66, 36 S. E. (2d), 706; *S. v. Morgan,* 225 N. C., 549, 35 S. E. (2d), 621; *S. v. Stokes,* 181 N. C., 539, 106 S. E., 763; *S. v. Jones,* 181 N. C., 546, 106 S. E., 817. Moreover, in all these cases the bills were for more serious offenses or more aggravated assaults.

There was no error in allowing the solicitor to amend the warrant, as this was a matter resting in the sound discretion of the trial court. *S. v. Brown,* 225 N. C., 22, 33 S. E. (2d), 121. Coming as it did, however, after verdict, the amendment was ineffectual to supply the deficiency of the jury's finding. So, conforming to the precedent of the *Lefler case, supra,* the present cause will be remanded for another hearing.

Venire de novo.

VOLLIE S. WHITAKER v. GEORGE RAINES AND JO ALICE RAINES.

(Filed 18 September, 1946.)

1. Judgments § 27a—Evidence held insufficient to establish excusable neglect.

In this action for the recovery of real property, the evidence tended to show that defendants were personally served with summons and a copy of the complaint, that it was agreed that pending negotiations for settlement no answer should be filed, that thereafter defendants' attorney was notified that plaintiff would ask for judgment by default, that thereupon unverified complaint without bond or application for leave to defend without bond was filed, that notice was then served on defendants' counsel that plaintiff would move for judgment at the next term, and that at this term the unverified answer was stricken out and judgment rendered for plaintiff. Defendants' affidavit stated that they did not receive the letters from their attorney notifying them that negotiations had broken down and that the case had been calendared for trial. *Held:* There was no sufficient showing of excusable neglect and the granting of defendants' motion to set aside the judgment under G. S., 1-220, was error.

2. Same—

In the absence of sufficient showing of excusable neglect the question of meritorious defense becomes immaterial.

3. Same—

Parties who have been duly served with summons and copy of complaint in an action against them should give to their defense that amount of attention which a man of ordinary prudence usually gives to his important business.

APPEAL by plaintiff from *Alley, J.*, at April Term, 1946, of BUNCOMBE. Reversed.

Motion by defendants to set aside judgment on the ground of excusable neglect. Motion allowed and plaintiff appealed.

Sanford W. Brown for plaintiff.

Don C. Young for defendants.

DEVIN, J. The question here presented is whether the facts appearing in the record were such as to justify the court below in setting aside the judgment theretofore rendered in the cause on the ground of excusable neglect.

The parties are all residents of Buncombe County. The plaintiff instituted this action 10 July, 1945, to recover possession of one acre of land, alleging title in himself and wrongful withholding by defendants. Personal service of summons with copy of verified complaint was had on defendants 11 July, 1945. At request of defendants, time to answer was extended to 25 August, and again for 30 days thereafter. No answer was filed (G. S., 1-125), or bond given as required by G. S., 1-111, or affidavit made that defendants were unable to give bond as allowed by G. S., 1-112. On 31 December, 1945, more than three months after extended time for answering had expired, counsel for plaintiff wrote defendants' counsel that unless answer was filed on or before 10 January, 1946, plaintiff would ask for judgment by default. On 10 January, 1946, counsel filed an unverified answer on behalf of defendants (G. S., 1-144), but without bond or application for leave to defend without bond. Counsel for plaintiff thereupon served notice on defendants' counsel that plaintiff would at February Term, 1946, move for judgment. The case was calendared for 11 February, 1946. When reached, the unverified answer was stricken out and judgment rendered for plaintiff. G. S., 1-211; G. S., 1-111. Counsel for defendants was in the bar at the time and did not interpose objection.

On 30 March, 1946, defendants filed motion to set aside the judgment under G. S., 1-220, alleging as grounds therefor that there had been

negotiations between counsel for settlement and that defendants did not receive letters from counsel advising them that negotiations had failed, either in November, December or January, and did not know the cause was calendared for hearing at the February Term; and further that during the two weeks of the February Term the male defendant George Raines was sick and confined to his home. A meritorious defense was alleged. Plaintiff replied setting out in detail his efforts to get defendants into court, and alleged that after notice had been given defendants' counsel of record that the case was calendared for the February Term counsel for defendants stated he had been unable to get his clients to respond or communicate with him and he could not resist judgment; further plaintiff testified that on 11 February he saw defendant George Raines on the road between his home and Asheville, and knew he was not sick and confined to his home on that day.

The court allowed the defendants' motion to set aside the judgment, "being of opinion from the evidence offered that defendants did not have notice that the action was on the calendar for trial at the February Term," and that defendants had shown a meritorious defense.

We are unable to concur in the ruling of the learned judge who heard this motion. There are no findings of fact which would show excusable neglect on the part of defendants, or that the failure to file proper answer and undertaking was due to excusable neglect. *Vick v. Baker,* 122 N. C., 98, 29 S. E., 64; *Pepper v. Clegg,* 132 N. C., 312, 43 S. E., 906; *Johnson v. Sidbury,* 225 N. C., 208, 34 S. E. (2d), 67. In the absence of sufficient showing of excusable neglect, the question of meritorious defense becomes immaterial. *Johnson v. Sidbury, supra.* The plaintiff appears to have prosecuted his action to a successful conclusion in accord with the orderly course of procedure prescribed for the determination of property rights, and judgment was entered as authorized by the statutes. The result may not be subsequently vacated upon motion under G. S., 1-220, save upon findings of fact sufficient to justify the granting of relief under that remedial statute. Parties who have been duly served with summons and copy of complaint in an action against them should give to their defense "that amount of attention which a man of ordinary prudence usually gives to his important business." *Sluder v. Rollins,* 76 N. C., 271; *Roberts v. Allman,* 106 N. C., 391, 11 S. E., 424; *Pierce v. Eller,* 167 N. C., 672, 83 S. E., 758; *Holland v. Benevolent Assn.,* 176 N. C., 86, 97 S. E., 150; *Cahoon v. Brinkley,* 176 N. C., 5, 96 S. E., 650; *Craver v. Spaugh, ante,* 450, 38 S. E. (2d), 525.

Judgment reversed.

STATE v. MELVIN NELSON.

(Filed 18 September, 1946.)

Criminal Law § 80b (4)—

Where a defendant convicted of a capital felony fails to file case on appeal in the Superior Court, the motion of the Attorney-General to docket and dismiss, made after expiration of time agreed for perfecting the appeal and any extension of time which may have been granted, will be allowed after a careful inspection of the record proper fails to disclose error.

APPEAL by defendant from *Clement, J.*, at October Term, 1945, of RICHMOND.

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

No counsel contra.

PER CURIAM. The defendant was convicted at October Term, 1945, Richmond County Superior Court, of murder in the first degree, and sentence of death pronounced upon him in accordance with law. He gave notice of appeal to the Supreme Court, but no case on appeal has been docketed in this Court, and no case on appeal filed in the office of the Clerk of the Superior Court of Richmond County. The time agreed upon by counsel for perfecting the appeal, and any extension of time which may have been granted, has expired, and the Clerk of the Superior Court of Richmond County certifies that counsel for the defendant informs him that he does not intend to perfect the appeal.

Thereupon, the Attorney-General has caused the record proper to be filed in this Court, and moves the Court that the case and record be docketed, and the appeal dismissed under Rule 17 of the Rules of Practice of this Court.

We have carefully examined the record filed in this case and find no error therein. For the causes stated, the motion of the Attorney-General is allowed, the appeal is dismissed, and the judgment of the lower court is affirmed. *S. v. Watson,* 208 N. C., 70, 179 S. E., 455; *S. v. Johnson,* 205 N. C., 610, 172 S. E., 219; *S. v. Goldston,* 201 N. C., 89, 158 S. E., 926; *S. v. Hamlet,* 206 N. C., 568, 174 S. E., 451.

Appeal dismissed.

Judgment affirmed.

STATE v. PHELON PERRY AND MODIS PERRY.

(Filed 25 September, 1946.)

1. Criminal Law §§ 52a, 78f—

To present the question of the sufficiency of the evidence upon appeal, a motion to nonsuit should be made at the close of the State's evidence, and exception noted upon its denial, and if defendant introduces evidence the motion should be renewed at the close of all the evidence, and if again overruled another exception should be noted, in which event the assignment of error should be based upon the second exception. G. S., 15-173.

2. Same—

An assignment of error to the refusal of the court to grant defendants' motion of nonsuit at the close of the State's evidence and refusal to grant similar motion made at the close of all the evidence cannot be sustained when the record fails to show an exception to the refusal of the motion made at the close of the State's evidence, and further fails to show that the motion was renewed at the close of all the evidence.

3. Criminal Law § 81c (3)—

In this prosecution for assault with a deadly weapon a witness was permitted to testify as to empty shotgun shells he found at the scene the following morning. There was no evidence tending to identify the persons who fired the shots. The court, in its charge, withdrew the question of assault with guns and specifically instructed the jury that the gunshot wound suffered by prosecuting witness could not form the basis of guilt of either defendant. *Held:* The admission of the evidence, if error, was not prejudicial.

4. Criminal Law § 81c (1)—

Appellant must not only show error but also that the alleged error was prejudicial.

5. Criminal Law § 78c—

An assignment of error must be based upon an exception entered at the trial.

6. Criminal Law § 78d (2)—

The failure of the court to restrict the admission of testimony competent for the purpose of corroboration will not be held for error when the defendant neither objects to the admission of the testimony nor requests that its admission be restricted. Rule of Practice in the Supreme Court No. 21. *S. v. Chapman*, 221 N. C., 157, cited and distinguished as an exception to the general rule.

7. Criminal Law §§ 53b, 53l—

The court is not required to charge upon the presumption of innocence, and an exception to the failure of the court to elaborate on this phase of the case cannot be sustained, it being incumbent upon defendant if he desires an amplification of the charge on this subordinate feature to aptly tender request therefor.

8. Assault § 8d—

A "brick" has a well defined meaning, and when thrown with force at close range may constitute a deadly weapon as a matter of law.

9. Assault § 14c—

Where the evidence tends to show an assault with a brick thrown at close range with force, it is not error for the court to limit the jury to a verdict of guilty of assault with a deadly weapon or not guilty, and to refuse to submit to the jury the question of defendant's guilt of simple assault.

10. Same—

Where the evidence tends to show an assault with a knife, it is not error for the court to limit the jury to a verdict of guilty of assault with a deadly weapon or not guilty, and to refuse to submit to the jury the question of defendant's guilt of simple assault.

APPEAL by defendants from *Bone, J.*, at March Term, 1946, of NASH.

Criminal prosecution, tried upon indictment charging several defendants with an assault with deadly weapons upon one Henry Eatman, with intent to kill, resulting in serious bodily harm.

At the close of the State's evidence, motion to dismiss as of nonsuit was allowed as to all the defendants except Phelon Perry and Modis Perry.

The evidence for the State tends to show that the prosecuting witness owns and operates a store and filling station near Bailey, in Nash County, North Carolina. On 19 May, 1945, the defendant Phelon Perry, accompanied by Bryce Eatman, went to this store and stayed about ten minutes. Later, the same evening, about 10:30 o'clock, Bryce Eatman and Phelon Perry returned to the store. Phelon Perry had been drinking and the prosecuting witness requested Bryce Eatman to take Phelon Perry away. Eatman did not do so; and Phelon Perry asked a Mrs. Taylor, an employee of the prosecuting witness, to dance with him. Mrs. Taylor replied that she could not dance, Phelon Perry jerked her out of her chair and started slinging her around the dance floor. Perry was using vulgar language. Also present at this time were the wife of the prosecuting witness, Mr. and Mrs. Vance Person and Venton Wells. The prosecuting witness asked Phelon Perry to leave the store. He did not do so and the prosecuting witness slapped Perry and with the assistance of Bryce Eatman took Perry out of the store and put him in his car. About forty minutes later Phelon Perry returned to the store accompanied by two carloads of people. He came to the door of the store with a pocketknife in his hand and started to enter. The wife of the prosecuting witness attempted to prevent him from entering. The prosecuting witness went to the door to prevent him from entering, and Phelon Perry stabbed him near the heart with the pocketknife. The wound was not a slicing cut, but a direct stab. The prosecuting witness pushed

Phelon Perry out of the door and threw a bottle at him. Phelon Perry left the store and returned a short time later with Bryce Eatman, Arthur Perry, Homer Perry, Modis Perry and B. Perry. When they arrived at the store, the prosecuting witness was dressing the knife wound which Phelon Perry had inflicted. He was being assisted by his wife. Modis Perry went to the door and said he was looking for "the bad man." He then threw a brick into the store at the prosecuting witness, but did not hit him. Guns were fired about this time, and the prosecuting witness returned the fire, and both the prosecuting witness and Phelon Perry received gunshot wounds.

The evidence for the defendants consisted of the testimony of the defendants themselves.

Phelon Perry testified that the prosecuting witness cut him, jumped on him and beat him up and that he did not remember anything that happened after that. He had been drinking beer, probably five or six bottles. He did not know when he was shot in the face. He did not remember going back into the store after he was hit by a bottle. "My memory first began to come back to me when I was in the hospital in Wilson."

Modis Perry testified that he went to the store of the prosecuting witness after he heard his brother Phelon Perry and Henry Eatman had just had some trouble. That he sat in his car in front of the store for a few minutes. When he got out of the car Phelon was on the ground and Henry Eatman was beating him. Phelon's face was bloody, his shirt was bloody and he had a cut under his eye. "I told him to quit and leave him alone, and they didn't, so I told him they couldn't kill my brother, so right then I picked up a rock that was lying there; a rock or brick I picked up and throwed it at them and when I threw it, it went inside the store. . . . Henry Eatman was scuffling with my brother and I was trying to get him off of my brother. I must have missed him when I threw the brick. The brick was lying on the oil drum in front of the station. At the time I threw the brick I was about as far from Mr. Eatman as from the witness stand to Mr. Sharpe. The reason I didn't walk over and hit Mr. Eatman in the head with the brick was because I didn't want to kill anybody and didn't want to hit anybody. Just before I threw the brick I didn't hardly have time to think. I didn't want to hit him so I throwed it at him and missed him."

The jury returned a verdict of guilty of an assault with a deadly weapon as to each defendant; and from the judgment pronounced thereon, the defendants appealed to the Supreme Court, assigning error.

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

Sharpe & Pittman, Cooley & May, and O. B. Moss for defendants.

DENNY, J. The defendants assign as error the refusal of his Honor to grant their motion for judgment as of nonsuit at the conclusion of the State's evidence and for failure to grant a similar motion lodged by the defendants at the close of all the evidence.

These assignments of error cannot be sustained. The defendants did not except to the refusal of the court to grant their motion for judgment as of nonsuit at the close of the State's evidence. Moreover, they testified in their own behalf and did not renew their motion to dismiss at the close of all the evidence.

A motion for judgment as of nonsuit, under G. S., 15-173, must be made at the close of the State's evidence, exception noted, if overruled, and, if the defendant introduces evidence the motion to dismiss should be renewed at the close of all the evidence, exception again noted, if overruled; and upon appeal from the refusal to dismiss, the assignment of error should be based upon the latter exception. *S. v. Bittings,* 206 N. C., 798, 175 S. E., 299; *S. v. Ormond,* 211 N. C., 437, 191 S. E., 22. No such assignment of error appears on the record. Even so, we think the evidence ample to go to the jury as to both defendants.

A number of exceptions relate to the action of the court in permitting a witness for the State to testify that he examined the premises of the prosecuting witness next morning after the defendant Phelon Perry and the prosecuting witness were shot and that he found empty shotgun shells on the premises near the store building and gunshot in the building.

The defendants complain of this evidence as being highly prejudicial, since the State did not establish the identity of the persons who fired the shots or the person who shot the prosecuting witness. However, the court withdrew from the jury the question of a criminal offense being committed by the defendants by the use of guns, and instructed the jury as follows: "There is no sufficient evidence in the case against this defendant to show that he fired any shots which found their place in the body of Eatman. The evidence does not disclose who fired the shots which Eatman testified lodged in his body and, therefore, the jury could not find the defendant, Phelon Perry, guilty of an assault with a deadly weapon because of the gunshot wound received by the prosecutor, but the verdict, if arrived at by the jury, of guilty, would have to be based upon what took place at the time of the alleged cutting, that is to say, the act of cutting, which would have to form the basis of a verdict of guilty in the case and the gunshot wound could not form the basis for the guilt of either of the defendants in this case." Conceding that the evidence was erroneously admitted, the instruction given by his Honor relative thereto, made its admission harmless. It is not sufficient for a defendant to show mere error in the trial below. He must show that his rights were prejudiced by the error. *S. v. King,* 225 N. C., 236, 34 S. E. (2d), 3; *S. v. Beal,* 199 N. C., 278, 154 S. E., 604.

Assignment of Error No. 8 is based upon the failure of the trial judge to instruct the jury that certain testimony of one of the State's witnesses was in corroboration of the testimony of the prosecuting witness. The defendants cite *S. v. Chapman,* 221 N. C., 157, 19 S. E. (2d), 250, as authority for their contention. This assignment of error is not based upon an exception entered at the trial below and cannot be sustained. Moreover, the evidence complained of was withdrawn from the consideration of the jury. But we discuss it because of the apparent misconception of the holding in the above case. There the exception was to the refusal of the court, upon objection by the State, to permit one of the witnesses for the defendant to testify to statements made by the defendant on the morning following the alleged crime, unless it was understood that the defendant was to testify in his own behalf. The defendant agreed to testify, but even so in view of the State's objection, it being admitted out of order and admissible only as corroborative evidence, it was the duty of the court to so instruct the jury at the time of its admission. But this is not the general rule. The general rule is set forth in Rule 21 of the Rules of Practice in the Supreme Court, as follows: "Nor will it be ground of exception that evidence competent for some purposes, but not for all, is admitted generally, unless the appellant asks at the time of admission, that its purpose shall be restricted." *S. v. Walker, ante,* 458, 38 S. E. (2d), 531; *S. v. Ham,* 224 N. C., 128, 29 S. E. (2d), 449; *S. v. McKinnon,* 223 N. C., 160, 25 S. E. (2d), 606; *S. v. Johnson,* 218 N. C., 604, 12 S. E. (2d), 278; *Beck v. Tanning Co.,* 179 N. C., 123, 101 S. E., 498; *Tise v. Thomasville,* 151 N. C., 281, 65 S. E., 1007; *Hill v. Bean,* 150 N. C., 436, 64 S. E., 212. In the trial below there was neither objection to the admission of the testimony nor request for it to be limited as corroborative only.

The defendants except and assign as error the following portion of his Honor's charge: "The defendants have pleaded not guilty and are presumed to be innocent."

The defendants contend the court should have gone further and stated that the presumption of innocence surrounded the defendants and remained with them throughout the trial until their guilt was established beyond a reasonable doubt by a verdict of the jury.

It has been held by this Court that it is not error for the trial judge to fail to charge the jury on the presumption of innocence. *S. v. Bowser,* 214 N. C., 249, 199 S. E., 31; *S. v. Alston,* 210 N. C., 258, 186 S. E., 354; *S. v. Herring,* 201 N. C., 543, 160 S. E., 891; *S. v. Rose,* 200 N. C., 342, 156 S. E., 916; *S. v. Boswell,* 194 N. C., 260, 139 S. E., 874.

The presumption of innocence is a subordinate feature of the cause and if the defendants desired an amplification of the charge in this respect, they should have so requested at the time. *S. v. Merrick,* 171 N. C., 788, 88 S. E., 501; *S. v. Herring, supra; S. v. Boswell, supra.*

The court properly charged the jury as to the burden of proof and fully defined reasonable doubt. The exception cannot be sustained.

Exceptions 21 and 28 are directed to the action of the trial court in charging the jury that it could return one of two verdicts against the defendant, Modis Perry—guilty of an assault with a deadly weapon or not guilty. The defendant contends his Honor should have charged the jury that it could bring in one of three verdicts, to wit: Guilty of assault with a deadly weapon, guilty of simple assault, or not guilty.

There is no evidence of any assault on the prosecuting witness by Modis Perry except the assault with a brick. If the brick thrown by Modis Perry constituted a deadly weapon, because of the manner in which it was used, the defendant has no cause to complain because the trial judge refused to charge the jury that it could convict this defendant of a simple assault.

The word "brick" has a well known meaning. It is defined in 11 C. J. S., p. 878, as "An artificial substitute for stone, which has been extensively used in all ages. Among builders and mechanics, a brick is understood to be eight inches in length, four inches in width, and two inches in thickness."

In *S. v. Lee,* 6 W. W. Harr., 11 (Del.), 171 A., 195, the Court said: "A deadly weapon is such a weapon as is likely to produce death when used by one person against another; and a brick thrown with force and violence in close proximity to the person of another, or used as a weapon to strike by holding it in hand, is a deadly weapon." And in *S. v. Schumann* (Iowa), 175 N. W., 75, it is said: "It has been held that a brick is, or may be, a deadly weapon, when used in an assault. *State v. Simms,* 80 Miss., 381, 31 South., 907."

In *S. v. Watkins,* 200 N. C., 692, 158 S. E., 393, *Stacy, C. J.,* speaking for the Court, said: "An instrument which is likely to produce death or great bodily harm, under the circumstances of its use, is properly denominated a deadly weapon. *S. v. Craton,* 28 N. C., 165, at page 179. But where it may or may not be likely to produce such results, according to the manner of its use, or the part of the body at which the blow is aimed, its alleged deadly character is one of fact to be determined by the jury. *S. v. West,* 51 N. C., 505: 'Where the deadly character of the weapon is to be determined by the relative size and condition of the parties and the manner in which it is used,' the question is for the jury. *S. v. Archbell,* 139 N. C., 537, 51 S. E., 801; *S. v. Norwood,* 115 N. C., 789, 20 S. E., 712; *S. v. Huntley,* 91 N. C., 621. 'If its character as being deadly or not depended upon the facts and circumstances it became a question for the jury with proper instructions from the court.' *S. v. Beal,* 170 N. C., 764, 87 S. E., 416. See, also, *S. v. Hefner,* 199 N. C., 778; *S. v. Phillips,* 104 N. C., 786, 10 S. E., 463; *S. v. Porter,* 101 N. C., 713, 7 S. E., 902; *S. v. Collins,* 30 N. C., 407."

In the instant case, under the evidence, we think his Honor would have been justified in holding as a matter of law that the manner in which the defendant used the brick, it was a deadly weapon. However, the question was submitted to the jury, under the following instructions: "As to Modis Perry, . . . if you should find beyond a reasonable doubt that he threw a brick in the store of Eatman with the intent to do him bodily harm, and further find that the brick was a deadly weapon under the circumstances of its use, that is, an instrument which was capable of producing death or great bodily harm under the circumstances of its use, then the defendant, Modis Perry, would be guilty of an assault with a deadly weapon, unless you find him not guilty on the principle of self-defense."

Under our decisions, the exception cannot be sustained. *S. v. Hobbs,* 216 N. C., 14, 3 S. E. (2d), 431; *S. v. Beal,* 170 N. C., 764, 87 S. E., 416; *S. v. Archbell,* 139 N. C., 537, 51 S. E., 801.

The defendant, Phelon Perry, also excepts and assigns as error the refusal of the court to charge the jury that it might convict him of a simple assault. There is no evidence tending to show that Phelon Perry assaulted the prosecuting witness except when the prosecuting witness and his wife undertook to keep Perry out of their store. It was during that altercation that the defendant Phelon Perry is charged with stabbing the prosecuting witness with a pocketknife and inflicting upon him serious bodily harm. *S. v. Hobbs, supra,* is in point and sustains the ruling of the court below. *Schenck, J.,* speaking for the Court, said: "The defendant assigns as error the court's failure to submit to the jury the charge of a simple assault. This assignment is untenable for the reason that there is no evidence of simple assault. The State's evidence tended to show that the assault committed upon the prosecuting witness was committed with a missile large enough, and thrown with force enough, to knock a hole 6 or 7 inches in the windshield of the truck driven by the witness. . . . 'Where all the evidence at the trial of a criminal action, if believed by the jury, tends to show that the crime charged in the indictment was committed as alleged therein, and there is no evidence tending to show the commission of a crime of less degree, it is not error for the court to fail to instruct the jury that they may acquit the defendant of the crime charged in the indictment and convict him of a crime of less degree. See *S. v. Ratcliff,* 199 N. C., 9, 153 S. E., 605, where the statute, C. S., 4640, is construed and applied.' *S. v. Cox,* 201 N. C., 357."

We have carefully examined the remaining exceptions and assignments of error, especially those challenging the correctness of his Honor's charge on the question of self-defense as to both defendants, and they cannot be sustained.

In the trial below, we find

No error.

E. A. WALSTON v. R. B. WHITLEY & COMPANY, INC., AND GENERAL FOUNDRY & MACHINE COMPANY.

(Filed 25 September, 1946.)

1. Sales § 14—Complaint held sufficient to allege breach of warranty as to quality and capacity of oil burning tobacco curers.

In this action to recover for breach of warranty in the sale of oil burning tobacco curers, the complaint alleged that defendant manufacturer warranted the curers to be of best grade, quality and efficiency and that they would generate sufficient heat to satisfactorily cure tobacco in the minimum time required, that the maximum temperature which could be obtained with the curers without smoking and clogging up the flues was about 100 degrees of temperature, whereas about 180 degrees of temperature are required for efficient curing, so that the curers required thirteen days instead of the four days and five nights normally required for curing tobacco. *Held:* The allegations are sufficient to allege breach of warranty as to quality and capacity and defendant's demurrer should have been overruled.

2. Same—

Representations as to quality and capacity or other inherent characteristics of machinery which are referable to ordinary and customary standards, constitute warranties and not mere expressions of opinion, but it is necessary that the intent to warrant appear in the form of the expressions, aided in proper cases by circumstances surrounding the transactions.

3. Damages § 2: Sales § 27—

A complaint alleging damage to plaintiff's tobacco crop and loss of a large part of it through breach of warranty as to quality and capacity of tobacco curers manufactured by defendant, with allegations that at the time of purchase defendant was advised of special circumstances as to the amount of tobacco plaintiff had to cure and that if it was not cured in apt time serious and substantial loss would result, *held* not demurrable on the ground that the complaint alleged only remote or speculative damages.

4. Sales § 17—

Ordinarily, an agent is not liable in an action by a third party for breach of warranty upon a sales contract in which he has acted fully within his authority or within its apparent scope, and contracted only in that capacity.

5. Principal and Agent §§ 7e, 12d—

An agent is liable on the contract where the principal is not disclosed, and the principal is liable upon discovery. However, the party aggrieved must elect as to which he shall hold liable and cannot hold them both.

6. Same: Sales § 17—

In an action against the manufacturer and dealer for breach of warranty in the sale of tobacco curers, a complaint which alleges that the

dealer acted as agent for the manufacturer in making the sale, without allegation that the agent exceeded his authority or allegation of circumstances tending to show that the agent expressly or impliedly intended to incur personal liability, is demurrable on the part of the alleged agent.

APPEAL by defendants from *Burney, J.*, at June, 1946, Term of HALIFAX.

Wade H. Dickens and Allsbrook & Benton for plaintiff, appellee.

R. B. Brady and Parker & Parker for defendant R. B. Whitley & Co., Inc., appellant.

Seawell & Seawell for defendant General Foundry & Machine Company, appellant.

SEAWELL, J. The plaintiff brought this action to recover for breach of warranty in a sales contract alleged in the complaint to have been made between the plaintiff and the defendant R. B. Whitley & Co., Inc., as agent of its codefendant, General Foundry & Machine Company.

The alleged breach of warranty was in connection with a contract of sale of Gainey Tobacco Curers, oil burning machines manufactured by the Machine Company, which, it is alleged, because of defective manufacture failed to cure plaintiff's tobacco crop properly and within a reasonable time and efficiency in breach of the said warranty.

The defendants were separately represented and separately filed demurrers to the complaint as not constituting an action against them.

The demurrer of the defendant Machine Company is based upon various grounds, amongst them being (a) that the complaint fails to allege that the tobacco curers were not reasonably fit for the service for which they were intended; (b) that it does not allege any defect in manufacture or material other than may be inferred from the fact that they failed to be operated properly; (c) that the complaint tends to show only speculative damages which might be suffered by the breach of warranty alleged.

There is a further demurrer upon the ground of defect of parties defendant.

The defendant R. B. Whitley & Co., Inc., demurred to the complaint on the ground that it fails to state a cause of action against this defendant, reciting practically the same grounds for the demurrer, but adding thereto that in paragraph 3 of the complaint plaintiff alleges that this defendant, R. B. Whitley & Co., Inc., acted as agent for its codefendant, General Foundry & Machine Co., in the sale of the tobacco curers complained of, but fails to allege that R. B. Whitley & Co., Inc., exceeded in any manner the authority of such agency.

Upon a careful perusal of the demurrer pertaining to the Machine Company, we arrive at the conclusion that the complaint, while in certain instances it might have been drawn with a greater particularity, is, nevertheless, sufficient to state a cause of action.

The plaintiff alleged that the defendants were notified at the time of the purchase of the following special circumstances: That he was a grower of flue cured tobacco and was unable to procure wood to cure his tobacco in that way, and that he had torn out his cord wood flue curing furnaces to replace same with oil burners for the purpose of curing his crop of tobacco; that five of the Gainey Tobacco Curers purchased were for the purpose of curing the crop grown by plaintiff on twenty-four acres in 1945; that the tobacco curing season was beginning, and that unless the tobacco crop was harvested and cured in apt time, serious and substantial loss would result necessarily to plaintiff.

In this connection, the plaintiff further alleges that in order to induce the plaintiff to purchase the Gainey Tobacco Curers, the defendants, with full knowledge of the special circumstances alleged, "warranted that said Gainey Tobacco Curers manufactured and sold by them were of the best grade, quality and efficiency obtainable and would generate sufficient heat to satisfactorily cure each barn of tobacco in the minimum time required for the curing of a barn of tobacco and that said . . . Curers would satisfactorily cure plaintiff's crop of tobacco grown on said twenty-four acres."

It is alleged that plaintiff purchased the curers, relying on the skill and judgment of defendants with respect to their character, capacity and efficiency.

The plaintiff further alleges a breach of warranty in the following respects, amongst others: That the tobacco curers purchased under such warranty would not and did not generate more than about 100 degrees of temperature; whereas, about 180 degrees of temperature are required for proper and efficient curing of a barn of tobacco; that when forced above said temperature, the burners and flues filled with smoke and soot and became stopped up so they had to be cleaned out almost constantly; that due to their said inefficiency, the curers required thirteen days to cure each barn of tobacco instead of four days and five nights normally required in curing a barn of tobacco with sufficient heat properly generated.

The alleged representations and warranty went to the quality and capacity of the machines purchased, and were in effect a representation of their essential character, such as have, with marked uniformity, been regarded as warranties for the breach of which damages are recoverable, where they have been positively made and not as an expression of opinion. *Swift v. Meekins,* 179 N. C., 173, 102 S. E., 138. There is no logical reason for denying the application of this principle to representa-

tions relating to the power, capacity or other inherent character of machinery referable to ordinary or customary standards of measurement and which, in the nature of things, is often a matter of importance to the purchaser and may be the basis of the transaction. We cannot assume that the manufacturer and dealer in machines possesses only an opinion as to these matters, instead of the knowledge he is supposed to have or may easily acquire. The intent to warrant is a matter which must appear in the form of the expression, aided in proper cases by the circumstances surrounding the transaction. *Harvester Co. v. Carter,* 173 N. C., 229, 91 S. E., 840; *Machine Co. v. Feezer,* 152 N. C., 516, 67 S. E., 1004; *Machine Co. v. McClamrock,* 152 N. C., 405, 67 S. E., 991. We are also of opinion that if the evidence should disclose injury of the character alleged, arising proximately from the breach, then it might be safely within the rule of recoverable damages. Damage to the crop and a loss of a large part of it through the alleged inefficiency of the machines and the impossibility of taking care of it through their want of capacity, if satisfactorily proven, would hardly be remote or speculative. We, therefore, conclude that the demurrer of this defendant was properly overruled.

The defendant Whitley & Co. was not entitled to have its demurrer sustained upon any of the causes set forth therein and above considered. But the Whitley Co. is represented in the complaint as the agent of its codefendant, the Machine Company, in such a manner as to exonerate it from liability to the plaintiff under the rules obtaining here and in the majority of jurisdictions elsewhere.

Ordinarily, an agent is not liable in an action by a third party for breach of warranty upon a sales contract in which he has acted fully within his authority or within its apparent scope, and contracted only in that capacity. The principle is thus expressed in 3 C. J. S., Agency, sec. 215: "An agent who contracts on behalf of a disclosed principal and within the scope of his authority, in the absence of an agreement otherwise, or other circumstances showing that he has expressly or impliedly incurred or intended to incur personal responsibility, is not personally liable to the other contracting party." *Way v. Ramsey,* 192 N. C., 549, 135 S. E., 454.

It is uniformly held that an agent will be held liable on the contract where the principal has not been disclosed; 3 C. J. S., Agency, sec. 216; *N. C. Lumber Co. v. Spear Motor Co.,* 192 N. C., 377, 135 S. E., 115; but the undisclosed principal is liable on discovery. *Carolina Hardware Co. v. Raleigh Banking & Trust Co.,* 169 N. C., 744, 86 S. E., 706. In that event, the aggrieved party seeking damages through the court is put to his election as to which he shall hold liable—the principal or the agent—and cannot hold both of them. *Horton v. Sou. Ry. Co.,* 170 N. C., 383, 86 S. E., 1020; Ann. Cases, 1918(a), 824; Page on Contracts,

sec. 1776. In a few jurisdictions it has been held that action may be brought against both agent and his undisclosed principal when the latter is discovered, and that the plaintiff is put to his election only before judgment. But that rule has never been adopted in this State, and we are compelled to reject it as placing an unnecessary burden upon trial and possibly leading to confusion. Election must be made when the suit is brought.

The rule of liability where the principal is not disclosed is mentioned merely by way of elimination and to clarify the applicable principle: Whether the principal is disclosed at the time of the sales contract or afterwards discovered, the plaintiff cannot hold both principal and agent in one suit, where, as here, the complaint recognizes and alleges agency and nothing further in support of the theory of personal or individual liability. The demurrer as to this defendant should have been sustained.

In view of the conclusion we have reached, it is unnecessary to discuss the demurrer to the improper joinder of parties.

As to defendant R. B. Whitley & Co., Inc., the judgment overruling the demurrer is reversed. As to the defendant General Foundry & Machine Company, the judgment overruling the demurrer is affirmed.

As to R. B. Whitley & Co., Inc.,
Reversed.
As to General Foundry & Machine Co.,
Affirmed.

WATSON WELCH v. OTELIA L. WELCH.

(Filed 25 September, 1946.)

1. Divorce § 4—

Plaintiff's testimony that he had been continuously a resident of North Carolina up to the time he went to another state for temporary work, and that he returned here once or twice a month and did not intend to make his home in such other state but intended to remain a citizen of North Carolina, *is held* sufficient to be submitted to the jury on the question of his residence in this State for the statutory period. G. S., 50-5 (4); G. S., 50-6.

2. Same—

The fact that plaintiff went to another state to engage temporarily in work there, and, upon mistaken advice, instituted an action for divorce in such other state upon allegations of residence therein, is evidence against him on the issue of his residence in this State for the statutory period but is not conclusive and does not constitute an estoppel.

3. Divorce § 2a—

Plaintiff's admission that he had been convicted for failing to support the children of his marriage is not alone sufficient to defeat his action for divorce on the ground of two years' separation.

4. Divorce § 11—

Where, in an action for divorce, the court, upon allegations contained in the verified answer, allows defendant reasonable counsel fees to enable her to make her defense, it will be presumed that the court found facts in accordance therewith, and the allowance, not being excessive, will be upheld as within the discretionary power of the court.

APPEAL by plaintiff from *Stevens, J.*, at June Term, 1946, of PASQUOTANK. Reversed.

This was an action for divorce on the ground of separation for two years.

At the conclusion of plaintiff's evidence, defendant moved for judgment of nonsuit on the ground that the plaintiff had failed to show that he had resided in North Carolina for six months before instituting his action. The motion was allowed, and from judgment dismissing the action plaintiff appealed.

P. H. Bell for plaintiff, appellant.

Robt. B. Lowry and Geo. J. Spence for defendant, appellee.

DEVIN, J. The ruling of the court below in dismissing the plaintiff's action was based upon the view that plaintiff had failed to offer sufficient evidence that he had resided in the State for the statutory period prescribed by G. S., 50-5 (4), and G. S., 50-6, before instituting his action for divorce.

Both the fact of marriage and that there had been a separation of husband and wife and cessation of marital relations since 1937 were admitted in the pleadings and shown by plaintiff's uncontradicted testimony. Upon the question of residence plaintiff testified that he was born in Chowan County, had lived in Tyrrell and Perquimans, where he had paid his taxes, and was now employed in Plymouth, North Carolina; that in 1938 he went to work in Norfolk, Virginia, but returned once or twice each month; that he did not intend to make Virginia his home, but it was his intention to remain a citizen of North Carolina.

He further testified that in 1942 the defendant, a resident of Pasquotank County, caused his arrest and conviction for failing to support his infant children, and he was required to make weekly payments for this purpose, which he has done. He also testified that in 1942 he instituted action for divorce in Pasquotank County, but on account of the failure of his counsel to advise him when the case was set for trial, his action

was dismissed; that thereafter, acting upon the advice of an attorney in Norfolk that if he slept in Virginia during the week while working there he would be considered a resident of that state, he brought suit for divorce in a Norfolk court, alleging in his complaint that he was a resident of Virginia. No divorce, however, was granted, and the case was subsequently dismissed.

This evidence, if accepted, would seem to be sufficient to be submitted to the jury on the essential issue of residence. *Ellis v. Ellis,* 190 N. C., 418, 130 S. E., 7. Having been continuously a resident of North Carolina up to the time he went to Norfolk to engage temporarily in work there, in order to constitute the plaintiff a nonresident of this State his stay in Virginia must have been coupled with the intention to make that his home or to live there permanently or indefinitely, which he here disavows. *Roanoke Rapids v. Patterson,* 184 N. C., 135, 113 S. E., 603; *Oliver v. Oliver,* 219 N. C., 299, 13 S. E. (2d), 549; *S. v. Williams,* 224 N. C., 183, 29 S. E. (2d), 744; Black's Law Dictionary.

The fact that under mistaken advice he instituted an action for divorce in Virginia upon allegations of residence there would not constitute an estoppel. This would be evidence against him on the issue of residence, but not conclusive. *Bank v. McCaskill,* 174 N. C., 362, 93 S. E., 905.

The plaintiff's evidence would seem to be sufficient to show a separation and living apart, such as contemplated by the statute as one of the grounds for divorce. *Byers v. Byers,* 222 N. C., 298, 22 S. E. (2d), 902; *Hyder v. Hyder,* 215 N. C., 239, 1 S. E. (2d), 540; *Dudley v. Dudley,* 225 N. C., 83, 33 S. E. (2d), 489. Nor would the plaintiff's admission that he had subsequently been convicted for failing to support his children be alone sufficient to defeat his present action under the principle enunciated by this Court in *Reynolds v. Reynolds,* 208 N. C., 428, 181 S. E., 338; *Brown v. Brown,* 213 N. C., 347, 196 S. E., 333; *Byers v. Byers,* 223 N. C., 85, 25 S. E. (2d), 466; *Pharr v. Pharr,* 223 N. C., 115, 25 S. E. (2d), 471.

The allowance by the court to the defendant of reasonable counsel fees, in order to enable her to make her defense to plaintiff's suit, was based upon allgations contained in her verified answer, and upon the facts presumably found in accordance therewith. The amount under the circumstances of this case may not be held excessive. The power of the court to make the allowance must be upheld. *Medlin v. Medlin,* 175 N. C., 529, 95 S. E., 857.

For the reasons stated, the judgment of nonsuit is

Reversed.

H. M. SMITH v. FRANCES HEPINSTALL SMITH.

(Filed 25 September, 1946.)

1. Insane Persons § 14—

G. S., 1-97 (3), provides the method of service of process on insane persons generally in all classes of actions against them, and process in an action for divorce may be served under its provisions.

2. Divorce § 2½—

Defendant in a divorce action cannot consent to the decree but can only elect to defend or abstain from answering.

3. Divorce § 3: Insane Persons § 15—

Where, in an action for divorce against a person who has been declared *non compos mentis*, process has been duly served in accordance with G. S., 1-97 (3), the duly appointed guardian *ad litem* must answer, G. S., 1-67, and demurrer of the guardian *ad litem* on the ground that the marital relation is such that the spouse alone may elect to prosecute or defend the action and that defendant's inability to appear and answer in person defeats the jurisdiction of the court, is untenable.

APPEAL by plaintiff from *Harris, J.*, at June Term, 1946, of WAKE. Reversed.

Civil action for divorce under G. S., 50-6, heard on motion to dismiss for want of jurisdiction.

Plaintiff and defendant intermarried in 1919. In July, 1938, they entered into a separation agreement and since that time have lived separate and apart. In July, 1942, defendant was adjudged *non compos mentis* and committed to the State Hospital at Morganton, where she has since remained.

Summons herein was duly served by the sheriff of Burke County in the manner provided by G. S., 1-97 (3).

On 1 April, 1946, on application of plaintiff, James C. Little, Jr., was duly appointed guardian *ad litem* for defendant. Being duly served with summons, he appeared and answered. Thereafter, on 13 June, 1946, he moved to dismiss the action for want of jurisdiction for that "the purported service of summons on Frances Hepinstall Smith, incompetent, was made in conformance with the provisions of the North Carolina statutes, but that this defendant believes that said statute applies only in actions where property rights of an incompetent are involved. This defendant believes and asks the court to hold that in this action the rights of the defendant, Frances Hepinstall Smith, and the questions involved are of so personal a nature that the defendant, James C. Little, Jr., guardian *ad litem* of Frances Hepinstall Smith, cannot properly answer the complaint or defend this action, and that no one other than the said Frances Hepinstall Smith could properly defend this action."

The motion was allowed and judgment entered dismissing the action. Plaintiff excepted and appealed.

Smith, Leach & Anderson for plaintiff, appellant.
James C. Little, Jr., for defendant, appellee.

BARNHILL, J. It is conceded that defendant has been "judicially declared of unsound mind"; that she is now confined in a State institution for the insane; and that summons herein was served as required by G. S., 1-97 (3).

The guardian *ad litem* bases his motion to dismiss on the grounds that (1) process may be served on an insane person as provided by G. S., 1-97 (3), only in cases involving property or property rights, and (2) the marital relation is such that the spouse alone may elect to prosecute or defend an action for divorce.

G. S., 1-94, provides that summons shall be served by delivering a copy thereof to the defendant or defendants therein named, and G. S., 1-97, prescribes the manner of delivering such copies. The statute is general in terms and all-inclusive in scope. There is nothing therein to indicate an intent to exclude any particular class of cases. Indeed, if divorce actions are excluded, then there is no statutory provision for service in such cases. *Cf.* ch. 755, Session Laws, 1945.

"If the declared incompetent has no committee or guardian service of notice may be made upon him personally or the notice may be returned without actual service with the endorsement required by the statute when service cannot be made without danger of injury to him, but in no event should final judgment be rendered against him without adequate notice to his committee, or to his general or testamentary guardian, or to a guardian *ad litem* duly appointed by the court." *Hood, Comr. of Banks, v. Holding,* 205 N. C., 451, 171 S. E., 633.

The intriguing contention that the right to prosecute or defend an action for divorce is strictly personal to the spouse and the election cannot be made by a legal representative is based on the holding in *Worthy v. Worthy,* 36 Ga., 45. There the plaintiff was insane. The action was instituted in her name by a next friend. It was held that the right to sue for a divorce must be regarded "as *strictly personal* to the party aggrieved," and that it was for the plaintiff alone to determine how long and to what extent she would condone the infidelities of a faithless husband and "whether . . . the wife will continue to regard him as her husband, and live with him as his wife *is for her decision only.*"

Even if we concede its force in respect to the plaintiff in a divorce action, this ratiocination may not be applied to the facts appearing on this record. Plaintiff has made the election to seek a dissolution of the

marital contract. Defendant, if sane, could not assent to the decree. She could only elect either to defend or abstain from answering. Being insane, she must appear through her duly appointed representative, G. S., 1-64, and he must answer, G. S., 1-67.

The insanity of defendant and her consequent inability to appear and answer in person does not defeat the jurisdiction of the court.

The only question here presented is that of jurisdiction. Neither the merits of the cause nor the course of future proceedings is considered or decided. *Stratford v. Stratford,* 92 N. C., 297. Let the plaintiff pay the costs.

The judgment below is

Reversed.

WACHOVIA BANK & TRUST COMPANY, A CORPORATION, TRUSTEE OF THE ESTATE OF CARROLL P. MARRIOTT, DECEASED, v. BOARD OF NATIONAL MISSIONS OF THE PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA, A CORPORATION OF THE STATE OF NEW YORK, AND OHIO WESLEYAN UNIVERSITY, A CORPORATION OF THE STATE OF OHIO.

(Filed 9 October, 1946.)

1. Wills § 31—

In the construction of a will, the intent of the testator as gathered from the four corners of the instrument is controlling unless contrary to some rule of law or at variance with public policy.

2. Same—

In ascertaining the intent of the testator, the circumstances surrounding the testator and his relationship to the beneficiaries may be considered in order that the language may be interpreted from testator's viewpoint.

3. Wills § 33d: Trusts § 29—

A bequest to a group of schools operated as a unit for the Christian education of mountain boys and girls provided the beneficiary should be in existence at the time of the termination of prior trust estates, will be upheld notwithstanding a change in name and curriculum and the discontinuance of certain of the schools, when it appears from the evidence and the findings of the jury that substantially the same educational program in which the testator was primarily interested was continued under a different name at one of the original institutions with which other associated units had been consolidated, in the adaptation of the program to changing local conditions, since under such circumstances, as a matter of law, the beneficiary had not ceased to exist.

4. Trusts § 30—

A bequest to an unincorporated association, school or organization, by its popular name, will be upheld as a gift in trust to its parent organization when such parent organization, legally capable of taking and handling property, exists.

TRUST CO. *v.* BOARD OF NATIONAL MISSIONS.

APPEAL by the defendant, Trustees of the Ohio Wesleyan University, from *Nettles, J.*, at March Term, 1946, of BUNCOMBE.

The plaintiff, Trustee, under the will of Carroll P. Marriott, brings this action under the provisions of the Uniform Declaratory Judgment Act, for the purpose of obtaining a construction of the said will; and for directions as to the disposition of the *corpus* of the Trust, under Item (i) of the will, as follows:

"Upon the termination of all the trusts provided herein to pay over and deliver the property of the estate, both principal and accumulated income, to the Asheville Normal and Associated Schools, of Asheville, N. C., to be added to the endowment funds of that institution. Should the said Asheville Normal and Associated Schools be not in existence or be discontinued any time as a public educational institution, then the said fund is to be paid to the Ohio Wesleyan University, of Delaware, Ohio, as an endowment to the Department of Chemistry."

All the other trusts referred to in the above item were terminated on or before 9 February, 1945, and the sole remaining question for determination is the proper disposition of the *corpus* of the estate under the terms set forth in the foregoing item of said will.

The evidence tends to show that at the time of the execution of the will of Carroll P. Marriott in 1921, and at the time of his death in 1922, the Woman's Board of Home Missions of the Presbyterian Church in the United States of America, a corporation, operated a large number of schools in the mountain areas of the United States, among them the Asheville Normal and Associated Schools of Asheville, N. C.

The Asheville Normal, the Home School and Pease House were located on a campus situate on the west side of Biltmore Avenue, in the City of Asheville, during the time they were operated as educational institutions. The Asheville Normal gave two years of post high school work until a few years before it was closed, during which period a four-year teachers' course was given, and the name of the school was changed to Asheville Normal and Teachers' College. The Home School was a school for girls in the elementary and high school grades. The Pease House was a school for small children in grades one to six. The Asheville Farm School was situated on a tract of land consisting of approximately 640 acres near Swannanoa, about ten miles from the City of Asheville.

The Woman's Board of Missions also operated the Dorland Bell School in Madison County, N. C., for boys and girls from the mountain area, in vocational, pre-high school and high school work. Later this school was discontinued as a coeducational institution and the boys were transferred to the Asheville Farm School. Some of the students at the Home School were transferred to Dorland Bell when the Home School was closed. Now, the Dorland Bell School for Girls, the Asheville Farm School for Boys and the Warren Wilson College, are operated as sepa-

rate units or divisions on the Asheville Farm School campus, under the name of Warren Wilson College. Educational opportunities are provided for deserving boys and girls from the mountain area of Western North Carolina, beginning with the lower grades through high school and the junior college level. None of the schools referred to herein have been incorporated.

The jury answered certain issues to the effect that at the time of the execution of the will of Carroll P. Marriott, in 1921, the Asheville Normal and Associated Schools of Asheville, N. C., consisted of the following schools: Asheville Normal, Home School, Pease House and Asheville Farm School; that said schools during the years 1921 and 1922 were owned and operated by the Woman's Board of Home Missions of the Presbyterian Church in the United States, and that the National Board of Missions of the Presbyterian Church in the United States of America, a corporation, has succeeded to all the rights and interests of the aforesaid Board. The jury also found that the Pease House in 1925, the Home School in 1930, and the Asheville Normal in 1940, ceased to exist as public educational institutions, but that the Farm School operated continuously up to and including the 9th day of February, 1945, as a public educational institution. The jury found the defendant Trustees of the Ohio Wesleyan University, to be the same Ohio Wesleyan University of Delaware, Ohio, as designated in the will of Carroll P. Marriott.

Upon the return of the jury's verdict, the court entered judgment to the effect that the defendant, Board of National Missions of the Presbyterian Church in the United States of America, is the owner and entitled to the principal and accumulated income of the Trust Estate of Carroll P. Marriott, held by the Wachovia Bank & Trust Company, Trustee, under the last will and testament of said testator; such funds to be held by the Board of National Missions of the Presbyterian Church in the United States of America, for the benefit of and added to the present endowment of a school owned and operated by it, to wit: Asheville Farm School, and directed the Trustee to pay over to said Board the principal and accumulated income of said Trust Estate.

The defendant, Trustees of the Ohio Wesleyan University, appealed to the Supreme Court, assigning error.

Williams, Cocke & Williams for appellee.
Fred L. Rosemond and Smathers & Meekins for appellant.

DENNY, J. There is ample evidence in this record to support the verdict of the jury, and while the findings of the jury are helpful in establishing the facts relative to the present status of the Asheville Normal and Associated Schools, the challenge of the appellant to the correctness of the judgment entered below, makes it necessary to con-

sider the legal effect of those findings in the light of the provisions contained in the testator's will. The appellant assails the judgment below on the ground that notwithstanding the verdict of the jury it does not follow necessarily that the Asheville Normal and Associated Schools, as an institution, had not ceased to exist on 9 February, 1945, within the meaning of the testator's will. Therefore, the exception to the judgment entered below presents for determination as a matter of law, whether or not the continued operation of the Asheville Farm School, along with other educational enterprises by the Board of National Missions of the Presbyterian Church in the United States of America, under the name of Warren Wilson College, on the campus of the Asheville Farm School, constitutes such existence, as a public educational institution, as will meet the condition imposed in the testator's will, notwithstanding the discontinuance of the Asheville Normal, the Home School and the Pease House, in the City of Asheville.

At the time of the execution of the will of Carroll P. Marriott, as well as at the time of his death in 1922, the Woman's Board of the Presbyterian Church in the United States, and later the defendant Board of National Missions of the same church, owned and operated the Asheville Normal, Home School, Pease House and Asheville Farm School. These unincorporated schools were popularly known as the Asheville Normal and Associated Schools. The program of the local units was adapted to meet specific local conditions. The curriculum was changed from time to time in the local units as local conditions changed. It is apparent that with the development of our public school system in North Carolina, it became unnecessary and impractical for the Board of National Missions to maintain the units of the Asheville Normal and Associated Schools in the City of Asheville. But we cannot say, in view of the evidence disclosed by the record and the findings of the jury in the trial below, that the Asheville Farm School is not and was not, on 9 February, 1945, engaged in a program of service in the field of Christian education for the benefit of the youth of the mountain area, substantially the same as that in which it was engaged at the time of the execution of the testator's will.

It appears from the evidence that when the College Department of the Asheville Normal and Teachers' College was dropped, the rest of the work was transferred to the Asheville Farm School, including the library and records of the Asheville Normal and Teachers' College. Likewise the Dorland Bell School for Girls was moved from Madison County, N. C., to the campus of the Asheville Farm School. The Asheville Farm School is being operated as a part of what is now known as Warren Wilson College. The courses given are the regular high school and pre-high school work, two years of college work, and in addition to the regular educational courses, there are vocational courses in agriculture,

mechanics, home making, printing and various other types of vocational training.

It is a rule of construction that the intent of the testator as expressed by him, is to be ascertained from the four corners of the will, and must control, unless contrary to some rule of law or at variance with public policy. *Holland v. Smith,* 224 N. C., 255, 29 S. E. (2d), 888; *Williams v. Rand,* 223 N. C., 734, 28 S. E. (2d), 247; *Culbreth v. Caison,* 220 N. C., 717, 18 S. E. (2d), 136; *Smith v. Mears,* 218 N. C., 193, 12 S. E. (2d), 649; *Williamson v. Cox,* 218 N. C., 177, 10 S. E. (2d), 662; *Heyer v. Bulluck,* 210 N. C., 321, 186 S. E., 356. However, we do not think it is violative of the rule of construction in the case before us, to consider the circumstances surrounding the testator and his relationship to the beneficiaries, in order that the language may be interpreted from the testator's viewpoint as an aid in ascertaining his intent. *Heyer v. Bulluck, supra; Benevolent Society v. Orrell,* 195 N. C., 405, 142 S. E., 493; *Tilley v. Ellis,* 119 N. C., 233, 26 S. E., 29.

Carroll P. Marriott was a student at the Ohio Wesleyan University at Delaware, Ohio, and graduated therefrom with an A.B. degree in the class of 1903. He was assistant in the Department of Chemistry during the last two years of his college course. Sometime after graduation he came to North Carolina for his health. He first lived in Asheville and moved from there to Tryon in 1908, where he continued to reside until his death in 1922.

What was the motive that led the testator to make the Asheville Normal and Associated Schools the first beneficiary of the residue of his estate? There is certainly nothing to indicate that the bequest was made for the primary benefit of the Woman's Board of Home Missions of the Presbyterian Church in the United States of America, a New York corporation. Neither can it be said that his long association with and attachment for the Presbyterian Church was the inducement for making the bequest. He was not a Presbyterian, but a Methodist. He was familiar, however, with the program of Christian education which this church organization was maintaining. He visited the Asheville campus of the Asheville Normal and Associated Schools on many occasions. He was familiar with the educational program of the organization operating these schools and knew that it was adapted to the peculiar needs of the youth in the mountain area of North Carolina. We think his real purpose in making this bequest was to aid in maintaining this program of Christian education for the benefit of the youth in the mountain area of Western North Carolina. And, so long as any one of the schools which composed the group popularly known as the Asheville Normal and Associated Schools continues to be operated "as a public educational institution," then the Asheville Normal and Associated Schools will continue to exist within the meaning and intent of the testator's will.

We think the evidence supports the contentions of the appellee, the Board of National Missions, that the educational program at Warren Wilson College offers substantially the same educational opportunities as those offered by the Asheville Normal and Associated Schools in 1921 and 1922. The mere fact that conditions have changed to such an extent that the Board of National Missions of the Presbyterian Church in the United States of America has seen fit to reorganize its educational program in the Asheville area, and to carry on all its work on the campus of one of the Associated Schools, will not work a forfeiture of the testator's bequest.

In view of the facts set forth herein and the findings of the jury, we hold as a matter of law, that the Asheville Normal and Associated Schools had not ceased to exist as a public educational institution on 9 February, 1945, within the meaning of the testamentary words of the testator, and the Board of National Missions of the Presbyterian Church in the United States of America is entitled to the trust fund to be administered in accordance with the decree of the court below. *Curtis v. First Church in Charlestown,* 285 Mass., 73, 188 N. E., 631; *Soldiers' Orphans' Home v. Wolff,* 10 Mo. App., 596; *Boston Safe Deposit & Trust Co. v. Stratton,* 259 Mass., 465, 156 N. E., 885; *Reed v. Fogg,* 248 Mass., 336, 143 N. E., 47; *West v. Lee,* 224 N. C., 79, 29 S. E. (2d), 31; *In re Jordan's Estate,* 310 Penn., 401, 165 A., 652; *Thatcher v. Lewis,* 335 Mo., 1130, 76 S. W. (2d), 677; *Lewis v. Gilliard,* 61 Fla., 819, 56 So., 281.

In the case of *Curtis v. First Church in Charlestown, supra,* it appears from the opinion of the Court that the testator died and her will was duly probated in 1904. The residue of her estate was given to trustees upon trusts which had terminated. Upon the termination of the trusts the residue was to be divided among four institutions. The controversy related to the institution entitled to recover one of the shares. The testatrix referred to her church by several different names in her will, among them "First Church in Charlestown" and "First Parish Church." The will contained the following clause: "Of all sums herein given from the Trust Fund to said First Parish Church, the income only thereof is to be used for paying its pastor's salary and for ringing the chime of bells on said church, in such proportions as its church officers may determine, and in case said church shall be discontinued or cease to maintain public worship as a separate and distinct organization, then said sums shall vest in and be paid to the Abbots Academy at Andover, Massachusetts." It appears that "By St. 1913, C. 84, the voluntary religious association became incorporated under the name of the First Church in Charlestown, and the Winthrop Church, a religious corporation, was absorbed in said corporation and conveyed all its property to said corporation. Since then the First Church of Charlestown, which

was the church in which the testatrix was active, had carried on its religious services and activities in an edifice formerly owned by the said Winthrop Church. That edifice, although on a different street, is in the same general locality as was the edifice in which the said First Church in Charlestown formerly worshipped and carried on its work." The Court held that the church, notwithstanding its incorporation and absorption of the Winthrop Church in the corporation and the change of its place of worship, had not been "discontinued," nor had it ceased "to maintain public worship as a separate and distinct organization," within the meaning of the testamentary words.

In the case of *Boston Safe Deposit & Trust Co. v. Stratton, supra,* the testator gave to trustees certain funds for the benefit of New Salem Academy, and directed that the trustees invest the funds and pay the income therefrom to said institution "so long as it continues to be an institution of learning . . . but whenever it ceases to be an institution of learning I direct said trustees to pay said principal sum . . . to my heirs at law." The testator died in 1887. The trustees of the Academy were incorporated and operated the school until 1900 or 1901, when they gave over to the Town of New Salem the entire control of the school, to be exercised by the school committee of the town. The trustees have continued to own the buildings and the real estate, while the school has been conducted in the buildings under the "exclusive management of the school committee, although the trustees have advised with the school committee." Certain boarding students are still accepted by the trustees of the Academy, and the trustees maintain the buildings and receive an annual rental of $500.00 for the use of the buildings, but the trustees pay tuition to the town for their boarding students and make other donations from time to time to the town for the benefit of the school. The Court held "The New Salem Academy has not ceased to be, but on the contrary continues to be an institution of learning, as those words are used in the will of the testator."

The holding of the Supreme Court of Missouri, in *Thatcher v. Lewis, supra,* is succinctly stated in the syllabus of the case, as follows: "Under will establishing trust fund for relief of 'all poor immigrants and travellers coming to St. Louis on their way, *bona fide,* to settle in the West,' evidence *held* to support finding that purposes of trust had not wholly or substantially failed, precluding reversion of the trust fund by operation of law to heirs of testator."

It has been held that the change of the name as well as the termination of certain activities of the beneficiary, does not terminate or forfeit a trust. *Lewis v. Gilliard, supra; Soldiers' Orphans' Home v. Wolff, supra; Re Waring* (1907), 1 Ch. (Eng.), 166, 91 A. L. R., Anno. p. 843.

Moreover, the fact that the Asheville Normal and Associated Schools, as an institution was not incorporated, will not defeat the trust. It is

the general rule that where a bequest is made to an unincorporated association, school, department or organization, by its popular name, if such association, school, department or organization is operated under a parent organization legally capable of taking and handling property, the bequest will be upheld as a gift in trust to such parent organization, for the benefit of the designated beneficiary. 69 C. J., 228; 10 Am. Jur., 611; *Keith v. Scales,* 124 N. C., 497, 32 S. E., 809; *Pope v. Hinckley,* 219 Mass., 323, 95 N. E., 798; *Kernochan v. Farmers' Loan & Trust Co.,* 175 N. Y. S., 831, 126 N. E., 912; *Holloway v. Institute of Mission Helpers,* 119 Md., 667, 87 A., 269; *Hutton v. St. Paul Brotherhood of People's Church,* 20 Ch. Del., 413, 178 A., 584; *In re Stuart's Estate,* 184 Iowa, 165, 168 N. W., 779; *In re Burger's Estate,* 205 N. Y., 220; *In re Rogers' Estate,* 258 N. Y. S., 534; *In re Winslow's Will,* 53 N. Y. S. (2d), 220; *In re Lemcke's Will,* 53 N. Y. S., 253; *Horne v. Nashville Trust Co.,* 11 Tenn., 225.

The right of the appellant to recover this trust fund in the event the Asheville Farm School ceases to exist as a public educational institution, within the meaning of the provisions contained in the will of the testator, is not presented for consideration and determination on this appeal, and we express no opinion thereon.

We have carefully examined the other exceptions and assignments of error, and in the trial below we find no prejudicial error.

No error.

MARTHA ROUNTREE v. LONNIE THOMPSON.

(Filed 9 October, 1946.)

1. Landlord and Tenant § 33—

In an action against a tenant to recover for the loss by fire of a tobacco barn on the premises, allegedly caused by the negligence of the tenant in failing to place a competent person in charge of the oil heating system and in failing to frequently visit the premises for inspection, nonsuit is properly entered where there is no evidence of causal relation between the fire and the negligence complained of.

2. Negligence §§ 5, 19b (1)—

Proximate cause is an essential element of actionable negligence, and nonsuit is properly entered upon failure of proof that the negligence complained of was the proximate cause of the injury.

3. Negligence § 19b (2): Landlord and Tenant § 33—

In an action by a landlord to recover for the destruction by fire of a tobacco barn on the premises, predicated on the alleged negligence of the tenant, the doctrine of *res ipsa loquitur* does not apply, and proof of

ownership in plaintiff and destruction of the barn by fire while in the possession of the tenant does not make out a case.

BARNHILL, J., concurring.

APPEAL by plaintiff from *Bone, J.*, at May Term, 1946, of WILSON. Affirmed.

This is an action by the plaintiff, landlord, against the defendant, tenant, to recover damages for the destruction by fire of a tobacco barn on the demised premises during the existence of the lease involved, alleged to have been proximately caused by the negligence of said defendant in (1) permitting his agent or servant to operate the oil heating system in said barn when he knew that said agent or servant was incompetent to operate said system; in (2) failure of defendant to place in charge of said barn some competent person who knew how to operate said heating system; and (3) the failure of the defendant to visit frequently the demised premises and to examine and see whether the heating system was properly operated. The defendant denied the allegations of negligence contained in the complaint. When the plaintiff had offered her evidence and rested her case the defendant moved to dismiss the action and for a judgment as of nonsuit, which motion was allowed by the court and a judgment of nonsuit entered, whereupon the plaintiff objected, preserved exception and appealed to the Supreme Court, assigning errors.

Sharpe & Pittman for plaintiff, appellant.
Lucas & Rand for defendant, appellee.

SCHENCK, J. The sole question posed in this appeal is: Did the court err in allowing the defendant's motion as in case of nonsuit, and accordingly entering judgment dismissing the action?

The plaintiff predicated her action upon allegations of negligence. The first allegation of negligence is that the defendant placed an incompetent person in charge of the barn to operate the heating system therein; and the second allegation of negligence is that the defendant failed to place in charge of the barn some competent person who knew how to operate such heating system; and the third allegation of negligence is that the defendant failed to frequently visit the premises to examine and see whether the system was being properly operated.

There is no evidence to support the third allegation of negligence. While there may be more than a scintilla of evidence that a person unfamiliar with the operation of the heating system was put in charge thereof, there is an absolute failure of proof of any causal relationship between the ignorance of the person put in charge of the barn and the origin of the fire.

The proof that the negligence alleged was the proximate cause of the damage suffered was essential to the plaintiff's alleged cause of action, and in the absence of any evidence that such alleged negligence was a proximate cause of the damage sought to be proven the plaintiff's cause of action had to fail.

It has been suggested that although the plaintiff's complaint alleges negligence, nevertheless the plaintiff had a right to rely upon the doctrine of *res ipsa loquitur,* and since the plaintiff has offered evidence to establish her ownership of the premises and that said defendant was in possession thereof and that the barn thereon was burned while in his possession, the burden was thereby placed on the defendant to explain how the loss occurred to excuse himself from liability. Such is but a method of contending that the doctrine of *res ipsa loquitur* is applicable in this case.

While the holdings in different jurisdictions are not all in accord, we are of the opinion, and so hold, that such doctrine is not applicable in this case. In 16 R. C. L., p. 747, par. 240, it is written: "According to the modern view, as regards the protection of the building on demised premises from destruction by accidental fires, the lessee is only required, in the absence of stipulations in regard thereto in the lease, to use reasonable diligence, and cannot be held liable in case the buildings are so destroyed, unless this has happened through his negligence." In 32 Am. Jur., Landlord and Tenant, par. 783, it is written: "Generally, the liability of a tenant for the destruction of a building by fire depends on negligence. The tenant is only required, in the absence of stipulations in the lease, to use reasonable diligence to protect buildings on the demised premises from destruction by fire, and is not liable for accidental damages or destruction by fire; he is liable only if the buildings are destroyed through his negligence."

The judgment of nonsuit entered by the Superior Court was correct.

Affirmed.

BARNHILL, J., concurring: The sufficiency of the evidence offered to take the case to the jury is the only question presented for decision. The majority affirms the judgment of nonsuit for want of evidence of negligence. On this record, as the cause is presented here, I concur.

By the ancient common law waste was recoverable only against a guardian in chivalry, a tenant in dower, and a tenant by the curtesy. There could be no recovery against a tenant for life or for years. 4 Coke's Inst., 299. Subsequently, in favor of the owners of the inheritance, Stat. 52 Hen. III, ch. 23, known as the "Statute of Marlbridge," was enacted. This act made all fermers liable for waste for which they shall be "punished by amerciament grievously." Liability for waste was made an ordinary and general incident to all kinds of estates for life and

for years and the actual damages sustained by the reversioner were recoverable in an action of waste. 1 Washb. Real. Prop., 5th Ed., 158.

Thus the law remained until the passage of the statute of 6 Edw. I, ch. 5, known as the "Statute of Gloucester," which provides "that a man from henceforth shall have a writ of waste in the chancery against him that holdeth by law of England, or otherwise for term of life or for term of years, or a woman in dower; and he which shall be attained of waste shall lose the thing that he hath wasted and moreover shall recompense thrice so much as the waste shall be taxed at."

Under the law as it stood after the passage of the Statute of Gloucester, not only tenants by curtesy and in dower were held responsible for accidental fires at the common law, but tenants for life and years, created by the act of the parties, were also held responsible therefor as for permissive waste, under the last-named statute. 4 Kent Com., 82. Apparently the only exception to the liability of the tenant for damages to the reversion was where the damage was caused by the acts of God, or the public enemy, or the reversioner himself. 4 Coke, 536.

It was said by *Heath, J.,* in *Attersoll v. Stevens,* 1 Taunt., 198: "It is common learning that every lessee of land, whether for life or years, is liable in an action of waste to his lessor for all waste done on the land in his lease, by whomsoever it may be committed." In the same case *Chambre, J.,* said: "The situation of the tenant is extremely analogous to that of a common carrier."

"Tenant by the curtesie, tenant in dower, tenant for life, years, etc., shall answer for the waste done by a stranger, and shall take their remedy over." Lord Coke, 1 Co. Litt., 54a, 4 Kent Com., 77.

The law of waste as thus briefly outlined continued in force in England until the passage of the statute of 6 Anne (A.D. 1707), which guarded a tenant from the consequences of accidental misfortune by declaring that no suit should be had or maintained against any person in whose house or chamber any fire should accidentally begin, nor any recompense be made by such person for any damage suffered or occasioned thereby. This statute was afterwards enlarged by the statute of 14 Geo. III, ch. 78, sec. 86, passed in 1774, so as to include stables, barns, or any other buildings on the estate.

Speaking of the statute of 6 Anne, *Chancellor Kent* says: "Until this statute, tenants by the curtesy and in dower were responsible at common law for accidental fires; and tenants for life and years, created by the act of the parties, were responsible also, under the Statute of Gloucester, as for permissive waste." 4 Kent Com., 82. *Sampson v. Bagley,* 44 L. R. A., 711.

So then, now, under the common law, as it prevails in this State, there is an implied covenant on the part of the lessee (unless otherwise provided in the lease) to redeliver the possession of the demised premises

upon the expiration of the term in the same general condition in which they were at the time of the letting, ordinary wear and tear alone excepted. 16 R. C. L., 781, sec. 275; 32 Am. Jur., 684; 64 L. R. A., 649. The landlord is entitled, at the end of the term, to the identical premises which he has leased. *Baltimore & P. S. Co. v. Ministers, etc., Starr M. P. Church,* 130 Atl., 46.

The implied covenant does not, however, extend to the loss of buildings by fire, flood, tempest, or enemies which it was not in the power of the lessee to prevent, and there is no implied covenant that the lessee shall restore buildings which have been destroyed by accident without fault on his part. *Earle v. Arbogast,* 26 Atl., 923, and cited cases; 2 Tiffany, Real Prop. (3rd Ed.), 658; Anno. 84 A. L. R., 401; G. S., 42-10.

It would seem then, in the light of the history of the law, that destruction by the act of God, or by the public enemy, or by accident, or by the act of the lessor, are exculpatory exceptions to the general rule of liability.

If this be true, it would not be just to permit the tenant to return the premises in a damaged condition and escape liability without any explanation of the reason for his inability to comply with his contract. Therefore, in an action in contract on the implied warranty, the lessor, perhaps, makes out a *prima facie* case when he shows that the lessee surrendered the premises at the end of the term *sans* a building, and the burden rests on the defendant lessee to prove the exculpatory facts or, at least, to go forward with evidence tending to bring the loss within the exceptive provisions of the law.

This we need not now decide for plaintiff casts her action in tort for negligence and not in contract for breach of covenant. Having elected to rest her case upon an allegation of negligence, she must prove it. This she has failed to do.

In an action for negligent injury to the demised premises by the tenant no recovery can be had without proof of negligence. *Mansfield Motors v. Freer,* 182 N. E., 51.

CLARA SPICER, MARY MUNROE, MRS. ELEANOR BEST, MRS. PEARL BRASHEAR, ON BEHALF OF THEMSELVES AND OTHER INTERESTED CITIZENS, v. CITY OF GOLDSBORO, GRAY HERRING, JAMES N. SMITH, J. M. PATE, GARLAND YELVERTON AND E. L. SIMMONS, ALDERMEN.

(Filed 9 October, 1946.)

1. Injunctions § 8: Dedication § 2—

In this suit to restrain a municipality from paving a parkway in a street, there was no controversy as to the evidence or the authenticity of

minute records of official acts of the municipal governing board, the sole controversy being whether, upon the facts, the municipality had dedicated the *locus* as a public park. *Held:* The question of intention and dedication upon the undisputed facts is a question of law and no issues of fact were raised for the determination of a jury.

2. Municipal Corporations § 10: Injunctions § 8—

In a suit to restrain a municipal corporation from paving a parkway in a street, allegation that the official action directing the paving of the *locus* was arbitrary and capricious does not raise an issue of fact for the determination of a jury when there is no evidence to support the allegation and overcome the presumption that the municipal governing body, acting in a matter within its exclusive jurisdiction, acted in good faith.

3. Municipal Corporations § 25b: Dedication § 2—

A municipality is not required to convert immediately to use for travel all portions of land acquired by it for a street, and nonuser or temporary user of a portion of the street for other purposes, not inconsistent with its later conversion for travel when future traffic conditions should so require, does not constitute an abandonment of such portion for street purposes nor a dedication for such temporary purposes.

4. Same—

Defendant municipality by official resolution established a parkway in the unpaved portion in the center of one of its streets and thereafter named the "small park now being developed in" the street as requested by petition. Later it directed the removal of the trees and shrubbery "from" the street in order to pave same. *Held:* The official actions of the governing board disclosed as a matter of law that the municipality did not intend to abandon the parkway as constituting a part of the street or to dedicate it for park purposes.

5. Municipal Corporations § 25b—

A "park" and a "parkway" are not synonymous: a parkway is merely a part of a street which is planted in trees, shrubs and grass for ornamentation and recreation, but which is subject to conversion into a driveway whenever, in the opinion of the constituted authorities, traffic conditions so require.

6. Municipal Corporations § 10—

Where a municipality maintains a parkway in the center, unpaved portion of a street, municipal resolutions directing that the street be paved and that the trees and shrubs be removed from the street to prepare for paving, are definite and certain, since the direction for the removal of the trees and shrubs and the paving of the street necessarily refers to the parkway which constitutes the only unpaved portion.

APPEAL by defendants from *Grady, Emergency Judge,* at June Term, 1946.

Civil action to restrain the abandonment of an alleged park.

The Town of Goldsboro grew up at its present location along the old Wilmington & Weldon Railroad. The railroad owned its right of way,

130 feet wide, and said right of way was used by the town as its main street, known as East Center and West Center Streets. About 1912, after some litigation, the railroad, now Atlantic Coast Line Railroad, built its main line along the western outskirts of the city but continued to use its old tracks in Center Street for certain purposes. On 1 October, 1925, the company conveyed its fee simple title to the land embraced in its right of way from Ash Street to Spruce Street (four blocks), theretofore used for railroad and street purposes, to the defendant city. It agreed to and did remove its tracks from the area conveyed.

Thereupon, in 1928, the city proceeded to pave the full area from Ash to Chestnut Street (three blocks), leaving a ten-foot elevated walkway along the center line. Between Chestnut and Spruce Streets it paved along the outer boundary of each side a strip approximately 21 feet wide. These lanes became one-way streets and were known as a part of East Center, South, and West Center, South, respectively. This left an area between these two paved ways extending from Chestnut to Spruce approximately 60 by 400 feet. This "island" area is the *locus* in controversy.

The minute book of the Board of Aldermen discloses the following entry as a part of the minutes of the meeting on 17 December, 1928:

"Upon motion of Alderman Waters the City Manager was authorized to make a parkway in Center Street between Chestnut and Spruce Streets."

The city officials thereupon proceeded to improve the area. Walkways were laid, shrubbery and grass were planted, and seats were provided. It became a beauty spot used by the public as a place of recreation, rest and relaxation.

On 1 April, 1929, the Goldsboro Woman's Club requested the Board to name "the small park now being developed in South Center Street" the "Joseph Robinson Park." The request was granted.

On 1 April, 1940, a committee representing the Goldsboro Woman's Club and the Garden Club requested the permission of the Board "to place a bronze marker in Robinson Park in memory of Col. Jos. E. Robinson, after whom the park is named." This request was granted with commendation to the ladies "for their thoughtfulness in so memorializing one of our beloved former citizens."

On 18 March, 1946, the Board adopted a motion directing that "South Center between Spruce and Chestnut be paved," and on 5 May, 1946, it officially, by majority vote, directed the city manager to proceed immediately to "remove the trees and shrubs from South Center Street between Chestnut and Spruce Streets and do all other incidental work necessary to prepare the surface for paving the area from Chestnut to Spruce Street." When the city employees began the work thus directed, this action was instituted and a temporary restraining order was issued.

Former members of the Board of Aldermen make affidavit it was their understanding that the Waters resolution was adopted with the intent to create a public park.

When the notice to show cause came on to be heard, the judge below concluded "that issues of fact arise on the pleadings" and thereupon continued the restraining order to the final hearing. Defendants excepted and appealed.

Langston, Allen & Taylor and W. Dortch Langston for plaintiffs, appellees.

W. A. Dees, D. H. Bland, and Ehringhaus & Ehringhaus for defendants, appellants.

BARNHILL, J. The defendants contend with some force, and the citation of authority, that plaintiffs have no legal right to maintain this action. We may, however, pass that question without decision and come to the crux of the case.

Are issues of fact raised by the pleadings and, if not, does the evidence offered disclose, as a matter of law, that the area between the paved portions of Center Street from Chestnut to Spruce has been dedicated for use as a public park? We are constrained to answer each question in the negative.

This cause was heard on evidence offered by plaintiffs plus pertinent excerpts from the official minutes of the governing board of defendant municipality. Defendants do not challenge the truth of plaintiffs' evidence except as to the conclusions they seek to draw therefrom, and the authenticity of the minute records is not controverted.

Where the facts are undisputed and admit of but one legal interpretation or can lead to but one conclusion, the question of intention and dedication is one of law. 16 Am. Jur., 424; *Marion v. Skillman* (Ind.), 26 N. E., 676, 11 L. R. A., 55, Anno. 129 Am. St. Rep., 578.

It is true plaintiffs allege the action of defendants in directing that the area in question be prepared for paving was arbitrary and capricious. But this is a conclusion unsupported by evidence. The aldermen had the authority to act. They spoke in respect to a matter within their exclusive jurisdiction. It is presumed they acted in good faith. No fact or circumstance which tends to rebut that presumption is made to appear. Hence, in respect thereto, there is no issue of fact to be submitted to a jury.

Subject to the superior right of the railroad company, what is now known as Center Street in Goldsboro has been maintained by the municipality and used by the people as a public way or street for approximately 100 years. In 1925 the town acquired all the land embraced therein in fee and proceeded to make such use thereof as existing necessities re-

quired. That it is a street subject to the legislative and administrative control of the town was determined as early as 1911. *R. R. v. Goldsboro,* 155 N. C., 356, 71 S. E., 514.

Roads and streets are frequently laid out or dedicated with reference to future requirements as well as with reference to existing conditions or needs. There is no rule of law which demands that all land acquired for such purpose must be converted immediately to use for travel. Hence, mere nonuser, or temporary user for other purposes, of a part thereof is insufficient to show an abandonment. *Basic City v. Bell,* 114 Va., 157, Anno. Cas. 1914 A, 1031.

Here defendant town paved two strips each 21 feet wide along the outer boundaries of so much of Center Street as lies between Chestnut and Spruce Streets. There are shade trees on that part which lies between the two roadbeds thus constructed. Shrubs and grass were added to give it a park-like appearance.

The town officially authorized the creation of a parkway *in* Center Street between Chestnut and Spruce Streets. On petition of the local Woman's Club it gave a name to the "small park now being developed *in* South Center Street." Still later it directed the removal of the trees and shrubs *from* South Center Street and the preparation of the surface for paving.

Thus it appears the official board at all times kept in mind the existence of this area as a part of an existing street. That they did not intend to abandon it as such or to dedicate it to an inconsistent use clearly appears. They in fact did nothing more than create a parkway.

A parkway is not a park. It is merely an ornamental part of a street which may be used for recreational purposes. *Kupelian v. Andrews,* 135 N. E., 502; *Municipal Securities Corp. v. Kansas City,* 177 S. W., 856; *Village of Grosse Pointe Shores v. Ayres,* 235 N. W., 829.

A municipal parkway is a street of special width which is given a parklike appearance by planting its sides or center or both with grass, shade trees, and flowers. *Kleopfert v. City of Minneapolis,* 95 N. W., 908; New Cent. Dic.; Webster, New Int. Dic.

While a parkway is sometimes referred to as a park, the terms are not synonymous, although each may include certain common features of ornamentation and recreation. McQuillin, Municipal Corporations, 2d Ed., sec. 1384; 44 C. J., 1103.

The essential and decisive fact is that a parkway exists when there is a single entire street of which a part is devoted to ordinary purposes of travel and a part to ornamental or recreational purposes. The two portions together constitute a single entire way which has some of the characteristics of a park. *Kupelian v. Andrews, supra.*

A municipality may set off a part of a highway for a particular use, *Hagerstown v. Hertzler,* 175 Atl., 447, and it is within the power of

public officials to beautify space within highway boundaries with lawns, trees, shrubs, flowers, statues, monuments and the like. *Ins. Co. v. Cuyler,* 283 Pa., 422, 129 Atl., 637.

Such action does not constitute an abandonment of that part of the highway which is set apart for a parkway or a dedication thereof to an inconsistent purpose. The area, for its full width, retains its character as a public way subject to conversion into a driveway whenever, in the opinion of the constituted authorities, traffic conditions so require. *Village of Grosse Pointe Shores v. Ayres, supra; S. v. Board of Park Com'rs.,* 110 N. W., 1121, 9 L. R. A. (N. S.), 1045.

The contention that the resolution of 5 May, 1946, may not be construed to refer to, or to authorize the removal of trees and shrubs from, the *locus* is without merit. There are no trees and shrubs in Center Street other than those in the parkway. If the resolution does not refer to these, it is meaningless. Likewise in respect to the resolution of 18 March, 1946, the parkway was the only unpaved part of Center Street. The decision to pave was a decision to pave the parkway area.

Other interesting questions are debated in the briefs. However, our conclusion that there has been no dedication of the *locus* to use as a park as distinguished from a parkway renders discussion thereof inappropriate.

The occasion for the destruction of old landmarks and spots of beauty always arouses sentiments of regret, oftentimes actual resentment towards those whose duty it is to act. This we fully appreciate. But that is not the criterion of decision. Whether the time has arrived when necessity demands the exclusively utilitarian use of the *locus* is for the local authorities to decide. In the absence of abuse of discretion the courts are without authority to interfere.

The judgment below is

Reversed.

WILLIAM SEARCY v. CHARLES A. LOGAN.

(Filed 9 October, 1946.)

1. Frauds, Statute of, § 2—

A writing cannot be held sufficient under the statute of frauds unless it describes the land, the subject matter of the agreement, with certainty or refers to matters *aliunde* from which the description can be made certain. G. S., 22-2.

2. Same—

A memorandum "Received of C. L. $50.00 for homeplace where he now lives which he has no deed for" dated and signed by the owner of land

is held sufficiently definite to admit of parol evidence for the purpose of identifying the land. This memorandum being sufficient under the statute of frauds, G. S., 22-2, the purchaser is entitled to introduce another receipt executed by the owner to him, even though it does not purport to identify the land, and to show by parol that it was part of the consideration for the land contracted to be conveyed.

3. Evidence § 30c—

A map or plat of a survey not made in pursuance of a court order may be used by a witness to explain his testimony but it is not competent as substantive evidence.

4. Appeal and Error § 6c (5)—

Where the charge of the court is not incorporated in appellant's statement of case on appeal, but the charge is incorporated in appellee's countercase, it would seem that an exception to the charge then entered by appellant is not timely. G. S., 1-282.

APPEAL by plaintiff from *Bobbitt, J.*, at February Term, 1946, of RUTHERFORD.

Civil action for recovery of possession of land, rents, etc.

Plaintiff alleges in his complaint, briefly stated: That he is the owner of a certain tract of land in Chimney Rock Township, Rutherford County, North Carolina, which is specifically described in a deed from O. C. Erwin, Trustee, to him, dated 6 March, 1937, and duly registered; that defendant went into possession of said land as tenant of plaintiff for standing rent of $40.00 cash a year, and paid same for the years 1940 and 1941; that defendant is indebted to plaintiff for rents for years 1942, 1943, and 1944, and, though demand therefor was made by plaintiff in spring of 1944, defendant refused to pay same; and that thereupon plaintiff notified defendant to vacate the land and not to cultivate same, but defendant refused to comply with the notice and wrongfully withholds the land.

Defendant, answering the complaint, admits that he went into possession of the land described in the complaint under a contract with plaintiff for a rental of $40.00 a year for the year 1940, but denies all other material allegations thereof; and for a further answer and defense, upon which he asks affirmative relief, defendant avers that in the year 1940, after he had entered upon said lands, he and plaintiff entered into an agreement by which plaintiff was to convey the land to him for the sum of $300; that he paid $80 to plaintiff and has receipts therefor, and now stands ready to pay to plaintiff the balance of $220, if and when plaintiff will execute and deliver to him a deed for said land; that plaintiff has refused to execute deed to him in accordance with the agreement; and that he now tenders to plaintiff the $220, balance of purchase price,

and will pay same to him upon execution of deed for the property. Thereupon defendant prays specific performance of contract.

Plaintiff in reply denies the averments of defendant's further answer and defense.

Upon the trial below plaintiff offered in evidence: (1) The admission of defendant that he went into possession of land described in complaint as tenant of plaintiff; (2) testimony of himself in respect to failure of defendant to pay rents; and (3) the deed from O. C. Erwin, Trustee, to plaintiff bearing date 6 March, 1937, and purporting (a) to have been executed pursuant to foreclosure sale held 20 February, 1937, under a deed of trust dated 26 May, 1927, and executed by L. F. Logan and wife, Eva J. Logan, at which sale plaintiff became the purchaser of the tract of land, as described in the complaint, at the price of $340 plus taxes due—and (b) to have conveyed said land. And, on cross-examination, plaintiff identified two papers marked numbers 1 and 2 as having been signed by his wife in his name at his direction.

Defendant then, over objection by plaintiff, offered in evidence the two papers so identified by plaintiff as follows:

Exhibit No. 1. "Received of Charley Logan $30.00 on trade.
(Signed) William Searcey
September 21, 1940."

Exhibit No. 2. "$50.00. Received of Charley Logan $50.00 for homeplace where he now lives which he has no deed for.
(Signed) William Searcy
September 26, 1941."

Exception by plaintiff.

Defendant then offered oral testimony, tending (1) to show the facts to be as averred in his further answer and defense, and (2) to identify the "homeplace where he now lives for which he has no deed," set forth in Exhibit No. 2, as the land described in the complaint, and in the deed from O. C. Erwin, Trustee, to plaintiff.

Plaintiff excepted and assigns as error the admission of certain portions of the testimony offered by defendant—the more important ones being adverted to in the opinion as hereinafter set forth.

On the other hand, plaintiff offered testimony tending (1) to controvert the evidence offered by defendant, and (2) to show that the land to which the agreement to purchase referred was not that described in the complaint, but another small tract.

Plaintiff excepted and assigns as error the refusal of the court to admit, upon objection by defendant, certain proffered evidence—the

more important instances being referred to in the opinion as hereinafter set forth.

These issues, in respect to controverted matters, were submitted and were answered by the jury as shown:

"2. Did the plaintiff thereafter contract in writing to sell and convey to the defendant the lands described in the complaint, as alleged in the answer? Answer: Yes.

"3. Has the defendant at all times been ready, able and willing to comply with the said contract of purchase and sale, as alleged in the answer? Answer: Yes."

In accordance with the verdict the court entered judgment for specific performance as prayed by defendant.

Plaintiff appeals therefrom to Supreme Court, and assigns error.

Stover P. Dunagan for plaintiff, appellant.

Hamrick & Hamrick for defendant, appellee.

WINBORNE, J. This is the paramount question on this appeal: Is the wording of the receipt, Exhibit 2, identified by plaintiff and offered in evidence by defendant, a sufficient memorandum of contract to sell and convey land to admit of parol evidence for purpose of identifying the land? The court below was of opinion that it is sufficient, and admitted parol evidence for that purpose. The ruling is in harmony with principle of law enunciated in long line of pertinent decisions of this Court.

This Court has uniformly recognized the principle that a deed conveying land, or a contract to sell or convey land, or a memorandum thereof, within the meaning of the statute of frauds, G. S., 22-2, must contain a description of the land, the subject matter thereof, either certain in itself or capable of being reduced to certainty by reference to something extrinsic to which the deed, contract or memorandum refers. The principle has been the subject of these recent decisions in which earlier decisions are cited and assembled: *Self Help Corp. v. Brinkley*, 215 N. C., 615, 2 S. E. (2d), 889; *Hodges v. Stewart,* 218 N. C., 290, 10 S. E. (2d), 723; *Comrs. of Beaufort v. Rowland,* 220 N. C., 24, 16 S. E. (2d), 401; and *Stewart v. Cary,* 220 N. C., 214, 17 S. E. (2d), 29. (Compare *Johnston County v. Stewart,* 217 N. C., 334, 7 S. E. (2d), 708.) Hence further exposition on the subject would be unnecessarily repetitious.

Tested by this principle, the description contained in Exhibit 2 is sufficiently definite to admit of parol evidence for the purpose of identification. Hence the exception may not be sustained.

Objection to Exhibit No. 1 is likewise untenable. While it does not purport to identify land, it is competent as receipt for money—and oral testimony was competent to show it to be a part of the consideration for

the land contracted to be conveyed. See *Bateman v. Hopkins,* 157 N. C., 470, 73 S. E., 133.

Appellant also assigns as error the ruling of the court in sustaining defendant's objection to plat of land which plaintiff proffered as evidence. This assignment is not tenable. A map or plat of a survey not made in pursuance of an order of the court is inadmissible as evidence *per se.* While it may be used by a witness under examination to explain or elucidate his testimony, it may not be exhibited as substantive evidence. See *Dobson v. Whisenhant,* 101 N. C., 645, 8 S. E., 126; *Burwell v. Sneed,* 104 N. C., 118, 10 S. E., 152; *Tankard v. R. R.,* 117 N. C., 558, 23 S. E., 46.

Next, regarding the assignment that the court erred in failing to charge the jury in respect to the statute of frauds. It is noted (1) that in the case on appeal as served by appellant the charge of the court was not incorporated, nor was any exception taken to the charge or to any failure of the court to charge; (2) that defendant included the charge in full in his countercase; and (3) that thereupon appellant excepted to the charge on the ground that it fails to charge properly the law with reference to the statute of frauds.

Upon this factual situation appellant insists that the exception is timely. Appellee takes contrary view. And the applicable statute, G. S., 1-282, provides that the appellant shall cause to be prepared a concise statement of the case, embodying the instructions of the judge, if there be exception thereto—"stating separately in articles numbered, the errors alleged." Thus it would seem that an exception not contained in the statement of case on appeal as prepared by appellant is not timely entered. Compare *Sloan v. Assurance Society,* 169 N. C., 257, 85 S. E., 216; *Layton v. Godwin,* 186 N. C., 312, 119 S. E., 495; *Carter v. Bryant,* 199 N. C., 704, 155 S. E., 602; *Chozen Confections v. Johnson,* 220 N. C., 432, 17 S. E. (2d), 505. But if the exception were timely, we are of opinion that it is not well founded. A reading of the charge reveals that the case was fully and fairly presented to the jury.

All other exceptions have been given due consideration, and are found to be without merit.

In the judgment below, we find

No error.

NATHAN L. WOOD v. W. W. MILLER, TRADING AS MILLER MOTOR EXPRESS.

(Filed 9 October, 1946.)

1. Automobiles § 24b—

Where the question of whether the relationship of master and servant exists between the driver of a truck and the lessee thereof depends upon the legal effect of the written lease agreement, the question is one of law.

2. Master and Servant § 1—

As a general rule the relationship of master and servant is created when the employer retains the right to control and direct the manner in which the details of the work are to be executed and what the laborer shall do as the work progresses.

3. Automobiles § 24b—Relationship of master and servant held to exist between lessee and driver of truck under terms of written lease agreement.

The written trip lease agreement under which the truck in question was being operated at the time of the collision provided that the driver should remain on lessor's pay roll and lessor be responsible for pay roll taxes and deductions and for fuel and repairs but that the sum paid by lessee was for the leasing of the truck and the services of the driver and that the lessee should assume direction and control of the leased vehicle and full responsibility to the public, shippers and consignees for its operation, and should display its name on the sides of the vehicle preceded by the words "operated by," and pay only such tolls, charges, fees and fines as were directly attributable to the transportation of lessee's freight. *Held:* Under the terms of the trip lease agreement the relationship of master and servant existed between the lessee and the operator of the truck so as to render the lessee liable for negligence in its operation.

APPEAL by plaintiff from *Thompson, J.,* at January Term, 1946, of PASQUOTANK.

Civil action to recover for personal injury allegedly sustained in collision at highway crossing in State of Virginia, between plaintiff's automobile and truck of one Turner under trip lease with defendant.

These facts are uncontroverted: On 27 February, 1945, the day before the collision occurred, defendant, a common carrier of freight by trucks owned and leased by him, entered into an agreement designated "Trip lease of truck," with Dick Turner's Motor Express, a common carrier of freight, of Norfolk, Virginia, for a single trip to transport freight by a Dodge truck, tractor and semi-trailer type, from Brooklyn, New York, to Washington, N. C., under these pertinent provisions:

"6. During the term of this lease the leased truck shall be operated only by the driver named Savage. Such driver, and any helper furnished by the lessor, shall remain on lessor's payroll . . .

"8. The compensation to be paid to the lessor by the lessee for the leasing of the truck and for the services of the driver named in para-

graph 6 shall be paid upon termination of this lease . . . as follows: (a) $100.00 for the trip. Turner to pay all expenses . . .

"10. The lessor and lessee hereby agree to all the terms, conditions and representations set forth in this lease, including those appearing on the reverse side hereof."

Among those "Additional Terms, Conditions and Representations" are these:

"A. The lessee, upon completion of the loading of the vehicle, shall furnish lessor with documentary evidence of the weight or value of the freight loaded thereon.

"B. The lessee shall assume direction and control of the leased vehicle and full responsibility to the public, shippers, and consignees for its operation. The lessee shall also display prominently on both sides of the leased vehicle . . . the name of the lessee preceded by the words 'operated by,' and the number of any operating certificate or permit held by the lessee . . .

"C. The lessee shall pay only such tolls, ferry charges, State fees, and fines as are directly attributable to the transportation of the lessee's freight in the leased vehicle. . . ."

"E" and "F" (combined). "The lessor, during the time of this lease, shall be responsible for the maintenance, service and repair of the leased vehicle, and shall provide motor fuel, oil, tires, and other equipment necessary to operate the vehicle" and "for the deduction and payment of all pay roll deductions, tax withholdings, taxes, assessment, premiums, and other payments, due by reason of the payment of wages or other earnings to the driver or any helper utilized in the operation of the leased vehicle without transfer to the lessee's pay roll."

Plaintiff alleges in his complaint, and on trial in Superior Court offered evidence tending to show (1) that the truck was loaded and operated pursuant to the terms of said trip lease agreement on the trip from Brooklyn, N. Y., to Washington, N. C., and while being so operated came into collision with the automobile of plaintiff at the intersection of U. S. Highway 17 and U. S. Highway 13, and (2) that such collision was the result of negligence of the operator of the truck.

Plaintiff further alleges in his complaint that "the defendant, under said agreement assumed direction and control of the aforesaid leased vehicle and full responsibility to the public, shippers and consignees for its operation," and on the trial offered in evidence the trip lease agreement containing the provisions hereinabove set forth.

There was judgment as of nonsuit at close of all the evidence. Plaintiff appeals therefrom to Supreme Court, and assigns error.

J. Henry LeRoy for plaintiff, appellant.

R. Clarence Dozier and John H. Hall for defendant, appellee.

WINBORNE, J. The parties do not debate in this Court the question as to sufficiency of the evidence, offered on the trial below, to take the case to the jury as to actionable negligence. The sole question for decision is whether there is evidence tending to show the relationship of master and servant between the driver of the truck covered by the trip lease agreement, and the defendant at the time of, and in respect to the collision.

The relationship between the driver of the truck and the defendant is determinable, in the main, from the terms of the trip lease agreement. This is a question of law under applicable principles of law.

It is generally held that the relationship of master and servant is created when the employer retains the right to control and direct the manner in which the details of the work are to be executed and what the laborer shall do as the work progresses. See *Hayes v. Elon College,* 224 N. C., 11, 29 S. E. (2d), 137, where the authorities are assembled. "The vital test is to be found in the fact that the employer has or has not retained the right of control or supervision over the contractor or employee as to the details," *Barnhill, J.,* in the *Hayes case, supra.*

In the light of this principle it is seen from the terms of the trip lease agreement that the defendant, as lessee of the truck, expressly assumed "direction and control of the leased vehicle and full responsibility to the public, shippers, and consignees, for its operation." Moreover, defendant agreed to display on the truck *indicia* showing that it was being operated by defendant. The language is sufficiently broad to give to the defendant the full control and direction of the operation of the truck for the duration of the trip. It is true it was agreed that the name of the driver of the leased truck would be kept on the pay roll of the lessor, the owner of the truck. But it is manifest that this was for the purpose of providing for "deduction and payment of all pay roll deductions, etc., due by reason of payment of wages or other earnings of the driver or any helper utilized in the operation of the leased vehicle, without the transfer to the lessee's pay roll." Such an arrangement does not nullify the legal effect of the action of defendant in assuming the control and direction of the operation of the truck and "responsibility to the public . . . for its operation." See *Shapiro v. Winston-Salem,* 212 N. C., 751, 194 S. E., 479. Furthermore, it is set out in the trip lease agreement that the compensation to be paid by the lessee to the lessor covered "the services of the driver."

Thus, holding as we do, that there was error in withholding the case from the jury, other principles of law advanced by appellant need not be considered.

The judgment below is

Reversed.

MRS. HESTER HODGES v. ZOLA HODGES.

(Filed 9 October, 1946.)

1. Divorce § 4—

In a suit for alimony without divorce, G. S., 50-16, plaintiff is not required to file affidavit provided in G. S., 50-8, but is required to verify the complaint in the manner prescribed for verification of pleadings in ordinary civil actions, which requirement is mandatory and jurisdictional, and where the complaint is not verified defendant's motion to dismiss for want of jurisdiction must be allowed, even in the Supreme Court upon appeal.

2. Same—

Divorce, alimony and alimony without divorce, are statutory, and the courts can acquire jurisdiction only if the pleadings are verified as prescribed by statute, the form of the verification being dependent upon the character of the relief sought.

APPEAL by defendant from *Williams, J.*, at Chambers in Sanford, N. C., 22 June, 1946. From HARNETT.

Civil action instituted by the plaintiff for alimony without divorce, as provided in G. S., 50-16.

Pursuant to notice, the plaintiff made application to his Honor for a subsistence allowance and counsel fees pending the trial and final determination of this cause. At the hearing on the application, the defendant moved to dismiss on the ground that the action, according to the pleadings of the plaintiff, was brought prematurely. Motion denied.

Alimony *pendente lite* and counsel fees were awarded. Defendant appealed to the Supreme Court, assigning error.

Wellons & Canaday for plaintiff.

Neill McK. Salmon and J. R. Young for defendant.

DENNY, J. The defendant now moves in this Court to dismiss the action on the ground that the Court is without jurisdiction, for the reason that the complaint filed in this cause is not verified as required by G. S., 50-16.

The appellee admits the complaint is not verified, but insists that a verification of the pleadings in an action for alimony without divorce is not required by the statute.

In G. S., 50-16, it is provided, "In actions brought under this section, the wife shall not be required to file the affidavit provided in section 50-8, but shall verify her complaint as prescribed in the case of ordinary civil actions." We hold that this provision is mandatory as to the verification but relieves the wife of the necessity of filing the affidavit required by G. S., 50-8, and substitutes therefor the form prescribed for the verifica-

tion of pleadings in ordinary civil actions. Moreover, this Court held in *Cowles v. Hardin,* 79 N. C., 577, where a statute directs that the complaint "shall be sworn to as in other actions," the want of a proper verification is a fatal defect, for which judgment will be arrested. And *Stacy, C. J.,* said, in speaking for the Court in *Padgett v. Long,* 225 N. C., 392, 35 S. E. (2d), 234: "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."

It is apparent that the able judge who heard this matter below was inadvertent to the fact that the complaint was not verified. It appears from the record that the pleadings were considered as affidavits and treated as such in granting the relief sought.

Jurisdiction over the subject matter of divorce is given only by statute. *Ellis v. Ellis,* 190 N. C., 418, 130 S. E., 7. This also applies to an action for alimony without divorce. The Court will not obtain jurisdiction in an action brought for relief under the provisions of our statutes relating to divorce, alimony, or divorce and alimony, unless the complaint is verified. The form of the verification will depend upon the character of the relief sought. *Holloman v. Holloman,* 127 N. C., 15, 37 S. E., 68; *Nichols v. Nichols,* 128 N. C., 108, 38 S. E., 296; *Martin v. Martin,* 130 N. C., 27, 40 S. E., 822; *Williams v. Williams,* 180 N. C., 273, 104 S. E., 561; *Ellis v. Ellis, supra; Smithdeal v. Smithdeal,* 206 N. C., 397, 174 S. E., 118; *Ragan v. Ragan,* 212 N. C., 753, 194 S. E., 458.

The motion of the defendant to dismiss this action is allowed, and the order of the court below must be vacated.

Action dismissed.

STATE v. EDWARD W. FLOYD.

(Filed 9 October, 1946.)

Homicide § 16—

While in a prosecution for murder in the first degree the State has the burden of proving each of the essential elements of the crime, it is entitled to avail itself of the presumption of malice upon the showing of an intentional killing with a deadly weapon, with the burden upon it to complete its case by establishing the elements of premeditation and deliberation beyond a reasonable doubt.

STATE *v.* FLOYD.

APPEAL by defendant from *Burney, J.*, at April Term, 1946, of NORTHAMPTON.

Criminal prosecution on indictment charging the defendant with the murder of one Wade Cooke.

On the evening of 10 November, 1945, just after dark, the defendant shot and killed his father-in-law, Wade Cooke, and his sister-in-law, Rosa Cooke, while they were seated, with other members of the family, at the supper table in their home in Northampton County. A third shot was fired which injured another sister-in-law and the defendant's wife. The firearm used was a .22 rifle apparently of the magazine type. The defendant had been drinking, but was not drunk or crazy. He gave as his reason for going berserk: "Sheriff, they have just provoked and aggravated me so long about drinking I wanted to put an end to it."

The defendant's plea was that of mental irresponsibility. It was in evidence that two of his uncles committed suicide, and a brother of the defendant died in the insane asylum.

Verdict: Guilty of murder in the first degree.

Judgment: Death by asphyxiation.

Defendant appeals, assigning errors.

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

Gay & Midyette for defendant.

STACY, C. J. The question for decision is whether error was committed in the following instruction to the jury: "When the killing is shown to be intentional and without legal provocation, and without just cause or excuse, or where the killing is shown to be done with a deadly weapon or in a cruel and brutal manner, then the law implies that it was done with malice."

It is the position of the defendant that in a prosecution for murder in the first degree, the State must prove every element of the offense, *S. v. Locklear,* 118 N. C., 1154, 24 S. E., 410, and cannot avail itself of the presumption of malice arising from an intentional killing with a deadly weapon, as this mounts the crime only to the level of murder in the second degree. G. S., 14-17; *S. v. Prince,* 223 N. C., 392, 26 S. E. (2d), 875.

Proof of malice is one of the intermediate steps necessary to be taken in a prosecution for murder in the first degree. In taking this step, the State may rely upon the presumption which arises from an intentional killing with a deadly weapon. It is true, the additional elements of premeditation and deliberation, essential to constitute murder in the first degree, are not presumed from an intentional killing with a deadly weapon. These must be established beyond a reasonable doubt, and

found by the jury, before a verdict of murder in the first degree can be rendered against the accused. *S. v. Hawkins,* 214 N. C., 326, 199 S. E., 284; *S. v. Miller,* 197 N. C., 445, 149 S. E., 590. Still this would not deprive the State of the effect of an intervening presumption to the extent that it goes, or of evidence possessing under the law a degree of probative force beyond its natural tendency to produce belief. *McNeill v. McNeill,* 223 N. C., 178, 25 S. E. (2d), 615; *Speas v. Bank,* 188 N. C., 524, 125 S. E., 398. "In those cases where the evidence establishes that the killing was with a deadly weapon, the presumption goes no further than that the homicide was murder in the second degree, and if the State seeks a conviction of murder in the first degree, it has the burden of proving beyond a reasonable doubt that the homicide was committed with deliberation and premeditation." *S. v. Perry,* 209 N. C., 604, 184 S. E., 545.

A careful perusal of the record leaves us with the impression that no error has been shown, and that the judgment follows the command of the law.

No error.

H. C. HOOD v. ROGER A. SMITH.

(Filed 9 October, 1946.)

Interest § 2: Vendor and Purchaser § 7—

Nothing else appearing, interest begins to run as a matter of law on the balance of the purchase price under a contract to convey from the date of the execution of the contract and the taking of possession by the purchaser, and not on the date set for the execution of the deed.

APPEAL by plaintiff from *Nimocks, J.,* at June Term, 1946, of JOHNSTON. New trial.

This is a civil action by the plaintiff to recover of the defendant the balance of $12,975.00, the total purchase price, namely, the sum of $6,975.00, with interest from 1 January, 1946, alleged to be due as balance purchase money for 86½ acres of land in Smithfield Township, known as the Dal U. Thompson place. It was agreed by and between the parties that the court might take the papers and render judgment in or out of term and in or out of the district. It appeared that the action was brought on a written receipt in the form of a contract for the sale and purchase of said land, and that an interpretation of said contract relating to interest was the only matter at issue between the parties. The court, upon consideration of the said contract and pleadings filed herein, finds as a fact and holds as a matter of law, that under and by virtue of said contract the plaintiff contracted to execute and deliver to the defendant a fee simple title to the said land, and upon delivery of such

deed to the defendant, the defendant contracted to pay to the plaintiff the sum of $6,975.00, balance due and unpaid on the purchase price of said land, which was due and payable. The court having found, as a matter of law, that the sum of $6,975.00 which was to be paid bore no interest except from maturity, and the balance of the contract was in full force and effect. The plaintiff was, by the judgment entered, ordered and directed to make and tender to the defendant a deed in fee simple for said land and defendant was ordered and directed to pay the further sum of $6,975.00 as set out in said contract. To this judgment the plaintiff objected, excepted and appealed, assigning error.

Leon G. Stevens for plaintiff, appellant.
Wellons & Canaday for defendant, appellee.

SCHENCK, J. There appears but one assignment of error in the record and upon this assignment of error the sole exception set out in appellant's brief is based, namely, exception to the judgment as signed by the court. In this case the exception poses but the one question, to wit: When did interest begin to accrue on deferred payment? His Honor was of the opinion that the interest began to accrue on 1 January, 1947; the plaintiff contended that interest began 1 January, 1946. Was his Honor's holding in error is the question posed. We are constrained to hold that such holding was error. Nothing else appearing, any unpaid balance due at the time the sale was consummated and the defendant took possession of the property would draw interest from that date as a matter of law. "A debt draws interest from the time it becomes due. When the interest is not made payable on the face of the instrument, it is in the nature of damages for the retention of the principal debt. *King v. Phillips,* 95 N. C., 246; *Grocery Co. v. Taylor,* 175 N. C., 37." *Bank v. Insurance Co.,* 209 N. C., 17, 182 S. E., 702.

The plaintiff is entitled to interest on the deferred payment from 1 January, 1946. Judgment accordingly.

Reversed.

LUMBER MUTUAL CASUALTY INSURANCE CO. OF NEW YORK v. CLARENCE WELLS ET AL.

(Filed 9 October, 1946.)

1. Insurance § 9: Evidence § 39—

Where a policy of insurance stipulates that it embodies all the agreements existing between insured and insurer or any of its agents, and that notice to the agent or any other person should not effect a waiver or

change of any part of the contract or estop the insurer from asserting any right unless endorsed thereon so as to form a part of the contract, *held* in the absence of prayer for reformation, evidence of knowledge of the agent relating to a stipulation excluding liability or limiting coverage of the policy would tend to vary the written instrument by parol, and an issue of knowledge of the agent is inadvertently submitted.

2. Insurance § 43—

A stipulation in a policy of liability insurance that the policy should not apply while the vehicle is used as a public or livery conveyance is not a condition working a forfeiture and subject to waiver, but an exclusion of liability or limitation on coverage.

3. Insurance § 50: Judgment § 17b—

Where, in an action on a policy of liability insurance, the verdict on the first issue establishes that the vehicle was being used as a public conveyance within the meaning of a provision of the policy excluding liability in such instance, a second issue as to knowledge of insurer's agent of such use, in the face of a stipulation in the policy that it contained all agreements between the parties and could not be varied by notice to any agent unless endorsed on the policy, is inadvertently submitted, and judgment in insurer's favor upon the verdict is not technically a judgment *non obstante veredicto* but is a judgment upon the first issue, the second issue being immaterial or surplusage.

APPEAL by defendants from *Grady, Emergency Judge,* at June Term, 1946, of WAYNE.

Proceeding for declaratory judgment to determine rights of parties under policy of liability insurance.

Following remand of the case at the Fall Term, 1945, reported in 225 N. C., 547, 35 S. E. (2d), 631, these issues were submitted to and answered by the jury:

"1. At the time of the collision referred to in the pleadings was the automobile described in said policy being used as a public or livery conveyance within the meaning of said policy? Answer: Yes.

"2. At the time said policy of insurance was issued by M. B. Andrews, Agent, and delivered to the defendant Wells, did the said M. B. Andrews have full knowledge of the fact that the automobile in question was to be used for transportation of passengers for hire to and from Seymour Johnson Field, as alleged in the answer? Answer: Yes."

Judgment on the verdict for plaintiff (the court disregarding the second issue as inappropriate since it runs counter to the terms of the policy and demand for reformation not being pressed), from which the defendants appeal, assigning errors.

Langston, Allen & Taylor, A. J. Fletcher, and F. T. Dupree, Jr., for plaintiff, appellee.

Rivers D. Johnson for defendant Wells, appellant.

J. Faison Thomson and J. T. Flythe for the other defendants, appellants.

STACY, C. J. Perhaps it should be noted that the original policy, which was before the court when the issues were submitted to the jury, has no rider attached to it, as was indicated on the former appeal. Nor do the words, "passenger type," appear on the face of the policy. This, however, is not material to the case.

It is provided in the contract of insurance that notice to any agent or other person "shall not affect a waiver or a change" in any part of the contract or "estop the company from asserting any right" under the terms of the instrument, unless endorsed thereon so as to form a part thereof; and further, "that this policy embodies all agreements existing between himself (the insured) and the company or any of its agents relating to this insurance."

In the face of these provisions, and the abandonment of the prayer for reformation, the trial court was justified in disregarding the second issue as it runs counter to the written stipulations of the policy, and the defendants are declaring on the policy as written. Its submission to the jury was unnecessary, or inadvertent, as it rests upon parol evidence which varies or contradicts the terms of the written instrument. *Insurance Co. v. Morehead,* 209 N. C., 174, 183 S. E., 606; *Potato Co. v. Jenette,* 172 N. C., 1, 89 S. E., 791.

The first issue establishes exclusion from liability under the provision: "This policy does not apply: (a) while the automobile is used as a public or livery conveyance." The stipulation is not a condition working a forfeiture and subject to waiver, but an exclusion of liability or limitation on coverage. *Mills v. Ins. Co.,* 210 N. C., 439, 187 S. E., 581; *McCabe v. Casualty Co.,* 209 N. C., 577, 183 S. E., 743; *Foscue v. Ins. Co.,* 196 N. C., 139, 144 S. E., 689; *Hunt v. Casualty Co.,* 212 N. C., 28, 192 S. E., 843.

The judgment creditors, who are the real parties in interest, were awarded recoveries against the insured on the allegation that the "panel-body truck" in question "had been converted into a passenger carrying vehicle" and was being used "for . . . the carrying of passengers," at the time of the collision. Thus, they proceeded on the assertion that the insured was a common carrier, when obtaining judgments against him. They now seem to argue that the insurance company should be held liable on a different theory, or under coverage which was neither purchased nor paid for.

The judgment is not technically one *"non obstante veredicto,"* as it is designated, but one on the first issue—the second issue being immaterial, or surplusage, in the light of the record.

No reversible error has been made manifest; hence, the result:

No error.

STATE v. WALTER BEASLEY.

(Filed 9 October, 1946.)

1. Criminal Law § 14—

Where defendant formally enters a plea of guilty to a charge of a misdemeanor within the jurisdiction of the inferior trial court, on appeal to the Superior Court such plea is conclusive as to the facts, including the fact of guilt, and the review in the Superior Court is solely upon matters of law.

2. Same—

Upon appeal to the Superior Court from judgment of an inferior court entered upon defendant's plea of guilty, the Superior Court is without authority to change the judgment when no legal defect appears on the face of the record and there is no question of abuse of discretion on the part of the judge of the inferior court, or of some other matter of law affecting the form, legality or validity of the judgment.

3. Criminal Law § 68b—

The right of appeal is unlimited in this jurisdiction, and where defendant has pleaded guilty to a charge within the jurisdiction of an inferior court, his appeal stays the judgment pending final disposition and presents only questions of law for review, but may not be the basis for adding to defendant's grounds of defense or for re-opening the issue of guilt or the disposition of the case properly predicated on his plea.

APPEAL by defendant from *Burney, J.*, at August Term, 1946. Error and remanded.

The defendant was charged in the Recorder's Court of Johnston County with the possession of a still and other property designed and intended for use in the manufacture of intoxicating liquor in violation of G. S., 18-4.

The minutes of the Recorder's Court, which had jurisdiction of the offense charged, showed that the defendant, in that court, entered a plea of guilty, and that judgment was pronounced imposing sentence of four months in jail to be assigned to work on the roads under the direction of the State Highway and Public Works Commission, and that from this judgment the defendant appealed to the Superior Court.

In the Superior Court it was held that the defendant having entered in the Recorder's Court a plea of guilty to a misdemeanor within the jurisdiction of that court was bound by that plea on his appeal, and was not entitled to a jury trial in the Superior Court. The judge then heard evidence from two witnesses tending to show that the defendant had reputation for making whiskey, and that after his hearing in the Recorder's Court he had left home and had remained away for two years. The court pronounced judgment imposing sentence of 12 months on the roads.

The defendant excepted and appealed.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.
Barefoot & Trader for defendant.

DEVIN, J. In the Superior Court it was correctly ruled that the defendant's plea of guilty, formally entered in the Johnston County Recorder's Court, to the charge of a misdemeanor within the jurisdiction of that court was conclusive upon the question of his guilt, and that he was not entitled to trial by jury in the Superior Court. The plea of guilty in the Recorder's Court foreclosed any further consideration of the facts. *S. v. Crandall,* 225 N. C., 148, 33 S. E. (2d), 861, 862.

In the *Crandall case, supra,* where the facts were similar to those in the case at bar, *Justice Winborne,* writing the opinion of the Court, stated the rule in these words: "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 on the face of the record as it comes to the Superior Court on his appeal from the judgment of the inferior court, his appeal cannot call in question the facts charged, but brings up for review only matters of law, and the defendant is not entitled to a trial *de novo.*" Numerous authorities are cited in support of the principle announced. Decisions from other jurisdictions are in accord. *Commonwealth v. Mahoney,* 115 Mass., 151; *Stokes v. State,* 122 Ark., 56; *Hardy v. State,* 35 Okl., 75; *U. S. v. Ury,* 106 F. (2d), 28; 24 C. J. S., 247; 14 A. J., 952.

However, a new question is here presented. The defendant has excepted to the judgment in the Superior Court on the ground that while the defendant was held bound by his plea of guilty in the Recorder's Court and not entitled to trial *de novo,* the court upon that plea entered judgment increasing the sentence from 4 to 12 months. It is contended that in the Superior Court on appeal, unless the defendant was entitled to trial *de novo,* the hearing should have been restricted to matters of law, and that to admit additional evidence as to the facts and upon those facts increase the sentence was beyond the scope of the inquiry and the power of the court.

The question thus presented was not decided by the *Crandall case, supra,* but we think it must logically follow from the rule there enunciated, that where a defendant in an inferior court voluntarily pleads guilty to the charge of a misdemeanor within the jurisdiction of that court, and then appeals from the judgment, the only question presented to the Superior Court, which *pro hac vice* sits as an appellate court, is the legality of the judgment. Consideration of the facts is foreclosed. Only matters of law are brought up for review. The sole question pre-

sented is "Was the judgment of the inferior court according to law and within the power and jurisdiction of that court?" Unless some question of abuse of discretion on the part of the judge of the inferior court, or some other matter of law affecting the form, legality or validity of the judgment, is properly presented, or legal defect appears on the face of the record, the judge of the Superior Court is without authority to change the judgment or to exercise his own discretion as to the *quantum* of punishment.

The right of appeal is unlimited in the courts of North Carolina, and a defendant's appeal in a criminal action from a judgment based upon his plea of guilty in the inferior court where first arraigned stays the judgment pending the appeal, but this may not be held to add to his grounds of defense or to reopen the issue of his guilt or the disposition of his case properly predicated on his plea. Only questions of law inherent in the judgment appealed from may be considered. *S. v. Warren,* 113 N. C., 683, 18 S. E., 498; *S. v. Abbott,* 218 N. C., 470, 11 S. E. (2d), 539; *S. v. Calcutt,* 219 N. C., 545, 15 S. E. (2d), 9; *Commonwealth v. Mahoney,* 115 Mass., 151; 24 C. J. S., 247, 248.

For the reasons stated the cause is remanded to the Superior Court of Johnston County for judgment in accordance with this opinion.

Error and remanded.

STATE v. ED AYERS.

(Filed 9 October, 1946.)

Criminal Law § 17c—

The court may impose sentence upon a plea of *nolo contendere* as upon a plea of guilty, and defendant's contention that the court could not pronounce judgment upon such plea without first determining his guilt or innocence is without merit.

APPEAL by defendant from *Gwyn, J.,* at April Term, 1946, of AVERY.

Criminal prosecution on indictment charging violation of certain provisions of the prohibition law.

The defendant entered a plea of *nolo contendere,* and from the judgment pronounced appealed, assigning error.

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

Charles Hutchins for defendant.

PER CURIAM. The defendant contends that notwithstanding his plea of *nolo contendere,* the court could not pronounce judgment without determining his guilt or innocence. The contention is without merit. A plea of *nolo contendere* is equivalent to a plea of guilty, in so far as it gives the court power to punish; and the court may impose sentence thereon as upon a plea of guilty. *S. v. Parker,* 220 N. C., 416, 17 S. E. (2d), 475; *S. v. Burnett,* 174 N. C., 796, 93 S. E., 473.

Affirmed.

STATE v. CHARLIE BEASLEY.

(Filed 9 October, 1946.)

Criminal Law § 17c—

Defendant's plea of *nolo contendere* establishes his guilt for the purpose of punishment, and the fact that the evidence offered by the solicitor at the request of the court to inform the court of the nature of the offense and to enable the court to fix punishment, is insufficient to establish any crime, does not entitle defendant to his discharge, the guilt of accused not being at issue.

APPEAL by defendant from *Grady, Emergency Judge,* at February Term, 1946, of JOHNSTON.

Criminal prosecution on indictments charging the defendant with the unlawful possession and use of "punch board or gambling device," and with resisting an officer.

The solicitor took a *"nol pros."* on the charge of resisting an officer, and the defendant, through counsel, entered a plea of *nolo contendere* to the remaining counts. The court thereupon requested the solicitor to offer some evidence in order that the court might know the nature of the offense, and fix the punishment.

From the judgment pronounced, the defendant appeals.

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

Levinson, Pool & Batton, Paul D. Grady, Jr., and R. M. Gantt for defendant.

PER CURIAM. The defendant seeks to contend that the evidence offered, after plea, to acquaint the court with the nature of the offense fails to establish any crime, and therefore he ought to be discharged. The position is untenable. The guilt of the accused was not at issue, and the solicitor was not undertaking to make out a case. The defend-

ant's plea relieved the prosecution of this burden. *S. v. Burnett,* 174 N. C., 796, 93 S. E., 473.

Similar questions are being resolved against the defendants in *S. v. Beasley, ante,* 577, and *S. v. Ayers, ante,* 579, herewith decided. Hence, the subject judgment will be affirmed on authority of these cases.

Affirmed.

GUY C. EVANS AND WIFE, CHARLOTTE S. EVANS, v. CHARLES O'H. HORNE AND WIFE, RENA C. HORNE.

(Filed 16 October, 1946.)

1. Dedication § 6—

Where one purchases a lot with reference to a plat showing a street, which street is necessary to afford convenient ingress and egress to the lot, and the purchase is made prior to the effective date of G. S., 136-96 (8 March, 1921), the statute, by its express terms does not apply, and nonuser of such street for twenty years and the filing of a withdrawal of dedication is ineffective to terminate the easement of the purchaser or those claiming under him as against the dedicator or those claiming under him.

2. Dedication § 4—

Where the owner of land subdivides and plats it into lots and streets, and sells and conveys the lots or any of them with reference to the plat, nothing else appearing, he thereby dedicates the streets, and all of them, to the use of the purchasers, and those claiming under them, and of the public.

3. Dedication § 6—

The purchaser of a lot in a subdivision with reference to a plat showing streets acquires vested appurtenant rights therein which property rights cannot be destroyed by nonuser for twenty years and the filing of a declaration of withdrawal from dedication under G. S., 136-96.

APPEAL by defendants from *Carr, J.,* at March Term, 1946, of PITT.

Civil action to perpetually restrain defendants from "closing, obstructing or in any wise interfering with plaintiffs' use and enjoyment of" street adjacent to their property.

These facts appear to be uncontroverted:

In the year 1898 C. T. Mumford, who owned a tract of land situate in the southern section of the Town of Greenville, Pitt County, North Carolina, subdivided same into blocks, lots and streets, and caused a plat of the subdivision to be prepared, and, after amendment thereto, to be registered in the year 1917 in the office of the register of deeds for said county. The blocks were designated alphabetically, the lots were numbered and the streets named.

As shown on the plat:

(1) Blocks A, B, C and D are located parallel and adjacent to, and west of the Atlantic Coast Line Railroad.

(2) Among the streets are (a) Albemarle Avenue, which is forty feet wide and runs in general north and south direction through Blocks A, B, C and D, with a tier of lots east of it, and west of the railroad right of way, and (b) Carolina Street, which is forty feet wide and runs in general east and west direction south of Block B and north of Block C, intersecting with Albemarle Avenue and crossing the railroad right of way.

(3) Lots 19 and 20 in Block B, owned by plaintiffs, are in the tier of lots lying between Albemarle Avenue and the railroad right of way—and front on said avenue approximately 120 feet—lot No. 20 being on the northeast corner of the intersection of Albemarle Avenue and Carolina Street, and runs with the northern margin of Carolina Street east to the railroad right of way, approximately 132 feet, and lot No. 19 lying immediately north of lot No. 20.

(4) Lots 19, 20, 21 and 22 in Block C, owned by defendants, are also in a tier of lots lying between Albemarle Avenue and the railroad right of way, and front on said street—lot No. 19 being on the southeast corner of the intersection of Albemarle Avenue and Carolina Street, and runs with the southern margin of Carolina Street to the east to railroad right of way, and lots 20, 21 and 22, in order, lying immediately south of lot No. 19.

(5) Lots 19 and 20 in Block B were conveyed by C. T. Mumford and wife in 1914, and title thereto has passed by *mesne* conveyances to plaintiffs, and lots 19, 20, 21 and 22 in Block C were conveyed by C. T. Mumford and wife in 1913, and title thereto has passed by *mesne* conveyances to defendants—in each of which conveyances said lots were described with specific reference to Albemarle Avenue and Carolina Street, as shown on the plat of the subdivision.

(6) Carolina Street has been opened to public use west of the east margin of its intersection with Albemarle Avenue, but the portion east of said east margin and lying between it and the railroad right of way has not been opened to public use, and a building has been erected on that portion of Carolina Street east of the railroad, and no crossing over the railroad on said street is open to public use.

(7) In September, 1944, Mrs. J. Caroline Mumford, as widow of C. T. Mumford, who made the subdivision and originally conveyed the lots hereinabove described, together with certain other persons as heirs at law of C. T. Mumford, acting under provisions of G. S., 136-96, filed in the office of the register of deeds of Pitt County a declaration of withdrawal of that portion of Carolina Street lying between Albemarle Avenue and the railroad right of way, immediately adjacent to, and lying

between the said lots of plaintiffs on the north and the lots of defendants on the south, by which they contend title in fee simple to said portion of Carolina Street was vested in them; and thereupon they executed a deed therefor to *feme* defendant, sufficient in form to convey a fee simple title thereto.

(8) Plaintiffs deny that the declaration of withdrawal had the legal effect of vesting in declarants title to said portion of Carolina Street, and deny that *feme* defendant acquired title thereto.

Plaintiffs, in pertinent part, allege in their complaint that notwithstanding defendants have not acquired and could not legally acquire the exclusive right or title to any portion of said Carolina Street, they are now threatening to close the portion thereof described in the deed from Mrs. J. Caroline Mumford and others to *feme* defendant, and have placed obstructions thereon, thereby preventing the plaintiffs from the use of the street and thereby depriving them of the full and complete enjoyment and use of their property to which they are legally entitled. Upon these allegations, in connection with the uncontroverted facts, plaintiffs pray that defendants be perpetually restrained from closing, obstructing or in any wise interfering with their use of said portion of Carolina Street.

Defendants, by way of further answer and defense, aver: (1) That by virtue of the deed from Mrs. J. Caroline Mumford and others to *feme* defendant, she is the owner in fee simple and entitled to the possession of the land covered by said portion of Carolina Street, the *locus in quo*. (2) That the land described in said deed has never been opened to the public as a street or used as a public thoroughfare, and was not used as a street or public thoroughfare for more than twenty years prior to 31 October, 1944, and same was not used, nor was the use of it necessary as a means of ingress or egress to and from any property owned by the plaintiffs or those under whom they claim. And (3) that such rights as accrued to plaintiffs and those under whom they claim title to lands in controversy, or any interest therein or easement thereon, accrued prior to 1921 and were not prosecuted within the time prescribed by statute, and plaintiffs and their predecessors in title are, therefore, barred and estopped to claim any interest in or title to the said lands, or easement over the same, and defendants plead said statute in bar of plaintiffs' alleged cause of action.

Temporary restraining order was continued to final hearing of the cause upon the merits.

Upon the trial on the merits, the plaintiffs offered evidence substantially in conformity with the uncontroverted facts, hereinabove stated, and defendants, reserving exception to refusal of their motion for judgment as of nonsuit at close of plaintiffs' evidence, offered evidence, and excepted to refusal of their motion for judgment as of nonsuit renewed at close of all the evidence.

The case was submitted to the jury upon these issues, which the jury answered as shown:

"1. Was the strip of land designated as 'Carolina Street' on Plaintiffs' Exhibit A, between Albemarle Avenue and the right of way of the A.C.L. RR Co. ever opened and used by the public as a street, as alleged in the complaint? Answer: No.

"2. Is the continued use of said strip of land necessary to afford convenient ingress, egress and regress to the lot or parcel of land now owned by the plaintiffs as alleged? Answer: Yes.

"3. Is plaintiffs' cause of action barred by the statute of limitations as provided in General Statutes, Section 136-96, as alleged in the Answer? Answer: No."

Thereupon, the court entered judgment in which it is adjudged (1) "that the continued use of the strip of land known and designated on the map referred to in the pleadings as Carolina Street is necessary to afford convenient ingress, egress and regress to the lot or parcel of land now owned by the plaintiffs," and (2) that defendants, their heirs and assigns, be forever restrained and enjoined from in any manner closing, obstructing, or in any wise interfering with the plaintiffs' continued use of said strip of land described in the first issue, known as Carolina Street.

Defendants appeal therefrom, and assign error.

J. W. H. Roberts for plaintiffs, appellees.

Harding & Lee and J. A. Jones for defendants, appellants.

WINBORNE, J. The assignment of error mainly relied upon by appellants is to the refusal of their motions for judgment as of nonsuit aptly made in trial court. The position taken is that when those claiming under the dedicator, purportedly acting under the provisions of G. S., 136-96, entitled "Roads or streets not used within twenty years after dedication deemed abandoned," filed a declaration withdrawing the portion of Carolina Street in controversy from public or private use to which theretofore it had been dedicated, had the effect of destroying all rights of plaintiffs in and to that portion of the street. This position is untenable in the light of the verdict on the second issue. The provisions of G. S., 136-96, as therein expressly stated, have "no application in any case where the continued use of any strip of land dedicated for street or highway purposes shall be necessary to afford ingress or egress to any lot or parcel of land sold and conveyed by the dedicator of such street or highway prior to 8 March, 1921," the effective date of the statute. Hence, the jury having found that the continued use of the strip of land in question is "necessary to afford convenient ingress, egress and regress to the lot or parcel of land now owned by the plaintiffs as

alleged" the provisions of the statute, G. S., 136-96, have no application, and the challenge to the ruling on the motions for judgment as of nonsuit on this ground may not be sustained.

Moreover, in the light of the holdings of this Court in the cases of *Ins. Co. v. Carolina Beach,* 216 N. C., 778, 7 S. E. (2d), 13, and *Broocks v. Muirhead,* 223 N. C., 227, 25 S. E. (2d), 889, on the uncontroverted facts, plaintiffs would seem to be entitled to the relief demanded as a matter of law.

It is a settled principle that if the owner of land, located within or without a city or town, has it subdivided and platted into lots and streets, and sells and conveys the lots or any of them with reference to the plat, nothing else appearing, he thereby dedicates the streets, and all of them, to the use of the purchasers, and those claiming under them, and of the public. This principle is set forth and applied in both *Ins. Co. v. Carolina Beach, supra,* and *Broocks v. Muirhead, supra,* where numerous other decisions of this Court are cited.

In *Ins. Co. v. Carolina Beach, supra,* the dedicated boulevard in question was shown on original plat as being ninety-nine feet wide, and lots owned by defendant were purchased with reference to this map. Later an amended map was filed, showing the boulevard to be eighty feet in width. Plaintiffs claimed ownership of the nineteen feet not included in the boulevard as shown on latter map—and relied upon certain acts of the General Assembly incorporating the town of Carolina Beach. In reference thereto, this Court stated: "To have deprived those who purchased lots with reference to the original map, and those claiming under them, of appurtenant rights in and to the streets, for the purpose of vesting such rights in another merely for private use would run counter to provisions of the Constitution of North Carolina, Art. I, section 17, and to the 14th Amendment of the Constitution of the United States."

And in *Broocks v. Muirhead, supra,* the dedicated alley extended from one street to another, and *feme* plaintiff bought lots fronting on a certain street and extending back to the alley. One end of this alley was opened to use by plaintiffs. But other end was not so opened, and defendants obtained deed therefor, and undertook to close it. This Court, after stating the general principle as to dedication of streets as hereinabove stated, held as follows: "Applying these principles to the factual situation in hand, the first contention of defendants that the court erred in refusing to grant their motion for judgment as of nonsuit for that there is no allegation or proof of 'any special, particular, or peculiar injury of a substantial nature' to plaintiff by reason of acts of defendants of which complaint is made, is met by the holding of this Court in *Hughes v. Clark* (134 N. C., 457, 46 S. E., 956), where it is declared that 'if the streets be obstructed there is created thereby a public nuisance, and each purchaser can, by injunction or other proper proceed-

ings, have the nuisance abated, as there is in all such cases an irrebuttable presumption of law that any complaining purchaser of a lot or lots has suffered peculiar loss and injury.'

"In this connection it must be borne in mind that plaintiff, Elsie E. Broocks, is not asserting rights enjoyed by the general public. She is asserting rights which were acquired when she purchased, and by reason of her purchase of lot 19 in Block C with reference to the map of Knollcrest subdivision. By such purchase she acquired the appurtenant right to use the 16 foot alleyway, and to have same kept open and freed of obstruction for her use. So far as she, as a purchaser, is concerned, the dedication of the alleyway was complete, irrespective of whether it was opened and accepted by the governing body of the city for public use. In such case an irrebuttable presumption of law arose that she 'has suffered peculiar loss and injury.'"

It will be noted that the present action, in factual situation, is distinguishable from the cases of *Sheets v. Walsh,* 217 N. C., 32, 6 S. E. (2d), 817, and *Foster v. Atwater, ante,* 472, 38 S. E. (2d), 316.

Appellants further contend that the court erred in admitting evidence as to the reasonable uses to which plaintiffs intended to make of their lots. In the light of the holding of this Court on the main assignment of error as hereinabove stated, the intended use of the property is immaterial to the decisive questions, and the admission of the evidence to which exceptions are taken, is harmless, particularly since plaintiffs are not seeking recovery of damages.

Other assignments of error have been given due consideration, and are not sustained.

No error.

FIRST-CITIZENS BANK & TRUST COMPANY, A CORPORATION, TRUSTEE; MAGGIE E. RASBERRY; ROBERT P. RASBERRY AND WIFE, MILDRED GREEN RASBERRY; HOWELL P. RASBERRY AND WIFE, NINA WAY CREDLE RASBERRY; FRANCIS P. RASBERRY AND WIFE, CLAIR RASBERRY; AND JOSEPH C. RASBERRY, JR., v. ROBERT P. RASBERRY, JR., AN INFANT SIXTEEN YEARS OF AGE; JANE RASBERRY, AN INFANT THREE YEARS OF AGE; AND ANY AND ALL PERSONS NOT NOW IN BEING, AND ANY AND ALL PERSONS UNDER ANY DISABILITY, AND ANY AND ALL PERSONS WHOSE NAMES AND RESIDENCES ARE NOT KNOWN, WHO, BECAUSE OF OR IN ANY CONTINGENCY MAY, TO ANY DEGREE OR EXTENT BECOME INTERESTED IN THE LANDS INVOLVED IN AND FOR THE SALE OF WHICH THIS ACTION IS INSTITUTED, AND MATT H. ALLEN, GUARDIAN AD LITEM.

(Filed 16 October, 1946.)

1. Estates § 10: Trusts § 20—

A petition by the trustee and the adult beneficiaries for authorization to sell a part of the realty of the trust estate to make assets to pay debts

in order to preserve and protect the bulk of the trust is addressed to the plenary equitable jurisdiction of the court. G. S., 41-11, authorizing sale only for the purposes of reinvestment or improvement applies to suits instituted by those having vested interests in lands and not as in the instant case to a suit by the trustee invoking the equitable jurisdiction of the court over trust estates, in which the trustee is the real petitioner notwithstanding the joinder of the adult beneficiaries.

2. Trusts § 14—

Courts of equity have general, inherent, exclusive, supervisory jurisdiction over trusts and the administration thereof. In the exercise of that power they may authorize whatever is necessary to be done to preserve a trust from destruction. The prime consideration is the necessity for the preservation of the estate.

3. Trusts § 20—

The trustee filed a petition, in which the adult beneficiaries joined, seeking authorization to sell a part of the realty of the trust estate to pay debts upon allegations that due to its heavy debt load the trust estate was in a precarious financial condition and that such sale would tend to preserve and protect the bulk of the estate. The minor contingent beneficiaries and those not in being were represented by a duly appointed guardian *ad litem*. *Held:* The order of the court granting the petition upon supporting findings and conclusions made after a full hearing is within its equitable jurisdiction and is upheld.

APPEAL by defendant guardian *ad litem* from *Nimocks, J.*, at August Term, 1946, of PITT.

On 25 October, 1940, Howell P. Rasberry owned large tracts of land in Lenoir, Pitt and Jones Counties. On that date he executed a deed to the corporate plaintiff in which he conveyed said land to the grantee in trust for the uses therein stipulated. The deed included 4,500 acres, of which 2,250 are cleared, in Pitt County. The trust became effective 1 November, 1940, and is to continue during the lives of J. C. and Maggie Rasberry, parents of grantor, and for three years after the date of the death of the survivor. During the period of the trust the trustee is to have full management and control of the estate and is to disburse the profits, if any, as therein directed.

At the time of the termination of the trust the trustee is directed to convey said property in equal shares to the four sons of J. C. and Maggie Rasberry. There are certain provisos and limitations over which create contingent estates in the issue of each of said *cestuis que trustent* and in the heirs of J. C. Rasberry, should all of said sons die without issue before the termination of the trust.

In the summer of 1946 there was a tornado which damaged the buildings on the trust property to the extent of approximately $17,500. In addition thereto the estate has indebtedness in the amount of $130,145.35.

Furthermore, the holdings are too extensive to permit the profitable farming thereof.

The trustee, being of the opinion that a reduction of said debt, the repair of the buildings damaged by the tornado, and the provision of funds with which to operate the estate is necessary for the proper preservation and protection of the trust estate, petitions for an order to make sale of the less desirable parts of said land located in Pitt County to raise funds for said purposes.

All the adult *cestuis que trustent* join in the petition. Interested infants and other contingent beneficiaries are made parties defendant and are represented by a duly appointed guardian *ad litem*.

When the cause came on to be heard in the court below the judge found the facts in detail, including the following:

"10. That all persons having a vested interest in the lands sought to be sold in this action are parties plaintiff, and all other persons, including any and all persons not now in being, and any and all persons under any disability, and any and all persons whose names and residences are not known, who, because of or in any contingency may, to any degree or extent, become interested in the lands involved in and for the sale of which this action is instituted are parties defendant, have been duly served with process, and are in court for all purposes, and this suit is properly constituted and has matured for the rendition of judgment."

"12. That the interests of all the parties require, and will be materially enhanced by, a sale of the tract of land hereinbefore described, for the sale of which this action was instituted, and such sale should be made in the fall of 1946.

"13. That the real estate proposed to be sold is the least desirable to remain in the trust estate of all the real estate owned by the trust, and, therefore, it is more desirable to sell the said real estate than any other held by the trust.

"14. That the interests of all the parties require, and will be materially enhanced by the proceeds from the sale of said lands being paid into and becoming a part of the general trust estate, and particularly so because of the heavy indebtedness of said trust estate as set forth in the complaint, amounting on August 8, 1946, to the sum of One Hundred and Thirty Thousand, One Hundred and Forty-three Dollars and Thirty-five Cents ($130,143.35), which indebtedness, unless reduced, will endanger the safety of the entire trust estate, which, as near as could be ascertained on August 8, 1946, had a net worth of One Hundred and Seventy-nine Thousand, Five Hundred and Seventy-four Dollars and Twenty-seven Cents ($179,574.27). That proceeds from the sale of land is the only available method to reduce the indebtedness of said trust estate except the current income arising therefrom, which is insufficient to

protect the said trust estate. That a great portion of said indebtedness has been existing for more than two years."

It thereupon entered its order authorizing and directing the corporate plaintiff to sell the land designated in the petition at public auction and to report its proceedings to the court for confirmation or rejection of such sale or sales as may be reported. The defendant guardian *ad litem* excepted and appealed.

John G. Dawson for plaintiffs, appellees.
F. E. Wallace for defendants, appellants.

BARNHILL, J. The appellant concedes that the trust estate, due to its heavy debt load, is in a precarious financial condition and that it would be to the advantage of the *cestuis que trustent* to sell a part of the trust estate to raise funds with which to reduce the indebtedness and thus make the profitable operation of the farm land possible. He admits that the contingent remaindermen are interested in all other lands held in trust in the same way and to the same extent as they are interested in the land proposed to be sold; hence, the application of the proceeds of the property sale to the payment of debts would tend to preserve and protect the bulk of the estate and thus inure to the benefit of the contingent remaindermen as well as the other beneficial owners. Even so, he contends the authority of the court to order the sale of land so as to convey the interest of contingent remaindermen and bar any future claim on their part is limited to sales for reinvestment and improvement. In support of his position he cites and relies on G. S., 41-11.

Were sale sought by those who have a vested interest in land with contingent remainders over to persons who are not in being, this position would be sound. But such is not the case here. While the adult *cestuis que trustent* join as plaintiffs the corporate plaintiff, trustee, is the real petitioner. It is seeking a sale to raise funds for the preservation and protection of the trust estate.

G. S., 41-11, is an enabling statute authorizing those who have a vested interest in land with contingent remainders over to persons not in being to petition for and procure the sale thereof for reinvestment. It does not limit the power of the court to supervise the administration of trust estates and to enter such orders and decrees in respect thereto as circumstances may require. Hence, on this record, it is not controlling.

Courts of equity have general, inherent, exclusive, supervisory jurisdiction over trusts and the administration thereof. In the exercise of that power they may authorize whatever is necessary to be done to preserve a trust from destruction. The prime consideration is the necessity for the preservation of the estate. *Cutter v. Trust Co.*, 213 N. C., 686, 197 S. E., 542; *Johnson v. Wagner*, 219 N. C., 235, 13 S. E. (2d), 419;

Duffy v. Duffy, 221 N. C., 521, 20 S. E. (2d), 835; *Bond v. Tarboro,* 217 N. C., 289, 7 S. E. (2d), 617; *Penick v. Bank,* 218 N. C., 686, 12 S. E. (2d), 253; 21 C. J., 116; 19 Am. Jur., 152, *et seq.;* 54 Am. Jur., 224; *Re Stack,* 97 A. L. R., 316; Anno. 97 A. L. R., 325.

Equity may and will give relief against the provisions of the trust instrument to save the beneficiaries from want or to prevent the loss of the estate, arising from exigencies not contemplated by the party creating the trust, which, had they been anticipated would undoubtedly have been provided for. The court may in cases of emergency, for the preservation of the trust estate and the protection of the *cestuis,* authorize and direct the trustee to do acts which under the terms of the trust agreement and under ordinary circumstances they would have no power to do. 54 Am. Jur., 227. "To protect the rights of the beneficiaries or *cestui que trust* the court of equity will administer whatever relief may be appropriate." 19 Am. Jur., 154.

This inherent authority vested in a court of equity, in our opinion, unquestionably includes the power to direct the sale of a part of the estate whenever it is made to appear that it is necessary to do so in order to preserve and safeguard the remainder for the benefit of the *cestuis.*

The court below, after a full hearing, concluded that the proposed sale should be had; that the funds to be raised thereby are needed to preserve the estate from destruction; and that the sale would serve the best interests of all parties concerned. His conclusion is fully supported by the record. Hence the judgment below is

Affirmed.

MRS. HELEN COLT RAMSEY, FRANCIS RUSSELL COLT, J. SHERMAN RAMSEY, JR., MRS. FANNIE RUSSELL COLT, MRS. HELEN COLT RAMSEY, EXECUTRIX, AND J. SHERMAN RAMSEY, JR., EXECUTOR, v. MRS. MARION NEBEL AND HUSBAND, WILLIAM NEBEL.

(Filed 16 October, 1946.)

1. Appeal and Error § 6c (1)—

An exception to the "several rulings of the court as appear in the judgment signed by the court, and to the signing thereof" is a "broadside" exception as to all matters except the signing of the judgment, and properly presents for review only whether the judgment is supported by the facts found.

2. Reference § 10—

Upon appeal in a consent reference the Superior Court has the power to confirm the findings of the referee in whole or in part, to set aside the findings in whole or in part and substitute other findings supported by the evidence. G. S., 1-194.

3. Ejectment § 12: Estoppel § 6c—

Where the owner of a lot encroaches upon a strip of the adjacent lot and builds structures located partly thereon, the owner of the adjacent lot is not estopped by his silence and failure to object from asserting his title thereto in an action in ejectment, and does not lose his title thereto until such adverse user has continued for the twenty years necessary to ripen title by adverse possession, G. S., 1-40, the user not being under color of title.

APPEAL by defendants from *Phillips, J.,* at April, 1946, Term of WATAUGA.

This is a suit in ejectment between the owners of adjoining lots in the town of Blowing Rock. They derive their respective titles from a common source, and the controversy concerns a small strip of land along the common dividing line.

The complaint sets up, by metes and bounds, a description of the land claimed by plaintiffs, with the allegation that defendants are in the wrongful possession of a part thereof and have trespassed thereupon by structure of buildings and cutting therefrom valuable trees. The defendants answer, denying that they are in possession of, or have trespassed upon, any land belonging to plaintiffs, describing the land which they claim by metes and bounds; and allege that they have been in "peaceable, continuous, open, notorious and adverse possession" of the land under color of title for more than seven years next prior to the commencement of the action and plead the seven-year statute, G. S., 1-38, in bar of recovery. They also allege that they and those under whom they claim have been in "peaceable, notorious, continuous and adverse possession of said lands under color of title for a period of more than twenty years next prior to the commencement of this action, which said statute of limitation is specifically pleaded in bar." G. S., 1-40.

They further allege that during the time defendants were building on the strip of land in controversy, the plaintiffs well knew it and did nothing to put defendants on notice that the structure "should not be built where it was being built" and that as a matter of law, plaintiffs are therefore estopped to claim title to the land so occupied.

There was an order of survey, which was made, and maps were filed.

At April Term, 1945, by consent of parties, an order was made referring the controversy to Honorable Charles H. Hughes, Attorney at Law, who duly heard the matter upon evidence and argument, and made and reported his findings of fact and conclusions of law.

Inter alia, plaintiffs' evidence tended to show that the encroachment by defendants on the land in controversy was deliberate and with full knowledge of plaintiffs' title. Testimony by the defendant Nebel was in contradiction of plaintiffs' testimony. In view of the conclusions reached in the decision, that evidence is not set out here in detail.

More particularly bearing upon the decision, the referee found as fact that the deed under which the defendants claim did not cover the disputed strip as designated in the court map, but that the true location of the dividing line was as claimed by plaintiffs. Within his finding of fact, there is stated that the first occupancy or work of any kind done on the disputed strip was subsequent to the purchase of the companion lot by Nebel Knitting Co., predecessor of defendants in title, in 1933; as to which fact there is now no dispute. The referee, however, found as a fact that the occupancy and possession of the strip in controversy by the defendants was in good faith and without the protest of plaintiffs "until the new cottage was completed" and that the defendants were, therefore, the legal owners of the land.

In his conclusions of law, the referee points out that defendants had been in the actual and open adverse possession of the lands in dispute since the latter part of the year 1933, erecting stone walls thereupon, and a garage building, and maintaining a chicken lot, a flower garden and lawn, "without any protest or objections on the part of plaintiffs, and in 1941 and 1942 erected a cottage, a part of which was on the land in dispute"; and concludes that "by reason of such conduct the plaintiffs are now estopped to deny the right and title of defendants to the land in dispute"; and concludes that the defendants are the rightful holders of the title.

Upon the filing of this report, the plaintiffs filed specific exceptions to the findings of fact other than those fixing the true dividing line between the litigants as contended for by plaintiffs and other matters, including the date of the Nebel occupancy; but including in such exceptions the finding that the Nebel occupancy was in good faith; and also excepted to the conclusion of law that plaintiffs were now estopped to deny the defendants' title to the land now in dispute and the conclusion that the title was now in the defendants. The defendants filed no exceptions, but made a motion to confirm the report as it stood, which motion was denied, and the defendants excepted.

Passing upon this report and exceptions thereto at April Term, 1946, of Watauga Superior Court, and after hearing argument and consideration of the evidence and findings of fact and conclusions of law, the court set aside the findings of fact and conclusions of law relating to the good faith of defendants, sustained all the exceptions to the findings of fact and conclusions of law in the referee's report, and made his own findings of fact and conclusions of law with respect to the exceptive matter; *inter alia*, finding that the encroachment upon the land in controversy was deliberate and not in good faith; and concluded that the plaintiffs were the owners and entitled to the immediate possession of the lands. The report was confirmed as thus modified, and judgment was entered accordingly.

The defendants appealed, assigning as error the following: (1) The refusal of their motion for judgment confirming the referee's report; and (2) the several rulings of the court as appear in the judgment signed by the court and to the signing thereof.

Trivette & Holshouser for plaintiffs, appellees.
Louis H. Smith and Wade E. Brown for defendants, appellants.

SEAWELL, J. It is questionable whether the broadside nature of defendants' exception to the "rulings of the court as appears in the judgment signed by the court, and the signing thereof," even as somewhat expanded in the assignment of error, serves to bring before us, on this review, more than the form of the judgment to which objection is made. The exceptions do not point out any specific defect in the "rulings" or findings which might engage special attention of this Court—whether not supported by evidence, or in some particular beyond the power of the court, or otherwise legally objectionable. But treating the exceptions with the greatest liberality in this respect, we do not find them meritorious. Findings of fact by the referee to which no exception was made by defendants, and which were confirmed by the judge without alteration or substitution, including the location of the true line, want of coverage of the lands by defendants' deed, the date which the first occupancy by defendants began, array the deciding factors against the defendants and are sufficient to support the conclusions of law made by the court upon review. Whether material to this decision or otherwise, other findings of fact, differing from those found by the referee, were not without evidence to support them. In reviewing the referee's report, the judge acted within the scope of his powers under the statute, and within the rules laid down for its observance. G. S., 1-194; *Williamson v. Spivey,* 224 N. C., 311, 30 S. E. (2d), 46; *Thigpen v. Trust Co.,* 203 N. C., 291, 293, 165 S. E., 714; *Trust Co. v. Lentz,* 196 N. C., 398, 406, 145 S. E., 787; *Thompson v. Smith,* 156 N. C., 345, 347, 72 S. E., 379.

The main contention of the appellants, as developed here, is that the conduct of plaintiffs in not warning them that they were building on plaintiffs' land, or otherwise trespassing upon it, although plaintiffs had actual knowledge and frequent observation of defendants' operations, now estop plaintiffs from asserting their claim, or denying title in defendants to the lands.

Whatever may have been plaintiffs' moral or legal duty in the matter—and we do not imply that there was any—its infraction could not result in the loss to plaintiffs of their land. *Carolina R. R. Co. v. McCaskill,* 94 N. C., 746; *Boddie v. Bond,* 154 N. C., 359, 70 S. E., 730; *Holmes v. Crowell,* 73 N. C., 613; *Exum v. Cogdell,* 74 N. C., 139; *Mason v. Williams,* 66 N. C., 564; *Melvin v. Bullard,* 82 N. C., 33. It is to be

observed that although plaintiffs' deed was not at the time on record, the defendants might have assured themselves of proper respect for their neighbors' boundary by a survey of their own deed.

The statutes fix the time within which the owner of the true title must take action against those committing acts implying a claim of ownership, either under color of title or by adverse possession—G. S., 1-38, G. S., 1-40—and this cannot be abridged on the theory advanced by the appellants.

It having been found on competent evidence that the disputed strip is on plaintiffs' side of the dividing line and without any color of title thereto by the defendants, and that defendants have not occupied the same or committed other acts adverse to plaintiffs' possession prior to 1933, whereas perfection of title by adverse possession takes at least twenty years, and since it is admitted the parties hold under a common title, the judgment of the court was proper and will be sustained.

Other exceptions are without merit.

We find no error, and the judgment is

Affirmed.

THELMA H. BUTLER v. G. G. BUTLER.

(Filed 16 October, 1946.)

1. Divorce § 12—

The power of the court to allow support and counsel fees *pendente lite* to the wife in her suit against the husband for divorce or for alimony without divorce is not within the absolute discretion of the court, and generally the court must make an allowance and its discretion is confined to consideration of the necessities of the wife on the one hand and the means of the husband on the other, unless there are statutory grounds for denial or unless plaintiff, in law, has no case.

2. Same—

A prior separation agreement between the parties which provides for the payment by the husband of subsistence to the wife does not preclude the wife's right to an allowance of subsistence *pendente lite* in her suit for alimony without divorce under G. S., 50-16, since the wife is entitled to have the payments for her subsistence secured by a court order.

APPEAL by plaintiff and defendant from *Bone, J.*, 18 May, 1946, in Chambers. From NASH.

The plaintiff sued her husband for alimony and support under G. S., 50-16, *quid vide*. She alleges in her complaint specific acts of cruelty, including beating, at the hands of her husband, threats against her life, and conduct which rendered her condition intolerable and life burden-

some, and which made it necessary for her health and safety that she leave the domicile of her husband and seek safety elsewhere. It is further alleged that defendant thereafter was convicted of an assault upon her with a deadly weapon and sentenced to a prison term, which sentence was suspended and defendant placed on probation upon condition that he support her and a child of the marriage; and that in compliance with the terms of the probation, he has contributed $85 per month to the support of herself and child every month, save one, since he was placed on probation, which she admits has been adequate to maintain them while they resided with her mother.

She alleges further that she owns no property sufficient to sustain herself and son, that she is in ill health, and unable to earn a livelihood.

She further alleges that defendant has notified her that at the expiration of two years from the date of their separation he will not contribute anything for the support of herself and child; and has declared his purpose at that time to obtain a divorce from her on the grounds of two years separation.

The defendant denies material allegations of the complaint, and for a further defense sets up a separation agreement, alleged to have been made between himself and the plaintiff 1 May, 1944, which is made an exhibit to the answer. The agreement is in writing, properly signed and acknowledged, and the notary certifies that it is not injurious to the wife.

After making provision for release of any right which either spouse may have in the other's separate property, now owned or thereafter acquired, the agreement contains the following provision pertinent to the appeal and decision:

"The said husband shall pay to the said wife for the support and maintenance of herself and their said child, and for the education of said child, $37.50 on this 1st day of May, 1944, and $37.50 on the 15th day of May, 1944, and a like amount on the first and fifteenth days of June, July, August, September, and October, 1944, and $42.50 on the 1st day of November, 1944, and $42.50 on the fifteenth day of November, 1944, and a like amount on the first and fifteenth days of each calendar month thereafter during the minority of said Robert Allen Butler; when said Robert Allen Butler has attained his majority or otherwise becomes self-supporting, that an agreement shall be made between the parties hereto for the payment by said husband to said wife a fair and reasonable amount for her support and maintenance, the amount to be determined by the income of the said husband (or his earning ability), and the then respective financial needs of said husband and wife. Each party hereto reserves the right to appeal to the Resident Judge of the Second Judicial District of North Carolina for a revision in the amount to be paid to the said wife, either for the joint support and

maintenance of the said wife and the said Robert Allen Butler, or solely for the support and maintenance of said wife."

Incidental to the noted provisions is paragraph 10, as follows:

"Nothing herein contained shall be construed as limiting or restricting the right and privilege of either of the parties hereto to seek and obtain for any just and legal cause a dissolution of their marriage, provided only that the covenants and agreements herein contained with respect to the custody, support, maintenance and education of the child of the parties hereto, and with respect to the support and maintenance of said wife, shall continue and remain in full force and effect in so far as the parties hereto, and each of them, has the right and power to contract and agree as relates thereto."

Pending a hearing on the merits, the plaintiff petitioned for an allowance of support *pendente lite* and attorney's fees, and the motion was heard upon notice by Judge Bone at Chambers, 18 May, 1946, and the following order was made in the premises:

"Upon the hearing, it appears to the Court and the Court finds as facts that on or about April 23, 1944, the defendant committed an assault upon the plaintiff which resulted in his indictment and conviction in the Superior Court of Nash County at the May Term, 1944; that on May 1, 1944, plaintiff and defendant entered into a separation agreement, a true copy of which is attached to the answer of the defendant; that it is not contended by the plaintiff that said separation agreement is for any reason invalid, nor is it contended that the same has not been complied with by the defendant, but, on the contrary, it is admitted by the plaintiff that defendant is now making the payments of money provided for in said separation agreement; that defendant has expressed to plaintiff his intention to obtain an absolute divorce at the end of two years from the date of their separation and has made statements causing plaintiff to anticipate and fear that defendant will not comply with said separation agreement after obtaining a divorce; that the amounts which are now being paid to plaintiff by defendant are adequate for the support of plaintiff and the child of the marriage, and no contention is made by plaintiff that such sums are inadequate.

"The Court is of the opinion that plaintiff is not entitled, pending the trial of the issues, to an order awarding her any sum for maintenance and support of herself and the child of the marriage, but the Court finds that there are serious questions of law involved in this action, that plaintiff is without funds with which to pay counsel fees and that plaintiff is entitled to have an order requiring defendant to pay to her counsel reasonable fees, which are hereby fixed by the Court at $100.

"Now, therefore, it is by the Court ORDERED, ADJUDGED AND DECREED that plaintiff's application for maintenance and support *pendente lite* be,

and the same is hereby denied, but the defendant is ordered to pay to Wilkinson and King, attorneys for plaintiff, the sum of $100 as counsel fees, $50 of which shall be paid on or before June 1, 1946, and the remainder on or before July 1, 1946."

From this order both plaintiff and defendant appealed—the plaintiff from denial of temporary support and the defendant from the allowance of counsel fees.

Wilkinson & King for plaintiff.
Cooley & May for defendant.

SEAWELL, J. The allowance of support and counsel fees *pendente lite* in a suit by the wife against the husband for divorce or alimony without divorce is, in certain aspects, within the discretion of the court. 17 Am. Jur., 531. It is not, however, an absolute discretion to be exercised at the pleasure of the court and unreviewable. It is to be exercised within certain limits and with respect to factual conditions which are controlling. *Morris v. Morris,* 89 N. C., 109; *Moore v. Moore,* 130 N. C., 333, 44 S. E., 943; *Barker v. Barker,* 136 N. C., 316, 48 S. E., 733. Generally speaking (and excluding statutory grounds for denial), allowance of support to an indigent wife while prosecuting a meritorious suit against her husband under G. S., 50-16, for alimony without divorce—and in similar actions here and elsewhere—is so strongly entrenched in practice as to be considered an established legal right. *Miller v. Miller,* 75 N. C., 70; *Oliver v. Oliver,* 219 N. C., 299, 13 S. E. (2d), 549. In such case discretion is confined to consideration of the necessities of the wife on the one hand, and the means of the husband on the other. But to warrant such allowance the court is permitted and expected to look into the merits of the action, and would not be justified in allowing subsistence and counsel fees where the plaintiff, in law, has no case. *Brooks v. Brooks, ante,* 280; *McManus v. McManus,* 191 N. C., 740, 133 S. E., 9; *Horton v. Horton,* 186 N. C., 332, 119 S. E., 490.

The Court is of opinion that the jurisdiction of the court invoked under G. S., 50-16, is not barred by the separation agreement pleaded, and that within the frame of her present action, the plaintiff may seek such relief as she may be entitled to have.

It appears that the wife is without property or resources of her own, is in ill health and unable to earn a living. In so far as the jurisdiction of that court is concerned, the husband might have quit the payments at any time he saw fit. She was entitled to the security of a court order. Incidentally, it may be said that this intended security is, doubtless, the *raison d'etre* of the statutes themselves.

For the reasons stated, on plaintiff's appeal the case must be remanded for proceeding in accordance with this opinion; on defendant's appeal the judgment is affirmed.

On plaintiff's appeal,
Error and remanded.
On defendant's appeal,
Affirmed.

E. E. BELL ET AL. v. HARRY B. CHADWICK ET AL.

(Filed 16 October, 1946.)

1. Evidence § 42f: Seals § 2—

Where defendant admits in his answer the paragraph of the complaint alleging that defendant had executed notes or bonds as set out therein, showing the printed word "seal" in brackets at the end of the line opposite defendant's signature, the admission is that defendant executed instruments under seal and defendant is bound by the admission introduced in evidence by plaintiff.

2. Evidence § 39: Seals § 2—

Where the execution of instruments under seal is established by defendant's admission, his testimony that he did not adopt or intend to adopt, as his seal, the printed word "seal" appearing in brackets at the end of the line opposite his signature, is properly excluded as parol testimony tending to vary, modify, or contradict the terms of a written instrument.

3. Limitation of Actions § 4a—

An action upon an instrument under seal is not barred until the expiration of ten years from its date of maturity.

APPEAL by defendants, Harry B. Chadwick and wife, from *Carr, J.*, at May Term, 1946, of CRAVEN.

Civil action to recover on promissory notes or bonds and to foreclose deed of trust given to secure their payment.

It is alleged in paragraph three of the complaint that on 3 December, 1929, the defendant, Harry B. Chadwick, then unmarried, executed and delivered to plaintiffs, E. E. Bell and J. K. Warren, six promissory notes or bonds in the aggregate sum of $2,608.40 (severally listed as bonds and showing maturity dates from one to five years after date of making), "all . . . identical in language" (so far as presently material), as follows:

New Bern, N. C., December 3, 1929.

"On or before . . . after date, I promise to pay to the order of E. E. Bell and J. K. Warren . . . with interest after maturity . . . expressly

waiving any protest . . . Secured by Deed of Trust of even date herewith. For value received.

"Due . . .

HARRY B. CHADWICK (Seal)"

In the answer of defendants, the allegations of paragraph three of the complaint are admitted. The defendants further plead, however, that the notes in suit were not under seal, and were therefore barred by the three-year statute of limitations.

This action was instituted 30 August, 1940.

At the time of trial, the death of J. K. Warren was suggested, and his administratrix came in as party plaintiff and duly adopted the complaint.

In support of the defendants' plea, Harry B. Chadwick offered to testify as follows: "At the time I executed these notes it was not my intention to adopt the seal thereon as my seal. This word 'seal' didn't imply any special meaning at all to me. I didn't know what it meant at all. If Griffin or Warren knew they didn't call my attention to it. That is a printed 'seal' on the notes. I was then 29 years old. That is my signature on the notes. I never adopted the printed word 'seal' as my seal."

This evidence was excluded, and its exclusion constitutes the sole exception for consideration on the appeal.

From verdict and judgment for plaintiffs, the defendants appeal.

R. E. Whitehurst and W. B. R. Guion for plaintiffs, appellees.

R. A. Nunn and H. P. Whitehurst for defendants, appellants.

STACY, C. J. As stated above, the only question presented for decision is the competency of Chadwick's proffered testimony that in executing the notes or bonds in suit, he did not adopt, or intend to adopt, as his seal, the printed word "Seal" appearing in brackets at the end of the line opposite his signature. *Williams v. Turner,* 208 N. C., 202, 179 S. E., 806; *Allsbrook v. Walston,* 212 N. C., 225, 193 S. E., 151; *Currin v. Currin,* 219 N. C., 815, 15 S. E. (2d), 279; *Baird v. Reynolds,* 99 N. C., 469, 6 S. E., 377; *Yarborough v. Monday,* 14 N. C., 420. See, also, *Supply Co. v. Windley,* 176 N. C., 18, 96 S. E., 664.

Initially, it should be observed the defendant admitted, in answering the 3rd paragraph of the complaint—and this admission was offered in evidence—that he executed the several notes or bonds in suit, "all identical in language," and each bearing the word "Seal" opposite his signature. The allegation and admission establish the word "Seal" as a part of each instrument. They are therefore immune from amendment, modification, or contradiction by parol. *Ins. Co. v. Wells, ante,* 574;

Coleman v. Whisnant, ante, 258; *Ins. Co. v. Morehead,* 209 N. C., 174, 183 S. E., 606; *Bank v. Dardine,* 207 N. C., 509, 177 S. E., 635; Stansbury's N. C. Evidence, sec. 253.

When it is admitted, as it is here, that the defendant signed or executed several instruments under seal, he is bound by his admission. *Davis v. Crump,* 219 N. C., 625, 14 S. E. (2d), 666; *Peanut Co. v. Lucas,* 206 N. C., 922, 175 S. E., 176; *State ex rel. Lee v. Martin,* 191 N. C., 401, 132 S. E., 14; *Weston v. Typewriter Co.,* 183 N. C., 1, 110 S. E., 581; *Jones v. R. R.,* 176 N. C., 260, 97 S. E., 48; Stansbury's N. C. Evidence, sec. 177. It is true, the notes or bonds in suit contain no *in testimonium* clause, nevertheless they are alleged to be notes or bonds under seal, and this is admitted. 11 C. J. S., 404. Hence, in the instant case, the proffered testimony of the defendant Chadwick that he did not adopt, or intend to adopt, as his seal, the word "Seal" appearing in brackets at the end of the line opposite his signature, was properly excluded under the rule which prohibits the introduction of parol testimony to vary, modify, or contradict the terms of a written instrument. *Etheridge v. Palin,* 72 N. C., 213. The rule is, that "parol evidence will not be heard to contradict, add to, take from or in any way vary the terms of a contract put in writing . . . for the reason that the parties, when they reduce their contract to writing, are presumed to have inserted in it all the provisions by which they intended to be bound." *Ray v. Blackwell,* 94 N. C., 10. As against the recollection of the parties, whose memories may fail them, the written word abides. *Walker v. Venters,* 148 N. C., 388, 62 S. E., 510.

Appellees further suggest Chadwick's proffered testimony was properly excluded under the "dead man's" statute, G. S., 8-51, as it concerns a personal transaction or communication between the witness and J. K. Warren, deceased. However this may be, we think the proffered testimony was correctly excluded on other grounds.

It is conceded that if the notes or bonds in suit be under seal, the ten-year statute of limitations applies, and the action is not barred; while if they be not under seal, the three-year statute of limitations applies, and the action is barred. The notes or bonds were executed 3 December, 1929, and matured one each year for five successive years after date of making. The present action was instituted 30 August, 1940.

No error has been made to appear; consequently the verdict and judgment will be upheld.

No error.

STATE v. H. M. BOWEN.

(Filed 16 October, 1946.)

1. Criminal Law § 40a—

Where a defendant lives within six or seven miles of a town and frequently visits the municipality, a witness may properly testify as to his general reputation "around in" the town community, the phrase being sufficient to include the surrounding rural region.

2. Criminal Law § 27—

The court will take judicial notice of the size and location of a municipality of the State.

3. Automobiles § 30d—

In a prosecution for operating a motor vehicle while under the influence of intoxicants a charge that the burden is on the State to prove beyond reasonable doubt that defendant while operating the vehicle was under the influence of a sufficient quantity of intoxicants to make him lose the normal control of his mental and physical faculties and cause those faculties to be "materially" impaired, *is held* not to constitute reversible error, although the use of "appreciably" impaired is preferable.

APPEAL by defendant from *Carr, J.*, at April Term, 1946, of PITT.

Criminal prosecution instituted in recorder's court of Pitt County upon a warrant charging that defendant "did unlawfully and willfully operate a motor vehicle on the public highway of North Carolina while under the influence of alcoholic beverages or narcotic drugs, etc.," heard in Superior Court of Pitt County upon appeal thereto from judgment of recorder's court on verdict of guilty.

Verdict in Superior Court: Guilty.

Judgment: Pronounced.

Defendant appeals therefrom to Supreme Court, and assigns error.

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

Sam O. Worthington for defendant, appellant.

WINBORNE, J. Appellant stresses for error in the main two assignments:

The first arising in this manner: A witness for the State was asked the question: "Do you know the general reputation of Bowen around in the Farmville community?" to which he replied, "Yes, sir." Whereupon, to question interposed by counsel for defendant, the witness replied that defendant does not live in Farmville. But upon further questioning by the solicitor and by the court, the witness testified that defendant goes to Farmville quite often; that he lives about six or seven miles from there;

and that he comes there about two or three times a week, "I guess." Upon this the court ruled that that is a part of the community. And to the further question by the solicitor as to what is defendant's character and reputation, the witness replied: "Well, with the exception of Mr. Bowen drinking some, his character is good, but he does have the reputation of drinking." Defendant excepts to denial of his motion to strike the answer.

In this State the testimony of "a character witness is confined to the general reputation of the person whose character is attacked, or supported, in the community in which he lives—depending upon what the witness has heard or learned as to the general opinion of his standing in the community." *S. v. Steen,* 185 N. C., 768, 117 S. E., 793, and cases cited. In the light of this rule of evidence, defendant contends that the proper foundation was not laid to qualify the witness to testify as to his character, since he, the defendant, did not live in Farmville, and the professed knowledge of the witness related to the character of defendant "around in the Farmville community." However, no exception is taken to the ruling of the court that the Farmville community included the place where defendant lives. But, if there had been, we think the word "around in the community" is comprehensive enough to include the neighboring rural region in which defendant lives. The Court will take judicial notice of size and location of the town of Farmville. See *Clark v. City of Greenville,* 221 N. C., 255, 20 S. E. (2d), 56; *Mallard v. Housing Authority,* 221 N. C., 334, 20 S. E. (2d), 281.

Hence, there is no error in refusing to strike the answer of the witness.

The second relates to this portion of the charge of the court:

"It is not necessary for the State to satisfy the jury beyond a reasonable doubt that the defendant was drunk, but it is necessary that the jury be satisfied beyond a reasonable doubt, the burden being upon the State to so satisfy them, that while the defendant was driving a motor vehicle on the public highway he had in his system a sufficient quantity of some kind of intoxicant to make him lose the normal control of his mental and physical faculties and cause those faculties to be materially impaired."

While the language of this portion of the charge is not identical with that in the opinion by *Denny, J.,* in *S. v. Carroll, ante,* 237, 37 S. E. (2d), 688, it is substantially the same. The chief difference is that here the court used the clause "to be materially impaired," whereas in the *Carroll case, supra,* the words were "appreciable impairment." Webster says "appreciable" means "large or material enough to be recognized or estimated; perceptible; as an appreciable quantity"; and that "materially" means "in an important regard or degree; substantially." While the language of the rule in the *Carroll case, supra,* is preferred, we fail

to see in that used in the present case sufficient difference in meaning for the rule given in the *Carroll case, supra,* to have been misunderstood by the jury. Hence, the assignment may not be sustained.

Other assignments have been given due consideration, and are found to be without merit.

In the judgment below, we find

No error.

STATE v. LEE EDGAR BIGGERSTAFF.

(Filed 16 October, 1946.)

1. Automobiles § 30d—

In this prosecution for driving a motor vehicle while under the influence of intoxicants, an instruction that the defendant was under the influence of intoxicants if he had drunk a sufficient amount to make him think or act differently than he would otherwise have done, regardless of the amount, and that he was "under the influence" if his mind and muscles did not normally co-ordinate or if he was abnormal in any degree from intoxicants, *is held* without error.

2. Criminal Law § 78c—

In order to preserve the right to review, exceptions must be aptly noted in the record and brought forward, numbered and grouped, and assigned as error at the end of the case either before or after the judge's signature. Rule of practice in Supreme Court No. 19.

3. Same: Criminal Law § 79—

Argument set forth in the brief which is not based upon an exception duly noted in the record is unavailing.

4. Criminal Law § 53d—

Where the court aptly instructs the jury that the jury is to take its recollection of the evidence and not the court's, the court is not required to again warn the jury on this aspect in recapitulating the evidence in the absence of a request so to do.

5. Criminal Law § 53k—

An exception to the charge based upon the manner of delivery and arrangement in stating the contentions of the parties is without merit when there is no exception to its correctness in stating the law.

6. Criminal Law § 53l—

If more complete instructions in stating the contentions of the parties are desired appellant must aptly tender request therefor.

7. Criminal Law § 78e (1)—

An assignment of error on the ground that the charge "failed to state in a plain and correct manner the evidence given and to explain the law

arising thereon" is a broadside attack upon the charge and will not be considered.

APPEAL by defendant from *Phillips, J.*, at February Term, 1946, of BURKE.

The defendant was tried on a bill of indictment charging that Lee Edgar Biggerstaff "did unlawfully and wilfully operate an automobile upon the public highways of Burke County while then and there being under the influence of intoxicating liquors, or narcotic drugs," and a verdict of "guilty as charged in the bill of indictment" was returned, whereupon the defendant was sentenced to be "confined in the common jail of Burke County and assigned to work on the roads . . . for a period of six months," to which judgment the defendant excepted and appealed to the Supreme Court, assigning errors.

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

O. L. Horton for defendant, appellant.

SCHENCK, J. The first assignment of error set out in appellant's brief relates to an instruction in the charge which purports to give a definition as to what constitutes "under the influence of intoxicants," as follows: "Our Court has said that a person is 'under the influence' within the meaning of the statute where his mind and muscles do not normally coordinate or where he is abnormal to any degree, from intoxication. In a prosecution under this statute our Court has said this: On the instruction that the defendant was under the influence of intoxicating liquors, if he had drunk enough to make him act or think differently than he would have acted or thought if he had not drunk any, regardless of the amount he drank; that is what our Court has said about it." While the instruction assailed is not far, if at all, variant in effect with the definition approved in *S. v. Carroll, ante,* 237, and, we think, is a substantial compliance with the approved charge and therefore constitutes no error, still the assignment of error is untenable for the reason that the appellant has failed to take advantage of the error he contends was committed by noting an exception in the record and grouping and separately numbering the assignment of error as required by the rules of this Court.

Rule 19, Rules of the Supreme Court, provides that all exceptions relied on shall be grouped and separately numbered immediately before or after the signature to the case on appeal, and exceptions not thus set out will be deemed to be abandoned, and this Court has held that its rules must be strictly adhered to. *Owens v. Hines,* 178 N. C., 325, and cases there cited, 100 S. E., 617.

This Court has also held that its rule is not complied with by showing in the record the various exceptions numbered, and there is no assignment of error at the end of the case either before or after the judge's signature. *Jones v. Atlantic Coast Line Railroad Co.,* 153 N. C., 419, 69 S. E., 427.

In this connection attention is called to the fact that neither was an exception taken to the portion of the charge assailed nor was any exception brought forward as an assignment of error as required by the aforesaid rule. Furthermore, the fact that the defendant discussed the correctness of this charge in his brief will not bring the question of the correctness of this charge before this Court for consideration, because questions discussed in the brief only will not be considered on appeal. On this question, in the case of *S. v. Britt,* 225 N. C., 364, 367, this Court said: "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."

The next assignments of error discussed in the appellant's brief relate to exceptions 2, 3, and 4. The defendant argues that the court erred in that it did not recite correctly the testimony of both the witnesses for the State and for the defendant, and that such action on its part was prejudicial and militated against the defendant in his case before the jury. Under these exceptions, the defendant also complains that the court did not properly warn the jury that if their recollection of the testimony differed from its that they should take their own recollection thereof and be guided thereby. The court did warn the jury that they should be guided by their recollection as to all of the evidence, and the court is not required so to do in recapitulating the evidence, and in the absence of a request so to do, the charge is free from error. *S. v. Harris,* 213 N. C., 648, 197 S. E., 156.

The next assignments of error discussed in appellant's brief relate to exceptions 5, 6, 7, 8, 9, 10 and 11, taken to the statement of the contentions of the State as made in the charge. An exception to the charge based upon the manner of delivery and an arrangement in stating the contentions of the parties, without exception to its correctness in stating the law, will not be sustained. *S. v. Buffkin,* 209 N. C., 117, 183 S. E., 543. If more complete instructions in stating the contentions were desired they should have been requested by the appellant. *S. v. Hendricks,* 207 N. C., 873, 178 S. E., 557; *S. v. Wade,* 169 N. C., 306, 84 S. E., 768.

The final assignment of error, No. 12, is discussed in the appellant's brief and contains the following language: "The Court failed to state

in a plain and correct manner the evidence given and to declare and explain the law arising thereon . . ." The exception is in the nature of a broadside attack upon the charge as a whole and for that reason the Supreme Court will not consider it. *S. v. Hicks,* 130 N. C., 705, 41 S. E., 803; *S. v. Wade, supra,* and cases there cited.

The appellant having failed to show error, the judgment below must be sustained.

No error.

ROGER A. JENNINGS v. MOREHEAD CITY, A MUNICIPAL CORPORATION.

(Filed 16 October, 1946.)

1. Limitation of Actions § 15—

Defendant's allegations that plaintiff's cause of action on bond coupons had accrued more than ten years prior to the institution of the action and was barred under the provisions of G. S., 1-46, is a sufficient pleading of statute of limitations, although no specific reference is made to the particular sections of the statute applicable. G. S., 1-47 (2); G. S., 1-56.

2. Limitation of Actions §§ 16, 18—

Where defendant sufficiently pleads the statute of limitations the burden is upon plaintiff to show that his action was commenced within the time permitted by the statute, and upon his failure to do so, nonsuit is proper.

3. Limitation of Actions § 6c—

Where bond coupons are negotiable in form and payable to the bearer, and have been detached from the bonds and the bonds sold, the statute of limitations begins to run against each of them from their respective dates of maturity, and in such instance a contention that the coupons were incident to the principal obligation of the bond and were valid during the life of the bond is untenable.

APPEAL by plaintiff from *Carr, J.,* at June Term, 1946, of CARTERET. Affirmed.

This was an action to recover on certain coupons which had been originally attached to municipal bonds issued by the defendant Morehead City.

These coupons, 30 in number, dated 1925, were due and payable April and October, 1932, and April, 1933. The bonds to which these coupons had been originally attached were No. 39, maturity date October, 1934; Nos. 43, 44 and 45, maturity date October, 1935; Nos. 49, 50 and 51, maturity date October, 1936; and Nos. 55, 56 and 57, maturity date October, 1937.

Defendant pleaded the ten-year statute of limitations as a bar to recovery on these coupons, alleging "that the plaintiff's claims have matured

more than ten years next prior to the time of commencement of this action and are therefore barred under the provisions of section 1-46 of the General Statutes of North Carolina, and which bar this defendant pleads against the right of plaintiff to recover."

Plaintiff testified he became the owner of the coupons sued on in 1932; that he at one time owned the bonds to which they had been attached and had sold them. It further appeared that in 1934 or 1935 the defendant Morehead City, finding itself unable by ordinary processes to discharge its obligation evidenced by its bonds, undertook to refinance its bonded indebtedness by calling in its outstanding bonds and issuing in substitution other bonds which it was able to finance; that this plan with the aid of a bondholders' committee and the Local Government Commission was successfully consummated in 1938, and the original bonds were surrendered and canceled; that at the time plaintiff had notice of the plan of defendant to refinance its obligation but declined to allow his coupons to be included, and demanded payment in full or credit on a street assessment, which was refused.

This action was begun 14 January, 1946.

At the conclusion of plaintiff's evidence, motion for judgment of nonsuit was allowed, and plaintiff appealed.

W. R. Dalton for plaintiff, appellant.

Hamilton & McNeill and J. F. Duncan for defendant, appellee.

DEVIN, J. The judgment of nonsuit entered below was based on the ground that plaintiff's evidence showed the action was barred by the ten-year statute of limitations. Two questions are presented by the appeal: (1) Has defendant sufficiently alleged the bar of the statute of limitations? (2) If so, is action on the coupons offered in evidence barred by the statute?

1. While the defendant in pleading the ten-year statute of limitations as a bar to plaintiff's action refers to section 1-46 of the General Statutes, it will be noted that this section is the general statute relative to the periods prescribed for the commencement of actions other than for the recovery of real property, "as set forth in this article," and immediately following is the specific provision prescribing the period of ten years with respect to an action upon a sealed instrument, and the statute prescribing the period of ten years after the cause of action has accrued within which an action for relief not otherwise provided for must be commenced. G. S., 1-47 (2); G. S., 1-56.

We think the defendant has sufficiently pleaded that plaintiff's cause of action accrued more than ten years before the commencement of his action, and that his action is barred by the statute of limitations.

2. The statute of limitations having been sufficiently pleaded, the burden of proof was upon the plaintiff to show that his action was commenced within the time permitted by the statute. *Sprinkle v. Sprinkle,* 159 N. C., 81, 74 S. E., 739. This he has failed to do, and defendant's motion for judgment of nonsuit was properly allowed.

The coupons sued on were negotiable in form, payable to bearer 1 April and 1 October, 1932 and 1933, and the statute of limitations began to run against them from their respective dates of maturity. Upon nonpayment at maturity of each coupon the holder had a complete cause of action. *Amy v. Dubuque,* 98 U. S., 470; *Koshkonong v. Burton,* 104 U. S., 668; *Threadgill v. Commissioners,* 116 N. C., 616, 21 S. E., 425; *Broadfoot v. Fayetteville,* 124 N. C., 478 (494); *Hidalgo County v. Jackson,* 119 F. (2d), 108; *State v. Rorabeck,* 108 P. (2d), 601; *Dickerson v. Railroad Co.,* 103 N. J. L., 175; 62 A. L. R., 270 (Annotation); McIntosh, 148.

The plaintiff's contention that the coupons, having been originally attached to municipal bonds and representing interest obligations thereon, were incident to the principal obligation of the bond and were valid during the life of the bond, is untenable on this record. According to the plaintiff's evidence the bonds to which the coupons in suit were originally attached were sold by the plaintiff and these bonds were subsequently surrendered and canceled. The coupons sued on were presumably detached and retained by the plaintiff when the bonds were sold. They became separate and distinct obligations due and payable in April and October, 1932, and April, 1933, and were barred after the lapse of ten years from those dates. The case of *Knight v. Braswell,* 70 N. C., 709, cited by plaintiff, related to the interest charge "payable annually" incorporated in the body of a note. The obiter reference to coupons was based on two decisions of the Supreme Court of the United States which were later distinguished in *Amy v. Dubuque, supra.* The ruling below was in accord with well considered decisions in this and other jurisdictions.

The judgment of nonsuit is

Affirmed.

STATE v. ROBERT L. NASH.

(Filed 16 October, 1946.)

Criminal Law § 80b—

Where a defendant convicted of a capital felony fails to file case on appeal in the Superior Court or give appeal bond as fixed, the motion of the Attorney-General to docket and dismiss, made after expiration of the time agreed for perfecting the appeal, will be allowed after an inspection of the record proper fails to disclose error.

FERRELL *v.* WORTHINGTON.

MOTION by State to docket case, affirm judgment, and dismiss appeal.

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

STACY, C. J. At the May Term, 1946, Wake Superior Court, before Grady, Emergency Judge, the defendant herein, Robert L. Nash, was tried upon indictment charging him with the murder of one Margie Parker, which resulted in conviction of murder in the first degree and sentence of death as the law commands on such conviction. G. S., 14-17.

From the judgment thus entered, the defendant gave notice of appeal to the Supreme Court and was allowed 60 days to make up and serve his statement of case on appeal, and the solicitor was allowed 30 days thereafter to prepare and serve exceptions or countercase. Appeal bond was fixed at $50. The record fails to show that any was given.

The Clerk certifies that no case on appeal has been filed in his office; that "the time allowed . . . for filing same has expired"; and that "the Clerk has inquired of counsel for the defendant and has been informed by him that he does not intend to perfect the appeal." The motion of the Attorney-General to docket and dismiss is supported by the record, and must be allowed. *S. v. Watson,* 208 N. C., 70, 179 S. E., 455.

No error appears on the face of the record proper. *S. v. Morrow,* 220 N. C., 441, 17 S. E. (2d), 507; *S. v. Brooks,* 224 N. C., 627, 31 S. E. (2d), 754.

Judgment affirmed. Appeal dismissed.

L. C. FERRELL v. G. C. WORTHINGTON.

(Filed 30 October, 1946.)

1. Pleadings § 15—

A demurrer tests the sufficiency of the complaint, liberally construed, to allege facts constituting a cause of action, admitting for this purpose the truth of the allegations of fact, and the demurrer will be overruled unless the pleading is fatally defective. G. S., 1-151.

2. Partnership §§ 2, 9b—

Allegations to the effect that prior to the sale of the partnership assets by one partner to the other it was agreed that the contemplated sale should have no effect upon certain accounts which had been charged off the active partnership records as worthless or doubtful for income tax purposes, and that the said charged off items should be the individual property of the partners, *are held* sufficient to admit of proof that by agreement said assets became the individual property of the partners prior

to the sale and therefore were not partnership assets transferred by the bill of sale.

3. Partnership § 9b: Reformation of Instruments § 7—

Allegations to the effect that in negotiations for the sale of partnership assets by one partner to the other it was agreed that the bill of sale should not include certain accounts which had been marked off the active records of the partnership as worthless or doubtful, and that defendant partner undertook to draw up the bill of sale to effectuate this agreement, with prayer for reformation of the bill of sale so as to make it conform to the true agreement between the parties if it did not, as a matter of law, exclude such accounts from the transfer, *are held* sufficient to support an issue of mutual mistake as basis of reformation of the bill of sale.

APPEAL by plaintiff from *Thompson, J.*, at June Civil Term, 1946, of LENOIR.

Civil action for an accounting by defendant for collections of "charged off accounts" of partnership of The Cash Supply Store, withdrawn from partnership assets for individual benefit of the partners, plaintiff and defendant, heard and dismissed upon demurrer *ore tenus*.

Plaintiff, in his complaint, sets forth two causes of action upon these basic facts, summarily stated:

1. That on or about 1 October, 1924, The Cash Supply Store, a partnership composed of plaintiff, defendant and one David E. Worthington, general partners, for the purpose of engaging in time-supply business—selling livestock, fertilizers and general farm supplies on a time basis with security in the form of crop liens, chattel mortgages, real estate mortgages, and deeds of trust as well as personal security, which partnership continued until 1 January, 1938, when plaintiff and defendant acquired the interest of David E. Worthington in the partnership assets, and also in all items which had theretofore been charged off the active partnership records in the manner hereinafter set out; and thereafter plaintiff and defendant, as general and equal partners, continued to do business under the same partnership name until the sale by plaintiff to defendant hereinafter set forth.

2. That the business of the partnership reached considerable proportions, approximately $200,000 per year, and it was found appropriate and necessary for income tax purposes to charge off and eliminate from active partnership records worthless and doubtful accounts against customers which had accumulated in the conduct of the partnership, upon which collections were made from time to time; and at the time of the sale by plaintiff to defendant hereinafter set forth there remained uncollected approximately $50,000, face value, of the accounts so charged off as worthless or doubtful.

3. That on 1 December, 1942, in consideration of a stipulated sum in cash and conveyances of certain real estate owned by the partnership,

plaintiff sold and conveyed to defendant all the interest of plaintiff in the other assets of the partnership in whatever form same might be held by the partnership and as shown on its active partnership records, but not including the uncollected charged off items hereinbefore mentioned, and the agreement in respect to such sale was reduced to writing and executed by plaintiff and his wife, a copy of which being attached to and made a part of the complaint as "Plaintiff's Exhibit A." This agreement covered:

"1. All cash on hand belonging to said partnership, with the exception of the agreed and stipulated amount to be received by the said L. C. Ferrell in the division of said partnership assets. And as said amount is being concurrently paid with the execution and delivery of this indenture, the parties have agreed that it is unnecessary to here state the amount of cash so transferred.

"2. All notes and bonds, whether secured or unsecured, held by the said copartnership trading as Cash Supply Store.

"3. All open accounts, secured and unsecured, and all other evidences of indebtedness held by the said copartnership trading as Cash Supply Store.

"4. All indebtedness, of every kind, character and description, owing to the Cash Supply Store, irrespective of whether the same may be evidenced by any paper writing, account, or not, together with all benefits, rights and powers with respect to any of the indebtedness, evidenced or unevidenced, intended to be transferred by this indenture."

Upon these basic facts, plaintiff alleges, as the first cause of action in his complaint, briefly stated, (1) That when the accounts charged off and removed from the books of account of the partnership and no longer appeared therein and were withdrawn from the stated assets of the partnership, such charged off assets, for whatever they might then or thereafter be worth, became, as a matter of law, the property of the partners in their individual capacities and no longer constituted any part of the partnership assets, and the undivided moiety in same passed to defendant by reason of the aforesaid sale by plaintiff to defendant; (2) but that if it be held as a matter of law that the paper writing, of which plaintiff's Exhibit A is a copy, does cover and embrace the charged off items not shown on the active partnership records, the holding would be contrary to agreement between the parties, and in such event the effect of such holding would be inequitable and unjust to plaintiff, and he would be entitled to a modification and reformation of same to conform to the actual agreement between the parties so as to exclude therefrom any interest of plaintiff in such charged off items, and plaintiff, therefore, asks, under such conditions, for such amendment and reformation.

And, upon same basic facts, plaintiff alleges, as the second cause of action in his complaint, briefly stated:

1. That defendant proposed that one partner should sell his interest in the assets appearing on the active books and records of the partnership for certain sum of cash and conveyances of certain real estate, and that the other partner should take all of the remaining assets appearing on the active books and records of the partnership, and the balance of the partnership real estate; and that his, plaintiff's, agreement to sell was upon the express condition that the charged off items were not to be treated as a part of the partnership assets; and that thereupon defendant stated that he would have appropriate papers prepared to carry out the agreement in respect to such sale which had been reached between them as aforesaid, and the papers, including plaintiff's Exhibit A, were prepared and executed.

2. But that if it be held as a matter of law that the paper writing of which "Plaintiff's Exhibit A" is a copy, purports to cover and embrace the charged off items not shown on the active partnership records, the holding would be contrary to the true and express agreement in respect thereto, and in such event, the effect of such holding would be inequitable and unjust to plaintiff, and he would be entitled to modification and reformation of the paper writing so as to conform to the actual and true agreement between the parties and so as to exclude entirely any interest of plaintiff in such charged off items which do not appear upon the active records of the partnership operations at the time of the execution of said paper writing; and, plaintiff, therefore, asks, under such condition, for such amendment and reformation.

Plaintiff, in reply filed to answer of defendant, reiterates allegations in substantial accord with the foregoing, and adds, among other similar allegations, "that irrespective of the issue of law raised by plaintiff's first cause of action it had been specifically agreed between the plaintiff and the defendant that the sale by one of them to the other, then under consideration, should have no effect upon the charged off items and that no consideration from one of them to the other either for value or forbearance was to be given or received and that said charged off items were and would continue to be the individual property of plaintiff and defendant, were not partnership assets and such status would be unaffected by the bill of sale to be executed by one of them to the other."

Plaintiff also prayed that a receiver be appointed, which was done.

Defendant, in answer filed, controverts the allegations of the plaintiff.

Thereafter, when the case came on for trial and, after the pleadings were read, defendant interposed demurrer *ore tenus* to each of the two causes of action alleged by plaintiff. The court, being of opinion that as a matter of law the charged off accounts of the Cash Supply Store, "referred to and sued upon in the plaintiff's first cause of action, were

partnership assets and assigned and conveyed to the defendant in the contract," plaintiff's Exhibit A, and, that, therefore, plaintiff has failed to allege facts sufficient to constitute a good cause of action against defendant on said first cause of action, sustained the demurrer thereto. And the court thereupon, and in accordance therewith, sustained the demurrer to second cause of action. Judgment was accordingly entered, and further vacating the order of receivership.

Plaintiff appeals therefrom to Supreme Court and assigns error.

Allen & Allen, Sutton & Greene, and W. Frank Taylor for plaintiff, appellant.

Whitaker & Jeffress, E. R. Wooten, and F. E. Wallace for defendant, appellee.

WINBORNE, J. Appellant challenges the action of the court below in sustaining demurrer *ore tenus* to each of his alleged causes of action. This brings into focus the pleadings, complaint and reply, filed by plaintiff, and raises the question as to whether the facts alleged are sufficient to constitute causes of action.

"The office of demurrer is to test the sufficiency of the pleadings, admitting, for the purpose, the truth of allegations of facts contained therein, and ordinarily relevant inferences of fact necessarily deducible therefrom are also admitted, but the principle does not extend to admissions of conclusions or inferences of law." *Stacy, C. J.,* in *Ballinger v. Thomas,* 195 N. C., 517, 142 S. E., 761. See also *Smith v. Smith,* 225 N. C., 189, 34 S. E. (2d), 148, and cases cited.

The statute, G. S., 1-151, as applied in decisions of this Court, requires that the pleading be liberally construed, with a view to substantial justice between the parties, and every reasonable intendment must be in favor of the pleader. The pleading must be fatally defective before it will be rejected as insufficient. *Leach v. Page,* 211 N. C., 622, 191 S. E., 349; *Pearce v. Privette,* 213 N. C., 501, 196 S. E., 843. See also *Sandlin v. Yancey,* 224 N. C., 519, 31 S. E. (2d), 532.

Applying these principles to the pleadings under consideration on this appeal, we are of opinion that the facts alleged are sufficient to state causes of action. In so holding it is not necessary to decide the question of law as to whether items of account charged off and taken out of the active books of account of the partnership, then cease to be partnership assets, and become the individual property of the partners, and we make no decision. But the facts alleged are sufficient (1) to admit of proof that by agreement of the parties the charged off items were expressly segregated from other assets of the partnership, and became individual property before the sale by plaintiff to defendant, and were not to be included in the subsequent bill of sale, and (2) to support an issue of

mutual mistake as basis for reformation of the bill of sale in accordance with the allegations of the complaint. This is sufficient to meet the test of demurrer.

Hence, we hold that there is error in sustaining the demurrer *ore tenus* to both causes of action. Whether plaintiff be able to prove his allegations, remains for another day. He is entitled to the opportunity.

The judgment below is

Reversed.

MATTIE M. HICKS, INFANT, BY HER NEXT FRIEND, JAMES W. MITCHELL, v. HOME SECURITY LIFE INSURANCE COMPANY.

(Filed 30 October, 1946.)

1. Insurance § 31c—

Stipulations in a policy of life insurance that insurer should not be deemed to have knowledge of any prior policy issued by it on the life of insured unless a waiver thereof is endorsed on the policy, and that issuance of the policy should not be deemed a waiver of the provision for forfeiture for prior insurance, are ineffectual to preclude a waiver of the forfeiture provision upon a proper showing.

2. Insurance § 13c—

Waiver of a forfeiture provision in a policy of insurance is predicated on knowledge on the part of the insurer of the pertinent facts, and conduct thereafter inconsistent with an intention to enforce the condition.

3. Insurance § 31c—

The issuance of a second policy, or the continued collection and receipt of premiums thereon, with knowledge on the part of the insurer that insured has another prior policy of the company in force on his life, thus inducing insured to believe the second policy is valid, constitutes a waiver or an estoppel precluding insurer from asserting a forfeiture provision of the second policy on the ground of the existence of the prior policy, and this result obtains regardless of whether the false statement in the application in regard to prior insurance was innocently or fraudulently made.

4. Same—

Forfeiture of a policy for misrepresentation is not a penalty imposed upon insured for making a false statement, but is based on the principle that insurer has been misled by the misrepresentation to its damage, and insurer will be held to have waived forfeiture where, after acquiring knowledge of the facts, he fails to cancel the policy or forego further collection of premiums.

5. Insurance § 31b (1)—

A representation that applicant is not protected by prior insurance issued by insurer is material, and when the statement is false, insurer is entitled to avoid the second policy unless insurer waives the forfeiture

provision, regardless of whether the misrepresentation is innocently or fraudulently made.

6. Insurance § 37—

An issue as to the knowledge of insurer's soliciting agent, submitted upon the theory that such knowledge was imputed to insurer and constituted a waiver of a forfeiture provision of the policy, is correctly submitted and is not objectionable because within itself it does not completely determine the controversy, when the other issues submitted in connection therewith are sufficient for this purpose.

7. Insurance § 31c—

Waiver of forfeiture provision in a life policy is a mixed question of law and fact, and when the facts are determined the question becomes one of law.

8. Insurance § 37—

Where insurer, in an action on a life policy, makes formal tender of premiums collected by it from date of issuance of policy to the death of insured, and the verdict of the jury establishes knowledge of insurer constituting a waiver of the forfeiture relied on by insurer as a defense, the facts before the court are sufficient to support its judgment awarding recovery on the policy.

APPEAL by defendant from *Carr, J.*, at May Term, 1946, of CRAVEN.

The plaintiff brought her action through a next friend to recover on a policy of insurance on the life of her father in which she is beneficiary. The policy was issued 10 January, 1944, in the sum of $500. It contains the following provision:

"3rd. Limitations. This policy shall be void if there be in force on the life of the Insured a policy or policies previously issued by this Company unless the number of such prior policy or policies is endorsed hereon with a waiver permitting such policy or policies signed by the President, the Secretary or an Assistant Secretary, it being expressly agreed that the Company shall not in the absence of such endorsement be assumed or held to know or to have known of the existence of such prior policy or policies and that the issuance of this policy shall not be deemed a waiver of such last mentioned conditions."

At the time of the issue of this policy, there was in existence a policy on the life of the insured in which his wife, Bertha Hicks, is named as beneficiary, which policy was issued 16 September, 1940, and was concededly in force. The policy in controversy does not have the endorsement provided for in the article above quoted. In the application for the second policy occurs the direction: "17. If now insured in the Company give Policy No....., Prem....., Amt....." to which Hicks responded "No."

The plaintiff's evidence discloses that at the time Hicks took out the second policy, he told the agent, Mr. Capps, from whom it was procured,

that there was another policy on his life in this company in which his estranged, and later divorced, wife was beneficiary, and asked him to have it canceled, which he promised to do. There was evidence by the defendant to the contrary, but in view of the jury verdict, the facts are to be taken as established.

The defendant continued to collect premiums upon both policies down to the death of the insured.

Hicks died 11 February, 1945. The defendant declined to pay the policy, relying upon the above cited condition, and, after action had been begun, tendered a return of premiums paid thereupon in the sum of $23.50.

Numerous objections were taken to the admission of evidence, which we do not find it necessary to note except as stated in the opinion.

The defendant, in apt time, made demurrers to the evidence and moved for judgment as of nonsuit, which demurrers and motions were overruled and exception noted by the defendant.

The verdict was favorable to plaintiff, and from the ensuing judgment thereupon the defendant appealed, assigning as errors matters covered by his exceptions.

Charles L. Abernethy, Jr., for plaintiff, appellee.

R. E. Whitehurst and George B. Riddle, Jr., for defendant, appellant.

SEAWELL, J. A careful study of the exceptions appearing in the record leads to the conclusion that they do not disclose reversible error. We direct our attention to that phase of the case which is regarded as more important to the disposal of the appeal.

The case properly hinges upon the question of waiver: Whether the facts and circumstances of record, constituting the history of the dealings between the parties, the conduct of the insurer toward the insured, and its attitude toward the policy it issued, works a waiver of the condition which purports to render it void if at the time of its issue there is in force a previously issued policy on the life of the insured in the same company unless a properly signed waiver of the condition is endorsed on the policy.

Involved with this question is the stipulation that in the absence of such endorsement, the company shall not be assumed or held to know of the existence of such prior policy, "and that the issue of this policy shall not be deemed a waiver of such last mentioned conditions." If the conduct of the defendant was such as to mislead the insured and induce in him a belief that he was protected by a valid policy while he continued to pay the premiums—that the condition imposed in the policy had been waived—and this can be established agreeably to the rules of

evidence and standards of practice prevailing in our courts, we have no doubt that the stipulation, intended to foreclose the plea of waiver altogether by binding the insured against the existing facts upon which it arises, would likewise, and for strong reasons of public policy, become ineffectual.

Waiver of the forfeiture provision in a policy of insurance is predicated on knowledge on the part of the insurer of the pertinent facts and conduct thereafter inconsistent with an intention to enforce the condition. In *Coile v. Com. Travelers,* 161 N. C., 104, 76 S. E., 622, quoted in *Paul v. Ins. Co.,* 183 N. C., 159, 162, and in *Arrington v. Ins. Co.,* 193 N. C., 344, it is said: "A course of action on the part of the insurance company which leads the party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract." *Ins. Co. v. Eggleston,* 26 U. S., 577; *Ins. Co. v. Norton,* 96 U. S., 234.

The majority of decided cases adopt the view that where the insurer is affected with knowledge of the existence of the prior policy, either the issue of the second policy or the continued acceptance, with such knowledge, of premiums paid thereupon, will work an estoppel or constitute a waiver of the condition. *Mellick v. Metropolitan L. Ins. Co.,* 84 N. J. L., 437, 87 A., 75 (affirmed in 85 N. J. L., 727, 91 A., 1070); *Western & S. L. Life Ins. Co. v. Oppenheimer* (1907), 31 Ky. L. Rep., 1049, 104 S. W., 721; *McGuire v. Home L. Ins. Co.,* 94 Pa. Super. Ct., 457; *National Life & Acci. Ins. Co. v. House* (1937), 104 Ind. App., 403, 9 N. E. (2d), 133; *Lanigan v. Prudential Ins. Co.,* 18 N. Y. S., 287; *Clay v. Liberty Industrial L. Ins. Co.* (La.), 157 So., 838; *Wills v. Liberty Industrial L. Ins. Co.* (1935—La. App.), 159 So., 141; *Atlas v. Metropolitan L. Ins. Co.,* 181 N. Y. S., 363. What we regard as the best considered cases also hold that, notwithstanding the stipulation to the contrary, knowledge of the prior existing policy may be inferred from the fact that both policies are issued by the same company and upon the same life. Some cases hold that knowledge to the agent soliciting the insurance or receiving the application will not be imputed to the insurer unless the information is given to an agent clothed with authority to make the waiver. The contrary view has been adopted in this State. *Follette v. Accident Association,* 107 N. C., 240, 12 S. E., 370; *S. c.,* 110 N. C., 377; *Dibbrell v. Ins. Co.,* 110 N. C., 193, 14 S. E., 783; *Horton v. Ins. Co.,* 122 N. C., 498, 29 S. E., 944; *Short v. Ins. Co.,* 194 N. C., 649, 650, 140 S. E., 302; *Marsh v. Ins. Co.,* 199 N. C., 341, 154 S. E., 313; *Laughinghouse v. Ins. Co.,* 200 N. C., 434, 436, 157 S. E., 131; *Mahler v. Ins. Co.,* 205 N. C., 692, 172 S. E., 204; *Cox v. Assurance Soc.,* 209 N. C., 778, 185 S. E., 671; *Heilig v. Ins. Co.,* 222 N. C., 231,

233, 22 S. E. (2d), 429. The issue of the second policy, or the continued collection and receipt of premiums thereupon with such knowledge, whereby the insured is induced to believe he is protected by valid insurance will constitute a waiver of the statement in the application, whether innocently or falsely made, that there was no prior insurance on his life in the company. *Monahan v. Mutual L. Ins. Co.,* 103 Md., 145, 63 A., 211; *Clay v. Liberty Industrial Ins. Co., supra.*

Forfeiture of right under the policy is not imposed as a penalty for making a false statement, which the insurer may invoke at his pleasure at any time, regardless of its own antecedent conduct. It is based on the principle that the insurer has been misled to its damage. The insurer is not misled when it knows the facts; and when that knowledge exists or is acquired, it becomes the right and the duty of the insurer either to cancel the policy or forego further collection of premiums. Failure to do either will operate as a waiver. In the instant case, nothing else appearing, the representation is material, of course, as affecting the risk which the insurer is willing to take, and, whether innocently or fraudulently made, would, at the instance of the insurer, avoid the contract. *Assurance Society v. Ashby,* 215 N. C., 280, 1 S. E. (2d), 830. (In the *Ashby case, supra,* the misrepresentation was in regard to the health of the applicant, a matter which was neither presumptively nor actually within the knowledge of the insurer.) But here something else does appear—as in all cases of waiver or estoppel—and that is, the knowledge of the company that the facts are contrary to the representation.

In most cases the representation is practically indistinguishable as a separate factor in a discussion of the subject and is uniformly treated as subject to waiver.

The equities of fair dealing will not permit an insurer knowingly to collect premiums on a void policy, thereby inducing the holder to believe he is protected by valid insurance. While the premiums are punctually paid and cheerfully received, conditions may intervene which will render it impossible to procure any other insurance. One of those conditions is death.

At the risk of consuming valuable space, we venture to quote from some of the cited cases:

In *Clay v. Liberty Industrial Ins. Co., supra,* it was said: "The insurer is presumed to be cognizant of its own records. It collected premiums for fifty weeks without attempting to cancel the policy upon the ground of the prior issue of another policy, and cannot now be allowed to deny validity of the policy upon that ground."

In *Wills v. Liberty Industrial Ins. Co., supra,* it is said with regard to the insurer: "Having accepted these premiums on the second policy, with full notice of the existence of the first, they cannot avoid their obligations under it upon the defense advanced herein. 'The acceptance by

an insurance company with knowledge of facts authorizing a forfeiture or avoidance of the policy, of premiums or assessments which were in no degree earned at the time of such forfeiture or avoidance, constitutes a waiver thereof.' "

In *Monahan v. Mutual L. Ins. Co., supra,* it is said: "If the company, to serve its own purposes, saw fit to adopt an imperfect and incomplete system of recording its policies, whereby its books failed to show what, if prudently and methodically kept, they would have revealed with respect to the names of the insured, it certainly should not be permitted to set up its own ignorance resulting from its own negligence, as a valid reason for the nonapplication of the doctrine of waiver."

Pointedly refusing to give effect to a stipulation, substantially identical with that presented on this appeal, that no knowledge of the existence of the prior policy should be imputed to the company by the issuance of the second, it is said in *McGuire v. Home L. Ins. Co., supra:* "We hold that an insurance company will not be permitted to accept premiums, under a policy which it knows to be void, until the death of the insured, and then seek to avoid responsibility under it by appealing to an equivocal agreement that it shall not be held to know what it does in fact know. A provision that there shall be no waiver under such circumstances amounts to an attempt to set aside the wholesome requirement of law that good conscience must prevail in dealings between citizens."

Directed towards the same kind of stipulation, as well as generally to the subject of waiver, in *Cobbs v. Unity Industrial L. Ins. Co.* (1935), La. App., 158 So., 263, where the reasonableness of this provision was urged because the premiums on the policies involved were collected by different agents, the Court said: "No matter how many agents collected the premiums, there was ample opportunity to ascertain the fact that the two policies were in existence."

And in *Atlas v. Metropolitan L. Ins. Co., supra,* where conditions and stipulations in the policy are parallel with those now under consideration, it is said: "Receipt of premiums continuously after the issuing of the policy is . . . on familiar principles, if unexplained, conclusive evidence of a waiver of the condition."

Objection to the issues presented to the jury is not tenable. Both the evidence as to the oral statement made by the applicant to the agent and the issue framed thereupon were directed to the knowledge which might be imputed to the company because of the information given the agent, and the issue is not objectionable because within itself it did not purport to completely determine the controversy.

Waiver is a mixed question of law and fact. When the facts are determined, it becomes a question of law. In the instant case, upon an issue directed to that question, the jury found that the insurer had knowledge of the existence of the prior policy at the time it issued the second policy.

The formal tender in court of all the premiums collected upon the policy from the time of its issue to the time of the death of the insured is sufficient admission that they were duly collected and received. The court had all the facts before it which were necessary to justify and support the judgment. We find

No error.

ETTA RAY TYNDALL, BY HER NEXT FRIEND, DELLA TYNDALL, v. HARVEY C. HINES COMPANY, A CORPORATION, AND ROY LINSTER GRAY.

(Filed 30 October, 1946.)

1. Evidence § 45—

Expert testimony is not based upon facts observed by the witness, but, contrary to the general rule, is based upon facts assumed, and an expert is permitted to give his conclusion as to an ultimate fact based upon facts assumed only in scientific or technical matters in which lay jurors, by reason of lack of specialized knowledge, skill or training, are unable to make the deduction for themselves.

2. Same—

A lay witness is permitted to give his opinion as to common appearances, facts and conditions in those instances where the basic facts cannot be described so as to enable a person who is not an eyewitness to form an accurate judgment in regard thereto, provided such "shorthand" statement is description of facts observed by the witness.

3. Evidence § 46—

Lay testimony as to the speed of a vehicle is competent only when the witness' opinion is based upon his observation of the moving vehicle, and a witness may not give his estimate of speed based upon tire marks of the vehicle and conditions observed by him at the scene of the accident, both because such opinion is not based on facts within the knowledge of the witness but is a deductive conclusion from what he saw and knew, and because such opinion invades the province of the jury, the jury being competent to draw the conclusion from testimony as to the basic facts.

4. Appeal and Error § 39e—

The erroneous admission of testimony of a highway patrolman that from his observation of the tire marks and conditions at the scene of the accident the vehicle in question was traveling 50 to 60 m.p.h. must be held prejudicial when it appears that the question of excessive speed is one of the primary acts of negligence relied on in the theory of trial, especially where the court specifically refers to the incompetent conclusion in the charge.

5. Same—

The erroneous admission over objection of testimony of a witness that the vehicle in question was traveling 50 to 60 m.p.h. cannot be held harm-

less on the ground that the witness had theretofore been permitted to testify without objection that the vehicle was going at a high rate of speed, since the conclusion objected to is not in substance "the same evidence" within the meaning of the rule.

APPEAL by defendants from *Thompson, J.*, at June Term, 1946, of LENOIR.

Civil action to recover damages for personal injuries.

On 12 June, 1944, about 3 p.m., plaintiff, her sister and her smaller brother were walking single file on the left-hand shoulder of Highway 258, going toward Kinston. They were about 300 yards from the crest of a hill to their rear. The highway, after reaching the crest of the hill, curved slightly to the right.

At the same time defendant Gray was operating an ice cream truck, belonging to the corporate defendant, on said highway, going in the same direction. When the truck reached the crest of the hill it did not turn with the curve but continued in a straight direction across the left-hand lane of traffic onto the left shoulder. There it struck plaintiff and inflicted certain bodily injuries. It also struck and killed her sister. It then cut back to the right-hand shoulder, then again to the left, and stopped 224 yards from the point of impact.

Plaintiff offered evidence tending to show that the truck was being operated at from 50 to 60 m.p.h. There was evidence for defendants tending to show that the driver, just as he reached the crest of the hill, lost consciousness; that the automobile was being operated at a reasonable rate of speed, and that the steering apparatus suddenly and unexpectedly became locked or unworkable, thus preventing the driver from turning with the curve.

The usual issues of negligence and damages were submitted to the jury and answered in favor of plaintiff. The court entered judgment on the verdict and defendants appealed.

J. A. Jones and Albert W. Cowper for plaintiff, appellee.

Allen & Allen and John G. Dawson for defendants, appellants.

BARNHILL, J. About an hour after the accident, T. W. Fearing, a State highway patrolman, went to the scene of the accident to make an investigation. He gave testimony as to the marks the truck made on the shoulders of the road and upon the grass. He testified they were not brake marks but were marks made when the truck made a sudden turn, thus shifting the weight to one side or the other. He was then asked this question:

"Mr. Fearing, leaving out of consideration for the purpose of this question any reference to the distances the bodies were found from the

point of impact, and basing your opinion upon the marks you found made by the truck on the road immediately before and continuing through the point of impact and to the point where the truck was found by you, do you have an opinion satisfactory to yourself as to the rate of speed at which the truck was being driven at the time of the impact?"

Over the objection of defendants he was permitted to answer the question in the affirmative and to give his opinion that the truck was at the time being operated at a rate of speed of from 50 to 60 m.p.h.

The admission of this testimony is the basis of one of defendants' primary assignments of error. We are constrained to hold that the assignment is well advised and should be sustained.

The general rule is that a witness must speak to facts. Following this rule the courts originally confined opinion evidence to questions of science, art, or skill in some particular branch of trade and to cases of sanity and the like. *Bailey v. Poole,* 35 N. C., 404.

But this rule is too narrow to meet the needs of everyday life and to protect the rights of citizens in courts of justice. It is practically impossible to give intelligible evidence as to some facts except through the medium of an opinion. The opinion of the observer is the only practical method of placing before the jury in a general and broad way a group of facts which in detail would be difficult of description but which as a whole make up a certain conception grasped at once by the mind. *Marshall v. Telephone Co.,* 181 N. C., 292, 106 S. E., 818.

Hence there developed another well-recognized rule which permits a common observer to give testimony as to the results of his observations made at the time in regard to common appearances, facts and conditions which cannot be reproduced and made palpable to a jury, *Britt v. R. R.,* 148 N. C., 37; *Marshall v. Telephone Co., supra; Morris v. Lambeth,* 203 N. C., 695, 166 S. E., 790; *Teseneer v. Mills Co.,* 209 N. C., 615, 184 S. E., 535; *S. v. Kincaid,* 183 N. C., 709, 110 S. E., 612, or cannot be stated or described in such language as will enable persons not eye-witnesses to form an accurate judgment in regard to it. *Steele v. Coxe,* 225 N. C., 726; *Clary v. Clary,* 24 N. C., 78; 22 C. J. S., 530; *Britt v. R. R., supra; Kepley v. Kirk,* 191 N. C., 690, 132 S. E., 788; *Street v. Coal Co.,* 196 N. C., 178, 145 S. E., 11; Stansbury, N. C. Evidence, 227, sec. 122, *et seq.*

There is a distinct difference between the opinion evidence of the expert under the rule first stated and that of the layman under the second.

The expert does not speak about what he saw. He gives the ultimate fact to be deduced from facts assumed, gathered from the testimony offered. He is permitted thus to invade the province of the jury for the reason lay jurors do not possess the expert knowledge, skill, or training necessary to enable them to make the deduction for themselves.

The lay witness gives a shorthand statement, in the form of an opinion, of the facts observed, when this is the only practical method of intelligently stating what he saw. How can a witness clearly and concisely describe the rapidity of the forward motion of an object other than by stating the impression of its speed, in the terms of m.p.h., formed when he saw the object in motion? He simply gives all the general facts, which in detail would be difficult of description, in the short and understandable expression of his opinion formed at the time and based on what he observed.

So now, any person of ordinary intelligence who has had an opportunity for observation is competent to testify as to the rate of speed of an automobile or other moving object. *Hicks v. Love,* 201 N. C., 773, 161 S. E., 394; *Potter v. Transit Co.,* 196 N. C., 824, 146 S. E., 709; Anno. 70 A. L. R., 540; 94 A. L. R., 1190.

The extent of his observation goes to the weight and credibility of his testimony. *Hicks v. Love, supra; Jones v. Bagwell,* 207 N. C., 378, 177 S. E., 170; *Coach Co. v. Lee,* 218 N. C., 320, 11 S. E. (2d), 341.

Conversely one who did not see a vehicle in motion will not be permitted to give an opinion as to its speed. The "opinion" must be a fact observed. The witness must speak of facts within his knowledge. He cannot, under the guise of an opinion, give his deductive conclusion from what he saw and knew. *S. v. Thorp,* 72 N. C., 186; Stansbury, N. C. Evidence, 227, sec. 122; *Nelson v. Hedin,* 169 N. W., 37; *Everart v. Fischer,* 147 Pac., 189.

Here the witness did not see the truck in motion. He saw certain marks on the road. When he gave his estimate of speed he was not speaking of what he saw. He was giving a conclusion reached upon a consideration of the facts he observed.

He gave a plain, clear, and distinct description of the signs, marks, and conditions he found at the scene of the collision so that ordinary jurymen could readily understand and appreciate just what he saw. Hence the jury was just as well qualified as he to determine what inferences the facts about which he testified permitted or required, *Burwell v. Sneed,* 104 N. C., 118; *Cogdell v. R. R.,* 132 N. C., 852; *Marshall v. Telephone Co., supra,* and it was for them to decide.

On this record the admission of this evidence, in our opinion, was prejudicial to the defendants. The witness was a State employee whose duty it was to make a disinterested and impartial investigation of the accident. In so doing he was a representative of the State. His testimony should, and no doubt did, carry great weight with the jury.

His testimony was material to the issue being tried. Excessive and unlawful speed is paramounted in the complaint, in the testimony, and in the charge of the court as one of the primary acts of negligence relied on by plaintiff. The manner of operation of the truck, due to its speed,

was reckless and unlawful; the excessive speed caused the driver to lose control; made it impossible for him to turn with the curve and remain on the hard surface, or for plaintiff and her companions to get out of the way of the rapidly approaching vehicle. This was the theory of the trial. So then any evidence tending to prove an unlawful rate of speed had a direct bearing on the cause of action plaintiff was seeking to establish.

Furthermore, in its charge to the jury, the court made special reference to the testimony of this witness, to his official position and to his statement that the car was traveling from 50 to 60 m.p.h.

We are not inadvertent to the prior testimony of this witness that the marks he saw on the pavement "indicated that the truck was going at a high rate of speed." We are of the opinion that it is not in substance "the same evidence" thereafter given to which exception was entered within the rule stated in *Shelton v. R. R.*, 193 N. C., 670, 139 S. E., 232, and approved in *Colvard v. Light Co.*, 204 N. C., 97, 167 S. E., 472; *Lambert v. Caronna*, 206 N. C., 616, 175 S. E., 303; and *Owens v. Lumber Co.*, 212 N. C., 133, 193 S. E., 219.

Plaintiff cites and relies on 9 Blashfield (Pt. 2), 710. On this record, the principle of law there stated is not in point.

For the reason stated there must be a

New trial.

BLANCHE LAWRENCE v. CARROLL LAWRENCE.

(Filed 30 October, 1946.)

1. Divorce § 1—

Divorce *a mensa et thoro* may be granted on any one of the grounds set forth in G. S., 50-7, but only at the instance of the party injured.

2. Divorce § 5c—

In an action for divorce *a mensa et thoro* on the ground that defendant had offered such indignities to the person of plaintiff as to make her condition intolerable and life burdensome, G. S., 50-7 (4), the plaintiff must set out with particularity the language and conduct on the part of defendant relied upon, and must allege and prove that such acts were without adequate provocation on plaintiff's part.

3. Divorce § 8c—In action for divorce from bed and board, nonsuit is proper upon failure of proof that misconduct complained of was without provocation.

In this action for divorce *a mensa et thoro* and for subsistence, plaintiff wife alleged that defendant had repeatedly accused her of having sexual relations with her foster father and other men, and her evidence tended to show that all of the specific acts of abuse and misconduct complained of occurred in connection with this accusation. Plaintiff further alleged

that she had been faithful and dutiful, and that defendant's acts of abuse and misconduct were without provocation or justification, but did not specifically allege or testify that the accusation was false. *Held:* Defendant's motion for judgment as of nonsuit should have been allowed, since even if the allegation denying provocation or justification be taken as denial of the charge of infidelity, plaintiff offered no testimony in support of such denial.

APPEAL by defendant from *Carr, J.*, at June Term, 1946, of CARTERET.

This is an action for divorce *a mensa et thoro* and for support and maintenance for the plaintiff and her infant daughter, born of the marriage. Plaintiff and defendant were married 24 December, 1942, and the plaintiff left defendant on 16 March, 1945.

An order for the support of the infant child of the plaintiff and defendant, *pendente lite,* was entered in this cause at the October Term, 1945, of the Superior Court of Carteret County. An appeal was taken therefrom to this Court at the Spring Term, 1946. See *ante,* 221.

The plaintiff alleges that since about six months after the marriage of the plaintiff and defendant, the conduct of the defendant toward the plaintiff has been a course of neglect, cruelty, humiliation and insult, repeated and persisted in, especially since 1 October, 1944, making her life burdensome and her condition intolerable. She then alleges certain specific conduct and accusations on the part of the defendant as to the indignities upon which she relies for the relief sought. Among them she alleges that by reason of his misconduct she had a miscarriage on 1 March, 1945; and that on many occasions the defendant accused her of having sexual relations with her foster father and other men.

It is further alleged by the plaintiff that she has always been a faithful, patient and dutiful wife, giving the defendant no provocation or justification for the many indignities and cruelties which she has been compelled to suffer.

The plaintiff is the only child of her foster parents who adopted her when she was six months old. Her evidence tends to show that the conduct and accusations of the defendant upon which she relies for the relief sought, grew out of the defendant's objection to the numerous visits in their home by her foster parents, and particularly by her foster father. It further appears from the evidence of the plaintiff that all the specific acts and the accusations which the plaintiff sets out with particularity as indignities that made her life burdensome and her condition intolerable, occurred about the time, or after the defendant accused the plaintiff of having sexual relations with her foster father.

The defendant offered evidence tending to show that his conduct, about which the plaintiff complains, was provoked or induced by the misconduct of the plaintiff, and also offered evidence tending to show that the plaintiff did have sexual intercourse with her foster father as charged by him.

Motion for judgment as of nonsuit was made at the conclusion of the plaintiff's evidence and renewed at the close of all the evidence. Motion denied and defendant excepted.

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

"1. Were the plaintiff and defendant married, as alleged in the complaint? Ans.: Yes.

"2. Has the plaintiff been a resident of the State of North Carolina for six months next preceding the institution of this action? Ans.: Yes.

"3. Did the defendant offer such indignities to the person of the plaintiff as to render her condition intolerable and her life burdensome, as alleged in the complaint? Ans.: Yes."

Judgment was entered granting the plaintiff a divorce *a mensa et thoro* and directing the defendant to pay the costs of the action, to be taxed by the clerk. The court awarded to plaintiff the sum of $12.50 per week for the support of herself and child, Serena Dawn Lawrence; and ordered the defendant to pay on or before 29 June, 1946, the sum of $248.00 due under the previous order for the support of his child. The court further ordered the defendant to pay an additional sum of $150.00 for the benefit of plaintiff's attorney and $25.00 to cover other expenses incurred by the plaintiff in the prosecution of the cause.

The court merged with this proceedings, the *habeas corpus* proceedings instituted after the separation of the plaintiff and defendant, for the custody of Serena Dawn Lawrence. The order of custody entered in said proceedings 28 May, 1945, was modified and as modified declared to be in full force and effect.

Defendant appeals to the Supreme Court and assigns error.

Wheatly & Wheatly for plaintiff.

Charles L. Abernethy, Jr., for defendant.

DENNY, J. A divorce *a mensa et thoro* may be granted on application of the party injured on any one of the grounds set forth in G. S., 50-7. *Albritton v. Albritton,* 210 N. C., 111, 185 S. E., 762. The plaintiff in this action relies upon subsection 4 of the above statute and alleges that the defendant offered such indignities to her person as to render her condition intolerable and life burdensome.

The defendant insists that his motion for judgment as of nonsuit, made at the close of the plaintiff's evidence and renewed at the close of all the evidence, should have been granted.

The defendant contends that the allegations of the complaint, as well as the evidence offered in support thereof, are insufficient to support a verdict and judgment for divorce *a mensa et thoro.*

A careful review of the complaint and all the evidence offered in the trial below, tends to show that the conduct of the defendant and the accu-

sations made by him, upon which the plaintiff relies as the indignities which had rendered her condition intolerable and her life burdensome, grew out of the charge on the part of the defendant that the plaintiff was too intimate with her foster father. In fact the plaintiff alleges as one of the specific indignities on the part of the defendant, his repeated accusation of her immoral relationship with her foster father and with other men. But, notwithstanding her reliance upon that allegation in her complaint, she did not deny the accusation or allege it was false. Moreover, she testified that her husband had accused her in October or November, 1944, of having sexual intercourse with her foster father, but she did not testify that the accusation was not true.

It might be argued that the allegation in the complaint to the effect that the plaintiff has always been a patient and dutiful wife, giving the defendant no provocation or justification for the many indignities and cruelties which she has been compelled to suffer, is at least an indirect denial of the husband's charge of infidelity. We think, however, such a serious accusation on the part of the husband, if untrue, merits a more direct and emphatic denial. But if we should concede that this allegation in the complaint constitutes a sufficient denial of the charge of infidelity, the plaintiff offered no testimony in support of her allegation that the acts of the defendant were without adequate provocation on her part.

In an action for divorce *a mensa et thoro,* only the injured party is entitled to relief. G. S., 50-7; *Vaughan v. Vaughan,* 211 N. C., 354, 190 S. E., 492; *Carnes v. Carnes,* 204 N. C., 636, 169 S. E., 222; *Brewer v. Brewer,* 198 N. C., 669, 153 S. E., 163. And, when the wife institutes such an action she must not only set out with particularity the language and conduct on the part of her husband, upon which she relies for the relief sought, but she is also required to aver, and consequently to prove, that such acts were without adequate provocation on her part. *Pearce v. Pearce,* 225 N. C., 571, 35 S. E. (2d), 636; *Howell v. Howell,* 223 N. C., 62, 25 S. E. (2d), 169; *Pollard v. Pollard,* 221 N. C., 46, 19 S. E. (2d), 1; *Carnes v. Carnes, supra; Dowdy v. Dowdy,* 154 N. C., 556, 70 S. E., 719; *Martin v. Martin,* 130 N. C., 27, 40 S. E., 822; *Jackson v. Jackson,* 105 N. C., 433, 11 S. E., 173. The failure of the plaintiff to allege and offer evidence tending to show the defendant's charge of her infidelity was untrue and unwarranted; and to offer evidence tending to show that the other language and conduct of the defendant relied upon as indignities that made her condition intolerable and life burdensome, were without adequate provocation on her part, is fatal to her action. The verdict below cannot be sustained and the defendant's motion for judgment as of nonsuit should have been allowed.

The judgment of the court below is

Reversed.

STATE v. SAM ELLISON.

(Filed 30 October, 1946.)

1. Homicide §§ 16, 19—

Where defendant enters a plea of not guilty and does not change this plea or make formal plea of self-defense, defendant's testimony that he shot deceased does not constitute an admission or testimony that he inflicted fatal injury, nor will defendant's negative reply to a question asked on cross-examination as to what occurred after defendant "killed" deceased, amount to such an admission, and the burden rests upon the State to prove that fatal injury was inflicted by the deadly weapon in defendant's hands before the State is entitled to the presumption of malice.

2. Homicide § 27b: Criminal Law §§ 53f, 81c (2)—Where misstatement of admissions affects burden of proof, charge must be held for prejudicial error.

Where defendant testifies that he intentionally shot deceased but does not admit that he inflicted fatal injury, a charge that defendant admitted the intentional killing of deceased with a deadly weapon, raising the presumption of malice constituting the offense of murder in the second degree and placing the burden on the defendant to prove matters in mitigation or excuse, must be held for prejudicial error since it affects the burden of proof, notwithstanding plenary evidence on the part of the State tending to show that the injuries inflicted by defendant were fatal, the credibility of the State's evidence being for the jury and the court being prohibited from expressing an opinion thereon. G. S., 1-180.

3. Homicide § 19: Criminal Law § 34c—

The fact that counsel for defendant in arguing the case to the jury admitted that defendant had killed deceased with a deadly weapon is not such an admission on the part of the defendant as will relieve the State of proving that essential fact.

APPEAL by defendant from *Phillips, J.*, at April Term, 1946, of WATAUGA. New trial.

The defendant was convicted of murder in the second degree for the felonious slaying of one Howard Hockaday.

The pertinent evidence produced at the trial may be summarized as follows:

The defendant and deceased had for several years lived within a few hundred yards of each other in a small mountain community in Watauga County. A road separated their respective premises. About 6:00 p.m., 15 October, 1945, the defendant shot the deceased three times with a shotgun. The State offered evidence tending to show that as result of wounds thus inflicted the deceased shortly thereafter died. About one hundred shot struck the chest and back of deceased. At the time of the shooting defendant, according to his own testimony, was standing on the porch of his home, 5 or 6 feet from the road, or in the road according to

the State's evidence. The deceased was standing on his own land across the road, at a distance of 94 feet according to defendant's testimony, or 65 feet according to the State. It appeared that shortly before the shooting the deceased had left his home carrying a loaded rifle and had gone to the place where he was shot, in front of defendant's home, for the purpose of warning defendant to keep his hogs off his land. Defendant testified deceased had threatened his life, had shot at him twice, had earlier that afternoon gone to his home, inquired for him, and left word with defendant's wife that he would get him when he came home. Soon after defendant came home from his work deceased appeared across the road armed with a rifle. Defendant further testified that deceased called to him to come out, using insulting language, and that as he stepped to the door he picked up his automatic shotgun, and as soon as deceased saw him he raised his rifle as if to shoot, and defendant shot three times as fast as he could. According to the State's evidence the deceased turned and ran, and fell 29 feet from the place where he received the first shot, and died a short time thereafter. At the point where deceased was struck by the shot his rifle was dropped or thrown down and was found with the barrel sticking up in the ground. There was no expert testimony as to cause of death. The defendant further testified that immediately after the shooting a State's witness approached him and asked if deceased was killed, and defendant said he did not know. Defendant then left and gave himself up to the officers.

During the defendant's cross-examination he was questioned about the rifle sticking up in the ground and as to when and by whom this was done. He replied that he did not know whether he saw the rifle sticking up or not. "I don't know whether he (the deceased) stuck it there or not. I do not mean to say after I killed him he stuck the rifle up in the ground. If he did not stick the rifle up in the ground before I fired the last shot I suppose it was after he fell. I don't know after I shot him whether he stuck the rifle in the ground 29 feet away from where he fell. I don't know how far I would say he was from the rifle when he fell. . . . He fell once with the rifle. Main (a State's witness) said he stuck the rifle in the ground and kept going."

The defendant noted exception to the following portion of the court's charge to the jury: "Now, gentlemen of the jury, the defendant in this case has interposed a plea of self-defense. He admitted the killing with a deadly weapon, both while upon the stand testifying in his own behalf and through his counsel when they argued the case to you in his behalf. He admits that he killed the deceased with a deadly weapon, to wit, a shotgun. Now when this is done, there are certain legal principles which you must consider when arriving at your verdict. . . . And the burden then rests upon the defendant to show not by the preponderance of the evidence, and not beyond a reasonable doubt, but simply to the satisfac-

tion of the jury such facts and circumstances as will reduce or mitigate the offense from murder in the second degree to manslaughter or excuse it altogether, and this he must do upon evidence introduced in his own behalf and all the evidence in the case."

The jury returned verdict of guilty of murder in the second degree, and from judgment imposing prison sentence, the defendant appealed.

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

Trivette & Holshouser and Lovill & Zimmerman for defendant.

DEVIN, J. The principal assignment of error brought forward in defendant's appeal relates to the judge's charge to the jury. The instruction of which he complains was bottomed upon the view that the defendant had admitted that he killed the deceased with a deadly weapon. The judge so stated to the jury, and instructed them to consider the case from the standpoint of such admission as constituting a predetermined fact. If the court correctly interpreted the testimony of the defendant, the exception is without merit.

The defendant testified on the stand that he fired three shots with a shotgun loaded with No. 8 shot at the deceased at a distance of 94 feet, and that the deceased fell 29 feet from the place where shot, but we do not find in the record any formal admission or testimony from the defendant that the shots he fired caused the death of the deceased.

The able trial judge was doubtless influenced in his view by the expression on the part of the defendant appearing in the record: "I do not mean to say after I killed him he stuck the rifle up in the ground." But this was on cross-examination and evidently in response to questions as to the circumstance and cause of the rifle of deceased being stuck up in the ground, and apparently the word "killed" was derived from the language of the questioner and incorporated in the statement of the witness in the process of reducing the cross-examination to narrative form for the record. Also the statement quoted was negative in form and indicated a negative response to the question whether he meant the deceased had stuck the rifle in the ground after he was killed. The defendant had, when arraigned, pleaded not guilty. So far as the record shows he did not change that plea or interpose formal plea of self-defense.

From an examination of the record we reach the conclusion that the trial judge misinterpreted the testimony of the defendant and was in error in stating to the jury that the defendant had admitted that he killed the deceased with a deadly weapon, to wit, a shotgun.

If so, it necessarily follows there was prejudicial error in the instruction to the jury based on that view. In *S. v. Redman,* 217 N. C., 483,

8 S. E. (2d), 623, where a similar question was raised, it was said: "The error is harmful, therefore, for the reason that the court, acting under the misapprehension that the killing was admitted, failed to instruct the jury properly in respect to the burden of proof."

The statement by the trial judge that the defendant had admitted that he had killed the deceased with a deadly weapon dispensed with proof of that material fact and infringed upon the exclusive province of the jury. *S. v. Maxwell,* 215 N. C., 32, 1 S. E. (2d), 125. While the evidence offered by the State would seem very strongly to support the view that the shots fired by the defendant caused the death of the deceased, but in the absence of an admission by the defendant, that was a fact for the jury to find. The credibility of the witnesses, the weight to be given their testimony, the conclusion to be drawn therefrom were matters exclusively for the jury. Notwithstanding the apparent strength of the State's evidence, the jury had the power not to accept it as sufficient proof. Since the early days of statehood the principle has been imbedded in our jurisprudence that the trial court shall not give an opinion to the jury whether a fact has been sufficiently proven, "that being the true office and province of the jury." G. S., 1-180; Laws 1796, chapter 452; *S. v. Blue,* 219 N. C., 612, 14 S. E. (2d), 635.

In the absence of an admission to that effect the burden of proof was upon the State to show from the evidence beyond a reasonable doubt that the shots admittedly fired by defendant caused the death of the deceased. As was observed by *Justice Barnhill* in writing the opinion in *S. v. Redman, supra:* "While there is sufficient evidence in the record to sustain a finding by the jury that defendant killed the deceased with a deadly weapon, the jury has not been permitted to weigh and consider this evidence under instructions that the burden of so showing rested upon the State."

The instruction to the jury that the defendant had admitted he intentionally killed the deceased with a deadly weapon, relieved the State of the necessity of proving that fact. This imposed upon the defendant the burden of showing mitigation or self-defense without requiring the State, as a prerequisite, to prove beyond a reasonable doubt the intentional killing by defendant of the deceased with a deadly weapon.

While the admission or proof of an intentional killing of a human being with a deadly weapon raises presumptions against the slayer that the killing is both unlawful and done with malice, in the absence of an admission by the defendant that he killed the deceased, the intermediate steps necessary to invoke the aid of these legal presumptions must first be taken by the State. *S. v. DeGraffenreid,* 223 N. C., 461, 27 S. E. (2d), 130; *S. v. Gregory,* 203 N. C., 528, 166 S. E., 387.

The fact that counsel for defendant in arguing the case to the jury admitted he had killed the deceased with a deadly weapon may not be

regarded as such an admission on the part of the defendant as would relieve the State of proving that essential fact. *S. v. Baker,* 222 N. C., 428, 23 S. E. (2d), 340; *S. v. Redman, supra.*

We conclude that the defendant's exception to the court's instruction to the jury, for the reasons herein stated, must be sustained, and a new trial awarded.

New trial.

STATE v. MORRIS OVERCASH.

(Filed 30 October, 1946.)

1. Rape § 24—

In order for a conviction under G. S., 14-22, there must be an assault by a male upon a female with intent to commit rape, which felonious intent is the intent to gratify his passion upon her at all events against her will and notwithstanding any resistance she may make.

2. Same—

Felonious intent is alone insufficient to constitute the offense defined by G. S., 14-22, and therefore immoral advances cannot constitute the offense until they reach the point where they are offensive to the woman and constitute an assault.

3. Rape § 25—

In a prosecution for assault with intent to commit rape, an instruction which fully explains the element of felonious intent, and instructs the jury that defendant would be guilty if he laid his hands on prosecutrix with such intent, must be held for reversible error for failing to charge upon the essential element of assault, since if defendant's advances were made with the consent of prosecutrix, defendant would not be guilty of the offense.

4. Criminal Law § 81c (2)—

A charge which contains both a correct and incorrect instruction upon a material point must be held for reversible error.

APPEAL by defendant from *Clement, J.,* at August Term, 1946, of CABARRUS. New trial.

Criminal prosecution on bill of indictment charging an assault with intent to commit rape.

On the night of 23 July, 1946, defendant and prosecutrix visited several places in Concord where beer was sold and drank several bottles of beer. About twelve midnight they drove out in the country and parked off the highway near a ball field. Prosecutrix testified that defendant then tried to assault her. Defendant testified that they agreed to engage in illicit intercourse and got into the back seat of his car or taxi for that purpose, but prosecutrix, when she learned that he did not

have a contraceptive, changed her mind and he brought her home. A more detailed summary of the sordid testimony would serve no good purpose.

There was a verdict of guilty as charged in the bill of indictment. From judgment pronounced on the verdict defendant appealed.

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

C. M. Llewellyn, Z. A. Morris, Jr., and John Hugh Williams for defendant, appellant.

BARNHILL, J. The court in its charge clearly defined an assault and instructed the jury:

"It may be a simple assault, as where one man strikes another with his hand, shoves him in anger or hits him with his fist. It may be an assault with intent to commit rape. The element of that offense is, that there must be an assault, and there must be an intent on the part of the assailant to have intercourse with a female by force and in spite of any resistance she might make."

It then charged the jury further as follows:

"If a man *lays his hands on a woman* and when he does so he intends to have intercourse with her, in spite of all resistance she may make, against her will, then that is an assault with intent to commit rape. A person may be guilty of an assault with intent to commit rape at any time *he takes hold of a woman, lays his hands on her,* and when he does so intends to have intercourse with her by force and against her will, in spite of all resistance she may make. He may change his mind, her resistance might be more than he anticipates; he might be frightened away; *but if at any time he took hold of her, laid his hands on her,* and when he did so he intended to have intercourse with her by force, against her will and in spite of all resistance she might make, then the crime of assault with intent to commit rape would have been accomplished." (Italics supplied.)

Thus the court in its amplification of the definition given fully explained the intent which is an intrinsic part of the assault, but it inadvertently disregarded the essential element of unlawfulness, rudeness or violence which makes the taking hold of a female an assault. The instruction makes the mere touching of the prosecutrix, without regard to her consent, sufficient if the defendant at the time intended to ravish in the event it became necessary to do so to accomplish his purpose.

The defendant admits that he put his hands upon the prosecutrix and that he intended to have carnal knowledge of her. He insists it was with her full consent and approval.

Under the charge thus given this consent on her part is immaterial. If he intended to press his attentions to the point of sexual gratification by seduction if possible, by force if necessary, and with that intent laid his hands upon her with her full consent and approval he would be guilty.

This is not the law. An assault is the essence of the crime. G. S., 14-22. The offense is not "an attempt to commit rape" but "an assault with intent to commit" the felony. So to convict, the State must prove (1) an assault by a male upon a female (2) with intent to commit rape, and the felonious intent is the intent to gratify his passion on the person of the woman at all events against her will and notwithstanding any resistance she may make. *S. v. Hewett,* 158 N. C., 627, 74 S. E., 356; *S. v. Adams,* 214 N. C., 501, 199 S. E., 716; *S. v. Jones,* 222 N. C., 37, 21 S. E. (2d), 812.

The felonious intent alone is not sufficient; nor is a felonious intent accompanied by attentions acceptable to the woman. Hence his advances, however immoral, did not constitute an assault until they reached a point they were offensive to her.

Thus the explanation fails to explain. Instead it tends to confuse.

That the court had theretofore correctly defined the offense does not cure the error. When there are conflicting instructions to the jury upon a material point, the one correct and the other incorrect, a new trial must be granted. We may not assume that the jurors possessed such discriminating knowledge of the law as would enable them to disregard the erroneous and to accept the correct statement of the law as their guide. We must assume instead that the jury in coming to a verdict, was influenced by that part of the charge that was incorrect. *S. v. Mosley,* 213 N. C., 304, 195 S. E., 830; *Templeton v. Kelley,* 217 N. C., 164, 7 S. E. (2d), 380; *S. v. Starnes,* 220 N. C., 384, 17 S. E. (2d), 346, and cited authorities; *S. v. Walsh,* 224 N. C., 218, 29 S. E. (2d), 743.

The error in the charge entitles defendant to a new trial and it is so ordered.

New trial.

CHARLES A. CANNON, TRUSTEE, v. EUGENE T. CANNON ET AL.

(Filed 30 October, 1946.)

1. Appeal and Error § 52: Wills § 39—In this suit by trustees for advice, beneficiary held not entitled to invoke jurisdiction of the court to control administration of estate.

Where, in the trustees' action to construe a will and for advice in the administration of the testamentary trust, the decision of the Supreme Court adjudicates the matters and directs the trustees to proceed, and

holds that the administration of the trust belongs in the first instance to the trustees, *held* upon the certification of the decision to the Superior Court, the matters adjudicated are not properly before it, and, there being no additional request for instructions from the trustees, a beneficiary of the trust may not invoke the jurisdiction of the court for the purpose of giving additional instructions to the trustees or to require them to file their report with provision that any party interested might file exceptions thereto within a time specified.

2. Appeal and Error § 51a—

A decision by the Supreme Court on a prior appeal constitutes the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal.

APPEAL by plaintiffs and defendants, other than Laura Cannon Mattes, from *Sink, J.*, at February Term, 1946, of CABARRUS.

Civil action by Trustee under the will of Mary Ella Cannon for construction of will and for advice in the administration of testamentary trust.

Following remand of the case at the Fall Term, 1945, reported in 225 N. C., 611, 36 S. E. (2d), 17, it was placed on the motion docket at the February Term, 1946, Cabarrus Superior Court, for judgment on certificate of decision of Supreme Court.

The defendant, Laura Cannon Mattes, appeared at said term through counsel, filed written motion, requested additional adjudication, asked that report of the Trustees be ordered filed with the court forthwith, setting forth valuations of the trust shares and how they were made, with opportunity of interested parties to file objections; and that the cause be retained until the valuation of the trust shares are finally determined.

In accordance with the petition and motion of Laura Cannon Mattes, the following paragraphs were incorporated in the judgment of the Superior Court:

"5. 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 May 4, 1938.

"6. That the principal of each such trust share which is to be thus valued, consists of all the assets set apart by said trustees in each of said trust shares, and which were owned by the said Mary Ella Cannon at the time of her death, including the stocks listed in paragraph 15 of the complaint.

"7. The trustees are instructed to proceed promptly to make a valuation of the principal of the said trust shares based upon their market value as of May 4, 1938, and to file in this cause, within thirty days, a report setting out the valuation so made by them in sufficient detail to

show the method pursued, the assets valued and the values placed upon each of said assets.

"8. That all parties shall have thirty days after the filing of said report to file exceptions thereto, and the matter shall thereafter be heard by the Court with respect to any questions raised by exceptions filed by the parties which require a determination by the Court."

From the judgment entered, the plaintiffs and defendants, other than Laura Cannon Mattes, appeal, assigning errors.

W. H. Beckerdite for Charles A. Cannon, Trustee, and Adelaide Cannon Blair, Successor Trustee, plaintiffs, appellants.

E. T. Bost, Jr., for William C. Cannon, Mariam Cannon Hayes, Mary Ruth Cannon, Harriett McLean Cannon, Executrix and Sole Legatee of Eugene T. Cannon, as such Executrix and in her Individual Capacity, and Cabarrus Bank & Trust Company, Guardian for Charles A. Cannon, III, defendants, appellants.

J. G. Korner, Jr., for Adelaide Cannon Blair, Jay B. Douglass, Adelaide Douglass Whitley and David H. Blair, Jr., defendants, appellants.

Ratcliff, Vaughn, Hudson & Ferrell for Margaret Cannon Howell, Mary Cannon Hill, Charles H. Hill, Susan Hill Walker and Jane Hill Simpson, defendants, appellants.

E. R. Alexander, Guardian ad Litem for the Minor Defendants, Norma Louise Cannon, et al., defendants, appellants.

J. Carlyle Rutledge, Guardian ad Litem for the Unborn Issue of Adelaide Cannon Blair, et al., defendants, appellants.

John M. Robinson and Hunter M. Jones for Laura Cannon Mattes, defendant, appellee.

STACY, C. J. It was said on the former appeal that the administration of the trust belongs in the first instance to the Trustees. They have not yet determined the value of the principal of the first trust shares; nor have they had sufficient time to do so. They have been in court all the while. The matters referred to in paragraphs 5 and 6 of the judgment were not properly before the court. No additional requests for instructions have come from the Trustees, and on the facts presently appearing of record, the movent is not supported in her position, as she seems to think, by the case of *Mountain Park Institute v. Lovill,* 198 N. C., 642, 153 S. E., 114. There, no suit had been brought to construe the will or for guidance in the administration of the trust, but the action was instituted by one of the beneficiaries to require performance or to enforce the trust.

It was also held on the former appeal that in the present state of the record the court was without authority to fix the value of the trust shares

or to entertain requests for instructions similar to those now sought by movent. "A decision by the Supreme Court on a prior appeal constitutes the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal"—Headnote (6th), *Harrington v. Rawls,* 136 N. C., 65, 48 S. E., 57, cited with approval in numerous later cases, some of them collected in *Robinson v. McAlhaney,* 216 N. C., 674, 6 S. E. (2d), 517.

The trial court was doubtless misled in the matter by the way in which it was presented. No objection was interposed to his hearing the motion as filed, and indeed the appellants themselves first suggested something in addition to judgment on certificate of decision of Supreme Court G. S., 7-16. Whether this was in excess of the matters then before the court, we need not decide. Suffice it for present purposes to say authority is a prerequisite to judicial action. Jurisdiction is essential to a valid judgment. *Stancill v. Gay,* 92 N. C., 462.

Error and remanded.

PHILLIP H. LANIER v. TOWN OF WARSAW, NORTH CAROLINA, ITS OFFICIALS AS DULY ELECTED, OFFICERS, AGENTS AND EMPLOYEES.

(Filed 30 October, 1946.)

1. Injunction § 4g—

Injunction will not lie to restrain the enforcement of a municipal ordinance on the ground of unconstitutionality except when plaintiff would otherwise suffer irreparable injury to property or personal rights.

2. Same—

Injunction will not lie at the instance of operator of taxicab maintaining stand on his property adjacent to a bus station, to enjoin the enforcement of a municipal ordinance prohibiting the maintenance of taxicab stands within five hundred feet from the bus station except at one designated place.

APPEAL by plaintiff from *Carr, J.,* at July Term, 1946, of DUPLIN.

Civil action to restrain the enforcement of a city ordinance.

Plaintiff, in complaint filed, alleges in brief: That he operates a service station, adjacent to the Union Bus Station in the town of Warsaw, North Carolina, at which he sells gasoline, oil and other automobile supplies and accessories, and, in connection with and from which he operates an automobile used as a cab or taxi—engaged in hauling passengers for hire; that on 12 June, 1946, he applied for and obtained from defendant, Town of Warsaw, a license privileging him to operate said cab or taxi within the limits of the town, and commenced to operate

the same, using the property which he owns or has under lease, or a portion of it, as his cab stand or headquarters, and has built up a valuable business; that on or about 6 July, 1946, he received letter from the Mayor of the town, advising him that the Board of Commissioners of the town had enacted an ordinance in words and figures as follows:

"ORDINANCE

"BE IT ORDAINED by the Board of Commissioners of the Town of Warsaw, North Carolina, that the lot known as the Fred Rhea Lot on the east side of College Street, in front of the Bus Station and the Town Hall, be and the same is hereby designated as the parking lot for all Taxi Cabs, conveying passengers to and from the Bus Station, and it shall be unlawful for any Taxi Cab, licensed by the Town of Warsaw, transporting passengers to and from said Bus Station, to park or to receive or deliver passengers at any point, other than the Rhea Lot within five hundred (500) feet of said Bus Station.

"That any person, firm or corporation found guilty of the violation of this ordinance shall be guilty of a misdemeanor and be punished by a fine of not more than $50.00 or imprisoned for not more than thirty days, and in addition thereto the Commissioners of the Town of Warsaw, shall have the power to revoke the license of any driver found guilty of any violation thereof.

"This ordinance adopted at a regular meeting of the Commissioners of the Town of Warsaw, held on the 5th day of July, 1946, and shall be in full force and effect for and after 12:15 A. M. on July 6th, 1946"; that thereafter he received a passenger on "bus or taxicab at his stand," located on his said property, and was arrested therefor and tried before the Mayor of the town and was found guilty of violating the alleged ordinance, and fined, from which judgment he appealed to the General County Court for Duplin County, and was advised by the Mayor that, upon a second violation he would be arrested, and his privilege license as a taxicab operator would be revoked and canceled by the town; that the ordinance is unconstitutional, and a violation of his constitutional rights, and deprives him of his property rights without due process of law, to his irreparable injury. Whereupon, he prays that the Town of Warsaw, its employees, servants and agents be restrained and enjoined from enforcing or attempting to enforce the ordinance—and that the same be declared unconstitutional and invalid.

Defendant demurred *ore tenus* to the complaint.

From judgment sustaining the demurrer, plaintiff appeals to Supreme Court and assigns error.

L. A. Wilson for plaintiff, appellant.

E. Walker Stevens and Rivers D. Johnson for defendant, appellee.

WINBORNE, J. It is a general principle of law that injunction does not lie to restrain the enforcement of an alleged invalid municipal ordinance, and ordinarily the validity of such ordinance may not be tested by injunction. *Thompson v. Lumberton,* 182 N. C., 260, 108 S. E., 722; *Turner v. New Bern,* 187 N. C., 541, 122 S. E., 469; *Flemming v. Asheville,* 205 N. C., 765, 172 S. E., 362; *Suddreth v. Charlotte,* 223 N. C., 630, 27 S. E. (2d), 650; *Jarrell v. Snow,* 225 N. C., 430, 35 S. E. (2d), 273.

However, this principle is subject to the exception that equity will enjoin a threatened enforcement of an alleged unconstitutional ordinance when it is manifest that otherwise property rights or the rights of persons would suffer irreparable injury. *Advertising Co. v. Asheville,* 189 N. C., 737, 128 S. E., 149. See also *Clinard v. Winston-Salem,* 217 N. C., 119, 6 S. E. (2d), 867, and cases cited.

In the present action we are of opinion that the general principle is applicable, and that the case does not come within the limits of the exception thereto. Such was the case in *Suddreth v. Charlotte, supra,* where an ordinance pertaining to the licensing and regulation of taxicabs operated for hire was under consideration. There this Court adhered to the general principle but in its discretion expressed an opinion on the merits of the case, which is pertinent to case in hand.

The judgment below is

Affirmed.

STATE v. HERMAN MATTHEWS AND CALVIN COOLIDGE WILLIAMS.

(Filed 30 October, 1946.)

1. Criminal Law § 78d (1)—

A motion to strike a question and answer is ineffectual to present the competency of the evidence for review when there is no prior objection to the question and answer.

2. Criminal Law § 31c—

A witness who has observed defendant, and has had reasonable opportunity of forming an opinion satisfactory to himself, may give his opinion as to the sanity of the defendant or his ability to understand the difference between right and wrong, though he may not invade the province of the jury by testifying as to his opinion as to defendant's mental capacity to commit a particular crime.

3. Criminal Law § 5a—

The test of mental responsibility for crime is not low mentality but the capacity to distinguish between right and wrong.

4. Homicide § 27h—

Where all the evidence tends to show murder committed in the perpetration of a robbery pursuant to a conspiracy and that both defendants were present and participated in the crime, the court properly limits the jury to verdicts of guilty of murder in the first degree or not guilty.

APPEAL by defendants from *Thompson, J.*, at April Term, 1946, of SAMPSON. No error.

The defendants were indicted for the murder of one John Addison. The jury returned verdict of guilty of murder in the first degree. From judgment imposing sentence of death, the defendants appealed.

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

J. Faison Thomson and Walter T. Britt for defendants.

DEVIN, J. The evidence offered at the trial showed that the murder was committed in the perpetration of a robbery and that both defendants were present and participated in the crime. The defendants made confessions at the time of their arrest, giving the details of the slaying of deceased with a shotgun for the purpose and in the course of robbing him, and that this was pursuant to a concerted plan conceived and consummated by the defendants. They lured the deceased into the woods under pretext of selling him whiskey, and there they told him to cross his arms behind him and shot him, killing him instantly. Then they robbed his body. The confessions of the defendants were admitted without objection. Neither of them went on the stand.

The defendants were young. At the time of the crime defendant Matthews was 18 years of age and Williams 17. Evidence was offered in their behalf that the mentality of both was of a low order. A mental expert testified, after examining them at the time of the trial, that both were border-line cases, with mental age of nine years and six months. The father of defendant Matthews said he was "frenzied minded," and Williams' father said his son was "frazzle minded." In rebuttal the State offered several witnesses who had known defendants for some time and for whom in several instances the defendants had worked, that the mental capacity of the defendants was apparently normal for persons of their age, and that in the opinion of the witnesses they had sufficient mental capacity to know right from wrong.

The defendants noted exception to the testimony of several of these non-expert witnesses on the ground that it was not competent for them to give in evidence their opinions as to the ability of the defendants to know right from wrong. It appears that in each instance no objection was made to the question or answer but only to the denial of a subse-

quent motion to strike the question and answer. The objection came too late. *S. v. Stancill,* 178 N. C., 683, 100 S. E., 241. But we think the evidence was competent. It is well settled in this jurisdiction that a witness who has observed another and had reasonable opportunity of forming an opinion satisfactory to himself as to his mental condition, may express an opinion as to his sanity or his ability to understand the difference between right and wrong. *S. v. Harris,* 223 N. C., 697, 28 S. E. (2d), 232; *S. v. Hawkins,* 214 N. C., 326 (333), 199 S. E., 284; *S. v. Nall,* 211 N. C., 61, 188 S. E., 637; *S. v. Keaton,* 205 N. C., 607, 172 S. E., 179; *S. v. Jones,* 203 N. C., 374, 166 S. E., 163; *S. v. Hauser,* 202 N. C., 738, 164 S. E., 114. "His objections that non-experts were allowed to express opinions upon his sanity or ability to know the difference between right and wrong are not well founded." *S. v. Stefanoff,* 206 N. C., 443, 174 S. E., 411.

Furthermore, there was no evidence in this case that either of the defendants was insane, or was unable to distinguish between right and wrong. The mental expert offered by the defendants gave it as his impression that they did know right from wrong. The defendants' evidence pointed to low mentality, but fell short of indicating mental irresponsibility or incapacity to commit crime. *S. v. Haywood,* 61 N. C., 376. However, the rule which permits opinion evidence as to the sanity of a person charged with crime, when his mental responsibility is in issue, may not be extended to permit a witness to testify whether defendant had mental capacity to commit the particular act charged, or to render competent opinion evidence which invades the province of the jury as to defendant's capacity for a particular crime. *S. v. Hauser,* 202 N. C., 738, 164 S. E., 114; *S. v. Journegan,* 185 N. C., 708, 117 S. E., 27; *In re Will of Lomax,* 224 N. C., 459, 31 S. E. (2d), 369.

Low mentality is not the test of responsibility for crime. *S. v. Jenkins,* 208 N. C., 740, 182 S. E., 324. The test of responsibility is the capacity to distinguish between right and wrong at the time and in respect of the matter under investigation. *S. v. Hairston,* 222 N. C., 455, 23 S. E. (2d), 885; *S. v. Potts,* 100 N. C., 457, 6 S. E., 657. "He who knows the right and still the wrong pursues is amenable to the criminal law." *S. v. Harris,* 223 N. C., 697, 28 S. E. (2d), 232.

Under the evidence in this case the trial court properly limited the possible verdicts of the jury to murder in the first degree or not guilty. *S. v. Mays,* 225 N. C., 486, 35 S. E. (2d), 494; *S. v. Miller,* 219 N. C., 514, 14 S. E. (2d), 522; G. S., 14-17.

Exceptions were noted to the judge's charge to the jury, but a careful examination of the portions criticized, as well as the entire charge, fails to disclose error. The court's instructions both as to the facts necessary to be found by the jury before they could convict the defendants or either

of them, as well as his instructions on the question of their mental responsibility, were in substantial accord with the uniform decisions of this Court. *S. v. Murray,* 216 N. C., 681, 6 S. E. (2d), 513; *S. v. Mays, supra; S. v. Cooper,* 170 N. C., 719, 87 S. E., 50; *S. v. Harris, supra; S. v. Hairston, supra; S. v. Miller, supra.*

We think the comment of the present *Chief Justice* in *S. v. Wingler,* 184 N. C., 747, 115 S. E., 59, is appropriate in this case. The only error we find in the record is the great error of the defendants in feloniously slaying the inoffensive victim of their lust for robbery. This error we have no power to correct. The only extenuating circumstance is the youth of the defendants, but that is not a matter for the consideration of this Court, since they possessed capacity to commit the crime charged, and were in law responsible for their wrongful acts.

In the trial we find

No error.

CHARLIE CRAIN AND WIFE, MARY BELL CRAIN, v. J. H. HUTCHINS AND J. C. RAMSEY, TRUSTEE.

(Filed 30 October, 1946.)

1. Mortgages § 30b—

Where the purchaser of notes secured by a deed of trust seeks foreclosure and also recovery for improvements placed on the property under trustor's agreement to convey the equity of redemption to him, his failure to establish a valid contract to convey does not defeat his right to foreclosure upon default, the contract to convey being relevant only to the issue of improvements.

2. Same—

Anyone may purchase negotiable notes secured by a deed of trust without giving rise to the defense of voluntary payment.

3. Betterments § 7—

The purchaser of notes secured by a deed of trust who seeks to recover for improvements placed upon the lands by him under an agreement by the trustor to convey, has the burden of proof on the issue.

4. Trial § 31d: Appeal and Error § 39h—

A charge which fails to instruct the jury as to the burden of proof upon one of the issues must be held for prejudicial error, since the burden of proof is a substantial right.

APPEAL by plaintiffs from *Alley, J.,* at April Term, 1946, of MADISON.

This is a civil action brought by the plaintiffs to cancel two notes of $250.00 each and deed of trust securing same executed by them, and to

restrain foreclosure sale already advertised under said deed of trust, wherein it is alleged that they had paid said notes by performing certain work and furnishing certain articles, under separate contracts, tried upon the following issues:

"1. Did the plaintiffs and the defendant, J. H. Hutchins, enter into an agreement known as the substitute agreement under the terms of which it was agreed that the plaintiffs, by their own labor and own expense for a period of five years would improve the farm of the defendant in the way of cutting ditches, covering up fills, grubbing lands, and clearing lands in consideration that the defendant would pay off and discharge two certain notes owing by the plaintiffs, each in the sum of $250.00? Answer: No.

"2. Did the plaintiffs perform said substitute agreement on their part, as alleged in the complaint? Answer: No.

"3. Did the defendant, J. H. Hutchins, commit a breach of said substitute contract, as alleged in the complaint? Answer: No.

"4. What is the reasonable value of services performed by the plaintiffs for the defendant, Hutchins, if anything, for which the plaintiffs have not been paid? Answer: No.

"5. What is the reasonable value of the corn, hay and other crops furnished the defendant Hutchins by the plaintiffs for which the plaintiffs have not been paid? Answer: No.

"6. In what amount, if anything, are the plaintiffs indebted to the defendant by reason of the payment of the aforesaid notes of $250.00 each? Answer: $500.00, with interest.

"7. In what amount, if any, is the defendant entitled to recover of the plaintiffs on account of improvements of the house on the 17-acre tract? Answer: $300.00."

Upon the answering of the issues as above indicated, his Honor entered judgment to the effect that the defendant, J. C. Ramsey, the trustee therein, foreclose the deed of trust, that the defendant recover of the plaintiffs the sum of $300.00, and that the plaintiffs and the bondsmen be taxed with the costs of the action, to which judgment the plaintiffs objected and excepted, and appealed to the Supreme Court, assigning errors.

Geo. M. Pritchard for plaintiffs, appellants.

Carl R. Stuart for defendants, appellees.

SCHENCK, J. The plaintiffs allege that they executed two promissory notes for $250.00 each, secured by purchase money mortgage. The uncontroverted evidence tends to show that defendant Hutchins discounted or "took up" these notes and now owns the same. They are

past due. While the plaintiffs allege payment the jury resolved that issue against them.

So then it appears that defendant Hutchins holds two unpaid, past-due notes of plaintiffs which are secured by mortgage lien on land. Therefore there is no reason why the decree of foreclosure should not be affirmed.

While it is true that defendant failed to prove that the *feme* plaintiff joined in any contract to convey the *locus* to defendant, this allegation is made as a foundation for defendant's claim for improvements and has no proper relation to the mortgage indebtedness. However, the notes are negotiable, and for this reason anyone could purchase without giving rise to the defense of voluntary payment. Hence, the absence of valid agreement to purchase does not defeat the defendant's right to recover on the notes and have a decree of foreclosure to satisfy the amount found to be due thereon.

Among other assignments of error appearing in the record and relied upon by the appellants, is Exception No. 9, which reads: "The Court erred in not defining and explaining the law arising on the seventh issue relating to improvements made by defendant." We are constrained to hold that this assignment of error is well taken. Among other ways, it is contended the charge fell short of the statute requiring "the judge to . . . state in a plain and correct manner the evidence . . . and declare and explain the law arising thereon," G. S., 1-180, his Honor failed to instruct the jury that the law cast upon the defendant the burden of proof of the issue. The issue read: "In what amount, if anything, is the defendant entitled to recover of the plaintiffs on account of improvements of the house on the 17-acre tract"? Since the defendant was seeking a monetary recovery of the plaintiffs, it clearly follows that the burden of proving the right to such recovery was upon the party alleging such right and the amount sought to be recovered under this issue was alleged and sought to be proved by the defendant, and therefore the burden of showing the right to such recovery was upon the defendant. " 'The rule as to the burden of proof is important and indispensable in the administration of justice. It constitutes a substantial right of the party upon whose adversary the burden rests; and, therefore, it should be carefully guarded and rigidly enforced by the Court. *S. v. Falkner,* 182 N. C., 793, and cases there cited.' *Hosiery Co. v. Express Co.,* 184 N. C., 478." *Coach Co. v. Lee,* 218 N. C., 320, 11 S. E. (2d), 341. This omission in the charge was error.

We have examined the other assignments of error set out in the appellants' brief but since there must be a new trial on defendant's claim for improvements, it is not deemed necessary to comment further upon such assignments as they present no new questions of law and are not likely to occur again.

For the error mentioned, the plaintiffs are entitled to a new trial on defendant's claim for improvements, and it is so ordered.

Partial new trial.

STATE v. JOHN MILFORD MAYNOR

and

JOHN MILFORD MAYNOR v. C. C. TART, SHERIFF.

(Filed 30 October, 1946.)

1. Intoxicating Liquor § 8—

Where a defendant has been convicted of illegal transportation of nontax-paid liquor, the court may at a subsequent term enter an order *nunc pro tunc* for the forfeiture and sale of the vehicle used for such transportation. G. S., 18-48 and 18-6.

2. Same—

An order of condemnation and sale of a vehicle used in illegal transportation of intoxicating liquor is no part of the personal judgment against the accused although dependent upon his conviction, and by statutory provision claimants are entitled to a hearing to determine their rights.

APPEAL by defendant in criminal prosecution, and plaintiff in civil action, from *Carr, J.*, at August Term, 1946, of SAMPSON.

Criminal prosecution upon warrant charging John Milford Maynor with having in his possession nontax-paid whiskey for purpose of sale and transporting it contrary to law, and claim and delivery proceeding by accused to recover automobile from sheriff, consolidated by consent and heard together as both actions are related to the same subject matter.

I. THE CRIMINAL CASE:

A. On 1 February, 1946, John Milford Maynor was arrested in the Town of Clinton and charged with having in his possession and transporting in an automobile, in violation of law, nontax-paid intoxicating liquor. At the same time the sheriff of Sampson County took into his possession the automobile, belonging to the defendant, and in which the said intoxicating liquor was being transported.

B. Upon trial in the Recorder's Court, the defendant was found guilty and sentenced to six months on the roads. The automobile seized by the sheriff was ordered confiscated and sold according to law.

C. On appeal to the Superior Court, the defendant was again convicted at the May Term, 1946, and sentenced to six months on the roads. "Road sentence suspended and defendant placed on probation for a period of three years on condition the defendant pay the costs."

D. The defendant was released upon payment of the costs.

II. THE CIVIL ACTION:

A. The defendant's automobile remained in the possession of the sheriff from the time it was seized until after the May Term of court, when John Milford Maynor instituted claim and delivery proceeding to obtain its possession.

B. The sheriff did not replevy, but demurred to the complaint and moved for judgment on the pleadings. At the same time, notice was served on the plaintiff that motion would be lodged in the companion criminal case for judgment of forfeiture and sale of the automobile.

C. At the August, 1946, mixed term, Sampson Superior Court, judgment of forfeiture and sale was entered *nunc pro tunc* in the companion case of *State v. John Milford Maynor,* and the demurrer and motion for judgment on the pleadings allowed in the claim and delivery proceeding, as there were no intervening rights of third persons.

From this judgment, John Milford Maynor appeals, assigning errors.

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

Mack M. Jernigan and Paul D. Herring for defendant-plaintiff, appellant.

Jeff D. Johnson, Jr., for defendant, C. C. Tart, Sheriff of Sampson County.

STACY, C. J. As no judgment of forfeiture or confiscation was entered at the trial term in the criminal prosecution, as required by the statutes on the subject, G. S., 18-48 and 18-6, it was proper to enter appropriate judgment therein *nunc pro tunc* at a later term. *Ferrell v. Hales,* 119 N. C., 199, 25 S. E., 821; McIntosh on Procedure, page 692, *et seq.* Moreover, a court has "the right to amend the records of any preceding term by inserting what has been omitted, either by the act of the Clerk or of the Court; and a record so amended stands as if it had never been defective, or as if the entry had been made at the proper time." *S. v. Warren,* 95 N. C., 674. See *Strickland v. Strickland,* 95 N. C., 471; *Walton v. Pearson,* 85 N. C., 35; McIntosh on Procedure, page 732, *et seq.* The order of condemnation and sale of the vehicle seized is perforce no part of the personal judgment against the accused, albeit both are dependent upon his conviction. *S. v. Hall,* 224 N. C., 314, 30 S. E. (2d), 158; 30 Am. Jur., 551.

Indeed, since the statute provides for a separate hearing to determine the rights of claimants to "any wagon, buggy, automobile, water or air craft, or other vehicle," used in transporting intoxicating liquor in

violation of law, it would seem that judgment of forfeiture or confiscation might well have been entered in the claim and delivery proceeding, treating it as a petition in the criminal case, *S. v. Ayres,* 220 N. C., 161, 16 S. E. (2d), 689, but as to this we make no present ruling, as it is unnecessary to do so. *In re State v. Gordon,* 225 N. C., 241, 34 S. E. (2d), 414; *S. c.,* 224 N. C., 304, 30 S. E. (2d), 43; *Motor Co. v. Jackson,* 184 N. C., 328, 114 S. E., 478; 30 Am. Jur., 551.

In the absence of a more substantial showing on the part of the appellant, the judgment will be upheld.

Affirmed.

IN THE MATTER OF BOYD BIGGERS AND LAWRENCE BIGGERS.

(Filed 30 October, 1946.)

1. Habeas Corpus § 3—

The jurisdiction of the court in *habeas corpus* proceedings to determine the custody of children in a contest between husband and wife, living in a state of separation but not divorced, although statutory, G. S., 17-39, is equitable.

2. Habeas Corpus § 9: Contempt of Court § 2b—

An order of the court awarding custody of minor children in *habeas corpus* proceedings, even though based upon consent of the parents, is not a mere affirmation of a civil contract, and perforce the court has jurisdiction to enforce such order by attachment for contempt.

APPEAL by petitioner from *Sink, J.,* at February Term, 1946, of CABARRUS.

Sometime in July, 1944, upon a hearing of a writ of *habeas corpus,* Honorable William H. Bobbitt, Judge Superior Court, presiding in the Fifteenth Judicial District, entered an order respecting the custody of Boyd Biggers and Lawrence Biggers, children of the petitioner in this proceeding, Annie Bost Biggers Bennick, and her husband, J. L. Biggers, who were then, and are now, living separate and apart. The order apportioned custody of the children between the father and mother and granted to the mother custody for a period of three months each year, specifying the period covering such custody, and assigning the children to the custody of the father at other times.

The petitioner, claiming that the respondent had refused to obey the order of the court with respect to yielding her the custody of the children for the designated period, or any part of it, and that she had repeatedly endeavored to obtain their custody but was prevented from so

doing by the respondent, sought to have the order enforced by having the respondent adjudged to be in contempt for his disobedience.

The respondent replied to the petitioner, denying that he had willfully disobeyed the order of the court, and averred that the children themselves declined to go with their mother.

During a part of this time the children had been carried beyond the jurisdiction of the court and it was alleged by the petitioner that this was in order that the judgment of the court might not be effectively carried out. Admitting that part of the time he had been beyond the jurisdiction of the court with the children, respondent alleged that it was in the regular course of his employment in the State of Florida and pointed out that the order of the court did not forbid him to go beyond its jurisdiction. The husband alleges that meantime he has obtained a divorce in the State of Florida.

Respondent further resisted the issue of any order based on contempt upon the ground that the judgment theretofore rendered by Bobbitt, J., was by consent of parties and could not be made the subject of such an order.

Upon the hearing, Judge Sink, being of opinion that the order of Bobbitt, J., derived its force and effectiveness from the consent of the parties and could not be enforced by holding the respondent in contempt for its disobedience, dismissed the petition. The petitioner appealed.

E. Johnston Irvin for petitioner.
Hartsell & Hartsell for respondent.

SEAWELL, J. G. S., 17-39, provides that the custody of children may be determined in a contest between husband and wife, living in a state of separation but not divorced, upon writ of *habeas corpus* in which the contesting parties and the child or children are brought into the court for a hearing of the controversy. Such a proceeding is at Chambers, and notwithstanding the fact that it is statutory, the jurisdiction of the court in the premises is unquestionably equitable, has long been so regarded in practice, and that principle has not been questioned in this jurisdiction. The wide latitude given the court in investigating and determining the controversy and the definite personal nature of the orders necessary to be made, and the fact that the welfare and rights of infants are involved, would necessarily brand the jurisdiction as one of equity and not of law, and authorities so declare. *Re Badger,* 286 Mo., 139, 226 S. W., 936; 14 A. L. R., 286, Annotation 285, 308; *Hancock v. Dupree,* 100 Fla., 617, 129 So., 822.

When the jurisdiction is invoked, a judgment based on consent of parties in a proceeding of this kind is, therefore, not a mere affirmation of a civil contract. The order operates *ex proprio vigore legis,* carrying

with it the sanctions of the jurisdiction invoked. One of these sanctions is imprisonment for contempt of court—sometimes distinguished as civil contempt—for willful refusal to obey its order. Indeed, if this were not so the judgments of a court of equity, often intimately personal in their nature, would be mere fulminations. The judgment is reversed and the case remanded for proceeding in accordance with this opinion. See *Dyer v. Dyer,* 212 N. C., 620, 194 S. E., 278; *Dyer v. Dyer,* 213 N. C., 634, 197 S. E., 157; *Vaughan v. Vaughan,* 213 N. C., 189, 195 S. E., 351; *Vaughan v. Vaughan,* 211 N. C., 554, 190 S. E., 492, in which similar principles as touching the jurisdiction and its incidents are applied to judgments based on consent of parties.

For these reasons the judgment of the court below is reversed, and the cause is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

FIRST SECURITY TRUST COMPANY, EXECUTOR, v. HAZEL E. HENDERSON ET AL.

(Filed 30 October, 1946.)

1. Removal of Causes § 6—

A party who invokes the jurisdiction of the State court and seeks and obtains the indulgence of the court in the matter of filing additional pleadings or motions, waives his right to seek removal of the cause to the Federal court.

2. Wills § 39: Declaratory Judgment Act § 1—

The Superior Court has jurisdiction over a proceeding under the Declaratory Judgment Act instituted by an executor to determine, *inter alia*, the validity of assignment of interest by a legatee, G. S., 1-254, and motions in the Supreme Court on appeal by assignor and assignee to dismiss for want of jurisdiction will be denied.

APPEAL by defendant, Miles O. Sherrill, from *Phillips, J.,* at May Term, 1946, of CATAWBA.

Proceeding under Declaratory Judgment Act for construction of will and to determine validity of assignment of interest in legacy.

In the petition filed herein by the executor of the will of Joseph Duckworth Elliott, late of Catawba County, asking for a construction of the will, it is alleged that Miles O. Sherrill, one of the legatees, had executed several assignments of various interests in his legacy, one to L. K. Higgenbotham in the sum of $10,000. Higgenbotham, in his answer, admitted the assignment, and asserted claim thereunder. Sherrill, in his

answer, denied the validity of the alleged assignment to Higgenbotham, and asserted that it "will be contested herein, if permitted by the court, and if not permitted herein, then in the proper forum."

After disposing of the construction of the will, by judgment entered 8 September, 1945, it was provided that the controversy between Miles O. Sherrill and L. K. Higgenbotham, over the validity of the assignment, "be, and the same is hereby retained for further orders, without prejudice to the said Miles O. Sherrill and to the said L. K. Higgenbotham to file such additional pleadings and to make such motion as they may deem appropriate."

On appeal to the Supreme Court, the judgment construing the will was upheld, reported in 225 N. C., 567, 35 S. E. (2d), 694, and at the January Term, 1946, judgment on the certificate was entered in the Superior Court of Catawba County.

Thereafter, on 30 March, 1946, Miles O. Sherrill filed herein petition and bond for removal of the controversy over the assignment to the District Court of the United States for the Western District of North Carolina for trial, on the ground of diverse citizenship—the petitioner being a resident of this State and L. K. Higgenbotham being a resident of the State of Georgia.

The Clerk denied the petition, and this ruling was affirmed on appeal to the Superior Court.

From this latter judgment, Miles O. Sherrill appeals, assigning error.

John W. Aiken for defendant, Sherrill, appellant.

Eddy S. Merritt for defendant, Higgenbotham, appellee.

STACY, C. J. The petition for removal to the District Court of the United States for trial was properly denied. The petitioner first asserted in his answer that the validity of the Higgenbotham assignment would be "contested herein, if permitted by the court." Such permission was granted, without prejudice to either of the contestants to file additional pleadings and to make appropriate motions in the cause. The authority to determine the validity of a written instrument, as well as its meaning, is contained in the Declaratory Judgment Act. G. S., 1-254. Thus, having invoked the jurisdiction of the court and sought its indulgence in the matter of filing additional pleadings or motions, the petitioner is in no position to insist upon a removal of the cause to the Federal District Court. *Butler v. Armour,* 192 N. C., 510, 135 S. E., 350. Other reasons are suggested on brief in support of the judgment denying the petition, but the foregoing will suffice for present purposes. McIntosh on Procedure, 285.

At the bar here, L. K. Higgenbotham moved to dismiss (motion styled demurrer) for want of jurisdiction, and in this he is joined by

Miles O. Sherrill. The controversy over the validity of the assignment between Sherrill and Higgenbotham was originally brought into court by the executor. It is entitled to have the matter determined in the present proceeding. G. S., 1-254.

Judgment affirmed.

Motion to dismiss, denied.

STATE v. CLARENCE THOMPSON.

(Filed 30 October, 1946.)

1. Criminal Law § 67—

On appeal from conviction in a criminal case, the jurisdiction of the Supreme Court is limited to matters of law or legal inference. Constitution of North Carolina, Art. IV, sec. 8.

2. Homicide § 18—

In order to be competent, dying declarations must relate to the act of killing or to circumstances so immediate attendant thereon as to constitute part of the *res gestæ*, must be made by the victim in the present anticipation of death, and death must ensue.

3. Same—

The ruling of the trial court admitting in evidence dying declarations will be reviewed only to determine if there is sufficient evidence as to the necessary facts, including the fact that the declarations were made in present anticipation of death, to support such ruling.

4. Homicide § 27e—

The definition of manslaughter in the court's charge as the unlawful killing of a human being without malice will not be held for error as inadequate.

5. Criminal Law § 53d—

An instruction which states the evidence and explains the law arising thereon under the form of contentions is sufficient and correct when the evidence is simple and direct and without equivocation and complication. G. S., 1-180.

6. Same—

Recapitulation of all the evidence is not required by G. S., 1-180, it being sufficient if the charge applies the law to the evidence and gives the position taken by the parties as to the essential features of the case.

7. Criminal Law § 78e (2)—

Any error or omission in the statement of the evidence upon a subordinate feature must be called to the attention of the court at the trial to avail the defendant any relief on his appeal.

STATE *v.* THOMPSON.

APPEAL by defendant from *Thompson, J.*, at April Term, 1946, of LENOIR.

The defendant was tried upon a bill of indictment charging him with the murder of Ralph Williams, and was convicted of manslaughter. Upon judgment of imprisonment in the State Prison the defendant gave notice of appeal, assigning errors.

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

Sutton & Greene for defendant, appellant.

SCHENCK, J. The jurisdiction in this Court in an action of this kind is to review, upon appeal, any decision of the courts below upon any matter of law or legal inferences. Constitution of North Carolina, Art. IV, sec. 8.

The first exceptions set out in appellant's brief, Nos. 1 and 2, relate to the admission in evidence of certain statements made by the deceased to the effect that the defendant had shot him, offered by the State upon the theory of their being dying declarations. It is contended by the defendant that no proper basis for the introduction in evidence of such statements was laid. It is essential to the admissibility in evidence of statements by a decedent as dying declarations that the statements not only relate to the act of killing or to the circumstances so immediately attendant thereon as to constitute a part of the *res gestæ*, but it must also appear that such statements were made by the victim in the present anticipation of death, which death ensues. It is true the deceased did not say he believed he was about to die, or he knew he would not live, but it appears from the record that he expressed doubt that "he would live through it" (his wound). But, however this may be, on appeal the action of the trial court is only reviewable to determine whether there was evidence to show facts necessary to support such ruling. *S. v. Stewart,* 210 N. C., 362, 186 S. E., 488. In the instant case, we think and so hold that there was sufficient evidence to support the ruling of the court below.

The next exceptions set out in appellant's brief are exceptions 3, 4, 5, 6, 7, 8, 9 and 10 discussed together in such brief. Exception No. 3 is to that portion of his Honor's charge defining manslaughter as follows: "Manslaughter, gentlemen, is the unlawful killing of a human being without malice." It is contended by the defendant that the definition given of manslaughter was inadequate. The definition in the form given is in substantial compliance with that ofttimes given in this jurisdiction. *S. v. Lance,* 149 N. C., 551, 63 S. E., 198; *S. v. Baldwin,* 152 N. C., 822, 68 S. E., 148; *S. v. Merrick,* 171 N. C., 788, 88 S. E., 501;

S. v. Leonard, 195 N. C., 242, 141 S. E., 736; *S. v. Hodgin,* 210 N. C., 371, 186 S. E., 495, and cases there cited.

The next exceptions set out in the appellant's brief are Exceptions Nos. 11, 12 and 13. These exceptions are all bottomed upon the asserted failure of the court to state the evidence and apply the law thereto as required by G. S., 1-180. However, the court explained the law on essential features of the case and clearly stated the evidence, although it may appear that such explanation and statement were made under the form of contentions. There was no error in this statement. The evidence was simple and direct and without equivocation and complication. There was no error claimed at the trial by the defendant. The statement of the evidence and the application of the law thereto was made in a correct manner. The record is free from error, hence the verdict must be upheld. The recapitulation of all the evidence is not required under G. S., 1-180, and nothing more is required than a clear instruction which applies the law to the evidence and gives the position taken by the parties as to the essential features of the case. Any error or omission in the statement of the evidence must be called to the attention of the court at the trial to avail the defendant any relief on his appeal. *S. v. Graham,* 194 N. C., 459, 140 S. E., 26; *S. v. McNair, ante,* 462, 38 S. E. (2d), 514.

On the record as presented, the validity of the trial will be upheld.

No error.

ELTHA KESLER CAMPBELL v. JOSEPH W. CAMPBELL.

(Filed 30 October, 1946.)

Appeal and Error §§ 19, 31g—

The pleadings upon which the judgment was entered are a necessary part of the record upon the wife's appeal from the dismissal of her motion to have the husband attached for contempt for failure to pay the amounts alleged to be due under the judgment, and when they are not incorporated in the record, motion to dismiss the appeal will be allowed.

APPEAL by petitioner from *Sink, J.,* at February Term, 1946, of ROWAN.

C. P. Barringer for petitioner.

Walter H. Woodson, Jr., for respondent.

SEAWELL, J. The respondent and petitioner are husband and wife, and have for some years lived separate and apart. The petitioner, in a motion purporting to be made in a pending action, sought to have the

respondent subjected to a contempt order for refusing to pay amounts alleged to be due under a prior judgment, inferentially appearing to have been entered in a pending action. Upon the hearing Judge Sink dismissed the motion, assigning as his reason that the judgment exhibited (rendered by Rousseau, J., in 1943) was a consent judgment, with no provision for extending its terms or otherwise continuing the jurisdiction of the court; is a contract between the parties not enforceable by a contempt proceeding.

On this appeal the petitioner did not cause the pleadings in the action in which the consent judgment was entered to be brought up as a part of the record. They are a necessary part of the record, both as determining the character of the action and the jurisdiction and power of the court. G. S., 1-284. For this reason the appellee has moved to dismiss the appeal. The motion is allowed. *Allen v. Hammond,* 122 N. C., 754, 30 S. E., 16; *Mitchell v. Moore,* 62 N. C., 281; *Ericson v. Ericson, ante,* 474, 475-6.

Appeal dismissed.

WESTERN NORTH CAROLINA CONFERENCE AND H. V. COX, B. J. EARPE, GEORGE T. GUNTER, CYRUS SHOFFNER AND EARL FARRELL, OFFICERS OF THE SAID CONFERENCE; G. O. LANFORD, T. J. GREEN, M. A. POLLARD, H. V. COX, CYRUS SHOFFNER, GEORGE T. GUNTER AND W. H. FREEMAN, THE EXECUTIVE COMMITTEE OF THE SAID CONFERENCE, AND MR. AND MRS. J. Q. PUGH, MRS. H. B. KINNEY, MRS. HELEN K. RICH, FRANK WILSON, MURIEL PUGH COX, FRANCES PUGH SMITH, VIRGINIA PUGH AND MRS. RUTH WILSON DAVIS, MR. AND MRS. J. W. WILSON, MRS. ODELL WRIGHT, SARAH ELLISON, FANNIE ELLISON, RUTH CHEEK KIVETT, D. G. CRAVEN, BEULAH DAVIS, RALPH WILSON, TIFFANY WILSON, MRS. ETTA HENDRICKS, BESSIE L. STOUT, TABITHE KELLING, LOLA PUGH CADDIS, JOHN PUGH, JR., ANNIE E. CRAVEN, WILLIAM CHEEK, MACIE CHEEK, CARRIE PUGH, JOE PUGH, NORDIE ALLRED HOLDER, G. H. KINNEY, MAXINE CRAVEN LEWIS, ON BEHALF OF THEMSELVES AND ALL OTHER MEMBERS OF PLEASANT CROSS CHRISTIAN CHURCH, v. GEORGE TALLEY, J. H. MALONE, TED TROGDON, A. M. BURNS, ED WRIGHT, MILDRED MALONE AND CLARENCE MALONE, AND ALL SUCH OTHER PERSONS WHOSE NAMES AND ADDRESSES ARE UNKNOWN, WHO ARE AFFILIATED WITH AND CLAIM TO BE MEMBERS OF AN ORGANIZATION KNOWN AND DESIGNATED AS THE INDEPENDENT CHRISTIAN CHURCH, A MOVEMENT FOSTERED AND ORGANIZED SINCE 14 NOVEMBER, 1943, BY THE SAID GEORGE M. TALLEY.

(Filed 30 October, 1946.)

Pleadings § 16: Appeal and Error § 40b—

Where a demurrer for misjoinder of parties is not interposed until after answer is filed it is too late to be considered as a matter of right but is

addressed to the sound discretion of the court, and its adverse ruling thereon is not subject to review.

APPEAL by defendants from *Clement, J.*, at July Term, 1946, of RANDOLPH. Affirmed.

After answering, the defendants moved to dismiss the action as to the plaintiff Conference for that it is not a proper party plaintiff. The motion was denied and defendant appealed.

H. M. Robins and Long & Long for plaintiffs, appellees.

Walter Siler, J. G. Prevette, and Seawell & Seawell for defendants, appellants.

PER CURIAM. Defendants' motion is in effect a demurrer for misjoinder of parties, interposed after answer was filed. It came too late. *Goldsboro v. Supply Co.*, 200 N. C., 405, 157 S. E., 58; *Schnibben v. Ballard & Ballard Co.*, 210 N. C., 193, 185 S. E., 646; *Ezzell v. Merritt*, 224 N. C., 602, 31 S. E. (2d), 751; McIntosh, N. C. P. & P., 457. Having answered, his motion was addressed to the sound discretion of the court. Its adverse ruling is not subject to review.

The judgment below is

Affirmed.

CLYDE D. HOPKINS v. SOUTHERN RAILWAY COMPANY.

(Filed 30 October, 1946.)

Railroads § 4—

Where plaintiff alleges negligence on the part of defendant railroad company in failing under the circumstances to maintain lights, watchman or guards at a public crossing, but plaintiff's evidence discloses that the lights on his car were burning and that he ran into the train, nonsuit is proper for failure of evidence tending to show any causal relation between the negligence complained of and the injury.

APPEAL by plaintiff from *Sink, J.*, at February Term, 1946, of CABARRUS.

Civil action to recover for personal injuries allegedly resulting from actionable negligence of defendant in failing under the circumstances to maintain "lights, watchman or guards or facilities to protect the public at the point where the said railroad makes a crossing of West Corbin Street," in the city of Concord, North Carolina.

The evidence for plaintiff tends to show, succinctly stated, that between 11 and 12 o'clock on the night of 6 September, 1945, as he, riding in his

automobile, with lights in good condition, approached the railroad crossing on West Corbin Street, upgrade to the east, he came to a complete stop, about 30 or 35 feet from the main southbound track, and looked and listened and, failing to see or to hear anything, started on across, and when he "got up on the track" he saw the passing train when he "was within four feet of it,—too late to stop"; that "the weather was rainy, foggy . . . a pretty heavy mist and fog"; that "when . . . within four feet of the train" he "discovered at that time there was smoke mixed in with the fog and mist and rain"; that "there were not any signal devices there, no watchman, no lights, no bells, no gates," and that he collided with the train—the train "snatched the car," and he sustained injuries.

From judgment as of nonsuit at close of plaintiff's evidence, he appeals to Supreme Court and assigns error.

B. W. Blackwelder for plaintiff, appellant.
Hartsell & Hartsell for defendant, appellee.

PER CURIAM. A careful consideration of the evidence offered by plaintiff fails to show any causal relation between the acts of negligence alleged and the injury sustained. No new principle of law is involved. Old and well established principles of law support the action of the court in sustaining demurrer to the evidence.

Affirmed.

STATE v. CLAUDE ABSHER.

(Filed 6 November, 1946.)

1. Homicide § 11—

In order to justify a killing in self-defense, defendant must be under reasonable apprehension of death or great bodily harm under the circumstances as they appear to him at the time, which subjective apprehension perforce is predicated upon the exercise of reason, and is therefore necessarily beyond the capacity of a person too drunk to have any conscious mental processes.

2. Homicide § 27f—

Where defendant testifies that he became so intoxicated that he had no remembrance of anything that happened for some time prior and subsequent to the homicide, the court is not required to submit to the jury the question of self-defense, notwithstanding testimony on the part of the State's witnesses that defendant knew what he was doing, since even the evidence that defendant knew what he was doing, standing alone, fails to lay the necessary predicate that defendant reasonably apprehended he was in danger of death or great bodily harm.

3. Homicide §§ 10c, 27b—

A charge which properly places the burden upon defendant to establish his contention of drunkenness rendering him incapable of premeditation and deliberation, but then further charges that the burden is on defendant to establish the matter to the satisfaction of the jury "in order for him to mitigate the offense," must be held for error, since the burden of establishing premeditation and deliberation beyond a reasonable doubt rests upon the State throughout, and defendant in no event has the burden of establishing matters mitigating the offense from first degree to second degree murder.

4. Criminal Law § 81c (2)—

Where the charge contains a correct and an incorrect instruction relating to the burden of proof, the error cannot be held harmless by the application of the rule of contextual construction.

APPEAL by defendant from *Phillips, J.*, at August Term, 1946, of WILKES.

The appellant, Claude Absher, was charged with the murder of Clyde Watts, was convicted of murder in the first degree, and from the sentence of death imposed, appealed to this Court. The case history in so far as it affects the disposition of this appeal is substantially as follows:

Watts was a soldier in the United States Army, engaged in the European Theatre for some four years. During that time the defendant, Absher, was frequently in company with Josie Watts, wife of deceased, and admittedly having immoral relations with her. Meantime, Watts had been discharged from the army for about two months before the occurrence immediately leading to his death, and had returned to his home in North Wilkesboro where all the parties were living. On the evening of the day in which events culminated, Watts, while standing across the street with a number of companions, amongst them Earl Watts, his brother, Quincy Parker, Parks Robertson, and Jack Anderson, observed Absher and Mrs. Josie Watts standing near the bank building engaged in conversation. Followed by the above named persons, he went across the street and charged Absher with breaking up his home. A struggle ensued between Watts and his wife in which Mrs. Watts took her husband by the hair and exclaimed that she was "going to get a warrant for every damned one of them." Watts proposed to accompany her to the Mayor's office and they both started in that direction.

The State's evidence tended to show that Absher, expressing his love for "that damned woman," started to follow. Anderson interfered and told him not to follow them. In the altercation which followed, Anderson knocked or slapped Absher to the sidewalk. The evidence tended to show that the defendant, at some point in this melee, had drawn a knife. The parties finally separated, Absher declaring he would return, and going off in the direction of the Call Hotel.

Absher was not seen by Clyde Watts for about 30 minutes, during which, Earl Watts, Anderson, Quincy Parker, Parks Robertson walked about without any particular objective, as they contended, and drank quantities of whiskey. They finally decided to see if they could find Clyde and his wife and walked back down the street, where they were joined by Clyde Watts and Coy Adkins. They finally approached Brame's Drug Store near which the previous altercation had occurred. There Clyde Watts saw the defendant on the opposite side of the street and "hollered" at him: "I want to see you a minute." Absher was standing near the taxicab stand and Watts went straight across the street and approached him. The group which had accompanied him converged on the scene from different angles. When Clyde Watts was about 25 or 30 feet from Absher, the latter, first pointing the gun at Earl Watts, then turned it upon Clyde Watts and shot him in the belly, the load striking a little below the level of the navel on the right side and inflicting a wound from which Watts died shortly thereafter.

After Clyde Watts was shot, Absher made a motion as if to reload the gun and he and Earl Watts struggled on the sidewalk until the gun was recovered by someone else. An officer arrived and Absher was taken into custody. The evidence is to the effect that Watts was unarmed throughout the difficulty.

Testifying in his own behalf, defendant said that after the first encounter near the bank in which he was knocked to the sidewalk, he went to the Call Hotel where he drank a great quantity of whiskey, so much in fact that after the last drink there, his mind was a perfect blank; and he now had no memory whatever of anything that occurred thereafter until he was awakened in jail about midnight and learned that Watts had been shot and killed. W. C. Sloop, taxicab driver and witness for the State, testified to the conduct of defendant during a part of the amnesic period. He testified that defendant approached his cab in front of the hotel and engaged witness to carry him to his home, about a mile away. Arriving there, defendant told him to turn around and wait for him. This the witness did; and in a short time defendant came out and got in the back seat of the cab. After some difference between them about which street they should take, witness drove defendant to a point a short distance from where the homicide took place. As defendant got out of the car, witness discovered that he was carrying a shotgun. Absher exclaimed, "Now where is he at," or "Now where is the s. o. b. at?" and went in a fast walk up toward Brame's Drug Store.

In rebuttal of defendant's testimony that he could remember nothing that happened from the time he took the last drink at the hotel until he was awakened in the jail after the fatal occurrence, the State offered evidence from witnesses who had observed him at various times during that period, particularly at the time of his arrest, who testified that in their opinion defendant knew what he was doing.

Omitted from this statement is any attempt at a categorical mention of objections to the evidence and of exceptions to the judge's charge not concerned with the basis of decision. Where pertinent to the discussion, exception to the instructions given and objection for the want of proper instructions will be specifically treated in the body of the opinion.

The jury returned a verdict of guilty of murder in the first degree and from the sentence of death imposed, the defendant, as noted, appealed, making some 94 assignments of error.

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

Trivette, Holshouser & Mitchell and Hayes & Hayes for defendant, appellant.

SEAWELL, J. The prime purpose of appellate review is to discover and correct prejudicial error. Often its correction necessitates a new trial; but it is not mandatory on the appellate court to treat separately 94 exceptions to the trial, all, allegedly, involving as many fatal errors, or to furnish a complete pattern for a new trial. Out of the objections to the conduct of the trial, a few of which may be meritorious, and a great many no doubt taken as an anchor to windward, we consider two, more deeply based and at the same time more prominently thrown up from the melange of the legal battle.

On the first of these the Court does not stand with the appellant. The objection is that the trial court failed to recognize defendant's right of self-defense, under the circumstances developed in the whole evidence, and to give the jury appropriate instructions thereupon.

Without going into the refinements with which time, place, and circumstance qualify the right, a person is justified in taking the life of an assailant in self-defense under a reasonable apprehension of death or great bodily harm. It is the reasonableness of the apprehension, as it must have appeared to the defendant at the time of the act, that justifies the homicide. *S. v. Robinson,* 213 N. C., 273, 279, 196 S. E., 366.

The defendant stated that he remembered nothing of what occurred after he had imbibed the last drink of white corn liquor at the hotel until he was awakened in jail after the killing. This covered the period during which the evidence tends to show he went home and procured the shotgun, returned and shot Watts. We are asked to infer from this amnesia and the drunkenness which caused it, that during this critical period defendant's reasoning faculties were so affected that he was incapable of premeditation or deliberation; but it is suggested that he might be still left with enough reason to appreciate or appraise physical danger and react to it rationally. But if such an anomalous condition

could exist, defendant's sweeping abnegation—the "blackout"—provides no stops for its consideration unless we resort to speculation *vice et contra* inference from the evidence. Under the "blackout" theory advanced by appellant and relevant testimony it is difficult to perceive how defendant could have had any apprehension at all, much less one which the law regards as extenuating only when tempered with reason. It is argued here that even an animal may have an instinct that warns him of impending menace to life; but the law of self-defense and justifiable homicide is not framed upon the facts of animal instinct and behavior, but upon the reason and accountability of man. It probes the motive behind the act. Its extenuation or justification does not rest so much in the objective circumstances staging the homicide as in the subjective apprehension of death or great bodily harm, which is reasonably aroused by them. The apprehension is morally and legally inseparable from the exercise of reason.

Witnesses for the State testified that they were of the opinion Absher knew what he was doing. Witnesses to the facts testified to conversation and behavior on the part of Absher from which a like inference may be drawn. Is this to be taken by the Court as contradicting the defendant about the "blackout" and giving him the right to claim that he killed Watts in a reasonable apprehension of death or great bodily harm? That the circumstances were such that he ought to have felt that way about it anyway, if normal, and thus, willy nilly, force him from the defense of drunken irresponsibility to the plea of self-defense? We are asked to give the defendant the benefit of a theory which is negatived by his own testimony and to credit him with reactions which he does not profess to have had, and which no evidence in the record, standing alone, is sufficient to impute to him. Upon this record the defendant is not entitled to the desired instruction relating to self-defense.

But the second objection we notice merits a new trial. The defendant had pleaded drunkenness at the time of the homicide to an extent which so affected his reason as to make it impossible for him to premeditate or deliberate the taking of life within the statutory definition of first degree murder and necessary to his conviction of that offense. On this point the trial court instructed the jury:

"To make such defense available, the evidence must show that at the time of the killing the prisoner's mind and reason was so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and premeditated purpose to kill. As the doctrine is one that is dangerous in its application, it is allowed only in very clear cases; and where the evidence was that the purpose to kill was deliberately and premeditatedly formed when sober, the imbibing of intoxicants to whatever extent, in order to carry out the design, will not avail as a defense; and the Court charges you, gentlemen of the jury, when a

defendant interposes a plea of drunkenness, that the burden of proving such plea is upon him, not beyond a reasonable doubt and not by the greater weight of the evidence, but simply to the satisfaction of the jury, in order for him to mitigate the offence."

The fault in this instruction does not lie in putting on the defendant the burden of establishing the affirmative defense of drunkenness and incapacity to deliberate to the satisfaction of the jury; *S. v. Cureton,* 218 N. C., 491, 11 S. E. (2d), 469; *S. v. Bracy,* 215 N. C., 248, 256, 1 S. E. (2d), 841; *S. v. Shelton,* 164 N. C., 513, 79 S. E., 883; but in the language used to explain its legitimate use and effect:—"in order for him to mitigate the offence." The office of the plea and evidence supporting it is to rebut the evidence of the State tending to show deliberation, and thus defeat conviction of first degree murder, which can only be had on proof beyond a reasonable doubt of this essential element, and not to mitigate an offense already chalked up against the defendant, either through assumption by the court or presumption of law.

There is, of course, another sort of presumption with which the defendant must, *imprimis,* contend—that of normal understanding, or sanity, which prevails until the contrary is shown; *S. v. Cureton, supra; S. v. Shelton, supra;* but the exception does not invite its discussion.

It may have been the purpose of the court to array the evidence of defendant's incapacity to deliberate against evidence of the State tending to show deliberation, but the phraseology will scarcely admit of that construction; and we do not think its prejudicial tendency is relieved by construing the charge contextually, although, in another part of it the burden was properly placed on the State to prove premeditation and deliberation beyond a reasonable doubt.

In the hope that the next trial will prove less challengeable, we refrain from comment on the other 92 assignments of error. For the reasons stated, however, the appellant is entitled to a new trial. It is so ordered.

New trial.

MARY H. LAMB v. LEON H. LAMB AND WIFE, MATTIE LAMB; NETTIE LAMB CHRISTESON, HERBERT LAMB AND WIFE, MATTIE LAMB; HATTIE LAMB MATTHEWS, LESTER H. LAMB AND WIFE, REVAH LAMB; ADRIAN LAMB AND WIFE, BESSIE LAMB; EULA BELLE PAGE AND HUSBAND, HAYWOOD PAGE; BETTIE LAMB DEVANE; FANNIE LAMB SMITH AND HUSBAND, ROBERT SMITH; EDNA LAMB; ANNIE C. GORE AND HUSBAND, FOREST GORE; CLARA LAMB McLAMB AND HUSBAND, THEODERICK McLAMB; THOMAS LAMB, JR.; LOUISE LAMB; EDNA LOU LAMB; EARLE LAMB; BOBBY (ROBERT) LAMB; ANNA J. LAMB; JAMES DRAUGHON; W. H. DRAUGHON; T. B. DRAUGHON AND WIFE, EULA DRAUGHON; ROSS WILLIAMS; IDA AMAN; BESSIE DRAUGHON SCOTT AND HUSBAND, JERE SCOTT; MINNIE DRAUGHON WATSON; MAMIE DRAUGHON BULLARD AND HUSBAND, WILLIAM BULLARD; J. F. COLWELL AND WIFE, MABEL COLWELL; A. W. COLWELL, JR., AND WIFE, EVELYN DIXON COLWELL, AND JOHN B. WILIAMS, JR., GUARDIAN AD LITEM.

(Filed 6 November, 1946.)

1. Wills § 44—

The doctrine of election under a will is based upon the principle that a person cannot take benefits under the will and at the same time reject its adverse provisions.

2. Same—

In order for the doctrine of election under a will to apply, the intent of the testator to put the beneficiary to an election must clearly appear from the instrument.

3. Same—

The doctrine of election under a will does not apply where, upon a fair and reasonable construction of the will it appears that testator mistakenly thought the property of the beneficiary he purports to dispose of was his own, nor where the beneficiary receives no alternative benefit under the will in lieu of the property purportedly disposed of.

4. Same—

A bequest of any part of a certain fund which testator may not have disposed of prior to his death, will not support the doctrine of election when there is no evidence that the beneficiary actually received any amount thereunder, since the court will not assume that any part of the fund remained undisposed of at testator's death.

5. Same—

Testator and his wife owned a tract of land by entireties. Testator devised "my interest" therein to his wife, with remainder over to designated beneficiaries, with further provision that the will should "not affect the deed" to him and his wife which created the estate by entireties. *Held:* It is apparent that testator believed he had a disposable interest in the estate by entireties and was attempting to devise only such interest and not any interest of his wife, and further, the intent to put his wife to her election does not appear, and therefore the doctrine of election is not applicable.

LAMB *v.* LAMB.

APPEAL by defendant from *Thompson, J.*, at March Term, 1946, of SAMPSON.

The plaintiff brought this action to remove a cloud from the title to land which she claims as survivor of her husband, W. B. Lamb, in tenancy by the entirety. The alleged cloud upon the title consists in defendants' claim of ownership based on their construction of the last will and testament of W. B. Lamb, which they contend put the defendant to her election with respect to the land in controversy, and other benefits under the will; an election which, it is contended, she exercised in a manner to exclude her present claim, and release her interest in the land to which they are, in that event, entitled under the will.

The will consists of the original testament, executed 4 March, 1932, and a codicil executed 31 December, 1942. The latter document is particularly directed to item three of the original will, which it revokes, but which is pertinent in explanation of the codicil. Item three is as follows:

"ITEM THREE: I give, devise and bequeath to my beloved wife, Mary H. Lamb, all of my property, real, personal and mixed, wherever the same may be located or in whatever form it may be, to have, own, use, sell, dispose of and manage during the term of her natural life, and at her death so much thereof as may remain shall become the property of and vest in my heirs at law, except C. T. Lamb and Nettie Lamb who are not to share therein, in fee-simple; but my said wife shall have the right to sell and convey any part thereof and all deeds and conveyances made by her shall be ample to convey any or all of said property, and she shall use and enjoy the proceeds therefrom and not be accountable therefor to my said heirs at law, as I have every confidence that she will preserve my estate so that they shall receive at her death such part thereof as she does not feel she should use during her life."

It is necessary to quote the codicil in full:

"NORTH CAROLINA
SAMPSON COUNTY

"I, W. B. Lamb, of Sampson County and State of North Carolina, make this codicil to my Last Will & Testament published by me, and dated the 4th day of March, 1932, which I ratify and confirm except as the same shall be changed hereby.

"WHEREAS, by Item Three of my Last Will & Testament above referred to I gave and devised to Mary H. Lamb, C. T. Lamb, Nettie Lamb, and others, certain property; and WHEREAS, I have since sold the property referred to in said paragraph and have received the cash therefor; and WHEREAS, prior to the date of sale, I have conveyed by deed to my wife, Mary H. Lamb, one-half interest in the lands which I referred to in said paragraph and that she was the owner of a one-half undivided

interest therein at the time of said sale, and accordingly is entitled to one-half of the purchase price of the whole tract of land, which was $9,000.00; and WHEREAS, it is my will and desire to dispose of my one-half of the proceeds from the sale of said property amounting to $4,500.00, which I have not disposed of and spent prior to my death.

"FIRST: Now, therefore, I hereby revoke the said paragraph Three of my will hereinbefore referred to, and I hereby give and bequeath to my wife, Mary H. Lamb, any part of the $4,500.00 which belongs to me from the sale of said lands, to her during the term of her natural life, and that she may use any part of the same which may be necessary to maintain and support her during said time, but if at her death any part of the $4,500.00, the same being my part of the proceeds from the sale of said land, shall be remaining in her hands, then such remaining part I hereby give and bequeath to the heirs of Allen Lamb, the heirs of Jimmie Lamb, and the heirs of Bettie Draughon, in the same manner as if they had inherited it without will.

"SECOND: That my wife, Mary H. Lamb, and W. B. Lamb are the owners of certain lands in the Town of Ingold which we hold as an estate by the entirety, and I hereby give and devise my interest in said property to Mary H. Lamb for life, and after her death I give and devise the same to the heirs of Allen Lamb, the heirs of Jimmie Lamb, and the heirs of Bettie Draughon in fee-simple forever, provided that this will shall not affect the deed which has already been made to Mary H. Lamb and to me.

"IN TESTIMONY WHEREOF, the said W. B. Lamb has hereunto set his hand and seal, this the 31st day of December, 1942.

W. B. LAMB (SEAL)"

Both the will and the codicil were duly admitted to probate on the death of W. B. Lamb, which occurred 24 April, 1944, and the plaintiff qualified as executrix thereunder and is still acting as such. She is now, and has been at all times, in possession of the lands in controversy.

In their answer, the defendants presented their view of the construction of the will and asserted their ownership of the land.

The case came on for hearing at March Term, 1945, of Sampson Superior Court. After consent that the matters in controversy should be heard by the Presiding Judge without a jury, plaintiff and defendants, respectively, moved for judgment on the pleadings. Neither party offered evidence.

After hearing the argument of counsel and considering the matters presented in the pleadings and admission of parties with respect thereto, the Judge entered judgment that the plaintiff is the owner in fee-simple of the lands in controversy, and that defendants have no interest therein; and that the alleged cloud upon the title "be and the same is hereby removed."

The defendants excepted and appealed, assigning error.

J. D. Johnson, Jr., and Faircloth & Faircloth for plaintiff, appellee.
Butler & Butler and P. D. Herring for defendants, appellants.

SEAWELL, J. The trial court, correctly construing the will of W. B. Lamb, held that the plaintiff, his widow, was not thereby put to her election with respect to the lands in controversy, and that her right of survivorship therein was not defeated. In this we concur.

Any attempt to list, by exhaustive rule, the conditions which give rise to the duty or legal necessity of election must be left to the text-writer or encyclopedist. Confining ourselves to the facts of this case and the situation they present, which is not wholly novel in type, we repeat some principles which we believe to be applicable and controlling.

The doctrine of election, as applied to wills, is based on the principle that a person cannot take benefits under the will and at the same time reject its adverse or onerous provisions; cannot, at the same time, hold under the will and against it. *Benton v. Alexander,* 224 N. C., 800, 32 S. E. (2d), 584; *McGehee v. McGehee,* 189 N. C., 558, 127 S. E., 684; *Weeks v. Weeks,* 77 N. C., 421. The intent to put the beneficiary to an election must clearly appear from the will. *Rich v. Morisey,* 149 N. C., 37, 62 S. E., 762; *Bank v. Misenheimer,* 211 N. C., 519, 191 S. E., 14; Page on Wills, Vol. 4, p. 1347. The propriety of this rule especially appears where, in derogation of a property right, the will purports to dispose of property belonging to the beneficiary and, inferentially, to bequeath or devise other property in lieu of it.

Our train of reasoning is not complete without adding that if, upon a fair and reasonable construction of the will, the testator, in a purported disposal of the beneficiary's property, has mistaken it to be his own, the law will not imply the necessity of election. *Benton v. Alexander, supra.* That result follows as a corollary to the principles already laid down.

We should also say that as a matter of course there is no election implied or is indeed possible when the person whose right is adversely dealt with in the will receives from the testator no alternative benefit thereunder in lieu of that taken away. *Ford v. Whedbee,* 21 N. C., 16; *McGehee v. McGehee, supra.*

In the case at bar the preamble to the codicil states that the testator had, since the making of his will, sold the land referred to in item three thereof (not the land in controversy here) receiving $9,000.00 therefor, one-half of which belonged to the wife, the present plaintiff, by virtue of her one-half interest therein, and that he now desires to dispose of such of his half of the proceeds—$4,500.00—as might remain in his hands at his death. This is the legacy which appellants contend the plaintiff accepted, formally and legally, in lieu of her own land when

she qualified as executrix to the will. But the burden rested upon the defendant to adduce some evidence of a condition confronting the plaintiff which put her to an election at the time she presented the will for probate and qualified as executrix; and, in view of the conditional nature of the bequest, the court cannot assume that any part of it remained undisposed of or unspent at the time of testator's death. The defendants offered no evidence. Ordinarily, time is no fixative when applied to cash assets.

But we are of opinion that defendants' cause must fail in respects more fundamental than mere procedure. The single sentence composing the second item in the codicil, under which the defendants claim, strikingly emphasizes the fact that the testator and his wife hold the land as an estate by the entirety, and purports to convey only his interest in it—"I hereby give and devise my interest"—and even so expressly negatives any effectual devise with the proviso, "That this will shall not affect the deed which has already been made to Mary H. Lamb and me"; this being the deed under which they hold by entirety.

It seems reasonably clear that the testator supposed himself to have some disposable interest in the land at the time, or anticipated that the estate in entirety might, in the course of time, be resolved into a cotenancy. But we need not speculate about this. It seems clear that the testator has put enough into this paragraph to negative any intent to interfere with the plaintiff's right of survivorship, and to toll the necessity of election, if it had otherwise existed.

We should say that *Hoggard v. Jordan,* 140 N. C., 610, 53 S. E., 220, cited by appellant, is not sufficiently in point to support appellant's appeal. What the Court might have done with that case except for the long continued acquiescence of the interested parties is not for us to say. But the factual differences between that case and the case at bar are sufficient to distinguish them in legal principle. One of these differences is that in *Hoggard v. Jordan, supra,* the testator, in terms, disposed of the whole land, and in the instant case the testator just as plainly limited the disposal to his own interest, clearly indicating that he was not attempting to dispose of the property of another. *Penn v. Guggenheimer,* 76 Va., 833, 847; 2d Story Eq. Jur., sec. 1037, Pomeroy, 849. Also, inasmuch as it does not affirmatively appear that the devisee got, or could have gotten, anything else from the will, the result would be to ration the wife's own estate between her and the defendants without offering any alternative as the subject of election. *McGehee v. McGehee, supra; Ford v. Whedbee, supra; Bennett v. Harper,* 36 W. Va., 546, 15 S. E., 143; Page on Wills, sec. 1188.

The judgment of the trial court is

Affirmed.

L. O. PERRY, INA P. FOWLER, BURMA P. FAUCETTE, MAUDE P. PRIVETTE, H. K. PERRY, R. K. PERRY, AND R. C. PERRY v. FIRST CITIZENS NATIONAL BANK & TRUST COMPANY, ADMINISTRATOR D. B. N. OF THE ESTATE OF J. B. PERRY, DECEASED.

(Filed 6 November, 1946.)

1. Trial § 27—

Where the evidence is conflicting it is error for the court to give an instruction which has the effect of a directed verdict for either party.

2. Bills and Notes § 34—

Although the burden is upon the maker who admits the execution and delivery of notes to establish his contention of non-liability, where testimony offered by him, considered in the light most favorable to him, affords any competent evidence in support of his contention, he is entitled to have the question submitted to the jury, and an instruction having the effect of a directed verdict against him is error.

3. Bills and Notes §§ 3, 33—

As between the parties, the maker of negotiable notes under seal purporting on their face to be for "value received" is not precluded from showing that their delivery was conditioned upon a contingency which had not been fulfilled or that they were given upon a condition which failed, or that there was a failure of consideration.

4. Same: Descent and Distribution § 13—Evidence held for jury on defense of want of consideration or that notes were given on condition that failed.

In this action by a distributee against the successor administrator to recover his distributive share of the estate, defendant set up as a defense notes executed by the distributee to intestate. Plaintiff admitted the execution of the notes, and offered evidence that the notes were executed and delivered upon condition that intestate assume and pay off certain tax liens on plaintiff's land, and that plaintiff thereafter executed other notes for substantially the same obligation to the first administrator who paid the tax liens, and that the first administrator had declared that the second set of notes settled the distributee's obligations to the estate. *Held:* Plaintiff's evidence was sufficient to be submitted to the jury upon his contention that the first series of notes were given upon a condition that failed or that they were without consideration, and an instruction having the effect of a directed verdict for the administrator on the issue is erroneous.

5. Evidence § 32—

Testimony by the maker of notes as to transactions with deceased payee tending to establish non-liability is properly excluded. G. S., 8-51.

APPEAL by plaintiff H. K. Perry from *Bone, J.*, at January Term, 1946, of FRANKLIN. New trial.

The plaintiffs sued to recover their distributive shares in the estate of J. B. Perry, deceased. The defendant administrator answered admitting assets for distribution, but alleged, among other things, that

plaintiff H. K. Perry was indebted to the estate, evidenced by certain enumerated notes, in an amount in excess of his distributive share.

It was admitted that all of the notes referred to were barred by the pleaded statute of limitations, except (1) three notes under seal, dated 22 January, 1935, in the aggregate sum of $2,300, and (2) one note for $1,971, dated 7 April, 1941. Plaintiff H. K. Perry admitted he owed the $1,971 note, which he was ready to pay, but denied liability on the notes for $2,300 on the ground that these notes, secured by deed of trust on his land, were conditioned upon J. B. Perry's paying certain outstanding liens on plaintiff's land arising out of unpaid taxes, and were executed to secure and indemnify J. B. Perry therefor; that J. B. Perry had failed to pay off these obligations, and that the note of $1,971 was later given by plaintiff to the former administrator of the J. B. Perry estate to cover these same obligations. Plaintiff pleaded failure of consideration.

The only controverted issue submitted to the jury was in regard to the three notes aggregating $2,300. As relating to this issue, it was not controverted that J. B. Perry, the uncle of plaintiff H. K. Perry and of plaintiff's brother W. C. Perry, died in 1940, and that W. C. Perry qualified as administrator of his estate and continued to act in that capacity until 9 April, 1942, when he resigned, and was succeeded by the defendant Bank; that the land of H. K. Perry (123 acres) had been at some previous time sold for taxes and bought in by the county; that the county in 1934 conveyed the land to W. C. Perry for $1,350, the amount of the taxes and costs. W. C. Perry paid part of the purchase money and gave notes secured by deed of trust on the land to the county for the balance of the purchase money in the sum of $1,187. 22 January, 1935, W. C. Perry conveyed the land back to H. K. Perry, who assumed payment of the debt, and on the same date H. K. Perry executed the three notes to J. B. Perry aggregating $2,300, secured by deed of trust on the land. On the face of these notes appeared the phrase "for purchase money." It was contended by the plaintiff, not admitted by defendant, that these notes were given only to secure J. B. Perry for the contemplated payment by him of the outstanding lien held by the county and the amount which had been advanced by W. C. Perry. The $1,187 deed of trust on the land was not canceled, and on 7 April, 1941, the notes representing this indebtedness, which, with interest and additional taxes, amounted to $1,971, were transferred by the county to W. C. Perry administrator. On the same date and for same amount the plaintiff H. K. Perry executed his note to W. C. Perry, administrator of J. B. Perry. Judgment on this note, admitted by plaintiff, was rendered against plaintiff in this action. The defendant Bank qualified as administrator *d. b. n.* 9 April, 1942, at which time these notes and deeds

of trust (both the $2,300 papers and the $1,971 papers) came into its hands. W. C. Perry died September, 1942.

The defendant Bank administrator offered evidence tending to show the execution of the notes referred to, and the admission in paragraph 3 of plaintiff H. K. Perry's reply that he had "executed and delivered" the three notes aggregating $2,300. Plaintiff then, without objection, offered the remainder of paragraph 3 to the effect that the $2,300 paper was executed "in consideration of said J. B. Perry paying all the taxes due on said land as hereinbefore set out, the said J. B. Perry failed and refused to pay the taxes which had accumulated upon said lands, and said taxes were not paid until after the death of said J. B. Perry when the same had amounted to $1,971, and were then paid by the administrator of the estate of J. B. Perry, deceased."

Mr. E. H. Malone, the attorney who drew the $2,300 papers, testified that H. K. Perry, J. B. Perry and W. C. Perry were present in his office at the time; that following failure of negotiations to secure a loan from the Federal Land Bank, J. B. Perry had agreed to take up and carry the indebtedness on the land for H. K. Perry (part due W. C. Perry), and these notes and deed of trust constituted as he understood a complete settlement among the parties at that time. No money was passed. The notes were left in the attorney's office and some six months later were taken by W. C. Perry. The attorney understood from what the parties said that these notes were to secure what J. B. Perry was taking up, including what the plaintiff owed W. C. Perry.

Plaintiff then called Bill Perry as a witness, who testified that he was a son of the plaintiff, but had no pecuniary interest in the matter; that W. C. Perry, after his qualification as administrator, stated that "H. K. Perry had straightened out all his indebtedness to the J. B. Perry estate, except taxes," and "that he (the administrator) would settle all of his notes."

The court charged the jury on the issue relating to the three notes aggregating $2,300 as follows: "I instruct you that if you believe the evidence and find the facts to be as all the evidence tends to show, that it would be your duty to answer that issue $2,300 with interest."

From judgment upon the verdict returned in accordance with this instruction, the plaintiff H. K. Perry appealed.

G. M. Beam for plaintiff, appellant.

Yarborough & Yarborough and Lumpkin, Lumpkin & Jolly for defendant, appellee.

DEVIN, J. The appellant assigns error in the charge on the ground that the instruction given by the trial court as to the only controverted issue amounted to a directed verdict for the defendant, and was based

upon the erroneous view, as thus expressed, that there was no competent evidence to support the plaintiff's contentions.

The question presented is whether the plaintiff has offered sufficient competent evidence to require the submission of the controversy on the determinative issue as an open question. From an examination of the report of the testimony set out in the record, it is apparent that the evidence on the principal question at issue was not all one way. It was conflicting in material respects. In *Kearney v. Thomas,* 225 N. C., 156 (165), 33 S. E. (2d), 871, 877, it was said: "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." Having admitted in his pleading the execution and delivery of the notes in suit, the burden was on the plaintiff to offer evidence tending to show non-liability thereon, and if the testimony on that point, considered in the light most favorable for him, afforded any competent evidence in support of his contention, he was entitled to have it submitted to the jury with appropriate instructions from the court as to all material phases of the case presented by such evidence. *R. R. v. Lumber Co.,* 185 N. C., 227, 117 S. E., 50; *Taylorsville v. Moose,* 212 N. C., 379, 193 S. E., 394.

While the notes in question were under seal, thus importing consideration (*Coleman v. Whisnant, ante,* 258, 37 S. E. (2d), 693), and indicated on their face that they were given "for value received," this would not preclude the plaintiff from showing if he can that the obligation was assumed upon a contingency which was not fulfilled, *Lerner Shops v. Rosenthal,* 225 N. C., 316, 34 S. E. (2d), 206; *Ins. Co. v. Morehead,* 209 N. C., 174, 183 S. E., 606; *Kindler v. Trust Co.,* 204 N. C., 198, 167 S. E., 811; *Sykes v. Everett,* 167 N. C., 600, 83 S. E., 585, or that the notes were given upon a condition which failed, *Thomas v. Carteret,* 182 N. C., 374, 109 S. E., 384; *Roebuck v. Carson,* 196 N. C., 672, 146 S. E., 708; *Federal Reserve Bank v. Mfg. Co.,* 213 N. C., 489, 196 S. E., 848; *Jones v. Casstevens,* 222 N. C., 411, 23 S. E. (2d), 897; or that as between the parties there was a failure of consideration, the notes being negotiable in form; G. S., 25-33; *Farrington v. McNeill,* 174 N. C., 420, 93 S. E., 957; *Patterson v. Fuller,* 203 N. C., 788, 167 S. E., 74; *Lentz v. Johnson,* 207 N. C., 614, 178 S. E., 226. "In proper cases it may be shown by parol evidence that an obligation was to be assumed only upon a certain contingency." *Kindler v. Trust Co., supra.* "The manual delivery of an instrument may always be proved to have been on a condition which has not been fulfilled, in order to avoid its effect." *Garrison v. Machine Co.,* 159 N. C., 285, 74 S. E., 821. "Parol evidence is admissible in an action between the parties to show that a written instrument executed and delivered by the party obligor to the party obligee absolute on its face was conditional and not intended to take

effect until another event should take place." *Ware v. Allen,* 128 U. S., 590; *Bowser v. Tarry,* 156 N. C., 35, 72 S. E., 74.

We think the plaintiff in this case has offered evidence which, when considered in the light most favorable for him, affords ground for the permissible inference, deducible therefrom, that the $2,300 papers and the $1,971 note relate to the same transaction, and evidence in the main the same obligation; that the three notes aggregating $2,300 were not based upon a present consideration, but were executed upon condition that the payee take up the outstanding liens on plaintiff's land; that upon the payee's failure so to do the $1,971 note was later given by the plaintiff to the payee's administrator to cover these same obligations, or a substantial part thereof; and further that this note for $1,971, which the plaintiff stands ready to pay, was accepted by the then acting administrator as constituting a discharge of the previously executed notes. *Ins. Co. v. Morehead,* 209 N. C., 174, 183 S. E., 606.

While the testimony of the plaintiff himself as to a personal transaction with the defendant's intestate was properly excluded as coming within the prohibition of G. S., 8-51 (*Wilder v. Medlin,* 215 N. C., 542, 2 S. E. (2d), 549), we think there was some competent evidence tending to support plaintiff's contentions, which he was entitled to have submitted to the jury, with appropriate instructions.

In stating this conclusion we must not be understood as expressing any opinion as to the weight or conclusiveness of the testimony. Conflicting or contradictory evidence invokes "the true office and province of the jury." G. S., 1-180. That there is such evidence here, in view of the peremptory instruction given, renders another hearing necessary. *Boutten v. R. R.,* 128 N. C., 337, 38 S. E., 920.

New trial.

STATE v. WILBERT JOHNSON AND CHARLES PRIMUS, JR.

(Filed 6 November, 1946.)

1. Rape §§ 1, 8—

Carnally knowing any female of the age of twelve years or more by force and against her will is rape; and carnally knowing and abusing any female child under the age of twelve years is also rape, G. S., 14-21.

2. Rape § 1—

"Force" as an element of rape may be either actual or constructive, and submission under fear or duress may take the place of actual physical force.

3. Rape § 1½—

The single crime of rape may be committed by more than one offender, and a person who is present and aids and abets the actual ravisher, is a principal and equally guilty.

4. Criminal Law § 8—

Aiders and abettors who assist in the perpetration of a crime are principals.

5. Rape § 4—Evidence of guilt of both defendants of rape, one as perpetrator and other as aider and abettor, held sufficient.

Evidence that defendants, in the middle of the night, pursuant to an admitted conspiracy to rob, took charge of a parked automobile occupied by prosecutrix and her male companion, drove it into the county, robbed the occupants and forced them to alight, and that one of defendants then ordered prosecutrix to remain at the spot with the other defendant, and forced her companion, at pistol point, to march two hundred feet away with him, and that while thus separated from her companion, the defendant who remained with prosecutrix threatened to kill her or do her great bodily harm if she resisted, and in the circumstances where resistance would be useless and might have been fatal, prosecutrix submitted to him "on account of fear" *is held* sufficient to carry the case to the jury as to the guilt of each defendant on the capital charge of rape, one as the actual perpetrator, and the other as an aider and abettor.

6. Criminal Law §§ 52a, 81f—

A demurrer to the evidence presents the sufficiency of the evidence considered in the light most favorable to the State, to carry the case to the jury or to support the verdict, and neither the trial court nor the Supreme Court on appeal may pass upon the weight of the evidence or the credibility of the witness.

APPEAL by defendants from *Harris, J.*, at June Term, 1946, of WAKE.

Criminal prosecution on indictment charging the defendants with rape.

Following arrest of judgment at the Spring Term, 1946, reported *ante,* 266, for defect in bill of indictment, another bill was duly returned against the defendants charging them with the carnal knowledge of a female forcibly and against her will. Upon this indictment they were again tried and convicted.

The record discloses that on the night of 19 June, 1945, about the hour of 11:45 p.m. Charles Primus, Jr., and Wilbert Johnson (Negroes), armed and admittedly bent on robbery, took charge of an automobile which was parked on Whitaker Mill Road in the northern part of the City of Raleigh and occupied at the time by John Guignard and Virginia Lipscomb (Whites), drove it a distance of about six miles into the country, ran it into a ditch, got out and ordered the occupants to do likewise, demanded their pocketbooks, commanded them to go down a road in the woods; the defendants then held a whispered conversation, after which Johnson, with gun in hand, directed Miss Lipscomb to "stay there," with Primus and marched Guignard approximately 200 feet down a path and demanded to know where his money was. While the parties were thus separated, Primus had intercourse with the prosecutrix after threatening to kill her if she did not submit. She says, "I submitted to Primus on

account of fear." The defendants were over 18 years of age; and the prosecutrix was 25 years old at the time of the assault.

Soon after the rape was accomplished the defendants freed the prosecutrix and her companion and allowed them to make their way to a house in the neighborhood.

The defendants admitted in statements in the nature of confessions that they obtained $650 from Guignard and $38 from Miss Lipscomb. Each originally claimed the other committed the rape, but finally Primus admitted he was the one who actually assaulted the prosecutrix. Johnson was tried on the theory of an accessory, being present, aiding and abetting in the perpetration of the capital offense. He was referred to by Primus as "the boss" of the hold-up conspiracy.

Verdict: Guilty of rape as to each defendant.

Judgments: Death by asphyxiation as to both defendants.

Defendants appeal, assigning as error the refusal of the court to sustain their demurrers and dismiss the action as in case of nonsuit. G. S., 15-173.

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

A. B. Breece for defendants.

STACY, C. J. The questions presented are whether the cases as made can survive the demurrers. Specifically, the question posed by Primus is whether the evidence shows force sufficient on his part to constitute rape; and the question raised by Johnson is whether the evidence renders him a participant in the capital offense. The defendants concede that they conspired to get money by hold-up and robbery on the night in question, but they contend that any additional crime was in excess of their original design. *S. v. Trammell,* 24 N. C., 379. *Cf. S. v. Smith,* 221 N. C., 400, 20 S. E. (2d), 360; *S. v. Bell,* 205 N. C., 225, 171 S. E., 50.

I. THE CASE AGAINST PRIMUS:

"Rape is the carnal knowledge of a female forcibly and against her will." *S. v. Jim,* 12 N. C., 142. This was the early definition of the crime, and it still has the same significance in the law. *S. v. Marsh,* 132 N. C., 1000, 43 S. E., 828; *S. v. Johnston,* 76 N. C., 209. Our statute also makes it rape, carnally to know and abuse any female child under the age of twelve years, even though she consents. G. S., 14-21; *S. v. Storkey,* 63 N. C., 7. In other words, "ravishing and carnally knowing any female of the age of twelve years or more by force and against her will" is rape; and "carnally knowing and abusing any female child under the age of twelve years" is also rape. G. S., 14-21; *S. v. Monds,* 130 N. C., 697, 41 S. E., 789.

In the instant case, as against Primus, it was incumbent upon the State to show that his connection with the prosecutrix was accomplished "by force and against her will." "By force," however, is not necessarily meant by actual physical force. 52 C. J., 1024. It may be actual or constructive. Anno. 8 L. R. A., 297. Fear, fright, or duress, may take the place of force. 44 Am. Jur., 903. The case is replete with evidence that the prosecutrix submitted "on account of fear" and after the defendant had threatened to kill her or do her great bodily harm, if she resisted. Indeed, the circumstances themselves were terrifying. The prosecutrix and her companion had been held up and robbed in the middle of the night by two strange men whom they regarded as desperadoes. Johnson with gun in hand ordered the prosecutrix to "stay there" in the wooded path with Primus while he marched her companion farther "down the path." Under these circumstances, the prosecutrix "submitted to Primus on account of fear." The jury has found that the intercourse was against her will; that she was prevented from fiercely resisting by terror or the exhibition of force, and that she was "overcome by numbers or terrified by threats, or in such place and position that resistance would have been useless," and might have been fatal. *Mills v. United States,* 164 U. S., 644, 41 L. Ed., 584; 44 Am. Jur., 904. The evidence against Primus was sufficient to carry the case to the jury, and his demurrer was properly overruled. *S. v. Sutton,* 225 N. C., 332, 34 S. E. (2d), 195; *S. v. Wagstaff,* 219 N. C., 15, 12 S. E. (2d), 657; *S. v. Page,* 215 N. C., 333, 1 S. E. (2d), 887.

II. THE CASE AGAINST JOHNSON:

The theory of the prosecution against Johnson is, that he was present, aiding and abetting in the commission of the rape. *S. v. Ham,* 224 N. C., 128, 29 S. E. (2d), 449; *S. v. Epps,* 213 N. C., 709, 197 S. E., 580; *S. v. Ray,* 212 N. C., 725, 194 S. E., 482; *S. v. Gosnell,* 208 N. C., 401, 181 S. E., 323; *S. v. Donnell,* 202 N. C., 782, 164 S. E., 352; *S. v. Beal,* 199 N. C., 278, 154 S. E., 604; *S. v. Hart,* 186 N. C., 582, 120 S. E., 345; *S. v. Skeen,* 182 N. C., 844, 109 S. E., 71; *S. v. Jarrell,* 141 N. C., 722, 53 S. E., 127. While Primus was the actual rapist, still it was Johnson who provided the opportunity and afforded the protection. *S. v. Kelly,* 216 N. C., 627, 6 S. E. (2d), 533. After a whispered conversation with Primus he ordered the prosecutrix to "stay there" with Primus in the wooded path, and then commanded her companion to move farther into the woods. *S. v. Bell, supra.*

If not the real author of the crime, Johnson was "the boss," directing the movements of the parties, lending aid and comfort by his presence and consenting unto the wrong. This made him a partaker of the offense and *particeps criminis. S. v. Whitehurst,* 202 N. C., 631, 163 S. E., 683. True, he again demanded of Guignard to know where his money was,

but this, the prosecution contends, was only a ruse as the money had already been taken. As soon as the crime was accomplished, the prosecutrix and her companion were freed by their captors.

The single crime of rape may be committed by more than one offender. *S. v. Jordan,* 110 N. C., 491, 14 S. E., 752; *S. v. Dowell,* 106 N. C., 722, 11 S. E., 525; *S. v. Jones,* 83 N. C., 605; Anno. 8 L. R. A., 297. If others are present, aiding and abetting the actual ravisher, they would all be principals and equally guilty. *S. v. Triplett,* 211 N. C., 105, 189 S. E., 123. Aiders and abettors who assist in the perpetration of a crime are principals, and may be tried as such. *S. v. Holland,* 211 N. C., 284, 189 S. E., 761; *S. v. Hart, supra; S. v. Fox,* 94 N. C., 928. "Where two persons aid and abet each other in the commission of a crime, both being present, both are principals and equally guilty." *S. v. Jarrell, supra; S. v. Williams,* 225 N. C., 182, 33 S. E. (2d), 880.

The evidence against Johnson was sufficient to carry the case to the jury, and his demurrer was properly overruled. *S. v. Lambert,* 196 N. C., 524, 146 S. E., 139; *S. v. Baldwin,* 193 N. C., 566, 137 S. E., 590; *S. v. Hart, supra.*

These are the only exceptions presented by the appeal. They are without special merit on the present record, and are not sustained. The court's inquiry, upon demurrer to the evidence, is directed to its sufficiency to carry the case to the jury or to support a verdict, and not to its weight or to the credibility of the witnesses. *S. v. Vincent,* 222 N. C., 543, 23 S. E. (2d), 832; *S. v. Rountree,* 181 N. C., 535, 106 S. E., 669. The jury alone are the triers of the facts. *S. v. Anderson,* 208 N. C., 771, 182 S. E., 643. We are not permitted to weigh the evidence here. *S. v. Fain,* 106 N. C., 760, 11 S. E., 593. "In considering a motion to dismiss the action under the statute, we are merely to ascertain whether there is any evidence to sustain the indictment; and in deciding the question we must not forget that the State is entitled to the most favorable interpretation of the circumstances and all inferences that may fairly be drawn from them. . . . It is not the province of this Court to weigh the testimony and determine what the verdict should have been, but only to say whether there was any evidence for the jury to consider; and if there was, the jury alone could determine its weight"—*Adams, J.,* in *S. v. Carr,* 196 N. C., 129, 144 S. E., 698.

The verdict and judgments will be upheld.

No error.

MRS. LOUISE BENNETT v. E. B. TEMPLETON.

(Filed 6 November, 1946.)

1. Trial § 53—

The consent of both parties is necessary to authorize the court to hear the evidence, find the facts and declare the law arising thereon, without a jury, and in the absence of mutual consent, the judgment of the court is void and may be set aside upon motion as a matter of right.

2. Judgments § 27d—In absence of finding that attorney who agreed to submission of cause to court for trial represented defendant, motion to set aside judgment should have been allowed as a matter of law.

The findings of fact by the court disclosed the following: The court agreed to continue all cases in which a certain attorney was attorney of record. Upon the calling of this case the court was informed that this attorney represented defendant. At the instance of the court another attorney phoned defendant and advised him that the case had been called and would be delayed thirty minutes for his appearance, and that thereupon defendant stated he had no way of getting there within that time and requested the attorney to "do the best you can for me." When the case was again called, the defendant had not appeared and, both the attorney and the court acting in good faith in the belief the attorney represented defendant, the attorney agreed to trial by the court, and the court heard evidence, found facts and rendered judgment. *Held:* The authority of the attorney agreeing to the submission of the cause to the court having been denied, in the absence of a finding that such attorney represented defendant, defendant's motion to set aside the judgment for irregularity should have been allowed as a matter of law.

APPEAL by defendant from *Sink, J.*, at July Term, 1946, of CATAWBA.

This is a proceeding in summary ejectment under the Landlord and Tenant Act, instituted before a justice of the peace, to recover possession of a house and lot located at 1250 Sixth Street, Hickory, N. C., and for the recovery of rent thereon from 6 April, 1946, until vacated, and for the cost of the action. From judgment in favor of plaintiff, entered 2 May, 1946, the defendant appealed to the Superior Court.

The case was calendared for trial in the Superior Court on Monday, 8 July, 1946, or any time thereafter during the term at the convenience of the court.

At the time the calendar was prepared the defendant was without counsel. He thereafter employed his present counsel. The night before this case was called for trial, Mr. Swift informed the trial judge that he would not be able to attend court on the following day, on account of the serious illness of his wife, and requested a continuance of all his cases. The trial judge informed him "That his cases would be taken care of in all instances where he was attorney of record, but that continuance would not be granted where he was employed merely for the purpose of working a continuance." On the following day this case was called for trial

and the plaintiff through her counsel insisted upon a trial. Mr. E. C. Willis, of the local bar, informed the court that Mr. Swift was appearing for the defendant. At the suggestion of the court, Mr. Willis phoned the defendant and informed him that his case was being called, but would be delayed for thirty minutes so he could be present for the trial. The defendant stated he had no way of getting from Hickory to Newton within that time, and said to Mr. Willis, "You go ahead and do the best you can for me." The defendant did not appear in court, and the case was again called, whereupon Mr. Willis stated, "We are willing for your Honor to hear the facts and pass upon the matter." Mr. D. M. McComb, attorney for the plaintiff, stated that the proposal was satisfactory to him. The court dictated the following stipulation, under the assumption that Mr. Willis was representing the defendant, Templeton: "It is agreed in open court by the plaintiff and defendant that their constitutional right to trial by jury shall be waived and that the Court may hear the facts and declare the law arising thereupon."

The court heard the evidence and found as a fact that notice to vacate the premises had been given as provided in the rental contract and that "the plaintiff is entitled to possession of the property and that the defendant is unlawfully and wrongfully in possession thereof." Whereupon, judgment was entered accordingly and the rent for said premises from the date of the judgment until the plaintiff is put in possession of the property was fixed at $70.00 per month, or double the amount of rent collected under the rental agreement prior to its expiration.

Thereafter, on 18 July, 1946, the defendant through his present counsel, moved to set aside the judgment for irregularity, in that Hon. E. C. Willis was not defendant's counsel, and that the court abused its discretion in denying defendant's request for a continuance.

The court heard the motion and found the facts as hereinabove set forth, and declined to set aside the judgment. Defendant appealed to the Supreme Court, assigning error.

No counsel for appellee.

C. David Swift for appellant.

DENNY, J. We think the merit of this appeal depends on whether or not the defendant employed Mr. E. C. Willis of the Catawba Bar to appear for him in the trial of this cause.

The defendant's counsel, Mr. C. David Swift, was absent with the permission of the court when the case was called for trial. However, he had requested a continuance of all his cases for the reason heretofore set out.

The defendant submitted an affidavit in support of his motion to set aside the judgment herein, in which he denies that he employed or

requested Mr. Willis to appear for him in this litigation. Moreover, the record does not disclose a finding by the court to the effect that Mr. Willis was employed or requested to represent the defendant in the trial of this cause. The record does state that the court proceeded upon the assumption that Mr. Willis represented the defendant. Therefore, if he was not authorized to represent the defendant in the trial of this case, he was without authority to waive a jury trial therein, and to consent for the court to hear the evidence, find the facts and declare the law arising thereon. Furthermore, without the consent of the parties, the court was without authority to dispense with a jury trial, and to hear the evidence, find the facts and declare the law arising thereon; and any judgment based thereon would be void. McIntosh on Practice and Procedure, p. 734, *et seq.; Ellis v. Ellis,* 190 N. C., 418, 130 S. E., 7; *Estes v. Rash,* 170 N. C., 341, 87 S. E., 109.

The court was not requested to set aside the judgment in its discretion. It was requested to set aside the judgment for irregularities, in that Mr. Willis was not employed by the defendant to represent him in the trial of this case.

Upon the facts disclosed on this record, we think Mr. Willis acted in good faith in participating in the trial. He was acting not only in the capacity of a friend to the court, but he was also endeavoring to accommodate a fellow member of the local bar; and unquestionably he interpreted what the defendant told him over the telephone to mean that he was employed to represent the defendant if the court ordered the case tried. Likewise, the court acted in good faith in assuming that Mr. Willis represented the defendant, but his authority to appear in the case having been denied, in the absence of a finding to the contrary, we think the motion to set aside the judgment should have been allowed as a matter of law. If the defendant had been present at the trial below, and had not protested the appearance of Mr. Willis in his behalf, he would be estopped from denying his authority to appear.

In view of the conclusion reached herein, there must be a new trial and it is so ordered.

It is unnecessary to consider or discuss the remaining exceptions.

New trial.

J. W. TARPLEY v. D. R. ARNOLD AND WIFE, ANNIE ARNOLD.

(Filed 6 November, 1946.)

Arbitration and Award § 3—

Upon motion to set aside an award made pursuant to the common law procedure for arbitration, movent is entitled to introduce evidence that prior to the filing of the award the arbitrator wrote movent's attorney expressing a desire to resign, and that the attorney, with movent's approval, wrote the arbitrator accepting the resignation, since if the facts should be found in accordance therewith, movent would be entitled to the relief, and refusal to consider such proof is reversible error.

APPEAL by plaintiff from *Harris, J.*, at June Term, 1946, of WAKE.

Civil action to recover possession of land.

Plaintiff alleges in his complaint that he is the owner in fee of a certain tract of land in Wake County, North Carolina, and that defendants have entered into the unlawful possession of and wrongfully withhold a part of it, to his damage.

Defendants, answering, deny the material allegations of the complaint, and assert ownership of the land of which they are in possession.

After the pleadings were filed, and on 12 May, 1945, plaintiff and defendants entered into a written agreement of arbitration to submit the matter in difference between them to certain named arbitrator, by whose findings they "will be forever bound," and on whose report and survey or map judgment may be entered, etc. The written agreement was signed and acknowledged by the parties and consented to by their respective attorneys of record.

The record shows that report of the arbitrator dated 1 February, 1946, was filed 10 April, 1946, and that on 12 April, 1946, plaintiff filed in court a motion to strike the report from the record, and for the action to be calendared for trial before a jury. The ground upon which the motion is based is that the arbitrator, in letter to and received by attorney for plaintiff on 6 March, 1946, had stated that he had found that it is not possible for him to decide definitely in his mind the question of the property line between plaintiff and defendants and would be glad (quoting his language), "if you relieved me of the responsibility of making a final decision," to which on same day the attorney for plaintiff, with the consent of plaintiff, wrote to the arbitrator that "in deference to your request and with much regret, we hereby accept your resignation as tendered today."

When the motion of plaintiff came on for hearing in Superior Court on 29 June, 1946, plaintiff tendered his affidavit in substantiation of the motion. Defendants objected to the introduction of the affidavit. The objection was sustained, and plaintiff excepted. And the court overruled the motion and plaintiff excepted.

Thereupon, the court entered judgment on the said report of the arbitrator in favor of defendants.

Plaintiff excepted, and appeals to Supreme Court and assigns error.

Albert Doub and Wilson & Bickett for plaintiff, appellant.
Bunn & Arendell for defendants, appellees.

WINBORNE, J. The parties in briefs filed in this Court appear to be in agreement that the method of arbitration adopted by them in this case is in accordance with procedure at common law, and not with that prescribed in the uniform arbitration act, G. S., 1-544, *et seq.* Hence, the motion of plaintiff to strike the report of the arbitrator must be considered in the light of pertinent common law.

Plaintiff contends that, by his acceding to the request of the arbitrator to be relieved of making a final decision, the agreement to arbitrate was revoked, and that thereafter the arbitrator had no authority to make an award. On the other hand, defendants contend that they have not "consented to the resignation of the arbitrator or to any modification or abrogation of the arbitration agreement," and that without their consent, the agreement may not be modified or set aside.

In respect to these contentions, the case of *Williams v. Mfg. Co.*, 153 N. C., 7, 69 S. E., 902, is pertinent. There in respect to the subject of revocation of agreement to arbitrate, *Brown, J.*, writing for the Court, stated: "At common law a submission might be revoked by any party thereto at any time before the award was rendered. . . . Some courts of this country have held to the contrary . . . but this Court has followed the doctrine of the common law," citing *Tyson v. Robinson*, 25 N. C., 333, and *Carpenter v. Tucker*, 98 N. C., 316, 3 S. E., 831. And, continuing, "The revocation to be effective must be express unless there is a revocation by implication of law, and in case of express revocation, in order to make it complete, notice must be given to the arbitrators. It is ineffective until this has been done."

Applying this doctrine to the case in hand, plaintiff was entitled to make proof of the facts set forth as ground for his motion to strike the report of the arbitrator, and, if the facts alleged be found to be true, to have his motion allowed. Hence, in refusing to admit and to consider the proof offered, there is error in overruling the motion.

Therefore, the judgment rendered will be set aside, and the case remanded for further consideration in the light of this opinion.

Error and remanded.

STATE v. ELVIE BROWN.

(Filed 6 November, 1946.)

1. Criminal Law § 81c (3)—

The exclusion of testimony cannot be held prejudicial when testimony of the same import is admitted without objection.

2. Criminal Law § 77c—

Where only a portion of the charge is brought forward in the record, all other portions of the charge not brought forward will be deemed without error.

3. Automobiles § 31a—

Where the driver of a car admits that he knew he had hit a man and did not stop or return to the scene, his own testimony discloses a violation of G. S., 20-166 (c), and his good faith in stopping 200 yards away from the accident and obtaining aid for the injured man before proceeding on his way to his home is immaterial on the issue of guilt or innocence and the exclusion of testimony to this effect is without error.

4. Same—

G. S., 20-166 (c), requires the driver of a vehicle involved in an accident to stop at the scene, and in the event the accident involves the injury of any person, it requires him to give his name, address, operator's license and the registration number of his vehicle, and to render reasonable assistance to the injured person.

APPEAL by defendant from *Sink, J.*, at June Term, 1946, of RANDOLPH. No error.

The defendant was charged with failing to stop at the scene of an accident in which the automobile he was driving was involved, in violation of G. S., 20-166.

The jury returned verdict of guilty, and from judgment imposing sentence defendant appealed.

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

J. Lee Moody and Walter D. Siler for defendant.

DEVIN, J. The State's evidence disclosed that the witness Smith was struck and his hip and leg broken by a speeding automobile driven by the defendant, and that the defendant did not stop at the scene of the accident or give his name, address and license number as required by the statute, G. S., 20-166. The place where the accident occurred was on the highway near Liberty, North Carolina. The defendant admitted that he knew he had hit a man and did not stop or return to the scene, but did

stop at a store 200 yards away and "got Mr. Moore (Murray) to take the injured man to Liberty." Defendant testified that he went home and hid because he was scared.

The defendant excepted to the exclusion of testimony as to his effort to obtain assistance for the injured man, but the substance of this evidence seems to have been admitted without objection. *S. v. Elder,* 217 N. C., 111, 6 S. E. (2d), 840. In any event we think the evidence was immaterial on the issue of his guilt or innocence of the offense charged.

The defendant also brought forward in his appeal a single paragraph of the judge's charge to which he noted exception. As the remainder of the charge does not appear, it is presumed the court charged the law correctly. *S. v. Hargrove,* 216 N. C., 570, 5 S. E. (2d), 852; *S. v. Jones,* 182 N. C., 781, 108 S. E., 376. Nor do we find prejudicial error in the portion excepted to.

The defendant relies upon his good faith after the accident in obtaining aid for the injured man, but this humane action cannot be held to relieve the defendant, if as a matter of fact he had violated the statute. The statute not only required the driver of a vehicle involved in an accident to stop at the scene of the accident, but also, when the accident results in injury to any person, the driver is required to give his name, address, operator's license and the registration number of his vehicle, and to render reasonable assistance to the injured person. *S. v. King,* 219 N. C., 667, 14 S. E. (2d), 803. It is apparent that on his own testimony the defendant has violated the provisions of this statute. G. S., 20-166 (c).

The subsequent action of the defendant was a matter for the consideration of the court in entering judgment.

In the trial we find

No error.

TOWN OF CLINTON v. GUY R. ROSS.

(Filed 20 November, 1946.)

1. Municipal Corporations § 40—

G. S., 160-179, is a part of the Zoning Act, and the equitable remedy of injunction therein authorized applies only to the enforcement of zoning regulations promulgated under the Zoning Act.

2. Same—

An ordinance prohibiting the operation of tobacco sales warehouses in certain sections of a municipality cannot be enforced by injunction under G. S., 160-179, as to a warehouse in operation prior to the adoption of zoning regulations by the municipality even if the ordinance be deemed a

part of the later adopted zoning regulations when the zoning ordinance expressly excludes from its operation nonconforming uses existing prior to its adoption.

3. Municipal Corporations § 36—

A charter provision giving a municipality power to establish and regulate markets relates only to markets established and operated by the municipality and not to those operated by private individuals.

4. Municipal Corporations § 40—

A charter provision giving a municipality authority to regulate certain specified businesses and trades and the sale of certain specified commodities excludes authority over business, trades and markets not specified. *Inclusio unius est exclusio alterius.*

5. Same—

Where a tobacco sales warehouse is operated within the business district but outside the fire district of a municipality, and the town has no charter or statutory authority to abate its operation, the city's right to injunctive relief to enforce its ordinance prohibiting the operation of tobacco sales warehouses in that section of the town must be determined in accordance with the general principles controlling the exercise of equity jurisdiction, treating the municipality on the same basis as any other litigant.

6. Constitutional Law § 11—

The general welfare is the prime objective of government and the right of the people to the protection of the public health, morals, and safety is the supreme law of the land, to which the right of private ownership of property must yield.

7. Injunctions § 2—

The object of equity is to supply the deficiencies of the law, and equity will not interfere when there is an adequate legal remedy.

8. Injunctions § 4g—

Injunction will not lie to restrain the violation of the criminal law unless the remedy of prosecution is inadequate because the threatened violation would result in irreparable injury to property or the rights of the public.

9. Same—

Inadequacy of punishment or difficulty in obtaining conviction or improper enforcement of a criminal statute is insufficient ground for injunctive relief.

10. Statutes § 11—

Where the statute which creates an offense prescribes the penalty for its violation, the particular remedy thus prescribed is exclusive of all other remedies.

11. Injunctions § 3—

Injunction will lie to prevent irremediable injury to or destruction of property rights.

12. Injunctions § 4d—

Injunction will lie to prevent the maintenance of a public or private nuisance where the public welfare or property rights are injuriously affected.

13. Municipal Corporations § 40: Injunctions § 4g—

A municipality may enjoin the operation of a lawful business only if there is something inherent in the nature of the business or in the manner of its operation which has some definite and substantial relation to public health, morals, safety or welfare, and the fact that the business may seriously interfere with the business of others is in itself insufficient.

14. Same—

Whether the operation of a business injuriously affects the public health, morals, safety or welfare may frequently depend upon its location and surroundings. That which is harmless in an industrial area may be unsafe or injurious in a thickly settled residential district.

15. Nuisances §§ 3a, 7a—

A tobacco sales warehouse is a lawful enterprise and when operated in the usual manner is in no sense a public or private nuisance.

16. Municipal Corporations § 40: Injunctions § 4g—

A municipal corporation is not entitled under the general principles of equity to enjoin the operation of a tobacco sales warehouse in an area proscribed by its ordinance when the warehouse is located in the industrial section of the town but not in the fire district and is operated in the customary manner.

17. Same—

The fact that the customers of a tobacco sales warehouse congest traffic in the public streets adjacent thereto forms no basis for enjoining operation of the warehouse, since such condition is produced by the traveling public and is not directed to any condition inherent in the operation of the warehouse or to any conduct on the part of the proprietor.

18. Same—

Allegations that the operation of defendant's tobacco sales warehouse depreciates the value of property in close proximity thereto constitutes no basis for enjoining the operation of the warehouse, such injury incident to a lawful business operated in a lawful manner being *damnum absque injuria.*

APPEAL by defendant from *Carr, J.,* at August Term, 1946, of SAMPSON.

Civil action to restrain the violation of a town ordinance.

The Town of Clinton is located in a populous area of North Carolina and in the tobacco belt. The courthouse square is the hub or center around which the town is built. Eight highways enter or pass through this square. The streets are narrow, and on busy days traffic jams are the rule rather than the exception.

In 1945 the people of the town, with the full co-operation of the governing authorities, sought and obtained a tobacco sales market. Plans were made by local citizens to operate three warehouses: one, the Big Sampson Warehouse, was to be located just outside the city limits; one, to be operated by one Taft M. Bass and associates, to be located on McKoy Street; and one by defendant and his associates to be located on Elizabeth Street. Defendant, on 1 June, 1945, applied for and procured a permit to build a warehouse on Elizabeth Street.

When it became certain that a tobacco sales market would be located in Clinton, the Town Board, on 5 June, 1945, enacted an ordinance which makes it unlawful to sell or offer to sell, buy or offer to buy, leaf tobacco, or to establish, operate, or attempt to operate a warehouse for the sale of leaf tobacco (1) within the fire district, (2) in certain designated areas, including Elizabeth Street, and (3) anywhere in the Town of Clinton unless the "operator of such warehouse shall provide immediately adjacent thereto a parking lot or lots containing a minimum of 100,000 square feet of free parking space for the use of the patrons of said warehouse."

The ordinance recites that it is enacted "in order to provide for the orderly marketing of tobacco on said market, to protect the citizens of said town from the increased traffic and fire hazards by reason of establishment of said market."

Shortly thereafter a new board took office and the board, as newly constituted, enacted an amendment thereto which postponed the effective date thereof until 1 December, 1945. The new board took this action for the reason that the ordinance precluded the operation of two of the three proposed warehouses and tended to destroy competition. The defendant and the owners of the Bass warehouse were notified that the ordinance would be enforced on and after its delayed effective date.

Defendant, having obtained a permit therefor on 1 June, 1945, erected a warehouse on property owned by him on Elizabeth Street and operated as a tobacco sales warehouse during the 1945 season. The building was actually erected after the adoption of the ordinance and with knowledge that it was being erected within a proscribed area.

During the 1945 tobacco season the streets in close proximity to defendant's warehouse were completely blocked on various occasions by the traffic thereon, composed largely of vehicles going to and from said warehouse. There were, however, other available streets which might be used by traffic other than that moving to the warehouse of the defendant.

Plaintiff owns a large tract of land covering about one block, adjoining the warehouse property of the defendant. It operates on this property a municipal cotton platform and also a vegetable and fruit auction market. The vegetable and fruit market produces more traffic than does

the defendant's warehouse, and the streets in close proximity thereto have on occasions been completely blocked by vehicular traffic going to and from the fruit market, and the traffic congestion resulting from the operation of said vegetable and fruit market has been considerably greater than that resulting from the operation of defendant's tobacco warehouse. The traffic going to and from plaintiff's cotton market has likewise tended to congest these streets but not to the extent they have been congested by traffic going to and from the vegetable and fruit market of plaintiff and the tobacco warehouse of defendant. The traffic congestion on the streets near plaintiff's property and that of the defendant at times rendered it practically impossible for fire-fighting vehicles to pass through. The ordinance was adopted for the primary purpose of attempting to relieve the resulting traffic and fire hazard.

The plaintiff is seeking to purchase a tract of land elsewhere and intends to remove its vegetable and fruit market and its cotton platform from its present location to the newly acquired property.

The Town of Clinton is located in a populous rural community for which it is the market place, and its streets are unusually narrow. As a result the town is confronted with serious traffic problems.

In the summer of 1946 the defendant began to make preparation and advertised his purpose to reopen his warehouse for the sale of tobacco during the 1946 sales season. Thereupon the plaintiff instituted this action and obtained a temporary restraining order. When the rule to show cause came on to be heard, the court, upon consideration of the evidence offered, found the facts and upon the facts found entered judgment continuing the temporary restraining order to the hearing. The defendant duly entered his exceptions to the findings of fact and to the judgment entered, and appealed.

H. H. Hubbard and Jeff D. Johnson, Jr., for plaintiff, appellee.

J. B. Williams and Varser, McIntyre & Henry for defendant, appellant.

BARNHILL, J. That defendant's warehouse is so built that by the erection of partitions it can be used for wholesale business establishments may be a fact. Even so, there is nothing in the record to sustain the finding that he erected the building for a dual purpose.

When he obtained a permit to erect a warehouse the designation of Clinton as a tobacco sales market was uppermost in the minds of its people. They, at that time, had cause to feel assured their efforts would be successful. To say that defendant did not have in mind a warehouse to be used for the sale of leaf tobacco would seem to beg the question.

G. S., 160-179, is not a statute of general application. It is a part of our Zoning Act, G. S., ch. 160, Art. 14, and authorizes a suit in equity

to restrain the erection, maintenance, or repair of any building, structure, or land used "in violation of this article or of any ordinance or other regulation made under authority conferred thereby." It has no application here.

Plaintiff does not plead the zoning ordinance of the town adopted in April, 1946. It pleads the 1945 ordinance, as amended, and bottoms its claim to injunctive relief in its complaint and in its evidence squarely on the contention that defendant's intended violation of that ordinance constitutes a threat to the welfare, peace, and safety of the citizens of the town.

In any event, on the facts here presented, the zoning ordinance forms no basis for equitable relief. Defendant's warehouse is in an industrial district as defined by it. Tobacco warehouses are not excepted, unless by the reference in sec. 19 thereof which provides:

"This ordinance shall not be construed as amending or repealing in any respect the tobacco warehouse ordinance enacted by the Board of Commissioners on the 5th day of June, 1945, as amended."

If we concede that this provision is sufficient to add tobacco warehouses to the list of businesses which may not be conducted in said district "until and unless the location of such use shall have been approved by the Board of Commissioners," a provision of doubtful validity, sec. 7, then we are met by sec. 8 of the ordinance which relates to nonconforming uses and provides that:

"The lawful use of a building or premises existing at the time of the adoption of this ordinance may be continued although such use does not conform with the provisions of this ordinance . . ."

The charter of plaintiff municipality, ch. 115, Private Laws Ex. Sess. 1913, does not confer upon it the power to prohibit the maintenance of warehouses of the type here involved. Section 43 (24) of said Act confers authority "To establish markets and market places, and provide for the government and regulation thereof." However, the power to regulate thus conferred relates to markets, such as the vegetable and fruit market, established and maintained by the town.

The Act likewise confers authority to abate nuisances and to regulate certain specified businesses and trades; to control the sale of named commodities; and to direct the location of slaughter houses and certain other buildings. Neither tobacco sales warehouses nor the sale of leaf tobacco is included. *Inclusio unius est exclusio alterius.*

Defendant's warehouse is not located in the fire district of the town. Hence whatever power it may have to regulate or prohibit any building within that area or to enjoin the continued use thereof does not pertain to the business, the operation of which it now seeks to enjoin.

So then, there is no special authority conferred upon the plaintiff by its charter which may be construed to vest power in it to resort to equity for aid in enforcing its ordinances.

Its anomalous position in seeking the aid of equity in the enforcement of its own ordinance can be maintained, if at all, only under recognized general principles controlling the exercise of equity jurisdiction. On this question the plaintiff comes into court as any other litigant with no distinction drawn in its favor. The inquiry is, as it is in cases of an individual seeking the aid of "the strong arm of equity," whether the facts presented show the need of the interference of equity for the protection of rights cognizable by equity. 28 A. J., 342; Anno. 40 A. L. R., 1147, 1149; 91 A. L. R., 316.

The general welfare is the prime objective of government and the right of the people to the protection of the public health, morals, and safety is the supreme law of the land, to which the right of private ownership of property must yield. However, in the enforcement of this right, equity acts within the bounds of, and in accord with, generally recognized principles.

The object of equity is to supply the deficiencies of the law, *Long v. Merrill,* 4 N. C., 549, and so it is axiomatic that equity will not intervene so long as there is an adequate remedy at law.

Likewise it will not exercise its preventive powers for the purpose of enforcing the criminal law by restraining criminal acts. *Hargett v. Bell,* 134 N. C., 394; *Motor Service v. R. R.,* 210 N. C., 36, 185 S. E., 479; *Fayetteville v. Distributing Co.,* 216 N. C., 596, 5 S. E. (2d), 838; *Dean v. S. ex rel. Anderson,* 40 A. L. R., 1132; *New Orleans v. Liberty Shop,* 40 A. L. R., 1136; *Pompano Horse Club v. S. ex rel. Bryan,* 52 A. L. R., 51, Anno. *ibid.* 79; *S. ex rel. Stewart v. Dist. Ct.,* 49 A. L. R., 627; 28 A. J., 336, and numerous authorities cited in notes; 28 A. J., 343, 347; Anno. 9 A. L. R., 925, 40 A. L. R., 1145, 91 A. L. R., 316, Ann. Cas. 1914A, 440; *Denver & S. P. R. Co. v. Englewood,* 4 A. L. R., 956; 3 McQuillin, Mun. Corp. (Rev.), 810.

The fact that the criminal statute is not properly enforced, or that it may be difficult to obtain a conviction, or the punishment prescribed is inadequate, does not furnish a sufficient reason for assuming jurisdiction to enjoin criminal acts. 43 C. J. S., 762; 28 A. J., 337, and cited cases; 28 A. J., 343; Anno. 40 A. L. R., 1154, 91 A. L. R., 318.

Inadequacy of remedy by prosecution at law is grounds for enjoining criminal acts only when such acts threaten irreparable injury to property or to the rights of the public. Anno. 40 A. L. R., 1150, 91 A. L. R., 317.

When an offense is created by statute, not existing at common law, and the penalty for its violation is prescribed by the same statute, the particular remedy thus prescribed must alone be pursued, for the mention of the particular remedy makes the latter exclusive. *S. v. R. R.,* 145 N. C., 495; *McCormick v. Proctor,* 217 N. C., 23, 6 S. E. (2d), 870.

Conversely equity will exercise its preventive powers by restraining:

(1) The irremediable injury or threatened injury to or destruction of property rights. 28 A. J., 339; *Lumber Co. v. Cedar Co.*, 142 N. C., 412; *Town of Roper v. Leary*, 171 N. C., 35, 87 S. E., 945; *Kinsland v. Kinsland*, 188 N. C., 810, 125 S. E., 625; *Frink v. Stewart*, 94 N. C., 484; *Cobb v. R. R.*, 172 N. C., 58, 89 S. E., 807; *S. ex rel. Hopkins v. Howat*, 25 A. L. R., 1210; Anno. 40 A. L. R., 1145, 1163; *Watson v. Buck*, 313 U. S., 387, 85 L. Ed., 1416.

(2) The maintenance of a public or private nuisance where the public welfare or property rights are injuriously affected. 28 A. J., 344; *New Orleans v. Liberty Shop, supra; S. ex rel. Stewart v. Dist. Ct., supra; S. ex rel. La Prade v. Smith*, 92 A. L. R., 168; *In re Debs*, 158 U. S., 564, 39 L. Ed., 1092; *S. ex rel. Blue v. Balt. & O. R. Co.*, L. R. A., 1916F, 1001; *Olson v. Platteville*, 91 A. L. R., 308; *Bennington v. Hawks*, 50 A. L. R., 982; Anno. 40 A. L. R., 1159, 91 A. L. R., 320; 4 McQuillin, Mun. Corp. (Rev.), 205; 2 Dillon, Mun. Corp., 1039.

(3) The maintenance of a business or enterprise, even though lawful, when there is something inherent in the manner of its operation which constitutes a threat to the general welfare, health, morals, or safety of the community. 37 A. J., 962; *Montgomery v. West*, 13 Ann. Cas., 651; Anno. 40 A. L. R., 1157; *Cosgrove v. Augusta*, 42 L. R. A., 711.

But the nature of the business or manner of operation must bear some definite and substantial relation to public health, morals, safety, or welfare—and oftentimes this is to be determined in the light of the location and surroundings. That which is harmless in an industrial area may be unsafe or injurious in a thickly settled residential district. *Turner v. New Bern*, 187 N. C., 541, 122 S. E., 469; *Wake Forest v. Medlin*, 199 N. C., 83, 154 S. E., 29; *Ahoskie v. Moye*, 200 N. C., 11, 156 S. E., 130; *Lawrence v. Nissen*, 173 N. C., 359, 91 S. E., 1036; *S. v. Bass*, 171 N. C., 780, 87 S. E., 972; *S. v. Vanhook*, 182 N. C., 831, 109 S. E., 65; *Barger v. Smith*, 156 N. C., 323, 72 S. E., 376; *Brunswick-Balke Co. v. Mecklenburg*, 181 N. C., 386, 107 S. E., 317; *Fayetteville v. Distributing Co., supra; Commonwealth v. Hubley*, 51 N. E., 448; *Kirk v. Mabis*, 87 A. L. R., 1055; Anno. *ibid.* 1061; 2 Dillon, Mun. Corp., 1046; 11 A. J., 1056; *Bennington v. Hawks, supra.*

The right to restrain does not exist unless the business is inherently injurious to the public health, safety, or morals, or has a tendency in that direction. There must be something in the methods employed which renders it injurious to the public. It is not enough that it seriously interferes with the business of others.

Municipalities cannot interfere with the lawful use of property for a lawful purpose. 43 C. J., 414, and numerous authorities cited in notes, including *S. v. Staples*, 157 N. C., 637, 73 S. E., 112, and *S. v. Whitlock*, 149 N. C., 542. They are given the power to conserve, not to impair,

private rights. *Maxwell v. Miami,* 33 A. L. R., 682; *Rochester v. Gutberlett,* 211 N. Y., 309; *People ex rel. Goldberg v. Busse,* 88 N. E., 831 (Ill.); *Commonwealth v. Malatsky,* 24 L. R. A. (n.s.), 1168; *Chicago v. Netcher,* 55 N. E., 707 (Ill.); *Chicago v. Drake Hotel Co.,* 113 N. E., 718 (Ill.).

"To justify an interference with an enjoyment of private property, two facts must be established: first, that the property, either *per se* or in the manner of using it, is a nuisance; and, second, that the interference does not extend beyond what is necessary to correct the evil." *Chicago v. Gunning System,* 114 Ill. A., 377 (Aff. 214 Ill., 628, 73 N. E., 1035).

Applying these general principles controlling equity jurisdiction to the facts appearing on this record, we are constrained to hold that plaintiff has failed to make out a case for injunctive relief.

A tobacco sales warehouse is a lawful enterprise and the medium through which the farmers of the State market one of its largest income-producing crops. It appears throughout the tobacco belts of this and other States. In no sense is it a public or private nuisance.

The court below found that the warehouse of defendant is operated in the same manner as are other warehouses of like kind throughout the tobacco belt. When so conducted there is nothing inherent in the manner of operation which constitutes a menace to the general welfare, health, morals, or safety of the community.

It is located in an industrial section of plaintiff municipality. Hence its location and surroundings do not render the manner of operation, otherwise lawful, a threat to the general welfare.

There is no allegation, proof or finding that defendant has committed a purpresture or that he owns or operates any vehicles on the public streets of the town or otherwise contributes to the congestion of traffic about which it complains. Plaintiff bottoms its case upon the contention that defendant's customers are so numerous that while traveling on the public streets, where they have a right to be, in going to and from his place of business, they congest, and at times completely block, the streets adjacent to the warehouse. In making this contention it seems to overlook the fact that this is only one of the contributing factors added to the tremendous traffic produced by customers of businesses it conducts and the travel of the general public which produces the undesirable result.

Be that as it may, the complaint is not directed to any condition inherent in the operation of the warehouse or to any conduct on the part of the defendant. It relates to the conduct of those who compose a part of the traveling public.

The municipality has full power and authority to regulate and control the traffic on its streets. Its inability or unwillingness to do so should not be charged to a private owner merely because a great proportion

of those using the streets are going to or from his place of business. Certainly a condition thus produced by the traveling public, and not by defendant, forms no basis for the intervention of a court of equity.

Plaintiff alleges further that the continued existence of defendant's warehouse as such depreciates the value and restricts the proposed sale of its adjoining property and the court below found that "its value will likely be depreciated as well as the value of other property in close proximity thereto should the defendant operate his tobacco warehouse on the adjoining property . . ."

What we have already said answers this contention. If anything further need be added, it is this:

We may not always choose our neighbors and so, in the give and take of life, our neighbor is one of the things we must "take." So long as he conducts a lawful business in a lawful manner and there is nothing inherent in the manner of operation which, under the surrounding circumstances, is obnoxious or which wrongfully invades the property rights of others his undesirability is *damnum absque injuria.*

Plaintiff cites and relies on a line of cases represented by *Fayetteville v. Distributing Co., supra.* In the *Fayetteville case* the defendant was preparing to store on its premises, located in the fire district of plaintiff municipality, a large quantity of a highly combustible substance. It was its action, and not the action of its customers, which created the hazard to the public safety. In *Turner v. New Bern,* 187 N. C., 541, 122 S. E., 469, the plaintiff was seeking to restrain the enforcement of an ordinance which prohibited the maintenance of lumber yards and loading wharves or docks in a thickly settled residential section. There the location and surrounding conditions rendered objectionable that which was otherwise lawful. Other citations are similarly distinguishable.

Defendant stressfully contends that the 1945 ordinance, as amended, is arbitrary, unreasonable, and *ultra vires.* Ordinarily that is a question for the criminal courts to decide. *Jarrell v. Snow,* 225 N. C., 430; *Lanier v. Town of Warsaw, ante,* p. 637. A court of equity will entertain it only when necessary to prevent irreparable loss to property or property rights. Since in no event is plaintiff entitled to equitable relief, we pass the question without decision.

For the reasons stated the judgment below is

Reversed.

D. A. S. HOKE, ADMINISTRATOR OF THE ESTATE OF JAMES MURRAY PATE, JR., v. ATLANTIC GREYHOUND CORPORATION, YATES CLYDE FARRIS AND GEO. W. SHARPE.

(Filed 20 November, 1946.)

1. Automobiles §§ 18d, 21—In this action to recover for death of passenger in car, killed in collision between car and bus, evidence of concurring negligence held sufficient.

In this action to recover for the death of intestate killed in a collision on a narrow highway bridge between a bus and the car in which intestate was a passenger, plaintiff alleged joint and concurring negligence and introduced evidence tending to show that the weather at the time of the collision was drizzly and foggy and the road slippery, that the car was traveling about 30 or 35 miles per hour as it entered the bridge and was being driven by the owner's daughter, who was under the legal driving age, with permission and under the control of defendant owner, who was riding therein on the front seat, that the bus was traveling 40 or 45 miles an hour as it entered the bridge, and that as the bus approached the scene it was 3 or 4 feet on its left side of the center line of the highway. The bus company offered evidence that the car was being driven several feet to its left of the center of the highway and the owner of the car offered evidence that the bus was being driven about 4 feet to its left of the center of the highway. *Held:* Motions for judgment as in case of nonsuit as to each defendant was properly overruled.

2. Automobiles § 12a—

By provision of G. S., 20-141, speed in excess of that which is reasonable and prudent under the circumstances when special hazards exist by reason of traffic, weather or highway conditions, is unlawful notwithstanding that the speed may be less than the *prima facie* limits prescribed by the statute.

3. Automobiles § 18b—

Plaintiff in a civil action has the burden of showing that excessive speed, when relied upon by him, was a proximate cause of injury. G. S., 20-141.

4. Automobiles § 13—

The violation of either G. S., 20-146, prescribing that a vehicle be driven on its right side of the highway when practical, or G. S., 20-148, prescribing that drivers of vehicles traveling in opposite directions in passing each other must each keep to the right and give to the other at least one-half of the regular traveled portion of the roadway as nearly as possible, is negligence *per se*, but in order to be actionable such negligence must be the proximate cause or one of the proximate causes of the injury.

5. Automobiles § 8k—

It is negligence *per se* for one to drive a motor vehicle without a license, G. S., 20-7, or for the owner of a car or one having it under his control to permit a person under legal age to operate same, G. S., 20-34, but such negligence must be the proximate cause of injury in order to be actionable.

6. Negligence § 5—

Ordinarily the question of proximate cause is a question of fact for the jury.

7. Automobiles §§ 8k, 18i—Fact of age must be proximate cause in order to warrant recovery for negligence in permitting person under legal age to drive.

Permitting one to drive under the legal age is negligence *per se*, but is not actionable unless the fact of such age be the proximate cause or one of the proximate causes of injury, and while the youthfulness of the driver may be taken into consideration by the jury in determining whether she exercised that degree of care which would have been exercised by an ordinarily prudent person under the circumstances, an additional charge to the jury in response to its request for clarification on the point, to the effect that permitting a person under the legal age to drive is negligence *per se*, and that defendant owner would then be liable if the jury should find from the greater weight of the evidence that negligence on the part of the driver was the proximate cause or one of the proximate causes of the injury, must be held for error.

Two appeals in same action, No. 525 by defendants Atlantic Greyhound Corporation and Yates Clyde Farris, and No. 528 by defendant George W. Sharpe, from *Alley, J.*, at June Term, 1946, of MECKLENBURG.

Civil action to recover damage for alleged wrongful death. G. S., 28-172. G. S., 28-173.

These facts appear to be uncontroverted: Plaintiff's intestate James Murray Pate, Jr., 24 years of age, came to his death on 28 July, 1945, as result of injuries sustained when the automobile of defendant, George W. Sharpe, in which he was riding, and a bus of defendant, Atlantic Greyhound Corporation, collided on the concrete bridge over Big Sugaw Creek on a public highway in the State of North Carolina, a short distance south of the town of Pineville. The automobile was being operated by Carol Sharpe, aged thirteen years and seven months, daughter of defendant Sharpe, with his permission and under his control, and was also occupied by defendant Sharpe on the front seat, and his wife and daughter-in-law and plaintiff's intestate on the rear seat. It was traveling south from the City of Charlotte, North Carolina, toward the City of Columbia, South Carolina. The bus of defendant corporation, of large passenger type, eight feet wide and thirty-three feet long, was being operated by its servant, agent and employee, the defendant Yates Clyde Farris. It was traveling north from the State of South Carolina toward the City of Charlotte, North Carolina. The bridge over Big Sugaw Creek was then about eighteen feet wide and one hundred fifty feet long, with concrete side walls approximately four feet high. The highway was paved, and, north of the bridge, was straight for nearly a quarter of mile, and south of it, straight for about one hundred fifty

feet and then curved to the left on a long sweeping curve. The automobile from the north, and the bus from the south approached said bridge at the same time and met and came into collision on the bridge.

Plaintiff alleges in his complaint that the injury and death of James Murray Pate, Jr., resulted directly and proximately from the joint and concurrent negligence of the defendants herein:

I. In that the defendants Atlantic Greyhound Corporation and Yates Clyde Farris operated the bus of said corporation (1) at an unlawful rate of speed, (2) on its left and wrong side of the center line of the highway and bridge when it was approaching another vehicle going in the opposite direction, in violation of G. S., 20-146, and G. S., 20-148, (3) wthout proper control upon a narrow bridge on a wet and slippery road, and (4) in a careless, reckless and negligent manner, and in wanton disregard of the rights and safety of others in violation of G. S., 20-141.

II. And in that the defendant George W. Sharpe unlawfully permitted his automobile to be operated in the State of North Carolina (1) by his minor daughter Carol Sharpe, although she had not reached the age of 16 years, and was not licensed to drive an automobile either in this State or in the State of South Carolina, (2) by a young and inexperienced driver at a rate of speed inconsistent with the rights and safety of others on a wet, slippery highway and bridge, in violation of the laws of the State of North Carolina, particularly G. S., 20-141; (3) to the left and wrong side of the center line of the highway and bridge which it was traversing when it was approaching another vehicle going in the opposite direction, in violation of G. S., 20-146, and (4) in a careless and negligent manner in wanton disregard of the rights and safety of others, in violation of G. S., 20-141.

The defendants Atlantic Greyhound Corporation and Yates Clyde Farris, answering the complaint of plaintiff, deny the allegations of negligence against them, and, by way of further answer and defense aver that the injury and death of plaintiff's intestate in said collision was the result of negligence of defendant George W. Sharpe as the sole proximate cause in the manner specifically set forth.

The defendant George W. Sharpe, answering the complaint of plaintiff, denies the allegations of negligence against him, and by way of further answer and defense avers (1) that if he were negligent in any way his negligence is imputed to plaintiff's intestate and plaintiff, (2) that the injury and death of plaintiff's intestate was caused solely and proximately by the negligence of defendant Atlantic Greyhound Corporation, through its driver and co-defendant in manner specifically set forth, and (3) that if plaintiff's intestate met his death on account of any negligence of this defendant, he contributed thereto by his own negligence in manner set forth.

Upon the trial below plaintiff offered among others two witnesses whose testimony tends to show that they saw the collision in question; that they were on the side of the highway about 150 feet north of the bridge; that the weather was "drizzly and foggy and the road was slippery"; that the Sharpe car and the Greyhound bus entered the bridge about the same time; that the Sharpe car from the north passed them running at speed of about 30 or 35 miles an hour; that it appeared to slacken its speed and the squealing of brakes was heard; that it did not appear to skid, but that it continued straight on and appeared to be rolling forward to cross the bridge; that as the Greyhound bus approached from the south it was 3 or 4 feet on its left side of the center line of the highway and "couldn't get back"; that the bus was going pretty fast, running at speed of 40 or 45 miles as it entered the bridge; that the two vehicles collided, the bus hitting the left side of the car,—knocking it against the bridge, and consequently damaging it.

Plaintiff also offered photographer to identify photographs made by him at the scene of and after the collision and the same were offered in evidence for the purpose of illustrating testimony of witnesses. And on cross-examination of this witness and others, testimony was elicited that there were tire marks where the brakes had been applied, leading from the rear of the bus tires for a distance of 75 feet,—21 feet of it being south of bridge, but all of it on the bus's right side of the center line of the highway,—starting south of the bridge at 18 inches and veering slightly to the right, to the point where the bus came to rest on the bridge after the collision.

Defendants Atlantic Greyhound Corporation and Yates Clyde Farris, reserving exception to refusal of the court to grant their motion for judgment as of nonsuit, offered testimony tending to show among other things: (1) That the photograph, offered in evidence by plaintiff, as aforesaid, showing tire marks on the surface of the bridge south of bus, correctly represented the scene of the accident; that at the beginning of those marks, 75 feet from the bus, the one nearest the center line of the bridge was two feet to the bus's right of the center line, and led directly to the rear of the bus, veering slightly to the right, and (2) that as the bus approached the bridge, it was raining slightly and the road was slick; that coming around the curve, the bus was traveling about thirty-five miles an hour, on its right side of the highway, and never, at any time, got on the left side, as the driver remembered; that the bus was traveling at about same speed as it entered the bridge, but, at that time, seeing the automobile start "sliding" its rear over to the bus's side of the bridge, the driver applied the brake of the bus and tried to stop, reducing its speed to about five miles an hour when the collision took place—stopping immediately—the bus being against the side wall of

the bridge on its right; and that the automobile did not get back on its right side until after the collision.

Defendant George W. Sharpe, reserving exception to the refusal of his motion for judgment as of nonsuit, offered testimony tending to show, among other things, (1) that as the bus of defendant corporation was traveling the curve, south of the bridge, it was about four feet over the center line of the highway and traveling at a speed of "some 45 to 50 miles per hour," and that when seen by Carol Sharpe, the driver of the automobile, about 100 to 150 feet south of the bridge, the bus looked to her "like it was driving anywhere from 50 to 60 miles per hour, 3 or 4 feet" on her side of the road; that it did not get back on its side; (2) that as the automobile approached the bridge it was running at speed of about thirty miles per hour; that the driver took her foot off the accelerator and slowed down the automobile; that as it got on the bridge it kept slowing down; that the driver did not apply brakes, until she saw that the bus was not getting back on its side of the highway, and about that time the collision occurred, and that the automobile did not skid before it got on the bridge, and (3) that Carol Sharpe was, at the time, "very competent to drive an automobile."

Defendant Sharpe also offered in evidence the "North Carolina Emergency War Powers Proclamations," effective at 12 o'clock noon, 6 May, 1943, providing among other things that notwithstanding the *prima facie* limits of speed, fixed by the statute, "it shall be unlawful to drive any vehicle at a speed in excess of thirty-five (35) miles per hour, except those exempted in Section 107,"—the exception not being pertinent here.

Motions of defendant Atlantic Greyhound Corporation and Yates Clyde Farris, and of defendant George W. Sharpe for judgment as of nonsuit at close of all the evidence were overruled, and they respectively entered exceptions.

The case was submitted to the jury on these issues, which were answered as shown, the second and third not being answered:

"1. Was the plaintiff's intestate, James Murray Pate, Jr., injured and killed by the joint and concurrent negligence of the defendants, as alleged in the complaint? Answer—Yes.

"2. Was the plaintiff's intestate, James Murray Pate, Jr., injured and killed by the sole negligence of the defendants, Atlantic Greyhound Corporation and Yates Clyde Farris? Answer .....

"3. Was the plaintiff's intestate, James Murray Pate, Jr., injured and killed by the sole negligence of the defendant, George W. Sharpe, Sr.? Answer .....

"4. Did the plaintiff's intestate contribute to his injury and death by his own negligence as alleged in the answer of the defendant, Geo. W. Sharpe? Answer—No.

"5. What amount, if any, is the plaintiff entitled to recover by reason of the wrongful death of his intestate, James Murray Pate, Jr.? Answer—$14,500."

From judgment on the verdict, the defendants Atlantic Greyhound Corporation and Yates Clyde Farris and the defendant George W. Sharpe, respectively, appeal to Supreme Court, and (filing separate records and cases on appeal) assign errors.

McDougle, Ervin, Fairley & Horack for plaintiff, appellee.

R. Hoyle Smathers and Smathers & Meekins for defendants, appellants, Atlantic Greyhound Corporation and Yates Clyde Farris.

Frank H. Kennedy, Goebel Porter, and P. D. Kennedy, Jr., for defendant, appellant, George W. Sharpe.

WINBORNE, J. The separate appeals of defendants Atlantic Greyhound Corporation and Yates Clyde Farris and of defendant George W. Sharpe are considered together, in view of the fact that they are in the same cause and from the same judgment on verdict finding joint and concurrent actionable negligence of all defendants.

In this connection decision here turns upon these assignments of error: (1) The refusal of the court to grant the motions of the respective defendants for judgment as in case of nonsuit at the close of all the evidence; and (2) a certain portion of the charge.

In the light of the allegations of joint and concurrent negligence as set forth in the complaint, the evidence shown in the record, tested by principles of law applicable thereto, appears to be sufficient to take the case to the jury as to all defendants.

The statute, G. S., 20-141, pertaining to restrictions upon speed of motor vehicles in this State provides in pertinent part that "no person shall drive a motor vehicle on a highway at a speed that is greater than is reasonable and prudent under the conditions then existing." It also provides that the fact that the speed of a vehicle is lower than the *prima facie* limits therein set forth shall not relieve the driver from the duty to decrease speed when special hazard exists with respect to other traffic or by reason of weather and highway conditions, and the speed shall be decreased as may be necessary to avoid colliding with any vehicle on the highway in compliance with legal requirements, and the duty of all persons to use due care. In *Kolman v. Silbert,* 219 N. C., 134, 12 S. E. (2d), 915, referring to this section of the statute and to that section now G. S., 20-140, *Barnhill, J.,* characterized them as constituting "the hub of the motor traffic law around which all other provisions regulating the operation of automobiles revolve." And, continuing, it is there said: "The motorist must at all times drive with due caution and circumspection, and at a speed and in a manner so as not to endanger, or be likely

to endanger, any person or property. At no time may he lawfully drive at a speed greater than is reasonable and prudent under the conditions then existing." In that case as in the present case, the weather was inclement,—raining.

However, the above statute, G. S., 20-141, further provides that the above provision shall not be construed to relieve the plaintiff in any civil action from the burden of proving negligence on the part of defendant as the proximate cause of an accident.

Also, the statute, G. S., 20-146, provides in pertinent part 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 upon such side of the highway. Moreover, the statute, G. S., 20-148, provides that "drivers of vehicles proceeding in opposite directions shall pass each other to the right, each giving to the other at least one-half of the main-traveled portion of the roadway as nearly as possible." The violation of either G. S., 20-146, or G. S., 20-148, would be negligence *per se,* but in order to be actionable such negligence must have been the proximate cause, or one of the proximate causes, of the collision. See *Morgan v. Coach Co.,* 225 N. C., 668, 36 S. E. (2d), 263; *Tysinger v. Dairy Products,* 225 N. C., 717, 36 S. E. (2d), 246, and cases cited.

Furthermore, the motor vehicle statute provides that no person, except those expressly exempted from license, "shall operate a motor vehicle upon any highway in this State unless such person upon application has been licensed as an operator or chauffeur by the department under the provisions of this article." G. S., 20-7. It is also provided "an operator's license shall not be issued to any person under the age of sixteen (16) years . . ." G. S., 20-9,—the age being reduced to fifteen years for biennium ending 19 March, 1947. Session Laws 1945, chapter 834.

And it is further provided that "no person shall authorize or knowingly permit a motor vehicle owned by him or under his control to be driven by any person who has no legal right to do so or in violation of any of the provisions of this article." G. S., 20-34. Such violations are declared to be misdemeanors. G. S., 20-35.

The violation of these provisions of the statute would constitute negligence *per se,* but in order to be actionable such negligence must be the proximate cause, or a proximate cause, of the injury. *Morgan v. Coach Co., supra; Tysinger v. Dairy Products, supra.*

"What is the proximate cause of an injury is ordinarily a question for the jury . . . It is to be determined as a fact, in view of the circumstances of fact attending it." *R. R. v. Kellogg,* 94 U. S., 464, 24 L. Ed., 256. See *Conley v. Pearce-Young-Angel Co., et al.,* 224 N. C., 211, 29 S. E. (2d), 740, and cases cited.

The next assignment of error considered is that brought up on the appeal of defendant Sharpe. It arose under these circumstances: The jury, after retiring for its deliberations, returned and asked the court this question: "The court says, your Honor, that Mr. Sharpe was negligent in letting his daughter drive, to begin with. Well, if she was driving in a normal manner at the scene of the accident, would Mr. Sharpe be held liable for the accident?" The court replied as follows: "That's not what I charged you. I charged you that it would be negligence *per se* if he permitted his 13-year-old daughter to drive the car at all, under any circumstances; that alone would be negligence on his part. And if you find, by the greater weight of the evidence, that negligence on her part was the cause of the injury and death,—the sole cause of the injury and death, or one of the contributing efficient causes of the injury and death of the dead boy—then Sharpe would be liable. The only remaining thing for you to find there, is whether the negligence of the 13-year-old driver was one of the proximate causes of the injury and death of the dead boy."

The charge as here given is not responsive to the question of the jury, and tends to confusion. Hence, the exception is well taken.

While it would be negligence *per se* for defendant Sharpe to permit his daughter, who was under fifteen years of age, to drive his automobile in this State, such negligence is not actionable unless the fact that she was of such age be the proximate cause, or one of the proximate causes of the injury. Therefore, if she were operating the automobile in accordance with the duty imposed by law upon operators of automobiles, the negligence of her father in permitting her to operate it in violation of law would not be actionable. *Taylor v. Stewart,* 172 N. C., 203, 90 S. E., 134; *Eller v. Dent,* 203 N. C., 439, 166 S. E., 330. However, her age may be taken into consideration by the jury in determining whether her conduct in the operation of the automobile under the circumstances surrounding the situation with which she was confronted, was that of an ordinarily prudent person, who in the operation of an automobile must exercise ordinary care, that is, that degree of care which an ordinarily prudent person would exercise under similar circumstances.

Since the error thus pointed out affects the first issue, that is, the issue as to the joint and concurrent negligence of all defendants, on which judgment below is based, and there must be a new trial, it is unnecessary to consider any other of the numerous assignments on either appeal. The matters to which they relate may not recur on another trial.

New trial.

T. L. COX v. D. D. HINSHAW AND LENA HINSHAW.

(Filed 20 November, 1946.)

1. Deeds § 14a—

Conditions in a deed requiring grantees to care for grantor during the remainder of his natural life and to provide a home for him are conditions precedent to the investment of title. In the present case the deed was put in escrow not to be delivered until the performance of these conditions.

2. Deeds §§ 14a, 14b—

Ordinarily, substantial compliance with conditions subsequent in a deed will suffice, while conditions precedent usually must be strictly observed, but where the conditions precedent require grantees to provide a peaceful home and take care of grantor for the remainder of his life, and thus involve human conduct over a considerable period of time, the rule of reason must perforce apply rather than the strict performance of definite acts and conditions.

3. Deeds § 14a—

In this case evidence of an altercation between grantor and grantees as shown by the evidence, *is held* to require the submission of the issue to the jury as to whether grantees had breached a condition precedent requiring grantees to care for and provide a peaceful, quiet and comfortable home for grantor during the remainder of his natural life, which condition was also made contractual by the joinder of the grantees in the execution of the deed.

4. Same—

Where a deed containing conditions precedent is placed in escrow under a separate agreement of the parties, the remedy of the grantor for condition broken is an action to rescind the contract of escrow and for the return of the deed to him, and not an action for the cancellation of the deed.

5. Appeal and Error § 40i—

Upon appeal from the granting of defendants' motion to nonsuit, the Supreme Court cannot pass upon the weakness or strength of plaintiff's evidence but only whether, taking it in the light most favorable to plaintiff, it is sufficient to raise an issue of fact for the jury.

APPEAL by plaintiff from *Clement, J.*, at July Term, 1946, of RANDOLPH.

Pursuant to an oral agreement, the plaintiff executed to the defendants a deed in fee simple to certain lands in Randolph County upon certain conditions set out in the deed. The defendants joined in the execution of the instrument, constituting it both a deed and a contract.

The conditions relate to the support of the grantor, furnishing him medical attention, the care and operation of a mill and ice plant situated

on the property, payment to the grantor of a specified portion of the net profits, and numerous other matters. As directly bearing on this controversy, the following may be quoted:

"1. The grantees herein, D. D. Hinshaw and Lena Hinshaw, his wife, are to move into the home of the grantor, T. L. Cox, and take over the running of said home, maintain and provide the said T. L. Cox with a peaceful, quiet and comfortable home during the remainder of his natural life, including subsistence, washing, fuel, doctor bills, hospital care, if needed, and all other things reasonably necessary for his care and comfort."

A clause in the deed provides for arbitration of any differences which might arise between the parties respecting the performance of the conditions.

The parties deposited the deed in escrow with the First National Bank of Asheboro, to be delivered to the defendants upon the death of the grantor, provided meantime they had performed the conditions named in the deed and contract.

The defendants moved into the home of the grantor sometime in September, 1944, and undertook performance of their duties as specified in the deed. The parties lived together in the home until September, 1945, when a disagreement having arisen between them, the plaintiff suggested to the defendants that either they or he should leave since conditions brought about by the defendants were no longer bearable; and contending that his action was caused by a breach of the conditions in the deed requiring the defendants to "maintain and provide said T. L. Cox with a peaceful, quiet and comfortable home during the remainder of his natural life," left the home and has since resided elsewhere. On 22 October following, he brought this action to cancel the deed because of the breach of the conditions therein. The case came on for trial at July Term, 1946, of Randolph Superior Court.

In view of the conclusion we have reached, it is necessary only to summarize the plaintiff's evidence relating to the obligations of the defendants, made a condition precedent to the deed, to maintain and provide for the plaintiff a peaceful, quiet and comfortable home during the remainder of his natural life, without special reference to other conditions claimed to have been broken.

Pertinent to this condition, the plaintiff testified on the trial: "The home provided by the defendants formerly was a happy and peaceful home part of the time, and part of the time it was not. A lot of stuff went along that I never said anything about. My table, where I kept my papers—they were tangled, or stacked up or piled up different. Gave me trouble. Lay them down and go off. These papers were newspapers and magazines. I told Mrs. Hinshaw I did not like my papers to be torn up, but my telling her this did not make any effect. . . . I

have my junk or scrap pile, good pieces of anything I want, lumber or blocks that I need around a place like that, and they used them and burned them; used up my stuff like that. I found this out several times since the Hinshaws came there. . . . Lena Hinshaw said that stuff was not any account; it was rotten. I said if it was rotten it would not do much good cooking. I went in the house and turned on my radio. In a few minutes her mother came to the door and said Lena (Mrs. Hinshaw) was crying. I asked her what she was crying about. She said what I said to her. I told her that I did not say anything to make anybody cry. Then they had supper ready. Mrs. Stout said for us to come to supper. While we were sitting at the table eating Lena did not come to the table."

The plaintiff testified that later Delbert Hinshaw "rared out on him and told him he couldn't talk that way to make her cry. Mr. Hinshaw got to talking and said we would mix. He was angry to some extent, it seemed like." Hinshaw made no demonstration of any kind. Did not get up.

Pursuing the conversation, after Mrs. Hinshaw came in, "She went to talking about the wood was no account. After they said I was no gentleman, I didn't like it, because I hadn't said anything out of the way, told them what I had said, it was a Fred Stanley proposition; he was the only person I had about me that burned up my stuff. We were talking there I expect thirty minutes. I said that I wasn't going to live in a fuss. I told Mr. and Mrs. Hinshaw if we couldn't live together in peace for them to leave; that I wouldn't live in a fuss, under any condition; if we couldn't live in peace and get along for them to just get out. After we talked a right smart, I told Mr. and Mrs. Hinshaw several things that wasn't kept like it should have been; I told them there was a scent around there somewhere. They suggested that it was a dead rat in my room. There was a baby there in the house and this old lady a grand aunt of Mrs. Hinshaw, Lidy Walker, who was sick. I have seen them throw clothes from the sick bed and diapers which the baby had used down the steps into the basement. These soiled clothes would stay in the basement until they were washed. They washed twice a week. The basement was directly under my room. The basement stairs went under the stairs that went upstairs. The door to the basement went right out of my door. I told them they were filthy; that I couldn't stand it, never had lived under such conditions. The throwing of these clothes into the basement had been going on for a month or so. The odor from these clothes was not so bad with me; I haven't got sensitive to smell; but I did smell this."

"I told them they didn't treat their mother, Mrs. Stout, like they should. I told them that they treated her like she was a slave. She did all the cooking, washing dishes and such as that. I told them that I

wasn't going to live in a fuss. After I told them this Lena (Mrs. Hinshaw) said, 'Oh, just let it all go, let it all be over'; after they had given me a run. Mrs. Hinshaw was out of fix when she was talking to me, until the last, when she wanted it all settled down. She was mad, and talked using a high, angry tone. I left about four o'clock next morning going to my brother's. I had made arrangements the day before to start to Florida. I got up early and went to the car house. Lena wanted me to go to the house and get breakfast. I told her I would get breakfast when I got to my brother's at Greensboro."

Witness explained that prior to Mrs. Hinshaw's bit of crying and the conversation with her husband about it, he had said that burning his scrap was a Fred Stanley proposition; that Fred Stanley, who formerly lived with him, was the only person who had burned his scrap. Fred Stanley was an ex-convict.

Plaintiff testified: "I told them if they could not live in peace to get out; and if they didn't, I would, and I did . . . I saw Lena the next morning before I left; she asked me to get breakfast; her attitude and demeanor were perfectly friendly. . . . I never suffered for anything to eat or keep comfortable with long. . . . They mistreated me by raring on me, fussing and going on. They did not rant on me except on one occasion when I accused Lena of burning my wood. They never had much to say. I left there because of what they said on that occasion." "Since that time I haven't given them any chance to be entirely cordial to me." "That one time is when they broke the peace and quiet and threatened me. They had not done so until then; but sometimes one time is enough. You get killed."

H. W. Clodfelter testified for plaintiff that he was present when Hinshaw and plaintiff had the talk about Lena crying. They had been dividing up my money and the following occurred:

"Mr. Hinshaw looked over at Mr. Cox and said, 'Talt, what did you make Lena cry for a while ago?' He said, 'I didn't make her cry.' Hinshaw said, 'You did. Now that's my wife you were talking to, if you class her as low down as Fred Stanley, if you ever do a trick like that again, I'm going to get with you.' Mr. Cox said, 'She is as low down,' or 'It's a Fred Stanley proposition, and anybody that will pick up scrap wood around the house and burn it'—I disremember just how he did speak this—'Mighty low down character,' or something. Mr. Cox said he didn't have anything to take back. He said, 'I ain't going to take back anything; I said it, and I'm going to stick to it.' That is all Hinshaw said that I remember."

The defendants offered no evidence.

At the close of plaintiff's evidence defendants demurred thereto and moved for judgment as of nonsuit, which was allowed. Plaintiff objected and excepted. From this judgment plaintiff appealed.

J. G. Prevette and Horton & Bell for plaintiff, appellant.
H. M. Robins for defendants, appellees.

SEAWELL, J. The contention of the appellant that defendants had not provided for him a peaceful, quiet and comfortable home as required in the condition precedent to delivery of the deed, brings the appeal into a field of unusual difficulty and severely challenges the propriety of dealing with the standards involved—if indeed there are any standards except those that are relative and shifting—as a matter of law or legal inference. The court below had the question whether an inference of a breach of the contract could be drawn from the evidence, and its negative answer passed that question to us; one which we may not decide as chancellors but with respect to appellant's right of trial by jury where there is evidence of the fact.

The conditions which the plaintiff claims were breached are conditions precedent to the investment of title and in fact the deed was put in escrow, not to be delivered until the full performance of those conditions.

Ordinarily, substantial compliance with the conditions subsequent in a deed will suffice, while it is said that conditions precedent must be "strictly, literally, and punctually performed." 36 C. J. S., page 488, sec. 151. There are obviously some situations arising in which such a rule cannot be rigidly enforced; where, for instance, the conditions relate to conduct of the grantee over a considerable period of time, to which the rule of reason must apply rather than to a performance of a more definite nature such as the payment of purchase price within a certain time, or the like.

But, however liberally we may construe the conditions imposed upon the defendants in the case at bar and their conduct with respect to it, we are hardly relieved of the necessity of determining whether the final appraisal of the conduct of the defendants in performing the conditions was a matter for the court or the jury.

No doubt the trial court sustained a demurrer to the evidence on the theory that, taking everything into consideration, the matters of which plaintiff complained, admitting them to be true, were too trivial to upset a solemn deed, constituted a minor family disagreement, evanescent in character, and which a proper exercise of forbearance and tolerance on both sides would have straightened out without serious interruption of the peace, quietude and comfort of the home. Reflecting that view here, counsel for the appellees reminds us that *"de minimis non curat lex."* But how small or wanting in significance are the facts in evidence, by what standard are they to be weighed, and who shall hold the scales?

What is a home? What measure of peace, quiet and comfort within its precincts was in contemplation of the parties signing the contract?

What tare is the court permitted to make as a matter of law before submitting the body of the offending to the jury? What consideration must be given to age and condition of the plaintiff and such allergy as he may have had to a threatened chastisement on his own premises? To what extent may physical, cultural and moral conditions be considered as affecting the peace, quiet and comfort of a home to be created by the joint living of the contracting parties?

Certainly, people are not perfect; and the plaintiff, appellees contend, could not expect "all this and Heaven too" under the known conditions with reference to which they contracted. But, before we apply the analogy, let us remember that the ordinary home is integrated by family ties, not by contract. In such a home the sanctions for peace, quiet and comfort are not forfeiture of a property right but loss of intangibles of far greater importance. Fortunately such a home may be retrieved from a bad situation by a lot of living and forgiving. But the person who is furnished a home by contract is not required to forgive or condone a breach of the condition when it occurs; he may look to his contract.

Referring to the incidents which occurred the day and night before the plaintiff sought residence elsewhere, we could hardly say that there was no substantial evidence tending to show that the condition in the home, temporarily at least, was wanting in peace, quiet and comfort. How often the same thing must be repeated to amount to a breach of condition cognizable in law brings up the question of a quantitative standard of evidence which the Court has hitherto thought it is not competent to determine. The accumulation of nothings can never amount to evidence and evidence need not be cumulative to demand its submission to the jury.

These are only a few of the considerations that incline the Court to the view that a solution of the factual problems involved here peculiarly calls for the offices of the jury rather than those of the Court.

It is proper to say here that in the opinion of the Court the plaintiff has mistaken his remedy, if upon a new trial he is able to make good on the facts. The deed sought to be canceled has never been delivered and is not effective without such delivery. By a separate contract between the parties it was put in escrow with the First National Bank of Asheboro, to be delivered upon the death of the grantor provided the holder of the escrow deemed the conditions to have been satisfactorily performed. Upon breach of the conditions,—if such breach is found to have taken place,—the plaintiff would be entitled to a rescission of the contract of escrow and return to him of his deed. Nevertheless, disregarding the prayer for relief, he would be entitled to whatever remedy might be appropriate to the facts alleged and proved.

On this appeal we are not concerned with either the weakness or the strength of plaintiff's evidence but only whether, taking the evidence in

its most favorable light, legitimate inferences in his favor may be drawn from it. Applying that principle, we think there was error in taking the case from the jury.

The judgment of the court below in sustaining the demurrer to the evidence and rendering judgment as of nonsuit is

Reversed.

HARTFORD ACCIDENT & INDEMNITY COMPANY, A CORPORATION, v. GURNEY P. HOOD, RECEIVER OF THE BANK OF DRAPER.

(Filed 20 November, 1946.)

1. Principal and Surety § 4—

The provision of G. S., 53-90, requiring officers and employees of a bank to give bond in an amount required by the directors and upon such form as may be approved by the commissioner of banks, is the only statutory provision which becomes a part of the bond.

2. Principal and Agent § 6b—

Where a bond guaranteeing the payment of any loss sustained through the dishonesty of a bank official while "in the continuous employment of a bank" after a specified date, is kept in force for a period of years by the payment of the stipulated annual premium, recovery on the bond is limited to the maximum liability therein stipulated for losses occurring during the life of the bond, and the contention that the surety is liable for defalcations to the amount of the penal sum of the bond for each of the years during which the bond is kept in force, is untenable, *Hood, Comr. of Banks, v. Simpson*, 206 N. C., 748, cited and distinguished.

3. Contracts § 8—

Where the language of a contract is clear and unambiguous, effect must be given to its terms, and the court under the guise of construction, cannot delete any provision or insert any provision which is not written into the contract in fact or by implication of law.

APPEAL by defendant from *Harris, J.*, at March Term, 1946, of WAKE. Affirmed.

Proceedings under the Declaratory Judgment Act, G. S., Chap. 1, Art. 26, to judicially determine the controversy existing between plaintiff and defendant as to the total liability of plaintiff on its fidelity bond issued to the Bank of Draper, assuring the faithful performance of his duties by O. L. Slayton, its cashier.

The Bank of Draper was a banking institution organized in 1920. It did business as such until 3 February, 1942, when it was found to be insolvent, and defendant Commissioner of Banks assumed control as statutory receiver.

Its by-laws, adopted in 1920, provide that the cashier shall be elected annually and shall hold office at the will of the board of directors, and that "he shall be required to give a bond, payable to the bank, in the sum of $10,000.00, for the faithful performance of his duties."

O. L. Slayton assumed the duties of cashier in September, 1925, and was elected cashier at the annual meeting in 1926. He served in that position continuously thereafter until the bank was closed. A fidelity bond, not here involved, was provided until 1929. On 10 July, 1929, plaintiff issued and delivered to the bank its bond, the material part of which is as follows:

"Know all men by these presents, That the HARTFORD ACCIDENT AND INDEMNITY COMPANY as Surety (hereinafter called Surety), does hereby agree to pay unto THE BANK OF DRAPER, Draper, North Carolina (hereinafter called Employer), within ninety days after presentation of proof of loss, as hereinafter provided, the amount of any loss, not exceeding TEN THOUSAND AND No/100 ($10,000.00) DOLLARS, which the Employer may sustain in respect of any moneys, funds, securities or other personal property of the Employer, or for which the Employer may be responsible, through any act of fraud, dishonesty, larceny, theft, embezzlement, forgery, misappropriation, wrongful abstraction or misapplication, or any other dishonest or criminal act or omission committed by OFUS LEE SLAYTON (hereinafter called the Employee), acting alone or in collusion with others, while in any position in the continuous employ of the Employer, after 12 o'clock noon of the Fifteenth day of July, 1929, but before the Employer shall become aware of any default on the part of the Employee, and discovered before the expiration of three years from the termination of such employment or cancellation of this bond, whichever may first happen.

"Provided, However, and upon the following express conditions . . .

"THIRD—That this bond may be cancelled by the Employer upon giving written notice to the Surety, or by the Surety upon giving thirty days' notice to the Employer, the unearned premium to be refunded by the Surety upon demand in writing; provided, however, that if claim be made hereunder, the premium so refunded shall be repaid to the Surety."

This bond is in the identical form approved by the Commissioner of Banks (formerly Corporation Commission). It was kept in force by the payment of the stipulated annual premium until the closing of the bank in February, 1942.

At each annual meeting of the board of directors subsequent to the issuance of the bond, except 1932, O. L. Slayton was elected cashier. No action requiring bond or stipulating the penal sum thereof was taken at any of these meetings. In 1935, 1937, 1939, and 1941 the bond of the cashier was approved. It is admitted that this action had reference to the bond issued in 1929.

After the bank closed it was discovered that the cashier was "short" in the sum of $297,735.51. The periods of time during which the peculations or abstractions which caused this shortage occurred, as to $289,549.91, have been ascertained and are as follows:

	Total	*Amount Claimed*
July 15, 1931 to July 14, 1932	$ 60.00	$ 60.00
July 15, 1932 to July 14, 1933	2,597.78	2,597.78
July 15, 1933 to July 14, 1934	13,461.85	10,000.00
July 15, 1934 to July 14, 1935	2,121.57	2,121.57
July 15, 1935 to July 14, 1936	6,951.83	6,951.83
July 15, 1936 to July 14, 1937	20,409.28	10,000.00
July 15, 1937 to July 14, 1938	13,264.89	10,000.00
July 15, 1938 to July 14, 1939	53,028.73	10,000.00
July 15, 1939 to July 14, 1940	26,106.57	10,000.00
July 15, 1940 to July 14, 1941	61,406.95	10,000.00
July 15, 1941 to Jan. 27, 1942	90,140.46	10,000.00
	$289,549.91	$81,731.18

Of the amount misappropriated $8,185.60 has not been apportioned to any specific period.

The defendant filed claim for $81,731.18 on the theory that each renewal of the bond constituted a new bond and insured the payment of defalcations during each succeeding year to the extent of the penal sum of the bond. Thereupon the plaintiff, admitting the defalcations and offering to pay $10,000, the penal sum of its bond, instituted this action to have its rights, status, and liability under the bond judicially determined.

When the cause came on for hearing the parties waived trial by jury and agreed that the court should hear the evidence, find the facts, "and adjudicate the controversy, without the intervention of a jury." After hearing the evidence offered the court found the facts in detail and adjudged:

"(a) That the defendant is not entitled to recover against the plaintiff or upon said bond, Exhibit B, anything in excess of the $10,000 tendered by plaintiff;

"(b) That any action or claim by defendant in excess of the $10,000 tendered is barred by the three year statute of limitations and defendant is also estopped by its conduct to assert the same;

"(c) That defendant have judgment herein against the plaintiff for said sum of $10,000 as tendered and that upon the payment of said sum into the office of the Clerk of this court the defendant within ten days

thereafter be and it is hereby required to deliver up to plaintiff said bond for cancellation as prayed in the complaint;

"(d) That plaintiff recover of defendant its costs herein to be taxed by the Clerk."

Defendant, having excepted to certain findings of fact and to the judgment entered, appealed.

A. J. Fletcher, F. T. Dupree, Jr., and Ehringhaus & Ehringhaus for plaintiff, appellee.

Bailey, Holding, Lassiter & Langston and Price & Osborne for defendant, appellant, James M. Kane, Washington, D. C., and John L. Cecil, Chicago, Ill., of counsel for appellant.

BARNHILL, J. The primary issue between plaintiff and defendant is clearly drawn. The plaintiff contends that its bond is for a single penalty of $10,000 which is the limit of the recovery which may be had against it for any and all defalcations occurring during the life of the bond, to wit, from 15 July, 1929, to 3 February, 1942. The defendant contends that the original bond assured against defalcation during the succeeding year and each renewal constitutes a new bond, so that he is entitled to recover losses arising out of the defalcation of the cashier during each bond year, not to exceed $10,000 for any one year. If plaintiff's contention is sustained, defendant is entitled to judgment in the sum of $10,000. On the other hand, if the defendant's construction of the contract is adopted he is entitled to judgment in the amount of $81,731.18, unless he is estopped by the conduct of the bank or is barred in whole or in part by the statute of limitations.

G. S., 53-90, provides that active officers and employees of a bank, before entering upon their duties, shall give bond to the bank in a bonding company authorized to do business in North Carolina in the amount required by the directors and upon such form as may be approved by the commissioner of banks. Both the commissioner of banks and the directors are authorized to require an increase of the amount of such bond whenever they may deem it necessary.

This is the only provision of our statutes which must be deemed to be incorporated in the contract. *Hutchins v. Durham,* 118 N. C., 457, 32 L. R. A., 706; *Graves v. Howard,* 159 N. C., 594, 75 S. E., 998, Ann. Cas. 1914C, 565; *Steele v. Ins. Co.,* 196 N. C., 408, 145 S. E., 787, 61 A. L. R., 821; *Monger v. Lutterloh,* 195 N. C., 274, 142 S. E., 12; *Bank v. Bank,* 262 U. S., 649, 67 L. Ed., 1157, 30 A. L. R., 635; 12 A. J., 769.

The bond furnished by plaintiff is in the exact form prescribed by the commissioner of banks and is in the amount required by the by-laws of

the bank, under which the directors operated. Neither they nor the commissioner of banks ever demanded or required any additional bond or any increase in the amount. Instead the directors on four separate occasions approved the bond as filed.

The assumption of liability is not limited to one year or any other fixed term, to be extended or renewed upon the payment of a stipulated premium. *Woodfin v. Ins. Co.,* 51 N. C., 558; *Jacksonville v. Bryan,* 196 N. C., 721, 147 S. E., 12. It guarantees the payment of any loss, not exceeding $10,000, sustained by the bank through the dishonesty of Slayton *at any time during his continuous service as cashier,* "but before the Employer shall become aware of any default on the part of the Employee, and discovered before the expiration of three years from the termination of such employment or cancellation of this bond, whichever may first happen."

This language is clear and unambiguous. Plaintiff agreed to reimburse the bank for losses incurred during the life of the bond through the default of Slayton to the extent of $10,000. It must be presumed the parties intended what the language used clearly expresses, *Kihlberg v. U. S.,* 97 U. S., 398, 24 L. Ed., 1106; 12 A. J., 752, and the contract must be construed to mean what on its face it purports to mean. *Hinton v. Vinson,* 180 N. C., 393, 104 S. E., 897; *McCain v. Ins. Co.,* 190 N. C., 549, 130 S. E., 186; *Wallace v. Bellamy,* 199 N. C., 759, 155 S. E., 856; *Jacksonville v. Bryan, supra; Thornton v. Barbour,* 204 N. C., 583, 169 S. E., 153; *Grocery Co. v. R. R.,* 215 N. C., 223, 1 S. E. (2d), 535; 12 A. J., 751.

The Court, under the guise of construction, cannot reject what the parties inserted, *Schneider v. Turner,* 130 Ill., 28, 22 N. E., 497, or insert what the parties elected to omit. *Hayes v. O'Brien,* 149 Ill., 403, 37 N. E., 73. It has no power to write into the contract any provision that is not there in fact or by implication of law. *Cook v. Smith,* 3 A. L. R., 940; *Hawkeye Commercial Men's Asso. v. Christy,* 294 Fed., 208, 40 A. L. R., 46; 12 A. J., 749.

Our conclusion that defendant's recovery may not extend beyond the one penalty stipulated in the contract is sustained by former decisions of this Court, *Jacksonville v. Bryan, supra; Thornton v. Barbour, supra,* and is in harmony with the great weight of authority. Anno. 42 A. L. R., 834; *Bank of England, Ark., v. Md. Cas. Co.,* 293 Fed., 783; *Chatham Real Est. & I. Co. v. U. S. F. & G. Co.,* 90 S. E., 88; *State ex rel. Freeling v. Casualty Co.,* 42 A. L. R., 829; *Bank v. Fidelity & D. Co.,* 45 A. L. R., 610; *Leonard v. Aetna Casualty & Surety Co.,* 80 F. 2d, 205; *Brulatour v. Aetna Casualty & Surety Co.,* 80 F. 2d, 834; *Bank & Tr. Co. v. F. & D. Co.,* 281 S. W., 785; *Hack v. Surety Co.,* 96 F. 2d, 939.

While there are decisions *contra,* cited by defendant, they are, in most instances, factually distinguishable.

Hood, Comr. of Banks, v. Simpson, 206 N. C., 748, 175 S. E., 193, cited and relied on by defendant, is not in conflict. While the facts in that case are in many respects similar, as clearly outlined in defendant's brief, there are material factual distinctions. Furthermore, in that case there were two bonds in the penal sum of $10,000 each. Notwithstanding the loss was in excess of $20,000, it was stipulated that if the court was of the opinion the two contracts constituted separate bonds, cumulative in effect, plaintiff should recover an amount equal to the total of the penal sums of the two. The court below held that there were two separate contracts imposing cumulative liability and entered judgment for $20,000 as agreed by the parties. We affirmed.

In the light of our conclusion as to the nature of the contract at issue the questions of estoppel and of the bar of the statute of limitations raised by plaintiff become immaterial and need not be discussed.

The one arresting circumstance in this record which "sticks out like a sore thumb" is the fact that the cashier of a small bank could abstract from the funds of his employer an amount equal to approximately twelve times the capital stock of the bank before his peculations were discovered. Wherever the fault may lie, the plaintiff must make good the losses thus sustained by the bank to the extent of the penal sum of its bond only.

The judgment below is

Affirmed.

R. P. HARVEY AND S. G. STARNES, TRADING AS HARVEY & STARNES, R. P. HARVEY AND S. G. STARNES, v. T. F. LINKER AND FAY C. LINKER.

(Filed 20 November, 1946.)

1. Frauds, Statute of, § 3—

The general denial of the contract as alleged is a sufficient pleading of the statute of frauds. G. S., 22-2.

2. Frauds, Statute of, § 10—

A contract for the sale of land or any interest therein must fix the price, and therefore where a valid contract to convey is executed by the owners of land, and later the purchasers add after the signatures a stipulation that by mutual agreement the time for performance had been extended and the purchase price changed to a reduced sum, the change in purchase price constitutes a new contract which, not having been signed by the owners, is unenforceable against them under the statute of frauds as not having been signed by the parties to be charged.

3. Frauds, Statute of, § 2—

The "party to be charged" whose signature is necessary to take the contract out of the statute of frauds, is the party against whom the contract is sought to be enforced, whether vendor or purchaser.

APPEAL by plaintiffs from *Clement, J.,* at August Term, 1946, of CABARRUS.

This is an action to enforce specific performance of an alleged contract or option for the purchase of a tract of land from the defendants. The option was dated 26 March, 1946, duly executed by the defendants, and provided for the conveyance of the property upon payment of $6,270.00 in cash, on or before 26 May, 1946. The option as executed was not exercised. Thereafter the evidence tends to show that the defendant T. F. Linker agreed to reduce the price of the property to $5,000.00, and to give the plaintiffs until 15 July, 1946, to purchase the property.

The plaintiffs changed the original option to conform to the alleged agreement and added below the signatures of the defendants the following statement: "By permission of both parties, this option has been changed to the amount of $5,000.00, and the time extended to July 15, 1946." None of the parties signed the alleged option as amended.

Upon motion of defendants, judgment as of nonsuit was entered. The plaintiffs appeal, assigning error.

B. W. Blackwelder for plaintiffs.

Hartsell & Hartsell for defendants.

DENNY, J. The plaintiffs concede that a contract for the sale of land must be in writing and signed by the party or parties to be charged therewith. But they insist the court erred in granting defendants' motion for judgment as of nonsuit herein, and cite in support of their contention the cases of *Allston v. Connell,* 140 N. C., 485, 53 S. E., 292, and *Johnson v. Noles,* 224 N. C., 542, 31 S. E. (2d), 637. Both cases relate solely to the extension of the time for performance under the terms of the contract; and the extensions were requested before the expiration of the options and at the request and for the accommodation of the parties to be charged. Therefore they are not in point.

The defendants rely on the statute of frauds under their general denial of the contract as alleged. G. S., 22-2; *McCall v. Institute,* 189 N. C., 775, 128 S. E., 349; *Miller v. Carolina Monazite Co.,* 152 N. C., 608, 68 S. E., 1; *Winders v. Hill,* 144 N. C., 614, 57 S. E., 456.

In the instant case it is not clear whether the alleged extension of time was granted before or after the expiration of the original option. Nevertheless, when the purchase price was changed it constituted a new con-

tract, unenforceable unless signed by the parties to be charged. In discussing the statute of frauds, *Ruffin, C. J.*, in speaking for this Court, in *Simms v. Killian,* 34 N. C., 252, said: "The danger seems as great that a purchase at an exorbitant price may by perjury be imposed on one who did not contract for it, as that by similar means a feigned contract of sale should be established against the owner of the land. Hence the act in terms avoids entirely every contract, of which the sale of land is the subject, in respect of a party, that is, either party who does not charge himself by his signature to it after it has been reduced to writing." *Keith v. Bailey,* 185 N. C., 262, 116 S. E., 729; *Burriss v. Starr,* 165 N. C., 657, 81 S. E., 929; *Hall v. Misenheimer,* 137 N. C., 183, 49 S. E., 104.

A contract for the sale of land or any interest therein, must fix the price. To permit the plaintiffs to establish by parol evidence a change as to one of the essential terms of the contract would open the door to "all the mischiefs which the statute was intended to prevent," *Hall v. Misenheimer, supra.*

The judgment of the court below must be upheld.

Affirmed.

VIRGINIA BELL SWINK v. P. W. HORN.

(Filed 20 November, 1946.)

1. Ejectment § 1—

Where the premises is located in an area subject to Federal Rent Control, plaintiff in summary ejectment must show not only the existence of the relationship of landlord and tenant, expiration of term and notice to quit, but also compliance with the regulations promulgated pursuant to the Emergency Price Control Act. 50 U. S. C. A., Appendix 902.

2. Appeal and Error § 40a—

An exception to the judgment rendered by the judge in a trial by the court under agreement of the parties presents the sole question whether the facts found support the judgment, and does not question any particular finding by the court.

3. Appeal and Error § 40d—

The findings of fact made by the court in a trial by the court by agreement are conclusive on appeal if supported by any competent evidence.

4. Ejectment § 7—

Plaintiff's evidence of notice given and received to vacate the premises *held* sufficient both under the State law and the Rent Control Regulations to overrule defendant's motion to nonsuit on this ground.

5. Ejectment § 3—

Under section 6 (a) (6) of Amendment 67 to Housing Regulations under the Emergency Price Control Act, "immediate" means "without delay," "compelling" means "to drive or urge with force," and "necessity" imports that which is unavoidable or the negation of freedom but does not in law mean essential to existence; and the phrase "immediate, compelling necessity" means a situation imperatively requiring relief, or a course of action impelled by uncontrollable circumstances, and mere convenience or preference for the premises as a residence by the owner is insufficient.

6. Trial § 22a—

On motion to nonsuit, the plaintiff's evidence is to be taken in the light most favorable for her, and she is entitled to the benefit of every reasonable intendment thereon and every inference properly to be drawn therefrom.

7. Ejectment § 7—

Plaintiff's evidence that she was seeking occupancy of the apartment owned by her for her own use as a residence in order to take care of her aged mother who was critically ill and lived in the apartment immediately under the premises in suit, with evidence of her good faith in that she had offered to permit defendant to retain possession if he would yield her two rooms so that she might be near her mother, *is held* sufficient on the question of "immediate, compelling necessity" for personal occupancy to sustain judgment of the court overruling defendant's motion to nonsuit.

APPEAL by defendant from *Hamilton, Special Judge,* at May Term, 1946, of MECKLENBURG. Affirmed.

This was a summary ejectment proceeding to recover possession of an apartment and to remove the defendant tenant therefrom, begun in the court of a justice of the peace, and heard on appeal in the Superior Court.

On the hearing in the Superior Court jury trial was waived and by consent the judge heard the evidence, found the facts and rendered judgment thereon as follows:

"1. That the plaintiff is the owner of an apartment house at 907 Ardsley Road, in the City of Charlotte, and the defendant has been occupying apartment No. 4 therein since some time in 1942 on a monthly tenancy, running from the first of one month to the first of the next month.

"2. That on January 29, 1946, the plaintiff wrote the defendant a letter, notifying him to vacate said apartment, for the reason that she had a compelling necessity for said apartment for use and occupancy by herself and family, and that she would move from China Grove, N. C., into said apartment on March 1, 1946, and that she was seeking in good faith to recover possession of said apartment for use and occupancy by herself and family; that the plaintiff sent a copy of said letter to the OPA Rent Office in Charlotte, N. C., and complied with the OPA Rent

Regulations with reference to said notice; that said letter bore the postmark date of January 30, 1946, at Charlotte, N. C., but the defendant did not receive it until February 1, 1946; that a few days prior to January 29, 1946, the plaintiff told the defendant in person that she would have to have said apartment for her own use on March 1, 1946, and that he would have to vacate it on that date, in order that she could move into it, and told him that she was writing him a letter to that effect; that said verbal notice and the letter constituted a sufficient notice to the defendant to vacate said apartment on or by March 1, 1946.

"3. That sometime in April, 1946, the plaintiff instituted this action before a Justice of the Peace to evict the defendant and from the result of the trial in that court, the defendant appealed to the Superior Court, and by agreement of counsel for the plaintiff and the defendant, the defendant continued to pay the rent wtihout prejudice to the rights of the plaintiff to recover possession of said apartment, and that in consequence of said agreement the defendant has paid the rent through May 31, 1946.

"4. That the plaintiff does have a compelling necessity for said apartment for use and occupancy by herself and family and she is seeking in good faith to recover the possession thereof.

"5. That the rent which the defendant has been paying to the plaintiff for said apartment is $90.00 per month."

It was thereupon adjudged that plaintiff was entitled to the immediate possession of the apartment, and that defendant be removed therefrom.

The defendant excepted to the judgment, and appealed to the Supreme Court.

J. C. Sedberry for plaintiff, appellee.
O. W. Clayton for defendant, appellant.

DEVIN, J. It was admitted that the plaintiff's apartment house from which she sought by this proceeding to evict the defendant was located within an area subject to Federal Rent Control. Hence it was necessary for the plaintiff to show not only the relationship of landlord and tenant, expiration of term and notice to quit, in order to secure possession, but also to show compliance with the regulations promulgated pursuant to the Emergency Price Control Act of 1942, as amended 30 June, 1945 (50 U. S. C. A., Appendix 902). It was said in *McGuinn v. McLain,* 225 N. C., 750, 36 S. E. (2d), 377, "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." *Myers v. Rust,* 134 F. (2), 417.

Upon the evidence offered at the trial, it was found by the court below that plaintiff had prosecuted this proceeding in accordance with the State law and in compliance with the Rent Control regulations, and upon these findings it was adjudged that plaintiff was entitled to the immediate possession of the premises. The defendant's appeal from the judgment brings the case to this Court for decision only on the questions properly raised by the defendant's exceptions duly noted in the trial below.

In the Superior Court jury trial was waived and it was agreed that the judge should hear the evidence, find the facts and render judgment thereon. The defendant's exception to the judgment therefore presents only the question whether the facts found were sufficient to support the judgment. *Mfg. Co. v. Lumber Co.,* 178 N. C., 571, 101 S. E., 214; *Best v. Garris,* 211 N. C., 305, 190 S. E., 221; *In re Escoffery,* 216 N. C., 19, 3 S. E. (2d), 425; *Jones v. Griggs,* 219 N. C., 700, 14 S. E. (2d), 836.

It was said in *Fox v. Mills, Inc.,* 225 N. C., 580, 35 S. E. (2d), 869: "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." *Crissman v. Palmer,* 225 N. C., 472 (475), 35 S. E. (2d), 422; *Query v. Ins. Co.,* 218 N. C., 386, 11 S. E. (2d), 139. In the case at bar no particular finding was questioned by the exception noted. *Rader v. Coach Co.,* 225 N. C., 537, 35 S. E. (2d), 609. Findings of fact made by the judge are conclusive on appeal if supported by any competent evidence. *Odom v. Palmer,* 209 N. C., 93 (98), 182 S. E., 741.

However, the defendant duly noted exception to the denial of his motion for judgment of nonsuit. This motion was based upon two grounds: (1) that plaintiff had failed to show proper notice to defendant to vacate the premises; and (2) that there was no evidence to show an "immediate compelling necessity" to recover possession of the premises for the personal use and occupancy of the plaintiff.

1. Defendant's motion on the first ground was properly denied. Notice to vacate both under the State law and under Rent Control Regulations was shown to have been given and received by defendant. Copy of the written notice was sent the Rent Control Board, and also notice of the institution of this proceeding in court for summary ejectment.

2. The reasons assigned by plaintiff for desiring personal occupancy of the apartment she owned was that she needed the apartment in order to be near her aged mother who was critically ill in the apartment immediately beneath the one withheld by the defendant. In her testimony she described in detail the circumstances of herself and family, and the critical condition of her mother as tending to show the urgency of her need for the apartment, and the immediate compelling necessity to

recover possession thereof for her personal occupancy. As evidence of her good faith she testified she offered to permit the defendant to retain five rooms of the seven-room apartment if he would yield her two rooms, with partition between to be erected by her. This offer the defendant refused. The court found that the plaintiff was acting in good faith and had a compelling necessity for personal occupancy of the apartment. *Nofree v. Leonard,* 327 Ill. App., 143.

Under section 6 (a) (6) of Amendment 67 to Housing Regulations under the Emergency Control Act, effective 15 September, 1945 (10 Fed. Reg. 11666), it was incumbent upon the plaintiff, the owner of the premises, in seeking to recover possession, to offer evidence not only that she sought in good faith to recover possession of such premises for use and occupancy as a dwelling for herself, but also to show an immediate compelling necessity to recover possession thereof for that purpose. If she has offered any competent evidence tending to establish these essential facts, this would be sufficient to withstand the motion for nonsuit, and to support the finding upon which the judgment below was predicated.

The phrase "immediate compelling necessity" associates three words which import both urgency and compulsion. Immediate means without delay. Compelling is the present participle of the verb compel—literally to draw together—meaning to drive or urge with force, *Hammond v. Marcely,* 58 N. Y. S. (2), 565, and signifies something overpowering, admitting of no choice. Necessity usually imports negation of freedom, that which is unavoidable, offering no other course, but the word has varying degrees of meaning and is not restricted in law to that which is absolutely essential to existence. *Storm v. Wrightsville Beach,* 189 N. C., 679, 128 S. E., 17; *M'Culloch v. Maryland,* 4 Wheat., 316 (414); *Boland v. Beebe,* 62 N. Y. S. (2), 8. The phrase is descriptive of a situation imperatively requiring relief, or a course of action impelled by uncontrollable circumstances.

Applying these definitions to the evidence in the record before us, it would seem that the plaintiff must have been prompted by a more potent motive than mere convenience, or a preference for this apartment as a place of residence. She must have been driven to this course by the urgent and imperative need to be in position to render prompt and essential service to her aged mother in her critical illness.

On the motion for nonsuit, the plaintiff's evidence is to be taken in the light most favorable for her, and she is entitled to the benefit of every reasonable intendment thereon and every inference properly to be drawn therefrom. *Nash v. Royster,* 189 N. C., 408, 127 S. E., 356; *Cole v. R. R.,* 211 N. C., 591, 191 S. E., 353.

Applying this rule in considering the defendant's motion for judgment of nonsuit on the evidence offered in the trial, we do not think too strict

an interpretation should be applied which would deprive the owner of the right of personal occupancy of her own premises, when sought in good faith, and under circumstances which reasonably may be regarded, when viewed in the light most favorable for her, as constituting "immediate compelling necessity."

"Where fair and impartial minds may draw different conclusions from the evidence, though there be no conflict therein, the conclusions drawn by the trial court must be sustained on appeal." *Spreckels v. San Francisco,* 244 Pac., 919 (923).

We think there was evidence to support plaintiff's contentions, and that the motion for nonsuit was properly denied.

We note that neither the Price Administrator, nor the local Rent Control Board, though duly notified, has intervened here, or sought to restrain plaintiff's action. *Bowles v. Hall,* 63 F. Supp., 826.

For the reasons stated the judgment is

Affirmed.

VIRGINIA BELL SWINK v. P. W. HORN.

(Filed 20 November, 1946.)

Appeal and Error § 5—

The subject matter of plaintiff's action in summary ejectment is located in an area subject to Federal Rent Control. Plaintiff sought possession for personal occupancy to be near her aged and ailing mother. Pending defendant's appeal from judgment for plaintiff, plaintiff's mother died. *Held:* The changed circumstances affected merely an element of proof incidental to the relief sought and does not destroy plaintiff's cause of action, and therefore defendant's motion to dismiss plaintiff's action as having abated, is denied.

MOTION to dismiss plaintiff's action. Motion denied.

J. C. Sedberry for plaintiff.

O. W. Clayton for defendant.

DEVIN, J. The defendant in the above entitled cause moves in this Court that plaintiff's action be dismissed as having abated by reason of the death, pending the appeal, of the plaintiff's mother whose critical illness was alleged to have rendered it necessary for plaintiff to obtain possession of the apartment now occupied by the defendant, under Federal Rent Control Regulations. It was contended that plaintiff's cause of action has become moot and is no longer supported by existing facts.

Undoubtedly, where, pending an appeal, the subject of the action has been destroyed or has ceased to exist, or been settled between the parties, or the right of action does not survive the death of the plaintiff, or the action or thing sought to be enjoined has happened or been completed, or because of devolution of title plaintiff's interest has determined, a motion in this Court to dismiss the action as having abated ordinarily would be entertained. *Cochran v. Rowe,* 225 N. C., 645, 36 S. E. (2d), 75; *Efird v. Commissioners,* 217 N. C., 691, 9 S. E. (2d), 466; *Rousseau v. Bullis,* 201 N. C., 12, 158 S. E., 553; *Rasberry v. Hicks,* 199 N. C., 702, 155 S. E., 616; *Glenn v. Culbreth,* 197 N. C., 675, 150 S. E., 332; *Kilpatrick v. Harvey,* 170 N. C., 668, 86 S. E., 596; *Reid v. R. R.,* 162 N. C., 355, 78 S. E., 306; *Wikel v. Commissioners,* 120 N. C., 451, 27 S. E., 117; *S. v. R. R.,* 74 N. C., 287; *Kidd v. Morrison,* 62 N. C., 31; McIntosh, 775. But here the ground on which defendant's motion is based is in substance that evidence material to the issue tried below is no longer available to the plaintiff. This applies not to the subject of the action but to an element of proof. It is merely incidental to the relief sought. Plaintiff's cause of action has not been destroyed. The evidence referred to was used by the plaintiff in the trial below to overcome the artificial strength temporarily given the defendant's defense by the rent regulations under the Emergency Price Control Act. The plaintiff's right to repossess her property upon the expiration of the defendant's lease, after due notice to vacate, under the law in this State, may not be deemed to have ceased to exist, or to afford the defendant ground for the reversal of the result in plaintiff's favor in the trial in the Superior Court by the dismissal of the action by this Court.

Motion denied.

ATLANTIC COAST LINE RAILROAD COMPANY v. DUPLIN COUNTY AND D. S. WILLIAMSON, TREASURER OF DUPLIN COUNTY.

(Filed 20 November, 1946.)

1. Taxation § 2—

Upkeep of county buildings, upkeep and maintenance of county home for the aged and infirm, expense of holding courts, and maintenance of jail and jail prisoners are general expenses and must be covered in the fifteen-cent levy limited for general purposes. Constitution, Article V, section 6.

2. Same—

Where a county's tax rate for general county purposes is fifteen cents, its levy for poor relief is limited to a tax rate of five cents. G. S., 153-9 (6).

3. Same—Seven-cent levy for poor in addition to fifteen-cent levy for general purposes is excessive by two cents, but county may show that excess was for special purpose with special approval of Legislature.

Where the tax records of the county disclose a fifteen-cent levy for general purposes and a seven-cent levy for the county poor, two cents of the seven-cent levy is patently excessive and no part thereof can be justified for items of general expense, but where, in an action by a taxpayer to recover the amount paid under protest under the two-cent levy, defendant county introduces resolutions of the board correcting its records to show that two cents of the seven-cent levy was for administration of old age assistance and aid to dependent children, and for salaries of the county accountant and farm agent, nonsuit is proper, since such purposes are for special purposes with special approval of the Legislature, G. S., 108-17, *et seq.*, G. S., 108-44, *et seq.*

4. Counties §§ 5, 10—

The Board of County Commissioners may amend or clarify their records to make them speak the truth in order to list separately tax levies for general and special purposes as required by G. S., 153-114, and while this power exists only to make *bona fide* corrections, nothing else appearing, resolutions amending the records will be assumed to be what they purport to be, and not original actions.

APPEAL by defendants from *Thompson, J.*, at March Term, 1946, of DUPLIN.

Two civil actions instituted 23 June, 1942, and 7 May, 1943, respectively, for recovery of *ad valorem* taxes alleged to have been assessed illegally by defendant, Duplin County, for the years 1941 and 1942, respectively, and paid under protest by plaintiff—consolidated for purpose of trial.

The pleadings in the two actions are substantially the same except as to dates and amounts.

Plaintiff alleges in its complaints that for the years above designated defendant Duplin County, by virtue of C. S., 1297 (28), (now G. S., 153-9 (6)), levied an invalid tax of seven cents on the one hundred dollars valuation on all taxable property in the county for the purpose of maintenance, comfort, and well ordering of the poor, and proceeded to collect tax at that rate for said purpose; that plaintiff paid under protest the tax so levied against it, and duly demanded in writing the return of that part of same which is represented by a levy of two cents of the seven cents on the one hundred dollars valuation as aforesaid, for that the legal limitation of the said levy is five cents on the one hundred dollars valuation and, therefore, the additional two cents, purporting to be levied as aforesaid, is not levied for a special purpose or necessary expenses, and the question of its levy has not been submitted to an election and approved by a majority of the qualified voters of the county,

and, hence, it is in excess of the authority of the county and is unconstitutional, invalid, and unenforceable.

Defendants, answering, admit the levy of seven cents, but aver that same is valid for that it was levied not only "(a) for the maintenance, comfort, and well ordering of the poor," but for the following purposes:

"(b) The upkeep of the county buildings, and the county home for the aged and infirm.

"(c) For the County's administrative expense of administering old age assistance.

"(d) For the County's administrative expense of administering aid to dependent children."

And, in the second action, the answer set forth an additional purpose, that is, for the expense of holding courts and the maintenance of the jail and jail prisoners, and by amendment thereto defendant, Duplin County, averred that the levy was also "for the purpose of raising funds" (1) "for the payment of the salary of the county farm agent" and (2) "for the payment of the salary of the county accountant."

When the cases came on for hearing in Superior Court, plaintiff offered in evidence the portions of the answers in respect of the levy and purposes as above set forth. But defendant, on cross-examination of the county accountant as witness for plaintiff, and over objection by plaintiff, obtained (1) identification of budget estimates, appropriation resolutions, and "corrected statement of the tax levy" for 1941 for the following funds, "General county, poor, etc., and health," and like statement for 1942, and (2) explanation that the two cents was levied for administration of old age assistance, and aid to dependent children, and county farm agent and county accountant salaries, and is listed on the tax receipt "Poor, etc." In other words, that the seven cents to "Poor, etc.," is composed of the items of five cents for the county poor, and the two cents for purposes "just explained." And that the requirement for administration of old age assistance and aid to dependent children, as per certificate from the State Board of Allotments and Appeals was $1,196.50, and for county accountant and county farm agent was $1,503.50, a total of $2,700, which plus the estimate for uncollected taxes of $300.00 make up the two cents levy on estimated fifteen million property valuation for the county as a whole.

Defendant moved for judgment as of nonsuit at close of evidence for plaintiff. Denied. Exception by defendants.

Defendants thereupon offered in evidence minutes of the Board of Commissioners showing the budget estimates, the appropriations resolutions, and tax levies for each of the years 1941 and 1942; the levy showing, among others, for General County Fund, fifteen cents, County Poor Fund, seven cents, Health, eight cents, and to old age assistance

fund six cents, and to dependent children fund three cents, and aid to the blind fund one cent.

Defendant also offered in evidence the resolutions showing that the seven cents rate for "Poor, etc.," was corrected, on 3 December, 1945, by the Board of Commissioners to show that two cents of it was for requirement for administration of old age assistance and aid to dependent children as per certificate from State Board of Allotments and Appeals, and for county accountant and county farm agent.

Motion of defendant for judgment as of nonsuit at close of all the evidence was denied. Exceptions. Thereupon, these issues as to the tax for the year 1941 were submitted to and answered by the jury under peremptory instructions of the court, as shown, to wit:

"1. Did the county of Duplin levy a tax for the year 1941, for the County Poor Fund, of seven cents on the one hundred dollars valuation of property, as alleged in the complaint? Answer: Yes.

"2. Was two cents of the tax of seven cents on the one hundred dollars valuation of property levied by Duplin County for the year 1941 for the county poor fund in the sum of $268.30, paid to the treasurer of Duplin County under protest duly made and filed with said Duplin County, as alleged in the complaint? Answer: Yes.

"3. Did the plaintiff within 30 days of the payment of the same demand of Duplin County the refund of said payment, as alleged in the complaint? Answer: Yes.

"4. What amount, if any, is the plaintiff entitled to recover of the defendant on account of said payment so made? Answer: $268.30 with interest from November 25, 1941."

And, identical issues and answers thereto appear for the year 1942, except as to the answer to the 4th issue, the amount there being "$268.60 with interest from February 10, 1943."

From judgments on verdicts defendants appeal to Supreme Court, and assign error.

Vance B. Gavin and Rivers D. Johnson for appellants.
Thomas W. Davis and M. V. Barnhill, Jr., for appellee.

WINBORNE, J. It must be conceded that on the face of the tax records of Duplin County for the years 1941 and 1942 as they existed when these actions were instituted, and so remained until the 3rd day of December, 1945, nearly three and a half years after the first of these actions was instituted, and nearly two and a half years after the second, the excessiveness of the levy of seven cents for "poor, etc.," was patent. *R. R. v. Cumberland County,* 223 N. C., 750, 28 S. E. (2d), 238; *R. R. v. Beaufort County,* 224 N. C., 115, 29 S. E. (2d), 201, and cases cited there.

The same is apparent even in the answers filed in these actions,—for the upkeep of the county buildings, the upkeep and maintenance of the county home for the aged and infirm, and the expense of holding courts, and maintenance of jail and jail prisoners are general expenses, and must be covered in the fifteen cents levy limited by the State Constitution, Article V, section 6, for general purposes. See *Power Co. v. Clay County,* 213 N. C., 698, 197 S. E., 603.

However, the expenses of the position of county accountant and of county farm agent, respectively, are held to be for special purposes, and have been given special approval of the Legislature. See *Power Co. v. Clay County, supra.*

Moreover, the General Assembly has declared that "the care and relief of aged persons who are in need and who are unable to provide for themselves is a legitimate obligation of government which cannot be ignored or avoided without injustice to such persons and serious detriment to the purposes of organized society" and is "a matter of State concern and necessary to promote the public health and welfare"—"Old Age Assistance Act," G. S., 108-17, *et seq.* In this act provision is made (1) for the creation of "The State Old Age Assistance Fund," G. S., 108-22, *et seq.,* (2) and for allocation to the several counties of the State an amount mandatorily required to be raised by each, by taxation, and contributed toward expense of administering the Fund. G. S., 108-38.

And in respect of the care and relief of dependent children who are in need and who are unable to provide for themselves, similar declaration as a matter of State concern and necessity is made. "Aid to Dependent Children Act," G. S., 108-44, *et seq.* In this act also, provision is made (1) for the creation of "The State Aid to Dependent Children Fund," G. S., 108-51, *et seq.,* and (2) for allocation to the several counties of the State an amount mandatorily required to be raised by each by taxation, and contributed toward expense of administering the Fund. G. S., 108-67.

It is noted, however, in connection with these acts that on this appeal the validity of the above mandatory requirements is not challenged.

The county levied in each year a tax rate of fifteen cents on the one hundred dollars property valuation for general purposes, the limit fixed by Article V, section 6, of the Constitution of North Carolina. Therefore, the levy for poor relief was limited to a rate of five cents on the one hundred dollars property valuation under provisions of G. S., 153-9 (6), formerly C. S., 1297 (8½). Hence, the levy of seven cents for "poor, etc.," nothing else appearing, exceeded the limit fixed by the statute to the extent of two cents.

However, we are of opinion, and hold, that the "corrected statement of the tax levy for 1941," and "the corrected statement of the tax levy

for the year 1942," entered of record on 3 December, 1945, by the Board of Commissioners of Duplin County, separating the five cents for "the poor" from the two cents rate to raise funds to meet the State's requirement for administration of the State Old Age Assistance Fund, and the State Aid to Dependent Children Fund, as per certificate from State Board of Allotments and Appeals, and toward salaries of county accountant and farm agent, *Power Co. v. Clay County, supra,* are sufficient to clarify *nunc pro tunc* the actions of the Board of Commissioners taken originally in adopting appropriations resolutions, and in levying the taxes for the years in question.

Boards of Commissioners are permitted to amend their records to speak the truth in cases where levies have been made for general and special purposes separately but recorded as a unit in an amount exceeding the constitutional limitation. However, if the record correctly shows the levy as actually made, the board has no power to amend. See *Power Co. v. Clay County, supra,* where the authorities are cited and assembled. Hence, when this principle is applied to the case in hand, it will be assumed, nothing else appearing, that "the corrected statements" entered by the Board of Commissioners on 3 December, 1945, are what they purport to be, corrections, in fact, and not original actions.

In the light of this holding, the motions for judgment as of nonsuit at the close of all the evidence should have been allowed.

It is not amiss, however, to call attention to the plain provisions of the County Fiscal Control Act, G. S., 153-114, *et seq.,* with respect to composition of county budget estimates, appropriation resolutions and tax levies that require that "each special purpose to which the General Assembly has given its special approval" shall be stated separately. If these provisions be followed, confusion such as is disclosed in the record on this appeal would be eliminated, and the expense of probable litigation avoided.

The judgment below is

Reversed.

FIRST-CITIZENS BANK & TRUST COMPANY, A BANKING CORPORATION, v. ANNIE LEE FRAZELLE AND HUSBAND, C. R. FRAZELLE.

(Filed 20 November, 1946.)

1. Landlord and Tenant § 18—

Ambiguity in the terms of a lease relating to renewals will be construed in favor of the tenant and not the landlord.

2. Same—

A lease for one year with privilege to lessee "to extend said lease for one year," said "privileges to continue in force for nine successive years," is a lease for one year with privilege of renewing it from year to year for nine successive years.

3. Same—

Where a lease for a year provides for extensions thereof from year to year at the option of lessee for a period of nine successive years, the continued occupancy of the premises by lessee and the payment of rent in accordance with the terms of the lease constitute renewals or extensions thereof, and the failure of lessee to give notice of intention to renew cannot be held to have terminated the lease when neither lessor nor his successor demands possession of the premises for such failure.

4. Vendor and Purchaser § 5a—

Where a lease for a year with privilege of renewal from year to year for a period of nine years is kept in force by exercising the renewal privilege, the lease is a sufficient consideration to support specific performance of an option therein granted lessee to purchase at any time during the life of the lease.

5. Landlord and Tenant § 18: Vendor and Purchaser § 5a—

Neither a lease nor an option therein granted lessee to purchase is terminated by the death of lessor, the obligations therein created not being personal but being covenants running with the land.

6. Descent and Distribution § 12—

Rents accruing under a lease after the death of lessor intestate should be paid to the heir and not to the personal representative of lessor.

7. Landlord and Tenant § 22a—

Where a lease contains no forfeiture clause for failure of lessee to pay rent, and the lessee, after lessor's death, pays the rent to lessor's personal representative to the knowledge of lessor's heir, the heir, who made no demand for the rent, may not declare the lease forfeited, since in the absence of a forfeiture clause, G. S., 42-3 applies, and forfeiture under the statute is not effective until the expiration of ten days after demand.

8. Vendor and Purchaser § 19a—

Where an option does not require payment or tender of purchase price until delivery of deed, and vendors refuse to execute deed upon request, tender of the purchase price is not required.

APPEAL by plaintiff from *Thompson, J.*, at May Term, 1946, of ONSLOW.

Civil action instituted 3 November, 1945, to enforce specific performance of an option to purchase certain real property described in a lease dated 7 November, 1936, and executed by and between U. W. Mills and First-Citizens Bank & Trust Company, and duly recorded in the office of the register of deeds of Onslow County, 21 December, 1936.

The pertinent parts of the lease and option are as follows:

"The life of this lease is for one year with the privilege granted for said party of the second part, or its assignee to extend said lease for one year at its expiration; said privileges to continue in force for nine successive years; said lease to date from the occupation of the property by the party of the second part.

"The party of the first part hereby gives to the party of the second part the right, or option, to purchase said property at any time during the life of this lease, or any extension thereof, for the sum of $10,000.

"Upon notice in writing from the party of the second part to the party of the first part that said party of the second part desires to exercise right to purchase said property the rent paid monthly stops at the end of the current rental month. Party of the first part hereby agrees to execute and deliver a deed in fee conveying the property clear of all encumbrances to the party of the second part. The party of the second part agrees to pay the purchase price upon receipt of said deed."

The lease does not purport to bind the heirs and assigns of U. W. Mills.

U. W. Mills died intestate on 12 December, 1941, leaving the defendant Annie Lee Frazelle, his daughter, as his sole surviving heir.

C. R. Frazelle, husband of Annie Lee Frazelle, is the duly qualified and acting administrator of the estate of U. W. Mills.

The plaintiff has continued to occupy the leased premises and to pay the agreed rental each month, and since the death of U. W. Mills the monthly rental payments have been made to the administrator of his estate. The defendant Annie Lee Frazelle knew the rent was being paid to her husband, as administrator of the estate of U. W. Mills.

The plaintiff notified defendants in writing of its intention to exercise the option contained in the lease, and requested the defendants to execute a deed in compliance therewith, but the defendants refused to comply with the request. Whereupon this action was instituted and the sum of $10,000.00 deposited with the court.

At the close of plaintiff's evidence, defendants moved for judgment as of nonsuit. Motion allowed and plaintiff appeals, assigning errors.

Warlick & Ellis for plaintiff.

J. A. Jones and Albert W. Cowper for defendants.

DENNY, J. This appeal presents four questions for our determination. 1. Was the option to purchase the premises described in the lease, in effect when the plaintiff notified the defendants of its election to purchase the property? 2. Did the failure of U. W. Mills to expressly bind his heirs and assigns in the lease, make its terms unenforceable

against his sole surviving heir? 3. Did payment of the rent to the personal representative of U. W. Mills and not to the heir at law, from 1941 until the institution of this action, invalidate the lease? 4. Was tender of the purchase price necessary under the evidence disclosed on this record?

We think the first question must be answered in the affirmative and the others in the negative.

The defendants contend the lease is ambiguous in its provisions relating to the renewals. It is the law, however, that in construing provisions of a lease relating to renewals, where there is any uncertainty, the tenant is favored and not the landlord. Taylor's Landlord and Tenant (9th Ed.), sec. 81; *Warren v. Breedlove,* 219 N. C., 383, 14 S. E. (2d), 43; *Temple Co. v. Guano Co.,* 162 N. C., 87, 77 S. E., 1106; 32 Amer. Jur., sec. 962, p. 809. Moreover, we think it is clear that this lease was for one year with the privilege of renewing it from year to year for nine successive years.

The defendants take the position that since there is no evidence that the plaintiff notified the lessor or his surviving heir at any time of its intention to renew the lease, the lease expired at the end of the first year and since that time the plaintiff has been a tenant at will. Therefore, it is contended that the plaintiff did not undertake to exercise the option during the existence of the lease. The position is untenable. Ordinarily where the tenant holds over it is presumed to have exercised its option to renew or extend. In the case of *Holton v. Andrews,* 151 N. C., 340, 66 S. E., 212, the lease contained the following provision: "The parties of the first part bind themselves, upon the request of the party of the second part, in writing, to renew this lease, without change in terms, from year to year, for a period of four years." The lessee continued in possession of the premises after the expiration of the first year, without making such request in writing or otherwise, paying rent monthly, as before. Seven months later the tenant vacated the premises and the lessor brought an action to recover the rent to the end of the year. This Court held: "His Honor erred in holding this to be a tenancy at will. The requirement that the request for renewal should be in writing was in favor of plaintiff. If not given, he could have refused to renew. The defendant, by continuing on, was presumed to be in for a year, as before, on the same terms as to time, price and monthly payments, and with a right to three years more if requested in writing. A case exactly in point is *Scheelky v. Koch,* 119 N. C., 80. Also, *Harty v. Harris,* 120 N. C., 408."

The continued occupancy of the premises by the plaintiff and the payment of rent in accordance with the terms of the lease, constituted renewals or extensions thereof. Furthermore, the terms of the lease did not require the lessee to notify the lessor of its intention to renew. But

this is immaterial to a decision in this case, because neither the lessor nor his sole surviving heir undertook at any time to have the plaintiff vacate the premises because of failure to give notice of its intention to renew the lease. We hold the lease was in effect at the time the plaintiff notified the defendants of its intention to exercise the option contained therein, and the option may be enforced by a decree of specific performance. *Ward v. Albertson,* 165 N. C., 218, 81 S. E., 168. This is in accord with a recent decision of this Court, *Crotts v. Thomas, ante,* 385, 38 S. E. (2d), 158, in which we said: "An option in a lease, which gives the lessee the right to purchase the leased premises at any time before the expiration of the lease, is a continuing offer to sell on the terms set forth in the option, and may not be withdrawn by the lessor within the time limited. The lease is a sufficient consideration to support specific performance of the option of purchase granted therein." *Pearson v. Millard,* 150 N. C., 303, 63 S. E., 1053; *Thomason v. Bescher,* 176 N. C., 622, 97 S. E., 654; *Willard v. Taylor,* 75 U. S., 557, 19 Law Ed., 501; 49 Am. Jur., 141, sec. 120.

The right of a lessee to enforce an option contained in a lease, is not affected by the death of the lessor. "Covenants to renew are not personal. They run with the land, and are binding upon the legal successors of the lessee as well as the lessor. They are entitled to the benefits and are burdened with the obligations which such covenants confer on the original parties." *Bank of Greenville v. Gornto,* 161 N. C., 341, 77 S. E., 222; 25 Cyc., 996; *Pearson v. Millard, supra; Barbee v. Greenberg,* 144 N. C., 430, 57 S. E., 125. "Contracts for the conveyance of land are capable of specific performance not only against the parties and their voluntary grantees and vendees with notice, but as against their heirs, devisees, and widows; and such suits may be maintained against the heirs, although the contract did not purport to be obligatory against the heirs of the parties." 49 Amer. Jur., sec. 147, p. 170, *et seq.;* 58 C. J., sec. 90, p. 925.

All rents which accrued under the lease herein, after the death of U. W. Mills, should have been paid to his sole surviving heir, Annie Lee Frazelle, or her agent, and not to the personal representative of U. W. Mills, deceased. *Mizell v. Lumber Co.,* 174 N. C., 68, 93 S. E., 436; *Timber Co. v. Wells,* 171 N. C., 262, 88 S. E., 327; *Timber Co. v. Bryan,* 171 N. C., 265, 88 S. E., 329. "Rent which is due at the time of the death of the lessor passes to his personal representative for administration as an asset of the decedent's estate, while rent which becomes due after that time becomes the property of the heirs or devisees who are entitled to the reversion, as an incident thereof." 32 Amer. Jur., sec. 457, p. 375. And where the heirs fail to receive the rent and it is paid to the administrator without their knowledge or consent, such payment is no defense against a demand by the heirs for the rent. 32 Amer. Jur.,

sec. 460, p. 377. However, the contention of the defendants on this point is without merit under the facts disclosed on this record.

The rents due under the terms of the lease after the death of the lessor, have been paid to the administrator with the knowledge of the sole surviving heir. Furthermore, there is no evidence that she notified the plaintiff to vacate the premises for failure to pay the rent to her. The lease contains no forfeiture clause upon failure to pay the rent, hence the statute, G. S., 42-3, applies. A forfeiture under the statute for failure to pay rent is not effective until the expiration of ten days "after a demand is made by the lessor or his agent on said lessee for all past due rent." *Monger v. Lutterloh,* 195 N. C., 274, 142 S. E., 12. No demand for the payment of rent having been made by the defendant Annie Lee Frazelle, sole surviving heir of U. W. Mills, as required by the statute, the lease was in full force and effect at the time the plaintiff gave notice of its intention to exercise the option contained therein.

The defendants also contend that there was no tender of the purchase price as required under the decisions of this Court, citing *Land Co. v. Smith,* 191 N. C., 619, 132 S. E., 593, and similar cases. We do not so hold. The option does not require payment or tender of the purchase price until a deed for the premises is delivered to the plaintiff. The defendants having refused to execute a deed for the premises when the plaintiff requested them to do so, their contention as to the failure of the plaintiff to tender the purchase price cannot be sustained. *Phelps v. Davenport,* 151 N. C., 22, 65 S. E., 459; *Gallimore v. Grubb,* 156 N. C., 575, 72 S. E., 628; *Gaylord v. McCoy,* 161 N. C., 686, 77 S. E., 959; *Cunningham v. Long,* 186 N. C., 526, 120 S. E., 81; *Crotts v. Thomas, supra.* Moreover, plaintiff was under no obligation to deposit the purchase money in the sum of $10,000.00 with the court, but evidently did so as an expression of good faith and as evidence of its readiness to comply with the terms of the option upon receipt of a deed for the premises.

The motion for judgment as of nonsuit should have been denied, and the judgment entered below is

Reversed.

VIOLA HOWELL AND EDNA BYRD, SISTERS, AND ROBERT FULWILEY, BROTHER, NEXT-OF-KIN OF JOHN HENRY FULWILEY, DECEASED, v. STANDARD ICE & FUEL COMPANY, EMPLOYER; AND U. S. CASUALTY COMPANY, CARRIER.

(Filed 20 November, 1946.)

1. Master and Servant § 40c—

Deceased in performance of his duties in unloading coal cars on a trestle had swept out the coal which failed to fall by gravity from one end of a car, and while waiting for the gravity fall of coal to cease in unloading the other end of the car in like manner, fell from the trestle to his fatal injury. *Held:* Deceased was required to be on the trestle in the discharge of his duties, and the risk of falling therefrom was a hazard of the employment, and at the time of injury deceased was doing what he was assigned to do, and therefore his death was from accident arising out of the employment.

2. Same: Master and Servant § 40a—

Where an employee engaged in sweeping out coal failing to fall by gravity from cars after the opening of the doors of the cars, is directed to stand on oil tanks on one side of the trestle while waiting for the gravity flow of coal to cease, his failure to take the position directed and his act in moving to the other side of the trestle may be negligence, which does not bar recovery under the Workmen's Compensation Act, but an accident occurring during the period of waiting required by his employment nevertheless arises out of the employment.

3. Same—

The Workmen's Compensation Act must be liberally construed, and the term "out of the employment" will not preclude recovery for an accident occurring while an employee is not in the exact spot designated by the employer if the employee is at the place he is required to be in the performance of his duties.

APPEAL by defendants from *Hamilton, Special Judge,* at June Extra Term, 1946, of MECKLENBURG. Affirmed.

Claim for death benefit compensation under the Workmen's Compensation Act.

The deceased, John Henry Fulwiley, was employed by defendant Standard Ice & Fuel Company as a laborer or helper. As such he was required to help unload coal, load wagons, and do similar work. On 20, March, 1945, he fell from a coal-car-unloading trestle, sustaining injuries which caused his death. As he left no dependents the claim is prosecuted in behalf of next of kin.

The employer was engaged in marketing coal. It maintained on its premises an elevated trestle about twelve feet high for the purpose of unloading coal from railroad cars through a hopper into trucks below. There was a walkway on each side of the track of sufficient width to

permit employees to walk or stand by the side of a coal car while it was on the trestle.

On 20 March, 1945, defendant was unloading a coal car on the trestle. Deceased was sent to the trestle to sweep out the coal after the gravity flow ceased. The front or near end of the car was placed over the hopper and was unloaded. Deceased then entered the car and swept out the coal as he was required to do. He was then told to stand on the flat top of some oil tanks built flush against the trestle while other employees moved the car forward so that the other end could be unloaded, after which he was again to enter the car and sweep out the coal. As other employees were opening the door of the coal car, deceased was seen near where they were working, on the side opposite the oil tanks, and when the door was opened the rush of coal caused the temporary hopper to collapse. One of the boards struck deceased and knocked him off the trestle. He fell to the concrete paving below, sustaining injuries which proximately caused his death.

The hearing commissioner found the facts, concluded that the deceased sustained an injury by accident arising out of and in the course of his employment which proximately caused his death and made an award under the statute. The full commission approved and, on appeal to the Superior Court, the judge below affirmed. Defendants excepted and appealed.

Taliaferro, Clarkson & Grier for plaintiffs, appellees.
Helms & Mulliss and James B. McMillan for defendants, appellants.

BARNHILL, J. It is admitted that deceased was an employee of defendant fuel company and that he was injured by accident on 20 March, 1945, and died the next day as a result of such injuries. That he received the injuries in the course of his employment could not be seriously debated. Hence the one question posed for decision is this: Is there any evidence in the record to sustain the conclusion that the injury by accident arose out of the employment of the deceased?

The term "arose out of" has been so often defined by this Court that it now has an established and well-recognized meaning. *Bryan v. T. A. Loving Co.*, 222 N. C., 724, 24 S. E. (2d), 751, and cited cases. The accident suffered by deceased, in our opinion, comes clearly within that meaning.

He was sent by his superior to the trestle platform to perform certain duties in connection with the unloading of a car of coal. He had swept out the front end and was waiting until the car could be moved and the "off" end unloaded so that he could sweep that out also. So then, he was doing what at the time he was assigned to do—waiting until the gravity flow of coal ceased. He was on the unloading trestle where his

work required him to be. The risk of falling from the trestle was a hazard of the employment to which he was exposed by virtue of his assignment to assist in the unloading. The nature of the work was the very thing that carried him there.

But defendants insist that "Fulwiley's only job on the trestle was the narrow and specific job of pushing down coal inside the car after the end of the car was nearly empty"; he "was not authorized to be on the west side of the trestle when the car doors were being opened"; he "voluntarily left his place of safety in violation of understood instructions"; and he "had no duties to perform anywhere while the doors were being opened."

This is to say an employee must step only where his work compels him to step; go only to the exact spot his duties require him to go. The rule of liberal construction will not permit such a narrow and restricted application of the law.

The failure of the deceased to observe the instructions to stand on the top of the oil tanks and his going on the west side where the workmen were opening the doors were, at most, acts of negligence which do not bar recovery. *Archie v. Lumber Co.*, 222 N. C., 477, 23 S. E. (2d), 834; *Michaux v. Bottling Co.*, 205 N. C., 786, 172 S. E., 406.

He was on the trestle to perform the work assigned to him, and it was as much his duty to wait while the unloading was in progress as it was for him to enter the car and sweep it out after the gravity flow ceased. *Brown v. Aluminum Co.*, 224 N. C., 766, 32 S. E. (2d), 320.

The cases cited and relied on by defendants are clearly distinguishable. In each the workman, of his own volition and for his own pleasure or convenience, undertook to do something entirely outside the work he was employed to do. *Bellamy v. Mfg. Co.*, 200 N. C., 676, 158 S. E., 246, is more nearly in point.

As the uncontroverted evidence supports the conclusion that the injury by accident sustained by deceased arose out of and in the course of his employment, the judgment must be

Affirmed.

RALPH H. BROWN v. F. GRADY HALL.

(Filed 20 November, 1946.)

1. Pleadings § 31—

Allegations in an answer of a prior action instituted by the plaintiff and incorporating in the answer the summons and complaint of such prior action, not for the purpose of pleading pendency of such action, it appearing from the allegation that voluntary nonsuit had been taken therein, is properly stricken upon motion of plaintiff on the ground of irrelevancy.

2. Same—

Irrelevant and redundant or evidential matter may be stricken from a pleading upon motion of the party aggrieved thereby, G. S., 1-153, and the order striking such matter from the pleading does not deprive the pleader of any substantial right.

3. Pleadings §§ 3a, 7—

A pleading should allege the ultimate facts upon which the right to relief is predicated and not the evidential facts which must be proven to establish the ultimate facts.

4. Pleadings § 30—

A motion to strike made before pleading or expiration of extension of time to plead, is made as a matter of right, while such motion not made in apt time is addressed to the discretion of the court.

5. Appeal and Error § 40b—

A discretionary ruling of the trial court is not reviewable on appeal in absence of abuse of discretion.

APPEAL by defendant from *Sink, J.*, at February Term, 1946, of ROWAN.

This was an action to recover for alleged personal injuries and for property damage caused by a collision between the Dodge automobile of the plaintiff and a Studebaker truck of the defendant on the Lincolnton Road about one and a half miles from Salisbury in April, 1944. The complaint contains allegations of actionable negligence on the part of the defendant in the operation of the defendant's truck, and of personal injuries and property damage proximately caused thereby. The answer denies the allegations of the defendant's negligence, and avers that even if he were negligent the plaintiff was guilty of contributory negligence, making specific allegations of such contributory negligence; and also in his further answer avers in Paragraph III thereof as follows: "That prior to the institution of this suit plaintiff in this case instituted a suit in the Rowan County Court for the same collision in which he alleged his total damage of every kind at $523.50, the complaint of said action having been duly sworn to by the plaintiff herein, and which action was dismissed by the court, copy of summons in said action, together with copy of complaint, is hereto attached and asked to be made a part of this answer as fully as if written herein."

The plaintiff lodged a motion to strike the said allegations contained in Paragraph III of defendant's answer before the clerk of Rowan County, which motion was denied. When the case was called for trial and the jury had been sworn and empaneled, the plaintiff made a similar motion to strike from the answer Paragraph III of the further answer, together with summons and complaint filed by the plaintiff in the former

action which had been incorporated in the answer by reference thereto, which motion was allowed by Sink, J., at term time, and to the order allowing said motion the defendant preserved exception, and appealed, assigning error.

Hayden Clement and George R. Uzzell for plaintiff, appellee.
Walter H. Woodson and John C. Kesler for defendant, appellant.

SCHENCK, J. There is but one assignment of error in the record, which assignment is brought forward in appellant's brief, namely: "The Court erred in sustaining the motion of the plaintiff to strike paragraph 3 of the defendant's further answer, together with the copy of the summons and copy of the complaint referred to in the said further answer." We are of the opinion, and so hold, that the answer to the question posed is in the negative.

The defendant does not plead the pendency of the other action, but on the contrary stipulates that a voluntary nonsuit had been taken and the costs therein had been paid by the plaintiff. The plaintiff therefore contends that the inclusion in the further answer of the defendant of paragraph 3, together with the summons and complaint in a former action was not germane to the trial in this case, but was immaterial, irrelevant, evidential and redundant. The answer contained a general and specific denial of the material allegations of the complaint, and averred the contributory negligence of the plaintiff. This was all that was required of the defendant to present his defense. The order striking the irrelevant matter from the answer did not deprive the defendant of any substantial right or defense. *Bank v. Atmore,* 200 N. C., 437, 157 S. E., 129. Irrelevant and redundant matter may be stricken out of pleadings on motion of any person aggrieved thereby, G. S., 1-153, and the Superior Court is authorized, in the exercise of its discretion, to strike from a pleading any allegations of purely evidential and probative facts. *Comrs. v. Piercy,* 72 N. C., 181.

"Allegations which set forth evidential matters would be considered irrelevant, and excessive fullness of detail would be redundant," sec. 371, p. 378, and further, "the material, essential, or ultimate facts upon which the right of action is based should be stated, and not collateral or evidential facts, which are only to be used to establish the ultimate facts. The plaintiff is to obtain relief only according to the allegations in his complaint and, therefore, he should allege all of the material facts, and not the evidence to prove them." McIntosh, N. C. Prac. & Proc., sec. 379, p. 388. *Revis v. Asheville,* 207 N. C., 237, 176 S. E., 738.

"The function of a complaint," as stated by *Walker, J.,* in *Winders v. Hill,* 141 N. C., 694, 54 S. E., 440, "is not the narration of the evidence, but a statement of the substantive and constituent facts upon

which the plaintiff's claim to relief is founded. The bare statement of the ultimate facts is all that is required, and they are always such as are directly put in issue. Probative facts are those which may be in controversy but they are not issuable. Facts from which the ultimate and decisive facts may be inferred are but evidence and therefore probative. Those from which a legal conclusion may be drawn and upon which the right of action depends are the issuable facts which are proper to be stated in a pleading. The distinction is well marked in the following passage: 'The ultimate facts are those which the evidence upon the trial will prove, and not the evidence which will be required to prove the existence of those facts.' *Wooden v. Strew,* 10 How. Pr., 48; 4 Enc. of Pl. and Pr., p. 612." See also *Revis v. Asheville, supra.*

As was said in *Hill v. Stansbury,* 221 N. C., 339, 20 S. E. (2d), 308, ". . . when the motion is made in apt time—that is, before pleading or an extension of time to plead—it is made as a matter or right, *Hosiery Mill v. Hosiery Mills, supra* (198 N. C., 596, 152 S. E., 794); *Poovey v. Hickory,* 210 N. C., 630, 631; and when made later, it is then within the discretion of the Court. *Hensley v. Furniture Co.,* 164 N. C., 148, 80 S. E., 154; *Bowling v. Bank,* 209 N. C., 463, 184 S. E., 13; *Warren v. Joint Stock Land Bank,* 214 N. C., 206, 198 S. E., 624."

"While the motion to strike was not made in proper time, that did not divest the court of the power, in the exercise of its sound discretion, to allow the motion during the term at which the case was on the calendar for trial, and the statement of the judge below, in denying the motion when first made, that it was not a matter of discretion, was an inadvertence (*Hines v. Lucas,* 195 N. C., 376, 142 S. E., 319); *Washington v. Hodges,* 200 N. C., 364, 156 S. E., 912; C. S., 536." *Warren v. Land Bank,* 214 N. C., 206, 198 S. E., 624.

"A discretionary ruling of the Superior Court is not reviewable on appeal unless it clearly appears that there has been an abuse of the discretionary power, and defendant's exception to a discretionary ruling of the trial court in the present case cannot be sustained." 2d syllabus of *Cody v. Hovey,* 219 N. C., 369, 14 S. E. (2d), 30.

The order of the judge below is

Affirmed.

MRS. OLA B. FREEMAN AND MRS. DOROTHY BARRETT v. MYERS AUTOMOBILE SERVICE COMPANY, INC.

(Filed 20 November, 1946.)

1. Bailment § 1: Landlord and Tenant § 1—

An agreement obligating the operator of a parking lot to permit parking at any convenient place in the lot constitutes a customer a mere licensee, while assignment of a designated place in the lot for designated period of time constitutes the agreement a lease, but a bailment is not created unless there is a delivery to and acceptance of possession of the automobile by the operator of the lot, giving him for the time sole and exclusive custody and control thereof.

2. Bailment § 7—

This action was instituted by the owner of an automobile against the operator of a parking lot to recover for the theft of the car upon the theory of bailment. The uncontroverted evidence tended to show that the contract signed by plaintiff obligated defendant to permit the vehicle tendered by the holder of the stub to occupy parking space in the lot, that ordinarily the driver parked and removed car herself, taking the keys with her, but that on the occasion in question the driver left the vehicle at the gas pumps on the lot with the keys in the car, and that the car was taken by a person unknown. *Held:* The evidence being insufficient to show a contract of bailment, defendant's motion for judgment as of nonsuit was properly allowed.

APPEAL by plaintiffs from *Olive, Special Judge,* at Extra Special May Term, 1946, of MECKLENBURG. Affirmed.

This is an action to recover damages for the loss of an automobile wherein at the close of the evidence the court sustained the defendant's motion duly lodged under G. S., 1-183, for judgment as in case of nonsuit.

Cochran, McCleneghan & Lassiter for plaintiffs, appellants.

James B. Craighill and Tillett & Campbell for defendant, appellee.

SCHENCK, J. The sole question presented on appeal to this Court is: Did the court below err in allowing motion for judgment as of nonsuit? There is no serious conflict in the evidence. It establishes that there was a contract between the plaintiffs and the defendant; that the defendant operated a parking lot, that the defendant had two types of contracts with its regular customers who paid by the month for parking privileges. The type of contract entered into with the plaintiffs contained the following provisions: "In consideration of the agreements hereinafter set out and the regular monthly parking charge paid by the holder of the other half of this ticker, Myers (defendant) agrees to permit the vehicle tendered by the said holder to occupy space on the Myers lot

shown below for not exceeding 30 days from the date hereof. . . . The holder agrees: 1. That Myers shall not be liable under any circumstances for loss or damage to said vehicle or its contents because of fire, theft, collision or anything else, whether due to negligence on the part of agents of Myers or not, and whether said vehicle is parked by an agent of Myers or not, unless a special monthly parking charge of $10.00 is paid and a special monthly parking ticket is procured." The fee paid by the plaintiffs, as was paid by other customers entering into this type of contract, was $4.00 per month, and the monthly fee paid by customers entering into the other type of contract available from the defendant to customers was $10.00 per month.

On 15 September, 1945, the plaintiffs, having entered into the said first described type of contract with the defendant, signifying their agreement to its terms by signing a memorandum thereof and receiving a copy thereof on a stub, and renewing it, in accordance with its terms, from month to month, parked the automobile belonging to them on defendant's lot for several months prior to said date. Mrs. Barrett left the said automobile on the said lot and left the keys in said automobile, her custom, however, being to take the keys with her to the office, and when she wanted to take the car out of the lot she went around to look for it herself. On the date aforesaid, 15 September, 1945, Mrs. Barrett drove up to defendant's parking lot at about 3:00 o'clock p.m., and stopped her automobile in front of the pumps about 10 or 15 feet from the sidewalk on Tryon Street, and got out of the automobile and walked away. When she returned the car was not there, and it has never been found. She reported the facts to the employees of the defendant, and the defendant made an investigation of the circumstances.

The evidence fails to establish a contract of bailment as contended by the plaintiffs. The legal principles affecting liability depend upon the relationship between plaintiffs and defendant, together with any expressed obligations, or those properly to be inferred from the circumstances. To constitute a bailment the bailee must have assumed the custody and possession of the property for another, and if there was only permission given, though for a reward, to park at any convenient place in the lot, without any assumption of dominion over the property or custody of it in any respect, the status created was a mere license. If a designated place on the lot was assigned to the owner of the car the status was that of a lease, but the status of bailment was not created under either circumstance. A bailment is not created unless there is a delivery to and an acceptance of possession of the article by the bailee. The rights and liabilities of the parties to a bailment are primarily determined by the contract and bailment purpose. The following principles, however, are common to all classes of bailments: "(b) There must be a delivery. . . . (c) There must be a voluntary acceptance by the bailee."

Hanes v. Shapiro & Smith, 168 N. C., 24 (29), 84 S. E., 33. Since there is no evidence either of delivery or of acceptance of possession of the automobile by the defendant, or of total surrender of control of the automobile by the plaintiff there was no bailment created.

"To constitute a bailment there must be a delivery by the bailor and acceptance by the bailee of the subject matter of the bailment. It must be placed in the bailee's possession, actual or constructive. 6 Am. Juris., 191. 'There must be such a full transfer, actual or constructive, of the property to the bailee as to exclude the possession of the owner and all other persons and give the bailee for the time being the sole custody and control thereof.' 6 Am. Juris., 192." *Wells v. West,* 212 N. C., 656, 194 S. E., 313. The agreement between the plaintiffs and defendant in the instant case was embodied in a written contract signed by Mrs. Barrett for the plaintiffs wherein the defendant only undertook to permit the plaintiffs' automobile to occupy space in its lot.

Since the allegations of the instant case are bottomed very largely, if not entirely, upon the theory of bailment, and since there is no evidence tending to show a bailment, the lower court was correct in sustaining the motion for judgment as of nonsuit, and it becomes supererogatory to discuss the other interesting points set forth in the briefs, as irrespective of the opinion this Court may have thereupon, the answer to the sole question posed involving the correctness of the court's ruling upon the motion for a judgment as of nonsuit could not be affected thereby.

The judgment below is

Affirmed.

STATE v. ROBERT SMITH AND ROSA ROBINSON.

(Filed 20 November, 1946.)

1. Intoxicating Liquor § 9g: Criminal Law §§ 54b, 60—

Defendants were charged in eight separate counts with violation of statutes relating to intoxicating liquor. The jury rendered a general verdict of guilty. Defendants objected on the ground that there was no evidence to support several of the counts in the bill. *Held:* The objection is untenable since the verdict may be given significance and correctly interpreted by reference to the allegations, the facts in evidence, and the instructions of the court, and since the general verdict will be presumed to have been rendered on the count or counts to which the evidence relates, and since a single sound count is sufficient to support the verdict and judgment.

2. Intoxicating Liquor § 9d: Criminal Law § 8—

In a prosecution for illegal possession and sale of intoxicating liquor and illegal possession for purpose of sale, evidence that witnesses pur-

chased drinks from one of defendants who was working on the premises is sufficient to support her conviction either as a principal or as an aider and abettor.

3. Criminal Law § 81c (3)—

Even if a portion of the evidence is incompetent as to one of defendants as being *inter alios*, such defendant will not be granted a new trial when its prejudicial effect is not apparent.

APPEAL by defendants from *Clement, J.*, at April, 1946, Special Criminal Term, from MECKLENBURG.

Criminal prosecution on indictment charging the defendants, in eight separate counts, with (1) manufacturing, (2) receiving more than a quart in a space of fifteen consecutive days, (3) transporting, (4) having in possession for purpose of sale, (5) selling, (6) delivering intoxicating liquors, (7) having in possession utensils, paraphernalia, etc., designed for the manufacture of liquor, and (8) receiving spirituous liquors, all contrary to the statutes in such cases provided and against the peace and dignity of the State.

On 25 January, 1946, two officers went to the home of the defendant, Robert Smith, in the City of Charlotte, and found three and one-half pints of whiskey, several small drinking glasses with the odor of whiskey in them, 25 or 30 empty pint bottles and several paper bags full of bottle caps, eight men in the living room who showed signs of having been drinking, and in the kitchen they found Rosa Robinson, a colored woman, apparently waiting on the trade. Two witnesses testified they had purchased drinks there from Rosa Robinson.

Before the officers left the house, the defendant Smith drove up in an automobile. He had seven pints of whiskey in his car and said the liquor in the house was his "and he would take the blame for it."

Verdict: Guilty as charged in the bill of indictment.

Judgments: Six months on the roads as to each defendant.

The defendants appeal, assigning errors.

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

Basil M. Boyd for defendants.

STACY, C. J. The bill in the instant case seems to have been patterned after the one used in the case of *S. v. Mull,* 193 N. C., 668, 137 S. E., 866. Unlike the verdict in the *Mull case,* however, the verdict here is a general one. The defendants complain at this because, they say, there was no evidence to support several of the counts in the bill. *S. v. McNeill,* 225 N. C., 560, 35 S. E. (2d), 629; *S. v. Graham,* 224 N. C., 347, 30 S. E. (2d), 151. Even so, it is the rule with us that a

verdict may be given significance and correctly interpreted by reference to the allegations, the facts in evidence, and the instructions of the court. *S. v. Whitley,* 208 N. C., 661, 182 S. E., 338; *S. v. Jones,* 211 N. C., 735, 190 S. E., 733; *S. v. Morris,* 215 N. C., 552, 2 S. E. (2d), 554; *S. v. Bentley,* 223 N. C., 563, 27 S. E. (2d), 738. And further, "where the indictment contains several counts, and the evidence applies to one or more, but not to all, a general verdict will be presumed to have been returned on the count or counts to which the evidence relates." *S. v. Snipes,* 185 N. C., 743, 117 S. E., 500; *S. v. Cody,* 224 N. C., 470, 27 S. E. (2d), 283. "Where there is more than one count in a bill of indictment, and there is a general verdict, the verdict is on each count; and if there is a defect in one or more counts, the verdict will be imputed to the sound count"—*S. v. Holder* (1st syllabus), 133 N. C., 710, 45 S. E., 862.

The general verdict, even if upheld by no more than a single count, suffices to support the judgments imposed. *S. v. Beal,* 199 N. C., 278, 154 S. E., 604; *S. v. Coleman,* 178 N. C., 757, 101 S. E., 261; *S. v. Jarrett,* 189 N. C., 516, 127 S. E., 590. "When there is a general verdict of guilty on an indictment containing several counts, and only one sentence is imposed, if some of the counts are defective the judgment will be supported by the good count; and, in like manner, if the verdict as to any of the counts is subject to objection for admission of improper testimony or erroneous instruction, the sentence will be supported by the verdict on the other counts, unless the error was such as might or could have affected the verdict on them." *S. v. Toole* (2nd syllabus), 106 N. C., 736, 11 S. E., 168.

The evidence was sufficient to convict the defendant, Rosa Robinson, either as a principal or as an aider and abettor. *S. v. Primus and Johnson, ante,* 671; *S. v. Williams,* 225 N. C., 182, 33 S. E. (2d), 880. And even if some of the testimony were *inter alios* as to her, its prejudicial effect is not apparent.

No reversible error has been made manifest, hence the verdict and judgment will be upheld.

No error.

FLOYD MASON v. LOTTIE H. MASON.

(Filed 20 November, 1946.)

1. Appeal and Error § 39b—

Plaintiff's exception to the submission of one of the issues becomes immaterial when the answers to the other issues establish that plaintiff is not entitled to the relief sought.

2. Divorce § 8b—

Evidence that less than two years before the institution of the action defendant visited plaintiff at camp and plaintiff visited defendant on furloughs, and that at such times they cohabited as man and wife, *is held* sufficient to negative the conclusion that conjugal relations between the parties had ceased for the period prescribed by the statute, and supports the verdict in defendant's favor and judgment denying plaintiff's suit for divorce on the grounds of two years separation. G. S., 50-6.

APPEAL by plaintiff from *Clement, J.*, at March Term, 1946, of GASTON. No error.

Action for divorce on ground of two years separation. G. S., 50-6. The defendant denied they had lived separate and apart for the statutory period.

The plaintiff and defendant were first married in 1929, divorced in an action by the present defendant in May, 1941, and remarried in December, 1941. The plaintiff was inducted into the armed forces of the United States in May, 1942, served in Camp Shelby and Camp Pickett until March, 1944, when he went overseas for service in the Pacific Area, returning to this country in July, 1945. Summons in the present action was issued March, 1945. Plaintiff testified he separated himself from the defendant in April, 1942, shortly before he entered the Army, and that they had lived separate and apart since that time.

The defendant denied the separation and testified that on visits to the plaintiff while he was in camp and, on his visits home on furlough, they cohabited as man and wife, and that these marital relations continued up to the time plaintiff sailed in March, 1944.

Issues were submitted to the jury and answered as follows:

"1. Were the plaintiff and defendant lawfully married as alleged in the complaint? Answer: Yes.

"2. Has plaintiff been a resident of North Carolina for a period of six months next preceding the filing of the complaint in this action? Answer: Yes.

"3. Have the plaintiff and defendant lived separate and apart for a period of two years as alleged in the complaint? Answer: No.

"4. Was said separation due to fault of plaintiff? Answer: Yes."

Harley B. Gaston and Willis C. Smith for plaintiff.

P. C. Froneberger for defendant.

DEVIN, J. The plaintiff assigns error in the action of the trial court in submitting to the jury the fourth issue as to whether the separation was due to the fault of the plaintiff. However, in view of the verdict on the third issue, by which it was determined by the jury that the plaintiff and defendant had not lived separate and apart from each other

for two years as alleged, the ruling of the court in this respect becomes immaterial.

The evidence offered by the defendant was sufficient to support the verdict, and to negative the conclusion that conjugal relations between husband and wife had ceased for the period prescribed by the statute. *Young v. Young,* 225 N. C., 340, 34 S. E. (2d), 154; *Dudley v. Dudley,* 225 N. C., 83, 33 S. E. (2d), 489; *Byers v. Byers,* 222 N. C., 298 (304); *Woodruff v. Woodruff,* 215 N. C., 685, 3 S. E. (2d), 5.

Likewise, the exception to the judge's charge, when considered contextually and in the light of the verdict, cannot be sustained. Controverted issues of fact as to separation and cessation of cohabitation between the husband and wife were decided by the jury in favor of the defendant, and judgment denying the plaintiff's suit for divorce was properly entered. *Moody v. Moody,* 225 N. C., 89, 33 S. E. (2d), 491; *Taylor v. Taylor,* 225 N. C., 80, 33 S. E. (2d), 492.

In the trial we find

No error.

GEORGIANNA STEPHENSON v. JOSEPHINE B. WATSON.

(Filed 20 November, 1946.)

1. Appeal and Error § 31i—

Where the agreed statement of case on appeal contains no exceptions or assignments of error, making it apparent that the appeal was taken solely for the purpose of delay, appellee's motion to docket and dismiss under Rule 17 (1), will be allowed. In this case in summary ejectment it further appeared that defendant's appeal was contrary to plaintiff's understanding when she consented to the adjustment of rent at the instance of defendant's counsel.

2. Appeal and Error § 3—

One who challenges neither the proceeding nor the judgment below and appeals only for purposes of delay, is not the "party aggrieved" within the meaning of G. S., 1-271.

MOTION by plaintiff, appellee, to docket and dismiss appeal under Rule 17, subsection (1), as having been taken only for purposes of delay.

Ward & Ward for plaintiff, appellee.

No counsel contra.

STACY, C. J. Summary proceeding in ejectment, tried originally 6 May, 1946, in court of justice of peace and then *de novo* on defendant's appeal at September Term, 1946, Johnston Superior Court.

The jury found that the plaintiff was entitled (1) to the immediate possession of the premises, (2) to a monthly rental of $35.00, or $175.00 up to 1 October, 1946 (this issue answered by consent); and (3) that the detention of the premises by the defendant was wrongful.

Judgment on the verdict for plaintiff in which it is recited that "no exceptions were taken in the course of the trial including the charge and the verdict." The defendant gave notice of appeal to the Supreme Court.

An agreed statement of case on appeal was filed in the office of Clerk of Superior Court of Johnston County, 22 October, 1946. It contains no exceptions or assignments of error. Obviously, the appeal was taken merely for purposes of delay, and must be dismissed on motion of appellee under Rule 17. *Ross v. Robinson,* 185 N. C., 548, 118 S. E., 4; *Hotel Co. v. Griffin,* 182 N. C., 539, 109 S. E., 371; *Blount v. Jones,* 175 N. C., 708, 95 S. E., 541; *Barnes v. Saleeby,* 177 N. C., 256, 98 S. E., 708. "While ordinarily an appeal lies to the Supreme from the Superior Court as a matter of right, it is required that it must be *bona fide* for the purpose of reviewing some alleged error; and when from the record it appears that the appeal is frivolous and made solely for delay, it will, upon due notice to the appellant, be dismissed upon appellee's motion." *Ludwick v. Mining Co.* (1st headnote), 171 N. C., 60, 87 S. E., 949.

The case states that "at the earnest solicitation of counsel for defendant, the plaintiff agreed that the rent issue might be answered" as above set out, "believing this ended the case, and that no special damages would be asked." Thus, it appears that the appeal is not only without merit, but at variance with the understanding which the plaintiff had when she consented to an adjustment of the rent. See *Featherstone v. Glenn,* 225 N. C., 404, 35 S. E. (2d), 243. No valid defense was interposed in the courts below; no exceptions were taken to the trial, and no answer has been filed to the motion here. One who challenges neither the proceeding nor the judgment below and appeals only for purposes of delay, is not the "party aggrieved" within the meaning of the appeal statute. G. S., 1-271; *Yadkin County v. High Point,* 219 N. C., 94, 13 S. E. (2d), 71; *Starnes v. Tyson, ante,* 395 (Defendant's Appeal).

Motion allowed.

STATE v. ERNEST HARRELL.

(Filed 20 November, 1946.)

1. Criminal Law § 80b (4)—

Where an appeal in a criminal case is not docketed within the time allowed, Rules of Practice of the Supreme Court Nos. 5 and 28, the motion of the Attorney-General to dismiss under Rules 17 and 28 will be allowed.

2. Criminal Law § 71—

The affidavit for appeal *in forma pauperis* must be made during the trial term or within ten days after the adjournment thereof, G. S., 15-182, in order for the Supreme Court to acquire jurisdiction of the appeal, but in a capital case, the Supreme Court will nevertheless examine the exception or exceptions defendant undertakes to have considered on the appeal.

APPEAL by defendant from *Burgwyn, Special Judge,* at July Term, 1946, of HERTFORD.

The defendant was tried upon a bill of indictment charging him with the murder of Janie Harrell, and was convicted of murder in the first degree. Thereupon, he was sentenced to death by asphyxiation, as provided by law; and from this judgment, he gave notice of appeal to the Supreme Court.

The appeal *in forma pauperis* was docketed in this Court 14 October, 1946, and the appellant's brief was filed the same date.

The Attorney-General moves to dismiss the appeal under Rules 17 and 28.

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

W. W. Jones and J. William Copeland for defendant.

PER CURIAM. This appeal should have been docketed in this Court on or before 10:00 a.m., Tuesday, 3 September, 1946, and appellant's brief filed by noon 7 September, 1946. Rules 5 and 28 of the Rules of Practice in the Supreme Court, 221 N. C., 546 and 562, *et seq. Pruitt v. Wood,* 199 N. C., 788, 156 S. E., 126.

We also find that the affidavit upon which the order for appeal *in forma pauperis* is based, was made more than ten days after the adjournment of the term of court at which the defendant was tried. Such affidavit must be made during the term or within ten days of the adjournment thereof, G. S., 15-182, otherwise this Court does not acquire jurisdiction of the appeal, *S. v. Holland,* 211 N. C., 284, 189 S. E., 761; *S. v. Stafford,* 203 N. C., 601, 166 S. E., 734.

Even though we have no jurisdiction to hear this appeal, since the life of the defendant is involved, we have examined the only exception the defendant undertakes to have this Court consider on the appeal. The exception is without merit and would not be sustained if the appeal were properly before us.

The record proper having been docketed in this Court, the judgment of the court below is affirmed and the motion of the Attorney-General is allowed.

Appeal dismissed.

STATE v. MAJOR BENTON.

(Filed 27 November, 1946.)

1. Rape § 2—

An indictment for rape must use the words "by force" or their equivalent in describing the manner in which the assault was accomplished. G. S., 14-21.

2. Indictment § 9—

In drawing an indictment it is advisable to adhere to the established practice.

3. Criminal Law § 53f—Charge held for error as containing an expression of opinion by the court on the evidence.

In this prosecution for rape defendant pleaded insanity and alibi. One of defendant's witnesses stated he would not go so far as to say defendant did not know right from wrong. The State's evidence included testimony of prosecutrix, an alleged confession and testimony of officers in respect thereto, and the court stated the State's contentions at length. The jury having failed to reach a verdict, the court recalled them and instructed them that the evidence was "rather clear" and that it should reach a verdict if possible. The jury shortly thereafter returned a verdict of guilty of the capital crime. *Held:* Under the circumstances the expression that the evidence was "rather clear" must have been understood to have referred to the State's witnesses and not to defendant's, and must be held for error as an expression of opinion by the court upon the weight of the evidence.

4. Same—

The court is precluded from expressing an opinion upon the weight or credibility of the evidence either directly or indirectly by manner, form of expression, or method of arraying and presenting the evidence which is calculated to influence the jury, or by the general tone and tenor of the trial.

5. Same—

Where defendant pleads insanity and alibi, the repeated use of the phrase in the charge "responsible for his crime" invades the province of the jury, since under the plea of alibi it is for the jury to determine whether the crime was committed by defendant.

6. Same—

The manner of stating the contentions of the parties, if indicative of the court's opinion, is within the prohibition of G. S., 1-180, and in the instant case the statement of the State's contentions in regard to the disinterestedness of officers who testified for the State and the weight to be given the testimony of a doctor as an expert witness, together with a later statement that the evidence was "rather clear" *is held* to disclose that the court entertained high regard for such testimony.

7. Same—

A misstatement in the charge that defendant's counsel had asked the jury to return a verdict of guilty of an assault with intent to commit

rape instead of one of rape, when not called to the court's attention at the time, ordinarily is no more than a harmless inadvertence, but in the instant case it may have been prejudicial when considered in connection with the charge of the court.

APPEAL by defendant from *Phillips, J.*, at April Term, 1946, of RICHMOND.

Criminal prosecution on indictment charging that the defendant did "with force and arms" assault, ravish and carnally know a female 'wilfully, unlawfully and feloniously . . . and against her will."

There was evidence by the State, including an alleged confession of the defendant, in support of the indictment. The prosecutrix was assaulted by someone with a "crippled hand—his fingers seemed to have been drawn on one hand"—on the night of 24 December, 1945, as she was walking along a wooded path near her daughter's home in Hamlet. She made outcry as soon as she was able to free herself and reach her daughter's house. Officers were called and found evidence of a struggle and the prosecutrix' pocketbook where the assault took place. A doctor was also called who found the prosecutrix in a highly nervous condition, with signs of having been choked and assaulted.

Sometime thereafter the defendant was questioned by the officers and made a statement in the nature of a confession to the effect that he raped the prosecutrix on the night in question. The defendant has a crippled hand.

On trial, the defendant interposed a plea of mental irresponsibility induced by drunkenness and low mentality. He also offered evidence tending to show that he was elsewhere at the time of the assault—an alibi. The defendant did not offer himself as a witness before the jury.

The defendant excepted to the general tone of the court's charge to the jury—its strong summation of the State's case—the singling out of some of the testimony for special consideration, and particularly to the following expressions:

1. "Something has been said in the argument about the competency of the confession. . . . The court has ruled that the confession was made freely and voluntarily . . ., so any argument . . . as to the incompetency of the confession . . . will not be considered by you at all. The court has ruled that the confession as made to the officers by the defendant was freely and voluntarily made and admitted in evidence for your consideration in this case. You will take the law from the court and the court alone." Exception.

2. "Now the State further insists and contends that the prosecutrix is corroborated in her testimony . . . that she immediately ran to her daughter's home, . . . and told them immediately what had happened . . . that she didn't wait five minutes, ten minutes, an hour or two hours, or a week." Exception.

3. "The State further insists and contends that a doctor was called and that you should believe what the doctor says about it, that he was an expert witness . . . which the State insists and contends corroborates her testimony."

4. The State further insists and contends that the psychiatrist offered by the defendant substantiates rather than contradicts the State "in its contention of his (defendant's) mental capacity to be responsible for his crime . . . and if you take what the defendant's evidence shows you would say that the defendant is responsible under the law for his crime."

5. "The State further insists and contends that you should believe the officers in the case (naming them); that they have no reason to testify falsely against this man; that they are officers of the law . . . worthy of your belief and you should believe them; that if you believe what they say about it and what the defendant told them and the other evidence in the case . . . you should be satisfied . . . beyond a reasonable doubt that the defendant is guilty of the capital crime of rape."

6. "Now the defendant's counsel in their argument . . . have asked you to return a verdict of 'guilty of assault with intent to commit rape' but not to find the defendant guilty of the capital charge of rape."

The jury was given the case about 4 o'clock on Friday afternoon. On the following morning about 11 o'clock they were called in by the court and asked if they were able to agree upon a verdict. The jury answered: "No, we are pretty well divided; 7 to 5." The court then instructed the jury that it was their duty to agree if possible, saying: "The evidence as testified to by the witnesses has been rather clear and if it is at all possible you gentlemen should try to reach a verdict." Exception.

In about 30 minutes, the jury returned the verdict, "Guilty of rape as charged in the bill of indictment."

Judgment: Death by asphyxiation.

The defendant appeals, assigning errors.

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

Jones & Jones and R. O. Everett for defendant.

STACY, C. J. The sufficiency of the indictment is challenged by motion in arrest of judgment, because it fails to allege the use of "force" in the accomplishment of the assault. *S. v. Johnson, ante,* 266; *S. c., ante,* 671. It has been decided that the words "by force," or some equivalent expression, must be used in an indictment for rape. G. S., 14-21; *S. v. Johnson,* 67 N. C., 55. Whether the instant bill is sufficient need not now be determined, since a new trial must be ordered on other grounds, and the solicitor can easily eliminate any objection by sending a new bill to the grand jury. It is desirable in criminal matters to

adhere to the established practice. Innovations usually result in prolonged litigation. *S. v. Owenby, ante,* 521.

A careful perusal of the charge invites the thought that it must have impressed the jury with the strength of the State's case and the weakness of the defendant's, especially in view of the closing admonition, "the evidence as testified to by the witnesses has been rather clear," and the result which followed immediately thereafter. *S. v. Rhinehart,* 209 N. C., 150, 183 S. E., 388; *S. v. Hart,* 186 N. C., 582, 120 S. E., 345; *S. v. Horne,* 171 N. C., 787, 88 S. E., 433. The jury could hardly have understood the court to mean that the testimony of the defendant's witnesses was "rather clear," for dual, if not discordant, pleas—insanity and alibi—were being interposed by him, and Dr. Owens, who testified in his behalf, had said on cross-examination: "I wouldn't go so far as to say he doesn't know right from wrong." The defendant did not testify before the jury. This pronouncement of the court that the evidence was "rather clear," would appear to be an invasion of the province of the twelve. *S. v. Browning,* 78 N. C., 555; *Earnhardt v. Clement,* 137 N. C., 91, 49 S. E., 49. Whether the evidence was acceptable or worthy of belief belonged to them. *S. v. Beal,* 199 N. C., 278, 154 S. E., 604. "It is only where the law gives to testimony an artificial weight that the judge is at liberty to express an opinion upon its weight." *Bonner v. Hodges* (1st syllabus), 111 N. C., 66, 15 S. E., 881.

It is the intent of the statute that the judge shall give no intimation to the jury whether a material fact has been fully or sufficiently established, it being the true office and province of the latter to weigh the testimony and to decide upon its adequacy to prove any issuable fact. *S. v. Jones,* 181 N. C., 546, 106 S. E., 817. It is the duty of the judge, under the provisions of the statute, to state in a plain and correct manner the evidence given in the case and to declare and explain the law arising thereon, without expressing any opinion upon the facts. G. S., 1-180. It can make no difference in what way or when the opinion of the judge is conveyed to the jury, whether directly or indirectly, or by the general tone and tenor of the trial. The statute forbids any intimation of his opinion in any form whatever, it being the intent of the law to insure to each and every litigant a fair and impartial trial before the jury. *Withers v. Lane,* 144 N. C., 183, 56 S. E., 855. "The slightest intimation from a judge as to the strength of the evidence or as to the credibility of a witness will always have great weight with the jury, and, therefore, we must be careful to see that neither party is unduly prejudiced by an expression from the bench which is likely to prevent a fair and impartial trial"—*Walker, J.,* in *S. v. Ownby,* 146 N. C., 677, 61 S. E., 630.

The judge may indicate to the jury what impression the evidence has made on his mind, or what deductions he thinks should be drawn there-

from, without expressly stating his opinion in so many words. This may be done by his manner or peculiar emphasis or by his so arraying and presenting the evidence as to give one of the parties an undue advantage over the other; or, again, the same result may follow the use of language or form of expression calculated to impair the credit which might otherwise and under normal conditions be given by the jury to the testimony of one of the parties. *Speed v. Perry,* 167 N. C., 122, 33 S. E., 176; *S. v. Dancy,* 78 N. C., 437; *S. v. Jones,* 67 N. C., 285.

The unusual combination of defendant's pleas—insanity and alibi—no doubt caused the repeated use of the expression "responsible for his crime." The jury, of course, was to say whether the alleged rape belonged to the defendant, or was "his crime."

While the disinterestedness of the officers who testified for the State, their freedom from bias and worthiness of belief were brought to the jury's attention in the form of contention that could hardly be doubted that the triers of the facts gained the impression from what was said that the judge entertained a high regard for their testimony and thought it "quite clear." *McRae v. Lawrence,* 75 N. C., 289. Also, in the same category would seem to fall the testimony of the doctor who attended the prosecutrix, for it was recited by way of contention that "he was an expert witness" and what he says "corroborates her testimony."

The manner of stating the contentions of the parties, if indicative of the court's opinion, is within the prohibition of the statute. G. S., 1-180; *Bailey v. Hayman,* 220 N. C., 402, 17 S. E. (2d), 520. "There must be no indication of the judge's opinion upon the facts, to the hurt of either party, either directly or indirectly, by words or conduct." *Bank v. McArthur,* 168 N. C., 48, 84 S. E., 39.

The *lapsus linguæ* or misstatement to the jury, if such it were, that defendant's counsel had asked them to return a verdict of "guilty of assault with intent to commit rape," rather than one of rape, should have been called to the court's attention at the time. *S. v. McNair, ante,* 462. Ordinarily, standing alone, this would perhaps amount to no more than a harmless inadvertence. In the instant case, however, it may have given color and tone to the court's charge, especially in the light of the prior references to the voluntariness of the confession.

We are inclined to the view that the defendant is entitled to another hearing. *Reel v. Reel,* 9 N. C., 63. It is so ordered.

New trial.

CITY OF CHARLOTTE v. M. LEE HEATH, D. MORGAN HEATH, WILLIAM H. LIVIE AND WIFE, EDNA R. LIVIE, AND JAMES J. COOK, INDIVIDUALLY, AND JAMES J. COOK, TRUSTEE.

(Filed 27 November, 1946.)

1. Eminent Domain § 1—

The choice of a route is primarily within the discretion of the authority exercising the power of eminent domain, and will not be reviewed on the ground that another route may have been more appropriately chosen unless it appears that there has been an abuse of discretion.

2. Eminent Domain § 4—

Private property can be taken under eminent domain only for a public purpose and upon payment of a just compensation.

3. Same—

What is a public purpose is a question of law for the court, and where the application of this principle requires an ascertainment of fact, whether by court or jury, when the facts are determined the issue no longer rests in fact but in law.

4. Same: Appeal and Error §§ 37, 40d—

A conclusion upon undisputed evidence that the purpose for which a municipality sought to exercise the power of eminent domain was not for a public purpose, is a conclusion of law which is reviewable notwithstanding that the judgment of the lower court denominates it a finding of fact.

5. Eminent Domain § 4—

If a purpose is a public purpose its nature is not affected by the fact that the number of persons to be served may be small.

6. Same—

The taking of a right-of-way for a sewer line to serve property adjacent to the municipality, which line lies partly outside the city, but which is to be connected with the municipal sewer system, and become the property of the municipality and subject to its exclusive control (Public-Local Laws of 1939, chapter 366, section 65) is for a public purpose, the service being available to the general public residing in, or who may seek residence in the area.

7. Municipal Corporations § 8: Eminent Domain § 6—

The City of Charlotte is given authority by its charter to extend its public services, including that of water and sewerage, to those living beyond the city limits, and to acquire the facilities used for said purposes, including pipe lines, Public-Local Laws of 1939, chapter 366, section 65, and this right being existent, the city has the right of condemnation for said purposes. G. S., 160-204; G. S., 160-205.

8. Municipal Corporations § 5—

Municipalities are altogether creatures of the Legislature and the General Assembly has the power to confer on a municipality authority to extend to the public, beyond its own territorial limits, services similar to those enjoyed by its own inhabitants, such as lights, water and sewerage.

BARNHILL and WINBORNE, JJ., dissent.

APPEAL by plaintiff from *Olive, Special Judge,* at 13 May, 1946. Extra Civil Term, of MECKLENBURG.

The residents of a considerable area on the watershed in the immediate vicinity of the corporate limits of the City of Charlotte, at the time consisting of 65 or 70 persons, had been using a common septic tank, which, as the population increased, proved insufficient for its purpose, overflowed and became so offensive and such a menace to the health of those inhabiting the city and its environs that the county health authorities demanded removal of the condition as dangerous to the public health. Finding that the condition could not be satisfactorily remedied otherwise, these persons made an agreement with the City of Charlotte in accordance with its Charter provisions whereby they undertook to install an addition to the sewerage system of the city and connect the same with the outfall of the city sewerage plant, the addition thereupon to become the property of the city and to be operated by it as other such facilities, City Charter, Public-Local Laws of 1939, chapter 366, sec. 65.

In their efforts to carry out the project they negotiated with the defendants, M. Lee Heath and D. Morgan Heath, for the purchase of a right-of-way over certain intervening land, partly within and partly without the city limits, which the Heaths were supposed to own. They were unable to purchase the right, although they were offered two lots upon which such a right-of-way might be constructed at the price of $1,500.00, which they declined to pay.

Thereupon, after a proper survey, they caused the sewerage line to run across other lots, including a portion of the area marked on the map as "Space Reserved"—(which appears thereon to be dedicated as a street) —and a portion of another lot (No. 34 on the map) not owned by the defendants Heath but as to which they now claim an adverse interest because of certain restrictive provisions in the deeds constituting the chain of title thereto that the property should be used for residential purposes only.

When the sewerage line had been partially completed the defendants Heath brought an injunction proceeding against the promoters, asserting the alleged restrictions as repugnant to the use intended and asking that the defendants therein be perpetually enjoined from interference therewith.

Upon a hearing of that matter before Hamilton, J., 3 February, 1944, the restraining order was dissolved on the ground that the plaintiff had no interest in the lands, and the plaintiff in that proceeding took a nonsuit. The sewerage system was then completed and connected to the main sewerage system of the city, at least to the outfall thereof, within

the "Space Reserved." Some time afterwards the defendants, M. Lee Heath and D. Morgan Heath, claiming to have purchased the area so designated,—"Space Reserved,"—for $100.00,—(as plaintiff contends with the knowledge of the foregoing facts)—brought an action of trespass against Cooper and others who had caused the sewerage line to be built as aforesaid, demanding a removal of the same. To this action the City of Charlotte, then operating the new line, was not made a party.

Shortly thereafter the City of Charlotte brought this proceeding against the defendants Heath and other defendants herein, not now appealing, asking to condemn a right-of-way for the sewer line already in operation, through the lands claimed by the Heaths and those in which they claimed adverse restrictive interests, for the purpose of serving those accessible to it, both within and without the city limits, with sewerage facilities.

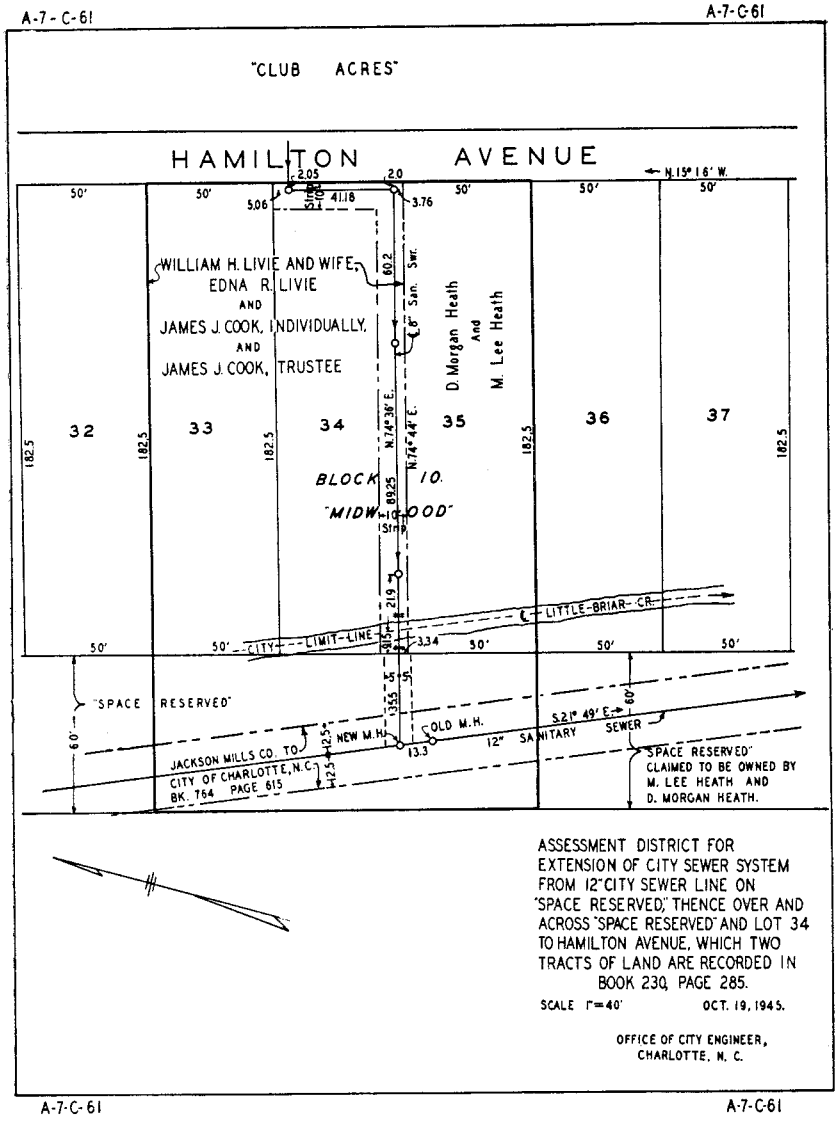
The right-of-way sought lies partly within and partly without the city limits as designated on the accompanying map. The "sanitary sewer" lines referred to are existing, *in situ,* and operating. Reference to the "new" sewer line is the sewer along the right-of-way sought to be condemned. The proposed right-of-way does not encroach on lot 35 owned by the defendants Heath but does cross for a distance of 35.5′ the "Reserved Space" in which they claim an interest, by purchase since the sewer was completed and in operation. The 12″ sewer line crossing this "Space Reserved" is part of the city system which has been in operation for many years. The appealing defendants claim an enforceable adverse interest in lot 34 by reason of the above mentioned restrictions in *mesne* conveyances that it shall be used only for residential purpose. The lot was originally owned by the Heaths and the restriction occurs in their deed.

The matter was once heard by the Clerk, appealed from him to the Superior Court of Mecklenburg, thence remanded to the Clerk for further hearing, with a favorable result to the plaintiff, and upon appeal again reached the Superior Court for final hearing. Upon such hearing by Olive, J., judgment was entered against the plaintiff, in which judgment the following occurs:

"The Court being of the opinion that upon all the evidence, and taking all the evidence as being true, the purpose for which the said defendant Heaths' property is sought to be condemned in this action is a private use and not a public use; the Court finding as a fact that the property is sought to be condemned for the private use and convenience of the owners of seventeen residences, all of which are located without the City of Charlotte.

"The Court finds as a matter of law, upon the facts found as aforesaid, that the plaintiff is without power and authority to condemn the

property of the defendants, M. Lee Heath and D. Morgan Heath, in this action."



The petition was denied and the action dismissed and the plaintiff taxed with the costs. From this judgment plaintiff appealed.

Where it is necessary to refer to statutes, case history, or evidence particularly bearing upon the decision and not above set out, such matter will be embodied in the opinion.

John D. Shaw, Goebel Porter, and Frank H. Kennedy for plaintiff, appellant.

C. D. Taliaferro and J. M. Scarborough for defendants, appellees.

SEAWELL, J. Preliminarily to the statement of the question, we observe that the choice of a route in a condemnation proceeding is primarily within the political discretion of the grantee of the power and will not be reviewed on the ground that another route may have been more appropriately chosen unless it appears that there has been an abuse of the discretion. *Power Co. v. Wissler,* 160 N. C., 269, 76 S. E., 267; *Selma v. Nobles,* 183 N. C., 322, 325, 111 S. E., 543.

In the exercise of the right of eminent domain, private property can be taken only for a public purpose and upon just compensation. *Long v. Rockingham,* 187 N. C., 199; *McRae v. Fayetteville,* 198 N. C., 51, 150 S. E., 810.

But in any proceeding for condemnation under the power of eminent domain, what is a public purpose, or, more properly speaking, a public use, is one for the court. *Deese v. Lumberton,* 211 N. C., 31, 188 S. E., 857; *Yarborough v. Park Commission,* 196 N. C., 284, 145 S. E., 563; *Highway Commission v. Young,* 200 N. C., 603, 607, 158 S. E., 91; McQuillin, Municipal Corporations, sec. 1600, p. 517; 29 C. J. S., pp. 820, 821. Where the particular application of this principle requires an ascertainment of fact, whether by court or jury, when the facts are determined the issue no longer rests in fact but in law.

In the case at bar the facts essential to judicial determination are not disputed. The judge, taking the whole evidence to be true, absolved all parties from bad faith, but found as a fact and repeated as a conclusion of law that the condemnation was sought for a private purpose; for the sole benefit of a group of home owners, indefinitely described, living outside the city limits. Either it is assumed that this group was not large enough to constitute a community, or to be credited with the necessity of a public use; or that the municipality was without power to exercise the right of eminent domain otherwise than for the exclusive benefit of its own inhabitants. The oral argument and discussion in the opposing briefs follow that pattern; and, disregarding matters not essential to disposition of the appeal, we may state the question before us in substantially the same form: (a) Whether the intended use of the right-of-way sought is public or private; and (b) Whether the City of Charlotte may, either under its Charter or the general public laws, extend its sewerage facilities to nonresidents living in the environment of the city

and acquire by condemnation a right-of-way for that purpose: or, conversely stated, whether condemnation may be made only for the exclusive benefit of those living within the city limits.

1. The first question must be answered in the affirmative. The label of fact put upon a conclusion of law will not defeat appellate review.

We will not attempt to give any definition of what is a public purpose or a public use applicable to all situations. Perhaps none can be devised which is not challengeable, since, with the progressive demands of society and changing concepts of governmental function, new subjects are constantly brought within the authority of eminent domain. The matter with which we are dealing does not carry us that far.

Perhaps the simplest definition is found in 18 Am. Jur., page 666, sec. 38 (2), originally devised by Judge Cooley in practically the same form: "Takings, either by a municipal or a private corporation, for the purpose of enabling such corporation to furnish the public with some necessity or convenience which cannot readily be furnished without the aid of some governmental power, and which is required by the public as such, when the public has a legal right to make use of such necessity and convenience."

If there was in the record any evidence to sustain the theory that the use of the sewer line was intended to be confined, or could be confined in the future, to the 65 or 70 persons presently dwelling in the area to be served, and was not now, nor could hereafter be accessible to the general public who seek residence there, the case might be different. But there is no such evidence, and the inferences are to the contrary.

The public nature of the project cannot be made to depend on a numerical count of those to be served or the smallness or largeness of a community.

Quoting again from 18 Am. Jur., "Eminent Domain," sec. 40: "Similarly in those states in which use by the public is the test, the mere number of people who use or can use the property taken are not determinative of whether it constitutes a public use or not. It may suffice if very few have or may ever have occasion to use it." See also C. J. S., "Eminent Domain," page 827, sec. 31 (b).

"The use which will justify the taking of private property under the exercise of the right of eminent domain is the use by or for the government, the general public, or some portion thereof as such, and not the use by or for particular individuals or for the benefit of particular estates. The use, however, may be limited to the inhabitants of a small locality, but the benefit must be in common." "It is not essential that the entire community nor even any considerable portion should directly enjoy or participate in an improvement in order to constitute a 'public use.'" *Rindge Co. v. Los Angeles County,* 262 U. S., 700, 67 Law Ed.,

1186. "The public use required need not be the use or benefit of the whole public or state or any large portion of it. It may be for the inhabitants of a small or restricted locality; but the use and benefit must be in common, not to particular individuals or estates." *Miller v. Pulaski,* 109 Va., 137, 63 S. E., 880, 883; McQuillin, Municipal Corporations, sec. 1600, page 521; Lewis, Eminent Domain, 3rd Ed., sec. 258. We are satisfied that the use to which it is proposed to put the land condemned is within these definitions.

The evidence developed nothing in common between the members of this community except the urgent communal necessity of a less offensive and more sanitary method of disposing of the sewage, and a co-operative effort to put the situation under the complete control of the city authorities. In so doing they only complied with the requirements of the City Charter, and the contribution made by members of the community to the original installation did not deprive the project of its public character. *Stratford v. City of Greensboro,* 124 N. C., 127, 32 S. E., 394. When the line was complete and connected with the city sewerage system it became the property of the City of Charlotte by virtue of the statute, sec. 65, Charter of City of Charlotte, *supra,* and they became nothing more than individually paying customers under city regulation applicable alike to the general public, and were without any vestige of further control.

Condemnation was, therefore, not as charged by defense, a mere device to put the project in control of those who had neither the power to condemn nor the right to exercise the franchise.

2. The Charter of the City of Charlotte, cited *supra,* expressly provides for the extension of its public services, including that of water and sewerage, to those living beyond the city limits and for the acquisition of the facilities, including pipe lines used for said purpose. Where that right exists a condemnation may be made under the City Charter or under the General Statute relating to the power of municipalities. G. S., 160-204, 205. The cited sections expressly confer the power of extra-territorial condemnation where the municipality has the right to acquire the property.

The power of the Legislature to confer on a municipality the authority to extend to the public, beyond its own territorial limits, services similar to those enjoyed by its own inhabitants, such as light, water, sewerage, is well established. *Holmes v. Fayetteville,* 197 N. C., 740, 150 S. E., 624; McQuillin on Municipal Corporations, sec. 1945. See citations, page 81, Vol. 5. Nothing that is said in *Williamson v. High Point,* 213 N. C., 96, 195 S. E., 90, is in conflict with this authority, which is now exercised by the cited municipality and many others in the State of North Carolina. The case is easily distinguishable. There, the

municipality sought to finance its project under the 1935 Bond Revenue Act, which act limited municipalities proceeding thereunder to projects undertaken exclusively for the benefit of the inhabitants of the city, a limitation which the Court enforced. This and related cases must be considered within the frame of the facts presented and the applicable law determinative of that controversy.

Municipalities are almost altogether creatures of the Legislature rather than of the Constitution; and the Constitution imposes upon them no restrictions in this respect. If there could be any question of policy involved it is determined by the fact of numerous legislative grants of authority. Not only does a city expand its limits from the increasingly populous territory surrounding it, but it cannot afford to be indifferent to the problems produced by the congestion on its borders, the solution of which is often a matter of common interest to those living within the city and those immediately without. This condition is recognized in practically all jurisdictions, including our own. On the criminal side, municipalities have been allowed extra-territorial police power. Economically, they are protected by extra-territorial taxing regulations. As a matter of welfare they have often been given extra-territorial jurisdiction; and, as in the present situation, they have been permitted extension of sewerage facilities. The town line means nothing to the breezes which blow across the city carrying malodorous exhalations, or to the minute wings laden with the germs of disease and death.

The statute operating *ex proprio vigore* needs no argument to support it. If any were needed it might be found in the recognition of the truth that a city cannot, any more than an individual, live unto itself alone.

It is the opinion of the Court that the City of Charlotte, under the facts of this case and applicable law, has the right to exercise its power of eminent domain to condemn the lands and property rights described in the petition for the proposed use.

The judgment of the court below is reversed and the cause is remanded to the Superior Court of Mecklenburg County for judgment and further proceeding in accordance with this opinion.

Reversed and remanded.

BARNHILL and WINBORNE, JJ., dissent.

Z. W. PRICE v. JOHNSTON COTTON COMPANY OF WENDELL, INC.

(Filed 27 November, 1946.)

1. Master and Servant § 13—

It is the general rule that an independent contractor is not liable for injuries to third parties occurring after the contractor has completed the work and it has been accepted by the owner.

2. Same—

The complaint alleged that defendant, an independent contractor, constructed a platform for a kerosene tank, and that plaintiff, an employee of an oil dealer, while on the platform filling the tank pursuant to a contract between his employer and the contractee, fell to his injury when the platform gave way due to its insufficient strength and its careless and negligent construction. There was no allegation of hidden defects known to the contractor and not disclosed to the contractee, nor of defects that could not have been discovered upon reasonable inspection. *Held:* Defendant's demurrer to the complaint on the ground that it failed to state a cause of action was properly sustained.

3. Same—

Where work has been completed and accepted by the owner, and the defect in construction, if any, is not hidden but readily observable upon reasonable inspection, the contractor is not liable.

APPEAL by plaintiff from *Grady, Emergency Judge,* at April Term, 1946, of WAKE.

Civil action to recover damages from the defendant, an independent contractor, for alleged negligence in the construction of a platform attached to a tobacco barn owned by Miley Johnson, located in Wake County, and erected for the purpose of holding a 250-gallon kerosene tank. The appellant alleges that the defendant, pursuant to a contract with the owner, installed a 250-gallon tank on a platform constructed of 2x4 scantling and braced by 1x4's, thereby creating an imminently dangerous situation. That the defendant corporation carelessly and negligently built the scaffold for the support of said kerosene tank out of timbers which were insufficient to hold the weight of the tank when filled with kerosene and the weight of a man while filling said tank.

Subsequently, on or about 13 July, 1945, the plaintiff, an employee of an oil dealer, who had contracted with Miley Johnson to fill the tank with kerosene, climbed on said platform, which was seven or eight feet from the ground, and while engaged in filling the tank with kerosene, the platform gave way causing the plaintiff to fall and sustain certain injuries, which he alleges are serious and permanent.

The defendant demurred to the plaintiff's complaint, on the ground that it did not state a cause of action against the defendant, in that:

(a) It alleged that the defendant, under a contract made by it with Miley Johnson, erected the platform and installed the oil tank; and

(b) That the work was completed by the defendant and accepted by the owner prior to the date of the injury.

The court below sustained the demurrer and the plaintiff appeals, assigning error.

Thos. W. Ruffin for plaintiff.
I. R. Williams for defendant.

DENNY, J. It is the general rule that an independent contractor is not liable for injuries to third parties occurring after the contractor has completed the work and it has been accepted by the owner. *Willis v. White,* 150 N. C., 199, 63 S. E., 942; *Williams v. Charles Stores Co., Inc.,* 209 N. C., 591, 184 S. E., 496; 27 Amer. Jur., sec. 55, p. 534; *Ford v. Sturgis,* 56 App. D. C., 361, 14 F. (2d), 253, 52 A. L. R., 619; 45 C. J., sec. 320, p. 884, *et seq.*

In the last cited authority we find: "It is a well established general rule that, where the work of an independent contractor is completed, turned over to, and accepted by, the owner, the contractor is not liable to third persons for damages or injuries subsequently suffered by reason of the condition of the work, even though he was negligent in carrying out the contract, and, *a fortiori,* he is not liable where he performed the work in strict accordance with the terms of their contract or where the injury is not due to the condition in which he left the work. There are also well recognized exceptions to the general rule, one of which is that the contractor is liable where the work is a nuisance *per se,* and another of which is that he is liable where the work done and turned over by him is so negligently defective as to be imminently dangerous to third persons, provided, in the case of the latter exception, the contractor knows, or should know, of the dangerous situation created by him, and the owner or contractee does not know of the dangerous condition or defect and would not discover it by reasonable inspection."

The appellant, however, contends the present case comes within the exception to the general rule and cites as authority for his position, *Williams v. Charles Stores Co., Inc., supra.*

We think the present case is distinguishable from the *Williams case.* There the Gas Company, a co-defendant, furnished the department store with gas for lighting purposes, and usually repaired the gas fixtures belonging to its customers. It was in evidence that the Gas Company knew its customers in calling for service and repairs relied upon the knowledge, experience, and technical ability of its employees. The Gas

Company was requested to repair and clean a gas fixture in its co-defendant's store. Its employee worked on the fixture and a few days thereafter the heavy glass globe of the fixture fell and injured a customer in the store. The evidence tended to show that the glass bowl was not properly fastened and that the wire basket, usually kept in place over the glass globe to prevent an injury in case the globe broke or fell was not properly replaced by the employee of the Gas Company. A judgment against both defendants was affirmed by this Court.

In the instant case the work required under the contract between the defendant and the owner of the property, had been completed and accepted. It is not alleged there were any hidden defects in the scaffold, known to the contractor and not disclosed to the owner, or defects, if any, that could not have been discovered upon reasonable inspection.

Where work has been completed and accepted by the owner, and the defect in construction, if any, is not hidden but readily observable upon reasonable inspection, the contractor is not liable. *Coleman v. A. L. Guidone & Sons,* 192 App. Div., 120, 182 N. Y. S., 625; *Travis v. Rochester Bridge Co.,* 188 Ind., 79, 122 N. E., 1; *Ford v. Sturgis, supra; Salliotte v. King Bridge Co.,* 122 Fed., 381, 65 L. R. A., 620, 58 C. C. A., 466. Annotations of cases on the liability of independent contractors for injuries to third parties will be found in 41 A. L. R., beginning on page 8, and in 123 A. L. R., beginning on page 1197. Moreover, it is not alleged by the plaintiff that it was necessary or customary for an employee of the oil company to go on such platform or scaffold in order to fill the tank with kerosene.

The judgment of the court below is

Affirmed.

STATE v. FRED JACKSON.
STATE v. BRIGHT BLACKWELL.

(Filed 27 November, 1946.)

1. Criminal Law § 52a—

Failure to demur to the evidence, G. S., 15-173, concedes its sufficiency to sustain the charge.

2. Assault § 14b—

The evidence in this case is held not to require the court, without a special prayer, to charge the law of self-defense, defense of property or the right of the proprietor of a public place to quell a disturbance thereon.

3. Criminal Law § 77b—

Where indictments relating to one offense against several defendants are properly consolidated for trial, only one record should be filed on the appeals of defendants. Rule of Practice in the Supreme Court No. 19 (2).

STATE *v.* JACKSON; STATE *v.* BLACKWELL.

APPEAL by defendants from *Clement, J.*, at April Term, 1946, of GASTON.

Criminal prosecution on indictments charging felonious assaults, heard on the lesser charge of assault with a deadly weapon, consolidated for trial.

Defendant Jackson operates a fish camp near Crowder's Mountain in Gaston County. On the night of 20 January, 1946, Fleece Heafner and Harry Taylor, accompanied by two women, went to his place, ordered a meal and were served. After they finished, defendant Blackwell induced Heafner to engage in a game of poker. A dispute arose in which Heafner accused Jackson of passing a card to Blackwell. Heafner and Blackwell both grabbed the money in the pot. The evidence for the State tends to show that Blackwell struck Heafner, a scuffle ensued, and Blackwell and Jackson struck Heafner with blackjacks. After he was "down and out" Jackson stomped him and Blackwell hit him with a 2x4. He was seriously injured. At the time, he had about $300 in his pockets which he missed when he "came to."

After Heafner became unconscious and was carried out, Taylor offered to pay what Heafner owed, and Jackson assaulted him with a blackjack.

Blackwell admits he struck Heafner but denies he used a blackjack or a 2x4. Jackson denies he used any weapon. He testified that when Blackwell and Heafner began to fight he grabbed Taylor and "pushed them out." After Jackson was arrested and released on bond he departed for Florida where he was later apprehended.

There was a verdict of guilty of an assault with a deadly weapon on each bill of indictment. The court pronounced judgment and defendants appealed.

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

J. L. Hamme for defendant appellant Jackson.

Ernest R. Warren and P. C. Froneberger for defendant appellant Blackwell.

BARNHILL, J. The evidence in this case tends to disclose a brawl in a common fish camp dive, following a game of poker, in which Jackson assaulted both Heafner and Taylor with a blackjack, and Blackwell assaulted Heafner with a blackjack and a 2x4. As the defendants did not demur under G. S., 15-173, it is concededly sufficient to sustain the charge.

There is no testimony in the record tending to show that Jackson fought in self-defense or in defense of his property or to quell a dis-

turbance such as would require the court, without special prayer, to explain the law applicable to his right to do so.

The other exceptions are without substantial merit. As they present no new or novel question of law we need not discuss them.

The three indictments returned by the grand jury relate to one assault in which it is alleged the defendants acted in concert. The court below properly consolidated for trial. Yet the appeals are brought here on separate records, *Conley v. Pearce-Young-Angel Co.*, 224 N. C., 211, 29 S. E. (2d), 740, which merely renders it more difficult for us to consider the merits of the case. We again call attention to the rule, Rule 19 (2), Practice in the Supreme Court, 221 N. C., 554, which was adopted for a purpose. It should be observed by counsel.

In the trial below we find

No error.

RICHARD W. BROWN v. V. P. LOFTIS, TRADING AND DOING BUSINESS AS V. P. LOFTIS COMPANY.

(Filed 27 November, 1946.)

1. Trial § 23a—

Where plaintiff's evidence tends to establish each essential element of his cause of action, defendant's motion to nonsuit is properly denied notwithstanding his evidence in contradiction thereto, since conflicting evidence raises an issue of fact for the jury.

2. Appeal and Error § 6c (5)—

A general exception to the charge as given is insufficient to present appellant's contention, argued in his brief, that the charge violated G. S., 1-180, in failing to charge upon a particular phase of the case.

3. Evidence § 18—

Where plaintiff's statement on direct examination is impeached by defendant on cross-examination, it is competent for plaintiff on re-direct examination to testify as to related matters, though not directly in issue in the action, for the purpose of re-establishing his credibility.

APPEAL by defendant from *Alley, J.*, at 6 May, 1946, Term, of MECKLENBURG.

Civil action to recover on contract.

Plaintiff alleges, in his complaint, in brief, that during the early part of May, 1944, he entered into a contract with the defendant to raise the tanker "Gulfland" which had been sunk in the Atlantic Ocean off the coast of the State of Florida, for which he was to be paid a weekly salary of two hundred fifty ($250) dollars; that "in addition thereto he was to be paid a bonus of fifty per cent of said salary of $250 per week, pro-

vided said vessel should be successfully raised and floated"; that he began work for defendant under said contract on 17 May, 1944, and continued in said employment for fourteen weeks from said date; that he was "successful in raising said tanker 'Gulfland' and putting her afloat"; that he is entitled to receive therefor the sum of $3,500 as a straight salary and "the additional sum of $1,750 as a bonus for having successfully raised and put afloat the said vessel," making a total of $5,250; that defendant has paid plaintiff the sum of $600, leaving a balance of $4,650; and that he is entitled to recover of defendant said sum of $4,650, with interest thereon from 23 August, 1944, until paid, for which amount judgment is prayed.

Defendant, answering, denies in material aspect all of said allegations of the complaint.

Upon the trial below plaintiff offered evidence in detail tending to support the allegations of his complaint as hereinabove stated. On the other hand, defendant offered evidence tending to support categorically his denial of the allegations of the complaint. The evidence was in sharp conflict.

The case was submitted to the jury upon these issues, which the jury answered as shown:

"1. Did the plaintiff and the defendant enter into an oral contract under the terms of which it was agreed that the plaintiff would assist in the raising from the Atlantic Ocean off the East Coast of Florida the boat known as the Gulfland at and for a wage or salary of $250 per week and a bonus of $125 per week to be paid to the plaintiff by the defendant upon the completion of said work, as alleged in the complaint? Answer: Yes.

"2. Did the plaintiff perform said contract on his part, as alleged in the complaint? Answer: Yes.

"3. Did the defendant commit a breach of said contract, as alleged in the complaint? Answer: Yes.

"4. What amount, if any, is the plaintiff entitled to recover of the defendant? Answer: $4,650.00 with interest."

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

Jones & Smathers and Claude L. Love for plaintiff, appellee.

Helms & Mulliss and Fred B. Helms for defendant, appellant.

WINBORNE, J. Careful consideration of the assignments of error presented on this appeal fails to disclose error in the trial below.

Appellant first challenges the correctness of the ruling of the court in refusing to grant his motions for judgment as in case of nonsuit. In this connection, evidence offered by plaintiff, taken in the light most

favorable to him, tends to show: (1) An express oral contract as alleged in the complaint; (2) a compliance by him with the terms of the contract; and (3) a breach of the contract by defendant. On the other hand, the evidence for defendant tends to show that no such contract existed, and that if it did exist plaintiff failed to fulfill it, and that there is no breach of it shown. But, all in all, the evidence presents a clear-cut but sharply contested issue of fact for the jury.

Appellant also excepts to certain portions of the charge as given with respect to the second, third and fourth issues, and upon such exceptions contends that the court failed "to instruct the jury to the effect that in no aspect of the case was the plaintiff entitled to a bonus payment, unless the ship was raised,"—in violation of provisions of G. S., 1-180. It is noted, however, that there is no exception in the record presenting the question of the failure of the court to charge as required by the statute, G. S., 1-180. Hence, argument unsupported by exception is insufficient to present the question, and will not be considered on appeal. See *S. v. Britt,* 225 N. C., 364, 34 S. E. (2d), 408, in opinion by *Denny, J.,* where the authorities are assembled. The question may not be presented on exception to charge as given. However, if there were exception here presenting the question, it would seem to be untenable in the light of the charge given by the court.

Appellant further assigns as error evidence, admitted over his objection, as to plaintiff's remuneration under other contracts on which he had worked before entering upon the work under the contract alleged in this action, and under contracts entered into after the completion of the work on the Gulfland. This testimony was admitted in response to cross-examination tending to impeach testimony of plaintiff. The record shows that plaintiff on direct examination testified that he told defendant "that seeing as how I was making about $250 a week with the Navy Salvage, I expected that much of him, etc." The cross-examination of him tended to impeach the statement as to what he was making. Then in response thereto he was permitted to state on re-direct examination what he was making in similar work under other employment. In the light of this setting, the evidence was competent for the purpose for which it was admitted. See *Jones v. Jones,* 80 N. C., 246; *Bowman v. Blankenship,* 165 N. C., 519, 81 S. E., 746; Stansbury on North Carolina Evidence, section 50, p. 79. In the *Jones case, Smith, C. J.,* used this pertinent expression: "In whatever way the credit of the witness may be impaired, it may be restored or strengthened by this or any other proper evidence tending to insure confidence in his veracity and in the truthfulness of his testimony."

All other assignments have been considered, and are found to be without merit, and require no further elaboration.

Hence, in the judgment below we find

No error.

STATE v. GEORGE NEAL BEATTY, CLIFTON TEAGUE AND HAROLD DOUGLAS WARE.

(Filed 27 November, 1946.)

1. Criminal Law §§ 42b, 81a—

It is within the discretion of the trial judge whether or not counsel shall be permitted to ask leading questions. The exercise of such discretion, in the absence of an abuse thereof, will not be reviewed on appeal.

2. Criminal Law § 53i—

A charge to the effect that the jury should take into consideration what a witness says and how he says it and his "interest in the case, if he is interested in it," and determine the weight to be given to the testimony, is not error in failing to further charge the jury to the effect that if they believe the testimony of an interested witness they should give the testimony the same weight as that of any other witness, since there was no instruction to scrutinize the testimony of interested witnesses, and the instruction applied to all the witnesses alike and did not refer to the defendants as being interested.

3. Criminal Law § 78e (1)—

An exception to instructions of the court "which appear on pages 28, 29 and 30 of the record" is a "broadside attack" and will not be considered.

APPEAL by defendants from *Clement, J.*, at June Term, 1946, of GASTON.

Criminal prosecution tried upon indictment charging the defendants with rape, but the Solicitor only asked for a conviction of an assault with intent to commit rape.

Verdict: Guilty. Judgment: That each of the defendants be imprisoned in the State's Prison for a term of not less than eight nor more than twelve years.

The defendants appeal, assigning error.

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

P. C. Froneberger and O. A. Warren for defendants.

DENNY, J. The first assignment of error is directed to the admission of certain evidence over defendants' objection, elicited from the prosecutrix in response to leading questions.

It is within the discretion of the trial judge whether or not counsel shall be permitted to ask leading questions. The exercise of such discretion, in the absence of an abuse thereof, will not be reviewed on appeal. *S. v. Harris,* 222 N. C., 157, 22 S. E. (2d), 229; *S. v. Hargrove,* 216 N. C., 570, 5 S. E. (2d), 852; *S. v. Buck,* 191 N. C., 528, 132 S. E., 151.

No prejudicial error has been shown and the exception cannot be sustained.

The defendants assign as error the following portion of his Honor's charge: "Take into consideration what the witness says and how he says it. Take into consideration the witness' interest in the case, if he is interested in it, and then apply your judgment to the witness' testimony and decide on what weight you will give to it."

The above instruction is only a part of his Honor's charge dealing with the question of the interest or bias of witnesses. The charge was applicable to all the witnesses alike, and did not single out any witness or refer to the defendants as being interested in the outcome of the trial. There was no instruction to scrutinize the testimony of the defendants or that of any other witnesses in the light of their interest in the result of the verdict. If there had been such instruction and the court had failed to further instruct the jury substantially to the effect, that if the jury believed the testimony of an interested witness they would give to such testimony the same weight as that given to the testimony of disinterested witnesses, the exception would have merit. *S. v. McKinnon,* 223 N. C., 160, 25 S. E. (2d), 606. But since the instruction applied to all the witnesses alike, those for the State as well as those for the defendants, this assignment of error cannot be sustained. *S. v. Cureton,* 215 N. C., 778, 3 S. E. (2d), 343.

The defendants also except to the instructions of the court below which appear on pages 28, 29 and 30 of the record. This is an insufficient exception, in that it does not point out any specific statement or instruction which the defendants contend is erroneous. Such exception constitutes a "broadside attack" upon the charge, and will not be considered. *S. v. Herron,* 175 N. C., 754, 94 S. E., 698; *S. v. Wade,* 169 N. C., 306, 84 S. E., 768; *S. v. Cameron,* 166 N. C., 379, 81 S. E., 748; *S. v. Johnson,* 161 N. C., 264, 76 S. E., 679. But even so, after a careful reading of the portion of the charge to which the defendants except, we find no error therein.

In the trial below, we find

No error.

STATE v. CARL McKNIGHT.

(Filed 27 November, 1946.)

1. Criminal Law § 79—

Exceptions not set out in appellant's brief are deemed abandoned. Rules of Practice in Supreme Court Nos. 21 and 28.

2. Criminal Law § 53f—

A charge that ". . . and the State contends that the evidence in the case" is sufficient to establish guilt beyond a reasonable doubt and that upon the testimony of the main witness for the State "and other evidence which corroborates this testimony" the jury should return a verdict of guilty, will not be held for error as an expression of opinion that "the other evidence" did corroborate the witness since it is clear that both phrases related to the statement of contentions of the State.

3. Criminal Law § 78e (2)—

Alleged error in the statement of contentions upon evidence introduced during the trial must be brought to the trial court's attention in apt time in order for an exception thereto to be considered on appeal. *S. v. Wyont*, 218 N. C., 505, cited and distinguished in that the statement of contentions in that case was not based on evidence adduced at the trial.

APPEAL by defendant from *Phillips, J.*, at February Term, 1946, of CALDWELL.

The appealing defendant, Carl McKnight, was indicted, together with Harold Carlton and William M. Dean, under a bill of indictment containing three counts, namely, (1) unlawfully, willfully and feloniously a certain building, to wit: United States Post Office of Kings Creek, North Carolina, and then and there occupied by the Post Office Department of the United States Government, wherein goods, moneys, bonds and other valuable securities were kept, did break and enter with the intent then and there to steal, take and carry away, and did open, or attempt to open a vault, safe or other secure place therein by the use of nitroglycerin, dynamite, or other explosives, and (2) the said Carl McKnight, Harold Carlton and William M. Dean unlawfully and willfully and feloniously cash, war bonds, and stamps, goods, chattels, money of the United States Post Office, did steal, take and carry away, and (3) that said Harold Carlton, William M. Dean and Carl McKnight unlawfully, willfully and feloniously the aforesaid property before feloniously stolen, taken and carried away, feloniously did receive and have, then and there well knowing the aforesaid property to have been feloniously taken, stolen and carried away.

The defendant Harold Carlton tendered a plea of guilty and was used as a State's witness against the appealing defendant McKnight, and the defendant William M. Dean at the close of all the evidence entered a plea of guilty. The court withdrew the charge in the third count of the bill, namely, that of feloniously receiving stolen goods, knowing them to have been stolen. There was, therefore, submitted to the jury only the charges against the defendant Carl McKnight for breaking and entering a building with the intent to commit a felony therein, and for the larceny of certain property.

The jury returned a verdict as to Carl McKnight of "guilty as charged in the bill of indictment," whereupon the court pronounced judgment on said defendant McKnight of imprisonment of 25 to 35 years in the State Central Prison, to which judgment the defendant McKnight preserved exception and appealed, assigning errors.

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

Elledge & Hayes for defendant McKnight, appellant.

SCHENCK, J. The only assignment of error set out in appellant's brief is of Exception No. 31, page 45 of the Record (erroneously referred to in said brief as Exception No. 29), which exception is to that portion of the charge reading as follows: ". . . and the State contends that the evidence in this case is not sufficient to raise in your minds a reasonable doubt of his (defendant) guilt, and that upon the evidence of Harold Carlton, *and other evidence which corroborates his testimony,* that you should return a verdict of guilty on the first two counts. The defendant, on the other hand, insists that your verdict should be one of not guilty, and that you fail to find from the evidence and beyond a reasonable doubt that he was implicated in any respect or in any way in this crime." Since no other exceptions are set out in appellant's brief, they are deemed abandoned, Rules 21 and 28, Rules of Practice in the Supreme Court, 221 N. C., 558.

It is contended by the appellant that the court, in violation of G. S., 1-180, expressed an opinion that there was corroborative evidence, and this contention presents the sole question posed, namely, Did the court in the excerpt quoted err in expressing an opinion as to whether an essential element had been sufficiently proved? We think the answer is in the negative. While we are of the opinion that the conviction of the appellant rested largely, if not entirely, upon the testimony of appellant's accomplice and any evidence tending to corroborate this testimony was competent upon the prosecution's case, however, it is contended by the State that if error was committed in this excerpt from the charge, it was committed in the statement of contentions, and since exception was not taken thereto at the time the charge was delivered, in order to give the court opportunity to correct such error after it was called to the court's attention, any error committed was waived and cannot avail appellant on appeal. The contention that the words constituted an expression of opinion upon the proof of essential elements of the crime charged is untenable for the reason that they do not warrant such a conclusion. The court was stating the contentions of the State. The statement begins with the words "and the State contends that." The immediate antecedent clause "and that upon the evidence of Harold Carlton" is joined

to the one in question by the conjunction "and." Very clearly both clauses relate back to the introductory and controlling phrase "and the State contends that." As a matter of fact the whole paragraph is a statement beginning with the phrase "The State contends further that."

However, the appellant relies upon the case of *S. v. Wyont,* 218 N. C., 505, 11 S. E. (2d), 473, and contends that there was no waiver of relief from the failure to call the alleged error to the court's attention at the time it was committed. We think the charge of the court in the *Wyont case* and the charge in the instant case are distinguishable. In the *Wyont case* the record fails to disclose any evidence on which to base the contention given and for this reason largely the giving of the contention was held for error, whereas in the instant case the corroborative evidence material to the issue was placed before the jury, it having been introduced and opportunity having been given to answer it and in any way to meet it.

The defendant, appellant McKnight, appears to have been given a trial in which no error prejudicial to him is made to appear, therefore the judgment of the lower court must be affirmed.

No error.

LENA HARRINGTON v. LEE WALTER TAYLOR.

(Filed 27 November, 1946.)

Negligence § 9—

Evidence that plaintiff interposed herself between defendant and his assailant in a fight, and was injured by the blow intended for defendant, is insufficient to take the case to the jury on the issue of negligence since defendant could not have reasonably foreseen or anticipated the injury.

APPEAL by plaintiff from *Stevens, J.,* at May Term, 1946, of RICHMOND.

Civil action to recover damages for personal injuries alleged to have been caused by the negligence of the defendant.

On 8 January, 1945, defendant went to the home of the plaintiff to get his wife who had gone there for protection. The defendant and his wife fell to fighting in the plaintiff's house. The defendant's wife had floored him with an axe and had it raised to strike him again when the plaintiff intervened and saved his life, but received a severe cut on the hand when she "got the lick which was intended for him."

From judgment of nonsuit, entered at the close of plaintiff's evidence, she appeals, assigning errors.

George S. Steele, Jr., for plaintiff, appellant.
Fred W. Bynum for defendant, appellee.

PER CURIAM. The action is against the defendant and not his wife who inflicted the injury. The plaintiff first sued on contract—defendant's promise to pay damages—reported in 225 N. C., 690, 36 S. E. (2d), 227. She now sues in tort.

The evidence is wanting in sufficiency to carry the case to the jury. The injury is not one which the defendant could have reasonably foreseen or anticipated. *Butner v. Spease,* 217 N. C., 82, 6 S. E. (2d), 808. The judgment of nonsuit will be upheld.

Affirmed.

STATE v. HOWARD PETERSON.

(Filed 27 November, 1946.)

Criminal Law § 85a—

Where on a former appeal the Supreme Court holds that the evidence was sufficient to be submitted to the jury, defendant's motion to nonsuit upon substantially the same evidence in the second trial is properly denied.

APPEAL by defendant from *Thompson, J.,* at August Term, 1946, of SAMPSON. No error.

The defendant was convicted of manslaughter, and from judgment imposing sentence appealed.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for the State.
J. Faison Thomson and Jeff D. Johnson for defendant.

PER CURIAM. This case was here at Fall Term, 1945, and is reported in 225 N. C., 540, where the material facts are stated. The former appeal was from judgment pronounced on verdict of guilty of murder in the second degree. This Court held there was evidence sufficient to carry the case to the jury, but ordered a new trial for error in the judge's charge.

On the trial from which comes the present appeal the jury again found the defendant guilty of manslaughter. The evidence for the State in both trials was substantially the same. Hence motion for judgment of nonsuit was properly denied. We have examined the other exceptions now brought forward in the assignments of error, both as to the admission of testimony, and as to the charge, and conclude that none of them can be sustained. In the trial we find

No error.

STATE v. JAMES BURGESS AND VERTIE BURGESS.

(Filed 30 October, 1946.)

APPEAL by defendant James Burgess from *Sink, J.*, at April Term, 1946, of CABARRUS. No error.

The defendants were charged with assault with intent to commit rape. *Nol. pros.* with leave was entered as to defendant Vertie Burgess. The jury returned verdict of guilty as to defendant James Burgess, and from judgment imposing sentence he appealed.

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

C. M. Llewellyn and Hartsell & Hartsell for defendant.

PER CURIAM. The defendant, appellant, noted exception to the judge's charge to the jury in respect to the definition of what was necessary to be shown to constitute assault with intent to commit rape. An examination of the language used by the court leads to the conclusion that the instructions given were in substantial accord with the definition approved by numerous decisions of this Court. *S. v. Massey,* 86 N. C., 658; *S. v. Jeffreys,* 117 N. C., 743, 23 S. E., 175; *S. v. Jones,* 222 N. C., 37, 21 S. E. (2d), 812; *S. v. Walsh,* 224 N. C., 218, 29 S. E. (2d), 743; *S. v. Gay,* 224 N. C., 141, 29 S. E. (2d), 458.

The State's evidence was sufficient to carry the case to the jury and to warrant the verdict. In the trial we find

No error.

APPENDIX

IN RE ADVISORY OPINION IN RE F. DONALD PHILLIPS.

(Filed 13 September, 1946.)

1. Public Officers § 4b—

The judgeship of a United States Zonal Court in Germany would seem to carry some of the attributes of sovereignty which would perforce invest the incumbent with governmental authority, in which event it would be an office or place of trust or profit under the United States, or a department thereof, so that the acceptance of an appointment to such office or place of trust by a judge of the Superior Court of North Carolina would *ipso facto* vacate the State office. N. C. Constitution, Art. XIV, sec. 7.

2. Same—

One who holds an office or place of trust under authority of this State forfeits such office or place of trust when he accepts another office or place of trust which is forbidden by the Constitution or is incompatible with the office or place of trust already held. The acceptance of the second forbidden or incompatible office or place of trust, operates *ipso facto* to vacate the first.

On 3 September, 1946, the following communication was received from His Excellency, R. Gregg Cherry, Governor of the State of North Carolina:

27 August 1946

HONORABLE W. P. STACY
Chief Justice
HONORABLE MICHAEL SCHENCK
HONORABLE W. A. DEVIN
HONORABLE M. V. BARNHILL
HONORABLE J. WALLACE WINBORNE
HONORABLE A. A. F. SEAWELL
HONORABLE E. B. DENNY
Associate Justices
RALEIGH, NORTH CAROLINA

MY DEAR SIRS:

Honorable Robert P. Patterson, Secretary of War, has requested Honorable F. Donald Phillips, Judge of the Superior Court of the Thirteenth Judicial District, to accept an appointment by the War Department as one of the presiding judges of the military courts set up by the War Department, under a directive of the War Department, for the trial of war criminals exclusively in the American zone of occupation in Germany. I am attaching herewith a copy of a letter to me from the Secretary of War.

Judge Phillips has requested leave of absence as Judge of the Superior Court of the Thirteenth Judicial District, without pay, for a period of one year or for less than one year, if the present national emergency declared by Congress is terminated before the end of such year. Such leave of absence is requested by Judge Phillips under the provisions of G. S., 128-39, and is asked for on the condition that such leave of absence could be granted by me under the terms of the statute, G. S., 128-39. The leave of absence requested by Judge Phillips would not be desired by him if the acceptance of the appointment of the War Department, as a presiding judge of the military court referred to, would result in and be regarded as a resignation by Judge Phillips of his office as a Judge of the Superior Court.

I would not wish to grant the leave of absence if the granting of same and acceptance of such position by Judge Phillips would result in vacating his office as Judge of the Superior Court, and I would not wish to grant the said leave of absence unless, under authority of the statute, G. S., 128-39, during the period of the leave of absence, I would have the authority to appoint a person to act as Judge of the Superior Court in the place and stead of Judge Phillips, with all his authority, duties, perquisites, and emoluments during the continuation of the leave of absence.

I have received a letter from Honorable Harry McMullan, Attorney-General, under dated of 26 August, 1946, which is hereto attached, in which it is stated that doubt exists as to whether or not such a leave of absence could be granted under these circumstances without causing Judge Phillips to vacate his office as Judge of the Superior Court.

In view of the fact that in the event such a leave of absence is granted, grave questions of public concern would arise affecting the validity of the judicial acts which might be performed by any person appointed by me as the Acting Judge of the Superior Court during the leave of absence, as well as the status of Judge Phillips resulting from the acceptance of such appointment, in the public interest I desire to herewith request the opinion of the Chief Justice and Associate Justices of the Supreme Court of North Carolina, specifically covering the following questions:

1) In view of the provisions of Section 11 of Article IV of the State Constitution, that every Judge of the Superior Court shall reside in the district for which he is elected and the other provisions of said section, would I, as Governor of North Carolina, under authority of the statute, G. S., 128-39, have the power and authority to grant a leave of absence to Honorable F. Donald Phillips, Judge of the Superior Court, for a period of one year for the purpose of acting as one of the presiding judges of the military courts of the United States Army set up by the War Department in the American occupied zone of Germany?

2) If such leave of absence may be granted and it is found necessary to appoint some other person to perform the duties of Honorable F. Donald Phillips, Judge of the Superior Court, during the term of such leave, could such person so appointed serve without regard to the residence or district in which such person resides, as provided in G. S., 128-39?

3) Would such person so appointed have all the authority, duties, perquisites and emoluments of a Judge of the Superior Court, regularly nominated in the Thirteenth Judicial District and elected by the people of the State of North Carolina to the office of Superior Court Judge?

4) Would acceptance by Judge F. Donald Phillips of the position tendered him by the War Department, as a presiding judge of the military courts set up by the War Department for the trial of war criminals exclusively in Germany for a term of not exceeding one year, amount to a resignation by Judge Phillips of his position as a Judge of the Superior Court, or would said Judge have a right, upon the termination of said leave of absence, to resume the performance of his duties as such Judge of the Superior Court and serve therein to the end of his existing term?

Respectfully submitted,

R. GREGG CHERRY,
Governor.

RGC:mw

26 August 1946

HONORABLE R. GREGG CHERRY
Governor of North Carolina
Raleigh, North Carolina

DEAR GOVERNOR CHERRY:

Honorable F. Donald Phillips, Judge of the Superior Court of the Thirteenth Judicial District, has been requested by the War Department of the United States to act as one of the presiding judges of the military courts set up by the War Department, under a War Department Directive, for the trial of war criminals exclusively in the American zone of occupation in Germany. I am informed that the Secretary of War, Honorable Robert P. Patterson, is communicating with you with reference to this matter and furnishing you with the information above recited.

Judge Phillips has consulted with me and requested my opinion as to whether or not a leave of absence can be granted to him under the provisions of G. S., 128-39, in the event such would have your approval, to serve in the capacity which he has been requested by the War Department, without salary during the period of his leave of absence, such leave

of absence to be granted for a period of one year, to be terminated upon the termination of the present national emergency. Judge Phillips desires to know, if leave of absence is granted to him and he should accept the appointment tendered him by the War Department, such an acceptance would result in terminating his office as Judge of the Superior Court, or whether he could continue to hold said office while on leave of absence and resume his duties as Judge of the Superior Court upon the termination of the leave.

My information from the War Department is that the position to be filled by Judge Phillips while serving in the military service of the United States is created by directives of the War Department for military purposes incident to the trial of war criminals in the American occupied zones of Germany.

The question presented by Judge Phillips, in its exact character, has never been presented to our Supreme Court. In the advisory opinion of the Chief Justice and Associate Justices of the Supreme Court of North Carolina, *In re Yelton,* 223 N. C., 845, the Governor was advised that under Chapter 121 of the Public Laws of 1941 (G. S., 128-39), a leave of absence could be granted to Captain Yelton to accept a temporary officer's commission in the United States Army or Navy without perforce vacating his civil office and without a violation of the provisions of the North Carolina Constitution, Article XIV, Section 7. While the question presented in that advisory opinion is very similar to the question presented in this matter, there remains some differences due to the fact that the appointment of Captain Yelton was as an officer in the United States Army while actual hostilities were in progress.

While in my opinion the leave of absence may be properly granted and while the acceptance of this position on the part of Judge Phillips would not vacate his office as Superior Court Judge, yet there being no direct authority in this State on the question and a variety of authority in other states, I believe it is very important that the quesion should be set at rest by an advisory opinion of the *Chief Justice* and *Associate Justices* of the Supreme Court of North Carolina, which they will doubtless render at your request. This question is important to Judge Phillips but also important to the public, as it will be necessary to know whether or not any person who may be appointed to fill the vacancy while he is on leave of absence, under authority of G. S., 128-39, would in all respects be authorized and empowered to act as the Judge of the Superior Court.

HARRY MCMULLAN,
Attorney-General.

HM : w

WAR DEPARTMENT
WASHINGTON

31 Aug. 1946

HONORABLE R. GREGG CHERRY
Governor of North Carolina
Raleigh, North Carolina

DEAR GOVERNOR CHERRY:

It is contemplated that the Honorable F. Donald Phillips, Judge of Superior Court of North Carolina, Western Division, Thirteenth District, will be appointed as a Judge to sit in Germany as a member of a U. S. Zonal Court that will try Nazi war criminals. Judge Phillips has been interviewed and he is willing to accept such an appointment if the necessary leave of absence can be obtained from his present position.

If you approve, it is requested that he be given a leave of absence from the Superior Court of North Carolina, in order to make him available for the overseas appointment. These war crimes trials are scheduled to commence in October and it is estimated they will continue for approximately one year.

Sincerely yours,
KENNETH ROYALL,
Acting Secretary of War.

The following response was made by the *Chief Justice* and *Associate Justices* of the Supreme Court on 13 September, 1946:

RALEIGH, N. C., 13 September, 1946

To His Excellency, R. GREGG CHERRY,
Governor of North Carolina:

ADVISORY OPINION IN RE F. DONALD PHILLIPS

Your request for an advisory opinion in the matter of a leave of absence for Judge F. Donald Phillips under the provisions of G. S., 128-39, poses four separate questions. It is stated, however, that the leave of absence requested by Judge Phillips would not be desired by him, nor would you wish to grant it, if the contemplated arrangement should work a vacancy in the judgeship of the Thirteenth Judicial District. The principal inquiry, then, which lies at the threshold of the matter, is whether Judge Phillips would vacate his present office, if, during his absence, he should accept appointment as Judge of a United

States Zonal Court in Germany. The remaining interrogatories are predicated on a negative answer to this central question.

No doubt it has been thought, and with good reason, that, in principle, some of the questions submitted were under consideration at the time of the advisory opinion in the matter of Nathan Yelton, reported in 223 N. C., 845. Even so, the Attorney-General is correct in advising that the constitutional matters here raised are in excess of the questions presented on that occasion. There, the position accepted by the civilian officer during his absence was a "temporary captaincy in the army during the war emergency," which, it was thought, was not different in character from those held by "officers in the militia," who are *eo nomine* excepted from the operation of the section of the Constitution inhibiting double office-holding. Here, the office which Judge Phillips proposes to accept, during his absence, apparently carries with it some of the attributes of sovereignty, and, if so, it would perforce invest him with governmental authority. *State ex rel. Wooten v. Smith,* 145 N. C., 476, 59 S. E., 649; *Barnhill v. Thompson,* 122 N. C., 493, 29 S. E., 720. He would then be holding an office or place of trust or profit under the United States, or a department thereof. *United States v. Mouat,* 124 U. S., 303; *United States v. Germaine,* 99 U. S., 508; *Groves v. Barden,* 169 N. C., 8, 84 S. E., 1042, L. R. A., 1917 A, 288, Ann. Cas. 1917 D, 316. "An office is a public station, or employment, conferred by appointment of government. The term embraces the idea of tenure, duration, emolument, and duties." *U. S. v. Hartwell,* 73 U. S., 385; *Eliason v. Coleman,* 86 N. C., 236; *Clark v. Stanley,* 66 N. C., 59, 8 Am. Rep., 488. While Judge Phillips has requested a leave of absence "for a period of one year or for less than one year, if the present national emergency declared by Congress is terminated before the end of such year," it will be noted the Zonal Court over which he would preside is not so limited. Moreover, compliance with the provisions of Art. IV, sec. 11, of the Constitution in the appointment of a substitute would also present a serious problem, if that question were reached.

One who holds an office or place of trust under authority of this State forfeits such office or place of trust when he accepts another office or place of trust which is forbidden by the Constitution or is incompatible with the office or place of trust already held. The acceptance of the second forbidden or incompatible office or place of trust, operates *ipso facto* to vacate the first. *Barnhill v. Thompson, supra; Whitehead v. Pittman,* 165 N. C., 89, 80 S. E., 976; *In re Martin,* 60 N. C., 153; Anno. 53 A. L. R., 595.

The Constitution, Art. XIV, sec. 7, provides: "No person who shall hold any office or place of trust or profit under the United States, or any department thereof, or under this State or under any other state or government, shall hold or exercise any other office or place of trust or

profit under the authority of this State, or be eligible to a seat in either House of the General Assembly: Provided, that nothing herein contained shall extend to officers in the militia, notaries public, justices of the peace, commissioners of public charities, or commissioners for special purposes."

Under this section, which is intended and designed to prevent or inhibit double office-holding, except in certain instances, it is not permissible for one person to hold two offices at the same time. *Groves v. Barden, supra; Harris v. Watson,* 201 N. C., 661, 161 S. E., 215; *Brigman v. Baley,* 213 N. C., 119, 195 S. E., 617; *In re Barnes,* 212 N. C., 735, 194 S. E., 499. "The manifest intent is to prevent double office-holding—that offices and places of trust should not accumulate in a single person"—*Smith, C. J.,* in *Doyle v. Raleigh,* 89 N. C., 133. See McIntosh on Procedure, 1089, *et seq.*

Accordingly, you are advised that the pivotal question above stated is regarded as involved in too much doubt to warrant a negative response or one favorable to the purposes indicated or contemplated.

Respectfully submitted,

WALTER P. STACY,
Chief Justice.

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

ETHEL BUFFALOE AND R. CARLTON STUART, EXECUTORS OF THE ESTATE OF DAVID THOMAS BARNES, DECEASED, v. ZELDA BARNES, ROSSIE MAE BARNES, MRS. NANCY BARNES STUART, ETHEL BUFFALOE, MRS. RUTH BUFFALOE WILSON, KATIE BUFFALOE AND NORMAN B. BUFFALOE.

(Filed 9 October, 1946.)

1. Gifts § 1—

Where one purchases stock with his own funds and has the certificates issued or reissued to himself and another as joint tenants with right of survivorship, but keeps the stock certificates in his possession throughout his lifetime, the transaction cannot constitute a gift *inter vivos* since it lacks the essential element of absolute and unconditional delivery. *Taylor v. Smith,* 116 N. C., 531, and *Jones v. Waldroup,* 217 N. C., 178, cited and distinguished.

2. Appeal and Error § 50—

Where the agreed facts establish a want of absolute and unconditional delivery of the chose necessary to constitute the transaction in suit a gift *inter vivos*, it would be futile to remand the case for further stipulations or findings relative to donative intent, since even if donative intent should be established the result would not be affected.

3. Appeal and Error § 40d—

Where an action is submitted upon facts agreed to determine whether testator had made a gift *inter vivos* of stock to claimant, and the executors admit upon the hearing and on appeal that claimant was the owner of one-half the stock, and claimant does not contest or protest this admission, the correctness of the admission is not presented for determination on the appeal, and perforce the Supreme Court passed only upon the question of ownership to that portion of the stock to which title is in dispute.

PETITION to rehear this case, reported in 226 N. C., 313.

Brassfield & Maupin for petitioner.

WINBORNE and DENNY, JJ. The petition to rehear, filed in this cause by the defendant, Rossie Mae Barnes, was referred to us, under Rule 44 of the Court.

Ordinarily the members of this Court do not assign any reasons for denying a petition to rehear, but in order to show that, contrary to the allegations of the petition, the Court understood and properly passed upon the essential questions presented on the appeal, we deem it not improper to insert this memorandum in the record.

It must be borne in mind that the case was submitted on an agreed statement of facts.

The petitioner is correct in assuming that the opinion of the Court was not intended to affect *Taylor v. Smith,* 116 N. C., 531, and *Jones v. Waldroup,* 217 N. C., 178, in so far as applicable to the facts of the present record.

The opinion in *Taylor v. Smith, supra,* is very clear as to the authority of joint tenants to make a bilateral contract to the effect that upon the death of one of the contracting parties, the property involved shall belong to the survivor or survivors. On the second issue, as to the gift of the one-half interest in the note, the opinion is not so clear and decisive. It merely holds that such a gift is not inconsistent with the original contract and if the issue should be set aside the judgment is still valid and must be upheld because of the finding on the first issue. Even so, the donor had delivered the note to the donee at the time the gift *inter vivos* was alleged to have been made.

In *Waldroup's case, supra,* the evidence tended to show that all the stock was purchased by Dr. Waldroup with his wife's money. That

evidence was sufficient to sustain the verdict to the effect that his estate was not entitled to the stock. *Harris v. Harris,* 178 N. C., 7. Moreover, Dr. Waldroup, prior to his death delivered to his wife all the stock certificates involved, together with an assignment of certain shares which had not been transferred, and they were in her possession at the time of his death. Very likely the jury answered the issues in *Waldroup's case, supra* as it did because of the evidence to the effect that the wife's money was used to purchase the stock.

The factual situation is very different in this case. It is admitted that the deceased paid for all the shares of stock in question with his own funds and kept the stock certificates in his possession. He received all the dividends on the stock by getting Miss Barnes to endorse the dividend checks and thereby turn over to him the entire income therefrom. The receipt of all the dividends, however, is merely incidental and had no material bearing on the decision in this case.

In the case before us, there is no claim to ownership under a bilateral agreement, but only by gift *inter vivos.* Certainly there is no sound legal basis for holding that the cases of *Taylor v. Smith, supra,* and *Jones v. Waldroup, supra,* are authority for sustaining the judgment of the court below on the ground that there was a valid gift *inter vivos.*

A gift *inter vivos* is one by which the donee becomes in the lifetime of the donor the absolute owner of the thing given. Black's Law Dictionary, p. 843. A gift *inter vivos* is not only one that must take effect during the lifetime of the donor, but it must be irrevocable and fully executed by complete and unconditional delivery. 28 C. J., 623.

The petitioner places great stress on donative intent and cites numerous authorities in support of her contentions. And it is argued that there is no room for an inference to be drawn from the stipulated facts which is inconsistent with a completed gift, and that it is the duty of the Court as a matter of law to declare that there was donative intent and delivery, and that the gift of the right of survivorship in the stock was complete. If, however, conflicting inferences are deducible from the stipulated facts, it is further contended, the decision herein should be altered to the extent of remanding the case to the lower court for these inferences to be established by further stipulation or by jury trial.

A joint tenancy in stock with a provision for survival of ownership, where the donor retains custody of the stock, nothing else appearing, in our opinion, does not meet the definition of a gift *inter vivos.* The possession of a joint tenant is not that exclusive, absolute, and unconditional possession contemplated in a gift *inter vivos.*

Consequently, it would serve no useful purpose to remand this case for further findings of fact in view of the stipulations in the present record. Moreover, the case was submitted on an agreed statement of facts. However, donative intent or other inferences that might be drawn

from further findings of fact, in our opinion, could not cure the admitted lack of absolute and unconditional delivery of the stock to the donee, in the lifetime of the donor, which is essential to the validity of a gift *inter vivos*.

The petitioner now takes the position that if she is not entitled to all the stock as survivor, she is not entitled to any of it. The contention is without merit on this petition. The appellants admitted in the hearing below and on appeal to this Court that the petitioner was the owner of one-half of the seventy shares of stock. The appellee did not contest or protest the admission. And the correctness of the admission was not presented for our determination, on the appeal. Hence, the Court passed only upon the question of ownership as to that portion of the stock to which title was in dispute.

In view of the stipulations and admissions set forth in the record and briefs, we think the case was correctly decided and that the petition to rehear should be denied.

This memorandum is in no way binding on this Court, but is intended to set forth the reasons why we think the petition should be denied.

Petition denied.

AMENDMENT TO RULES OF BOARD OF LAW EXAMINERS.

NORTH CAROLINA—WAKE COUNTY.

I, Edward L. Cannon, Secretary-Treasurer of The North Carolina State Bar, do hereby certify that the following resolution was duly adopted by the Council of The North Carolina State Bar at its regular quarterly meeting held on July 12, 1946, and that the said Council did adopt said resolution as an amendment to the rules of the Board of Law Examiners of the State of North Carolina as appearing on Page 611, 221 North Carolina Reports, beginning on Line 18 under Numeral 9 entitled "Legal Education" and which said amendment applies to Rule 9 and Line 5 of the attached copy of the rules of the said Board:

RESOLVED that Rule 9 be amended by adding after the words "six years" in Line 5 of said rule the following: "Provided, however, that the period between the date of induction of the applicant into the armed services and the date of his discharge therefrom shall not be counted."

Given under my hand and the seal of The North Carolina State Bar, this the 21st day of October, 1946.

(Signed) EDWARD L. CANNON.

(Seal of
The North Carolina
State Bar)

After examining the foregoing resolution of The North Carolina State Bar, it is my opinion that the same complies with a permissible interpretation of 210 Public Laws of 1933 and amendments thereto, this the 29 day of October, 1946.

(Signed) W. P. STACY,
Chief Justice.

Upon the foregoing certification, it is ordered that the foregoing amendment to the rules of The North Carolina State Bar be spread upon the Minutes of the Supreme Court and that it be published in the forthcoming volume of the Reports as provided by the Act establishing The North Carolina State Bar, this the 29 day of October, 1946.

(Signed) DENNY, J.,
For the Court.

WORD AND PHRASE INDEX.

Abandonment—Second contract relating to purchase of its stock by corporation *held* not abandonment of prior agreement relating thereto, *Bank v. Supply Co.*, 416; evidence *held* insufficient as predicate for alimony without divorce to show constructive abandonment, *Blanchard v. Blanchard*, 152; failure to support children *held* not to preclude divorce on ground of separation, *Welch v. Welch*, 541.

Abatement and Revival—Death of lessor does not terminate lease or option, *Trust Co., v. Frazelle*, 724; death of party and survival of actions in general, *Harrison v. Carter*, 36; *Swink v. Horn*, 718; actions for negligent injuries causing death, *Harrison v. Carter*, 36; *Hoke v. Greyhound Corp.*, 332; actions for negligent injury not causing death, *Hoke v. Greyhound Corp.*, 332.

Abortion—Evidence of manslaughter in attempting abortion *held* sufficient, *S. v. Gardner*, 310.

Abrogation—Second contract relating to purchase of its stock by corporation *held* not abrogation of prior agreement relating thereto, *Bank v. Supply Co.*, 416.

Accident—Within meaning of Workmen's Compensation Act, *Rewis v. Ins. Co.*, 325.

Acknowledgment—Deed of separation must be acknowledged as required by G. S., 52-12, *Pearce v. Pearce*, 307.

Actions—Causes improperly joined need not be dismissed on demurrer, *Pressley v. Tea Co.*, 518; death of mother of plaintiff in action in summary ejectment under Federal Rent Control *held* not grounds for dismissal, *Swink v. Horn*, 718.

Administration—See Executors and Administrators.

Admissions—Flight as implied admission of guilt, *S. v. Shoup*, 69; admission in argument that defendant shot and killed deceased not binding on defendant, *S. v. Ellison*, 628; in pleadings, *Bell v. Chadwick*, 598; misstatement of admissions which affects burden of proof *held* error, *S. v. Ellison*, 628.

Adultery—Of wife has no relevancy to order allowing support *pendente lite* for child of marriage, *Lawrence v. Lawrence*, 221.

Adverse Possession—Of cartways, *Speight v. Anderson*, 492; hostile character of possession—Landlord and Tenant, *Lofton v. Barber*, 481; what constitutes color of title, *Lofton v. Barber*, 481; accrual of right of action and time from which possession is adverse, *Lofton v. Barber*, 481; competency and relevancy of evidence, *Graham v. Spaulding*, 86; sufficiency of evidence and nonsuit, *Graham v. Spaulding*, 86.

"Aforethought"—Use of word "aforethought" in defining premeditation and deliberation not necessary, *S. v. Hightower*, 62.

"After"—Indicates that promise is to be performed only upon happening of stated event, *Jones v. Realty Co.*, 303.

Agency—See Principal and Agent.

Agreed Facts—Are binding on appeal, *Airport Authority v. Johnson*, 1; *Buffaloe v. Barnes*, 780.

Aiders and Abettors—*S. v. Johnson*, 671; *S. v. Smith*, 738.

Aid to Dependent Children—Tax to support is for special purpose with special approval of Legislature, *R. R. v. Duplin County*, 719.

Airport—Right of city to contribute funds to airport, *Airport Authority v. Johnson*, 1.

Alimony—Husband may not be imprisoned for failure to pay judgment for debt due wife under separation agreement not adopted as order of court, *Stanley v. Stanley*, 129; adultery of wife has no relevancy to order allowing support *pendente lite* for child of marriage, *Lawrence v. Lawrence*, 221; but pending appeal, court has no power

to adjudge defendant in contempt, *ibid.;* misconduct of wife no defense to subsistence of minor child *pendente lite*, *Brooks v. Brooks*, 280; allowance for attorney's fees sustained, *Welch v. Welch*, 541; separation agreement does not preclude allowance of alimony *pendente lite*, *Butler v. Butler*, 594; evidence *held* insufficient to show abandonment as predicate for alimony without divorce, *Blanchard v. Blanchard*, 153; complaint *held* sufficient in action for alimony without divorce, *Brooks v. Brooks*, 280; cross-action for alimony without divorce or consent judgment based thereon may not be entered in husband's action for divorce, *Ericson v. Ericson*, 474.

Amendment—Court may allow amendment which does not change nature of action, *James v. James*, 399; court may allow amendment to order of publication *nunc pro tunc*, *Smith v. Smith*, 506; court has discretionary power to permit amendment to warrant, *S. v. Grimes*, 523.

Answer—See Pleadings.

Anticipation of Injury—See *Harrington v. Taylor*, 769.

Appeal and Error—Appeals in criminal cases see Criminal Law; assessment of costs after decision on appeal modifying and affirming judgment, *Clark v. Cagle*, 230; review of award of Industrial Commission, *Reavis v. Ins. Co.*, 325; no appeal lies from order that suspended judgment be executed, *S. v. Farrar*, 478; appellate jurisdiction in general, *Lindsay v. Brawley*, 468; parties who may appeal—"Party Aggrieved," *Starnes v. Tyson*, 395; *Stephenson v. Watson*, 742; moot questions and dismissal where question has become academic, *Swink v. Horn*, 718; parties entitled to object and take exception, *Johnson v. Sidbury*, 345; form and sufficiency of objections and exceptions in general, *Ramsey v. Nebel*, 590; objections and exceptions to charge, *S. v. Thomas*, 384; *Searcy v. Logan*, 562; *Brown v. Loftis*, 762; theory of trial, *Jernigan v. Jernigan*, 204; settlement of case on appeal, *Lindsay v. Brawley*, 468; *certiorari* to correct or amplify record, *Lindsay v. Brawley*, 468; powers of and proceedings in lower court after appeal, *Lawrence v. Lawrence*, 221; *Clark v. Cagle*, 230; necessary parts of record proper, *S. v. Clough*, 384; *Ericson v. Ericson*, 474; *Campbell v. Campbell*, 653; conclusiveness and effect of record, *Ericson v. Ericson*, 474; necessity for exceptions to support assignments of error, *S. v. Herring*, 213; abandonment of exceptions and assignments of error by failing to discuss in briefs, *Smith v. Mariakakis*, 100; *S. v. Hightower*, 62; *S. v. Stone*, 97; *S. v. Hart*, 200; *Clark v. Cagle*, 230; *S. v. Carroll*, 237; dismissal for failure to serve statement of case on appeal, *Lawrence v. Lawrence*, 221; for failure to docket appeal in time, *S. v. Presnell*, 160; for insufficiency of record, *Ericson v. Ericson*, 474; *Campbell v. Campbell*, 653; dismissal of frivolous appeals, *Stephenson v. Watson*, 742; scope and extent of review in general, *Charlotte v. Heath*, 750; presumptions and burden of showing error, *Rea v. Simowitz*, 379; error harmless because of answer to another issue, *Miller v. McConnell*, 28; *Mason v. Mason*, 740; because of admissions, *McCorkle v. Beatty*, 338; *Webb v. Theatre Corp.*, 342; harmless and prejudicial error in admission or exclusion of evidence, *McCorkle v. Beatty*, 338; *Deaton v. Elon College*, 433; *Webb v. Theatre Corp.*, 342; *Belhaven v. Hodges*, 485; *Speight v. Anderson*, 492; *In re Will of Lomax*, 498; *Tyndall v. Hines Co.*, 620; in instructions generally, *Rea v. Simowitz*, 379; error in placing of burden of proof, *Lindsay v. Brawley*, 468; *Crain v. Hutchins*, 642; review of exceptions to judgment or to signing of judgment, *Lee v. Board of Adjustment*, 108; *Redwine v. Clodfelter*, 366; *King v. Rudd*, 156; *Smith v. Smith*, 506; *Howell v. Branson*, 264; *In re Collins*, 412;

Swink v. Horn, 713; review of matters in discretion of lower court, *Ziglar v. Ziglar*, 102; *Bailey v. McCotter*, 160; *Webb v. Theatre Corp.*, 342; *Western N. C. Conference v. Talley*, 654; *Brown v. Hall*, 732; review of findings of fact or facts agreed, *Airport Authority v. Johnson*, 1; *Buffaloe v. Barnes*, 780; *Clark v. Cagle*, 230; *Lindsay v. Brawley*, 468; *Swink v. Horn*, 713; *Charlotte v. Heath*, 750; review of judgments on motions to nonsuit, *Wallace v. Longest*, 161; *Highway Comm. v. Transportation Corp.*, 371; *Cox v. Hinshaw*, 700; *Deaton v. Elon College*, 433; partial new trial, *Starnes v. Tyson*, 395; remand, *Buffaloe v. Barnes*, 780; law of the case, *Coleman v. Whisnant*, 258; *Cannon v. Cannon*, 634; proceedings in lower court after remand, *Cannon v. Cannon*, 634.

Arbitration and Award—Attack of and setting aside award, *Tarpley v. Arnold*, 679.

Argument—Right to opening and concluding argument in caveat proceedings, *In re Will of Lomax*, 498.

"Arising Out of Employment"—Within meaning of Workmen's Compensation Act, *Rewis v. Ins. Co.*, 325.

Arrest of Judgment—Upon conviction upon void warrant Supreme Court will arrest judgment *ex mero motu*, *S. v. Morgan*, 414; *S. v. Johnson*, 266.

Assault—With intent to commit rape, *S. v. Petry*, 78; *S. v. Overcash*, 632; assault with deadly weapon, *S. v. Perry*, 530; instructions on defenses, *S. v. Jackson*, 760; on less degrees of the crime, *S. v. Perry*, 530; verdict and judgment, *S. v. Grimes*, 523; person hurt while intervening in fight between husband and wife not entitled to recovery on issue of negligence, *Harrington v. Taylor*, 769.

Assignments of Error—Failure to bring forward in briefs abandonment of, *S. v. Hightower*, 62; *S. v. Stone*, 97; *Smith v. Mariakakis*, 100; *S. v. Hart*, 200; *S. v. Carroll*, 237; assignments of error must be based upon exceptions, *S. v. Herring*, 213; *S. v. Perry*, 530; *S. v. Biggerstaff*, 603.

Associate Justice—Notice of candidacy for Justice of the Supreme Court must designate to which of two vacancies nomination is sought, *Ingle v. Board of Elections*, 454.

"As Soon As"—Indicates that promise is to be performed only upon happening of stated event, *Jones v. Realty Co.*, 303.

Attorney and Client—Scope of authority of attorney, *Bath v. Norman*, 502; evidence *held* to raise issues of fact as to whether attorney consenting to trial by court represented defendant, *Bennett v. Templeton*, 676; neglect in failing to see that cause was calendared for two separate weeks of term not imputable to client, *Craver v. Spaugh*, 450; right to opening and concluding argument in caveat proceedings, *In re Will of Lomax*, 498; admission in argument that defendant shot and killed deceased not binding on defendant, *S. v. Ellison*, 628.

Automobiles—Evidence *held* sufficient in action for damages to truck while being transported under own power by carrier, *Barnard v. Sober, Inc.*, 392; action by widow to replevy automobile from father-in-law on ground that it was gift of her husband, *James v. James*, 399; acquiescence of father in purchase of car by son is evidence of emancipation, *James v. James*, 399; customer of automobile parking lot *held* licensee and not bailee or tenant, *Freeman v. Service Co.*, 736; backing, *Phillips v. Nessmith*, 173; intersections, *Kennedy v. Smith*, 514; legal age and driving without license, *Hoke v. Greyhound Corp.*, 692; speed in general, *Hoke v. Greyhound Corp.*, 692; right side of road and passing vehicles traveling in opposite direction, *Wallace v. Longest*, 161; *Hoke v. Greyhound Corp.*, 692; proximate cause, *Hoke v. Greyhound Corp.*, 692; contributory negligence, *Phillips v. Nessmith*, 173; *Hobbs v. Drewer*, 146; concurring

and intervening negligence, *Hoke v. Greyhound Corp.*, 692; evidence as to speed, *Tyndall v. Hines Co.*, 620; nonsuit on issue of negligence, *Wallace v. Longest*, 161; *Phillips v. Nessmith*, 173; on issue of contributory negligence, *Phillips v. Nessmith*, 173; *Kennedy v. Smith*, 514; instructions on negligence in permitting person under age to drive, *Hoke v. Greyhound Corp.*, 692; issues and verdict, *Phillips v. Nessmith*, 173; parties liable to guest or passenger, *Hoke v. Greyhound Corp.*, 692; actions by guests or passengers, *Strickland v. Smith*, 517; agents and employees within rule of *respondeat superior*, *Wood v. Miller*, 567; sufficiency of evidence on issue of *respondeat superior*, *Smith v. Mariakakis*, 100; *Tomlinson v. Sharpe*, 177; *Toler v. Savage*, 208; definition of "under the influence of intoxicants," *S. v. Carroll*, 237; prosecutions for drunken driving, *S. v. Carroll*, 237; *S. v. Bowen*, 601; *S. v. Biggerstaff*, 603; elements of offense of failing to stop after accident, *S. v. Bowen*, 601.

"Backing"—Vehicle from curb, *Phillips v. Nessmith*, 173.

Bailment — Nature and requisites, *Freeman v. Service Co.*, 736; receipt of property, *Barnard v. Sober, Inc.*, 392; actions for conversion or failure to return property, *Freeman v. Service Co.*, 736; actions for damage to property, *Barnard v. Sober, Inc.*, 392.

Bankruptcy—Where homestead is allotted subject to specified judgment, judgment creditor can proceed by levy of execution, *Sample v. Jackson*, 408.

Banks and Banking—Bank cashiers' fidelity bond, *Indemnity Co. v. Hood*, 706.

Barn—*Res ipsa loquitur* does not apply upon showing of burning of barn while in possession of tenant, *Rountree v. Thompson*, 553.

Bastards—Warrant and indictment for failure to support, *S. v. Morgan*, 414.

Betterments—Evidence and burden of proof, *Crain v. Hutchins*, 642.

Bigamy and Bigamous Cohabitation—Prosecution and punishment, *S. v. Setzer*, 216.

Bills and Notes—Consideration, *Perry v. Trust Co.*, 667; competency and relevancy of evidence, *Perry v. Trust Co.*, 667; sufficiency of evidence, *Perry v. Trust Co.*, 667; statute runs against bond coupons from date of maturity, *Jennings v. Morehead City*, 606.

Blouse—*Held* competent to corroborate witness, *S. v. Petry*, 78.

Board of Adjustment—Authority of Municipal, *Lee v. Board of Adjustment*, 107.

"Bodily Heirs"—When used as *descriptio personarum* and issue connotes children, grandchildren, *Turpin v. Jarrett*, 135.

Bonds—Limitation on increase of county debt, *Coe v. Surry County*, 125; statute runs against bond coupons from date of maturity, *Jennings v. Morehead City*, 606; renewals of bank cashier's fidelity bond, *Indemnity Co. v. Hood*, 706.

Boundaries—Reversing calls of deed, *Belhaven v. Hodges*, 485; declarations, *Belhaven v. Hodges*, 485; evidence of other proceedings, *Clark v. Cagle*, 230; location of corners of contiguous property, *Belhaven v. Hodges*, 485.

Brick—May be deadly weapon as a matter of law, *S. v. Perry*, 530.

Bridges—Failure of municipality to maintain guard rails along bridge constituting part of street, negligence, *Hunt v. High Point*, 74; plaintiff *held* not guilty of contributory negligence as matter of law, in failing to wait defendant's truck had cleared bridge before entering thereon, *Hobbs v. Drewer*, 146.

Briefs—Assignments of error not brought forward deemed abandoned, *S. v. Hightower*, 62; *S. v. Stone*, 97; *Smith v. Mariakakis*, 100; *S. v. Hart*, 200; *Clark v. Cagle*, 230; *S. v. Carroll*, 237; *S. v. Malpass*, 403; *S. v. McKnight*, 766.

Broadside Exception — See *S. v. Thomas*, 384; *S. v. Biggerstaff*, 603; *Brown v. Loftis*, 762; *S. v. Beatty*, 765; *Ramsey v. Nebel*, 590.

Brokers—Creation, existence and termination of relationship, *Buffaloe v. Barnes*, 313; right to commissions where sale is not consummated, *Jones v. Realty Co.*, 303.

Building Permits—Authority of Municipal Board of Adjustment, *Lee v. Board of Adjustment*, 107.

Burden of Proof—Upon plea of sole seizin in partition, *Jernigan v. Jernigan*, 204; of proving parol trust, *McCorkle v. Beatty*, 338; is on purchaser to establish right to improvements, *Crain v. Hutchins*, 642; is on maker to establish defenses to note, *Perry v. Trust Co.*, 667; is on defendant to prove all elements of self-defense relied on in homicide prosecution, *S. v. Taylor*, 286; upon plea of statute of limitations burden is on plaintiff to prove live claim, *Jennings v. Morehead City*, 606; assertion that claim had been settled in prior agreement is matter of defense carrying burden of proof, *Lindsay v. Brawley*, 468; State may rely on presumption upon showing intentional killing with deadly weapon on charge of first degree murder, *S. v. Floyd*, 571; findings based upon erroneous placing of burden of proof present questions of law or legal inference which are reviewable, *Lindsay v. Brawley*, 468; charge on sufficiency of circumstantial evidence to convict, *S. v. Shoup*, 69; charge on burden of proof *held* without error, *S. v. Petry*, 78; failure to instruct as to burden of proof of issue is error, *Crain v. Hutchins*, 642; misstatement of admissions which affects burden of proof *held* error, *S. v. Ellison*, 628; charge containing correct and incorrect instruction on burden of proof is reversible error, *S. v. Absher*, 656.

Burglary—Possession of implements of burglary, *S. v. Baldwin*, 295; sufficiency of evidence and nonsuit, *S. v. Gibson*, 194: *S. v. Baldwin*, 295; conviction of different degree of the crime, *S. v. Jordan*, 155; *S. v. Locklear*, 410.

Buses—Relation of carrier and passenger does not exist during transfer from one urban bus to another, *Patterson v. Power Co.*, 22.

Calendar—Calendaring of case is notice to litigants, *Craver v. Spaugh*, 450.

Cancellation—Of liability policy by mailing notice, *White v. Ins. Co.*, 119.

Carnal Knowledge—Use of phrase "statutory rape" in prosecution under G. S., 14-26, *held* not prejudicial, *S. v. Bullins*, 142; in prosecution under G. S., 110-39, charge that crime is encouraging minor "in moral delinquency" *held* for error. *S. v. Bullins*, 142.

Carriers—Injury to goods *in transitu*, *Barnard v. Sober, Inc.*, 392; injuries in boarding or alighting, *Patterson v. Power Co.*, 22.

Cartways—Establishment of by prescription, *Speight v. Anderson*, 492; defendants *held* bound by equitable estoppel from obstructing cartway, *Long v. Trantham*, 510.

Case on Appeal—Appeal will not be dismissed for failure to serve, *Lawrence v. Lawrence*, 221; judge not subject to supervision in settlement of case, *Lindsay v. Brawley*, 468; appeal dismissed for failure to docket, *S. v. Nelson*, 529; *S. v. Nash*, 608.

Casual Employees—Employment continuously for five or six weeks *held* not casual employment within meaning of Compensation Act, *Smith v. Paper Co.*, 47.

Caveat—See Wills.

Certiorari—Is sole remedy to bring up omitted parts of record, *Lindsay v. Brawley*, 468.

Character Evidence—See *S. v. Robinson*, 95; defendant *held* to live in "community" for purpose of testimony as to general reputation, *S. v. Bowen*, 601.

Charge—See Instructions.

Charities—Associated schools *held* in continued existence as matter of

law for purpose of accepting bequest notwithstanding change of name and curriculum, *Trust Co. v. Board of National Missions*, 546.
Checks—Bad check does not discharge tax lien, *Miller v. McConnell*, 28.
Children—"Bodily heirs" when used as *descroptio personarum* and "issue" connote children, grandchildren and other lineal descendants, *Turpin v. Jarrett*, 135; bequest or devise to heirs or children requires division per capita, *Wooten v. Outland*, 245; approval of family agreement for distribution of trust which preserves trust estate for minors, approved, *Redwine v. Clodfelter*, 366; determination of life expectancy of child under ten, *Rea v. Simowitz*, 379; acquiescence of father in purchase of car by son is evidence of emancipation, *James v. James*, 399; right of respective parents to custody, *In re DeFord*, 189; *habeas corpus* to determine custody of children in contest between husband and wife, *In re Biggers*, 647; father's right to earnings of child during minority, *Toler v. Savage*, 208; *James v. James*, 399; adultery of wife has no relevancy to order allowing support *pendente lite* for child of marriage, *Lawrence v. Lawrence*, 221; tax to support dependent is for special purpose with special approval of Legislature, *R. R. v. Duplin County*, 719; indictment for failure to support illegitimate child must allege willfulness, *S. v. Morgan*, 414; in prosecution under G. S., 110-39, charge that crime is encouraging minor 'in moral delinquency *held* for error, *S. v. Bullins*, 142; kidnapping of, *S. v. Witherington*, 211.
Circumstantial Evidence—*Held* sufficient to support conviction for larceny, *S. v. Shoup*, 69; instructions on sufficiency of circumstantial evidence, *S. v. Shoup*, 69; intent usually must be proved by circumstantial evidence, *S. v. Petry*, 78; undue influence usually must be established by circumstantial evidence, *In re Will of Lomax*, 498.
Cities and Towns—See Municipal Corporations.
Citizen—Taxpayer not a landowner may not enjoin closing of street, *Shaw v. Tobacco Co.*, 477.
Claim and Delivery—Sufficiency of evidence and nonsuit, *James v. James*, 399; instructions, *James v. James*, 399.
Clear, Strong and Convincing Proof—See *McCorkle v. Beatty*, 338.
Clerks of Court—Order of clerk permitting executor to be made party without notice is subject to approval of judge, *King v. Rudd*, 156; assessing of costs after decision on appeal modifying and affirming judgment, *Clark v. Cagle*, 230; jurisdiction of clerk in general, *Johnston County v. Ellis*, 268; jurisdiction to render default judgments, *Johnston County v. Ellis*, 268.
Color of Title—*Lofton v. Barber*, 481.
Commerce—In action on interstate message Federal decisions apply, *Ward v. Tel. Co.*, 175; evidence *held* sufficient in action for damages to truck while being transported under own power by carrier, *Barnard v. Sober, Inc.*, 392.
Commissioner of Banks—Action on bank cashier's fidelity bond, *Indemnity Co. v. Hood*, 706.
Common Knowledge—Court will take judicial notice of facts within common knowledge, *S. v. Baldwin*, 295.
Common Law—*Hoke v. Greyhound Corp.*, 332.
Community—Defendant *held* to live in "community" for purpose of testimony as to general reputation, *S. v. Bowen*, 601.
"Compelling" — Defined. *Swink v. Horn*, 713.
Compensation Act, Unemployment Compensation Commission — See Master and Servant. Workmen's Compensation, see Master and Servant.
Complaint—See Pleadings; in action against dentist for malpractice, *Love v. Zimmerman*, 389; *held* to allege facts constituting basis for exclusion of certain acts from operation of sale of partnership assets,

Ferrell v. Worthington, 609; in action for divorce, *Brooks v. Brooks*, 280; *Pearce v. Pearce*, 307; *Lawrence v. Lawrence*, 624.

Compromise and Settlement—Operation and effect of agreements, *Lindsay v. Brawley*, 468.

Concurring Negligence—*Hoke v. Greyhound Corp.*, 692.

Conditions Concurrent and Precedent —*Cox v. Hinshaw*, 700.

Condonation—Misconduct committed after reconciliation is not condoned, *Brooks v. Brooks*, 280.

Confessions—Competency of, *S. v. Bennett*, 82; confession of intent to rape competent in homicide prosecution, *S. v. King*, 241.

Conflict of Laws—See Courts.

Consent—Defendant in a divorce action cannot consent to decree, *Smith v. Smith*, 544.

Consent Judgments—As bar to subsequent action, *Stansbury v. Guilford County*, 41; guardian *ad litem* may not consent to judgment, *Johnston County v. Ellis*, 268; official action of its board is necessary for authorization for consent judgment against municipality, *Bath v. Norman*, 502; order awarding custody of children in *habeas corpus* enforceable by contempt proceedings notwithstanding order is based on consent of parents, *In re Biggers*, 647; cross action for alimony without divorce or consent judgment based thereon may not be entered on husband's action for divorce, *Ericson v. Ericson*, 474.

Consideration—Contract relating to use of patent *held* supported by valid consideration, *Coleman v. Whisnant*, 258; contract relating to expenses of digging well *held* not supported by consideration, *Stonestreet v. Oil Co.*, 261; seal imports, *Crotts v. Thomas*, 385; lease is sufficient consideration for option contained therein, *Crotts v. Thomas*, 385; *Trust Co. v. Frazelle*, 724.

Conspiracy—Murder committed pursuant to intent to rob is murder in the first degree, *S. v. Matthews*, 639; where murder is committed pursuant to conspiracy to rob, each conspirator is guilty, *S. v. Bennett*, 82; testimony of conversation of one conspirator is competent against all, *S. v. Bennett*, 82.

Constitutional Law—Enlarging time for recovery of unemployment compensation taxes paid through mistake *held* constitutional, *B-C Remedy Co. v. Unemployment Compensation Comm.*, 52; agreement under which county acquired land subject to debts to circumvent constitutional limitations upon incurrence of debt by county *held void*, Ins. *Co. v. Guilford County*, 441; acceptance of judgeship of U. S. Zonal Court would vacate office of Judge of Superior Court, *In re Advisory Opinion in re Phillips*, 773; *mandamus* will not lie where relief can be granted only by declaring statute unconstitutional, *Ingle v. Board of Elections*, 454; legislative power in general, *Airport Authority v. Johnson*, 1; legislative powers in regard to municipal corporations, *Airport Authority v. Johnson*, 1; *Charlotte v. Heath*, 750; scope of police power in general, *Clinton v. Ross*, 682; imprisonment for debt, *Stanley v. Stanley*, 129; due process in general, *Harrison v. Corley*, 184; right of accused not to incriminate self, *S. v. Shoup*, 69.

Constructive Abandonment—Evidence *held* insufficient as predicate for alimony without divorce to show constructive abandonment, *Blanchard v. Blanchard*, 152.

Contempt of Court—Willful disobedience of court order, *Stanley v. Stanley*, 129; *In re Biggers*, 647; husband may not be imprisoned for failure to pay judgment for debt due wife under separation agreement not adopted as order of court, *Stanley v. Stanley*, 129; pending appeal Superior Court may not hold defendant in contempt for failure to pay subsistence as directed, *Lawrence v. Lawrence*, 221.

Contentions—Statement of in charge, see Instructions.

Contingent Remainders—Sale of part of realty to preserve balance of trust, *Trust Co. v. Rasberry*, 586.

Contractor—Pilot is independent contractor but ship owner may nevertheless be liable for its own negligence in failing to warn pilot of peculiarity of vessel, *Highway Comm. v. Transportation Corp.*, 371; contractee is under duty to warn of latent dangers, but independent contractor was guilty of contributory negligence barring recovery, *Deaton v. Elon College*, 433; liability of contractor for injury to third person, *Price v. Cotton Co.*, 758; finding of Industrial Commission that deceased was employee and not independent contractor *held* supported by evidence, *Smith v. Paper Co.*, 47.

Contracts—Required to be in writing—See Frauds, Statute of; contracts to convey realty, see Vendor and Purchaser; lease contracts, see Landlord and Tenant; insurance contracts, see Insurance; to take care of grantor, *Gerringer v. Gerringer*, 105; *Cox v. Hinshaw*, 700; complaint *held* to allege facts constituting basis for exclusion of certain acts from operation of sale of partnership assets, *Ferrell v. Worthington*, 609; consideration, *Coleman v. Whisnant*, 258; *Stonestreet v. Oil Co.*, 261; general rules of construction, *Smith v. Paper Co.*, 46; *Jones v. Realty Co.*, 303; *Bank v. Supply Co.*, 416; *Indemnity Co. v. Hood*, 706; time of performance, *Jones v. Realty Co.*, 303; rescission or abandonment by agreement, *Bank v. Supply Co.*, 416; substantial performance, *Bank v. Supply Co.*, 416; waiver of breach, *Bank v. Supply Co.*, 416; competency and relevancy of evidence, *McCorkle v. Beatty*, 338; sufficiency of evidence and nonsuit, *Coleman v. Whisnant*, 258; *Stonestreet v. Oil Co.*, 261; measure of damages for breach of contract in general, *Price v. Goodman*, 223; *Walston v. Whitley & Co.*, 537.

Contributory Negligence—Nonsuit on ground of, *Hobbs v. Drewer*, 146; instructions on issue of contributory negligence, *Hobbs v. Drewer*, 146; evidence *held* sufficient to require submission of issue of contributory negligence, *Phillips v. Nessmith*, 173; *Kennedy v. Smith*, 514; peremptory instruction on issue of contributory negligence *held* error, *Kennedy v. Smith*, 514; but in favor of guest on issue of contributory negligence *held* without error, *Strickland v. Smith*, 517.

Conversion—Of realty into personalty to make assets to pay decedent's debts, *Moore v. Jones*, 149.

Corporations—Service of process on foreign corporation by service of process on Secretary of State, *Harrison v. Corley*, 184; issue of stock in name of purchaser and another as joint tenants *held* not gift *inter vivos*, *Buffaloe v. Barnes*, 313; *Buffaloe v. Barnes*, 780; purchase of own stock by corporation, *Bank v. Supply Co.*, 416.

Corroborating Evidence—See *S. v. Petry*, 78; *S. v. Bennett*, 82; party must request that evidence competent for restrictive purpose be so restricted, *S. v. Walker*, 458; *S. v. Perry*, 530; inconsistency in corroborating evidence does not render it incompetent, *S. v. Walker*, 530.

Costs—Additional cost provided by G. S., 143-166, not compensation for officers but public funds, *Gardner v. Retirement System*, 465; amount and assessment, *Clarke v. Cagle*, 230.

Counties—Action by chairman to recover increased emoluments upon appointment as county manager, *Stansbury v. Guilford County*, 41; constitutional restriction on increase in debt for schools, *Coe v. Surry County*, 125; limitation of tax rate, see Taxation; county budgets, *R. R. v. Duplin County*, 719; purchase of land by county, *Ins. Co. v. Guilford County*, 441; authority to contract, *Ins. Co. v. Guilford County*, 441; ratification of contracts and estoppel, *Ins. Co. v. Guilford County*, 441; validity and attack of contracts, *Ins. Co. v. Guilford County*, 441; rights of parties under *ultra*

vires contract, *Ins. Co. v. Guilford County*, 441.
County Accountant—Tax for salary is for special purpose with special approval of Legislature, *R. R. v. Duplin County*, 719.
County Farm Agent—Tax for salary is for special purpose with special approval of Legislature, *R. R. v. Duplin County*, 719.
County Manager—Action by chairman to recover increased emoluments upon appointment as manager, *Stansbury v. Guilford County*, 42.
Coupons—Statute of limitations runs against bond coupons from date of maturity, *Jennings v. Morehead City*, 606.
Course of Employment—See *Tomlinson v. Sharpe*, 177; *Toler v. Savage*, 208; within meaning of Workmen's Compensation Act, *Rewis v. Ins. Co.*, 325.
Course and Practice of Court—Decree of foreclosure of mortgage entered in tax foreclosure suit is contrary to course and practice of court, *Johnston County v. Ellis*, 268.
Courts—Jurisdiction in general, *In re DeFord*, 189; *Johnston County v. Ellis*, 268; appeals to Superior Court from Municipal Courts, *Starnes v. Tyson*, 395; appellate jurisdiction of Superior Court on appeal from Justice of Peace, *Howell v. Branson*, 264; jurisdiction of State and Federal Courts; conflict of laws, *Ward v. Telephone Co.*, 175; *Harrison v. Corley*, 184; application of laws of other states: conflict of laws, *Price v. Goodman*, 223; removal of causes to Federal, see Removal of Causes; valid warrant or indictment is essential to jurisdiction, *S. v. Morgan*, 414; verification of complaint in suit for alimony without divorce is necessary to give court jurisdiction, *Hodges v. Hodges*, 570; equitable jurisdiction of courts over trust estates, *Trust Co. v. Rasberry*, 586; court will take judicial notice of size and location of municipalities, *S. v. Bowen*, 601; whether taking under eminent domain is for public purpose is question of law for court, *Charlotte v. Heath*, 750; court may allow amendment which does not change nature of action, *James v. James*, 399; remark of court in sustaining objection to further cross-examination *held* not expression of opinion by court, *S. v. Stone*, 97; charge to the effect that killing with deadly weapon was established *held* for error as expression of opinion, *S. v. Ellison*, 628; new trial awarded for remarks of court impeaching credibility of witness and intimating that fact had not been established, *S. v. Stone*, 97; *S. v. Owenby*, 521; trial by court must be by consent of both parties, *Bennett v. Templeton*, 676; power of Superior Court to make findings on appeal from referee, *Ramsey v. Nebel*, 590; court's findings of fact conclusive on appeal, *S. v. Hart*, 200; motion to strike not made in apt time is addressed to discretion of the court, *Brown v. Hall*, 732; demurrer for misjoinder of parties not made in apt time is addressed to discretion, *Western N. C. Conference v. Talley*, 654; court has discretionary power to permit amendment to warrant, *S. v. Grimes*, 523; motion to set aside verdict as against weight of evidence addressed to discretion of court, *Ziglar v. Ziglar*, 102; *Bailey v. McCotter*, 160; *Webb v. Theatre Corp.*, 342; whether new trial should be limited to issue of damages rests in discretion of, *Starnes v. Tyson*, 395; scope of cross-examination to impeach witness is in discretion of, *S. v. Stone*, 97; discretionary ruling not reviewable in absence of abuse, *Ziglar v. Ziglar*, 102; *Bailey v. McCotter*, 160; *Webb v. Theatre Corp.*, 342; *Western N. C. Conference v. Talley*, 654; *Brown v. Hall*, 732; order awarding custody of children in *habeas corpus* enforceable by contempt proceedings notwithstanding order is based on consent of parents, *In re Biggers*, 647; defendant may be held in contempt for failure to pay allowance to wife only if payment is ordered by de-

cree of court, *Stanley v. Stanley*, 130; after appeal Superior Court has no further jurisdiction, *Lawrence v. Lawrence*, 221; *Clark v. Cagle*, 230; while motion to set aside divorce decree is pending it is error for court to strike out widow's dissent from will, *In re Estate of Smith*, 169; judgment on former appeal is *res judicata*, *S. v. Stone*, 97; upon certification of decision of Supreme Court matters therein adjudicated are not before Superior Court, *Cannon v. Cannon*, 634; jurisdiction of Supreme Court on appeal is limited to matters of law or legal inference, *S. v. Thompson*, 651; may not weigh evidence on appeal from refusal to nonsuit, *S. v. Johnson*, 671; acceptance of judgeship of U. S. Zonal Court would vacate office of Judge of Superior Court, *In re Advisory Opinion in re Phillips*, 773.

Covenants—Covenant restricting sale or lease to Negroes, *Vernon v. Realty Co.*, 58; *Phillips v. Wearn*, 290; option and lease are covenants running with land, *Trust Co. v. Frazelle*, 724.

Criminal Law—Introduction of papers taken from defendant does not violate constitutional right, *S. v. Shoup*, 69; upon conviction of illegal transportation, court at later term may order forfeiture of vehicle *nunc pro tunc*, *S. v. Maynor*, 645; enjoining violation of criminal law, *Clinton v. Ross*, 682; intent, *S. v. Petry*, 78; mental capacity in general, *S. v. Matthews*, 639; parties and offenses—principals, *S. v. Gibson*, 194; *S. v. Johnson*, 671; *S. v. Smith*, 738; jurisdiction in general, *S. v. Morgan*, 414; appeals from inferior court to Superior Court, *S. v. Beasley*, 577; plea of *nolo contendere*, *S. v. Ayers*, 579; *S. v. Beasley*, 580; time of entering and necessity for plea of former jeopardy, *S. v. Baldwin*, 295; attachment of jeopardy, *S. v. Lewis*, 249; former jeopardy—mistrials and new trials, *S. v. Locklear*, 410; former jeopardy—prosecutions under void warrants or indictments, *S. v. Johnson*, 266; *S. v. Morgan*, 414; judicial notice, *S. v. Baldwin*, 295; *S. v. Bowen*, 601; evidence of intent and motive, *S. v. King*, 241; evidence and pleadings at former trial or proceedings, *S. v. McNair*, 462; expert and opinion evidence—sanity and mental capacity, *S. v. Matthews*, 639; footprints, *S. v. Walker*, 458; confessions, *S. v. Bennett*, 82; admissions of counsel, *S. v. Ellison*, 628; flight and acts to avoid being traced, *S. v. Shoup*, 69; acts and declarations of co-conspirator, *S. v. Bennett*, 82; clothes and effects, *S. v. Petry*, 78; character evidence of defendant in general, *S. v. Bowen*, 601; competency of evidence of defendant's bad character, *S. v. Robinson*, 95; competency of husband or wife to testify against spouse, *S. v. Setzer*, 216; credibility of witnesses in general, *S. v. Petry*, 78; direct examination of witnesses, *S. v. Beatty*, 765; cross-examination of witnesses, *S. v. Stone*, 97; *S. v. Herring*, 213; competency of evidence to corroborate witness, *S. v. Bennett*, 82; *S. v. Petry*, 78; *S. v. Walker*, 458; evidence competent to impeach or discredit witness, *S. v. Gardner*, 310; *S. v. McNair*, 462; evidence competent for restricted purpose, *S. v. Petry*, 78; *S. v. Walker*, 458; expression of opinion by court during progress of trial, *S. v. Stone*, 97; *S. v. Owenby*, 521; irregularities or misconduct of officers having custody of jury, *S. v. Taylor*, 286; permitting jury to visit exhibits or scene of crime, *S. v. Taylor*, 286; province of court and jury in respect to evidence, *S. v. Gardner*, 310; nonsuit, *S. v. Baldwin*, 295; *S. v. Perry*, 530; *S. v. Johnson*, 671; *S. v. Jackson*, 760; instructions on burden of proof and presumptions, *S. v. Shoup*, 69; *S. v. Petry*, 78; *S. v. Perry*, 530; statement of evidence and explanation of law arising thereon, *S. v. Biggerstaff*, 603; *S. v. Thompson*, 651; expression of opinion on evidence, *S. v. Bullins*, 142; *S. v. Ellison*,

628; *S. v. Benton*, 745; *S. v. McKnight*, 766; charge on credibility of defendant as witness, *S. v. Hightower*, 62; *S. v. Beatty*, 765; statement of contentions, *S. v. Shoup*, 69; *S. v. Biggerstaff*, 603; *S. v. Benton*, 745; requests for instructions, *S. v. Perry*, 530; *S. v. Biggerstaff*, 603; form, sufficiency and effect of verdict, *S. v. Smith*, 738; verdict of guilty of different degree of crime charged, *S. v. Jordan*, 155; *S. v. Locklear*, 410; *S. v. Peterson*, 255; motions in arrest of judgment, *S. v. Johnson*, 266; *S. v. Morgan*, 414; motions for new trial for irregularity or misconduct of or affecting jury, *S. v. Hart*, 200; judgment and sentence—conformity to verdict, *S. v. Peterson*, 255; *S. v. Grimes*, 523; *S. v. Smith*, 738; severity of sentence, *S. v. Mounce*, 159; suspended judgments and executions, *S. v. Jackson*, 66; *S. v. Lewis*, 249; *S. v. Farrar*, 478; nature of costs and disposition of funds, *Gardner v. Retirement System*, 465; nature and grounds of appellate jurisdiction, *S. v. Shoup*, 69; *S. v. Thompson*, 651; right of defendant to appeal, *S. v. Farrar*, 478; *S. v. Beasley*, 577; pauper appeals, *S. v. Harrell*, 743; filing and docketing appeal, *S. v. Presnell*, 160; *S. v. Nelson*, 529; *S. v. Nash*, 608; *S. v. Harrell*, 743; necessary parts of record proper, *S. v. Clough*, 384; form and requisites of transcript, *S. v. Jackson*, 760; matters not appearing of record deemed without error, *S. v. Brown*, 681; conclusiveness and effect of record, *S. v. Setzer*, 216; necessity for, form and requisites of objections and exceptions, *S. v. Herring*, 213; *S. v. Perry*, 530; *S. v. Biggerstaff*, 603; *S. v. Matthews*, 639; necessity for motion to restrict evidence competent for restricted purpose, *S. v. Walker*, 458; *S. v. Perry*, 530; exceptions to charge—form and requisites in general, *S. v. Thomas*, 384; *S. v. Biggerstaff*, 603; *S. v. Beatty*, 765; necessity that misstatement of contentions or evidence brought to trial court's attention, *S. v. McNair*, 462; *S. v. Shoup*, 69; *S. v. Thompson*, 651; *S. v. Benton*, 745; *S. v. McKnight*, 766; necessity, form and requisites of assignments of error, *S. v. Biggerstaff*, 603; necessity of renewing motion to nonsuit at close of all the evidence, *S. v. Perry*, 530; briefs, *S. v. Hightower*, 62; *S. v. Stone*, 97; *S. v. McKnight*, 766; *S. v. Hart*, 200; *S. v. Carroll*, 237; *S. v. Malpass*, 403; *S. v. Biggerstaff*, 603; *S. v. Morgan*, 414; dismissal for failure to prosecute appeal, *S. v. Presnell*, 160; *S. v. Nelson*, 529; *S. v. Nash*, 608; *S. v. Harrell*, 743; matters reviewable, *S. v. Hart*, 200; *S. v. Beatty*, 765; prejudicial and harmless error, *S. v. Bullins*, 142; *S. v. Smith*, 738; *S. v. Hart*, 200; *S. v. Perry*, 530; *S. v. Shoup*, 69; *S. v. Bennett*, 82; *S. v. King*, 241; *S. v. Brown*, 681; *S. v. Taylor*, 286; *S. v. Gardner*, 310; *S. v. Deaton*, 348; *S. v. Ellison*, 628; *S. v. Overcash*, 632; *S. v. Absher*, 656; review of instructions, *S. v. Bennett*, 82; *S. v. Bullins*, 142; review of exceptions to refusal to nonsuit, *S. v. Johnson*, 671; determination and disposition of cause, *S. v. Lewis*, 249; *S. v. Malpass*, 403; *S. v. Morgan*, 414; proceedings in lower court after remand, *S. v. Stone*, 97; *S. v. Peterson*, 770; *S. v. Locklear*, 410; *stare decisis*, *S. v. Setzer*, 216.

Cross-Action—For alimony without divorce or consent judgment based thereon may not be entered on husbands action for divorce, *Ericson v. Ericson*, 474.

Cross-Examination—Scope of cross-examination, *S. v. Stone*, 97; *S. v. Herring*, 213; *McCorkle v. Beatty*, 338; of defendant in regard to pleadings in civil action *held* competent to impeach defendant's testimony, *S. v. McNair*, 462.

Crossings—*Hopkins v. R. R.*, 655.

Damages—In action for failure to send interstate message damages for mental anguish or punitive damages not recoverable, *Ward v. Tel. Co.*, 175; in minor's action for neg-

ligent injury he may not recover for loss of earnings, *Toler v. Savage*, 208; special damages must be pleaded, *Price v. Goodman*, 223; measure of, for breach of contract, see *Price v. Goodman*, 223; for wrongful death, *Rea v. Simowitz*, 379; issues of damages, *Hoke v. Greyhound Corp.*, 332; excessive and inadequate award, *Rea v. Simowitz*, 379.

Damnum Absque Injuria—*Clinton v. Ross*, 682.

Deadly Weapon—Knife, *S. v. Hightower*, 62; "brick" may be deadly weapon as a matter of law, *S. v. Perry*, 530; killing with, raises presumption of malice, *S. v. Robinson*, 95; *S. v. Vaden*, 138; where defendant does not admit that shot inflicted fatal wound, State must prove this fact before it is entitled to presumption of malice, *S. v. Ellison*, 628; State may rely on presumption upon showing intentional killing with deadly weapon on charge of first degree murder, *S. v. Floyd*, 571; premeditation and deliberation not presumed from killing with, *S. v. Stewart*, 299; court need not submit question of guilt of simple assault where all evidence shows assault with deadly weapon, *S. v. Perry*, 530.

Dealer—*Held* not liable on warranty, *Walston v. Whitley & Co.*, 537.

Death—Of debtor does not destroy right to priority of judgment but merely precludes execution, *Moore v. Jones*, 149; death of mother of plaintiff in action in summary ejectment under Federal Rent Control *held* not grounds for dismissal, *Swink v. Horn*, 718; of lessor does not terminate lease or option, *Trust Co. v. Frazelle*, 724; nature, grounds and conditions precedent to actions for wrongful death, *Hoke v. Greyhound Corp.*, 332; time of institution of action, *Harrison v. Carter*, 36; parties, *Harrison v. Carter*, 36; *Hoke v. Greyhound Corp.*, 332; measure of damages for wrongful death, *Rea v. Simowitz*, 379; *Starnes v. Tyson*, 395; distribution of recovery for wrongful death, *In re Badgett*, 92.

Debt—Husband may not be imprisoned for failure to pay judgment for debt due wife under separation agreement not adopted as order of court, *Stanley v. Stanley*, 129.

Decedent—Conversion of realty into personalty to make assets to pay decedent's debts, *Moore v. Jones*, 149; beneficiaries may testify as to transactions with deceased testator on issue of testamentary capacity but not undue influence, *In re Will of Lomax*, 498; maker may not testify as to transactions with deceased payee on defense of nonliability, *In re Will of Lomax*, 498; *Perry v. Trust Co.*, 667.

Declarations—Of deceased owner of adjacent property as to his corner *held* incompetent to establish corner of prior deed to contiguous property, *Belhaven v. Hodges*, 485.

Declaratory Judgment Act—Subject of action, *Trust Co. v. Henderson*, 649.

Dedication—Offer and intent, *Spicer v. Goldsboro*, 557; implied dedication, *Foster v. Atwater*, 472; *Evans v. Horne*, 581; revocation of dedication, *Foster v. Atwater*, 472; *Evans v. Horne*, 581.

Deed of Separation—Must be acknowledged as required by G. S., 52-12, *Pearce v. Pearce*, 307.

Deeds of Trusts—See Mortgages.

Deeds—Competent as circumstance tending to show adverse claim, *Graham v. Spaulding*, 86; corner called for in junior deed not controlling in establishing corner in prior deed, *Belhaven v. Hodges*, 485; ascertainment of boundaries, see Boundaries; undue influence, *Jernigan v. Jernigan*, 204; general rules of construction, *Loftin v. Barber*, 481; estates and interest created, *Turpin v. Jarrett*, 135; rule in *Shelley's case*, *Turpin v. Jarrett*, 135; conditions precedent, *Cox v. Hinshaw*, 700; conditions concurrent and subsequent, *Cox v. Hinshaw*, 700; restrictive covenants, *Vernon v. Realty Co.*, 59; *Phillips v. Wearn*,

290; agreements to support grantor, *Gerringer v. Gerringer*, 105; *Cox v. Hinshaw*, 700.

Default—Failure to move promptly for judgment by, does not work discontinuance, *King v. Rudd*, 156; where scope of inquiry upon default judgment is enlarged upon insistence of defendant he may not complain of result, *Johnson v. Sidbury*, 345.

Defeasible Fee—Conveyance with provision that should grantee die without issue after her death, grantee takes qualified fee defeasible upon death without children or other lineal descendants, *Turpin v. Jarrett*, 135.

Deliberation—See *S. v. Hart*, 200.

Demurrer — Demurrer to pleadings and to evidence are different in purpose and effect, *Coleman v. Whisnant*, 258; to evidence, see Nonsuit; pleadings will be liberally construed upon, *Pearce v. Pearce*, 307; *Ferrell v. Worthington*, 609; causes improperly joined, demurrer does not require dismissal, *Pressley v. Tea Co.*, 518; for misjoinder of parties not made in apt time is addressed to discretion, *Western N. C. Conference v. Talley*, 654.

Dentist—Action against, for malpractice, *Love v. Zimmerman*, 389.

Descent and Distribution—Land descends to heirs subject to liens and debts of deceased, *Moore v. Jones*, 149; *cestui que trust* held to take sister's share upon sister's death by inheritance and not under terms of will, *Welch v. Trust Co.*, 357; approval of family agreement for distribution of trust which preserves trust estate for minors approved, *Redwine v. Clodfelter*, 366; share of heirs and distributees in general, *In re Badgett*, 92; title and rights of heirs in general, *Trust Co. v. Frazelle*, 724; advancements and debts due estate, *Perry v. Trust Co.*, 667.

Directed Verdict—On conflicting evidence is error, *Perry v. Trust Co.*, 667.

Discretion of Court—Scope of cross-examination to impeach witness is in, *S. v. Stone*, 97; motion to set aside verdict as against weight of evidence addressed to discretion of court, *Ziglar v. Ziglar*, 102; *Bailey v. McCotter*, 160; *Webb v. Theatre Corp.*, 342; demurrer for misjoinder of parties not made in apt time is addressed to discretion, *Western N. C. Conference v. Talley*, 654; motion to strike not made in apt time is addressed to discretion of court, *Brown v. Hall*, 732; court has discretionary power to permit amendment to warrant, *S. v. Grimes*, 523; discretionary ruling not reviewable in absence of abuse, *Ziglar v. Ziglar*, 102; *Bailey v. McCotter*, 160; *Webb v. Theatre Corp.*, 342; *Western N. C. Conference v. Talley*, 654; *Brown v. Hall*, 732; *S. v. Beatty*, 765.

Discretionary Powers — Powers of executor *held* personal and discretionary, *Welch v. Trust Co.*, 357.

Dismissal—Of appeal for failure to docket in time, *S. v. Presnell*, 160; appeal will not be dismissed for failure to serve case on appeal, *Lawrence v. Lawrence*, 221; appeal will be dismissed where record proper fails to contain necessary parts, *S. v. Clough*, 384; *Ericson v. Ericson*, 747; *Campbell v. Campbell*, 653; appeal dismissed for failure to prosecute same, *S. v. Nelson*, 529; *S. v. Nash*, 608; death of mother of plaintiff in action in summary ejectment under Federal Rent Control *held* not grounds for dismissal, *Swink v. Horn*, 718.

Dissent from Will—While motion to set aside divorce decree is pending, error for court to strike out widow's dissent from will, *In re Estate of Smith*, 169.

District Courts—Where district court orders all suits arising out of subject matter be stayed, action instituted immediately after claim in district court is dismissed for want of jurisdiction, is not barred by statute of limitation, *Highway Comm. v. Transportation Corp.*, 371.

Divorce—In action for divorce on ground of adultery, plaintiff's motion to set aside verdict on ground it was against weight of evidence, addressed to discretion of court, *Ziglar v. Ziglar*, 102; while motion to set aside divorce decree is pending, it is error for court to strike out widow's dissent from will, *In re Estate of Smith*, 169; grounds for divorce from bed and board, *Pearce v. Pearce*, 307; *Lawrence v. Lawrence*, 624; grounds for divorce—separation, *Welch v. Welch*, 541; adultery—condonation, *Brooks v. Brooks*, 280; recrimination, *Pearce v. Pearce*, 307; consent, *Smith v. Smith*, 544; jurisdiction and venue, *Smith v. Smith*, 506; *Smith v. Smith*, 544; conditions precedent—residence, *Welch v. Welch*, 541; conditions precedent — verification and affidavit, *Hodges v. Hodges*, 570; pleading in actions for absolute divorce, *Brooks v. Brooks*, 280; *Pearce v. Pearce*, 307; pleadings in actions for divorce from bed and board, *Brooks v. Brooks*, 280; *Lawrence v. Lawrence*, 624; *Pearce v. Pearce*, 307; sufficiency of evidence and nonsuit in actions for divorce on ground of separation, *Mason v. Mason*, 740; sufficiency of evidence and nonsuit in actions for divorce from bed and board, *Lawrence v. Lawrence*, 624; alimony in general, *Stanley v. Stanley*, 129; alimony *pendente lite*, *Lawrence v. Lawrence*, 221; *Brooks v. Brooks*, 280; *Welch v. Welch*, 541; *Butler v. Butler*, 594; alimony without divorce, *Blanchard v. Blanchard*, 152; *Brooks v. Brooks*, 280; *Ericson v. Ericson*, 474; alimony upon absolute divorce, *Stanley v. Stanley*, 129; enforcing payment of alimony, *Stanley v. Stanley*, 129; *Lawrence v. Lawrence*, 221.

Docketing—Dismissal of appeal for failure to docket in time, *S. v. Presnell*, 160.

Doctrine of Election—*Lamb v. Lamb*, 662.

"Doing Business"—Service of process on foreign corporation by service on Secretary of State, *Harrison v. Corley*, 184.

Domicile—Temporary work in another state *held* not to affect residence, *Welch v. Welch*, 541.

Double Jeopardy—Repeated investigation by grand jury under identical bills of indictment is not double jeopardy, *S. v. Lewis*, 249.

Drunken Driving—Defined in prosecution for, *S. v. Carroll*, 237; *S. v. Bowen*, 601; *S. v. Biggerstaff*, 603.

Due Process—Service of process on foreign corporation by service on Secretary of State is question of due process determinable by Federal decisions, *Harrison v. Corley*, 184.

Dying Declarations—*S. v. Thompson*, 651.

Easements—Implied dedication from sale of lots with reference to maps, *Foster v. Atwater*, 472; withdrawal from dedication, *ibid.*; vested easement of purchaser of lot cannot be destroyed by declaration of withdrawal from dedication, *Evans v. Horne*, 581; defendants *held* bound by equitable estoppel from obstructing cartway, *Long v. Trantham*, 510; establishment by prescription, *Speight v. Anderson*, 492.

Education—Bequest for benefit of school upheld notwithstanding change of name and location, *Trust Co. v. Board of National Missions*, 546.

Ejectment—Plea of sole seizin in partition proceedings, see *Jernigan v. Jernigan*, 204; nature and scope of summary ejectment, *Swink v. Horn*, 713; summary ejectment for personal occupancy of premises subject to Federal Rent Control, *Swink v. Horn*, 713; termination of tenancy and notice to quit, *Swink v. Horn*, 713; jurisdiction of summary ejectment, *Howell v. Branson*, 264; sufficiency of evidence and nonsuit in summary ejectment, *Swink v. Horn*, 713; appeals to Superior Court in summary ejectment, *Howell v. Branson*, 264; defenses, *Ramsey v. Nebel*, 590.

Election—Under wills, *Lamb v. Lamb*, 662.

Elections—Notice of candidacy, *Ingle v. Board of Elections*, 454.

Electricity—Degree of care required in general, *Deaton v. Elon College*, 433; contributory negligence of persons injured, *Deaton v. Elon College*, 433.

Eleemosynary Corporations—Bequest for benefit of school upheld notwithstanding change of name and location, *Trust Co. v. Board of National Missions*, 546.

Emancipation—Acquiescence of father in purchase of car by son is evidence of, *James v. James*, 399.

Emergency Price Control—Action in ejectment in area subject to Federal Rent Control, *Swink v. Horn*, 713.

Eminent Domain—Nature and extent of power in general, *Charlotte v. Heath*, 750; public purpose, *Charlotte v. Heath*, 750; selection of route or land to be taken, *Charlotte v. Heath*, 750; delegation of power to political subdivisions, *Charlotte v. Heath*, 750.

Employer and Employee—See Master and Servant.

Employers' Liability Act—Distribution of recovery in action under Federal Employers' Liability Act, *In re Badgett*, 92.

Equity—Courts will not enter decree which will divest it of jurisdiction to enforce its provisions, *In re DeFord*, 189; equitable jurisdiction of courts over trust estates, *Trust Co. v. Rasberry*, 586; doctrine of election, *Lamb v. Lamb*, 662; failure to object until defendant had completed house located on plaintiff's land *held* not to estop plaintiff from asserting title, *Ramsey v. Nebel*, 590; defendants *held* bound by equitable estoppel from obstructing cartway, *Long v. Trantham*, 510; nature of equitable rights and remedies in general, *Vernon v. Realty Co.*, 59; he who seeks equity must do equity, *Ins. Co. v. Guilford County*, 441; laches, *Johnston County v. Ellis*, 268.

Escrow—Where deed is placed in escrow, remedy for breach of condition precedent is action to rescind contract of escrow, *Cox v. Hinshaw*, 700.

Estates—Of decedents, see Executors and Administrators; created by will, see Wills; created by deed, see Deeds; law favors early vesting of, *Patterson v. Brandon*, 89; where tenant acquires title of landlord, leasehold estate merges in the fee, *Lofton v. Barber*, 481; nature and grounds of remedy of sale of estates for reinvestment, *Trust Co. v. Rasberry*, 586.

Estate Taxes—Federal and State taxes ordinarily payable out of general funds of estate, *Barnes v. Buffaloe*, 313.

Estoppel—Judgment as bar to subsequent action, *Stansbury v. Guilford County*, 41; when party is estopped by pleading from asserting statute of frauds, *Davis v. Lovick*, 252; nature and essentials of estoppel by record, *Welch v. Welch*, 541; estoppel by silence, *Ramsey v. Nebel*, 590; acceptance of benefits, *Bank v. Supply Co.*, 616; estoppel by conduct, *Long v. Trantham*, 510.

Evidence—Order of proof in caveat proceedings, *In re Will of Lomax*, 498; memorandum *held* sufficiently definite to admit parol evidence to identify land, *Searcy v. Logan*, 562; competency to prove contract, *McCorkle v. Beatty*, 338; mortuary table is evidence of life expectancy, *Starnes v. Tyson*, 395; competency of evidence that other patrons walked on foyer without slipping, *quære*, *Webb v. Theatre Corp.*, 342; testimony as to footprints *held* competent, *S. v. Walker*, 458; lay witness may testify as to defendant's ability to distinguish right from wrong, *S. v. Matthews*, 639; inconsistency in corroborating evidence does not render it incompetent, *S. v. Walker*, 458; party must request that evidence competent for restrictive purpose be so restricted, *S. v. Walker*, 458; *S. v. Perry*, 530; objection to evidence is necessary to present

competency of evidence for review, *S. v. Matthews*, 639; scintilla rule applies to issues of negligence and contributory negligence, *Phillips v. Nessmith*, 173; defendant's evidence which tends to impeach or contradict plaintiff's evidence will not be considered on nonsuit. *Deaton v. Elon College*, 433; evidence will be considered in light most favorable to plaintiff, *Toler v. Savage*, 208; *Highway Comm. v. Transportation Corp.*, 371; upon nonsuit plaintiff is entitled to every fact and inference of fact deducible from evidence, *Love v. Zimmerman*, 389; upon review of refusal to nonsuit Supreme Court will not consider evidence which record fails to show was introduced, *Wallace v. Longest*, 161; Supreme Court cannot pass on weight of evidence. *S. v. Shoup*, 69; record must show what testimony would have been in order for exception to exclusion to be considered, *McCorkle v. Beatty*, 338; directed verdict on conflicting evidence is error, *Perry v. Trust Co.*, 667; motion to set aside verdict as against weight of evidence addressed to discretion of court. *Ziglar v. Ziglar*, 102; *Bailey v. McCotter*, 169; *Webb v. Theatre Corp.*, 342; credibility and weight is for jury, sufficiency is for court, *S. v. Gardner*, 310; evidence of guilt of manslaughter in attempting abortion *held* sufficient, *ibid.*; evidence of premeditation and deliberation *held* sufficient, *S. v. Stewart*, 299; of larceny *held* sufficient, *S. v. McNair*, 462; evidence of guilt of rape *held* sufficient, *S. v. Herring*, 213; *S. v. Johnson*, 671; *S. v. Walker*, 458; evidence *held* insufficient in prosecution for possession of liquor for sale, *S. v. Peterson*, 255; *held* to raise issue of contributory negligence for jury, *Phillips v. Nessmith*, 173; *Kennedy v. Smith*, 514; new trial awarded for remarks of court impeaching credibility of witness and intimating that fact had not been established, *S. v. Stone*, 97; *S. v. Owenby*, 521; charge *held* for error as expression of opinion on evidence, *James v. James*, 399; *S. v. Benton*, 745; harmless and prejudicial error in admission or exclusion of evidence, *Graham v. Spaulding*, 86; *Ziglar v. Ziglar*, 102; *S. v. King*, 241; *Webb v. Theatre Corp.*, 342; *Deaton v. Elon College*, 433; *Belhaven v. Hodges*, 485; *Speight v. Anderson*, 492; *In re Will of Lomax*, 498; *S. v. Perry*, 530; *Tyndall v. Hines Co.*, 620; *S. v. Brown*, 681; *S. v. Smith*, 738; judicial notice of official acts and political subdivisions of this State, *S. v. Bowen*, 601; judicial notice of facts within common knowledge, *S. v. Baldwin*, 295; clear, strong and convincing proof, *McCorkle v. Beatty*, 338; credibility of witnesses in general, *S. v. Petry*, 78; *Graham v. Spaulding*, 86; evidence competent to corroborate witness, *Brown v. Loftis*, 762; direct examination—broad questions, *McCorkle v. Beatty*, 338; cross-examination of witnesses, *McCorkle v. Beatty*, 338; maps and plats, *Searcy v. Logan*, 562; transactions or communications with decedent, *In re Will of Lomax*, 498; *Perry v. Trust Co.*, 667; documentary evidence—statutes, laws and ordinances of this State, *Toler v. Savage*, 208; parol or extrinsic evidence affecting writings in general, *Coleman v. Whisnant*, 258; *Ins. Co. v. Wells*, 574; *Bell v. Chadwick*, 598; *Perry v. Trust Co.*, 667; admissions by agents or representatives, *McCorkle v. Beatty*, 338; admissions in pleadings, *Bell v. Chadwick*, 598; expert and opinion evidence in general, *Tyndall v. Hines Co.*, 620; subjects of opinion evidence by non-experts, *Tyndall v. Hines Co.*, 620.

Exceptions—Not set out in brief deemed abandoned, *S. v. Stone*, 97; *Smith v. Mariakakis*, 100; *S. v. Hart*, 200; *Clark v. Cagle*, 230; *S. v. Malpass*, 403; *S. v. McKnight*, 766; necessity of, to preserve ground of review upon appeal from referee, *Clark v. Cagle*, 230; assignments of error must be based upon

exceptions, *S. v. Herring*, 213; *S. v. Perry*, 530; *S. v. Biggerstaff*, 603; exception to signing judgment, *Lee v. Board of Adjustment*, 107; *King v. Rudd*, 156; *Howell v. Branson*, 264; *Smith v. Smith*, 506; *Swink v. Horn*, 713; *In re Collins*, 412; broadside exception, *S. v. Thomas*, 384; *S. v. Biggerstaff*, 603; *Brown v. Loftis*, 762; *S. v. Beatty*, 765; *Ramsey v. Nebel*, 590; exception to charge *held* not aptly entered, *Searcy v. Logan*, 562; time within which exceptions to receiver's report must be filed, *Benson v. Roberson*, 103; inadvertence in statement of contentions or evidence must be called to court's attention, *S. v. McNair*, 462.

Excessive Damages—Court's offer to reduce verdict if agreed to, to end litigation, not a finding that verdict was excessive, *Rea v. Simowitz*, 379.

Excusable Neglect—In order to set aside involuntary nonsuit for excusable neglect plaintiff must show meritorious cause, *Craver v. Spaugh*, 450; evidence *held* insufficient to establish excusable neglect, *Whitaker v. Raines*, 526.

Execution—Judgment may be suspended on condition only where defendant assents, *S. v. Jackson*, 66; death of debtor does not destroy right to priority but merely precludes execution, *Moore v. Jones*, 149; where homestead is allotted subject to specified judgment, judgment creditor may proceed by levy of execution, *Sample v. Jackson*, 408.

Executors and Administrators — Whether executor should be allowed to be made party and file answer after expiration of time rests in discretion of court, *King v. Rudd*, 156; while motion to set aside divorce decree is pending it is error for court to strike out widow's dissent from will, *In re Estate of Smith*, 169; issue of stock in name of purchaser and another as joint tenants *held* not gift *causa mortis*, *Barnes v. Buffaloe*, 313; Federal and State taxes ordinarily payable out of general funds of estate, *Barnes v. Buffaloe*, 313; administration of testamentary trust belongs in first instance to trustees, *Cannon v. Cannon*, 634; collection of debts due estate by heir, *Perry v. Trust Co.*, 667; rents accruing after death of lessor should be paid to heir and not personal representative, *Trust Co. v. Frazelle*, 724; removal and revocation of letters, *Harrison v. Carter*, 36; appointment of successors after removal, *Harrison v. Carter*, 36; assets of estates in general, *Hope v. Greyhound Corp.*, 332; title and right to possession of assets, *Buffaloe v. Barnes*, 313; actions to collect assets, *Harrison v. Carter*, 36; control and management of estate in general, *Welch v. Trust Co.*, 357; nature and grounds of remedy to sell land to make assets, *Moore v. Jones*, 149; proceeds of sale, *Moore v. Jones*, 149; claims against estate—contracts and undertakings of decedent, *Buffaloe v. Barnes*, 313; claims against estate—taxes, *Buffaloe v. Barnes*, 313; priorities, *Moore v. Jones*, 149; actions on claims—limitations, *Craver v. Spaugh*, 450; distribution of estate under family agreements, *Redwine v. Clodfelter*, 366.

Exhibits—Permitting jury to leave courtroom to view exhibit *held* proper, *S. v. Taylor*, 286.

Ex Mero Motu—On conviction upon void warrant Supreme Court will arrest judgment *ex mero motu*, *S. v. Morgan*, 414.

Expectancy of Life—Determination of life expectancy of child under ten, *Rea v. Simowitz*, 379.

Expert Testimony—As to speed of vehicle based upon tire marks incompetent, *Tyndall v. Hines Co.*, 620.

Expression of Opinion—By court in charge, *S. v. Bullins*, 142; *S. v. Ellison*, 628; *S. v. Benton*, 745; *James v. James*, 399; *S. v. Stone*, 97; *S. v. Owenby*, 521.

Facts Agreed—Are binding on court, *Airport Authority v. Johnson*, 1; *Buffaloe v. Barnes*, 780.

Facts, Findings of—Of Industrial Commission are conclusive, *Smith v. Paper Co.*, 47; *Rewis v. Ins. Co.*, 325; referee's findings supported by evidence are conclusive on appeal, *Clark v. Cagle*, 230; power of Superior Court to make findings on appeal for referee, *Ramsey v. Nebel*, 590; court's findings of fact conclusive on appeal, *S. v. Hart*, 200; *Swink v. Horn*, 713; findings that confession is voluntary conclusive when supported by evidence, *S. v. Bennett*, 82; findings based upon erroneous placing of burden of proof present questions of law or legal inferences which are reviewable, *Lindsay v. Brawley*, 468; the Supreme Court may review a conclusion of law notwithstanding it is denominated by the trial court a finding of fact, *Charlotte v. Heath*, 750.

Family Agreements — Approval of family agreement for distribution of trust which preserves trust estate for minors, approved, *Redwine v. Clodfelter*, 366.

Farm Agent—Tax for salaries is for special purpose with special approval of Legislature, *R. R. v. Duplin County*, 719.

Father—Is entitled to son's earnings during minority, *Toler v. Savage*, 208.

Federal Courts—In action on interstate message Federal decisions apply, *Ward v. Tel. Co.*, 175; service of process on foreign corporation by service on Secretary of State is question of due process determinable by Federal decisions, *Harrison v. Corley*, 184; where district court orders all suits arising out of subject matter stayed, action instituted immediately after claim in district court is dismissed for want of jurisdiction, is not barred by statute of limitation, *Highway Comm. v. Transportation Corp.*, 371; removal of causes, see Removal of Causes.

Federal Employers' Liability Act—Distribution of recovery in action under, *In re Badgett*, 92.

Federal Estate Taxes—Federal and State taxes are ordinarily payable out of general funds of estate, *Barnes v. Buffaloe*, 313.

Federal Rent Control—Action in ejectment in area subject to Federal Rent Control, *Swink v. Horn*, 713.

Fee—Conveyance with provision that should grantee die without issue after her death, grantee takes qualified fee defeasible upon death without children or other lineal descendants, *Turpin v. Jarrett*, 135.

Felony—Where evidence sustains conviction only for misdemeanor, judgment imposing sentence for felony must be remanded, *S. v. Malpass*, 403.

Female—Use of phrase "statutory rape" in prosecution under G. S., 14-26, in charge *held* not prejudicial, *S. v. Bullins*, 142; in prosecution under G. S., 110-39, charge that crime is encouraging minor 'in moral delinquency" *held* for error, *S. v. Bullins*, 142; sentence for assault by man or boy upon, *S. v. Jackson*, 66; warrant charging assault on female will not support sentence as for general misdemeanor though amended after verdict to charge defendant was male over eighteen, *S. v. Grimes*, 523.

Fidelity Bond—Action on bank cashier's fidelity bond, *Indemnity Co. v. Hood*, 706.

Findings of Facts—See Facts, Findings of.

Fire—Negligence of defendant's driver setting fire to plaintiff's truck *held* not in scope of employment, *Tomlinson v. Sharpe*, 177; *res ipsa loquitur* does not apply upon showing of burning of barn while in possession of tenant, *Rountree v. Thompson*, 553.

First Degree Murder—See Homicide.

Fiscal Year—See *Coe v. Surry County*, 125.

Flight—As implied admission of guilt, *S. v. Shoup*, 69.

Footprints—Are competent, *S. v. Walker*, 458.

Forcible Trespass—See *S. v. Gibson*, 194.

"Forcibly"—Must be alleged in indictment for rape; "ravish" alone being insufficient, *S. v. Johnson*, 266; indictment *held* sufficient, *S. v. Herring*, 213; force as an element of rape may be either actual or constructive, *S. v. Johnson*, 671.

Foreclosure—Of tax lien by tax collector, who had accepted bad checks in payment of taxes, *Miller v. McConnell*, 28; of mortgages, see Mortgages.

Foreseeability — See *Harrington v. Taylor*, 769.

Forfeiture—Devisee *held* to take vested remainder and proviso that she should look after testator's wife *held* not to work forfeiture, *Patterson v. Brandon*, 89.

Forma Pauperis—Time for filing affidavit, *S. v. Harrell*, 743.

Former Jeopardy—Repeated investigation by grand jury under identical bills of indictment is not double jeopardy, *S. v. Lewis*, 249; prosecution under void warrant is not jeopardy, *S. v. Johnson*, 266; contention that voluntary nonsuit on one count established innocence under another count must be presented by plea of former jeopardy and not by nonsuit, *S. v. Baldwin*, 295; upon new trial upon conviction of second degree burglary, defendant may be tried for first degree burglary under original indictment, *S. v. Locklear*, 410.

Fraud—As basis for forfeiture of insurance policy, see Insurance: damage, *Ins. Co. v. Guilford County*, 441: legal fraud, *Ins. Co. v. Guilford County*, 441.

Frauds, Statute of—Purpose and operation in general, *Davis v. Lovick*, 252; sufficiency of writing, *Searcy v. Logan*, 562: *Harvey v. Linker*, 711; pleading of statute, *Harvey v. Linker*, 711: estoppel and waiver of defense, *Davis v. Lovick*, 252; contracts to convey realty, *Harvey v. Linker*, 711; leases, *Wright v. Allred*, 113; *Davis v. Lovick*, 252.

Frivolous Appeals—See *Stephenson v. Watson*, 742.

General Assembly—May create *quasi*-municipal corporations to operate airport, *Airport Authority v. Johnson*, 1; legislative power over municipalities, *Charlotte v. Heath*, 750.

General Reputation—Defendant *held* to live in "community" for purpose of testimony as to general reputation, *S. v. Bowen*, 601.

General Verdict—Single sound count will support general verdict of guilty and judgment thereon, *S. v. Smith*, 738.

Gifts—Nature and essentials of gifts *inter vivos*, *Buffaloe v. Barnes*, 313; *James v. James*, 399; *Buffaloe v. Barnes*, 780; nature and essentials of gifts *causa mortis*, *Buffaloe v. Barnes*, 313.

Grand Jury—Nature and functions of grand jury in general, *S. v. Lewis*, 249.

Guaranty—Action on bank cashier's fidelity bond, *Indemnity Co. v. Hood*, 706.

Guardian ad Litem—Cannot consent to judgment without consent of court, *Johnston County v. Ellis*, 268; of insane person must answer complaint in suit for divorce, *Smith v. Smith*, 544.

Guard Rail—Negligence of municipality in failure to maintain guard rails along bridge constituting part of street, *Hunt v. High Point*, 74.

Guests—Peremptory instructions in favor of guest on issue of contributory negligence *held* without error, *Strickland v. Smith*, 517; evidence of concurring negligence *held* sufficient, *Hoke v. Greyhound Corp.*, 692.

Habeas Corpus—*Habeas corpus* to obtain custody of minor children, *In re Biggers*, 647; enforcement of decree, *In re Biggers*, 647.

Hand Rails—Negligence of municipality in failure to maintain guard rails along bridge constituting part of street, *Hunt v. High Point*, 74.

Harmless and Prejudicial Error—Error, if any, relating to inappropriate

issue, harmless, *Miller v. McConnell*, 28; error relating to issue not affecting right to recover, harmless, *Mason v. Mason*, 740; defendant must make it appear that alleged error was prejudicial, *S. v. Shoup*, 69; *S. v. Hart*, 200; *S. v. Perry*, 530; *S. v. Smith*, 739; charge *held* without prejudicial error when read contextually, *S. v. Bennett*, 82; *S. v. Bullins*, 142; in admission or exclusion of evidence, *Graham v. Spaulding*, 86; *Ziglar v. Ziglar*, 102; *S. v. King*, 241; *Webb v. Theatre Corp.*, 342; *Deaton v. Elon College*, 433; *Belhaven v. Hodges*, 485; *Speight v. Anderson*, 492; *In re Will of Lomax*, 498; *S. v. Perry*, 530; *Tyndall v. Hines Co.*, 620; *S. v. Brown*, 681; charge containing correct and incorrect instruction upon material point *must be held* for prejudicial error, *S. v. Overcash*, 632.

Heirs—When used as *descriptio personarum* and "issue" connotes children and grandchildren, *Turpin v. Jarrett*, 135; bequest or devise to heirs or children requires division per capita, *Wooten v. Outlaw*, 245; respective liability of estate and heirs for repairs to realty, *Barnes v. Buffaloe*, 313; *cestui que trust held* to take sister's share upon sister's death by inheritance and not under terms of will, *Welch v. Trust Co.*, 357; rents accruing after death of lessor should be paid to heir and not personal representative, *Trust Co. v. Frazelle*, 724; distribution of recovery in action under Federal Employers' Liability Act, *In re Badgett*, 92.

He Who Seeks Equity Must Do Equity—See *Ins. Co. v. Guilford County*, 441.

Highway Patrolman—Not competent to give opinion as to speed of vehicle based upon tire marks, *Tyndall v. Hines Co.*, 620.

Highways—Nature and establishment of neighborhood roads, *Speight v. Anderson*, 491; law of the road, see Automobiles.

Hit and Run Driving—*S. v. Brown*, 681.

Homestead—Appraisal and allotment of homestead, *Sample v. Jackson*, 408.

Homicide — Definition of "deadly weapon," *S. v. Hightower*, 62; *S. v. Perry*, 530; parties and offenses, *S. v. Vaden*, 138; premeditation and deliberation, *S. v. Hart*, 200; *S. v. Stewart*, 299; murder in perpetration of robbery, *S. v. Bennett*, 82; murder in perpetration of rape, *S. v. King*, 241; voluntary manslaughter, *S. v. Hightower*, 62; self-defense, *S. v. Vaden*, 138; *S. v. Taylor*, 286; *S. v. Absher*, 656; presumptions and burden of proof, *S. v. Taylor*, 286; *S. v. Stewart*, 299; *S. v. Floyd*, 571; *S. v. Ellison*, 628; relevancy and competency of evidence in general, *S. v. King*, 241; dying declarations, *S. v. Thompson*, 651; admissions, *S. v. Ellison*, 628; evidence of motive and malice, *S. v. King*, 241; evidence of premeditation and deliberation, *S. v. Stewart*, 299; sufficiency of evidence and nonsuit, *S. v. Bennett*, 82; *S. v. Robinson*, 95; *S. v. Vaden*, 138; *S. v. Hart*, 200; *S. v. Stewart*, 299; *S. v. Gardner*, 310; form and sufficiency of instructions in general, *S. v. Hightower*, 62; instructions on presumptions and burden of proof, *S. v. Ellison*, 628; *S. v. Absher*, 656; on murder in first degree, *S. v. Hightower*, 62; *S. v. Deaton*, 348; on manslaughter, *S. v. Thompson*, 651; on defenses, *S. v. Hightower*, 62; *S. v. Taylor*, 286; *S. v. Deaton*, 348; *S. v. Absher*, 656; form and sufficiency of issues and instructions on less degrees of crime, *S. v. Matthews*, 639.

House Breaking—Possession of implements of, *S. v. Baldwin*, 295.

Husband and Wife—Divorce, see Divorce; requisites and validity of deeds of separation, *Pearce v. Pearce*, 307; *habeas corpus* to determine custody of children in contest between husband and wife, *In re Biggers*, 647; husband may not be imprisoned for failure to pay judgment for debt due wife under separation agreement not adopted as order of court, *Stanley v. Stanley*,

129; separation agreement does not preclude allowance of alimony *pendente lite*, *Butler v. Butler*, 594; while motion to set aside divorce decree is pending, it is error for court to strike out widow's dissent from will, *In re Estate of Smith*, 169; competency of wife to testify against husband, *S. v. Setzer*, 216; prosecution for bigamy, *S. v. Setzer*, 216; person hurt in intervening in fight between husband and wife not entitled to recovery on issue of negligence, *Harrington v. Taylor*, 769.

Id Certum Est Quod Certum Reddi Potest—See *Crotts v. Thomas*, 385.

Illegitimate Children—Indictment for failure to support illegitimate child must allege willfulness, *S. v. Morgan*, 414.

Immediate—Defined, *Swink v. Horn*, 713.

Implied Dedication—Implied dedication from sale of lots with reference to maps, *Foster v. Atwater*, 472; withdrawal from dedication, *ibid.*, *Evans v. Horne*, 581.

Imprisonment—Of husband for failure to pay judgment for debt due wife under separation agreement not adopted as order of court, *Stanley v. Stanley*, 129.

Improvements—See Betterments.

Inclusio Unius Est Exclusio Alterius —*Clinton v. Ross*, 682.

Incorporeal Right—Restrictive covenants creates, *Vernon v. Realty Co.*, 58.

Incrimination—Introduction of papers taken from defendant does not violate constitutional right, *S. v. Shoup*, 69.

Indemnity Bond—Action on bank cashier's fidelity bond, *Indemnity Co. v. Hood*, 706.

Independent Contractor—Pilot is independent contractor but ship owner may nevertheless be liable for its own negligence in failing to warn pilot of peculiarity of vessel, *Highway Comm. v. Transportation Corp.*, 371; contractee is under duty to warn of latent danger but independent contractor was guilty of want of due care for own safety barring recovery, *Deaton v. Elon College*, 433; liability of contractor for injury to third person, *Price v. Cotton Co.*, 758; finding of Industrial Commission that deceased was employee and not independent contractor *held* supported by evidence, *Smith v. Paper Co.*, 47.

Indictment and Warrant—Charge of crime, *S. v. Morgan*, 414; *S. v. Owenby*, 521; *S. v. Benton*, 745; right to and scope of amendment, *S. v. Grimes*, 523; sufficiency of indictment to support conviction of less degree of crime charged, *S. v. Locklear*, 410; for rape *held* sufficient, *S. v. Herring*, 213; for rape *held* fatally defective, *S. v. Johnson*, 266; repeated investigation by grand jury under identical bills of indictment is not double jeopardy, *S. v. Lewis*, 249; valid warrant or indictment is essential to jurisdiction, *S. v. Morgan*, 414.

Indigent Aged—Tax to support is for special purpose with special approval of Legislature, *R. R. v. Duplin County*, 719.

Industrial Commission—See Master and Servant.

Infants—Kidnapping of, *S. v. Witherington*, 211; determination of life expectancy of child under ten, *Rea v. Simowitz*, 379; father's right to earnings of child during minority, *Toler v. Savage*, 208; *James v. James*, 399; acquiescence of father in purchase of car by son is evidence of emancipation, *James v. James*, 399; indictment for failure to support illegitimate child must allege willfulness, *S. v. Morgan*, 414; permitting one under legal age to drive without license is negligence but must be proximate cause to warrant recovery, *Hoke v. Greyhound Corp.*, 692; damages in action by minor for negligent injury, *Toler v. Savage*, 208; duties, liability and authority of guardians *ad litem*, *Johnston County v. Ellis*, 268; conduct causing child to be adjudged a delinquent, *S. v. Bullins*, 142.

Injunctions—Taxpayer not landowner may not enjoin closing of street,

Shaw v. Tobacco Co., 477; inadequacy of legal remedy, *Clinton v. Ross*, 682; irreparable injury, *Clinton v. Ross*, 682; subjects of injunctive relief—nuisances, *Clinton v. Ross*, 682; ordinances, crimes and misdemeanors, *Lanier v. Warsaw*, 637; *Clinton v. Ross*, 682; continuance, modification and dissolution of temporary orders, *Kass v. Hedgpeth*, 405; *Spicer v. Goldsboro*, 557.

Innocence—Court is not required to charge on presumption of innocence and defendant must submit request if he desires same, *S. v. Perry*, 530.

Inquiry—Where scope of inquiry upon default judgment is enlarged upon insistence of defendant he may not complain of result, *Johnson v. Sidbury*, 345.

In Rem—Foreclosure of tax lien is *in rem*, *Miller v. McConnell*, 28; caveat proceedings are *in rem*, *In re Will of Lomax*, 498.

Insane Persons—Service of process, *Smith v. Smith*, 544; representation of incompetent, *Smith v. Smith*, 544.

Insanity—Lay witness may testify as to defendant's ability to distinguish right from wrong, *S. v. Matthews*, 639; ability to distinguish right from wrong is test of mental responsibility, *S. v. Matthews*, 639.

Instructions—In homicide prosecutions, see Homicide; charge on duty to retreat *held* presented on evidence and was proper, *S. v. Taylor*, 286; evidence *held* not to require instruction on question of self-defense, *S. v. Jackson*, 760; in prosecution for drunken driving, *S. v. Carroll*, 237; *S. v. Bowen*, 601; *S. v. Biggerstaff*, 603; in prosecution in assault with intent to commit rape, *S. v. Overcash*, 632; in prosecution for assault on female, *S. v. Herring*, 213; charge on credibility of defendant's testimony, *S. v. Hightower*, 62; defining kidnapping *held error*, *S. v. Witherington*, 211; charge on sufficiency of circumstantial evidence to convict, *S. v. Shoup*, 69; charge on burden of proof *held* without error, *S. v. Petry*, 78; failure to instruct as to burden of proof on issue is error, *Crain v. Hutchins*, 642; charge containing correct and incorrect instruction on burden of proof is reversible, *S. v. Absher*, 656; charge containing correct and incorrect instruction upon material point *must be held* for prejudicial error, *S. v. Overcash*, 632; delineating competent and incompetent testimony *held* too general, *In re Will of Lomax*, 498; recapitulation of all the evidence is not required, *S. v. Thompson*, 651; court is not required in recapitulating evidence to again warn jury to take its recollection of evidence, *S. v. Biggerstaff*, 603; statement of evidence in form of contentions *held* without error, *S. v. Thompson*, 651; failure to charge on *respondeat superior* not error where defendant admits and case is tried upon theory of master and servant, *Webb v. Theatre Corp.*, 342; party having burden of proof is not entitled to peremptory instructions upon conflicting evidence, *White v. Ins. Co.*, 119; peremptory instruction on issue of contributory negligence *held* error, *Kennedy v. Smith*, 514; but in favor of guest on issue of contributory negligence *held* without error, *Strickland v. Smith*, 517; on issue of contributory negligence, *Hobbs v. Drewer*, 146; on negligence in permitting person under legal driving age to operate automobile *held* error, *Hoke v. Greyhound Corp.*, 692; expression of opinion by court in charge, *S. v. Bullins*, 142; *S. v. Ellison*, 628; *S. v. Benton*, 745; *James v. James*, 399; court need not submit question of guilt of simple assault where all evidence shows assault with deadly weapon, *S. v. Perry*, 530; court is not required to charge on presumption of innocence and defendant must submit request if he desires same, *S. v. Perry*, 530; party desiring more elaborate statement of contentions must make request therefor, *S. v. Biggerstaff*, 603; inadvertence in statement of contentions or evidence must be called to

court's attention, *S. v. McNair*, 462; misstatement of admissions which affect burden of proof *held* error, *S. v. Ellison*, 628; exceptions to manner of statement of contentions is without merit, *S. v. Biggerstaff*, 603; charge *held* without prejudicial error when read contextually, *S. v. Bennett*, 82; *S. v. Bullins*, 142; broadside exceptions, *S. v. Thomas*, 384; *S. v. Biggerstaff*, 603; *Brown v. Loftis*, 762; *S. v. Beatty*, 765; exception to charge *held* not aptly entered, *Searcy v. Logan*, 562; not brought forward in record deemed correct, *S. v. Brown*, 681.

Insurance—Proceeds of life policy taken out by corporation on officer-stockholder *held* trust fund for purchase of his stock for estate under agreement, *Bank v. Supply Co.*, 416; bank cashier's fidelity bond, *Indemnity Co. v. Hood*, 706; waiver of provisions by insurer, *Ins. Co. v. Wells*, 574; *Hicks v. Ins. Co.*, 614; misrepresentations as to existence of other insurance, *Hicks v. Ins. Co.*, 614; knowledge and waiver by insurer, *Hicks v. Ins. Co.*, 614; construction and operation of disability clauses and sufficiency of evidence of disability, *Ireland v. Ins. Co.*, 349; actions on life policies, *Hicks v. Ins. Co.*, 614; construction of liability policies as to risks covered, *Ins. Co. v. Wells*, 574; actions on liability and collision policies, *White v. Ins. Co.*, 119; *Ins. Co. v. Wells*, 574.

Intent—Ordinarily intent must be proved by circumstantial evidence, *S. v. Petry*, 78; of parties to contract, *Bank v. Supply Co.*, 416; of parties to deed controlling in construction, *Lofton v. Barber*, 481; is controlling in construction of wills, *Trust Co. v. Board of National Missions*, 546; no personal intent required for conviction of possession of burglary tools without lawful excuse, *S. v. Baldwin*, 295.

Interest—Accrual of right of action on bond coupons, *Jennings v. Morehead City*, 606; time and computation, *Hood v. Smith*, 573.

Intersection—Right of way at, *Kennedy v. Smith*, 514.

Interstate Commerce—In action on interstate message Federal decisions apply, *Ward v. Tel. Co.*, 175; evidence *held* sufficient in action for damages to truck while being transported under own power by carrier, *Barnard v. Sober, Inc.*, 392.

Inter Vivos—Issue of stock in name of purchaser and another as joint tenants *held* not gift *inter vivos*, *Buffaloe v. Barnes*, 313; *Buffaloe v. Barnes*, 780.

Intoxicating Liquor—Forfeitures, *S. v. Maynor*, 645; presumptions and burden of proof, *S. v. Peterson*, 255; sufficiency of evidence and nonsuit, *S. v. Peterson*, 255; *S. v. Smith*, 738; verdict and judgment, *S. v. Peterson*, 255; *S. v. Smith*, 738.

Intoxication—Defined in prosecution for drunken driving, *S. v. Carroll*, 237; *S. v. Bowen*, 601; *S. v. Biggerstaff*, 603; as defense to first degree murder, *S. v. Absher*, 656.

Irrelevant and Redundant Matter—Motions to strike, *Brown v. Hall*, 732.

"Issue"—Connotes children and grandchildren, *Turpin v. Jarrett*, 135.

Issues—Sufficiency of, *Miller v. McConnell*, 28; issue as to knowledge of soliciting agent *held* proper in action on life policy, *Hicks v. Ins. Co.*, 614; pleadings *held* to raise issue of trespass, *Speight v. Anderson*, 492; evidence *held* sufficient to require submission of issue of contributory negligence, *Phillips v. Nessmith*, 174; *Kennedy v. Smith*, 514; where no issues of fact are raised continuance of restraining order is error, *Spicer v. Goldsboro*, 557; upon plea of sole seizin in partition, *Jernigan v. Jernigan*, 204; where verdict on first issue determines right of parties, submission of second issue is improvident and verdict thereon will be disregarded, *Ins. Co. v. Wells*, 574.

Jeopardy—Repeated investigation by grand jury under identical bills of indictment is not double jeopardy,

S. v. Lewis, 249; prosecution under void warrant is not jeopardy, *S. v. Johnson*, 266; contention that voluntary nonsuit on one count established innocence under another count must be presented by plea of former jeopardy and not by nonsuit, *S. v. Baldwin*, 295; upon new trial upon conviction of second degree burglary, defendant may be tried for first degree burglary under original indictment, *S. v. Locklear*, 410.

Joinder of Actions—Causes *held* improperly joined but demurrer did not require dismissal, *Pressley v. Tea Co.*, 518.

Joinder of Parties—Where action for wrongful death is instituted within time allowed third successive representative may be made party thereto and maintain action, *Harrison v. Carter*, 36.

Joint Tenants—Issue of stock in name of purchaser and another as joint tenants *held* not gift *inter vivos*, *Barnes v. Buffaloe*, 313.

Judges—Order of clerk permitting executor to be made party without notice is subject to approval of judge, *King v. Rudd*, 156; court has discretionary power to permit amendment to warrant, *S. v. Grimes*, 523; judge is not subject to supervision in settlement of case, *Lindsay v. Brawley*, 468; remark of court in sustaining objection to further cross-examination *held* not expression of opinion by court, *S. v. Stone*, 97; expression of opinion by judge in charge, *S. v. Stone*, 97; *S. v. Owenby*, 521; *S. v. Benton*, 745; *S. v. Bullins*, 142; *S. v. Ellison*, 628; *James v. James*, 399; acceptance of judgship of U. S. Zonal Court would vacate office of Judge of Superior Court, *In re Advisory Opinion in re Phillips*, 773.

Judgments—For foreclosure of tax lien is *in rem*, *Miller v. McConnell*, 28; where scope of inquiry upon default judgment is enlarged upon insistence of defendant he may not complain of result, *Johnson v. Sidbury*, 345; where homestead is allotted subject to specified judgment, judgment creditor can proceed by levy of execution, *Sample v. Jackson*, 408; order awarding custody of children in *habeas corpus* enforceable by contempt proceedings notwithstanding order is based on consent of parents, *In re Biggers*, 647; cross-action for alimony without divorce or consent judgment based thereon may not be entered on husband's action for divorce, *Ericson v. Ericson*, 474; motion for judgment on pleadings admits allegations, *Ingle v. Board of Elections*, 454; approval of family agreement for distribution of trust which preserves trust estate for minors, approved, *Redwine v. Clodfelter*, 366; admissions and verdict *held* sufficient to support judgment for recovery on life policy, *Hicks v. Ins. Co.*, 614; exception to judgment or signing of judgment, *Lee v. Board of Adjustment*, 107; *King v. Rudd*, 156; *Howell v. Branson*, 264; *Smith v. Smith*, 506; *Swink v. Horn*, 713; *In re Collins*, 412; single sound count will support general verdict of guilty and judgment thereon, *S. v. Smith*, 738; upon conviction of illegal transportation, court at later term may order forfeiture of vehicle *nunc pro tunc*, *S. v. Maynor*, 645; punishment for simple assault upon female in discretion of court, *S. v. Jackson*, 66; judgment may be suspended on condition only where defendant assents, *ibid.*; conviction on insufficient evidence on charge of possession of liquor for sale cannot be sustained on ground that evidence was sufficient for conviction of illegal possession, *S. v. Peterson*, 255; where evidence sustains conviction only for misdemeanor, judgment imposing sentence for felony must be remanded, *S. v. Malpass*, 403; warrant charging assault on female will not support sentence as for general misdemeanor though amended after verdict to charge defendant was male over eighteen, *S. v. Grimes*, 523; where indictment

is fatally defective judgment will be arrested even in Supreme Court, *S. v. Johnson*, 266; *S. v. Morgan*, 414; nature and essentials of consent judgments, *Johnston County v. Ellis*, 268; *Bath v. Norman*, 502; attack and setting aside consent judgments, *Bath v. Norman*, 502; judgments by default in general, *King v. Rudd*, 156; involuntary nonsuit for failure to prosecute action, *Craver v. Spaugh*, 450; conformity to verdict, proof and pleadings, *Speight v. Anderson*, 492; *Ins. Co. v. Wells*, 574; life of lien, *Moore v. Jones*, 149; procedure: direct and collateral attack, *Johnston County v. Ellis*, 268; limitations: time within which attack may be made, *Johnston County v. Ellis*, 268; setting aside for surprise, inadvertence or excusable neglect, *Craver v. Spaugh*, 450; *Whitaker v. Raines*, 526; attack of void judgments, *Bath v. Norman*, 502; *Bennett v. Templeton*, 676; attack for irregularity, *Johnston County v. Ellis*, 268; *Bennett v. Templeton*, 676; operation of judgments as bar to subsequent action in general, *Deaton v. Elon College*, 433; consent judgments as bar to subsequent action, *Stansbury v. Guilford County*, 41.

Judicial Knowledge—Arises only from matters appearing of record, *Ericson v. Ericson*, 474.

Judicial Notice—Court will take judicial notice of facts within common knowledge, *S. v. Baldwin*, 295; court will take judicial notice of size and location of municipalities, *S. v. Bowen*, 601.

Jurisdiction—Courts will not enter decree which will divest it of jurisdiction to enforce its provisions, *In re DeFord*, 189; valid warrant or indictment is essential to jurisdiction, *S. v. Morgan*, 414; verification of complaint in suit for alimony without divorce is necessary to give court jurisdiction, *Hodges v. Hodges*, 570; requirement that summons in divorce action be returnable to county of residence of either party is not jurisdictional, *Smith v. Smith*, 506; of clerk of Superior Court is statutory and limited, *Johnston County v. Ellis*, 268; relationship of landlord and tenant is essential in jurisdiction in summary ejectment, *Howell v. Branson*, 264; of Supreme Court on appeal is limited to matters of law or legal inference, *S. v. Thompson*, 651.

Jury—Defendant *held* not prejudiced for that custodian of jury was also witness for State, *S. v. Hart*, 200; fact that officer having custody of jury was witness for State alone insufficient for new trial, *S. v. Taylor*, 286; permitting jury to leave courtroom to view exhibit *held* proper, *S. v. Taylor*, 286; proximate cause ordinarily question of fact for jury, *Hoke v. Greyhound Corp.*, 692; whether taking under eminent domain is for public purpose is question of law for court, *Charlotte v. Heath*, 750.

Justices—Notice of candidacy for Justice of Supreme Court must designate to which of two vacancies nomination is sought, *Ingle v. Board of Elections*, 454.

Justices of the Peace—Relationship of landlord and tenant is essential in jurisdiction in summary ejectment, *Howell v. Branson*, 264.

Kidnapping—Elements of the crime and prosecution, *S. v. Witherington*, 211.

Knife—*Held* deadly weapon as a matter of law, *S. v. Hightower*, 62; *S. v. Perry*, 530.

Laborers' and Materialmen's Lien—Action involving sale to satisfy laborers' and materialmen's liens is removable to county where property is situated, *Penland v. Church*, 171.

Laches—Is inapplicable to motion to set aside void judgment, *Johnston County v. Ellis*, 268.

Landlord and Tenant—Contract between lessor and lessee as to reimbursement of lessor for expenses of digging well if lessee exercise option *held* without consideration, *Stonestreet v. Oil Co.*, 261; relationship of landlord and tenant is es-

sential in jurisdiction in summary ejectment, *Howell v. Branson*, 264; adverse possession by tenant, *Lofton v. Barber*, 481; action in ejectment in area subject to Federal Rent Control, *Swink v. Horn*, 713; rents accruing after death of lessor should be paid to heir and not personal representative, *Trust Co. v. Frazelle*, 724; nature and essentials of the relationship, *Freeman v. Service Co.*, 736; tenancies at will and at sufferance, *Davis v. Lovick*, 252; termination of leases in general, *Trust Co. v. Frazelle*, 724; renewals and extensions, *Trust Co. v. Frazelle*, 724; termination for failure to pay rent, *Trust Co. v. Frazelle*, 724; liability of tenant for negligent destruction of property, *Rountree v. Thompson*, 553.

Larceny—Competency and sufficiency of evidence and nonsuit, *S. v. Shoup*, 69; *S. v. McNair*, 462.

Law Enforcement Officers' Retirement—Policeman *held* not eligible to membership in local governmental employees' retirement system. *Gardner v. Retirement System*, 465.

Law of the Case—*S. v. Stone*, 97; *Coleman v. Whisnant*, 258; *Cannon v. Cannon*, 634; *S. v. Peterson*, 770.

Leases—Agreement to lease for one year with privilege of renewal for four years comes within statute of frauds, *Wright v. Allred*, 113; lease by remaindermen for duration of life estate comes within statute of frauds, *Davis v. Lovick*, 252; upon effective plea of statute of frauds lessees become tenants at will, *Davis v. Lovick*, 252; lease is sufficient consideration for option contained therein, *Crotts v. Thomas*, 385; where tenant acquires title of landlord, leasehold estate merges in the fee, *Lofton v. Barber*, 481; action in ejectment in area subject to Federal Rent Control, *Swink v. Horn*, 713; lease of trucks, *Wood v. Miller*, 567.

Legal Fraud—See *Insurance Co. v. Guilford County*, 441.

Legal Provocation—Must be circumstances amounting to assault or threatened assault, *S. v. Hightower*, 62.

Legislature—May create *quasi*-municipal corporations to operate airport, *Airport Authority v. Johnson*, 1; legislative power over municipalities, *Charlotte v. Heath*, 750.

Less Degree of Crime—On indictment charging first degree burglary defendant may not be convicted of second degree burglary in absence of evidence, *S. v. Locklear*, 410; court need not submit question of guilt of simple assault where all evidence shows assault with deadly weapon, *S. v. Perry*, 530; where evidence shows murder committed in perpetration of robbery court need not submit guilt of less degrees, *S. v. Matthews*, 639.

License—Permitting one under legal age to drive without license is negligence but must be proximate cause to warrant recovery, *Hoke v. Greyhound Corp.*, 692.

Licensee—Customer of automobile parking lot *held* licensee and not bailee or tenant, *Freeman v. Service Co.*, 736.

Liens—Priority of mortgage and judgment liens upon sale of land to make assets, *Moore v. Jones*, 149; action involving sale to satisfy laborers' and materialmen's liens is removable to county where property is situated, *Penland v. Church*, 171.

Life Tenant—Verbal agreement of remaindermen to lease for life estate voidable under statute of frauds, *Davis v. Lovick*, 252.

Lighting—Negligence of municipality in failure to maintain proper lighting and guard rails along bridge constituting part of street, *Hunt v. High Point*, 74.

Limitation of Actions—For recovery of real estate, see Adverse Possessions, *Lofton v. Barber*, 481; time of institution of action for wrongful death, *Harrison v. Carter*, 36; to foreclose tax liens, *Miller v. McConnell*, 28; statute enlarging time for filing claim for Unemployment Compensation taxes paid under mistake *held* retroactive, *B-C Remedy*

Co. v. Unemployment Compensation Comm., 52; statutory changes in period of limitation, *B-C Remedy Co. v. Unemployment Compensation Comm.*, 52; accrual of right of action—for interest, *Jennings v. Morehead City*, 606; disabilities, *Johnston County v. Ellis*, 268; institution of action—dismissal of prior actions instituted within limitation, *Highway Comm. v. Transportation Corp.*, 371; pleading of statute of limitation, *Jennings v. Morehead City*, 606; burden of proof, *Highway Comm., v. Transportation Corp.*, 371; *Jennings v. Morehead City*, 606; sufficiency of evidence and nonsuit, *Jennings v. Morehead City*, 606.

Limitation Over—Roll must be called as of date of death of first taker, *Turpin v. Jarrett*, 135.

Liquor—See Intoxicating Liquor.

Local Governmental Employees' Retirement—Policeman *held* not eligible to membership in local governmental employees' retirement system. *Gardner v. Retirement System*, 465.

Mail—Testimony that notice of cancellation was not received is some evidence that notice was not mailed, *White v. Ins. Co.*, 119.

Malice—Killing with deadly weapon implies malice, *S. v. Robinson*, 95; *S. v. Vaden*, 138; State may rely on presumption upon showing intentional killing with deadly weapon on charge of first degree murder. *S. v. Floyd*, 571; where defendant does not admit that shot inflicted fatal wound, State must prove this fact before it is entitled to presumption of malice, *S. v. Ellison*, 628.

Mandamus—Will lie to compel municipal treasurers to pay lawful appropriations, *Airport Authority v. Johnson*, 1; nature and grounds of writ in general, *Ingle v. Board of Elections*, 454; ministerial duty, *Airport Authority v. Johnson*, 1; elections, *Ingle v. Board of Elections*, 454.

Manslaughter—Provocation sufficient to reduce murder in second degree to manslaughter, *S. v. Hightower*, 62; definition of in charge held without error, *S. v. Thompson*, 651.

Maps—Implied dedication from sale of lots with reference to maps, *Foster v. Atwater*, 472; *Evans v. Horne*, 581; incompetent as substantive evidence, *Searcy v. Logan*, 562.

Marriage—Nature of relationship in general, *S. v. Setzer*, 216; divorce see Divorce; bigamy see Bigamy.

Married Women—While motion to set aside divorce decree is pending, error for court to strike out widow's dissent from will, *In re Estate of Smith*, 169; requisites and validity of deeds of separation, *Pearce v. Pearce*, 307.

Master and Servant—Liability of employer for negligence of driver, *Smith v. Mariakakis*, 100; *Tomlinson v. Shaw*, 177; *Toler v. Savage*, 208; *Wood v. Miller*, 567; the relationship in general, *Wood v. Miller*, 567; distinction between employees and independent contractors, *Smith v. Paper Co.*, 47; *Highway Comm. v. Transportation Corp*, 371; nature and extent of liability of contractee to independent contractor, *Deaton v. Elon College*, 433; nature and extent of liability of contractee to third persons injured or damaged by acts of independent contractor or his employees, *Highway Comm. v. Transportation Corp.*, 371; nature and extent of liability of independent contractor to third persons, *Price v. Cotton Co.*, 758; liability of master for negligence of servant—"employees" within meaning of rule, *Toler v. Savage*, 208; liability of master for negligence of servant—scope of employment, *Tomlinson v. Sharpe*, 177; *Toler v. Savage*, 208; distribution of recovery in action under Federal Employers' Liability Act, *In re Badgett*, 92; Workmen's Compensation Act—independent contractors, *Smith v. Paper Co.*, 47; Workmen's Compensation Act — casual em-

ployees, *Smith v. Paper Co.*, 47; Workmen's Compensation Act—injuries compensable in general, *Howell v. Fuel Co.*, 730; Workmen's Compensation Act—whether injury results from "accident," *Rewis v. Ins. Co.*, 325; Workmen's Compensation Act — whether injury arises out of and in course of employment, *Rewis v. Ins. Co.*, 325; *Howell v. Fuel Co.*, 730; review of awards of Industrial Commission, *Smith v. Paper Co.*, 47; *Rewis v. Ins. Co.*, 325; Workmen's Compensation Act—subsequent proceedings —effect of judgment, *Deaton v. Elon College*, 433; recovery of unemployment compensation taxes paid through mistake, *B-C Remedy Co. v. Unemployment Compensation Comm.*, 42.

Mayhem—Nature and elements of the crime, *S. v. Malpass*, 403.

Mental Anguish—Damages in action for failure to send interstate message not recoverable, *Ward v. Tel. Co.*, 175.

Mental Capacity—Beneficiaries may testify as to transactions with deceased testator on issue of testamentary capacity but not undue influence, *In re Will of Lomax*, 498; lay witness may testify as to defendant's ability to distinguish right from wrong, *S. v. Matthews*, 639; ability to distinguish right from wrong is test of mental responsibility, *S. v. Matthews*, 639.

Meritorious Cause—In order to set aside involuntary nonsuit for excusable neglect plaintiff must show meritorious cause, *Craver v. Spaugh*, 450.

Meritorious Defense—Is not necessary to set aside void judgment, *Bath v. Norman*, 502; is immaterial in absence of showing of excusable neglect, *Whitaker v. Raines*, 526.

Ministerial Act—Mandaums will lie to compel performance of, *Airport Authority v. Johnson*, 1.

Minors—Use of phrase "statutory rape" in charge in prosecution under G. S., 14-26, *held* not prejudicial, *S. v. Bullins*, 142; in prosecution under G. S. 110-39 charge that crime is encouraging minor "in moral delinquency" *held* for error, *S. v. Bullins*, 142; father's right to earnings of child during minority, *Toler v. Savage*, 208; *James v. James*, 399; acquiescence of father in purchase of car by son is evidence of emancipation, *James v. James*, 399; determination of life expectance of child under ten, *Rea v. Simonwitz*, 379; permitting one under legal age to drive without license is negligence but must be proximate cause to warrant recovery, *Hoke v. Greyhound Corp.*, 692; *habeas corpus* to determine custody of children in contest between husband and wife, *In re Biggers*, 647; next friend seeking to set aside tax foreclosure is not required to defend mortgage foreclosure asserted in the action by intervenor, *Johnston County v. Ellis*, 268; approval of family agreement for distribution of trust which preserves trust estate for minors, approved, *Redwine v. Clodfelter*, 366.

Misdemeanor — Where evidence sustains conviction only for misdemeanor judgment imposing sentence for felony must be remanded, *S. v. Malpass*, 403; warrant charging assault on female will not support sentence as for general misdemeanor though amended after verdict to charge defendant was male over eighteen, *S. v. Grimes*, 523; sentence within statutory limits cannot be held excessive, *S. v. Mounce*, 159.

Misjoinder—Causes *held* improperly joined but demurrer did not require dismissal, *Pressley v. Tea Co.*, 518; demurrer for misjoinder of parties not made in apt time is addressed to discretion, *Western N. C. Conference v. Talley*, 654.

Misrepresentations—As basis for forfeiture of insurance policy, *Hicks v. Insurance Co.*, 614.

Mortgages—Priority of payment upon sale of decedent's lands to make assets, *Moore v. Jones*, 149; right to foreclose and defenses in gen-

eral, *Ins. Co. v. Guilford County*, 441; *Crain v. Hutchins*, 642; parties entitled to foreclosure, *Crain v. Hutchins*, 642; foreclosure by action—parties and procedure, *Johnston County v. Ellis*, 268; agreements to purchase at foreclosure for benefit of mortgagor, *McCorkle v. Beatty*, 338.

Mortuary Tables—Mortuary table is evidence of life expectancy, *Starnes v. Tyson*, 395; determination of life expectancy of child under ten, *Rea v. Simowitz*, 379.

Motions—To strike, *Brown v. Hall*, 732; admission of evidence, competent at time of admission will not be held projudicial in absence of motion to strike when evidence later became incompetent, *Ziglar v. Ziglar*, 102; failure to move promptly for judgment by default does not work discontinuance, *King v. Rudd*, 156; motion for new trial for that custodian of jury was also witness for State, denied, *S. v. Hart*, 200; motion for judgment on pleadings admits allegations, *Ingle v. Board of Elections*, 454; while motion to set aside divorce decree is pending it is error for court to strike out widow's dissent from will, *In re Estate of Smith*, 169; failure to move for nonsuit concedes sufficiency of evidence, *S. v. Jackson*, 760; upon motion for nonsuit evidence will be considered in light most favorable to plaintiff, *Toler v. Savage*, 208; *Highway Comm. v. Transportation Corp.*, 371; motion to nonsuit must be renewed at close of all evidence, *S. v. Perry*, 530; upon review of refusal to nonsuit Supreme Court will not consider evidence which record fails to show was introduced, *Wallace v. Longest*, 161; motion to set aside verdict as against weight of evidence addressed to discretion of court, *Ziglar v. Ziglar*, 102; *Bailey v. McCotter*, 160; *Webb v. Theatre Corp.*, 342; where indictment is fatally defective judgment will be arrested even in Supreme Court, *S. v. Johnson*, 266.

Motive—Evidence of motive competent even though not element of offense, *S. v. King*, 241.

Municipal Board of Adjustment — Authority of, *Lee v. Board of Adjustment*, 107.

Municipal Corporations — City may appropriate funds for airport in proper instances. *Airport Authority v. Johnson*, 1; proof of municipal ordinance see *Toler v. Savage*, 208; creation, *Airport Authority v. Johnson*, 1; powers and functions in general—legislative control and supervision, *Charlotte v. Heath*, 750; private or corporate powers, *Charlotte v. Heath*, 750; meetings, proceedings and orders of governing board, *Bath v. Norman*, 502; *Spicer v. Goldsboro*, 557; duties and authority of officers and agents, *Bath v. Norman*, 502; defects or obstructions in streets or sidewalks, *Hunt v. High Point*, 74; control and authority over streets, *Shaw v. Tobacco Co.*, 477; *Spicer v. Goldsboro*, 557; nature and extent of municipal police power in general, *Kass v. Hedgpeth*, 405; *Clinton v. Ross*, 682; zoning ordinances and building permits, *Lee v. Board of Adjustment*, 107; *Kass v. Hedgpeth*, 405; violation and enforcement of police regulations and ordinances, *Clinton v. Ross*, 682; *Lanier v. Warsaw*, 637; municipal charges and expenses, *Airport Authority v. Johnson*, 1; parties who may sue, *Shaw v. Tobacco Co.*, 477; court will take judicial notice of size and location of municipalities, *S. v. Bowen*, 601; policeman held not eligible to membership in local governmental employee's retirement system, *Gardner v. Retirement System*, 465.

Murder—See Homicide.

Navigation—Liability of ship owner for damages caused to bridge piling in collision while ship was navigated by pilot, *Highway Comm. v. Transportation Corp*, 371.

"Necessity"—Defined, *Swink v. Horn*, 713.

Negligence—Of municipality in failure to maintain guard rails along bridge constituting part of street, *Hunt v. High Point*, 74; liability of master for servant's negligence see Master and Servant; at crossings, *Hopkins v. R. R.*, 655; in operation of automobiles see Automobiles; action against dentist for malpractice, *Love v. Zimmerman*, 389; evidence *held* insufficient on issue in action to recover for injuries sustained while transferring from one urban bus to another, *Patterson v. Power Co.*, 22; right of action for damages accruing between injury and death, survives, *Hoke v. Greyhound Corp.*, 332; where action for wrongful death is instituted within time allowed third successive representative may be made party thereto and maintain action, *Harrison v. Carter*, 36; distribution of recovery in action under Federal Employers Liability Act, *In re Badgett*, 92; acts and omissions constituting negligence in general, *Highway Comm. v. Transportation Corp*, 371; obstructions and dangerous conditions of lands, *Deaton v. Elon College*, 433; proximate cause, *Rountree v. Thompson*, 553; *Hoke v. Greyhound Corp.*, 692; anticipation of injury, *Harrington v. Taylor*, 769; competency and relevancy of evidence, *Webb v. Theatre Corp*, 342; nonsuit on issue of negligence in general, *Rountree v. Thompson*, 553; *Harrington v. Taylor*, 769; sufficiency of evidence and nonsuit—*res ipsa loquitur*, *Rountree v. Thompson*, 553; nonsuit on issue of contributory negligence, *Hobbs v. Drewer*, 146; instructions, *Hobbs v. Drewer*, 146; issues and verdict, *Phillips v. Nessmith*, 173; *Kennedy v. Smith*, 514.

Negligence Per Se—Violation of statute requiring vehicles to keep to right is negligence per se, *Wallace v. Longest*, 161; *Hoke v. Greyhound Corp.*, 692; permitting person under legal driving age to drive is negligence *per se*, *Hoke v. Greyhound Corp.*, 692.

Negroes—Covenant restricting sale or lease to Negroes, *Vernon v. Realty Co.*, 58; *Phillips v. Wearn*, 290.

Neighborhood Public Roads—*Speight v. Anderson*, 492.

Newspapers—Admission of news article for purpose of impeaching witness *held* error, *S. v. Gardner*, 310.

Next Friend—Is not required to defend mortgage foreclosure asserted by intervenor in tax foreclosure, *Johnston County v. Ellis*, 268.

Nolle Prosequi—Announcement by solicitor that he would not ask verdict of first degree burglary is tantamount to *nolle prosequi* thereon, *S. v. Locklear*, 410.

Nolo Contendere—Establishes guilt for purpose of punishment, *S. v. Ayers*, 579; *S. v. Beasley*, 580.

Non Obstante Veredicto—Where answer to first issue determines rights of parties, treatment of second issue as surplusage and rendition of judgment on first issue is not *non obstante veredicto*, *Ins. Co. v. Wells*, 574.

Nonsuit—demurrer to pleadings and to evidence are different in purpose and effect, *Coleman v. Whisnant*, 258; failure to move for nonsuit concedes sufficiency of evidence, *S. v. Jackson*, 760; motion to nonsuit must be renewed at close of all evidence, *S. v. Perry*, 530; upon motion for nonsuit evidence will be considered in light most favorable to plaintiff, *Toler v. Savage*, 208; *Ireland v. Ins. Co.*, 349; *Highway Comm. v. Transportation Corp.*, 371; *Cox v. Hinshaw*, 700; *Swink v. Horn*, 713; *Love v. Zimmerman*, 389; defendant's evidence which tends to impeach or contradict plaintiff's evidence will not be considered on nonsuit, *Deaton v. Elon College*, 433; defendant's evidence in contradiction does not justify nonsuit, *Brown v. Loftis*, 762; on ground that evidence establishes bar of affirmative defense, *White v. Ins. Co.*, 119; testimony by State's

witness of declarations of innocence made by defendant no basis for nonsuit, *S. v. Baldwin*, 295; contention that voluntary nonsuit on one count established innocence under another count must be presented by plea of former jeopardy and not by nonsuit, *Ibid;* on appeal from granting judgment of nonsuit, Supreme Court cannot weigh evidence, *Highway Comm. v. Transportation Corp.*, 371; *Cox v. Hinshaw*, 700; upon review of refusal to nonsuit Supreme Court will not consider evidence which record fails to show was introduced, *Wallace v. Longest*, 161; on issue of negligence in automobile collision cases see *Wallace v. Longest*, 161; evidence held insufficient to establish negligence of bus company causing injury to passenger transferring from one urban bus to another, *Patterson v. Power Co.*, 122; is proper in negligent action upon failure of proof of proximate cause, *Rountree v. Thompson*, 553; nonsuit on ground of contributory negligence, *Hobbs v. Drewer*, 146; *Phillips v. Nessmith*, 173; evidence on issue of *respondeat superior held* insufficient, *Smith v. Mariakakis*, 100; evidence of adverse possession of land held sufficient, *Graham v. Spaulding*, 86; on ground of bar of statute of limitations proper where plaintiff fails to show live claim, *Jennings v. Morehead City*, 606; is proper in action for divorce from bed and board upon failure of proof that misconduct complained of was without provocation, *Lawrence v. Lawrence*, 624; evidence as to location of boundary *held* sufficient, *Clark v. Cagle*, 230; *Belhaven v. Hodges*, 485; evidence held sufficient for jury in action for breach of agreement in deed to maintain and support grantor, *Gerringer v. Gerringer*, 105; evidence of guilt of rape held sufficient, *S. v. Herring*, 213; *S. v. Johnson*, 671; *S. v. Walker*, 458; evidence held sufficient in homicide prosecutions, *S. v. Bennett*, 82; *S. v. Robinson*, 95; *S. v. Vaden*, 138; *S. v. Hart*, 200; evidence of premeditation and deliberation *held* sufficient, *S. v. Stewart*, 299; evidence of guilt of manslaughter in attempting abortion held sufficient, *S. v. Gardner*, 310; evidence of larceny *held* sufficient, *S. v. McNair*, 458; evidence held insufficient on charge of attempt to commit burglary: held sufficient on charge of forceable trespass, *S. v. Gibson*, 194; circumstantial evidence of guilt of larceny *held* sufficient to overrule nonsuit, *S. v. Shoup*, 69; evidence *held* insufficient in prosecution for possession of liquor for sale, *S. v. Peterson*, 255.

North Carolina Unemployment Compensation Commission—See Master and Servant.

North Carolina Workmen's Compensation Act—See Master and Servant.

Notes—See Bills and Notes.

Notice—Testimony that notice of cancellation was not received is some evidence that notice was not mailed, *White v. Ins. Co.*, 119; calendaring of case is notice to litigants, *Craver v. Spaugh*, 450; is not required for widow's dissent from will, *In re Estate of Smith*, 169; order of clerk permitting executor to be made party without notice is subject to approval of judge, *King v. Rudd*, 156; notice of candidacy for Justice of Supreme Court must designate to which of two vacancies nomination is sought, *Ingle v. Board of Elections*, 454.

Nuisances — Noise and disturbance, *Kass v. Hedgpeth*, 305; *Clinton v. Ross*, 682.

Nunc Pro Tunc—Court may allow amendment to order of publication *nunc pro tunc*, *Smith v. Smith*, 506; upon conviction of illegal transportation, court at later term may order forfeiture of vehicle *nunc pro tunc*, *State v. Maynor*, 645.

Officers—See Public Officers; mandamus will lie to compel performance of ministerial duties, *Airport Authority v. Johnson*, 1.

Old Age Assistance—Tax to support is for special purpose with special approval of Legislature, *R. R. v. Duplin County*, 719.

Opinion—Remark of court in sustaining objection to further cross-examination *held* not expression of opinion by court, *S. v. Stone*, 97; new trial awarded for remarks of court impeaching credibility of witness and intimating that fact had not been established, *S. v. Stone*, 97; *S. v. Owenby*, 521; expression of opinion by court in charge, *S. v. Bullins*, 142; *S. v. Ellison*, 628; *S. v. Benton*, 745.

Opinion Evidence—As to speed of vehicle based upon tire marks incompetent, *Tyndall v. Hines Co.*, 620; lay witness may testify as to defendant's ability to distinguish right from wrong, *S. v. Matthews*, 639.

Optionee—Cannot be prejudiced by withholding of building permit, *Lee v. Board of Adjustment*, 107.

Options—Lease is sufficient consideration for option contained therein, *Crotts v. Thomas*, 385; *Trust Co. v. Frazelle*, 724; description of *locus in quo held* sufficient, *Crotts v. Thomas*, 385.

"Or"—Use of phrase premeditation "or" deliberation held not prejudicial, *S. v. Deaton*, 348.

Order of Proof—In caveat proceedings, *In re Will of Lomax*, 498.

Ordinances—Proof of municipal ordinance, *Toler v. Savage*, 208; ordinarily injunction will not lie to restrain violation of ordinance, *Lanier v. Warsaw*, 637; municipality *held* not entitled to injunctive relief to enforce ordinance against operation of tobacco warehouse in prescribed area, *Clinton v. Ross*, 682.

Parent and Child—*Habeas corpus* to determine custody of children in contest between husband and wife, *In re Biggers*, 647; right to custody and control, *In re DeFord*, 189; right of parent to earnings of child, *James v. James*, 399; *Toler v. Savage*, 208; no presumption of undue influence in deed from parent to child, *Jernigan v. Jernigan*, 204; adultery of wife has no relevance to order allowing support *pendente lite* for child of marriage, *Lawrence v. Lawrence*, 221; prosecution for failure to support illegitimate child, *S. v. Morgan*, 414.

Parking Lot—Customer of automobile parking lot held licensee and not bailee or tenant, *Freeman v. Service Co.*, 736.

Parks and Parkways—Defined, *Spicer v. Goldsboro*, 557.

Parol Evidence — Not competent to vary written instrument, *Coleman v. Whisnant*, 258; *Ins. Co. v. Wells*, 574; but competent to show want of consideration for note or conditional delivery, *Perry v. Trust Co.*, 667; that maker did not intend to adopt seal incompetent where execution of instrument under seal is admitted, *Bell v. Chadwick*, 598; memorandum *held* sufficiently definite to admit parol evidence to identify land, *Searcy v. Logan*, 562.

Parol Trust—See *McCorkle v. Beatty*, 338.

Parole—Is exclusive prerogative of governor, *S. v. Lewis*, 249.

Partial New Trial — Whether new trial should be limited to issue of damages rests in the discretion of trial court, *Starnes v. Tyson*, 395.

Parties—Where action for wrongful death is instituted within time allowed third successive representative may be made party thereto and maintain action, *Harrison v. Carter*, 36; whether executor should be allowed to be made party and file answer after expiration of time rests in discretion of court, *King v. Rudd*, 156; order of clerk permitting executor to be made party without notice is subject to approval of judge, *King v. Rudd*, 156; taxpayer not a landowner may not enjoin closing of street, *Shaw v. Tobacco Co.*, 477; who may appeal from ruling of Municipal Board of Adjustment, *Lee v. Board of Adjustment*, 107; demurrer for misjoinder of, made after filing of

answer is addressed to discretion of the court, *Western N. C. Conference v. Talley*, 654.

Partition—Right to partition of personal property, *Buffaloe v. Barnes*, 313; plea of sole seizing and transfer to civil issue docket, *Jernigan v. Jernigan*, 204.

Partnership—Time within which exceptions to receiver's report must be filed, *Benson v. Roberson*, 103; firm property and business, *Ferrell v. Worthington*, 609; dissolution by purchase of partnership assets by one of partners, *Ferrell v. Worthington*, 609.

"Party Aggrieved"—See *Starnes v. Tyson*, 395; *Stephenson v. Watson*, 742.

Passengers—Relationship does not exist during transfer from one urban bus to another, *Patterson v. Power Co.*, 22; peremptory instructions in favor of guest on issue of contributory negligence *held* without error, *Strickland v. Smith*, 517; evidence of concurring negligence held sufficient, *Hoke v. Greyhound Corp.*, 692.

Patents—Contract relating to use of patent held supported by valid consideration, *Coleman v. Whisnant*, 258.

Pauper Appeals—Time for filing affidavit, *S. v. Harrell*, 743.

Pendente Lite—Adultery of wife has no relevancy to order allowing support *pendente lite* for child of marriage, *Lawrence v. Lawrence*, 221; allowance for attorney's fees sustained, *Welch v. Welch*, 541; complaint stating cause of action for alimony without divorce is sufficient basis for allowance of alimony *pendente lite*, *Brooks v. Brooks*, 280; separation agreement does not preclude allowance of alimony *pendente lite*, *Butler v. Butler*, 594.

Per Capita—Bequest or devise to heirs or children requires division per capita, *Wooten v. Outlaw*, 245.

Peremptory Instructions—Party having burden of proof is not entitled to, upon conflicting evidence, *White v. Ins. Co.*, 119; on issue of contributory negligence *held* error, *Kennedy v. Smith*, 514; but in favor of guest on issue of contributory negligence held without error, *Strickland v. Smith*, 517.

Permanent Disability—Evidence held insufficient to show permanent and total disability of insured, *Ireland v. Ins. Co.*, 349.

Personal Powers—Powers of executor *held* personal and discretionary, *Welch v. Trust Co.*, 357.

Personalty—Conversion of realty into, to make assets to pay decedent's debts, *Moore v. Jones*, 149; issue of stock in name of purchaser and another as joint tenants *held* not gift *inter vivos*, *Barnes v. Buffaloe*, 313.

Per Stirpes—Bequest or devise to heirs or children requires division per capita, *Wooten v. Outalw*, 245.

Physicians and Surgeons — Action against dentist for malpractice, *Love v. Zimmerman*, 389.

Pilots—Contracts of pilotage, *Highway Comm. v. Transportation Corp.*, 371; liabilities for injuries to persons and property, *Highway Comm. v. Transportation Corp.*, 371.

Plats—Incompetent as substantive evidence, *Searcy v. Logan*, 562; dedication by sale of lots with reference to plats, *Evans v. Horne*, 581.

Pleadings—Admissions in, *Bell v. Chadwick*, 598; cross examination of defendant in regard to pleadings in civil action *held* competent to impeach defendant's testimony, *S. v. McNair*, 462; when party is estopped by pleading from asserting statute of frauds, *Davis v. Lovick*, 252; denial of contract as alleged is sufficient pleading of Statute of Frauds, *Harvey v. Linker*, 711; complaint in action against dentist for malpractice, *Love v. Zimmerman*, 389; in action for divorce, *Brooks v. Brooks*, 280; *Pearce v. Pearce*, 307; *Lawrence v. Lawrence*, 624; *Hodges v. Hodges*, 570; *held* to raise issue of trespass, *Speight v. Anderson*, 492; *held* sufficient to allege breach of warranty of quality and capacity in sale of tobacco curers, *Walston v. Whit-*

ley & Co., 537; complaint *held* insufficient to state cause of action in favor of third person for negligence of independent contractor, *Price v. Cotton Co.*, 758; necessary part of record proper, *Campbell v. Campbell*, 653; *Ericson v. Ericson*, 747; joinder of causes, *Pressly v. Tea Co.*, 518; statement of cause of action in general, *Brown v. Hall*, 732; time for filing answer, *King v. Rudd*, 156; office and effect of demurrer, *Coleman v. Whisnant*, 258; *Pearce v. Pearce*, 307; *Ferrell v. Worthington*, 609; time of filing demurrer, *Western N. C. Conference v. Talley*, 654; demurrer for misjoinder of parties and causes, *Pressley v. Tea Co.*, 518; *Western N. C. Conference v. Talley*, 654; scope and extent of amendment by permission of trial court, *James v. James*, 399; nature and grounds for judgment on the pleadings, *Ingle v. Board of Elections*, 454; time for making and necessity for motions to strike, *Brown v. Hall*, 732; grounds for motions to strike, *Brown v. Hall*, 732.

Plea of *Nolo Contendere*—Establishes guilt for purpose of punishment, *S. v. Ayers*, 579; *S. v. Beasley*, 580.

Policeman—Policeman *held* not eligible to membership in local governmental employees retirement system. *Gardner v. Retirement System*, 465.

Police Power—Extent of municipal police power, *Kass v. Hedgpeth*, 405; *Clinton v. Ross*, 682.

Powers—Of executor held personal and discretionary, *Welch v. Trust Co.*, 357.

Practice of Courts—Decree of foreclosure of mortgage entered in tax foreclosure suit is contrary to course and practice of court. *Johnston County v. Ellis*, 268.

Prejudicial and Harmless Error—See Harmless and Prejudicial Error.

Premeditation and Deliberation—Use of word "aforethought" not necessary in defining. *S. v. Hightower*, 62; no definite length of time required for, *S. v. Hart*, 200; not presumed from killing with deadly weapon, *S. v. Stewart*, 299; evidence of premeditation and deliberation *held* sufficient, *S. v. Stewart*, 299; use of phrase premeditation "or" deliberation held not prejudicial, *S. v. Deaton*, 348.

Prescription—Establishment of cartway by, *Speight v. Anderson*, 492.

Presumptions—Of innocence, in absence of request, court is not required to charge on. *S. v. Perry*, 530; killing with deadly weapon raises presumption of malice, *S. v. Robinson*, 95; *S. v. Vaden*, 138; where defendant does not admit that shot inflicted fatal wound, State must prove this fact before it is entitled to presumption of malice, *S. v. Ellison*, 628; State may rely on presumption upon showing intentional killing with deadly weapon on charge of first degree murder. *S. v. Floyd*, 571; premeditation and deliberation not presumed from killing with deadly weapon, *S. v. Stewart*, 299; in prosecution for assault on female, defendant presumed over 18 years of age, *S. v. Herring*, 213; in prosecution under G. S., 1850 no presumption of intent to sell arises from illegal possession of liquor, *S. v. Peterson*, 255; presumption is in favor of regularity of order for publication, and order need not specify that newspaper of publication is most likely to give notice, *Smith v. Smith*, 506; no presumption of undue influence in deed from parent to child, *Jernigan v. Jernigan*, 204; that use of cartway is permissive, *Speight v. Anderson*, 492.

Price Control—Action in ejectment in area subject to Federal Rent Control, *Swink v. Horn*, 713.

Primary—Notice of candidacy for Justice of Supreme Court must designate to which of two vacancies nomination is sought, *Ingle v. Board of Elections*, 454.

Principal and Agent—Agency is revoked by death of principal, *Barnes v. Buffaloe*, 313: insurance agent, see Insurance; power and authority

to bind principal in general, *Ins. Co. v. Guilford County*, 441; power and authority to bind principal—undisclosed principal, *Walston v. Whitley & Co.*, 537; liability of agent—agent for undisclosed principal, *Walston v. Whitley & Co.*, 537.

Principal and Surety—Statutory provisions, *Indemnity Co. v. Hood*, 706; renewals of bonds of private or corporate officers, *Indemnity Co. v. Hood*, 706.

Priorities — Of mortgage and judgment liens upon sale of land to make assets, *Moore v. Jones*, 149.

Process—Service on an insane person, *Smith v. Smith*, 544; service on foreign corporations—service on Secretary of State, *Harrison v. Corley*, 184; defective process and amendment, *Smith v. Smith*, 506; service by publication, *Smith v. Smith*, 506.

Processioning Proceeding — *Belhaven v. Hodges*, 485.

Prohibition—See Intoxicating Liquor.

Prosecution of Appeals — Dismissal for failure to prosecute, *S. v. Nelson*, 529; *S. v. Nash*, 608.

Provocation—Mere words not sufficient to reduce murder in second degree to manslaughter, *S. v. Hightower*, 62.

Proximate Cause—Essential element of actionable negligence, *Rountree v. Thompson*, 553; *Hoke v. Greyhound Corp.*, 692; is ordinarily a question of fact for jury, *Hoke v. Greyhound Corp.*, 692; excessive speed or driving under age must be proximate cause to warrant recovery, *Hoke v. Greyhound Corp.*, 692.

Publication—Presumption is in favor of regularity of order for publication, and order need not specify that newspaper of publication is most likely to give notice, *Smith v. Smith*, 506.

Public Disturbance — Evidence *held* not to require instruction on right of defendant in assault prosecution to quell disturbance, *S. v. Jackson*, 760.

Public Funds—Additional cost provided by G. S. 143-166 not compensation for officers but public funds, *Gardner v. Retirement System*, 465.

Public Nuisance—Warehouse is not, *Kuss v. Hedgpeth*, 405; *Clinton v. Ross*, 682.

Public Officers — Prohibition against holding two public offices simultaneously, *In re Phillips*, 773; amount of compensation, *Stansbury v. Guilford County*, 41; policeman *held* not eligible to membership in local governmental employees' retirement system, *Gardner v. Retirement System*, 465.

Public Purpose—Airport is public purpose within objects of municipal expenditure, *Airport Authority v. Johnson*, 1; within meaning of the law of eminent domain is question for the court, *Charlotte v. Heath*, 750.

Punishment—For simple assault upon female is in discretion of court, *S. v. Jackson*, 66; judgment may be suspended on condition only where defendant assents, *ibid.*; warrant charging assault on female will not support sentence as for general misdemeanor though amended after verdict to charge defendant was male over eighteen, *S. v. Grimes*, 523; within statutory limits cannot be held excessive, *S. v. Mounce*, 159.

Punitive Damages—Not recoverable in action for failure to send interstate message, *Ward v. Tel. Co.*, 175.

Qualified Fee—Conveyance with provision that should grantee die without issue after her death, grantee takes qualified fee defeasible upon death without children or other lineal descendants, *Turpin v. Jarrett*, 135.

Quasi-Municipal Corporations—Legislature may create, to operate airport, *Airport Authority v. Johnston*, 1.

Questions of Law or of Fact—Whether taking under eminent domain is for public purpose is question of law for court, *Charlotte v. Heath*, 750; where question of relationship of

master and servant depends upon legal effect of written lease agreement, the question is one of law, *Wood v. Miller*, 567; proximate cause ordinarily question of fact for jury, *Hoke v. Greyhound Corp.*, 692.

Railroads — Accidents at crossings, *Hopkins v. R. R.*, 655.

Rape—Elements of the offense, *S. v. Johnson*, 671; parties and offenses, *S. v. Johnson*, 671; indictment for rape, *S. v. Herring*, 213; *S. v. Johnson*, 266; *S. v. Benton*, 745; sufficiency of evidence and nonsuit in prosecution for rape, *S. v. Herring*, 213; *S. v. Walker*, 458; *S. v. Johnson*, 671; elements of offense of carnally knowing female under 12 years of age, *S. v. Johnson*, 266; *S. v. Johnson*, 671; instructions in prosecution for carnal knowledge of female between ages 12 and 16; *S. v. Bullins*, 142; prosecution and punishment for assault on a female, *S. v. Jackson*, 66; *S. v. Herring*, 213; assault with intent to commit rape, *S. v. Petry*, 78; *S. v. Overcash*, 632.

Ratification—County may not ratify contract which it had no power to execute, *Ins. Co. v. Guilford County*, 441.

"Ravish"—"Forcibly" must be alleged in indictment for rape; "ravish" alone being insufficient, *S. v. Johnson*, 266.

Real Estate Brokers — Commission *held* payable under contract only upon consummation of sale, *Jones v. Realty Co.*, 303.

Receipt—Items included on back of written receipt form, *Barnard v. Sober, Inc.*, 392.

Receivers—Actions on claims, *Benson v. Roberson*, 103.

Record—Supreme Court is bound by record, *S. v. Setzer*, 216; appeal will be dismissed where record proper fails to contain necessary parts, *S. v. Clough*, 384; *Ericson v. Ericson*, 474; *certiorari* is sole remedy to bring up omitted parts of record, *Lindsay v. Brawley*, 468; only one record necessary where indictments are consolidated for trial, *S. v. Jackson*, 760.

Recorder's Court—Superior Court may not increase punishment upon appeal from Recorder's Court from sentence upon plea of guilty, *S. v. Beasley*, 577.

Recrimination—Is defense to divorce action, *Pearce v. Pearce*, 307.

Redundant Matter—Motions to strike, *Brown v. Hall*, 732.

Reference—Exceptions and preservation of ground of review, *Clark v. Cagle*, 230; duties and powers of court upon review, *Ramsey v. Nebel*, 590; referee's findings approved by court and supported by evidence are conclusive on appeal, *Clark v. Cagle*, 230.

Reformation of Instruments—Retention of benefits as defense, *Ins. Co. v. Guilford County*, 441; pleadings, *Ferrell v. Worthington*, 609.

Remainders—Devisee *held* to take vested remainder and proviso that she should look after testator's wife *held* not to work forfeiture, *Patterson v. Brandon*, 89; roll must be called as of date of death of first taker, *Turpin v. Jarrett*, 135; sale of part of realty to preserve balance of trust, *Trust Co. v. Rasberry*, 586; accrual of right of action for possession against grantee of life tenant, *Lofton v. Barber*, 481; verbal agreement of remaindermen to lease for life estate voidable under statute of frauds, *Davis v. Lovick*, 252.

Remand—Cause will not be remanded if additional findings could not alter rights of parties, *Buffaloe v. Barnes*, 780.

Removal of Causes—Waiver of right to seek removal, *Trust Co. v. Henderson*, 649.

Rent Control—Action in ejectment in area subject to Federal Rent Control, *Swink v. Horn*, 713.

Rents—Rents accruing after death of lessor should be paid to heir and not personal representative, *Trust Co. v. Frazelle*, 724.

Repairs—Respective liability of estate and heirs for repairs to realty, *Barnes v. Buffaloe*, 313.

Replevin—Action by widow to replevy automobile from father-in-law on ground that it was gift of her husband, *James v. James*, 399.

Reply—Plaintiff *held* not estopped from pleading statute of frauds in reply on ground that complaint alleged verbal agreement, *Davis v. Lovick*, 252.

Rescission—Second contract relating to purchase of its stock by corporation *held* not rescission of prior agreement relating thereto, *Bank v. Supply Co.*, 416.

Residence—Temporary work in another state *held* not to affect residence, *Welch v. Welch*, 541.

Res Ipsa Loquitur—Does not apply upon showing of burning of barn while in possession of tenant, *Rountree v. Thompson*, 553.

Res Judicata—Judgment on former appeal is, *S. v. Stone*, 97; *S. v. Peterson*, 770; judgment on Workmen's Compensation Act barring recovery on the ground that party insured was independent contractor and not employee is *res judicata* as to relationship but does not bar action for negligence, *Deaton v. Elon College*, 433.

Respondeat Superior—Evidence on issue of, *held* insufficient, *Smith v. Mariakakis*, 100; evidence *held* insufficient to show that negligence was committed in course of employment, *Tomlinson v. Sharpe*, 177; *Toler v. Savage*, 208; driver *held* employee under terms of trip lease agreement, *Wood v. Miller*, 567; failure to charge on *respondeat superior* not error where defendant admits and case is tried upon theory of master and servant, *Webb v. Theatre Corp.*, 342.

Restrictive Covenants—Covenant restricting sale or lease to Negroes, *Vernon v. Realty Co.*, 58; *Phillips v. Wearn*, 290.

Retailer—*Held* not liable on warranty, *Walston v. Whitley & Co.*, 537.

Retention of Benefits—*Held* to preclude reformation, *Ins. Co. v. Guilford County*, 441.

Retirement Systems—Policeman member of officers' system *held* not entitled to membership in local governmental employees' retirement system, *Gardner v. Retirement System*, 465.

Review—By Supreme Court, see Appeal and Error; decision of Industrial Commission, *Smith v. Paper Co.*, 47; municipal boards of adjustment, *Lee v. Board of Adjustment*, 107.

Right of Way—Intersections, *Kennedy v. Smith*, 514.

Roads, Neighborhood Public—*Speight v. Anderson*, 492.

Robbery—Murder in perpetration of, is murder in first degree, and each conspirator to rob is guilty, *S. v. Bennett*, 82; murder committed in perpetration of robbery is murder in the first degree, *S. v. Matthews*, 639.

Rule in Shelley's Case—Does not apply when term "bodily heirs" is used as *descriptio personarum*, *Turpin v. Jarrett*, 135.

Sales—Complaint *held* to allege facts constituting basis for exclusion of certain assets from operation of sale of partnership assets, *Ferrell v. Worthington*, 609; operation and construction of warranties in general, *Price v. Goodman*, 223; express warranties, *Walston v. Whitley & Co.*, 537; parties to warranty, manufacturer and retailer, *Walston v. Whitley & Co.*, 537; actions for purchase price, *Price v. Goodman*, 223; actions and counterclaims for breach of warranty, *Price v. Goodman*, 223; *Walston v. Whitley & Co.*, 537.

Sanity—Lay witness may testify as to defendant's ability to distinguish right from wrong, *S. v. Matthews*, 639; ability to distinguish right from wrong is test of mental responsibility, *S. v. Matthews*, 639.

Schools—Bequest for benefit of school upheld notwithstanding change of name and location, *Trust Co. v. Board of National Missions*, 546.

Schools and School Districts—Constitutional restriction on increase in debt, *Coe v. Surry County*, 125.

"Scintilla"—Scintilla rule applies to issues of negligence and contributory negligence, *Phillips v. Nessmith*, 173.

Scope of Employment—See *Tomlinson v. Sharpe*, 177; *Toler v. Savage*, 208.

Seals—As between parties maker may show that note under seal was without consideration, *Perry v. Trust Co.*, 667; but where party admits execution of instruments under seal, evidence that he did not intend to adopt seal is incompetent. *Bell v. Chadwick*, 598; evidence and burden of proving adoption of seal, *Bell v. Chadwick*, 598; effect of seals, *Coleman v. Whisnant*, 258; *Crotts v. Thomas*, 385.

Secretary of State—Service of process on foreign corporation by service on, *Harrison v. Corley*, 184.

Self-Defense—*S. v. Hightower*, 62; *S. v. Taylor*, 286; *S. v. Deaton*, 348; *S. v. Vaden*, 138; *S. v. Absher*, 656; evidence *held* not to require instruction on question of self-defense, *S. v. Jackson*, 760.

Self-Incrimination — Introduction of papers taken from defendant does not violate constitutional right, *S. v. Shoup*, 69.

Sentence — Within statutory limits cannot be held excessive, *S. v. Mounce*, 159; court without power to divide sentence and suspend latter portion, *S. v. Lewis*, 249; judgment may be suspended on conditions only where defendant assents, *S. v. Jackson*, 66; where evidence sustains conviction only for misdemeanor judgment imposing sentence for felony must be remanded, *S. v. Malpass*, 403; upon conviction of illegal transportation, court at later term may order forfeiture of vehicle *nunc pro tunc*, *S. v. Maynor*, 645; no appeal lies from order that suspended judgment be executed, *S. v. Farrar*, 478; for simple assault upon female, is in discretion of court, *S. v. Jackson*, 66; warrant charging assault on female will not support sentence as for general misdemeanor though amended after verdict to charge defendant was male over eighteen, *S. v. Grimes*, 523.

Separation—Failure to support children *held* not to preclude divorce on ground of separation, *Welch v. Welch*, 541.

Separation Agreement—Husband may not be imprisoned for failure to pay subsistence due wife under separation agreement not adopted as order of court, *Stanley v. Stanley*, 129; separation agreement does not preclude allowance of alimony *pendente lite*, *Butler v. Butler*, 594.

Service of Case on Appeal—Appeal will not be dismissed for failure to serve case on appeal, *Lawrence v. Lawrence*, 221.

Service of Summons—Service of process on foreign corporation by service on Secretary of State, *Harrison v. Corley*, 184; presumption is in favor of regularity of order for publication, and order need not specify that newspaper of publication is most likely to give notice, *Smith v. Smith*, 506; service on an insane person, *Smith v. Smith*, 544.

Settlement of Case on Appeal—Judge not subject to supervision in settlement of case, *Lindsay v. Brawley*, 468.

Sewer System—City of Charlotte has authority to condemn land for sewer line outside its limits, *Charlotte v. Heath*, 750.

Shelley's Case, Rule in—Does not apply when term "bodily heirs" is used as *descriptio personarum*, *Turpin v. Jarrett*, 135.

Shipping—Liability of ship owner for damages caused to bridge piling in collision while ship was navigated by pilot, *Highway Comm. v. Transportation Corp*, 371.

Silence—Failure to object until defendant had completed house located on plaintiff's land *held* not to estop plaintiff from asserting title, *Ramsey v. Nebel*, 590.

Sole Seizin—Plea of sole seizin in partition, *Jernigan v. Jernigan*, 204.

Special Damages—Must be pleaded, *Price v. Goodman*, 223; *held* suffi-

ciently pleaded, *Walston v. Whitley & Co.*, 537.

Specific Performance — Of option, *Crotts v. Thomas*, 385; *Trust Co. v. Frazelle*, 724.

Speed—See Automobiles.

State—State Treasurer, *Gardner v. Retirement System*, 465.

Statement of Case on Appeal—Appeal will not be dismissed for failure to serve, *Lawrence v. Lawrence*, 221.

Statute of Frauds—See Frauds, Statute of.

Statutes—Enlarging time for filing claim for Unemployment Compensation taxes, paid through mistake *held* retroactive as well as prospective in effect, *B-C Remedy Co. v. Unemployment Compensation Comm.*, 52; *mandamus* will not lie where statute must be declared unconstitutional, *Ingle v. Board of Elections*, 454; construction of amendments, *Hoke v. Greyhound Corp.*, 332; construction and operation of criminal and penal statutes, *Clinton v. Ross*, 682.

Statutes of Limitations—See Limitation of Actions.

"Statutory Rape"—Use of phrase in charge *held* not prejudicial error, *S. v. Bullins*, 142.

Stock—Second contract relating to purchase of its stock by corporation *held* not abandonment of prior agreement relating thereto, *Bank v. Supply Co.*, 416; issue of stock in name of purchaser and another as joint tenants *held* not gift *inter vivos*, *Barnes v. Buffaloe*, 313; *Buffaloe v. Barnes*, 780.

Streets—Implied dedication from sale of lots with reference to maps, *Foster v. Atwater*, 472; *Evans v. Horne*, 581; withdrawal from dedication, *ibid.*, parkways are part of street and city may pave same when exigencies of traffic require, *Spicer v. Goldsboro*, 557; taxpayer not a landowner may not enjoin closing of street, *Shaw v. Tobacco Co.*, 477.

Summary Ejectment—Relationship of landlord and tenant is essential to jurisdiction in summary ejectment, *Howell v. Branson*, 264.

Summons—Service of process on foreign corporation by service on Secretary of State, *Harrison v. Corley*, 184; presumption is in favor of regularity of order for publication, and order need not specify that newspaper of publication is most likely to give notice, *Smith v. Smith*, 506; service on an insane person, *Smith v. Smith*, 544.

Superior Court—After appeal Superior Court has no further jurisdiction, *Lawrence v. Lawrence*, 221; *Clark v. Cagle*, 230; upon certification of decision of Supreme Court, matters therein adjudicated are not before Superior Court, *Cannon v. Cannon*, 634; power of Superior Court to make findings on appeal from referee, *Ramsey v. Nebel*, 590; jurisdiction on appeal from justice of the peace is derivative, *Howell v. Branson*, 264; may not increase punishment upon appeal from Recorder's Court from sentence upon plea of guilty, *S. v. Beasley*, 577; trial by court must be by consent of both parties, *Bennett v. Templeton*, 676; court may allow amendment which does not change nature of action, *James v. James*, 399; whether new trial should be limited to issue of damages rests in the discretion of, *Starnes v. Tyson*, 395; judge is not subject to supervision in settlement of case, *Lindsay v. Brawley*, 468; acceptance of judgeship of U. S. Zonal Court would vacate office of Judge of Superior Court, *In re Advisory Opinion in re Phillips*, 773.

Supreme Court—Is bound by record, *S. v. Setzer*, 216; jurisdiction on appeal is limited to matters of law or legal inference, *S. v. Thompson*, 651; on appeal from granting judgment of nonsuit, Supreme Court cannot weigh evidence, *Highway Comm. v. Transportation Corp.*, 371; *Cox v. Hinshaw*, 700; *S. v. Johnson*, 671; *S. v. Shoup*, 69; findings based upon erroneous placing of burden of proof present questions of law or legal inferences which are reviewable, *Lindsay v. Brawley*, 468;

judgment on former appeal is *res judicata*, *S. v. Stone*, 97; *S. v. Peterson*, 770; upon certification of decision of Supreme Court matters therein adjudicated are not before Superior Court, *Cannon v. Cannon*, 634; mere recitation of evidence unobjected to in lower court is not a holding that such evidence is competent, *S. v. Setzer*, 216; on conviction upon void warrant Supreme Court will arrest judgment *ex mero motu*, *S. v. Morgan*, 414; *S. v. Johnson*, 266; notice of candidacy for Justice of Supreme Court must designate to which of two vacancies nomination is sought, *Ingle v. Board of Elections*, 454.

Surprise and Excusable Neglect—In order to set aside involuntary nonsuit for excusable neglect plaintiff must show meritorious cause, *Craver v. Spaugh*, 450; but meritorious defense is immaterial in absence of showing of excusable neglect, *Whitaker v. Raines*, 526; evidence *held* insufficient to establish excusable neglect, *Whitaker v. Raines*, 526.

Survival—Right of action for damages accruing between injury and death survives, *Hoke v. Greyhound Corp.*, 332.

Survivorship—Issue of stock in name of purchaser and another as joint tenants *held* not gift *inter vivos*, *Barnes v. Buffaloe*, 313.

Suspended Sentence or Judgment—Judgment may be suspended on condition only where defendant assents, *S. v. Jackson*, 66; court without power to divide sentence and suspend latter portion, *S. v. Lewis*, 249; no appeal lies from order that suspended judgment be executed, *S. v. Farrar*, 478.

Taxation—Recovery of unemployment compensation tax paid under mistake, *B-C Remedy Co. v. Unemployment Compensation Comm.*, 52; tax deed is color of title, *Lofton v. Barber*, 481; foreclosure of mortgage may not be had in tax foreclosure suit, *Johnston County v. Ellis*, 268; Federal and State taxes ordinarily payable out of general funds of estate, *Barnes v. Buffaloe*, 313; agreement under which county acquired land subject to debt to circumvent constitutional limitations upon incurrence of debt by county *held* void, *Ins. Co. v. Guilford County*, 441; limitation on tax rate, *R. R. v. Duplin County*, 719; limitation on increase of indebtedness, *Coe v. Surry County*, 125; necessary expenses, *Airport Authority v. Johnson*, 1; public purpose, *Airport Authority v. Johnson*, 1; tax on one municipality for benefit of another, *Airport Authority v. Johnson*, 1; foreclosure of tax lien, *Miller v. McConnell*, 28; limitations, *Miller v. McConnell*, 28; judgments in foreclosure proceedings, *Miller v. McConnell*, 28.

Tax Collector—Right to foreclose tax lien after accepting bad checks in payment of taxes, *Miller v. McConnell*, 28.

Taxis—Ordinance limiting taxicab stands, *Lanier v. Warsaw*, 637.

Taxpayer—Not a landowner may not enjoin closing of street, *Shaw v. Tobacco Co.*, 477.

Tax Receipt—Are competent as circumstance tending to show adverse claim, *Graham v. Spaulding*, 86.

Telephone and Telegraph Companies—Liability for failure to send or deliver message, *Wood v. Tel. Co.*, 175.

Tenant—Adverse possession by tenant, *Lofton v. Barber*, 481; *res ipsa loquitur* does not apply upon showing of burning of barn while in possession of tenant, *Rountree v. Thompson*, 553.

Tenants-at-Will—Upon effective plea of statute of frauds lessees become tenants at will, *Davis v. Lovick*, 252.

Tenants-in-Common—Plea of sole seizin in partition, *Jernigan v. Jernigan*, 204.

Tender—Purchaser not required to tender purchase price before delivery of deed, *Crotts v. Thomas*, 385.

Testamentary Capacity—Beneficiaries may testify as to transactions with deceased testator on issue of testa-

mentary capacity but not undue influence, *In re Will of Lomax*, 498.

Theatres — Competency of evidence that other patrons walked on foyer without slipping, *quære*, *Webb v. Theatre Corp.*, 342.

Theory of Trial—Appeal must follow, *Jernigan v. Jernigan*, 204; where case is tried upon theory insisted upon by appellant he may not complain of result, *Johnson v. Sidbury*, 345.

Tobacco Barn—*Res ipsa loquitur* does not apply upon showing of burning of barn while in possession of tenant, *Rountree v. Thompson*, 553.

Tobacco Curers—Action for breach of warranty in sale of, *Walston v. Whitley & Co.*, 537.

Tobacco Warehouse—Is not nuisance, *Kass v. Hedgpeth*, 405; *Clinton v. Ross*, 682; injunction *held* not to lie to prohibit operation of warehouse in area proscribed by municipal ordinance, *Clinton v. Ross*, 682.

Total Disability—Evidence *held* insufficient to show permanent and total disability of insured, *Ireland v. Ins. Co.*, 349.

Towns and Cities—See Municipal Corporations.

Transactions With Decedent—Beneficiaries may testify as to transactions with deceased testator on issue of testamentary capacity but not undue influence, *In re Will of Lomax*, 498; maker may not testify as to transactions with deceased payee on defense of nonliability, *In re Will of Lomax*, 498; *Perry v. Trust Co.*, 667.

Trespass—Issues, verdict and judgment, *Speight v. Anderson*, 492; nature and elements of forcible trespass, *S. v. Gibson*, 194.

Trial—In criminal cases see Criminal Law; motions to strike evidence, *Ziglar v. Ziglar*, 102; withdrawal of evidence, *Graham v. Spaulding*, 86; office and effect of motion to nonsuit, *Coleman v. Whisnant*, 258; *S. v. Perry*, 530; consideration of evidence on motion to nonsuit in general, *Toler v. Savage*, 208; *Ireland v. Ins. Co.*, 349; *Highway Comm. v. Transportation Corp.*, 371; *Deaton v. Elon College*, 433; *Swink v. Horn*, 713; *Love v. Zimmerman*, 389; defendant's evidence on motion to nonsuit, *Deaton v. Elon College*, 433; sufficiency of evidence to overrule nonsuit in general, *Brown v. Loftis*, 762; nonsuit on ground that plaintiff's evidence establishes bar or affirmative defense, *White v. Ins. Co.*, 119; directed verdict in general, *Perry v. Trust Co.*, 667; directed verdict or peremptory instruction in favor of party having burden of proof, *White v. Ins. Co.*, 119; form, requisites and sufficiency of instructions in general, *Rea v. Simowitz*, 379; statement of evidence and explanation of law arising thereon, *Hobbs v. Drewer*, 146; *Webb v. Theatre Corp.*, 342; *In re Will of Lomax*, 498; charge on burden of proof, *McCorkle v. Beatty*, 338; *Crain v. Hutchins*, 642; expression of opinion by court on weight or credibility of evidence, *Starnes v. Tyson*, 395; *James v. James*, 399; form and sufficiency of issues, *Miller v. McConnell*, 28; form and sufficiency of verdict, *Jernigan v. Jernigan*, 204; motions to set aside verdict as being against weight of evidence, *Ziglar v. Ziglar*, 102; *Bailey v. McCotter*, 160; *Webb v. Theatre Corp.*, 342; trial by court under agreement of parties, *Bennett v. Templeton*, 676.

Trucks—Evidence *held* sufficient in action for damages to truck while being transported under own power by carrier, *Barnard v. Sober, Inc.*, 392; liability in operation of trucks, see Automobiles.

Trusts—Approval of family agreement for distribution of trust which preserves trust estate for minors, approved, *Redwine v. Clodfelter*, 366; proceeds of life policy taken out by corporation on officer-stockholder *held* trust fund for purchase of his stock for estate under agreement, *Bank v. Supply Co.*, 416; administration of testamentary trust belongs in first instance to trustees,

Cannon v. Cannon, 634; actions to establish parol trusts, *McCorkle v. Beatty*, 338; written trusts in general, *Buffaloe v. Barnes*, 313; property subject to trust, *Welch v. Trust Co.*, 357; supervisory powers of courts of equity, *Trust Co. v. Rasberry*, 586; authority and powers of trustee in general, *Welch v. Trust Co.*, 357; power to sell trust property, *Trust Co. v. Rasberry*, 586; termination or forfeiture of trust upon failure of objectives or beneficiaries, *Trust Co. v. Board of National Missions*, 546; *Welch v. Trust Co.*, 357; termination for want of competent trustee, *Welch v. Trust Co.*, 357; *Trust Co. v. Board of National Missions*, 546.

"Under the Influence of Intoxicants" —Defined, *S. v. Carroll*, 237; *S. v. Bowen*, 601; *S. v. Bifferstaff*, 603.

Undisclosed Principal — *Walston v. Whitley & Co.*, 537.

Undue Influence—No presumption of undue influence in deed from parent to child, *Jernigan v. Jernigan*, 204; beneficiaries may testify as to transactions with deceased testator on issue of testamentary capacity but not undue influence, *In re Will of Lomax*, 498; undue influence usually must be established by circumstantial evidence, *In re Will of Lomax*, 498.

Unemployment Compensation Act—See Master and Servant.

U. S. Zonal Court—Acceptance of judgeship of U. S. Zonal Court would vacate office of Judge of Superior Court, *In re Advisory Opinion in re Phillips*, 780.

"Unnecessary Hardships" — Within meaning of zoning statutes, *Lee v. Board of Adjustment*, 107.

Unregistered Deed—Competent as circumstance tending to show adverse claim, *Graham v. Spaulding*, 86.

Vendor and Purchaser—Commissions *held* payable under contract only upon consummation of sale, *Jones v. Realty Co.*, 303; agreement to sell comes within statute of frauds, *Harvey v. Linker*, 711; sufficiency of memorandum to take agreement out of statute of frauds, *Searcy v. Logan*, 562; burden is on purchaser to establish right to recover for improvements but failure to establish contract to convey does not preclude purchaser who had also purchased mortgage notes, from foreclosing, *Crain v. Hutchins*, 642; consideration, *Crotts v. Thomas*, 385; *Trust Co. v. Frazelle*, 724; construction and operation of options in general, *Crotts v. Thomas*, 385; *Trust Co. v. Frazelle*, 724; purchase price, *Crotts v. Thomas*, 385; *Ins. Co. v. Wells*, 574; description and amount of land, *Crotts v. Thomas*, 385; necessity for tender of purchase price, *Crotts v. Thomas*, 385; *Trust Co. v. Frazelle*, 724.

Venue—Actions involving realty, *Penland v. Church*, 171; requirement that summons in divorce action be returnable to county of residence of either party is not jurisdictional, *Smith v. Smith*, 506.

Verdict—Where solicitor announces he would not ask for verdict of guilty of more than second degree, verdict of guilty of first degree burglary must be set aside, *S. v. Jordan*, 155; may be interpreted in light of pleadings and evidence, *Jernigan v. Jernigan*, 204; may be interpreted by reference to allegations, evidence and instructions, *S. v. Smith*, 738; judgment *held* not supported by, *Speight v. Anderson*, 492; conviction on insufficient evidence on charge of possession of liquor for sale cannot be sustained on ground that evidence was sufficient for conviction of illegal possession, *S. v. Peterson*, 255; directed verdict on conflicting evidence is error, *Perry v. Trust Co.*, 667; court's offer to reduce verdict if agreed to, to end litigation not a finding that verdict was excessive, *Rea v. Simowitz*, 379; where verdict on first issue determines right of parties, submission of second issue is improvident and verdict thereon will be disregarded, *Ins. Co. v. Wells*, 574; motion to set aside as contrary to evidence, *Ziglar v. Ziglar*, 102; *Bailey*

v. McCotter, 160; *Webb v. Theatre Corp.*, 342.

Verification—Of complaint in suit for alimony without divorce is necessary to give court jurisdiction, *Hodges v. Hodges*, 570.

Vessels—Liability of ship owner for damages caused to bridge piling in collision while ship was navigated by pilot, *Highway Comm. v. Transportation Corp.*, 371.

Vesting of Estates—Created by will, *Patterson v. Spaulding*, 89; *Turpin v. Jarrett*, 135.

Waiver—Of provisions of insurance *policy*, *Ins. Co. v. Wells*, 574; *Hicks v. Ins. Co.*, 614; of right to seek removal, *Trust Co. v. Henderson*, 649.

War Department — Acceptance of judgeship of U. S. Zonal Court would vacate office of Judge of Superior Court. *In re Advisory Opinion in re Phillips*, 773.

Warehouse—Is not nuisance, *Kass v. Hedgpeth*, 405; *Clinton v. Ross*, 682; injunction *held* not to lie to prohibit operation of warehouse in area proscribed by municipal ordinance, *Clinton v. Ross*, 682.

Warrant—Valid warrant or indictment is essential to jurisdiction, *S. v. Morgan*, 414; court has discretionary power to permit amendment to warrant, *S. v. Grimes*, 523.

Warranty—Counterclaim for breach of warranty in sale of personal property, *Price v. Goodman*, 223; breach of warranty as to quality and capacity, *Walston v. Whitley & Co.*, 537.

Weapon—Knife used as deadly weapon, *S. v. Hightower*, 62; brick used as, *S. v. Perry*, 530; killing with, raises presumption of malice, *S. v. Robinson*, 95; premeditation and deliberation not presumed from killing with deadly weapon, *S. v. Stewart*, 299.

Well—Contract relating to expenses of digging well *held* not supported by consideration, *Stonestreet v. Oil Co.*, 261.

"When"—Indicates that promise is to be performed only upon happening of stated event, *Jones v. Realty Co.*, 303.

Widow—While motion to set aside divorce decree is pending, it is error for court to strike out widow's dissent from will, *In re Estate of Smith*, 169.

Wills—Revocation of letters of administration upon discovery of will, *Harrison v. Carter*, 36; testamentary intent, *Buffaloe v. Barnes*, 313; nature of caveat proceedings, *In re Will of Lomax*, 498; evidence on issue of mental capacity, *In re Will of Lomax*, 498; evidence on issue of undue influence, *In re Will of Lomax*, 498; order of proof, *In re Will of Lomax*, 498; argument of counsel, *In re Will of Lomax*, 498; general rules of construction, *Trust Co. v. Board of National Missions*, 546; vested and contingent interests and defeasible fees, *Patterson v. Brandon*, 89; estates in trust, *Welch v. Trust Co.*, 357; *Trust Co. v. Board of National Missions*, 546; designation of devisees and legatees and their respective shares, *Wooten v. Outland*, 245; actions to construe wills, *Cannon v. Cannon*, 634; *Trust Co. v. Henderson*, 649; right of widow to dissent from will, *In re Estate of Smith*, 169; election, *Lamb v. Lamb*, 662; nature of title and rights and liabilities of devisees, *Buffaloe v. Barnes*, 313.

Witnesses—Opinion evidence as to speed of vehicle based upon tire marks incompetent, *Tyndall v. Hines Co.*, 620; lay witness may testify as to defendant's ability to distinguish right from wrong, *S. v. Matthews*, 639; maker may not testify as to transactions with deceased payee on defense of nonliability, *In re Will of Lomax*, 498; *Perry v. Trust Co.*, 667; defendant *held* to live in "community" for purpose of testimony as to general reputation, *S. v. Bowen*, 601; competency of wife to testify against husband, *S. v. Setzer*, 216; credibility of defendant as witness, *S. v. Hightower*, 62; court has discretionary power to permit leading

questions, *S. v. Beatty*, 765; cross-examination of, *S. v. Herring*, 213; *S. v. Stone*, 97; *McCorkle v. Beatty*, 338; cross-examination of defendant in regard to pleadings in civil action *held* competent to impeach defendant's testimony, *S. v. McNair*, 462; inconsistency in testimony affects credibility, *S. v. Petry*, 78; *Graham v. Spaulding*, 86; admission of news article for purpose of impeaching witness *held* error, *S. v. Gardner*, 310; where credibility has been attacked, witness may testify as to collateral matters to re-establish credibility, *Brown v. Loftis*, 762; evidence competent to corroborate, *S. v. Petry*, 78; *S. v. Bennett*, 82; new trial awarded for remarks of court impeaching credibility of witness, *S. v. Stone*, 97; *S. v. Owenby*, 521.

Workmen's Compensation—See Master and Servant.

Wrongful Death—See Death.

Zoning Ordinances—Authority of Municipal Board of Adjustment, *Lee v. Board of Adjustment*, 107; must be adopted in accordance with enabling provisions of statute, *Kass v. Hedgpeth*, 405; enforcement by injunction applies only to zoning regulations promulgated under zoning act, *Clinton v. Ross*, 682.

ANALYTICAL INDEX.

ABATEMENT AND REVIVAL.

§ 10. Death of Party and Survival of Actions in General.

A cause of action which survives against successor personal representatives of an estate likewise survives in their favor. G. S., 28-172, -181. *Harrison v. Carter*, 36.

The subject matter of plaintiff's action in summary ejectment is located in an area subject to Federal Rent Control. Plaintiff sought possession for personal occupancy to be near her aged and ailing mother. Pending defendant's appeal from judgment for plaintiff, plaintiff's mother died. *Held:* The changed circumstances affected merely an element of proof incidental to the relief sought and does not destroy plaintiff's cause of action, and therefore defendant's motion to dismiss plaintiff's action as having abated, is denied. *Swink v. Horn*, 718.

§ 11. Actions for Negligent Injuries Causing Death.

A cause of action for wrongful death properly instituted does not abate upon the death, resignation or removal of the personal representative who instituted the action, but the action survives to his successor. G. S., 1-74. *Harrison v. Carter*, 36.

Survival of actions for wrongful death is solely by virtue of statute. *Hoke v. Greyhound Corp.*, 332.

Where a person injured by the negligence of another, lives for a period of time thereafter (in the instant case 31 days), but thereafter dies as a result of the injuries, his personal representative may recover (1) as an asset of the estate those damages sustained by the injured person during his lifetime, and (2) for the benefit of the next of kin the pecuniary injury resulting from death, the amounts recoverable being determinable upon separate issues without overlapping. *Ibid.*

§ 12. Actions for Negligent Injury Not Causing Death.

Survival of actions is solely by virtue of statute. *Hoke v. Greyhound Corp.*, 332.

By virtue of amendment of 1915, ch. 38, causes of action for negligent injury which do not cause death, survive. *Ibid.*

ADVERSE POSSESSION.

§ 4d. Hostile Character of Possession—Landlord and Tenant.

The rule that the possession of the tenant is the possession of the landlord, precluding adverse possession by the tenant without first surrendering the possession he has under the lease, obtains only when the tenant seeks to assert a title adverse to that of the landlord or assumes an attitude of hostility to that title, and does not apply where the tenant or those claiming under him assert title derived from the landlord and therefore rely upon and claim under such title. G. S., 1-43. *Lofton v. Barber*, 481.

Where a tenant acquires the title of his landlord by deed from the purchaser at the foreclosure sale of a mortgage executed by the landlord, and thus acquires a title derived from the landlord, G. S., 1-43, is not applicable, and the tenant's deed purporting to convey the fee is color of title, and adverse possession thereunder for seven years is sufficient to ripen the title in the

ADVERSE POSSESSION—*Continued.*

grantee as against those claiming as remaindermen upon their contention that the landlord mortgagor had only a life estate in the lands. *Ibid.*

Where a tenant acquires the title of his landlord, his leasehold estate merges in the greater estate conveyed by his deed, and the tenant is thereafter under no obligation to recognize his former landlord as such or surrender possession to him before asserting the title thus acquired. G. S., 1-43. *Ibid.*

§ 9a. What Constitutes Color of Title.

A deed which is regular on its face and purports to convey title to land constitute color of title even though void for matters *dehors* the record, such as want of title in the grantor. G. S., 1-38. *Lofton v. Barber*, 481.

A deed otherwise sufficient in form to convey the fee contained a paragraph between the description and the *habendum* clause "after the death of me (the grantee) and my wife . . . this land to be divided between my two daughters . . ." The grantee and his wife executed a mortgage thereon purporting to convey the fee as security, without the joinder of the daughters. Defendants claim by *mesne* conveyance under the foreclosure. *Held:* Deed to defendants purporting to convey the fee is color of title regardless of whether or not the deed to the mortgagors conveyed to them only a life estate with remainder to their daughters. *Ibid.*

The grantee under an inoperative tax foreclosure deed may convey colorable title. *Ibid.*

§ 13a. Accrual of Right of Action and Time from Which Possession Is Adverse.

Where the life tenant executes an instrument purporting to convey the fee, the right of action of the remaindermen against those possessing and claiming under such instrument by *mesne* conveyances accrues as of the date of the death of the life tenant. *Lofton v. Barber*, 481.

§ 18. Competency and Relevancy of Evidence.

In a case tried solely on the theory of adverse possession for a period of 20 years, a deed to plaintiff executed at the time he took possession but unregistered until after defendant's deed, is competent as a relevant fact in connection with other circumstances tending to show claim of title. *Graham v. Spaulding*, 86.

Under a claim of title by 20 years adverse possession, tax receipts, though insufficient alone, are competent in connection with other circumstances to show that plaintiff had been asserting a claim to the property. *Ibid.*

§ 19. Sufficiency of Evidence and Nonsuit.

In an action involving title to timber lands, evidence that plaintiff, for a period of 27 years, listed the property for taxes, cleared and cultivated small patches, cut and removed logs and crossties, *held* sufficient to be submitted to the jury on the question of adverse possession by the continuous use of the property for the purpose of which it was susceptible. *Graham v. Spaulding*, 86.

APPEAL AND ERROR.

§ 1. Appellate Jurisdiction in General.

Where referee's findings are based upon an erroneous placing of the burden of proof, exceptions to the approval of the referee's findings raises questions of law or legal inference reviewable by Supreme Court. *Lindsay v. Brawley*, 468.

APPEAL AND ERROR—*Continued.*

§ 3. Parties Who May Appeal—"Party Aggrieved."

When the Superior Court on defendant's appeal from the Municipal Court, grants a new trial on two exceptions and overrules the others, and the Supreme Court on plaintiff's appeal from this ruling sustains the ruling granting a new trial, defendant's appeal from the action of the Superior Court in overruling its other exceptions will be dismissed, since defendant having been granted a new trial is not the "party aggrieved." *Starnes v. Tyson*, 395.

One who challenges neither the proceeding nor the judgment below and appeals only for purposes of delay, is not the "party aggrieved" within the meaning of G. S., 1-271. *Stephenson v. Watson*, 742.

§ 5. Moot Questions and Dismissal Where Question Has Become Academic.

The subject matter of plaintiff's action in summary ejectment is located in an area subject to Federal Rent Control. Plaintiff sought possession for personal occupancy to be near her aged and ailing mother. Pending defendant's appeal from judgment for plaintiff, plaintiff's mother died. *Held:* The changed circumstances affected merely an element of proof incidental to the relief sought and does not destroy plaintiff's cause of action, and therefore defendant's motion to dismiss plaintiff's action as having abated, is denied. *Swink v. Horn*, 718.

§ 6a. Parties Entitled to Object and Take Exception.

In this action for specific performance and for damages for tortuous eviction, plaintiff obtained judgment by default and inquiry. Answer was filed pending decision on appeal reversing judgment setting aside the default judgment. At the execution of the inquiry plaintiff waived the cause on contract. Defendant persisted in trying the matter on the complaint and answer, and offered evidence to sustain his position under the contract. Under instructions from the court, damages were awarded as for breach of contract. *Held:* Conceding the measure of damages was in excess of the scope of the inquiry, having invited the court to entertain his answer and evidence, defendant is in no position to complain. *Johnson v. Sidbury*, 345.

§ 6c (1). Form and Sufficiency of Objections and Exceptions in General.

An exception to the "several rulings of the court as appear in the judgment signed by the court, and to the signing thereof" is a "broadside exception as to all matters except the signing of the judgment, and properly presents for review only whether the judgment is supported by the facts found. *Ramsey v. Nebel*, 590.

§ 6c (5). Objections and Exceptions to Charge.

Exception to charge for failure to "charge the law and facts relative to this case" *held* defective as "broadside exception." *S. v. Thomas*, 384.

Where the charge of the court is not incorporated in appellant's statement of case on appeal, but the charge is incorporated in appellee's countercase, it would seem that an exception to the charge then entered by appellant is not timely. G. S., 1-282. *Searcy v. Logan*, 562.

A general exception to the charge as given is sufficient to present appellant's contention, argued in his brief, that the charge violated G. S., 1-180, in failing to charge upon a particular phase of the case. *Brown v. Loftis*, 762.

§ 8. Theory of Trial.

An appeal *ex necessitate* rests upon the theory of trial in the lower court. *Jernigan v. Jernigan*, 204.

APPEAL AND ERROR—*Continued.*

§ 10e. Settlement of Case on Appeal.

Ordinarily, no supervision can be exercised over the judge in the settlement of case on appeal except to see that the duty is performed, G. S., 1-283, and asserted errors in omitting certain matters from the case on appeal cannot be brought up on exception taken at the time the case is settled, the sole remedy being by motion for *certiorari*. *Lindsay v. Brawley*, 468.

§ 13c. Certiorari to Correct or Amplify Record.

Remedy when judge omits matters from case on appeal deemed material by appellant is by motion for *certiorari*. *Lindsay v. Brawley*, 468.

§ 14. Powers and Proceedings in Lower Court After Appeal.

After appeal from order allowing support *pendente lite*, Superior Court is without authority pending the appeal to adjudge defendant in contempt for failure to make payments as directed. *Lawrence v. Lawrence*, 221.

Where appeal entries are noted at the time of the signing of final judgment, the trial court is without authority at a subsequent term, and within the time allowed for service of case on appeal, to set aside the judgment and substitute another except by consent, and upon objection a substituted judgment not consented to must be stricken out. *Clark v. Cagle*, 230.

§ 19. Necessary Parts of Record Proper.

Where record fails to show organization of lower court and contains no indictment or verdict, appeal will be dismissed. *S. v. Clough*, 384.

The pleadings are a necessary part of the record proper upon appeal, and where the pleadings are omitted from the record, the appeal must be dismissed. Rule of Practice in the Supreme Court, No. 19, sec. 1. Nor will memoranda of the pleadings suffice. Rule 20. *Ericson v. Ericson*, 474; *Campbell v. Campbell*, 653.

§ 22. Conclusiveness and Effect of Record.

Judicial knowledge arises only from what properly appears on the record. *Ericson v. Ericson*, 474.

§ 24. Necessity for Exceptions to Support Assignments of Error.

Assignments of error should be based upon exceptions briefly and clearly stated and numbered in the record. *S. v. Herring*, 213.

§ 29. Abandonment of Exceptions and Assignments of Error by Failing to Discuss in Briefs.

Exceptions not set out and discussed in appellant's brief are deemed abandoned. *Smith v. Mariakakis*, 100; *S. v. Hightower*, 62; *S. v. Stone*, 97; *S. v. Hart*, 200; *Clark v. Cagle*, 230; *S. v. Carroll*, 237.

§ 31f. Dismissal for Failure to Serve Statement of Case on Appeal.

An appeal will not be dismissed for failure of appellant to serve statement of case on appeal, appellant being entitled to review for alleged errors appearing on the face of the record. *Lawrence v. Lawrence*, 221.

§ 31c. Dismissal for Failure to Docket Appeal in Time.

When a case is not docketed within the time prescribed, Rule 5, and no application for writ of *certiorari* is made, the appeal will be dismissed, the Rules of Practice in the Supreme Court being mandatory and not directory. *S. v. Presnell*, 160.

APPEAL AND ERROR—*Continued.*

§ 31g. Dismissal for Insufficiency of Record.

Where pleadings are not made a part of the record, the appeal will be dismissed. *Ericson v. Ericson*, 474; *Campbell v. Campbell*, 653.

§ 31i. Dismissal of Frivolous Appeals.

Where the agreed statement of case on appeal contains no exceptions or assignments of error, making it apparent that the appeal was taken solely for the purpose of delay, appellee's motion to docket and dismiss under Rule 17 (1), will be allowed. *Stephenson v. Watson*, 742.

§ 37. Scope and Extent of Review in General.

The Supreme Court can consider on appeal only matters of law or legal inference; but the denomination by the lower court of a conclusion as a finding of fact does not preclude review when the conclusion is in fact a conclusion of law. *Charlotte v. Heath*, 750.

§ 38. Presumptions and Burden of Showing Error.

Appellant has the burden not only to show error but also that the alleged error was prejudicial to the extent that the verdict of the jury was probably influenced thereby. *Rea v. Simowitz*, 379.

§ 39b. Error Harmless Because of Answer to Another Issue.

Where certain issues submitted are inappropriate and do not affect the rights of the parties, any error in the instructions relating to such issues is harmless. *Miller v. McConnell*, 28.

Plaintiff's exception to the submission of one of the issues becomes immaterial when the answers to the other issues establish that plaintiff is not entitled to the relief sought. *Mason v. Mason*, 740.

§ 39d. Error Harmless Because of Admissions.

Where defendants admit a relevant fact, the exclusion of plaintiff's evidence tending to establish such fact, and an instruction, in excluding the evidence, that it was not material, cannot be held prejudicial. *McCorkle v. Beatty*, 338.

Where defendants admit the relationship of master and servant and the case is tried throughout on this theory, the failure of the court to charge upon the doctrine of *respondeat superior* is not prejudicial. *Webb v. Theatre Corp.*, 342.

§ 39e. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

Where the record fails to show what the answer of the witness would have been if permitted to answer, the exclusion of the testimony cannot be held prejudicial. *McCorkle v. Beatty*, 338.

The exclusion of evidence tending to establish a fact which is admitted by the adverse party cannot be held prejudicial. *Ibid.*

The exclusion of evidence, even if competent, cannot be held harmful when the ultimate fact sought to be proven thereby is fully established by other evidence. *Deaton v. Elon College*, 433.

The admission of evidence objected to cannot be held prejudicial when the ultimate fact such evidence tends to establish is proven by other evidence admitted without objection. *Webb v. Theatre Corp.*, 342; *Belhaven v. Hodges*, 485.

APPEAL AND ERROR—*Continued.*

Permissive use is presumed until the contrary is made to appear, and on the present record testimony of the husband and predecessor in title to the servient tenement that the use of the way across plaintiff's lands was permissive, if error, was not prejudicial. *Speight v. Anderson*, 492.

Evidence of undue influence is usually of a circumstantial nature, and therefore an instruction which withdraws from the consideration of the jury competent testimony upon the issue must be held for prejudicial error, since the testimony may have substantial and material bearing upon the issue when considered with the other circumstances adduced by the testimony in the case. *In re Will of Lomax*, 498.

The erroneous admission of testimony of a highway patrolman that from his observation of the tire marks and conditions at the scene of the accident the vehicle in question was traveling 50 to 60 m.p.h. must be held prejudicial when it appears that the question of excessive speed is one of the primary acts of negligence relied on in the theory of trial, especially where the court specifically refers to the incompetent conclusion in the charge. *Tyndall v. Hines Co.*, 620.

The erroneous admission over objection of testimony of a witness that the vehicle in question was traveling 50 to 60 m.p.h. cannot be held harmless on the ground that the witness had theretofore been permitted to testify without objection that the vehicle was going at a high rate of speed, since the conclusion objected to is not in substance "the same evidence" within the meaning of the rule. *Ibid.*

§ 39f. Harmless and Prejudicial Error in Instructions Generally.

Use of illustrations in charge *held* not prejudicial error in view of charge construed as a whole. *Rea v. Simowitz*, 379.

§ 39h. Error in Placing of Burden of Proof.

Where referee's findings are based upon an erroneous placing of the burden of proof the case must be remanded for appropriate proceedings. *Lindsay v. Brawley*, 468.

Failure of charge to instruct jury as to the burden of proof on one of issues is reversible error. *Crain v. Hutchins*, 642.

§ 40a. Review of Exceptions to Judgment or to Signing of Judgment.

An exception to the judgment presents the single question whether the facts found and admitted are sufficient to support the judgment rendered. *Lee v. Board of Adjustment*, 108.

An exception to the signing of the judgment presents the single question whether the court correctly applied the law to the facts found. *Redwine v. Clodfelter*, 366.

An exception to "the signing of the judgment" presents only the face of the record for inspection or review, and when the judgment is supported by the record the exception must fail. *King v. Rudd*, 156; *Smith v. Smith*, 506.

When the absence of jurisdiction appears on the face of the record, such defect is presented by an exception to the judgment which challenges the correctness of the judgment. *Howell v. Branson*, 264.

An exception to the judgment presents the single question whether the facts found and admitted are sufficient to support the judgment and does not present for decision whether the findings are supported by evidence, and therefore when the findings of fact support the judgment, the judgment will be affirmed. *In re Collins*, 412; *Swink v. Horn*, 713.

APPEAL AND ERROR—*Continued.*

§ 40b. Review of Matters in Discretion of Lower Court.

Matters resting in the discretion of the lower court are not reviewable in the absence of abuse of discretion. *Ziglar v. Ziglar*, 102; *Bailey v. McCotter*, 160; *Webb v. Theatre Corp.*, 342; *Western N. C. Conference v. Talley*, 654; *Brown v. Hall*, 732.

§ 40d. Review of Findings of Fact or Facts Agreed.

Where the agreed facts contain a stipulation that the appropriations in question were made by defendant municipalities out of funds in their hands not derived from *ad valorem* taxes, but mainly from the sale of property, the Supreme Court on appeal is bound by the stipulation. *Airport Authority v. Johnson*, 1.

Where an action is submitted upon facts agreed to determine whether testator had made a gift *inter vivos* of stock to claimant, and the executors admit upon the hearing and on appeal that claimant was the owner of one-half the stock, and claimant does not contest or protest this admission, the correctness of the admission is not presented for determination on the appeal, and perforce the Supreme Court passed only upon the question of ownership to that portion of the stock to which title is in dispute. *Buffaloe v. Barnes*, 780.

Findings of fact by a referee approved by the trial judge cannot be reviewed on appeal if supported by any competent evidence. *Clark v. Cagle*, 230.

An exception to the approval by the court of the referee's findings of fact raises the question whether there is any evidence to support the findings, the findings being conclusive in the Supreme Court if they are supported by evidence. *Lindsay v. Brawley*, 468.

Where the referee, in making a finding of fact upon conflicting evidence, applies an erroneous rule as to which party has the burden of proof, an exception to the approval of the finding by the court raises a question of law and legal inference reviewable by the Supreme Court, and since the error of law may have seriously prejudiced appellant, the cause will be remanded for appropriate proceedings. *Ibid.*

The findings of fact made by the court in a trial by the court by agreement are conclusive on appeal if supported by any competent evidence. *Swink v. Horn*, 713.

A conclusion upon undisputed evidence that the purpose for which a municipality sought to exercise the power of eminent domain was not for a public purpose, is a conclusion of law which is reviewable notwithstanding that the judgment of the lower court denominates it a finding of fact. *Charlotte v. Heath*, 750.

§ 40i. Review of Judgments on Motions to Nonsuit.

In reviewing exceptions to refusal of defendant's motions to nonsuit, photographs, identified by stipulation of parties and by oral testimony, but which the record fails to show were offered in evidence, will not be considered. *Wallace v. Longest*, 161.

In determining an exception to the granting of defendant's motion to nonsuit the province of the Supreme Court is solely to determine whether there is sufficient evidence to carry the case to the jury. *Highway Comm. v. Transportation Corp.*, 371; *Cox v. Hinshaw*, 700.

On appeal from the granting of defendant's motion to nonsuit, exceptions to the admission of evidence offered by defendant are without merit, since

APPEAL AND ERROR—*Continued.*

defendant's evidence in derogation of plaintiff's evidence is not considered in determining the sufficiency of the evidence. *Deaton v. Elon College*, 433.

§ 48. Partial New Trial.

Whether the Superior Court, in sustaining exceptions relating solely to the issue of damages on defendant's appeal from the Municipal Court, should limit the new trial to the issue of damages, rests solely in the discretion of that court, and the Supreme Court, on further appeal, will not entertain plaintiff's request that the new trial be so limited. *Starnes v. Tyson*, 395.

§ 50. Remand.

Where the agreed facts establish a want of absolute and unconditional delivery of the chose necessary to constitute the transaction in suit a gift *inter vivos*, it would be futile to remand the case for further stipulations or findings relative to donative intent, since even if donative intent should be established the result would not be affected. *Buffaloe v. Barnes*, 780.

§ 51a. Law of the Case.

Where it is determined on appeal that plaintiff's recovery is dependent upon his showing want of consideration to support the contract involved in the litigation, judgment of nonsuit upon the subsequent trial upon failure of proof on the issue by plaintiff, conforms to the law of the case. *Coleman v. Whisnant*, 258.

A decision by the Supreme Court on a prior appeal constitutes the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal. *Cannon v. Cannon*, 634.

§ 52. Proceedings in Lower Court After Remand.

Upon certification of decision of Supreme Court to Superior Court, the matters therein adjudicated are not before the Superior Court and it should issue no orders or judgments affecting the matters adjudicated. *Cannon v. Cannon*, 634.

ARBITRATION AND AWARD.

§ 13. Attack of and Setting Aside Award.

Upon motion to set aside an award made pursuant to the common law procedure for arbitration, movent is entitled to introduce evidence that prior to the filing of the award the arbitrator wrote movent's attorney expressing a desire to resign, and that the attorney, with movent's approval, wrote the arbitrator accepting the resignation, since if the facts should be found in accordance therewith, movent would be entitled to the relief, and refusal to consider such proof is reversible error. *Tarpley v. Arnold*, 679.

ASSAULT.

§ 8d. Assault with Deadly Weapon.

A "brick" has a well defined meaning, and when thrown with force at close range may constitute a deadly weapon as a matter of law. *S. v. Perry*, 530.

§ 14b. Instructions on Defenses.

The evidence in this case is held not to require the court, without a special prayer, to charge the law of self-defense, defense of property or the right of the proprietor of a public place to quell a disturbance thereon. *S. v. Jackson*, 760.

ASSAULT—*Continued.*

§ 14c. Instructions on Less Degrees of the Crime.

Where the evidence tends to show an assault with a brick thrown at close range with force, it is not error for the court to limit the jury to a verdict of guilty of assault with a deadly weapon or not guilty, and to refuse to submit to the jury the question of defendant's guilt of simple assault. *S. v. Perry*, 530.

Where the evidence tends to show an assault with a knife, it is not error for the court to limit the jury to a verdict of guilty of assault with a deadly weapon or not guilty, and to refuse to submit to the jury the question of defendant's guilt of simple assault. *Ibid.*

§ 15. Verdict and Judgment.

Assault on female *simpliciter* is punishable by fine of not more than fifty dollars or imprisonment not in excess of thirty days, and verdict of guilty on warrant charging such assault will not support sentence as for general misdemeanor notwithstanding amendment of warrant after verdict to charge that defendant was male over 18 years old. *S. v. Grimes*, 523.

ATTORNEY AND CLIENT.

§ 6. Scope of Authority of Attorney.

An attorney, perforce an attorney for a municipality, has no inherent or imputed power to enter a consent judgment which abandons the claim of the client, or to make any other substantial compromise of his client's rights. *Bath v. Norman*, 502.

AUTOMOBILES.

§ 8e. Backing.

Evidence that defendant's truck was "backed out with speed" from curb, and struck plaintiff's car *held* sufficient on issue of negligence. *Phillips v. Nessmith*, 173.

§ 8i. Intersections.

The statutory rule that a vehicle approaching an intersection has the right of way over a vehicle approaching the intersection from its left applies when the two vehicles approach or enter the intersection at approximately the same time, and a driver has no right to proceed on his way upon the assumption that the vehicle to his left will stop in time to avoid collision if, in the exercise of reasonable prudence, he ascertains that the vehicle on his left has already entered the intersection. G. S., 20-155. *Kennedy v. Smith*, 514.

§ 8k. Legal Age and Driving Without License.

It is negligence *per se* for one to drive a motor vehicle without a license, G. S., 20-7, or for the owner of a car or one having it under his control to permit a person under legal age to operate same, G. S., 20-34, but such negligence must be the proximate cause of injury in order to be actionable. *Hoke v. Greyhound Corp.*, 692.

Fact of driver is under legal age must be proximate cause, and while youthfulness of driver may be taken into consideration in determining whether driver exercised that degree of care which would have been exercised by ordinarily prudent man under the circumstances, but mere negligence of youthful driver does not justify recovery against person permitting him to drive. *Ibid.*

AUTOMOBILES—*Continued.*

§ 12a. Speed in General.

By provision of G. S., 20-141, speed in excess of that which is reasonable and prudent under the circumstances when special hazards exist by reason of traffic, weather or highway conditions, is unlawful notwithstanding that the speed may be less than the *prima facie* limits prescribed by the statute. *Hoke v. Greyhound Corp.*, 692.

§ 13. Right Side of Road and Passing Vehicles Traveling in Opposite Direction.

The violation of G. S., 20-148, prescribing that vehicles traveling in opposite directions in passing each other on the highway should each keep to its right and give the other at least one-half of the main traveled portion of the roadway as nearly as possible, is negligence *per se* and if the proximate cause of injury is actionable. *Wallace v. Longest*, 161; *Hoke v. Greyhound Corp.*, 692.

§ 18b. Proximate Cause.

Plaintiff in a civil action has the burden of showing that excessive speed, when relied upon by him, was a proximate cause of injury. G. S., 20-141. *Hoke v. Greyhound Corp.*, 692.

Plaintiff has burden of showing that driving under legal age was proximate cause in order to be entitled to recover on this ground. *Ibid.*

§ 18c. Contributory Negligence.

When diverse inferences can be drawn from evidence on issue of contributory negligence, issue must be submitted to jury. *Phillips v. Nessmith*, 173.

Evidence *held* not to establish contributory negligence as matter of law in failing to wait until defendant's truck had cleared bridge before plaintiff entered thereon. *Hobbs v. Drewer*, 146.

§ 18d. Concurring and Intervening Negligence.

In this action to recover for death of passenger in car, killed in collision between car and bus, evidence of concurring negligence *held* sufficient. *Hoke v. Greyhound Corp.*, 692.

§ 18g (2). Evidence as to Speed.

Highway patrolman cannot give opinion as to speed of vehicle based upon observation of tire marks. *Tyndall v. Hines Co.*, 620.

§ 18h (2). Nonsuit on Issue of Negligence.

Evidence that, in meeting each other on the highway while traveling in opposite directions, the driver of defendant's truck was not passing on his right side of the highway and did not give to plaintiffs one-half the main traveled portion of the roadway as nearly as possible, resulting in the collision, *is held* sufficient to be submitted to the jury on the question of negligence in the violation of G. S., 20-148, and proximate cause, and this result is not affected by defendant's contention that the evidence showed that the right front of plaintiffs' truck and left front of defendant's truck came into contact, since even so the question of whether defendant's truck was on its left side of the highway at the time of such impact would be for the jury. *Wallace v. Longest*, 161.

Plaintiff's testimony that he was driving on the right side of the street with his lights burning, when defendant's truck, which had been parked at

the curb, "backed out with speed" and hit plaintiff's car, *is held* sufficient to carry the case to the jury on the issue of negligence. *Phillips v. Nessmith*, 173.

§ 18h (3). Sufficiency of Evidence and Nonsuit on Issue of Contributory Negligence.

The "more than a scintilla" rule of evidence applies equally to the issues of negligence and contributory negligence, and if diverse inferences may reasonably be drawn from the evidence upon the issue of contributory negligence, some favorable to plaintiff and some favorable to defendant, the issue must be submitted to the jury. *Phillips v. Nessmith*, 173.

Testimony of the driver that in approaching an intersection he saw the headlights of a vehicle approaching the intersection from his left, that he proceeded on his way assuming the other vehicle would stop, and that the front of his car struck the side of the other vehicle "full broadsided," *is held* to raise the issue of contributory negligence for the determination of the jury in the absence of evidence that the other vehicle was traveling at excessive speed, since the evidence affords ground for the deduction that the other vehicle had preceded plaintiff's car into the intersection. *Kennedy v. Smith*, 514.

§ 18i. Instructions—On Negligence in Permitting Person Under Age to Drive.

Permitting one to drive under the legal age is negligence *per se*, but is not actionable unless the fact of such age be the proximate cause or one of the proximate causes of injury, and while the youthfulness of the driver may be taken into consideration by the jury in determining whether she exercised that degree of care which would have been exercised by an ordinarily prudent person under the circumstances, an additional charge to the jury in response to its request for clarification on the point, to the effect that permitting a person under the legal age to drive is negligence *per se*, and that defendant owner would then be liable if the jury should find from the greater weight of the evidence that negligence on the part of the driver was the proximate cause or one of the proximate causes of the injury, must be held for error. *Hoke v. Greyhound Corp.*, 692.

§ 18j. Issues and Verdict.

Defendant's testimony was to the effect that she was backing her truck from the curb where it had been parked, that her lights, front and rear, were burning, and that she was looking backward the while, when her truck struck plaintiff's car, and that after the impact she saw plaintiff turn on his lights, and that there was nothing to obstruct the view of either driver, but that she did not see plaintiff's car before the collision. Plaintiff testified his lights were burning throughout. *Held:* It was error for the court to refuse to submit the issue of contributory negligence. *Phillips v. Nessmith*, 173.

§ 21. Parties Liable to Guest or Passenger.

In this action to recover for death of passenger in car, killed in collision between car and bus, evidence of concurring negligence *held* sufficient. *Hoke v. Greyhound Corp.*, 692.

§ 22. Actions by Guests or Passengers.

Where, in an action by a passenger in an automobile to recover for injuries sustained in collision with a truck, there is no evidence upon which con-

tributory negligence of the driver of the car can be imputed to the plaintiff, a peremptory instruction in plaintiff's favor upon the issue of contributory negligence is without error. *Strickland v. Smith*, 517.

§ 24b. Agents and Employees Within Meaning of Rule.

Where the question of whether the relationship of master and servant exists between the driver of a truck and the lessee thereof depends upon the legal effect of the written lease agreement, the question is one of law. *Wood v. Miller*, 567.

Relationship of master and servant *held* to exist between lessee and driver of truck under terms of written lease agreement. *Ibid.*

§ 24e. Sufficiency of Evidence on Issue of Respondeat Superior.

Evidence that the driver of the car involved in the accident had been seen by the witness working in his co-defendants' sandwich shop practically every day and that the car was owned by his co-defendants, or one of them, and license therefor issued in the name of one of them, *is held* insufficient to carry the case to the jury on the issue of *respondeat superior*. *Smith v. Mariakakis*, 100.

The evidence tended to show that defendant's drivers went to ask aid of plaintiff's driver, ignored warning of plaintiff's driver as to fire hazard, and dropped match to gasoline-soaked floorboard of plaintiff's truck after lighting cigarette, resulting in burning of plaintiff's truck. *Held:* The negligent act was committed on premises over which defendant had no control, and the match was struck to light a cigarette for the personal use of defendant's employee, and therefore the act was in no way connected with any business of defendant nor in furtherance thereof, and the evidence is insufficient to be submitted to the jury on the issue of *respondeat superior*. *Tomlinson v. Sharpe*, 177.

Testimony of a statement made by a partner to the effect that the truck involved in the collision belonged to the partnership, that the driver was an employee and had been on a trip to pull a taxi out of a ditch, together with a statement in the answers, introduced in evidence by plaintiffs, that the truck involved in the accident belonged to defendant partners, *is held* sufficient to be submitted to the jury both on the question of employment and the question of whether the employee was acting in the scope of his employment. *Toler v. Savage*, 208.

§ 30a. Definition of "Under the Influence of Intoxicants."

A person is under the influence of intoxicating liquor or narcotic drugs, within the meaning and intent of G. S., 20-138, when he has drunk a sufficient quantity of intoxicating beverage or taken a sufficient amount of narcotic drugs, to cause him to lose the normal control of his bodily or mental faculties, or both, to such an extent that there is an appreciable impairment of either or both of these faculties. *S. v. Carroll*, 237.

§ 30d. Prosecutions for Drunken Driving.

Before the State is entitled to a conviction under G. S., 20-138, it must show beyond a reasonable doubt that the defendant was driving a motor vehicle on a public highway of this State while under the influence of intoxicating liquor or narcotic drugs. *S. v. Carroll*, 237.

An instruction that a person is under the influence of intoxicating liquor when "he has drunk a sufficient quantity of alcoholic liquor or beverage to

AUTOMOBILES—*Continued.*

affect, however slightly, his mind and his muscles, his mental and his physical faculties" *is held* for error. *Ibid.*

In a prosecution for operating a motor vehicle while under the influence of intoxicants a charge that the burden is on the State to prove beyond reasonable doubt that defendant while operating the vehicle was under the influence of a sufficient quantity of intoxicants to make him lose the normal control of his mental and physical faculties and cause those faculties to be "materially" impaired, *is held* not to constitute reversible error, although the use of "appreciably" impaired is preferable. *S. v. Bowen*, 601.

In this prosecution for driving a motor vehicle while under the influence of intoxicants, an instruction that the defendant was under the influence of intoxicants if he had drunk a sufficient amount to make him think or act differently than he would otherwise have done, regardless of the amount, and that he was "under the influence" if his mind and muscles did not normally co-ordinate or if he was abnormal in any degree from intoxicants, *is held* without error. *S. v. Biggerstaff*, 603.

§ 31a. Elements of Offense of Failing to Stop After Accident.

Where the driver of a car admits that he knew he had hit a man and did not stop or return to the scene, his own testimony discloses a violation of G. S., 20-166 (c), and his good faith in stopping 200 yards away from the accident and obtaining aid for the injured man before proceeding on his way to his home is immaterial on the issue of guilt or innocence and the exclusion of testimony to this effect is without error. *S. v. Brown*, 681.

G. S., 20-166 (c), requires the driver of a vehicle involved in an accident to stop at the scene, and in the event the accident involves the injury of any person, it requires him to give his name, address, operator's license and the registration number of his vehicle, and to render reasonable assistance to the injured person. *Ibid.*

BAILMENT.

§ 1. Nature and Requisites.

An agreement obligating the operator of a parking lot to permit parking at any convenient place in the lot constitutes a customer a mere licensee, while assignment of a designated place in the lot for designated period of time constitutes the agreement a lease, but a bailment is not created unless there is a delivery to and acceptance of possession of the automobile by the operator of the lot, giving him for the time sole and exclusive custody and control thereof. *Freeman v. Service Co.*, 736.

§ 3. Receipt of Property.

A printed receipt form, acknowledging receipt of items listed on its reverse side, signed by defendant's agent, having on its back a typewritten list of articles followed by the words "Con't on next page," and having the next printed page of the form filled out with model, serial and number of plaintiff's bus, chassis and engine, includes the bus engine in the list of articles receipted for. *Barnard v. Sober, Inc.*, 392.

§ 7. Actions for Conversion or Failure to Return Property.

This action was instituted by the owner of an automobile against the operator of a parking lot to recover for the theft of the car upon the theory of bailment. The uncontroverted evidence tended to show that the contract signed by plaintiff obligated defendant to permit the vehicle tendered by the

BAILMENT—*Continued.*

holder of the stub to occupy parking space in the lot, that ordinarily the driver parked and removed car herself, taking the keys with her, but that on the occasion in question the driver left the vehicle at the gas pumps on the lot with the keys in the car, and that the car was taken by a person unknown. *Held:* The evidence being insufficient to show a contract of bailment, defendant's motion for judgment as of nonsuit was properly allowed. *Freeman v. Service Co.*, 736.

§ 8. Actions for Damage to Property.

Evidence that defendant signed receipt which included truck engine as property received in good condition and that engine burned out in transportation of truck under its own power by defendant *held* sufficient to overrule nonsuit. *Barnard v. Sober, Inc.*, 392.

BASTARDS.

§ 4. Warrant and Indictment for Failure to Support.

Under G. S., 49-2, the neglect or refusal to support an illegitimate child must be willful, and it must be so charged in the warrant or bill of indictment. *S. v. Morgan*, 414.

BETTERMENTS.

§ 7. Evidence and Burden of Proof.

The purchaser of notes secured by a deed of trust who seeks to recover for improvements placed upon the lands by him under an agreement by the trustor to convey, has the burden of proof on the issue. *Crain v. Hutchins*, 642.

BIGAMY AND BIGAMOUS COHABITATION.

§ 3. Prosecution and Punishment.

Conceding that in a prosecution for bigamous cohabitation, as in a prosecution for bigamy, the wife is competent to testify against the husband to prove the fact of marriage, G. S., 8-57, her testimony is limited to proof of the fact of marriage and any testimony by her as to other incriminating facts, such as testimony tending to show that they had not been divorced, is incompetent. *S. v. Setzer*, 216.

In a prosecution for bigamous cohabitation based upon a second marriage in another state, the State must prove by the evidence, beyond a reasonable doubt, each of the three essential elements of the offense: (1) Marriage of defendant to a spouse still living, (2) an unlawful contract of marriage in another state which would have been punishable as bigamous if contracted here, (3) cohabitation thereafter in this State with the party of the second marriage. G. S., 14-183. *Ibid.*

In a prosecution for bigamous cohabitation based upon a second marriage in another state, an admission by the State in reference to the second marriage that the parties thereto were "lawfully married" presupposes that they were capable of entering into a legal contract of marriage, and there being no competent evidence that the parties to the first marriage had not been divorced or the marriage annulled, the evidence fails to establish the essential element of the offense that the second marriage in the other state would be a bigamous contract of marriage if entered into in this State. G. S., 14-183. *Ibid.*

BILLS AND NOTES.

§ 3. Consideration.

As between parties, maker may show want of consideration. *Perry v. Trust Co.*, 667.

§ 33. Competency and Relevancy of Evidence.

As between the parties, the maker of negotiable notes under seal purporting on their face to be for "value received" is not precluded from showing that their delivery was conditioned upon a contingency which had not been fulfilled or that they were given upon a condition which failed, or that there was a failure of consideration. *Perry v. Trust Co.*, 667.

§ 34. Sufficiency of Evidence.

Although the burden is upon the maker who admits the execution and delivery of notes to establish his contention of non-liability, where testimony offered by him, considered in the light most favorable to him, affords any competent evidence in support of his contention, he is entitled to have the question submitted to the jury, and an instruction having the effect of a directed verdict against him is error. *Perry v. Trust Co.*, 667.

BOUNDARIES.

§ 3c. Reversing Calls of Deed.

Where the beginning corner is not marked and is in dispute, it is permissible for the surveyor to begin at the second corner when it is known or established and reverse the first call in the deed in order to locate the beginning corner. Appellants' contention in this case that the second corner was neither known nor established is untenable. *Belhaven v. Hodges*, 485.

§ 5d. Declarations.

Testimony of declarations of deceased owner of adjacent property as to his corner is incompetent when he holds under junior deed; but admission of such testimony *held* harmless in this case. *Belhaven v. Hodges*, 485.

§ 5g. Evidence of Other Proceedings.

Where plaintiffs' title as heirs at law is admitted, leaving only the question of locating the boundaries for determination, the referee properly admits in evidence the record in the partition proceeding to show that land in dispute was carved out of the lands partitioned, some of which boundaries were coincidental with the boundaries to the *locus in quo* claimed by plaintiffs. *Clark v. Cagle*, 230.

§ 5h. Location of Corners of Contiguous Property.

Ordinarily a corner or line called for in a junior deed will not be controlling in establishing a corner or line in a prior deed, if the corner or line can be ascertained from the description in the prior deed. *Belhaven v. Hodges*, 485.

Declarations of deceased owner of adjacent property as to his corner is incompetent when he holds under junior deed, but admission of testimony of such declarations *held* harmless in view of other evidence. *Ibid.*

§ 10. Nonsuit and Directed Verdict.

In this reference to determine the location of the boundary lines of plaintiffs' land *it is held* there was sufficient evidence to support the referee's findings as to the location of the boundaries, and the lower court properly

BOUNDARIES—*Continued.*

overruled defendants' exception to the refusal of the referee to grant their motion for judgment as of nonsuit. *Clark v. Cagle*, 230.

In this processioning proceeding, plaintiff's evidence tending to establish the dividing line as contended for by him, between his land and that of the defendants, *is held* sufficient to sustain the verdict of the jury in plaintiff's favor. *Belhaven v. Hodges*, 485.

BROKERS.

§ 3. Creation, Existence and Termination of Relationship.

Death of principal revokes agency of broker. *Buffaloe v. Barnes*, 313.

§ 11. Right to Commissions Where Sale Is Not Consummated.

Agreement to pay commissions "when the deal is closed . . . out of the sale price" is enforceable only upon consummation of sale. *Jones v. Realty Co.*, 303.

BURGLARY.

§ 6. Possession of Implements of Burglary.

Although a Stillson wrench, a brace, drills of varying sizes, detonating caps, flashlight batteries, gloves, dynamite, bullets, a drill chuck key, and other like articles, are articles having legitimate uses, the court will take judicial knowledge that they are, in combination, implements of housebreaking. *S. v. Baldwin*, 295.

The offense of being armed with any dangerous weapon with intent to break and enter a dwelling or other building and commit a felony therein, and the offense of possessing, without lawful excuse, implements of housebreaking, are separate and distinct offenses, G. S., 14-55, the first requiring a presently existing intent to break and enter, and the second mere possession, without lawful excuse, of implements of housebreaking, which infers no personal intent but rather the purpose for which the implements are kept. *Ibid.*

§ 11. Sufficiency of Evidence and Nonsuit.

Evidence *held* insufficient to be submitted to jury on charge of attempt to commit burglary. *S. v. Gibson*, 194.

Evidence tending to show that officers searched a car owned by defendant and to which defendant had the key, and found therein implements which, in combination, as a matter of common knowledge, are implements of housebreaking, *is held* sufficient to overrule defendant's motion to nonsuit in a prosecution under G. S., 14-55. *S. v. Baldwin*, 295.

§ 13b. Conviction of Different Degree of the Crime.

When solicitor announces he would not ask for verdict of more than burglary in second degree, verdict of guilty "as charged in bill of indictment," which charged burglary in first degree, must be set aside. *S. v. Jordan*, 155.

Where upon the trial of defendant on an indictment charging burglary in the first degree, the solicitor takes a *nolle prosequi* as to the capital charge, but all the evidence shows that the dwelling was occupied, *held:* there is no evidence of guilt of burglary in the second degree, and no charge remained in the bill of indictment to support such verdict, and defendant's motion to set aside the verdict should have been allowed. G. S., 15-170, 15-171. *S. v. Locklear*, 410.

CARRIERS.

§ 10. Injury in Transitu.

A printed receipt form acknowledging receipt of items listed on its reverse side, signed by defendant's agent, having on its back a typewritten list of articles followed by the words "Con't on next page," and having the next printed page of the form filled out with model and serial numbers of plaintiff's bus, chassis and engine, includes the bus engine in the list of articles receipted for. *Barnard v. Sober, Inc.*, 392.

Evidence that carrier signed receipt for engine in "good shape" and that engine was burned out in transportation of truck under its own power *held* sufficient to overrule nonsuit. *Ibid.*

§ 15. Relationship of Carrier and Passenger.

Ordinarily a passenger who has obtained a transfer and has safely alighted from one urban bus with the intent to transfer to another is not a passenger while traveling on the public street for the purpose of making the transfer, so as to impose upon the carrier the duty to protect him from the hazards of the street. *Patterson v. Power Co.*, 22.

When a person attempting to transfer from one urban bus to another reaches the second bus as the driver shuts the door, knocks to attract the driver's attention, but receives no recognition of his signal, the relationship of carrier and passenger is not resumed, since he had not entered the premises of the carrier, had done nothing to entitle the carrier to demand the surrender of his transfer and the carrier had done nothing to indicate his acceptance as a passenger. *Ibid.*

§ 21c. Injuries in Boarding or Alighting.

Nonsuit *held* proper in action to recover for injuries sustained while plaintiff was transferring from one urban bus to another, it appearing that plaintiff reached second bus after door was closed, received no recognition from driver, and was injured as he followed moving bus into street. *Patterson v. Power Co.*, 22.

CLAIM AND DELIVERY.

§ 14c. Sufficiency of Evidence and Nonsuit.

This action was instituted in replevin by a widow to recover possession of an automobile from her father-in-law. Plaintiff's evidence that the car had been purchased by her husband and that he had made a valid gift *inter vivos* of the care to her *is held* sufficient to overrule defendant's motions to nonsuit. *James v. James*, 399.

§ 14d. Instructions.

Where, in action by son's widow who claimed car as gift *inter vivos* from her husband, title is in issue on conflicting evidence as to whether car was purchased by son or his father, instruction to answer issue in favor of widow if jury believed evidence relating to gift, *held* error as inadvertently overlooking fact that title was in issue. *James v. James*, 399.

CLERKS OF COURT.

§ 3. Jurisdiction of Clerk in General.

The jurisdiction of the clerk of the Superior Court is statutory and limited, and can be exercised only with strict observance of the statutes. *Johnston County v. Ellis*, 268.

CLERKS OF COURT—*Continued.*

§ 21. Jurisdiction to Render Default Judgments.

Jurisdiction of clerk to render foreclosure of mortgage by default is limited to cases where ownership of debt and amount due is ascertainable from verified pleading, and he has no jurisdiction where he must ascertain facts *aliunde* the pleadings. *Johnston County v. Ellis*, 268.

COMMON LAW.

So much of the common law as has not been repealed or abrogated by statute is in full force and effect in this State, G. S., 4-1; and since at common law, causes of action for wrongful injury, whether resulting in death or not, did not survive the injured party, the survival of such actions is solely by virtue of statute. *Hoke v. Greyhound Corp.*, 332.

COMPROMISE AND SETTLEMENT.

§ 2. Operation and Effect of Agreements.

In an action on a claim, defendants' assertion that the matter had been settled in a prior agreement between the parties, is a matter of defense, upon which defendants have the burden of proof. *Lindsay v. Brawley*, 468.

CONSTITUTIONAL LAW.

§ 8a. Legislative Power in General.

Our Constitution is a limitation and not a grant of legislative power, and all powers not withdrawn are reserved to the people to be exercised by their representatives. *Airport Authority v. Johnson*, 1.

§ 8b. Legislative Powers in Regard to Municipal Corporation.

Municipalities are creatures of the Legislature, and the Legislature in its discretion may create *quasi*-municipal corporations to perform ancillary municipal functions, and grant to such corporations even greater powers than those absolutely necessary to perform the particular function, and give the municipality only such control over the corporation as the Legislature may deem expedient. *Airport Authority v. Johnson*, 1.

§ 11. Scope of Police Power in General.

The general welfare is the prime objective of government and the right of the people to the protection of the public health, morals, and safety is the supreme law of the land, to which the right of private ownership of property must yield. *Clinton v. Ross*, 682.

§ 19b. Imprisonment for Debt.

Imprisonment of the husband for failure to pay a simple judgment for debt due the wife under a separation agreement not adopted as an order of court violates Art. I, Sec. 16, of the Constitution. *Stanley v. Stanley*, 129.

§ 20b. Due Process in General.

Whether service of process on a foreign corporation by service on the Secretary of State, G. S., 55-38, is valid depends upon whether the corporation was engaged in business activities in this State at the time the cause of action arose, which is a question of due process of law under the Federal Constitu-

CONSTITUTIONAL LAW—*Continued.*

tion to be determined in harmony with the decisions of the Supreme Court of the United States. *Harrison v. Corley*, 184.

§ 35. Right of Accused Not to Incriminate Self.

The introduction in evidence of incriminating papers taken from the defendant at the time of his arrest does not infringe the constitutional guarantee against self-incrimination, Art. I, sec. 2, and in the instant case defendant went upon the stand and thus waived such right. *S. v. Shoup*, 69.

CONTEMPT OF COURT.

§ 2b. Willful Disobedience of Court Order.

Contempt proceedings will not lie to enforce provision of separation agreement to pay subsistence to wife, when agreement, though referred to in later divorce action, is never made an order of court. *Stanley v. Stanley*, 129.

An order of the court awarding custody of minor children in *habeas corpus* proceedings, even though based upon consent of the parents, is not a mere affirmation of a civil contract, and perforce the court has jurisdiction to enforce such order by attachment for contempt. *In re Biggers*, 647.

CONTRACTS.

§ 5. Consideration.

At common law, which still obtains in this jurisdiction, instruments under seal are generally held to be good as against a plea by one of the parties of no consideration, because the seal imports consideration or renders it unnecessary. *Coleman v. Whisnant*, 258.

Seal and mutual contractual recitations *held* sufficient consideration to support contract for use of patent rights. *Ibid.*

Consideration in the law of contracts is some benefit or advantage to the promisor, or some loss or detriment to the promisee. A mere promise, without more, lacks consideration and is unenforceable. *Stonestreet v. Oil Co.*, 261.

§ 8. General Rules of Construction.

It is a well settled principle of law in the interpretation of contracts that in determining the meaning and effect of the terms of a contract, where its nature and intent are not clear, the construction placed upon the contract by the parties themselves will usually be adopted by the Court. *Smith v. Paper Co.*, 46.

If there be no dispute in respect of the terms of a contract, and they are plain and unambiguous, there is no room for construction. The contract is to be interpreted as written. *Jones v. Realty Co.*, 303.

If the words employed in a contract are capable of more than one meaning, the meaning to be given is that which it is apparent the parties intended them to have, and the practical interpretation of the agreement by the parties *ante litem motam* will control. *Ibid.*

An ambiguity in a written contract is to be inclined against the party who prepared the writing. *Ibid.*

Where a second contract dealing with the same subject matter does not constitute a rescission of the first the two instruments must be read and construed together in determining the intent of the parties and in ascertaining to what extent the second contract modifies the first. *Bank v. Supply Co.*, 416.

CONTRACTS—*Continued.*

The intent of a contract is perforce the mutual intent of the parties, and therefore where the instrument must be construed to ascertain its intent a unilateral purpose will not be given effect in derogation of a mutual intent inferable from the instrument. *Ibid.*

In determining the intent of the parties to a contract it will not be assumed that one of them has acted unreasonably or inequitably when a contrary inference is permissible. *Ibid.*

Acts of the parties indicating the manner in which they themselves construed the contract will be given primary consideration by the courts. *Ibid.*

Where the language of a contract is clear and unambiguous, effect must be given to its terms, and the court under the guise of construction, cannot delete any provision or insert any provision which is not written into the contract in fact or by implication of law. *Indemnity Co. v. Hood*, 706.

§ 10. Time of Performance.

The general rule is to the effect that the use of such words as "when," "after," "as soon as," and the like, gives clear indication that a promise is not to be performed except upon the happening of stated event, and it can make no difference whether the event be called a contingency or the time of performance, since in neither case may performance be exacted unless or until the event transpires. *Jones v. Realty Co.*, 303.

§ 13. Rescission or Abandonment by Agreement.

Where the question of whether a second contract dealing with the same subject matter rescinds or abrogates a prior contract between the parties depends solely upon the legal effect of the latter instrument the question is one of law for the court. *Bank v. Supply Co.*, 416.

A prior contract is not abrogated by a second contract between the parties dealing with the same subject matter unless the second contract is so comprehensive and complete as to raise the legal inference of substitution or unless the second contract presents such inconsistencies that the two cannot in any respect stand together or unless the intent of rescission or substitution clearly appears. *Ibid.*

In ascertaining whether the parties intend that a second contract abrogate a prior contract dealing with the same subject matter the circumstances surrounding the execution of the contracts, the relationship of the parties and the objectives to be accomplished should be considered when not in conflict with the written instruments. *Ibid.*

Contract relating to agreement of close corporation to buy shares of stock from estate of officer-stockholder upon his death *held* not rescinded by second contract under which corporation acquired a number of the shares in return for cancellation of judgment against officer-stockholder. *Ibid.*

§ 17. Substantial Performance.

Close corporation and a corporate officer owning majority of stock made agreement for the purchase of his stock from his estate upon his death. Thereafter, the corporation by subsequent agreement acquired a number of the shares from the officer-stockholder. The stock remaining in his possession was less than a majority of the stock. *Held:* Upon his death, the tender by his personal representative of the remaining stock constituted substantial performance, since acquisition of a majority of the stock was not the sole or prime motivation, but under the circumstances preventing the stock from falling into the hands of a stranger was of major consideration. *Bank v. Supply Co.*, 416.

CONTRACTS—*Continued.*

§ 18. Waiver of Breach.

A party who by his own act prevents complete performance of a contract by the other party may not take advantage of his own act and insist upon complete performance when the other party has tendered the substantial performance remaining in his power. *Bank v. Supply Co.*, 416.

§ 22. Competency and Relevancy of Evidence.

Ordinarily, evidence of all the facts and circumstances surrounding the parties at the time of the making of a contract, which are necessary to be known to properly understand their conduct and motives or to weigh the reasonableness of their contentions, is relevant and admissible. *McCorkle v. Beatty*, 338.

§ 23. Sufficiency of Evidence and Nonsuit.

In this action attacking contract for want of consideration, seal and mutual contractual recitations *held* to justify nonsuit in absence of competent evidence by plaintiff that seal was not intended and that plaintiff failed to receive consideration recited. *Coleman v. Whisnant*, 258.

Plaintiff leased and optioned certain lands to defendant. Thereafter the parties had a well dug on the property under a written agreement that each should pay one-half the cost, and each satisfied this agreement. Defendant later exercised the option. Plaintiff instituted this action to recover the one-half cost of digging the well borne by him, alleging that at the time of executing the written agreement defendant verbally agreed to so reimburse him in the event defendant exercised the option. Plaintiff testified on cross-examination that while the well was being dug, defendant's representative came to the premises and promised plaintiff to reimburse him if the option were exercised. *Held:* Upon plaintiff's testimony the agreement to reimburse was a mere naked promise, unsupported by consideration, and defendant's motion for judgment as of nonsuit should have been allowed. *Stonestreet v. Oil Co.*, 261.

§ 25a. Measure of Damages for Breach of Contract in General.

Only those damages may be awarded for a breach of contract which are within the reasonable contemplation of the parties as a natural and probable consequence of the breach and which are, therefore, foreseeable. *Price v. Goodman*, 223.

In this action for breach of warranty in sale of personalty, special damages were sufficiently alleged. *Walston v. Whitley & Co.*, 537.

CORPORATIONS.

§ 15. Purchase of Own Stock by Corporation.

Second agreement relating to purchase of part of the stock held by officer-stockholder *held* not to rescind prior agreement by close corporation to purchase all of his stock from his estate upon his death. *Bank v. Supply Co.*, 416.

COSTS.

§ 6. Amount and Assessment.

After decision of the Supreme Court modifying and affirming a judgment of the Superior Court on appeal from the referee, allowances constituting items of costs may be adjudged as provided by G. S., 6-7. *Clark v. Cagle*, 230.

COUNTIES.

§ 10. County Budgets.

The Board of County Commissioners may amend or clarify their records to make them speak the truth in order to list separately tax levies for general and special purposes as required by G. S., 153-114, and while this power exists only to make *bona fide* corrections, nothing else appearing, resolutions amending the records will be assumed to be what they purport to be, and not original actions. *R. R. v. Duplin County*, 719.

§ 14. Purchase of Land by County.

The owner of land conveyed it to an individual who gave a purchase money deed of trust and sold the equity of redemption to the county subject to the debt. The entire transaction was for the purpose of avoiding constitutional prohibition against incurrance of debt by the county. *Held:* The county is not entitled to reform the instruments so as to acquire the property free from encumbrance and thereby retain the benefits of the very transaction attacked by it. *Ins. Co. v. Guilford County*, 441.

§ 18. Authority to Contract.

A transaction by which a county seeks to obtain title to property and assume the debt for the purchase price in contravention of constitutional and statutory prohibitions is void. *Ins. Co. v. Guilford County*, 441.

A county is subject to the general rule that where it has no capacity to do a contemplated act it is without power to appoint an agent for that purpose. *Ibid.*

§ 21. Ratification of Contracts and Estoppel.

A transaction by which a county seeks to obtain title to property and assume the debt for the purchase price in contravention of constitutional and statutory prohibitions is void, and since the county is without power or capacity to execute the transaction it is also incapable of ratifying it. *Ins. Co. v. Guilford County*, 441.

§ 22. Validity and Attack of Contracts.

In its business transactions a county is held to the same rules of equitable dealing that apply to all persons, natural or corporate, in so far as this may be done while respecting its municipal character and the laws regulating its business and commercial transactions. *Ins. Co. v. Guilford County*, 441.

County may not attack agreement and seek reformation thereof for fraud and at the same time seek to retain the benefits. *Ibid.*

§ 23. Rights of Parties Under Ultra Vires Contract.

The rule that a county is not required to restore the *status quo* or compensate for benefits received under a void contract where to do so would be tantamount to annulling constitutional or statutory prohibitions, has no application where the county obtains nothing under the void transaction. *Ins. Co. v. Guilford County*, 441.

COURTS.

§ 2. Jurisdiction in General.

The final judgment or decree is the end for which jurisdiction is exercised, and courts will seek to maintain control over their judgments and processes in order to make them efficacious. *In re DeFord*, 189.

Courts have no extraterritorial jurisdiction and will not adjudicate when they cannot enforce the adjudication, and therefore a court will not enter a

COURTS—*Continued.*

decree the very terms of which will divest it of jurisdiction or vest the losing litigant with power to defeat the jurisdiction. *Ibid.*

The court is without power to entertain within the frame of a pending action, without amendment or substitution, a new and independent cause of action unrelated in any manner to that to which its jurisdiction has attached. *Johnston County v. Ellis*, 268.

§ 4b. Appeals to Superior Court from Municipal Courts.

Whether the Superior Court, in sustaining exceptions relating solely to the issue of damages on defendant's appeal from the Municipal Court, should limit the new trial to the issue of damages, rests solely in the discretion of that court, and the Supreme Court, on further appeal, will not entertain plaintiff's request that the new trial be so limited. *Starnes v. Tyson*, 395.

§ 4d. Appellate Jurisdiction of Superior Court on Appeal from Justice of Peace.

Jurisdiction of Superior Court on appeal from justice of the peace in summary ejectment is derivative. *Howell v. Branson*, 264.

§ 12. Jurisdiction of State and Federal Courts: Conflict of Laws.

An action to recover for failure to transmit an interstate message is governed by the Federal decisions, and plaintiff may not recover damages for mental anguish, or punitive damages, or any state statutory penalty. *Ward v. Tel. Co.*, 175.

Whether service of process on a foreign corporation by service on Secretary of State, G. S., 55-38, is valid depends upon whether the corporation was engaged in business activities in this State at the time the cause of action arose, which is a question of due process of law under the Federal Constitution to be determined in harmony with the decisions of the Supreme Court of the United States. *Harrison v. Corley*, 184.

§ 14. Application of Laws of Other States: Conflict of Laws.

Action on contract consummated in another state is governed by its laws. *Price v. Goodman*, 223.

CRIMINAL LAW.

§ 1b. Intent.

Intent is a mental attitude which seldom may be proven by direct evidence, but must ordinarily be proven by circumstances from which it may be inferred. *S. v. Petry*, 78.

§ 5a. Mental Capacity in General.

The test of mental responsibility for crime is not low mentality but the capacity to distinguish between right and wrong. *S. v. Matthews*, 639.

§ 8. Parties and Offenses—Principals.

Where there is plenary evidence that the defendants acted in concert in the commission of the offenses charged, each is equally guilty. *S. v. Gibson*, 194.

Aiders and abettors who assist in the perpetration of a crime are principals. *S. v. Johnson*, 671; *S. v. Smith*, 738.

§ 12a. Jurisdiction in General.

A valid warrant or indictment is an essential of jurisdiction. *S. v. Morgan*, 414.

CRIMINAL LAW—*Continued.*

§ 14. Appeals from Inferior Court to Superior Court.

Appeal from sentence entered on plea of guilty in recorder's court presents only questions of law, and Superior Court is without authority to increase punishment. *S. v. Beasley*, 577.

§ 17c. Plea of Nolo Contendere.

The court may impose sentence upon a plea of *nolo contendere* as upon a plea of guilty, and defendant's contention that the court could not pronounce judgment upon such plea without first determining his guilt or innocence is without merit. *S. v. Ayers*, 579.

Defendant's plea of *nolo contendere* establishes his guilt for the purpose of punishment, and the fact that the evidence offered by the solicitor at the request of the court to inform the court of the nature of the offense and to enable the court to fix punishment, is insufficient to establish any crime, does not entitle defendant to his discharge, the guilt of accused not being at issue. *S. v. Beasley*, 580.

§ 19. Time of Entering and Necessity for Plea of Former Jeopardy.

Where the indictments contain two separate charges and the State takes a voluntary nonsuit upon the first count, defendant's contention that the nonsuit established his innocence of acts charged under that count which also constituted essential elements of the offense charged in the second count, must be presented by a plea of former jeopardy or former acquittal, and not by motion for judgment as of nonsuit, G. S., 15-173, and the failure of a plea of former jeopardy amounts to a waiver of his rights in the premises. *S. v. Baldwin*, 295.

§ 20. Attachment of Jeopardy.

No question of double jeopardy is presented by the repeated investigation by the grand jury under bills of indictment, even though there be an identity of persons and description of offenses in the bills. *S. v. Lewis*, 249.

§ 22. Former Jeopardy—Mistrials and New Trials.

Where on appeal from a verdict of guilty of burglary in the second degree, it is determined that defendant's motion to set aside the verdict should have been allowed for want of evidence of defendant's guilt of second degree burglary and want of charge of second degree burglary in the indictment, upon the new trial ordered, defendant may be tried upon the original bill of burglary in the first degree, or upon an indictment charging breaking and entering otherwise than burglariously, with intent to commit a felony or other infamous crime therein. G. S., 14-54. *S. v. Locklear*, 410.

§ 23. Former Jeopardy—Prosecutions Under Void Warrants or Indictments.

Proceedings had upon an indictment which is fatally defective do not constitute jeopardy and do not preclude subsequent trial of defendants upon proper bills. *S. v. Johnson*, 266; *S. v. Morgan*, 414.

§ 27. Judicial Notice.

Court will take judicial knowledge that certain articles, in combination, are implements of housebreaking. *S. v. Baldwin*, 295.

The court will take judicial notice of the size and location of a municipality of the State. *S. v. Bowen*, 601.

CRIMINAL LAW—*Continued.*

§ 29e. Evidence of Intent and Motive.

It is competent for the State to show motive for the commission of the crime charged although motive does not constitute an element of the crime. *S. v. King*, 241.

§ 30. Evidence and Pleadings at Former Trial or Proceedings.

Solicitor may cross-examine defendant relative to his allegations in complaint in prior civil action when purpose is not to establish truth of allegations, but to impeach defendant by showing he had made two false, conflicting statements. *S. v. McNair*, 462.

§ 31c. Expert and Opinion Evidence—Sanity and Mental Capacity.

A witness who has observed defendant, and has had reasonable opportunity of forming an opinion satisfactory to himself, may give his opinion as to the sanity of the defendant or his ability to understand the difference between right and wrong, though he may not invade the province of the jury by testifying as to his opinion as to defendant's mental capacity to commit a particular crime. *S. v. Matthews*, 639.

§ 31e. Expert and Opinion Evidence—Footprints.

Evidence that footprints at the scene of the crime were made by shoes owned by defendant and led to defendant's tobacco barn and thence to defendant's home, is competent. *S. v. Walker*, 458.

§ 33. Confessions.

The finding of the court that the confessions offered in evidence were voluntary will not be disturbed on appeal when the finding is supported by evidence. *S. v. Bennett*, 82.

Unless challenged, the voluntariness of a confession will be taken for granted. *Ibid.*

The fact that defendants were under arrest and in the presence of a number of officers at the time of making confessions does not in itself render the confessions incompetent for lack of voluntariness. *Ibid.*

§ 34c. Admissions of Counsel.

The fact that counsel for defendant in arguing the case to the jury admitted that defendant had killed deceased with a deadly weapon is not such an admission on the part of the defendant as will relieve the State of the burden of proving that essential fact. *S. v. Ellison*, 628.

§ 34d. Flight and Acts to Avoid Being Traced.

Evidence that after the crime was committed defendant left the bus before reaching the station in a city prior to the city called for on his ticket, and registered at a hotel under an assumed name *held* competent as an incriminating circumstance in the nature of an admission as tending to show motive to cover up identity and avoid being traced. *S. v. Shoup*, 69.

§ 34g. Acts and Declarations of Co-conspirators.

Conversations between several conspirators in furtherance of the common purpose is competent against another conspirator even though he was not present. *S. v. Bennett*, 82.

CRIMINAL LAW—*Continued.*

§ 38c. Clothes and Effects.

In this prosecution for assault with intent to commit rape, the blouse offered in evidence *held* competent for the purpose of corroborating the testimony of witnesses as to tears about the shoulder, and inconsistencies in the testimony of prosecutrix on the question of whether the blouse was in the same condition at the trial as it was immediately after the assault affects only the question of credibility. *S. v. Petry*, 78.

§ 40a. Character Evidence of Defendant in General.

Where a defendant lives within six or seven miles of a town and frequently visits the municipality, a witness may properly testify as to his general reputation "around in" in the town community, the phrase being sufficient to include the surrounding rural region. *S. v. Bowen*, 601.

§ 40d. Competency of Evidence of Defendant's Bad Character.

Where defendant introduces evidence of good character the State is authorized to introduce evidence of defendant's bad character, but it is reversible error to permit the State by cross-examination or otherwise to offer evidence as to particular acts of misconduct. *S. v. Robinson*, 95.

§ 41d. Competency of Husband or Wife to Testify Against Spouse.

Conceding that in a prosecution for bigamous cohabitation, as in a prosecution for bigamy, the wife is competent to testify against the husband to prove the fact of marriage, G. S., 8-57, her testimony is limited to proof of the fact of marriage and any testimony by her as to other incriminating facts, such as testimony tending to show that they had not been divorced, is incompetent. *S. v. Setzer*, 216.

§ 41e. Credibility of Witnesses in General.

Inconsistency in the testimony of a witness goes only to its credibility and not to its competency. *S. v. Petry*, 78.

In this prosecution for assault with intent to commit rape, the blouse offered in evidence *held* competent for the purpose of corroborating the testimony of witnesses as to tears about the shoulder, and inconsistencies in the testimony of prosecutrix on the question of whether the blouse was in the same condition at the trial as it was immediately after the assault affects only the question of credibility. *Ibid.*

§ 42b. Direct Examination of Witnesses.

It is within the discretion of the trial judge whether or not counsel shall be permitted to ask leading questions. The exercise of such discretion, in the absence of an abuse thereof, will not be reviewed on appeal. *S. v. Beatty*, 765.

§ 42c. Cross-Examination of Witnesses.

While cross-examination may be pursued as a matter of right so long as it relates to facts in issue or relevant facts which were the subject of the examination-in-chief, cross-examination for the purpose of determining the interest or bias of the witness or to impeach credibility, rests in the discreton of the trial court, and the limiting of the cross-examination in the exercise of such discretion is not reviewable. *S. v. Stone*, 97.

In cross-examining a witness for the State, defendant is not entitled to ask a question which assumes facts which are not established or admitted. *S. v. Herring*, 213.

CRIMINAL LAW—*Continued.*

§ 42d. Competency of Evidence to Corroborate Witness.

Where incriminating testimony of a witness has been attacked by cross-examination to impeach the witness' credibility, testimony by officers of similar, consistent statements made by the witness is competent for the purpose of corroborating the witness. *S. v. Bennett*, 82.

Inconsistencies in evidence introduced to corroborate a witness does not render such evidence incompetent, but only affects its credibility. *S. v. Petry*, 78; *S. v. Walker*, 458.

§ 42e. Evidence Competent to Impeach or Discredit Witness.

Admission of entire news articles, without proper correlation for purpose of peaching witness, *held* error. *S. v. Gardner*, 310.

Solicitor may cross-examine defendant relative to his allegations in complaint in prior civil action when purpose is not to establish truth of allegations, but to impeach defendant by showing he had made two false, conflicting statements. *S. v. McNair*, 462.

§ 48c. Evidence Competent for Restricted Purpose.

Where there is no request to limit the scope of evidence competent for the purpose of corroboration, the evidence is competent for general purposes. Rule 21. *S. v. Petry*, 78; *S. v. Walker*, 458.

§ 50d. Expression of Opinion by Court During Progress of Trial.

In sustaining the State's objection to further cross-examination of a witness for the purpose of impeaching her credibility the court remarked that the witness is an elderly lady suffering from high blood pressure, that the court was of the opinion she had answered the interrogations sufficiently, and that the witness said she had tried to tell the truth and did not recall all the particulars of the evidence given by her in the former trial. *Held:* The remark was not, and could not have been understood by the jury, as an expression of opinion by the court as to the truthfulness of the witness, but was solely to suggest to counsel that her answers to his question were complete, in the discharge of the court's right and duty to control the cross-examination. G. S., 1-180. *S. v. Stone*, 97.

New trial awarded for remarks of court impeaching credibility of witness and intimating that fact had not been established. *S. v. Owenby*, 521.

§ 50e (3). Irregularities or Misconduct of Officers Having Custody of Jury.

The fact that the officer having the jury in custody in conducting it to the courthouse lawn to view a material exhibit was also a witness for the State, is not sufficient, standing alone, to justify a new trial in the absence of evidence of some fact or circumstance tending to show misconduct on the part of the officer or the jury, but such practice is not approved. *S. v. Taylor*, 286.

§ 50e (4). Permitting Jury to Visit Exhibits or Scene of Crime.

Held: The automobile was an exhibit material to the State's case, and the court's action in permitting the jury to retire to the courtyard in custody of a deputy sheriff to examine the automobile, is not held for error, there being no suggestion of misconduct on the part of the officer or the jury and it not appearing that the judge or the defendant was absent at the time. *S. v. Taylor*, 286.

CRIMINAL LAW—*Continued.*

§ 51. Province of Court and Jury in Respect to Evidence.

The legal sufficiency of evidence to go to the jury is for the court; its credibility, weight and significance are for the jury, upon appropriate instruction by the court respecting the degree, or intensity of proof required to convict. *S. v. Gardner*, 310.

§ 52a. Nonsuit.

Testimony by a witness for the State that defendant made a declaration of innocence does not entitle defendant to judgment as of nonsuit, since such self-serving declaration does not rebut any proof by the State. Such case is distinguishable from instances in which the State by positive evidence establishes a complete defense, or in which the State's evidence is entirely negative and defendant's evidence, without being in conflict therewith, explains away such negative evidence. G. S., 15-173. *S. v. Baldwin*, 295.

Where the indictments contain two separate charges and the State takes a voluntary nonsuit upon the first count, defendant's contention that the nonsuit established his innocence of acts charged under that count which also constituted essential elements of the offense charged in the second count, must be presented by a plea of former jeopardy or former acquittal, and not by motion for judgment as of nonsuit, G. S., 15-173, and the failure of a plea of former jeopardy amounts to a waiver of his rights in the premises. *Ibid.*

To present the question of the sufficiency of the evidence upon appeal, a motion to nonsuit should be made at the close of the State's evidence, and exception noted upon its denial, and if defendant introduces evidence the motion should be renewed at the close of all the evidence, and if again overruled another exception should be noted, in which event the assignment of error should be based upon the second exception. G. S., 15-173. *S. v. Perry*, 530.

Demurrer to evidence presents sufficiency of evidence to carry case to jury, considering evidence in light most favorable to State, and trial court may not pass on weight of evidence or credibility of witnesses. *S. v. Johnson*, 671.

Failure to demur to the evidence, G. S., 15-173, concedes its sufficiency to sustain the charge. *S. v. Jackson*, 760.

§ 53b. Instructions on Burden of Proof and Presumptions.

The failure of the court to charge the jury as to the degree of circumstantial proof required to convict is not held for error in this case, the charge that the jury should be satisfied from the evidence beyond a reasonable doubt of defendant's guilt in order to justify conviction being sufficient on the degree of proof required. G. S., 1-180. *S. v. Shoup*, 69.

In this prosecution for assault with intent to commit rape the charge of the court *is held* to have correctly placed the burden on the State to prove each of the essential elements of the offense beyond a reasonable doubt, and defendant's exception thereto is untenable. *S. v. Petry*, 78.

Court is not required to charge upon presumption of innocence. *S. v. Perry*, 530.

§ 53d. Statement of Evidence and Explanation of Law Arising Thereon.

Where the court aptly instructs the jury that the jury is to take its recollection of the evidence and not the court's, the court is not required to again warn the jury on this aspect in recapitulating the evidence in the absence of a request so to do. *S. v. Biggerstaff*, 603.

CRIMINAL LAW—*Continued.*

An instruction which states the evidence and explains the law arising thereon under the form of contentions is sufficient and correct when the evidence is simple and direct and without equivocation and complication. G. S., 1-180. *S. v. Thompson*, 651.

Recapitulation of all the evidence is not required by G. S., 1-180, it being sufficient if the charge applies the law to the evidence and gives the position taken by the parties as to the essential features of the case. *Ibid.*

§ 53f. Expression of Opinion on Evidence.

The court stated the State's evidence as to the date of birth of prosecutrix and continued "so in the year 1944 she was something over 14 years of age in the month of September, at which time she testified . . ." *Held:* In using the adverb "so" the court simply stated the mathematical effect of the State's evidence, and read contextually the charge contains no statement of opinion as to whether any fact was fully or sufficiently proven. *S. v. Bullins*, 142.

Instruction erroneously stating that defendant admitted intentional killing with deadly weapon, when defendant admitted only that he shot deceased, *held* for error notwithstanding plenary evidence by State that shot caused fatal injury, since credibility of State's evidence was for jury. *S. v. Ellison*, 628.

In this prosecution for rape defendant pleaded insanity and alibi. One of defendant's witnesses stated he would not go so far as to say defendant did not know right from wrong. The State's evidence included testimony of prosecutrix, an alleged confession and testimony of officers in respect thereto, and the court stated the State's contentions at length. The jury having failed to reach a verdict, the court recalled them and instructed them that the evidence was "rather clear" and that it should reach a verdict if possible. The jury shortly thereafter returned a verdict of guilty of the capital crime. *Held:* Under the circumstances the expression that the evidence was "rather clear" must have been understood to have referred to the State's witnesses and not to defendant's, and must be held for error as an expression of opinion by the court upon the weight of the evidence. *S. v. Benton*, 745.

The court is precluded from expressing an opinion upon the weight or credibility of the evidence either directly or indirectly by manner, form of expression, or method of arraying and presenting the evidence which is calculated to influence the jury, or by the general tone and tenor of the trial. *Ibid.*

Where defendant pleads insanity and alibi. the repeated use of the phrase in the charge "responsible for his crime" invades the province of the jury, since under the plea of alibi it is for the jury to determine whether the crime was committed by defendant. *Ibid.*

A charge that ". . . and the State contends that the evidence in the case" is sufficient to establish guilt beyond a reasonable doubt and that upon the testimony of the main witness for the State "and other evidence which corroborates this testimony" the jury should return a verdict of guilty, will not be held for error as an expression of opinion that the other evidence" did corroborate the witness since it is clear that both phrases related to the statement of contentions of the State. *S. v. McKnight*, 766.

§ 53i. Charge on Credibility of Defendant as Witness.

A charge that the jury should consider the testimony of defendant in the light of his interest in the verdict and in the "outcome of the trial" is not error. *S. v. Hightower*, 62.

A charge on the credibility of defendant's testimony which uses the phrase "if you come to the conclusion that he is telling the truth" is without error. *Ibid.*

CRIMINAL LAW—*Continued.*

A charge to the effect that the jury should take into consideration what a witness says and how he says it and his "interest in the case, if he is interested in it," and determine the weight to be given to the testimony, is not error in failing to further charge the jury to the effect that if they believe the testimony of an interested witness they should give the testimony the same weight as that of any other witness, since there was no instruction to scrutinize the testimony of interested witnesses, and the instruction applied to all the witnesses alike and did not refer to the defendants as being interested. *S. v. Beatty*, 765.

§ 53k. Statement of Contentions.

Statement of a contention favorable to defendant cannot be held for error, since, if defendant desired the statement made in any particular form, and, in fact, to entitle defendant to the statement of the contention at all, it is incumbent on defendant to submit request therefor. *S. v. Shoup*, 69.

An exception to the charge based upon the manner of delivery and arrangement in stating the contentions of the parties is without merit when there is no exception to its correctness in stating the law. *S. v. Biggerstaff*, 603.

The manner of stating the contentions of the parties, if indicative of the court's opinion, is within the prohibition of G. S., 1-180, and in the instant case the statement of the State's contentions in regard to the disinterestedness of officers who testified for the State and the weight to be given the testimony of a doctor as an expert witness, together with a later statement that the evidence was "rather clear" *is held* to disclose that the court entertained high regard for such testimony. *S. v. Benton*, 745.

A misstatement in the charge that defendant's counsel had asked the jury to return a verdict of guilty of an assault with intent to commit rape instead of one of rape, when not called to the court's attention at the time, ordinarily is no more than a harmless inadvertence, but in the instant case it may have been prejudicial when considered in connection with the charge of the court. *Ibid.*

§ 53l. Requests for Instructions.

The court is not required to charge upon the presumption of innocence, and an exception to the failure of the court to elaborate on this phase of the case cannot be sustained, it being incumbent upon defendant if he desires an amplification of the charge on this subordinate feature to aptly tender request therefor. *S. v. Perry*, 530.

If more complete instructions in stating the contentions of the parties are desired appellant must aptly tender request therefor. *S. v. Biggerstaff*, 603.

§ 54b. Form, Sufficiency and Effect of Verdict.

A verdict may be given significance and correctly interpreted by reference to the indictment, evidence and instructions. *S. v. Smith*, 738.

A general verdict will be presumed to have been rendered on the count or counts supported by the evidence. *Ibid.*

A general verdict of guilty will be upheld if supported by a single sound count. *Ibid.*

§ 54c. Verdict of Guilty of Different Degree of Crime Charged.

Defendant was tried upon an indictment charging burglary in the first degree, and there was evidence tending to support the allegations of the bill. The solicitor, in apt time, announced that he would not ask for a verdict of

CRIMINAL LAW—*Continued.*

more than burglary in the second degree. The jury returned a verdict of guilty "as charged in the bill of indictment." The sentence presupposed conviction of burglary in the second degree, G. S., 14-52. *Held:* Defendant's motion to set aside the verdict should have been allowed. *S. v. Jordan*, 155.

Where, upon the trial of defendant on an indictment charging burglary in the first degree, the solicitor takes a *nolle prosequi* as to the capital charge, but all the evidence shows that the dwelling was occupied, *held:* there is no evidence of guilt of burglary in the second degree, and no charge remained in the bill of indictment to support such verdict, and defendant's motion to set aside the verdict should have been allowed. G. S., 15-170, 15-171. *S. v. Locklear*, 410.

Conviction for violating a specific statute, had upon insufficient evidence, cannot be sustained on the ground that the evidence warrants conviction under another statute for an offense of equal gravity. *S. v. Peterson*, 255.

§ 56. Motions in Arrest of Judgment.

Where an indictment is fatally defective, defendants' motion in arrest of judgment, even when filed originally in the Supreme Court, must be allowed. *S. v. Johnson*, 266.

Where no crime is charged in the warrant or bill of indictment upon which the defendant has been tried and convicted the judgment must be arrested, and in such instance the Supreme Court will arrest the judgment *ex mero motu*. *S. v. Morgan*, 414.

§ 57a. Motions for New Trial for Irregularity or Misconduct of or Affecting Jury.

In order for defendant to be entitled to a new trial as a matter of right for the reason that an officer acting as custodian of the jury was a witness for the State, defendant must show actual prejudice, and in the instant case the findings of the trial court disclose a full investigation without a finding of prejudice, and therefore its refusal to grant defendant's motion for a new trial is not held for error. *S. v. Hart*, 200.

§ 60. Judgment and Sentence—Conformity to Verdict.

Conviction for violation of specific statute, had upon insufficient evidence, cannot be sustained on ground that evidence warrants conviction under another statute for offense of equal gravity. *S. v. Peterson*, 255.

Defendant was convicted upon a warrant charging an assault upon a female, and no more. After verdict the court permitted an amendment to charge an assault upon a female by a man or boy over eighteen years of age, and sentenced defendant to eighteen months on the roads. *Held:* There being no finding by the jury that defendant was a man or boy over eighteen years of age at the time of the assault, and the amendment after verdict being ineffectual to supply this deficiency, the judgment is not supported by the verdict, and a *venire de novo* must be ordered. *S. v. Grimes*, 523.

A single sound count will support a general verdict of guilty and judgment thereon. *S. v. Smith*, 738.

§ 62a. Severity of Sentence.

Upon a plea of *nolo contendere* to a charge of receiving cigarettes of the value of $75.00 knowing them to have been stolen, a sentence of imprisonment at hard labor for not less than three years nor more than five years is within the limits prescribed by statute, and therefore defendant's contention that the punishment imposed is excessive for the offense charged is not meritorious. *S. v. Mounce*, 159.

CRIMINAL LAW—*Continued.*

§ 62f. Suspended Judgments and Executions.

Judgment may be suspended on condition only where defendant either assents or, being present, fails to object. *S. v. Jackson*, 66.

The trial court is without power even at the time of sentencing defendant to separate the term and provide that after serving a stipulated part of the sentence the balance should be suspended for a period of five years on condition of good behavior, since such provision is in effect an anticipatory parole and it is the spirit of the Constitution that the power of pardon, parole or discharge during the term of imprisonment should be the exclusive prerogative of the Governor. *S. v. Lewis*, 249.

No appeal lies from an order that a suspended judgment be executed upon findings that defendant had violated the conditions upon which judgment was suspended. *S. v. Farrar*, 478.

§ 66. Nature of Costs and Disposition of Funds.

The additional cost in criminal cases provided by G. S., 143-166, is not intended to be used to compensate the officers who make the arrests or participate in the prosecutions, but is to be paid to the State Treasurer and by him received, G. S., 147-68, as public funds for disbursement under the provisions of the statute for the purposes of the Law Enforcement Officers' Retirement Fund. *Gardner v. Retirement System*, 465.

§ 67. Nature and Grounds of Appellate Jurisdiction.

On an appeal in criminal cases the Supreme Court cannot pass upon the weight of the evidence but only whether there is sufficient evidence to support conviction. *S. v. Shoup*, 69.

On appeal from conviction in a criminal case, the jurisdiction of the Supreme Court is limited to matters of law or legal inference. Constitution of North Carolina, Art. IV, sec. 8. *S. v. Thompson*, 651.

§ 68b. Right of Defendant to Appeal.

No appeal lies from an order that a suspended judgment be executed upon findings that defendant had violated the conditions upon which judgment was suspended. *S. v. Farrar*, 478.

The right of appeal is unlimited in this jurisdiction, and where defendant has pleaded guilty to a charge within the jurisdiction of an inferior court, his appeal stays the judgment pending final disposition and presents only questions of law for review, but may not be the basis for adding to defendant's grounds of defense or for re-opening the issue of guilt or the disposition of the case properly predicated on his plea. *S. v. Beasley*, 577.

§ 71. Pauper Appeals.

The affidavit for appeal *in forma pauperis* must be made during the trial term or within ten days after the adjournment thereof, G. S., 15-182, in order for the Supreme Court to acquire jurisdiction of the appeal, but in a capital case, the Supreme Court will nevertheless examine the exception or exceptions defendant undertakes to have considered on the appeal. *S. v. Harrell*, 743.

§ 75. Filing and Docketing Appeal.

When case is not docketed within time the appeal will be dismissed: the Rules are mandatory, and cannot be waived by counsel. *S. v. Presnell*, 160; *S. v. Nelson*, 529; *S. v. Nash*, 608; *S. v. Harrell*, 743.

CRIMINAL LAW—*Continued.*

§ 77a. Necessary Parts of Record Proper.

Where the record fails to show the organization of the lower court and contains no indictment nor verdict, the appeal will be dismissed on motion of the Attorney-General. *S. v. Clough*, 384.

§ 77b. Form and Requisites of Transcript.

Where indictments relating to one offense against several defendants are properly consolidated for trial, only one record should be filed on the appeals of defendants. Rule of Practice in the Supreme Court No. 19 (2). *S. v. Jackson*, 760.

§ 77c. Matters Not Appearing of Record Deemed Without Error.

Where only a portion of the charge is brought forward in the record, all other portions of the charge not brought forward will be deemed without error. *S. v. Brown*, 681.

§ 77d. Conclusiveness and Effect of Record.

The Supreme Court is bound by the record as filed. *S. v. Setzer*, 216.

§ 78c. Necessity for, Form and Requisites of Objections and Exceptions in General.

Assignments of error should be based upon exceptions briefly and clearly stated and numbered in the record, but in a capital case assignments of error not so based nevertheless may be considered. Rule 21. *S. v. Herring*, 213.

An assignment of error must be based upon an exception entered at the trial. *S. v. Perry*, 530; *S. v. Biggerstaff*, 603.

§ 78d (1). Form and Necessity for Objections and Exceptions.

A motion to strike a question and answer is ineffectual to present the competency of the evidence for review when there is no prior objection to the question and answer. *S. v. Matthews*, 639.

§ 78d (2). Necessity for Motion to Restrict Evidence Competent for Restricted Purpose.

Where evidence competent for the purpose of corroboration is admitted generally, and defendant fails at the time of its admission to request that its purpose be restricted, his exception to the admission of the testimony cannot be sustained. *S. v. Walker*, 458.

The failure of the court to restrict the admission of testimony competent for the purpose of corroboration will not be held for error when the defendant neither objects to the admission of the testimony nor requests that its admission be restricted. *S. v. Perry*, 530.

§ 78e (1). Exceptions to Charge—Form and Requisites in General.

An exception to the charge for failure to "charge the law and facts relative to this case" is an unpointed broadside exception. *S. v. Thomas*, 384; *S. v. Biggerstaff*, 603.

An exception to instructions of the court "which appear on pages 28, 29 and 30 of the record" is a "broadside attack" and will not be considered. *S. v Beatty*, 765.

CRIMINAL LAW—*Continued.*

§ 78e (2). Necessity That Misstatement of Contentions or Evidence Be Brought to Trial Court's Attention.

An error in stating the contentions of a party, or in recapitulating the evidence, should be called to the court's attention in time to afford an opportunity of correction, otherwise it may be regarded as waived or as a harmless inadvertence. Usually the most convenient time for correctional requests is just before the jury retires to make up its verdict. *S. v. McNair*, 462.

An exception to the statement of the testimony of a witness is not available on appeal when defendant does not bring the matter to the trial court's attention at the time for immediate correction. *S. v. Shoup*, 69.

Any error or omission in the statement of the evidence upon a subordinate feature must be called to the attention of the court at the trial to avail the defendant any relief on his appeal. *S. v. Thompson*, 651.

Misstatement of contentions under facts of this case *held* expression of opinion on evidence and constituted reversible error notwithstanding that matter was not called to court's attention. *S. v. Benton*, 745.

Alleged error in the statement of contentions upon evidence introduced during the trial must be brought to the trial court's attention in apt time in order for an exception thereto to be considered on appeal. *S. v. Wyont*, 218 N. C., 505, cited and distinguished in that the statement of contentions in that case was not based on evidence adduced at the trial. *S. v. McKnight*, 766.

§ 78g. Necessity, Form, and Requisites of Assignments of Error.

In order to preserve the right to review, exceptions must be aptly noted in the record and brought forward, numbered and grouped, and assigned as error at the end of the case either before or after the judge's signature. Rule of Practice in Supreme Court No. 19. *S. v. Biggerstaff*, 603.

§ 78f (2). Necessity of Renewing Motion to Nonsuit at Close of All the the Evidence.

An assignment of error to the refusal of the court to grant defendants' motion of nonsuit at the close of the State's evidence and refusal to grant similar motion made at the close of all the evidence cannot be sustained when the record fails to show an exception to the refusal of the motion made at the close of the State's evidence, and further fails to show that the motion was renewed at the close of all the evidence. *S. v. Perry*, 530.

§ 79. Briefs.

Exceptions or assignments of error not brought forward in defendant's brief and in support of which no reason or argument is stated or authority cited are deemed abandoned. Rule 28. *S. v. Hightower*, 62; *S. v. Stone*, 97; *S. v. McKnight*, 766; *S. v. Hart*, 200; *S. v. Carroll*, 237; *S. v. Malpass*, 403.

Argument set forth in the brief which is not based upon an exception duly noted in the record is unavailing. G. S., 1-180. *S. v. Biggerstaff*, 603.

Where defendant fails to bring forward exception to refusal of motion for arrest of judgment, the Supreme Court will arrest the judgment *ex mero motu* when it appears on face of record that warrant failed to charge a crime. *S. v. Morgan*, 414.

§ 80b (4). Dismissal for Failure to Prosecute Appeal.

When a case is not docketed within the time prescribed, Rule 5, and no application for writ of *certiorari* is made, the appeal will be dismissed, the

CRIMINAL LAW—*Continued.*

Rules of Practice in the Supreme Court being mandatory and not directory. *S. v. Presnell*, 160.

Where a defendant convicted of a capital felony fails to file case on appeal in the Superior Court, the motion of the Attorney-General to docket and dismiss, made after expiration of time agreed for perfecting the appeal and any extension of time which may have been granted, will be allowed after a careful inspection of the record proper fails to disclose error. *S. v. Nelson*, 529; *S. v. Nash*, 608; *S. v. Harrell*, 743.

§ 81a. Matters Reviewable.

Upon defendant's motion for a new trial, the court's finding of circumstances disclosing that defendant was not prejudiced by the fact that the officer having the custody of the jury was also a witness for the State, *held* conclusive. *S. v. Hart*, 200.

Discretionary rulings of trial court are not reviewable in absence of abuse. *S. v. Beatty*, 765.

§ 81c. Prejudicial and Harmless Error.

To prevail on appeal the appellant not only must show error, he must show the error was prejudicial, and that but for the error a different result would likely have been reached. *S. v. Bullins*, 142; *S. v. Smith*, 738; *S. v. Hart*, 200; *S. v. Perry*, 530.

Where defendant does not make it appear that a statement made by him was true, testimony of a police officer that he did not think it worth while to investigate defendant's statement, cannot be held prejudicial. *S. v. Shoup*, 69.

When there is no prejudicial error in the charge when read contextually, assignments of error thereto will not be sustained. *S. v. Bennett*, 82; *S. v. Bullins*, 142.

Even if incompetent evidence is admitted over objection, defendant is not entitled to a new trial in the absence of a showing of prejudice. *S. v. Smith*, 738.

An error in the admission of evidence over defendant's objection is harmless when testimony to the same effect is admitted without objection. *S. v. King*, 241; *S. v. Brown*, 681.

Held: In absence of showing of prejudice, fact that officer having custody of jury was also witness for State, is insufficient to warrant new trial. *S. v. Taylor*, 286.

Admission of entire news articles, which constituted second-hand evidence of prejudicial events recorded therein, to impeach witness but without proper correlation for this purpose, *held* reversible error. *S. v. Gardner*, 310.

The use of the phrase "premeditation *or* deliberation" in the charge *held* not prejudicial error in view of the fact that immediately thereafter the court repeatedly and correctly instructed the jury that both these elements were essential for a conviction of first degree murder. *S. v. Deaton*, 348.

In this prosecution for assault with a deadly weapon a witness was permitted to testify as to empty shotgun shells he found at the scene the following morning. There was no evidence tending to identify the persons who fired the shots. The court, in its charge, withdrew the question of assault with guns and specifically instructed the jury that the gunshot wound suffered by prosecuting witness could not form the basis of guilt of either defendant. *Held:* The admission of the evidence, if error, was not prejudicial. *S. v. Perry*, 530.

CRIMINAL LAW—*Continued.*

Where misstatement of admissions affects burden of proof, charge must be held for prejudicial error. *S. v. Ellison*, 628.

A charge which contains both a correct and incorrect instruction upon a material point must be held for reversible error. *S. v. Overcash*, 632.

Where the charge contains a correct and an incorrect instruction relating to the burden of proof, the error cannot be held harmless by the application of the rule of contextual construction. *S. v. Absher*, 656.

§ 81c. Review of Instructions.

The charge of the court must be read contextually. *S. v. Bennett*, 82; *S. v. Bullins*, 142.

§ 81f. Review of Exceptions to Refusal to Nonsuit.

A demurrer to the evidence presents the sufficiency of the evidence considered in the light most favorable to the State, to carry the case to the jury or to support the verdict, and neither the trial court nor the Supreme Court on appeal may pass upon the weight of the evidence or the credibility of the witness. *S. v. Johnson*, 671.

§ 83. Determination and Disposition of Cause.

Where the trial court separates the term of sentence and provides that after serving a stipulated part of the term the balance should be suspended upon condition of good behavior, the case will be remanded for proper judgment rather than permit the valid portion of the judgment to stand, since it cannot be determined to what extent the sentence was affected by the ameliorating provisions. *S. v. Lewis*, 249.

Where defendant is sentenced to serve a term in the State's Prison upon a general verdict of guilty on an indictment containing two counts, one charging a felony and the other a misdemeanor, and on appeal it is determined that defendant's motion to nonsuit should have been allowed on the count charging a felony, the cause must be remanded for proper judgment upon the conviction of the misdemeanor, since the sentence is not supported by the conviction on that count. *S. v. Malpass*, 403.

Where defendant does not bring forward his exception to the denial of his motion in arrest of judgment, but it appears on the face of the record that the warrant is fatally defective in failing to charge any crime, the Supreme Court *ex mero motu* will arrest the judgment, and such action does not prejudice defendant since a void warrant will not support a plea of former jeopardy upon a subsequent trial. *S. v. Morgan*, 414.

§ 85a. Proceedings in Lower Court After Remand.

Where on a former appeal the Supreme Court holds that the evidence was sufficient to be submitted to the jury, defendant's motion to nonsuit upon substantially the same evidence in the second trial is properly denied. *S. v. Stone*, 97; *S. v. Peterson*, 770.

Where on appeal from a verdict of guilty of burglary in the second degree, it is determined that defendant's motion to set aside the verdict should have been allowed for want of evidence of defendant's guilt of second degree burglary and want of charge of second degree burglary in the indictment, upon the new trial ordered, defendant may be tried upon the original bill of burglary in the first degree, or upon an indictment charging breaking and entering otherwise than burglariously, with intent to commit a felony or other infamous crime therein. G. S., 14-54. *S. v. Locklear*, 410.

CRIMINAL LAW—*Continued.*

§ 85b. Stare Decisis.

The mere fact that in an opinion of the Supreme Court certain testimony admitted in the lower court without objection is incorporated in the recitation of the State's evidence does not constitute a holding that such testimony is competent, the competency of the testimony not being presented or decided. *S. v. Setzer*, 216.

DAMAGES.

§ 13b. Issues of Damages.

Recovery for pain and suffering and for hospital and medical expenses, consequent to wrongful injury, relate to a single cause of action and should be submitted upon a single issue of damages. *Hoke v. Greyhound Corp.*, 332.

§ 14. Excessive and Inadequate Award.

The action of the trial court in offering to reduce the verdict, if agreed to, for the purpose of putting an end to the case, does not amount to a finding that the verdict was excessive, is not an abuse of discretion, and is not held for error. *Rea v. Simowitz*, 379.

DEATH.

§ 3. Nature, Grounds and Conditions Precedent to Actions for Wrongful Death.

Where a person injured by the negligence of another, lives for a period of time thereafter (in the instant case 31 days), but thereafter dies as a result of the injuries, his personal representative may recover (1) as an asset of the estate those damages sustained by the injured person during his lifetime, and (2) for the benefit of the next of kin the pecuniary injury resulting from death, the amounts recoverable being determinable upon separate issues without overlapping. *Hoke v. Greyhound Corp.*, 332.

Wrongful death statutes confer a new right of action with damages limited to fair and just compensation for the pecuniary injury. *Ibid.*

§ 4. Time of Institution of Action.

A cause of action for wrongful death properly instituted does not abate upon the death, resignation or removal of the personal representative who instituted the action, but the action survives to his successor. G. S., 1-74. *Harrison v. Carter*, 36.

§ 5. Parties.

The personal or legal representative of an estate in instituting an action is a formal or nominal, although a necessary, party, and acts in the capacity of a trustee or agent for the estate, or for the beneficiaries of the estate when the recovery, as in case of actions for wrongful death is not an asset of the estate. *Harrison v. Carter*, 36.

Where injured person lives for time after injury, personal representative may recover (1) damages for wrongful death for benefit of next of kin, and (2) for pain and suffering, and hospital expenses as asset of estate. *Hoke v. Greyhound Corp.*, 332.

§ 8. Measure of Damages for Wrongful Death.

The measure of damages for wrongful death is the present value of the accumulations of the income which would have been derived from the person's

DEATH—*Continued.*

own exertions after deducting the probable cost of his own living and ordinary expenses, based upon the person's life expectancy. *Rea v. Simowitz*, 379.

While the rule of admeasurement of damages for wrongful death is more difficult of application in the case of an infant under ten years of age, since the mortuary tables do not afford evidence of life expectancy of one so young, the rule is the same, and the expectancy of life may be determined by the jury upon consideration of the evidence of the constitution, health and habits of the infant under proper instructions from the court, G. S., 8-46. *Ibid.*

Use of figures 50 and 20 as illustrations in referring to life expectancy not approved, but *held* not prejudicial in view of charge as a whole. *Rea v. Simowitz*, 379.

The mortuary table is merely evidence of life expectancy to be considered with other evidence as to the health, constitution and habits of the deceased, G. S., 8-46, and an instruction having the effect of making the expectancy set out in the statute definitive and conclusive not only violates this rule, but also the prohibition against expression of opinion "whether a fact is fully or sufficiently proven." G. S., 1-180. *Starnes v. Tyson*, 395.

§ 9. Distribution of Recovery for Wrongful Death.

A railroad company settled a claim for wrongful death of an employee engaged in interstate commerce. The funds were paid to his administratrix. *Held:* The funds have the same status as though they had been recovered under the Federal Employer's Liability Act *in solido* without apportionment of the award by a jury, and therefore the funds should be distributed according to our statute of distribution and not apportioned among the beneficiaries of the deceased according to the pecuniary loss each sustained. *In re Badgett*, 92.

DECLARATORY JUDGMENT ACT.

§ 2a. Subject of Action.

The Superior Court has jurisdiction over a proceeding under the Declaratory Judgment Act instituted by an executor to determine, *inter alia*, the validity of assignment of interest by a legatee, G. S., 1-254, and motions in the Supreme Court on appeal by assignor and assignee to dismiss for want of jurisdiction will be denied. *Trust Co. v. Henderson*, 649.

DEDICATION.

§ 2. Offer and Intent.

Where facts are not in dispute, intent and dedication is question of law. *Spicer v. Goldsboro*, 557.

Temporary use of part of street for purposes other than driveway *held* not dedication by municipality for use for such purposes. *Ibid.*

§ 4. Implied Dedication.

When land is divided into lots according to a map thereof, showing streets, alleys and parks, and lots are sold with reference to the map, the owner thereby dedicates the streets, alleys and parks to the use of those who purchase the lots, and also under some circumstances to the public. *Foster v. Atwater*, 472.

Where the owner of land subdivides and plats it into lots and streets, and sells and conveys the lots or any of them with reference to the plat, nothing else appearing, he thereby dedicates the streets, and all of them, to the use of

DEDICATION—*Continued.*

the purchasers, and those claiming under them, and of the public. *Evans v. Horne*, 581.

§ 6. Revocation of Dedication.

Where land impliedly dedicated has not been actually opened or used nor public or private easement claimed therein for twenty years, and the land is not necessary for ingress, egress or regress to lots sold, a declaration of withdrawal from dedication in accordance with G. S., 136-96, on the part of those holding under the original owner, is effective, and no claim of public or private easement under the dedication may thereafter be enforced. *Foster v. Atwater*, 472.

Purchaser of lot with reference to plat showing streets acquires vested easement which may not be defeated by nonuser or withdrawal of dedication, and *further*, street being necessary to convenient ingress and egress and purchase having been made prior to 8 March, 1921, G. S., 136-96, does not apply. *Evans v. Horne*, 581.

DEEDS.

§ 2a (3). Undue Influence.

No presumption of undue influence arises from the mere relationship in a conveyance from a parent to her child, and when the evidence discloses only that each lived in her own home and the mother managed her own affairs, and the daughter helped her mother in the mother's old age, the evidence is insufficient to show any confidential or fiduciary relationship between them which would give rise to a presumption of fraud or undue influence. *Jernigan v. Jernigan*, 204.

§ 11. General Rules of Construction.

Ordinarily the intent of the parties as expressed in the deed must prevail and in seeking the intent the deed must be construed by its four corners, taking all of its provisions together. *Loftin v. Barber*, 481.

§ 13a. Estates and Interest Created.

To determine the effectiveness of a limitation over the roll must be called as of the date of the death of the first taker. G. S., 41-4. *Turpin v. Jarrett*, 135.

"Bodily heirs," when used as *descriptio personarum*, and "issue" are synonymous terms connoting and embracing children, grandchildren, and other lineal descendants. *Ibid.*

The deed in question conveyed the property to the grantee with provision that should she die "without issue after her death" the lands should descend to the grantee's brothers and sisters. The grantee's sole child predeceased her but left children who survived grantee. *Held:* The grantee took a base or qualified fee, defeasible upon her death without "issue," which term embraces lineal descendants, and therefore upon the death of the grantee leaving grandchildren her surviving the fee became absolute, defeating the limitation over, and her conveyance of the property during her lifetime is binding upon her heirs. *Ibid.*

§ 13b. Rule in Shelley's Case.

A provision following the warranty clause in a deed that if the grantee "should die without issue after her death" the land should descend to her brothers and sisters, precludes the application of the rule in *Shelley's case*,

DEEDS—*Continued.*

even though the *habendum* is to the grantee and "her bodily heirs." *Turpin v. Jarrett*, 135.

§ 14a. Conditions Precedent.

Conditions in a deed requiring grantees to care for grantor during the remainder of his natural life and to provide a home for him are conditions precedent to the investment of title. In the present case the deed was put in escrow not to be delivered until the performance of these conditions. *Cox v. Hinshaw*, 700.

While conditions precedent usually must be strictly observed, but where the conditions precedent require grantees to provide a peaceful home and take care of grantor for the remainder of his life, and thus involve human conduct over a considerable period of time, the rule of reason must perforce apply rather than the strict performance of definite acts and conditions. *Ibid.*

§ 14b. Conditions Concurrent and Subsequent.

Ordinarily, substantial compliance with conditions subsequent in a deed will suffice. *Cox v. Hinshaw*, 700.

§ 16b. Restrictive Covenants.

A restrictive covenant contained in deeds to lots in a subdivision developed according to a general scheme or plan is contractual in nature and creates a species of incorporeal property right. *Vernon v. Realty Co.*, 59.

This action was brought for equitable relief against restrictive covenants contained in deeds to property in a residential development precluding sale or lease to Negroes for a period of 50 years. Plaintiffs allege that in recent years the whole surrounding area for the depth of one-quarter mile has been acquired by and is owned, used and occupied by Negroes, and that the restrictions had therefore become a burden and not a benefit to the property. *Held:* Radical change in the ownership, use and occupancy of the property immediately surrounding and adjacent to the restricted development affords no grounds for equitable relief against restrictive covenants when there has been no breach of the restrictions within the covenanted area. *Ibid.*

The owner of a tract of land sold a number of lots, scattered throughout the development, by deeds containing covenants restricting the use of the lots to residential purposes, and during the same period sold a number of lots, also scattered throughout the development, without restrictions. *Held:* There was no evidence that the development was subject to a general scheme or plan, and therefore the restrictions cannot be enforced by the grantees *inter se*. *Phillips v. Wearn*, 290.

The purchaser of the balance of lots in a development which had not been developed according to a general scheme may not impose restrictions on such part enforceable by the grantees *inter se*, and restrictions placed by it in deeds to its purchasers become unenforceable upon the dissolution of the corporation. *Ibid.*

Restrictive covenants, including a covenant against occupancy by persons of the Negro race, were placed upon the land by vendors' predecessor in title. Vendors contracted to convey free from restrictions except against occupancy by Negroes. It was adjudicated that the restrictive covenants were unenforceable because of want of a general plan of development. *Held:* The purchasers are nevertheless bound to accept deed with covenant against occupancy by Negroes by virtue of the agreement contained in the contract to convey. *Phillips v. Wearn*, 290.

DEEDS—*Continued.*

§ 16c. Agreements to Support Grantor.

In this action to recover for breach of contract to maintain and support plaintiff as consideration for the execution of a deed, the evidence considered in the light most favorable for plaintiff *is held* sufficient to carry the case to the jury. *Gerringer v. Gerringer*, 105.

In this case evidence of an altercation between grantor and grantees as shown by the evidence, *is held* to require the submission of the issue to the jury as to whether grantees had breached a condition precedent requiring grantees to care for and provide a peaceful, quiet and comfortable home for grantor during the remainder of his natural life, which condition was also made contractual by the joinder of the grantees in the execution of the deed. *Cox v. Hinshaw*, 700.

Where a deed containing conditions precedent is placed in escrow under a separate agreement of the parties, the remedy of the grantor for condition broken is an action to rescind the contract of escrow and for the return of the deed to him, and not an action for the cancellation of the deed. *Ibid.*

DESCENT AND DISTRIBUTION.

§ 3. Share of Heirs and Distributees in General.

A railroad company settled a claim for wrongful death of an employee engaged in interstate commerce. The funds were paid to his administratrix. *Held:* The funds have the same status as though they had been recovered under the Federal Employer's Liability Act *in solido* without apportionment of the award by a jury, and therefore the funds should be distributed according to our statute of distribution and not apportioned among the beneficiaries of the deceased according to the pecuniary loss each sustained. *In re Badgett*, 92.

§ 12. Title and Rights of Heirs in General.

Rents accruing under a lease after the death of lessor intestate should be paid to the heir and not to the personal representative of lessor. *Trust Co. v. Frazelle*, 724.

§ 13. Advancements and Debts Due Estate.

In this action by an heir against the successor administrator to recover his distributive share of the estate, defendant set up as a defense notes executed by the heir to intestate. Plaintiff admitted the execution of the notes, and offered evidence that the notes were executed and delivered upon condition that intestate assume and pay off certain tax liens on plaintiff's land, and that plaintiff thereafter executed other notes for substantially the same obligation to the first administrator who paid the tax liens, and that the first administrator had declared that the second set of notes settled the heir's obligations to the estate. *Held:* Plaintiff's evidence was sufficient to be submitted to the jury upon his contention that the first series of notes were given upon a condition that failed or that they were without consideration, and an instruction having the effect of a directed verdict for the administrator on the issue is erroneous. *Perry v. Trust Co.*, 667.

DIVORCE.

§ 1. Grounds for Divorce from Bed and Board.

Actual physical violence is not necessary for divorce on ground of indignities to person making condition intolerable and life burdensome. *Pearce v. Pearce*, 307.

Divorce *a mensa et thoro* may be granted on any one of the grounds set forth in G. S., 50-7, but only at the instance of the party injury. *Lawrence v. Lawrence*, 624.

§ 2a. Grounds for Divorce—Separation.

Plaintiff's admission that he had been convicted for failing to support the children of his marriage is not alone sufficient to defeat his action for divorce on the ground of two years' separation. *Welch v. Welch*, 541.

§ 2c. Grounds for Absolute Divorce—Adultery—Condonation.

In an action for alimony without divorce the allegation of adultery forming a basis for the relief sought cannot be held fatally defective on the ground that it sets forth facts amounting to condonation when the complaint also alleges acts of misconduct committed by defendant after the reconciliation which revive the old grounds. *Brooks v. Brooks*, 280.

§ 2d. Recrimination.

In a divorce action, an answer which alleges causes for divorce against plaintiff interposes a plea of recrimination in defense. *Pearce v. Pearce*, 307.

§ 2½. Nature and Essentials Proceedings for Divorce—Consent.

Defendant in a divorce action cannot consent to the decree but can only elect to defend or abstain from answering. *Smith v. Smith*, 544.

§ 3. Jurisdiction and Venue.

The requirement of G. S., 50-3, that in proceedings for divorce the summons shall be returnable to the court of the county in which either the plaintiff or defendant resides, is not jurisdictional but relates to venue, and the right to have the cause tried in the proper county is waived by failure of defendant to make demand in writing before time of answering expires. *Smith v. Smith*, 506.

Where, in an action for divorce against a person who has been declared *non compos mentis*, process has been duly served in accordance with G. S., 1-97 (3), the duly appointed guardian *ad litem* must answer, G. S., 1-67, and demurrer of the guardian *ad litem* on the ground that the marital relation is such that the spouse alone may elect to prosecute or defend the action and that defendant's inability to appear and answer in person defeats the jurisdiction of the court, is untenable. *Smith v. Smith*, 544.

§ 4 (1). Conditions Precedent—Residence.

Plaintiff's testimony that he had been continuously a resident of North Carolina up to the time he went to another state for temporary work, and that he returned here once or twice a month and did not intend to make his home in such other state but intended to remain a citizen of North Carolina, *is held* sufficient to be submitted to the jury on the question of his residence in this State for the statutory period. G. S., 50-5 (4); G. S., 50-6. *Welch v. Welch*, 541.

The fact that plaintiff went to another state to engage temporarily in work there, and, upon mistaken advice, instituted an action for divorce in such

DIVORCE—*Continued.*

other state upon allegations of residence therein, is evidence against him on the issue of his residence in this State for the statutory period but is not conclusive and does not constitute an estoppel. *Ibid.*

§ 4 (2). Conditions Precedent—Verification and Affidavit.

In a suit for alimony without divorce, G. S., 50-16, plaintiff is not required to file affidavit provided in G. S., 50-8, but is required to verify the complaint in the manner prescribed for verification of pleadings in ordinary civil actions, which requirement is mandatory and jurisdictional, and where the complaint is not verified defendant's motion to dismiss for want of jurisdiction must be allowed, even in the Supreme Court upon appeal. *Hodges v. Hodges*, 570.

Divorce, alimony and alimony without divorce, are statutory, and the courts can acquire jurisdiction only if the pleadings are verified as prescribed by statute, the form of the verification being dependent upon the character of the relief sought. *Ibid.*

§ 5b. Pleadings in Actions for Absolute Divorce.

In an action for absolute divorce on the ground of adultery it is not required that the complaint allege that the misconduct was without adequate provocation. *Brooks v. Brooks*, 280.

Allegations that the husband cohabited and committed adultery with another woman and that these illicit relations continued over a period of time notwithstanding the protestations and pleas of the wife, states a cause of action for absolute divorce. G. S., 50-5 (1). *Pearce v. Pearce*, 307.

A deed of separation which is not executed as required by G. S., 52-12, G. S., 52-13, is void *ab initio* and does not in law exist, and therefore no claim can be asserted by the husband thereunder, and where the execution of such agreement appears from the pleadings in the husband's action for divorce on the ground of two years separation, the allegations of the wife's answer must be weighed in the light of this fact. *Ibid.*

§ 5c. Pleadings in Actions for Divorce from Bed and Board.

In an action for divorce from bed and board under G. S., 50-7, it is necessary that the complaint allege that any of the acts of misconduct constituting the basis of the action were without adequate provocation on the part of plaintiff. *Brooks v. Brooks*, 280; *Lawrence v. Lawrence*, 624.

Allegations to the effect that the husband, to the great humiliation of the wife, had been living in adultery, that he repeatedly avowed his loss of affection for, and his desire to be rid of his wife, had ejected her from his bed, and finally ordered her from his home, saying that he never intended to live with her again as husband and wife, states a cause of action in the wife's favor for divorce from bed and board. G. S., 50-7 (4). *Pearce v. Pearce*, 307.

Under G. S., 50-7 (4), allegation of actual physical violence is not required. *Ibid.*

§ 8b. Sufficiency of Evidence and Nonsuit in Actions for Divorce on Ground of Separation.

Evidence that less than two years before the institution of the action defendant visited plaintiff at camp and plaintiff visited defendant on furloughs, and that at such times they cohabited as man and wife, *is held* sufficient to negative the conclusion that conjugal relations between the parties had ceased for the period prescribed by the statute, and supports the verdict in defend-

DIVORCE—*Continued.*

ant's favor and judgment denying plaintiff's suit for divorce on the grounds of two years separation. G. S., 50-6. *Mason v. Mason*, 740.

§ 8c. Sufficiency of Evidence and Nonsuit in Actions for Divorce from Bed and Board.

In action for divorce from bed and board, nonsuit is proper upon failure of proof that misconduct complained of was without provocation. *Lawrence v. Lawrence*, 624.

§ 11. Alimony in General.

Alimony is an allowance made for the support of the wife out of the estate of the husband by order of court in an appropriate proceeding, independent of any agreement between the parties which is not itself made an order of the court. *Stanley v. Stanley*, 129.

§ 12. Alimony Pendente Lite.

There is no statutory provision that adultery of the wife should bar allowance of alimony *pendente lite*, and conceding her misconduct may be considered, in the instant case defendant's contention that since the court refused to hear his evidence or find any facts in regard to the alleged adultery of his wife, it was without jurisdiction to order subsistence *pendente lite*, is untenable it appearing that the order directed no payment for the use and benefit of his wife but ordered only an allowance *pendente lite* for the support of the child of the marriage and for counsel fees and a sum to the wife to defray the necessary and proper expenses of the court. *Lawrence v. Lawrence*, 221.

The fact that an action for the custody of a child is pending does not deprive the court of jurisdiction in an action for divorce *a mensa* from awarding an allowance for the support of the child *pendente lite*, since such order does not purport to adjudicate custody, but in this case the record failed to support the plea of a prior action pending. *Ibid.*

The complaint in this action is held to state a cause of action for alimony without divorce under G. S., 50-16, and therefore was sufficient basis for the order allowing alimony *pendente lite*. *Brooks v. Brooks*, 280.

Where, in an action for divorce, the court, upon allegations contained in the verified answer, allows defendant reasonable counsel fees to enable her to make her defense, it will be presumed that the court found facts in accordance therewith, and the allowance, not being excessive, will be upheld as within the discretionary power of the court. *Welch v. Welch*, 541.

The power of the court to allow support and counsel fees *pendente lite* to the wife in her suit against the husband for divorce or for alimony without divorce is not within the absolute discretion of the court, and generally the court must make an allowance and its discretion is confined to consideration of the necessities of the wife on the one hand and the means of the husband on the other, unless there are statutory grounds for denial or unless plaintiff, in law, has no case. *Butler v. Butler*, 594.

A prior separation agreement between the parties which provides for the payment by the husband of subsistence to the wife does not preclude the wife's right to an allowance of subsistence *pendente lite* in her suit for alimony without divorce under G. S., 50-16, since the wife is entitled to have the payments for her subsistence secured by a court order. *Ibid.*

§ 14. Alimony Without Divorce.

Evidence *held* insufficient to show constructive abandonment as predicate for alimony without divorce. *Blanchard v. Blanchard*, 152.

DIVORCE—*Continued.*

Where a complaint alleges certain acts of misconduct constituting bases for divorce, both absolute and from bed and board, with prayer for relief demanding subsistence for the plaintiff and the minor child of the marriage, and for such other relief as may be just and proper, without prayer for divorce, the cause is an action for alimony without divorce under G. S., 50-16. *Brooks v. Brooks*, 280.

In an action for alimony without divorce under G. S., 50-16, there is available to the wife not only the grounds specifically set forth in the statute, but also any ground that would constitute cause for divorce from bed and board under G. S., 50-7, or cause for absolute divorce under G. S., 50-5. *Ibid.*

Where, in an action for alimony without divorce under G. S., 50-16, the complaint alleges adultery and also sets forth acts of misconduct constituting a basis for divorce from bed and board, the failure of the complaint to allege that the misconduct was without adequate provocation is not fatal, since such allegation is not necessary in an action for absolute divorce on the ground of adultery, and this ground, independently, is sufficient to sustain the action for alimony without divorce. *Ibid.*

In action for alimony without divorce, complaint cannot be held defective as setting forth condonation of adultery forming basis of action when it also alleges misconduct committed after condonation. *Ibid.*

In this action for alimony without divorce plaintiff set forth in the complaint that she had theretofore instituted an action for subsistence in which an order had been made, but that plaintiff secured the dismissal of this suit after defendant had begged forgiveness and promised to mend his ways. *Held:* The court was without jurisdiction to incorporate into the allowance granted plaintiff the amount supposedly due under the prior order, both because of the vagueness of the reference to the prior order in the complaint and also because of the fact that the prior action had been dismissed. *Brooks v. Brooks*, 280.

A cross action for alimony without divorce, G. S., 50-16, cannot be maintained nor a consent judgment based upon such cross action entered in the husband's action for divorce on the ground of two years separation. *Ericson v. Ericson*, 474.

§ 15. Alimony Upon Absolute Divorce.

A decree of absolute divorce may not award permanent alimony, and the proviso of the statute, G. S., 50-11, that a decree of absolute divorce on the ground of two years separation should not impair or destroy the right to alimony under prior decrees relates to alimony properly allowed by decree of court and not to payments provided in a mere separation agreement. *Stanley v. Stanley*, 129.

§ 16. Enforcing Payment of Alimony.

The parties entered into a separation agreement which provided that the husband pay the wife a stipulated sum weekly, which should continue though the husband should later obtain a divorce. Thereafter the husband obtained an absolute divorce on the ground of two years separation, and the decree stipulated that it should not prejudice the wife's right to support under the separation agreement. Upon the husband's failure to make payments, the wife instituted action and obtained judgment for the amount in arrears. Thereafter, upon motion in the cause, the husband was adjudged in contempt for failure to pay the amount of the judgment and was also ordered to pay

DIVORCE—*Continued.*

subsequent installments then due under penalty of contempt. *Held:* The provision that the husband pay the stipulated sums weekly was contained in a separation agreement which was at no time made an order of the court, since the divorce decree merely provided it should not affect the agreement and the last judgment was a simple recovery of a money demand, and therefore the attachment for contempt upon motion in the cause was erroneous. *Stanley v. Stanley*, 129.

An appeal from an order allowing support *pendente lite* takes the case out of the jurisdiction of the Superior Court, and the judge, pending the appeal is *functus officio*, and is without authority to adjudge defendant in contempt for failing to make the payments as directed. *Lawrence v. Lawrence*, 221.

EASEMENTS.

§ 3. Establishment by Prescription.

Adverse user of cartway must be confined to definite and specific line, though slight deviations are not fatal if the way is substantially identical. *Speight v. Anderson*, 492. Permissive use is presumed. *Ibid.*

Where the evidence both for plaintiff and defendant tends to show that a new way across the lands of plaintiff was constructed and was commenced to be used less than twenty years prior to the institution of the action, the testimony of one witness, who had not gone on the premises prior to construction of the new way, cannot be construed as tending to show that the line of travel along the new way had been in use prior to the construction referred to, and thus make out a *prima facie* case, when his testimony is ambiguous and not necessarily in conflict with the evidence that the old way was in exclusive use prior to the construction of the new. *Ibid.*

On the present record testimony of the husband and predecessor in title to the servient tenement that the use of the way across plaintiff's lands was permissive, if error, was not prejudicial. *Ibid.*

EJECTMENT.

§ 1. Nature and Scope of Summary Ejectment.

Where the premises is located in an area subject to Federal Rent Control, plaintiff in summary ejectment must show not only the existence of the relationship of landlord and tenant, expiration of term and notice to quit, but also compliance with the regulations promulgated pursuant to the Emergency Price Control Act. 50 U. S. C. A., Appendix 902. *Swink v. Horn*, 713.

§ 1½. Summary Ejectment for Personal Occupancy of Premises Subject to Federal Rent Control.

Under section 6 (a) (6) of Amendment 67 to Housing Regulations under the Emergency Price Control Act, "immediate" means "without delay," "compelling" means "to drive or urge with force," and "necessity" imports that which is unavoidable or the negation of freedom but does not in law mean essential to existence; and the phrase "immediate, compelling necessity" means a situation imperatively requiring relief, or a course of action impelled by uncontrollable circumstances, and mere convenience or preference for the premises as a residence by the owner is insufficient. *Swink v. Horn*, 713.

EJECTMENT—*Continued.*

§ 3. Termination of Tenancy and Notice to Quit.

Plaintiff's evidence of notice given and received to vacate the premises *held* sufficient both under the State law and the Rent Control Regulations to overrule defendant's motion to nonsuit on this ground. *Swink v. Horn*, 713.

§ 4. Jurisdiction of Summary Ejectment.

The jurisdiction of a justice of the peace of proceedings in summary ejectment is purely statutory, Const. N. C., Art. IV, sec. 27; G. S., 42-26, and is limited by statute to those cases in which the relationship of landlord and tenant exists and the tenant holds over after expiration of the term or otherwise violates the provisions of his lease, and it is necessary that the jurisdictional facts be alleged, G. S., 42-28. *Howell v. Branson*, 264.

§ 7. Sufficiency of Evidence and Nonsuit in Summary Ejectment.

Plaintiff's evidence that she was seeking occupancy of the apartment owned by her for her own use as a residence in order to take care of her aged mother who was critically ill and lived in the apartment immediately under the premises in suit, with evidence of her good faith in that she had offered to permit defendant to retain possession if he would yield her two rooms so that she might be near her mother, *is held* sufficient on the question of "immediate, compelling necessity" for personal occupancy to sustain judgment of the court overruling defendant's motion to nonsuit. *Swink v. Horn*, 713.

§ 9. Appeals to Superior Court in Summary Ejectment.

The jurisdiction of the Superior Court on appeal from the justice of the peace in summary ejectment is derivative, and when the proceedings before the justice of the peace is based upon an "oath in writing" to the effect only that defendant entered into possession of the premises and refused to vacate same, without allegation of the existence of the jurisdictional relationship of landlord and tenant, the proceedings should be dismissed in the Superior Court as in case of nonsuit. *Howell v. Branson*, 264.

§ 12. Defenses.

That plaintiff remained silent and made no objection until after defendant had completed house located partly on plaintiff's land does not estop plaintiff from asserting title. *Ramsey v. Nebel*, 590.

ELECTIONS.

§ 25. Notice of Candidacy.

Where there are two vacancies for the office of Associate Justice of the Supreme Court to be filed at the general election, a notice of candidacy for the nomination of a party which does not specify to which of the vacancies the candidate is asking the nomination is fatally defective. G S., 163-147. *Ingle v. Board of Elections*, 454.

G. S., 163-147, requiring that in any primary where there are two or more vacancies for Chief Justice and Associate Justices of the Supreme Court to be filled by nomination, a candidate must designate to which vacancy he is asking the nomination, *held* not to contravene Art. IV, sec. 21, of the State Constitution requiring Justices to be elected in the same manner as members of the General Assembly, since the method of selection of nominees does not reach into and control the general election. *Ibid.*

ELECTIONS—*Continued.*

§ 27a. Right to Have Name Placed on Ballot Where There Is Only One Candidate of Party.

Mandamus will not lie to compel the State Board of Elections to place on the official ballot, G. S., 163-128, the name of petitioner as the nominee of his party to the office of Associate Justice of the Supreme Court when his notice of candidacy for the nomination is fatally defective in failing to designate to which of two vacancies he is seeking the nomination. *Ingle v. Board of Elections*, 454.

ELECTRICITY.

§ 6. Degree of Care Required in General.

In the handling of live wires by an electrician ordinary care means the highest degree of care. *Deaton v. Elon College*, 433.

§ 10. Contributory Negligence of Persons Injured.

Experienced electrician was employed as independent contractor to repair private transmission line. The contractor caught hold of a high tension wire with his bare hands while standing on wet ground and was electrocuted. Contractor could have had current turned off or used rubber gloves. *Held:* Negligence of contractor was sole or contributing cause of injury, precluding recovery regardless of negligence of contractee in failing to warn of unusual location of high tension wire, since death or great bodily injury would have resulted if it had been a light circuit wire as position of wire indicated. *Deaton v. Elon College*, 433.

EMINENT DOMAIN.

§ 1. Nature and Extent of Power in General.

Private property can be taken under eminent domain only for a public purpose and upon payment of a just compensation. *Charlotte v. Heath*, 750.

§ 4. Public Purpose.

What is a public purpose is a question of law for the court, and where the application of this principle requires an ascertainment of fact, whether by court or jury, when the facts are determined the issue no longer rests in fact but in law. *Charlotte v. Heath*, 750.

If a purpose is a public purpose its nature is not affected by the fact that the number of persons to be served may be small. *Ibid.*

The taking of a right-of-way for a sewer line to serve property adjacent to the municipality, which line lies partly outside the city, but which is to be connected with the municipal sewer system, and become the property of the municipality and subject to its exclusive control (Public-Local Laws of 1939, chapter 366, section 65) is for a public purpose, the service being available to the general public residing in, or who may seek residence in the area. *Ibid.*

§ 4½. Selection of Route or Land to Be Taken.

The choice of a route is primarily within the discretion of the authority exercising the power of eminent domain, and will not be reviewed on the ground that another route may have been more appropriately chosen unless it appears that there has been an abuse of discretion. *Charlotte v. Heath*, 750.

EMINENT DOMAIN—*Continued.*

§ 6. Delegation of Power to Political Subdivisions.

City of Charlotte is given authority by its charter to condemn land for sewer line to serve property lying outside its city limits. *Charlotte v. Heath*, 750.

EQUITY.

§ 1. Nature of Equitable Rights and Remedies in General.

It is not the way of equity to override the law or to invalidate contracts or to destroy property rights. *Vernon v. Realty Co.*, 59.

§ 2a. He Who Seeks Equity Must Do Equity.

The maxim that he who seeks equity must do equity is not a precept for moral observance but an enforceable rule of law. *Ins. Co. v. Guilford County*, 441.

§ 3. Laches.

Lapse of time is unavailing against a motion to set aside a void judgment. *Johnston County v. Ellis*, 268.

ESTATES.

§ 10. Nature and Grounds of Remedy of Sale of Estates for Reinvestment.

G. S., 41-11, does not apply to suit by trustee to sell part of realty of trust estate to pay debts to preserve bulk of trust property. *Trust Co. v. Rasberry*, 586.

ESTOPPEL.

§ 3. Nature and Essentials of Estoppel by Record.

Fact that plaintiff had instituted action for divorce in Virginia, alleging residence there, *held* not to estop him from asserting residence here in subsequent suit in our court for divorce. *Welch v. Welch*, 541.

§ 6c. Estoppel by Silence.

Where the owner of a lot encroaches upon a strip of the adjacent lot and builds structures located partly thereon, the owner of the adjacent lot is not estopped by his silence and failure to object from asserting his title thereto in an action in ejectment, and does not lose his title thereto until such adverse user has continued for the twenty years necessary to ripen title by adverse possession. G. S., 1-40, the user not being under color of title. *Ramsey v. Nebel*, 590.

§ 6g. Acceptance of Benefits.

Plaintiff's testator was an officer-stockholder in a close corporation which distributed its profits largely through salaries to officer-stockholders rather than through dividends. Testator entered into an agreement with the defendant and other stockholders under which the corporation obligated itself to continue payment of premiums on policies taken out by it on testator's life and to use the proceeds in the purchase of testator's stock upon his death. Upon testator's death the corporation collected the insurance, and deposited the proceeds in a separate trust fund. *Held:* During his life plaintiff's remuneration from the corporation was decreased proportionately by the expenditure of corporate funds to pay the insurance premiums, and at his death the corporation and the other stockholders are estopped from claiming the proceeds of the insurance as a general corporate asset. *Bank v. Supply Co.*, 616.

ESTOPPEL—*Continued.*

§ 6d. Estoppel by Conduct.

Petitioners, three separate landowners, sought establishment of cartway along old route which ran from public road over lands of respondents and two of petitioners. Cartway was established. Thereafter two of petitioners sold their lands to respondents. *Held:* The other petitioners would be estopped to deny plaintiff the use of the old road across their lands to get to the cartway established across the lands of respondents, and respondents, being in privity of title to them, are likewise estopped. *Long v. Trantham*, 510.

EVIDENCE.

§ 2. Judicial Notice of Official Acts and Political Subdivisions of This State.

Courts will take judicial notice of size and location of municipality of the State. *S. v. Bowen*, 601.

§ 5. Judicial Notice of Facts Within Common Knowledge.

Court will take judicial notice that certain articles, in combination, are implements of housebreaking. *S. v. Baldwin*, 295.

§ 7d. Clear, Strong, and Convincing Proof.

"Clear," "strong," and "convincing" have ordinary and accepted sense as defined in dictionary. *McCorkle v. Beatty*, 338.

§ 15. Credibility of Witnesses in General.

Conflict in statements in plaintiff's evidence affects its credibility but not its competency. *S. v. Petry*, 78; *Graham v. Spaulding*, 86.

§ 18. Evidence Competent to Corroborate Witness.

Where plaintiff's statement on direct examination is impeached by defendant on cross-examination, it is competent for plaintiff on re-direct examination to testify as to related matters, though not directly in issue in the action, for the purpose of re-establishing his credibility. *Brown v. Loftis*, 762.

§ 21. Direct Examination—Broad Questions.

Even when the financial inability of plaintiff to prevent foreclosure of a mortgage executed by him is relevant and competent, a question as to his "financial shape and the reason for it" is too broad. *McCorkle v. Beatty*, 338.

§ 22. Cross-Examination of Witnesses.

The extent to which cross-examination for impeachment is to be permitted rests largely in the discretion of the trial judge, and an exception to the extent of the cross-examination upon legitimate subjects of inquiry will not be sustained when the record fails to show abuse. *McCorkle v. Beatty*, 338.

§ 30c. Maps and Plats.

A map or plat of a survey not made in pursuance of a court order may be used by a witness to explain his testimony but it is not competent as substantive evidence. *Searcy v. Logan*, 562.

§ 32. Transactions or Communications with Decedent.

G. S., 8-51, applies to caveat proceedings, but, as under general rule, prohibition applies only to transactions with decedent and not with propounder;

EVIDENCE—*Continued.*

further, beneficiaries may testify as to transactions with decedent testator on issue of testamentary capacity. *In re Will of Lomax*, 498.

Testimony by the maker of notes as to transactions with deceased payee tending to establish non-liability is properly excluded. G. S., 8-51. *Perry v. Trust Co.*, 667.

§ 33. Documentary Evidence—Statutes, Laws, and Ordinances of This State.

In the absence of evidence that a purported municipal ordinance had been certified, as required by G. S., 8-5, or that it had been printed in book form, as provided in G. S., 160-272, it is not error for the court to exclude testimony of the police chief as to the existence and contents of the purported ordinance, it being necessary in such instance to produce by the proper official the official municipal records to prove the ordinance. *Toler v. Savage*, 208.

§ 39. Parol or Extrinsic Evidence Affecting Writings in General.

Recitations of a contractual nature in a written instrument may not be contradicted or varied by parol. *Coleman v. Whisnant*, 258.

Evidence of knowledge of agent respecting stipulation excluding liability is incompetent as tending to vary written policy. *Ins. Co. v. Wells*, 574.

Where the execution of instruments under seal is established by defendant's admission, his testimony that he did not adopt or intend to adopt as his seal, the printed word "seal" appearing in brackets at the end of the line opposite his signature, is properly excluded as parol testimony tending to vary, modify, or contradict the terms of a written instrument. *Bell v. Chadwick*, 598.

As between parties, maker may show that note, even though under seal, was without consideration or that delivery was conditional. *Perry v. Trust Co.*, 667.

§ 42d. Admissions by Agents or Representatives.

In the absence of competent evidence tending to establish the fact of agency, declarations of the alleged agent, even if material, are incompetent. *McCorkle v. Beatty*, 338.

§ 42f. Admissions in Pleadings.

Where defendant admits in his answer the paragraph of the complaint alleging that defendant had executed notes as set out therein, showing the printed word "seal" in brackets at the end of the line opposite defendant's signature, the admission is that defendant executed instruments under seal and defendant is bound by the admission introduced in evidence by plaintiff. *Bell v. Chadwick*, 598.

§ 45. Expert and Opinion Evidence in General.

Expert testimony is not based upon facts observed by the witness, but, contrary to the general rule, is based upon facts assumed, and an expert is permitted to give his conclusion as to an ultimate fact based upon facts assumed only in scientific or technical matters in which lay jurors, by reason of lack of specialized knowledge, skill or training, are unable to make the deduction for themselves. *Tyndall v. Hines Co.*, 620.

A lay witness is permitted to give his opinion as to common appearances, facts and conditions in those instances where the basic facts cannot be described so as to enable a person who is not an eyewitness to form an accurate judgment in regard thereto, provided such "shorthand" statement is based upon facts observed by the witness. *Ibid.*

EVIDENCE—*Continued.*

§ 46. Subjects of Opinion Evidence by Non-Experts.

Lay testimony as to the speed of a vehicle is competent only when the witness' opinion is based upon his observation of the moving vehicle, and a witness may not give his estimate of speed based upon tire marks of the vehicle and conditions observed by him at the scene of the accident, both because such opinion is not based on facts within the knowledge of the witness but is a deductive conclusion from what he saw and knew, and because such opinion invades the province of the jury, the jury being competent to draw the conclusion from testimony as to the basic facts. *Tyndall v. Hines Co.*, 620.

EXECUTORS AND ADMINISTRATORS.

§ 3. Removal and Revocation of Letters.

Where, after letters of administration have been issued, a will is found and probated and letters issued thereon, the letters of administration must be revoked, G. S., 28-31; however, all acts done by the administrator in good faith prior to the discovery and probate of the will are valid and binding. *Harrison v. Carter*, 36.

§ 4. Appointment of Successors After Removal.

Upon the revocation of letters the clerk of the Superior Court is required immediately to appoint a successor, G. S., 28-33, and the law contemplates a continuity of succession until the estate has been fully administered. *Harrison v. Carter*, 36.

§ 5. Assets of Estate in General.

Recovery of damages for wrongful death is for benefit of next of kin, but recovery for pain and suffering and hospital expenses prior to death is asset of estate. *Hoke v. Greyhound Corp.*, 332.

§ 8. Title and Right to Possession of Assets.

Purchaser of stock had certificates issued in name of self and niece as tenants in common with right of survivorship. *Held:* Facts were insufficient to show as matter of law donative intent and delivery, and court's conclusion that niece was sole owner of stock was error. *Buffaloe v. Barnes*, 313.

Testator purchased certain stock through a broker and directed the broker to have the certificate issued in the name of himself and niece with right of survivorship, but died before the stock was issued by the transfer agent. *Held:* The agency of the broker was revoked by the death of his principal, and the transaction not having been consummated, the executor is entitled to the stock as against the niece. *Ibid.*

§ 9. Actions to Collect Assets.

Personal representative instituted action for wrongful death. Upon later discovery of will, letters were revoked and administrator *c. t. a.* appointed, who resigned in 18 days without prosecuting action. Original administrator was then appointed administrator *c. t. a., d. b. n.* *Held:* Administrator *c. t. a., d. b. n.*, was entitled to be made party and prosecute action *Harrison v. Carter*, 36.

§ 10. Control and Management of Estate in General.

Where powers conferred upon executor are personal and discretionary, such powers cannot be exercised by substitute or successor. *Welch v. Trust Co.*, 357.

EXECUTORS AND ADMINISTRATORS—*Continued.*

§ 13a. Nature and Grounds of Remedy to Sell Land to Make Assets.

The personalty is primarily liable for the payment of decedent's debts, including judgments and obligations secured by mortgages, and the real estate is secondarily liable and may be resorted to only in the event the personalty is insufficient to pay all debts in full. *Moore v. Jones*, 149.

§ 13f. Proceeds of Sale.

When realty is sold under order of court to make assets and personal representative takes the land in the condition in which his decedent left it, and the proceeds of sale remain real estate until all liens are discharged and must be applied to the payment of such liens in the order of their priority, and only the residue is personalty to be distributed in the order of priority prescribed by G. S., 28-105, and therefore where the land is subject to a docketed judgment and a subsequently recorded mortgage the judgment must be satisfied in full before application of any part of the proceeds to the mortgage or to the payment of other debts. *Moore v. Jones*, 149.

§ 15m. Claims Against Estate—Contracts and Undertakings of Decedent.

The cost of repairs to real property which are ordered by testator or by his authorized agent, and which are completed prior to his death, are chargeable against the executors; but other repairs made after testator's death when title had vested in the devisees, in the absence of a finding or evidence that they had been contracted for by testator or someone authorized by him, are chargeable against the devisees. *Buffaloe v. Barnes*, 313.

§ 15k. Claims Against Estate—Taxes.

In the absence of a contrary testamentary provision, Federal Estate taxes should be paid out of the general funds of the estate and not charged against the individual beneficiaries. *Buffaloe v. Barnes*, 313.

§ 16. Priorities.

When realty is sold to make assets, proceeds are realty until all liens are discharged, and docketed judgments and mortgages must be paid in order of priority before residue is used to pay other debts of estate. *Moore v. Jones*, 149.

§ 19. Actions on Claims—Limitations.

Where a claim against an estate is not referred, G. S., 28-111, and is rejected, action thereon is barred if not instituted within six months of receipt of written notice of the rejection, and the burden of proof is on claimants. *Craver v. Spaugh*, 450.

§ 24. Distribution of Estate Under Family Agreements.

Family agreements for the settlement of *bona fide* disputes and controversies in regard to estates, not involving the rights of infants, when approved by the court, are valid and binding, and when fairly made, are favorites of the law. *Redwine v. Clodfelter*, 366.

Where there is a testamentary trust and the rights of infants are affected: (1) A family agreement will not be allowed to amend, defeat, or revoke the trust, but will be approved only to preserve the trust; (2) The rule that the law looks with favor on family agreements does not prevail, but the maxim applies that equity looks with a jealous eye on contracts materially affecting the rights of infants and that their welfare is the guiding star in determining

EXECUTORS AND ADMINISTRATORS—*Continued.*

its reasonableness; (3) The trust will not be modified on technical objections, but there must be some exigency, contingency, or emergency which makes action of the court indispensable to the preservation of the trust and the protection of the infants. *Ibid.*

Approval of family agreement *held* without error upon facts found in this case. *Ibid.*

FRAUD.

§ 6. Damage.

In order to be actionable, legal fraud, as well as moral fraud, must involve some detriment resulting from the fraud suffered by the party seeking relief, or some inequitable advantage taken by the party against whom the relief is sought. *Ins. Co. v. Guilford County*, 441.

§ 8. Legal Fraud.

While legal fraud has not been precisely defined, it rests upon public policy and does not necessarily involve the conscience or moral dereliction. *Ins. Co. v. Guilford County*, 441.

FRAUDS, STATUTE OF.

§ 1. Purpose and Operation in General.

Any person, plaintiff or defendant, against whom enforcement is sought may plead the statute of frauds against a contract voidable under the statute. *Davis v. Lovick*, 252.

§ 2. Sufficiency of Writing.

A writing cannot be held sufficient under the statute of frauds unless it describes the land, the subject matter of the agreement, with certainty or refers to matters *aliunde* from which the description can be made certain. *Searcy v. Logan*, 562.

A memorandum "Received of C. L. $50.00 for homeplace where he now lives which he has no deed for" dated and signed by the owner of land *is held* sufficiently definite to admit of parol evidence for the purpose of identifying the land. This memorandum being sufficient under the statute of frauds, G. S., 22-2, the purchaser is entitled to introduce another receipt executed by the owner to him, even though it does not purport to identify the land, and to show by parol that it was part of the consideration for the land contracted to be conveyed. *Ibid.*

The "party to be charged" whose signature is necessary to take the contract out of the statute of frauds, is the party against whom the contract is sought to be enforced, whether vendor or purchaser. *Harvey v. Linker*, 711.

§ 3. Pleading of Statute.

The general denial of the contract as alleged is a sufficient pleading of the statute of frauds. G. S., 22-2. *Harvey v. Linker*, 711.

§ 4. Estoppel and Waiver of Defense.

A party is not estopped by his pleading from asserting the defense of the statute of frauds unless the pleading asserts the voidable contract as a necessary basis for the relief sought, and the mere recital of the parol agreement in the pleading does not adopt it or ratify it or waive the right to thereafter assert the statute in subsequent pleadings. *Davis v. Lovick*, 252.

Complaint *held* to state cause in ejectment regardless of verbal agreement and plaintiff was not estopped from pleading statute in reply. *Ibid.*

FRAUDS, STATUTE OF—*Continued.*

§ 10. Contracts to Convey Realty.

A contract for the sale of land or any interest therein must fix the price, and therefore where a valid contract to convey is executed by the owners of land, and later the purchasers add after the signatures a stipulation that by mutual agreement the time for performance had been extended and the purchase price changed to a reduced sum, the change in purchase price constitutes a new contract which, not having been signed by the owners, is unenforceable against them under the statute of frauds as not having been signed by the parties to be charged. *Harvey v. Linker*, 711.

§ 11. Leases.

A verbal agreement to lease real property for one year with privilege of renewal thereafter for four successive years comes within the statute of frauds, G. S., 22-2, since the lease and the provision for renewals constitute but a single contract, and the full term is absolute as to the lessor. *Wright v. Allred*, 113.

An agreement by the remainderman to rent the *locus in quo* from the life tenant for the entire period of the life estate is for an indefinite term and one which may last beyond three years and therefore such agreement comes within the statute of frauds, G. S., 22-2. *Davis v. Lovick*, 252.

GIFTS.

§ 1. Nature and Essentials of Gifts Inter Vivos.

In order to constitute a gift *inter vivos* there must be an intent to presently pass title, and this intention must be consummated by delivery, actual or constructive, with consequent loss by the donor of dominion over the property given. *Buffaloe v. Barnes*, 313.

Ordinarily, when the purchaser of shares of stock has the certificate issued in the name of another, and so registered on the books of the corporation, though retaining possession of the certificate, the transaction constitutes a gift *inter vivos* consummated by constructive delivery, but such transaction does not operate as a gift *inter vivos* when the name of such other is inserted for the convenience of the purchaser, donative intent is not established, or where the donor has not divested himself of right and title to the stock and of all dominion and control over it. *Ibid.*

The fact that the purchaser of stock has the certificate issued in the name of himself and another with words purporting to create a joint tenancy with right of survivorship, does not conclusively establish donative intent which is essential to a valid gift *inter vivos*, but such intent must be determined by consideration of all the attendant facts and circumstances. *Ibid.*

Act of uncle in having stock certificate issued in name of himself and niece *held* not to show as matter of law, upon facts agreed, donative intent and delivery. *Ibid.*

Where one purchases stock with his own funds and has the certificates issued or reissued to himself and another as joint tenants with right of survivorship, but keeps the stock certificates in his possession throughout his lifetime, the transaction cannot constitute a gift *inter vivos* since it lacks the essential element of absolute and unconditional delivery. *Buffaloe v. Barnes*, 780.

This action was instituted in replevin by a widow to recover possession of an automobile from her father-in-law. Plaintiff's evidence that the car had

GIFTS—*Continued.*

been purchased by her husband and that he had made a valid gift *inter vivos* of the car to her *is held* sufficient to overrule defendant's motions to nonsuit. *James v. James*, 399.

§ 4. Nature and Essentials of Gifts Causa Mortis.

Having stock, paid for by testator, issued in his name and that of another as joint tenants with right of survivorship *held* not to constitute gift *causa mortis*. *Buffaloe v. Barnes*, 313.

GRAND JURY.

§ 3. Nature and Functions of Grand Jury in General.

The grand jury is not a trial court, but an investigatory body, and it is competent to send to the grand jury as many bills of indictment as may be necessary to get before it necessary witnesses and evidence from which it may decide the propriety of submitting the accused to trial. *S. v. Lewis*, 249.

HABEAS CORPUS.

§ 3. Habeas Corpus to Obtain Custody of Minor Children.

The jurisdiction of the court in *habeas corpus* proceedings to determine the custody of children in a contest between husband and wife, living in a state of separation but not divorce, although statutory, G. S., 17-39, is equitable. *In re Biggers*, 647.

§ 9. Enforcement of Decree.

An order of the court awarding custody of minor children in *habeas corpus* proceedings, even though based upon consent of the parents, is not a mere affirmation of a civil contract, and perforce the court has jurisdiction to enforce such order by attachment for contempt. *In re Biggers*, 647.

HIGHWAYS.

§ 11. Nature and Establishment of Neighborhood Public Roads.

There is no legislative sanction or provision for the establishment of a neighborhood road, a term ordinarily used to designate a private way which serves a neighborhood as an outlet to a public road. *Speight v. Anderson*, 492.

Neither a way of egress or ingress over lands of another existing by consent, nor one obtained by prescription, is a neighborhood public road. *Speight v. Anderson*, 492.

Such way does not come within provisions of Ch. 183, Public Laws 1941, which amends Ch. 302, Public Laws 1933. *Ibid.*

HOMESTEAD.

§ 8. Appraisal and Allotment of Homestead.

In bankruptcy proceedings homestead was allotted in certain lands, subject to a specified judgment. *Held:* As against this judgment there was no determination of the extent of debtor's homestead in the lands, and the judgment creditor was not remitted to reallotment of homestead either by suit in equity or by application to the clerk under G. S., 1-373, but could proceed by levy of execution and allotment of homestead. *Sample v. Jackson*, 408.

HOMICIDE.

§ 1c. Definition of "Deadly Weapon."

A sharp, thick, pointed blade six inches long, sufficient when stabbed into the body of another to reach and penetrate the heart, is, when so used, *per se* a deadly weapon. *S. v. Hightower*, 62.

"Brick" may be deadly weapon as matter of law when thrown at close range with force. *S. v. Perry*, 530.

§ 2. Parties and Offenses.

Upon evidence tending to show that all of defendants acted in concert in producing the first difficulty and all engaged in the fighting, and that during the second affray, which was but a continuation of the first, one of defendants fired the fatal shot while the deceased and appealing defendant were fighting, the contention of the appealing defendant that the one who inflicted the fatal injury was acting independently, is untenable. *S. v. Vaden*, 138.

§ 4c. Premeditation and Deliberation.

No rule as to the length of time necessary for the mental processes of premeditation and deliberation can be laid down, it being sufficient if a fixed design to kill is formed and thereafter such intent is executed, however soon or late. *S. v. Hart*, 200.

If a person forms a fixed design to kill, and thereafter executes such intent, however soon or late, there is sufficient premeditation and deliberation to warrant the jury in finding him guilty of murder in the first degree. *S. v. Stewart*, 299.

§ 4d. Murder in Perpetration of Robbery.

Murder committed in the perpetration or attempt to perpetrate a robbery is murder in the first degree. G. S., 14-17. *S. v. Bennett*, 82.

Where there is a conspiracy to rob and one of the conspirators kills in the attempt to perpetrate the robbery, each of the conspirators is guilty. *Ibid.*

§ 4e. Murder in Perpetration of Rape.

A homicide committed in the perpetration of the capital felony of rape is murder in the first degree, G. S., 14-17, and premeditation and deliberation is presumed and need not be proven. *S. v. King*, 241.

§ 7. Voluntary Manslaughter.

Mere words, however abusive, are not sufficient provocation to reduce murder in the second degree to manslaughter, but legal provocation must be circumstances amounting to an assault or threatened assault. *S. v. Hightower*, 62.

§ 11. Self-Defense.

Where the State's evidence supports view that defendants did not quit fight when they had opportunity, nonsuit on ground of self-defense is properly denied. *S. v. Vaden*, 138.

When defendant testifies that he was part owner of the filling station, the scene of the fatal encounter, but the State offers evidence that the filling station was a public filling station operated in the sole name of defendant's brother and that all licenses were issued in the brother's name and that defendant was a farmer living some distance away, defendant's contention that he was on his own premises is an open question for the jury on the conflicting evidence. *S. v. Taylor*, 286.

HOMICIDE—*Continued.*

In order to justify a killing in self-defense, defendant must be under reasonable apprehension of death or great bodily harm under the circumstances as they appear to him at the time, which subjective apprehension perforce is predicated upon the exercise of reason, and therefore necessarily beyond the capacity of a person too drunk to have any conscious mental processes. *S. v. Absher*, 656.

§ 16. Presumptions and Burden of Proof.

The burden is on defendant to prove his plea of self-defense, including his contention that he was on his own premises when this fact is material only to his plea to establish that he was not required to retreat. *S. v. Taylor*, 286.

Premeditation and deliberation are not presumed from killing with deadly weapon. *S. v. Stewart*, 299.

While in a prosecution for murder in the first degree the State has the burden of proving each of the essential elements of the crime, it is entitled to avail itself of the presumption of malice upon the showing of an intentional killing with a deadly weapon, with the burden upon it to complete its case by establishing the elements of premeditation and deliberation beyond a reasonable doubt. *S. v. Floyd*, 571.

The State must prove that deceased died as result of gunshot wound inflicted by defendant before it is entitled to presumption of malice. *S. v. Ellison*, 628.

§ 17. Relevancy and Competency of Evidence in General.

In a prosecution for murder in the first degree, testimony that in his voluntary confession the defendant stated he entered the house in which deceased was sleeping with the motive of raping her is competent to show that the killing was done in the perpetration or attempt to perpetrate the capital offense of rape, which would constitute murder in the first degree without proof of premeditation and deliberation. *S. v. King*, 241.

§ 18. Dying Declarations.

In order to be competent, dying declarations must relate to the act of killing or to circumstances so immediate attendant thereon as to constitute part of the *res gestæ*, must be made by the victim in the present anticipation of death, and death must ensue. *S. v. Thompson*, 651.

The ruling of the trial court admitting in evidence dying declarations will be reviewed only to determine if there is sufficient evidence as to the necessary facts, including the fact that the declarations were made in present anticipation of death, to support such ruling. *Ibid.*

§ 19. Admissions.

Admission by defendant that he shot deceased is not admission that he inflicted fatal wound; nor is admission by counsel in argument binding upon defendant. *S. v. Ellison*, 628.

§ 20. Evidence of Motive and Malice.

Evidence that defendant's motive in entering house where deceased was sleeping was to commit rape *held* competent, even though motive is not element of offense. *S. v. King*, 241.

HOMICIDE—*Continued.*

§ 21. Evidence of Premeditation and Deliberation.

Premeditation and deliberation are not presumed from a killing with a deadly weapon, but may be shown by circumstances, and all the circumstances under which the homicide was committed may be considered, one such circumstance being the entire absence of legal provocation. *S. v. Stewart*, 299.

§ 25. Sufficiency of Evidence and Nonsuit.

Evidence of defendant's participation in a conspiracy to rob resulting in the death of the victim at the hands of a co-conspirator in the attempt to perpetrate the offense *held* sufficient to overrule defendant's motion to nonsuit. *S. v. Bennett*, 82.

Defendant's motion to nonsuit is properly denied when the evidence tends to show an intentional killing with a deadly weapon, since the credibility and sufficiency of the defendant's evidence in mitigation or excuse is for the jury to consider and decide. *S. v. Robinson*, 95; *S. v. Vaden*, 138.

The State's evidence tended to show an affray at a filling station engaged in by all defendants, that the fight was stopped but that thereafter defendants, three brothers, sought and found their antagonist at another filling station, that third parties induced them to shake hands and apparently settle their controversy and the brothers started to leave in their truck when one of them called the proprietor out and expressed dissatisfaction with the settlement, that their antagonist then came out of the filling station and the quarrel was renewed and he, armed with a knife, and one of defendants, armed with a blackjack, started fighting, and that while they were fighting another defendant shot from the truck, inflicting fatal injury. *Held:* The evidence supports the view that the second fight was but a continuation of the first and that the purported settlement of the controversy was not entered into in good faith, and that in reality defendants had not quit the fight, and therefore motion to nonsuit on the ground that the State's evidence established the defense of self-defense, was properly denied. *S. v. Vaden*, 138.

Testimony of a witness that defendant got a shell, showed it to the witness and stated "this is Miss Margie's (the deceased) dose," and later stated that he had shot deceased through the head, and testimony of another witness that defendant stated that he was going to kill "everyone there" *is held* sufficient to be submitted to the jury on the question of premeditation and deliberation. *S. v. Hart*, 200.

Evidence of premeditation and deliberation *held* sufficient to sustain conviction of murder in the first degree. *S. v. Stewart*, 299.

Evidence of defendant's guilt of manslaughter in an attempt at criminal abortion *held* sufficient to be submitted to the jury, but as a new trial is ordered on an exception relating to the admission of evidence, recitation of the evidence is not necessary. *S. v. Gardner*, 310.

§ 27a. Form and Sufficiency of Instructions in General.

The use of the term "the implement offered in evidence and referred to by witnesses as a knife" *is held* a sufficiently definite reference to the weapon offered in evidence, it appearing that the jury could not have misunderstood. *S. v. Hightower*, 62.

§ 27b. Instructions on Presumptions and Burden of Proof.

Where defendant testifies that he intentionally shot deceased but does not admit that he inflicted fatal injury, a charge that defendant admitted the

intentional killing of deceased with a deadly weapon, raising the presumption of malice constituting the offense of murder in the second degree and placing the burden on the defendant to prove matters in mitigation or excuse, must be held for prejudicial error since it affects the burden of proof, notwithstanding plenary evidence on the part of the State tending to show that the injuries inflicted by defendant were fatal, the credibility of the State's evidence being for the jury and the court being prohibited from expressing an opinion thereon. G. S., 1-180. *S. v. Ellison*, 628.

A charge which properly places the burden upon defendant to establish his contention of drunkenness rendering him incapable of premeditation and deliberation, but then further charges that the burden is on defendant to establish the matter to the satisfaction of the jury "in order for him to mitigate the offense," must be held for error, since the burden of establishing premeditation and deliberation beyond a reasonable doubt rests upon the State throughout, and defendant in no event has the burden of establishing matters mitigating the offense from first degree to second degree murder. *S. v. Absher*, 656.

§ 27c. Instructions on Murder in First Degree.

Since the enactment of the statute dividing murder into degrees, C. S., 4200, G. S., 14-17, the use of the adjective "aforethought" in charging upon murder in the first degree is not required, the definition and use of the term "premeditation and deliberation" being sufficient. *S. v. Hightower*, 62.

The use of the phrase "premeditation *or* deliberation" in the charge *held* not prejudicial error in view of the fact that immediately thereafter the court repeatedly and correctly instructed the jury that both these elements were essential for a conviction of first degree murder. *S. v. Deaton*, 348.

§ 27e. Instructions on Manslaughter.

The definition of manslaughter in the court's charge as the unlawful killing of a human being without malice will not be held for error as inadequate. *S. v. Thompson*, 651.

§ 27f. Instructions on Defenses.

In this prosecution for murder in the first degree *it is held* that the court below fairly and fully presented defendant's cause, both as to the law and evidence, on defendant's defenses of insanity, drunkenness, provoked assault, and self-defense. *S. v. Hightower*, 62.

When the question of whether defendant was on his own premises at the time of the fatal encounter is an open question for the jury on conflicting evidence, the court, in the discharge of its duty to explain and apply the law to all material phases of the testimony, properly explains the law both upon the duty to retreat ordinarily prevailing, and the right of a person to stand his ground if without fault and on his own premises, and defendant's contention that the explanation of the duty to retreat was inapplicable to the evidence and prejudicial is without merit. *S. v. Taylor*, 286.

Where the State's evidence tends to show a deliberate, premeditated killing with a deadly weapon, and there is no evidence in the case constituting any basis that the killing was in self-defense, defendant having offered no evidence, the failure of the court to instruct the jury upon the right of self-defense will not be held for error. *S. v. Deaton*, 348.

Where defendant testifies that he became so intoxicated that he had no remembrance of anything that happened for some time prior and subsequent

HOMICIDE—*Continued.*

to the homicide, the court is not required to submit to the jury the question of self-defense, notwithstanding testimony on the part of the State's witnesses that defendant knew what he was doing, since even the evidence that defendant knew what he was doing, standing alone, fails to lay the necessary predicate that defendant reasonably apprehended he was in danger of death or great bodily harm. *S. v. Absher*, 656.

§ 27h. Form and Sufficiency of Issues and Instructions on Less Degrees of Crime.

Where all the evidence tends to show murder committed in the perpetration of a robbery pursuant to a conspiracy and that both defendants were present and participated in the crime, the court properly limits the jury to verdicts of guilty of murder in the first degree or not guilty. *S. v. Matthews*, 639.

HUSBAND AND WIFE.

§ 12d (1). Requisites and Validity of Deeds of Separation.

Deed of separation not executed as required by statute is void *ab initio* and is a nullity. *Pearce v. Pearce*, 307.

INDICTMENT AND WARRANT.

§ 9. Charge of Crime.

No indictment, whether at common law or under a statute, can be good if it does not accurately and clearly allege all the constituent elements of the offense charged. *S. v. Morgan*, 414.

In drawing an indictment it is always better to adhere to the established practice. *S. v. Owenby*, 521; *S. v. Benton*, 745.

§ 15. Right to and Scope of Amendment.

The trial court has the discretionary power to permit an amendment to a warrant charging assault on a female *simpliciter* so as to charge an assault on a female by a man or boy over eighteen years of age. *S. v. Grimes*, 523.

§ 22. Sufficiency of Indictment to Support Conviction of Less Degree of Crime Charged.

Where, upon indictment charging first degree burglary, solicitor announces he would not ask for more than conviction of burglary in second degree, it is tantamount to a *nolle prosequi* on the capital charge, and no charge remains in the bill of indictment to support conviction of second degree burglary. *S. v. Locklear*, 410.

INFANTS.

§ 11. Damages in Action by Minor for Negligent Injury.

In an action by a minor to recover for permanent personal injuries, a charge on the issue of damages permitting the jury to consider loss or decrease of earning capacity during minority as an element of recovery must be held for reversible error, since the father is entitled to the services and earnings of his unemancipated child during minority. *Toler v. Savage*, 208.

§ 14. Duties, Liability and Authority of Guardians Ad Litem.

A guardian *ad item*, much less a next friend of minors, cannot consent to a judgment against the minors without special authority of the court.....*Johnston County v. Ellis*, 268.

INFANTS—*Continued.*

A next friend is appointed to bring or prosecute a proceeding in which the infant suitor is plaintiff or seeks to assert some positive right, while a guardian *ad litem* is appointed to defend, and the distinction between them in legal effect is substantial and not merely formal. G. S., 1-64, 1-65. *Ibid.*

While a next friend, in the prosecution of some positive relief for an infant suitor, may be called upon to defend against incidental or opposing rights, such as offsets, counterclaims, or other defenses or demands connected with the original claim, a next friend of minor heirs at law seeking to set aside a tax foreclosure is not required to defend a mortgage foreclosure asserted by an intervener in the action, and his representation of the minors in such unrelated and independent cause does not legally exist. *Ibid.*

Where a next friend of minor heirs at law seeking to set aside a tax foreclosure obtains a judgment setting aside the sale and providing repayment to the purchaser at the sale of taxes and expenses, his office as next friend becomes *functus officio*, and he does not legally represent the minors upon a hearing thereafter had at the instigation of an intervening mortgagee to foreclose a mortgage on the land. *Ibid.*

§ 18. Conduct Causing Child to Be Adjudged a Delinquent.

In a prosecution under G. S., 110-39, a charge to the effect that defendant would be guilty if he encouraged, aided and abetted the prosecuting witness "in moral delinquency" *is held* for error, since the statute uses the term "to be adjudged a delinquent" and the two terms are not synonymous. *S. v. Bullins*, 142.

INJUNCTIONS.

§ 2. Inadequacy of Legal Remedy.

The object of equity is to supply the deficiencies of the law and equity will not interfere when there is an adequate legal remedy. *Clinton v. Ross*, 682.

§ 3. Irreparable Injury.

Injunction will lie to prevent irremediable injury to or destruction of property rights. *Clinton v. Ross*, 682.

§ 4d. Subjects of Injunctive Relief—Nuisances.

Injunction will lie to prevent the maintenance of a public or private nuisance where the public welfare or property rights are injuriously affected. *Clinton v. Ross*, 682.

A municipality may enjoin the operation of a lawful business only if there is something inherent in the nature of the business or in the manner of its operation which has some definite and substantial relation to public health, morals, safety or welfare, and the fact that the business may seriously interfere with the business of others is in itself insufficient. *Ibid.*

Whether the operation of a business injuriously affects the public health, morals, safety or welfare may frequently depend upon its location and surroundings. That which is harmless in an industrial area may be unsafe or injurious in a thickly settled residential district. *Ibid.*

§ 4g. Subjects of Injunctive Relief—Ordinances, Crimes and Misdemeanors.

Injunction will not lie to restrain the enforcement of a municipal ordinance on the ground of unconstitutionality except when plaintiff would otherwise suffer irreparable injury to property or personal rights. *Lanier v. Warsaw*, 637.

INJUNCTIONS—*Continued.*

Injunction will not lie at the instance of operator of taxicab maintaining stand on his property adjacent to a bus station, to enjoin the enforcement of a municipal ordinance prohibiting the maintenance of taxicab stands within five hundred feet from the bus station except at one designated place. *Ibid.*

Injunction will not lie to restrain the violation of the criminal law unless the remedy of prosecution is inadequate because the threatened violation would result in irreparable injury to property or the rights of the public, inadequacy of punishment or difficulty in obtaining conviction or improper enforcement of the criminal statute being insufficient. *Clinton v. Ross*, 682.

§ 8. Continuance, Modification and Dissolution of Temporary Orders.

Continuance to hearing of order restraining construction of addition to tobacco warehouse *held* error in absence of finding that it was contrary to valid zoning regulation or that structure would constitute nuisance. *Kass v. Hedgpeth*, 405.

Continuance of order restraining municipality from paving parkway in street to hearing *held* error where pleadings and evidence raised no issues of fact for determination of jury. *Spicer v. Goldsboro*, 557.

INSANE PERSONS.

§ 14. Service of Process.

G. S., 1-97 (3), provides the method of service of process on insane persons generally in all classes of actions against them, and process in an action for divorce may be served under its provisions. *Smith v. Smith*, 544.

§ 15. Representation of Incompetent.

Where, in an action for divorce against a person who has been declared *non compos mentis*, process has been duly served in accordance with G. S., 1-97 (3), the duly appointed guardian *ad litem* must answer G. S., 1-67, and demurrer of the guardian *ad litem* on the ground that the marital relation is such that the spouse alone may elect to prosecute or defend the action and that defendant's inability to appear and answer in person defeats the jurisdiction of the court, is untenable. *Smith v. Smith*, 544.

INSURANCE.

§ 13c. Waiver of Provisions by Insurer.

Where a policy of insurance stipulates that it embodies all the agreements existing between insured and insurer or any of its agents, and that notice to the agent or any other person should not effect a waiver or change of any part of the contract or estop the insurer from asserting any right unless endorsed thereon so as to form a part of the contract, *held* in the absence of prayer for reformation, evidence of knowledge of the agent relating to a stipulation excluding liability or limiting coverage of the policy would tend to vary the written instrument by parol, and an issue of knowledge of the agent is inadvertently submitted. *Ins. Co. v. Wells*, 574.

Stipulations in a policy of life insurance that insurer should not be deemed to have knowledge of any prior policy issued by it on the life of insured unless a waiver thereof is endorsed on the policy, and that issuance of the policy should not be deemed a waiver of the provision for forfeiture for prior insurance, are ineffectual to preclude a waiver of the forfeiture provision upon a proper showing. *Hicks v. Ins. Co.*, 614.

INSURANCE—*Continued.*

Waiver of a forfeiture provision in a policy of insurance is predicated on knowledge on the part of the insurer of the pertinent facts, and conduct thereafter inconsistent with an intention to enforce the condition. *Ibid.*

§ 31b (1). Misrepresentations as to Existence of Other Insurance.

A representation that applicant is not protected by prior insurance issued by insurer is material, and when the statement is false, insurer is entitled to avoid the second policy unless insurer waives the forfeiture provision, regardless of whether the misrepresentation is innocently or fraudulently made. *Hicks v. Ins. Co.*, 614.

§ 31c. Knowledge and Waiver by Insurer.

The issuance of a second policy, or the continued collection and receipt of premiums thereon, with knowledge on the part of the insurer that insured has another prior policy of the company in force on his life, thus inducing insured to believe the second policy is valid, constitutes a waiver or an estoppel precluding insurer from asserting a forfeiture provision of the second policy on the ground of the existence of the prior policy, and this result obtains regardless of whether the false statement in the application in regard to prior insurance was innocently or fraudulently made. *Hicks v. Insurance*, 614.

Forfeiture of a policy for misrepresentation is not a penalty imposed upon insured for making a false statement, but is based on the principle that insurer has been misled by the misrepresentation to its damage, and insurer will be held to have waived forfeiture where, after acquiring knowledge of the facts, he fails to cancel the policy or forego further collection of premiums. *Ibid.*

§ 34a. Construction and Operation of Disability Clauses and Sufficiency of Evidence of Disability.

Held: Plaintiff's own evidence reveals that during the period of claimed disability he actively engaged continuously in business transactions in connection with the operation of the farms, and insurer's motion to nonsuit should have been allowed in his action on a life insurance policy providing for benefits if insured should become "totally and permanently disabled by bodily injury or disease" so as to prevent him from "performing any work for compensation, gain or profit." *Ireland v. Ins. Co.*, 349.

§ 37. Action on Life Policies.

An issue as to the knowledge of insurer's soliciting agent, submitted upon the theory that such knowledge was imputed to insurer and constituted a waiver of a forfeiture provision of the policy, is correctly submitted and is not objectionable because within itself it does not completely determine the controversy, when the other issues submitted in connection therewith are sufficient for this purpose. *Hicks v. Ins. Co.*, 614.

Where insurer, in an action on a life policy, makes formal tender of premiums collected by it from date of issuance of policy to the death of insured, and the verdict of the jury establishes knowledge of insurer constituting a waiver of the forfeiture relied on by insurer as a defense, the facts before the court are sufficient to support its judgment awarding recovery on the policy. *Ibid.*

§ 43. Construction of Liability Policies as to Risks Covered.

A stipulation in a policy of liability insurance that the policy should not apply while the vehicle is used as a public or livery conveyance is not a condi-

INSURANCE—*Continued.*

tion working a forfeiture and subject to waiver, but an exclusion of liability or limitation on coverage. *Ins. Co. v. Wells*, 574.

§ 50. Actions on Liability and Collision Policies.

Insurer denied liability on the policy in suit on the ground that it had canceled the policy by mailing notice of cancellation to insured more than a month prior to the accident. Insured offered in evidence letters written by insurer's agents, one stating that the policy had been canceled and the other that the policy had been canceled by notice addressed to insured. Plaintiff testified that he had not received any notice of cancellation and did not receive the unearned part of premium until after notice of loss had been given insurer. Insurer's agent testified he mailed the notice. *Held:* Since matter properly mailed is ordinarily received, insured's testimony that he did not receive notice of cancellation is some evidence that notice had not been mailed, and therefore the question was for the jury upon the conflicting evidence, and insurer's motions to nonsuit at the close of plaintiff's evidence and at the close of all the evidence and its request for a directed verdict, were properly denied. *White v. Ins. Co.*, 119.

In action on liability policy, jury's answer establishing that vehicle, at time of collision, was being used for carriage of passengers for hire, within clause of policy excluding liability in such instance, supports judgment for insurer, and second issue of agent's knowledge of such use is improvidently submitted and may be treated as surplusage. *Ins. Co .v. Wells*, 574.

INTEREST.

§ 2. Time and Computation.

Nothing else appearing, interest on balance of purchase price under contract to convey begins to run at time of execution of contract and possession by owner, and not date of execution of deed. *Hood v. Smith*, 573.

INTOXICATING LIQUOR.

§ 8. Forfeitures.

Where a defendant has been convicted of illegal transportation of nontax-paid liquor, the court may at a subsequent term enter an order *nunc pro tunc* for the forfeiture and sale of the vehicle used for such transportation. G. S., 18-48 and 18-6. *S. v. Maynor*, 645.

An order of condemnation and sale of a vehicle used in illegal transportation of intoxicating liquor is no part of the personal judgment against the accused although dependent upon his conviction, and by statutory provision claimants are entitled to a hearing to determine their rights. *Ibid.*

§ 9b. Presumptions and Burden of Proof.

In a prosecution under G. S., 18-50, no presumption of intent to sell arises from the unlawful possession of illicit liquor, and the State must prove not only unlawful possession of illicit liquor but also the intent to sell, unaided by any presumption or rule of evidence. *S. v. Peterson*, 255.

§ 9d. Sufficiency of Evidence and Nonsuit.

Evidence *held* insufficient to overrule nonsuit in prosecution for unlawful possession of illicit liquor for sale. *S. v. Peterson*, 255.

In a prosecution for illegal possession and sale of intoxicating liquor and illegal possession for purpose of sale, evidence that witnesses purchased drinks

INTOXICATING LIQUOR—*Continued.*

from one of defendants who was working on the premises is sufficient to support her conviction either as a principal or as an aider and abettor. *S. v. Smith*, 738.

§ 9g. Verdict and Judgment.

A conviction on insufficient evidence on a warrant charging unlawful possession of illicit liquor for the purpose of sale, G. S., 18-50, cannot be sustained on the ground that the evidence might be sufficient to sustain a conviction of possession of a quantity of nontax-paid liquor, G. S., 18-48. *S. v. Peterson*, 255.

Defendants were charged in eight separate counts with violation of statutes relating to intoxicating liquor. The jury rendered a general verdict of guilty. Defendants objected on the ground that there was no evidence to support several of the counts in the bill. *Held:* The objection is untenable since the verdict may be given significance and correctly interpreted by reference to the allegations, the facts in evidence, and the instructions of the court, and since the general verdict will be presumed to have been rendered on the count or counts to which the evidence relates, and since a single sound count is sufficient to support the verdict and judgment. *S. v. Smith*, 738.

JUDGMENTS.

§ 1. Nature and Essentials of Consent Judgments.

A guardian *ad litem* cannot consent to a judgment against minors without special authority of the court. *Johnston County v. Ellis*, 268.

A consent judgment depends for its validity upon the consent of both parties, without which it is wholly void. *Bath v. Norman*, 502.

§ 4. Attack and Setting Aside Consent Judgments.

Upon attack of consent judgment by municipality on ground of want of authorization of attorney to consent thereto, showing of merit is not necessary. *Bath v. Norman*, 502.

§ 9. Judgments by Default in General. (Permitting pleading to be filed after time, see Pleadings § 11b.)

Failure of plaintiffs to move promptly for judgment by default after they are entitled thereto by the lapse of the prescribed time or the expiration of the time allowed by consent order, G. S., 1-211, does not work a discontinuance of the action. *King v. Rudd*, 156.

§ 14. Involuntary Nonsuit for Failure to Prosecute Action.

Where plaintiff is not present when his cause is called for trial and defendant makes no demand for affirmative relief, judgment that plaintiff recover nothing is essentially a judgment of nonsuit or dismissal, and the fact that the court heard defendant's evidence and submitted issues to the jury is not so irregular as to constitute a fatal defect. *Craver v. Spaugh*, 450.

§ 17b. Conformity to Verdict, Proof and Pleadings.

Plaintiff alleged a cause of action in trespass. Defendant denied the trespass and set up a prescriptive right to cross plaintiff's land. The issues submitted related solely to the assertive prescriptive right. *Held:* An issue of trespass was raised by the pleadings, and upon the jury's verdict in plaintiff's favor, a provision of the judgment that defendant be restrained from crossing the land of plaintiff must be stricken and a new trial ordered, since defend-

JUDGMENTS—*Continued.*

ant's user is presumed permissive and the judgment based upon a contrary assumption without a verdict is unwarranted in law. *Speight v. Anderson*, 492.

Where, in an action on a policy of liability insurance, the verdict on the first issue establishes that the vehicle was being used as a public conveyance within the meaning of a provision of the policy excluding liability in such instance, a second issue as to knowledge of insurer's agent of such use, is inadvertently submitted, and judgment in insurer's favor upon the verdict is not technically a judgment *non obstante veredicto* but is a judgment upon the first issue, the second issue being immaterial or surplusage. *Ins. Co. v. Wells*, 574.

§ 23. Life of Lien.

The owner of a docketed judgment has a lien on all real estate of his debtor within the county, G. S., 1-234, and death of the judgment debtor does not destroy the right to priority but merely precludes execution and remits the judgment creditor to the personal representative whose duty it is to administer the whole estate. *Moore v. Jones*, 149.

§ 25. Procedure: Direct and Collateral Attack.

Where a new and independent cause is adjudicated in favor of an intervener against defendants upon a hearing before the clerk out of term and without notice, the judgment is so contrary to the course and practice of the court as to be beyond its jurisdiction and void and may be attacked by motion in the cause. *Johnston County v. Ellis*, 268.

§ 26. Limitation: Time Within Which Attack May Be Made.

Lapse of time does not bar a motion to set aside a void judgment, and G. S., 1-17, has no application. *Johnston County v. Ellis*, 268.

§ 27a. Setting Aside for Surprise, Inadvertence or Excusable Neglect.

The calendaring of a cause is notice thereof to the litigants, but when a cause is calendared for both the first and third weeks of a term, and counsel, having been advised that opposing counsel would seek to have it calendared for the third week, notes that it is so calendared, and so advises his clients, the oversight in failing to see that the case was calendared for the first week, at which time the case was called, will not be held against the clients. *Craver v. Spaugh*, 450.

In order for plaintiff to be entitled to set aside a judgment of nonsuit on the ground of excusable neglect he must show the existence of a meritorious cause of action. *Ibid.*

Plaintiffs instituted this action on a claim against an estate more than six months after receipt of written notice of rejection. Defendant pleaded G. S., 28-112, in bar. Plaintiffs alleged in their reply that defendant had agreed not to plead the statute, but offered no evidence in support thereof. Defendant testified he made no such agreement. *Held:* Using plaintiffs' verified pleading as evidence on this point, it is not conclusive or irrebuttable, and the trial court's finding upon the conflicting evidence that plaintiff had no meritorious cause is conclusive on appeal. *Ibid.*

Parties who have been duly served with summons and copy of complaint in an action against them should give to their defense that amount of attention which a man of ordinary prudence usually gives to his important business, and fact that it was agreed that no answer be filed pending negotiations for

JUDGMENTS—*Continued.*

settlement and that defendants did not receive letters from their attorney stating that negotiations had fallen through and case had been calendared is insufficient to show excusable neglect. *Whitaker v. Raines*, 526.

In the absence of sufficient showing of excusable neglect the question of meritorious defense becomes immaterial. *Ibid.*

§ 27b. Attack of Void Judgments.

In this jurisdiction, a showing of merit either as to the cause of action or defense, is not required in order to vacate a void judgment. *Bath v. Norman*, 502.

Judgment rendered upon trial by court is void when one party does not consent to waive jury trial. *Bennett v. Templeton*, 676.

§ 27d. Attack for Irregularity.

A county foreclosed the land in controversy in a tax foreclosure suit. One of the heirs at law, upon attaining his majority, moved to set aside the tax foreclosure on the ground that the suit was against the widow and that he and the other heirs at law, who owned the land and who were minors at the time were not parties to the suit. Pending this motion, the holder of a mortgage on the property intervened and joined in the allegations to set aside the tax foreclosure, and demanded sale of the lands to satisfy the mortgage. *Held:* The motion to foreclose the mortgage introduced a new cause of action having no relation to the tax foreclosure suit and not necessary to the determination of that cause, and its inclusion and determination without amendment of the complaint, consent of the parties, or notice, renders the judgment void as being contrary to the course and practice of the court. *Johnston County v. Ellis*, 268.

In absence of finding that attorney who agreed to submission of cause to court for trial represented defendant, motion to set aside judgment should have been allowed as a matter of law. *Bennett v. Templeton*, 676.

§ 32. Operation of Judgments as Bar to Subsequent Action in General.

Judgment was entered in a proceeding under the Workmen's Compensation Act denying recovery on the ground that deceased workman was an independent contractor and not an employee. Thereafter this action for wrongful death was instituted. The beneficiaries of the estate and the claimants in the former proceeding are the same. *Held:* The prior judgment is *res judicata* as to the *status* of the workman but does not bar the action for wrongful death. *Deaton v. Elon College*, 433.

§ 33b. Consent Judgments as Bar to Subsequent Action.

Consent judgment stipulating that it should be without prejudice bars identical claims adjudicated but not other claims arising on same facts even though involving same legal question. *Stansbury v. Guilford County*, 41.

KIDNAPPING.

§§ 1, 2. Elements of the Crime and Prosecution.

Kidnapping is the taking and carrying away of a human being by physical force or by fraud, done unlawfully or without lawful authority, and a charge defining the offense as forcibly taking and carrying away of a human being *is held* for error as being incomplete. G. S., 14-39. *S. v. Witherington*, 211.

LANDLORD AND TENANT.

§ 1. Nature and Essentials of the Relationship.

An agreement obligating the operator of a parking lot to permit parking at any convenient place in the lot constitutes a customer a mere licensee, while assignment of a designated place in the lot for designated period of time constitutes the agreement a lease, but a bailment is not created unless there is a delivery to and acceptance of possession of the automobile by the operator of the lot, giving him for the time sole and exclusive custody and control thereof. *Freeman v. Service Co.*, 736.

§ 6. Tenancies at Will and at Sufferance.

Where the statute of frauds is effectively pleaded to a verbal agreement by the remainderman to rent the premises for the duration of the life estate, the remaindermen become tenants at will whose occupancy may be terminated *instanter* by demand for possession by the life tenant. *Davis v. Lovick*, 252.

§ 16. Termination of Leases in General.

Death of lessor does not terminate lease, the obligations arising thereunder being covenants running with the land. *Trust Co. v. Frazelle*, 724.

§ 18. Renewals and Extensions.

Ambiguity in the terms of a lease relating to renewals will be construed in favor of the tenant and not the landlord. *Trust Co. v. Frazelle*, 724.

A lease for one year with privilege to lessee "to extend said lease for one year," said "privileges to continue in force for nine successive years," is a lease for one year with privilege of renewing it from year to year for nine successive years. *Ibid.*

Where a lease for a year provides for extensions thereof from year to year at the option of lessee for a period of nine successive years, the continued occupancy of the premises by lessee and the payment of rent in accordance with the terms of the lease constitute renewals or extensions thereof, and the failure of lessee to give notice of intention to renew cannot be held to have terminated the lease when neither lessor nor his successor demands possession of the permises for such failure. *Ibid.*

§ 22a. Termination for Failure to Pay Rent.

Where a lease contains no forfeiture clause for failure of lessee to pay rent, and the lessee, after lessor's death, pays the rent to lessor's personal representative to the knowledge of lessor's heir, the heir, who made no demand for the rent, may not declare the lease forfeited, since in the absence of a forfeiture clause, G. S., 42-3, applies, and forfeiture under the statute is not effective until the expiration of ten days after demand. *Trust Co. v. Frazelle*, 724.

§ 33. Liability of Tenant for Negligent Destruction of Property.

In action for negligence of tenant resulting in burning of tobacco barn, plaintiff must show that negligence complained of was proximate cause of fire, *res ipsa loquitur* not being applicable. *Rountree v. Thompson*, 553.

LARCENY.

§ 6. Competency and Relevancy of Evidence.

A paper issued defendant by his employer which entitled defendant to two weeks delay in paying a $5 deposit on house rent *held* competent in this

LARCENY—*Continued.*

prosecution for larceny to contradict defendant's claim as to the amount of money he had prior to the commission of the crime. *S. v. Shoup*, 69.

§ 7. Sufficiency of Evidence and Nonsuit.

Circumstantial evidence of defendant's guilt of larceny of wallet from fellow bus passenger *held* sufficient to be submitted to jury. *S. v. Shoup*, 69.

Evidence tending to show that title to the automobile in question was taken in the name of prosecuting witness, that defendant was allowed by her to drive it at times with the understanding that he would not take it out of town, that defendant borrowed the car, took it out of town and refused to bring it back or surrender its possession, with sharp conflict in the evidence as to whether defendant or prosecuting witness paid for the car, *is held* sufficient to take the case to the jury, the *bona fides* of defendant's asserted belief of ownership being for the jury. *S. v. McNair*, 462.

LIMITATION OF ACTIONS.

§ 3. Statutory Changes in Period of Limitation.

Giving retroactive effect to statutes enlarging the period of limitation for the institution of an action or filing of claim does not violate any constitutional inhibition when such effect does not impair the obligations of contracts or disturb vested rights. *B-C Remedy Co. v. Unemployment Compensation Comm.*, 52.

§ 6c. Accrual of Right of Action—For Interest.

Where bond coupons are negotiable in form and payable to the bearer, and have been detached from the bonds and the bonds sold, the statute of limitations begins to run against each of them from their respective dates of maturity, and in such instance a contention that the coupons were incident to the principal obligation of the bond and were valid during the life of the bond is untenable. *Jennings v. Morehead City*, 606.

§ 7. Disabilities.

Requirement of G. S., 1-17, that action for recovery of real property be instituted within three years from removal of disability, has no application to motion to set aside a void judgment of foreclosure. *Johnston County v. Ellis*, 268.

§ 11. Institution of Action—Dismissal of Prior Actions Instituted Within Limitation.

Where plaintiff shows that shortly after the collision, proceedings were instituted in admiralty in the United States District Court, in which it was ordered that all suits arising out of the collision be stayed, that plaintiff filed its claim therein, and immediately after its claim was dismissed in the United States Court for want of jurisdiction, it instituted this action, plaintiff's evidence is sufficient to overrule the motion to nonsuit on the ground of the bar of the statute of limitations. G. S., 1-23 and 1-25. *Highway Comm. v. Transportation Corp.*, 371.

§ 15. Pleading of Statute of Limitation.

Defendant's allegations that plaintiff's cause of action on bond coupons had accrued more than ten years prior to the institution of the action and was barred under the provisions of G. S., 1-46, is a sufficient pleading of statute of

LIMITATION OF ACTIONS—*Continued.*

limitations, although no specific reference is made to the particular sections of the statute applicable. G. S., 1-47 (2); G. S., 1-56. *Jennings v. Morehead City*, 606.

§ 16. Burden of Proof.

Upon motion to nonsuit for that plaintiff's cause is barred by a specified statute of limitations, the burden is on plaintiff to show that its action was begun within the time allowed by law. *Highway Comm. v. Transportation Corp.*, 371.

Where defendant sufficiently pleads the applicable statute of limitations the burden is on plaintiff to show his cause is not barred. *Jennings v. Morehead City*, 606.

§ 18. Sufficiency of Evidence and Nonsuit.

Where defendant sufficiently pleads the statute of limitations the burden is upon plaintiff to show that his action was commenced within the time permitted by the statute, and upon his failure to do so, nonsuit is proper. *Jennings v. Morehead City*, 606.

MANDAMUS.

§ 1. Nature and Grounds of Writ in General.

Mandamus lies only to enforce a clear legal right at the instance of a party having a right to demand it, and the party to be coerced must be under legal obligation to perform the act sought to be enforced. *Ingle v. Board of Elections*, 454.

It is rarely, if ever, proper to award a *mandamus* where it can be done only by declaring an Act of Assembly unconstitutional. *Ibid.*

§ 2a. Ministerial Duty.

The treasurers of municipalities act in a ministerial capacity in the payment of appropriations lawfully made by their respective boards and governing bodies, and therefore *mandamus* will lie to compel such payment. *Airport Authority v. Johnson*, 1.

§ 2e. Elections.

Mandamus will not lie to compel the State Board of Elections to place on the official ballot, G. S., 163-128, the name of petitioner as the nominee of his party to the office of Associate Justice of the Supreme Court when his notice of candidacy for the nomination is fatally defective in failing to designate to which of two vacancies he is seeking the nomination. *Ingle v. Board of Elections*, 454.

MARRIAGE.

§ 1. Nature of Relationship in General.

Marriage is the legal contract that makes a man and woman husband and wife and is also the status or relation of a man and a woman who have been legally united as husband and wife, which status continues during the joint lives of the parties or until divorce or annulment. *S. v. Setzer*, 216.

MASTER AND SERVANT.

§ 1. Relationship in General.

As a general rule the relationship of master and servant is created when the employer retains the right to control and direct the manner in which the details of the work are to be executed and what the laborer shall do as the work progresses. *Wood v. Miller*, 567.

§ 4a. Distinction Between Employees and Independent Contractors.

The generally accepted definition of an independent contractor is that he is one who exercises an independent employment and contracts to do a piece of work according to his own judgment and method, without being subject to his employer except as to the results of his work. *Smith v. Paper Co.*, 47.

The pilot in the navigation of a ship up a navigable stream is an independent contractor. *Highway Comm. v. Transportation Corp.*, 371.

§ 11. Nature and Extent of Liability of Contractee to Independent Contractor.

The contractee is not liable for injury sustained by an independent contractor in the performance of the work unless the injury is the result of latent dangers of which the contractee knew or should have known and of which the contractor had no knowledge and could not reasonably have discovered. *Deaton v. Elon College*, 433.

Whether owner was negligent in failing to warn independent contractor, an experienced electrician, of unusual position of high tension wire, *quære*, but contractor's negligence in grasping such wire with bare hands while standing on wet ground, when two safe methods for doing the work were available, was sole or contributing cause of injury precluding recovery in any event. *Ibid.*

§ 13. Nature and Extent of Liability of Contractee to Third Persons Injured or Damaged by Acts of Independent Contractor or His Employees.

A contractee may be held liable for negligent injury to property of third person in the performance of the work by an independent contractor if the injury is the result of the contractee's own negligence or its own negligence co-operates with that of the independent contractor. *Highway Comm. v. Transportation Corp.*, 371.

Evidence that vessel had peculiarities not common to all of its type, and inferences of defective equipment *held* sufficient for jury on question of negligence of owner in failing to warn pilot. *Ibid.*

§ 13½. Nature and Extent of Liability of Independent Contractor to Third Persons.

It is the general rule that an independent contractor is not liable for injuries to third parties occurring after the contractor has completed the work and it has been accepted by the owner. *Price v. Cotton Co.*, 758.

The complaint alleged that defendant, an independent contractor, constructed a platform for a kerosene tank, and that plaintiff, an employee of an oil dealer, while on the platform filling the tank pursuant to a contract between his employer and the contractee, fell to his injury when the platform gave way due to its insufficient strength and its careless and negligent construction. There was no allegation of hidden defects known to the contractor and not disclosed to the contractee, nor of defects that could not have been

MASTER AND SERVANT—*Continued.*

discovered upon reasonable inspection. *Held:* Defendant's demurrer to the complaint on the ground that it failed to state a cause of action was properly sustained. *Ibid.*

Where work has been completed and accepted by the owner, and the defect in construction, if any, is not hidden but readily observable upon reasonable inspection, the contractor is not liable. *Ibid.*

§ 22b. Liability of Master for Negligence of Servant—"Employees" Within Meaning of Rule.

Evidence that driver was defendant's employee *held* sufficient. *Toler v. Savage*, 208.

§ 22c. Liability of Master for Negligence of Servant—Scope of Employment.

An employer may not be held liable for the negligent act of his employee unless the employee at the time and in respect to the very transaction complained of was acting within the scope of his employment. *Tomlinson v. Sharpe*, 177.

The same rule is applied in Virginia as in this jurisdiction with respect to the liability of the master for the torts of the servant committed in the course of his employment. *Ibid.*

Evidence that employee was acting in scope of employment *held* sufficient. *Toler v. Savage*, 208.

§ 30b. Distribution of Recovery in Action Under Federal Employers' Liability Act.

A railroad company settled a claim for wrongful death of an employee engaged in interstate commerce. The funds were paid to his administratrix. *Held:* The funds have the same status as though they had been recovered under the Federal Employers' Liability Act *in solido* without apportionment of the award by a jury, and therefore the funds should be distributed according to our statute of distribution and not apportioned among the beneficiaries of the deceased according to the pecuniary loss each sustained. *In re Badgett*, 92.

§ 39b. Workmen's Compensation Act—Independent Contractors.

Finding of Industrial Commission that deceased was employee and not independent contractor *held* supported by evidence. *Smith v. Paper Co.*, 47.

§ 39g. Workmen's Compensation Act—Casual Employees.

Employment continuously for five or six weeks in construction of facilities for handling material in defendant's plant may not be held to be either casual or not in the course of defendant's business. *Smith v. Paper Co.*, 47.

§ 40a. Workmen's Compensation Act—Injuries Compensable in General.

Negligence of the employee does not bar recovery under the Workmen's Compensation Act. *Howell v. Fuel Co.*, 730.

§ 40b. Workmen's Compensation Act—Whether Injury Results from "Accident."

The evidence disclosed the following circumstances: The employee had a disease which weakened him and subjected him to frequent fainting spells. While he was in the men's washroom, he called to the person in the adjacent booth, "Please help me to the window, I am about to faint." The floor of

MASTER AND SERVANT—*Continued.*

the washroom was of tile and very slick when wet. It was washed each morning. Two windows were open 37 inches from the front of the booth occupied by the employee. The employee was afterwards found on the roof of the adjacent building, directly beneath the open windows. *Held:* The circumstances permit the inference drawn by the Industrial Commission that the employee slipped and fell to his death, even though other inferences may appear equally plausible. *Rewis v. Ins. Co.*, 325.

Proof of the accidental character of an injury, and how it occurred, may be made by circumstantial as well as direct evidence. *Ibid.*

§ 40c. Workmen's Compensation Act—Whether Injury Arises Out of and in Course of Employment.

An injury "arises out of" the employment when it occurs in the course of the employment and is a natural and probable consequence or incident of it, so that there is some causal relation between the accident and the performance of some service of the employment. *Rewis v. Ins. Co.*, 325.

Acts which are necessary to the health and comfort of an employee while at work, though personal to himself and not technically acts of service, such as visits to the washroom, are incidental to the employment. *Ibid.*

Evidence tending to show that the employee was suffering from a disease which weakened him and subjected him to frequent fainting spells, that, during the course of his employment he went to the men's washroom, and that while there felt faint, and in seeking fresh air, went to the open window, slipped on the tile floor, and fell through the window to his death, *is held* sufficient to support the finding of the Industrial Commission that his death was the result of an accident arising out of and in the course of his employment. *Ibid.*

Deceased in performance of his duties in unloading coal cars on a trestle had swept out the coal which failed to fall by gravity from one end of a car, and while waiting for the gravity fall of coal to cease in unloading the other end of the car in like manner, fell from the trestle to his fatal injury. *Held:* Deceased was required to be on the trestle in the discharge of his duties, and the risk of falling therefrom was a hazard of the employment, and at the time of injury deceased was doing what he was assigned to do, and therefore his death was from accident arising out of the employment. *Howell v. Fuel Co.*, 730.

Where an employee engaged in sweeping out coal failing to fall by gravity from cars after the opening of the doors of the cars, is directed to stand on oil tanks on one side of the trestle while waiting for the gravity flow of coal to cease, his failure to take the position directed and his act in moving to the other side of the trestle may be negligence, which does not bar recovery under the Workmen's Compensation Act, but an accident occurring during the period of waiting required by his employment nevertheless arises out of the employment. *Ibid.*

The Workmen's Compensation Act must be liberally construed, and the term "out of the employment" will not preclude recovery for an accident occurring while an employee is not in the exact spot designated by the employer if the employee is at the place he is required to be in the performance of his duties. *Ibid.*

§ 55d. Review of Awards of Industrial Commission.

While the findings of fact by the Industrial Commission, when supported by competent evidence, are conclusive, the rulings of the Commission are sub-

MASTER AND SERVANT—*Continued.*

ject to review on questions of law, (a) whether the Industrial Commission has jurisdiction, (b) whether the findings are supported by the evidence, (c) whether upon the facts established the decision is correct. *Smith v. Paper Co.*, 47.

Where the evidence is such that several inferences appear equally plausible, the finding of the Industrial Commission is conclusive on appeal. The courts are not at liberty to reweigh the evidence and set aside the finding simply because other conclusions might have been reached. *Rewis v. Ins. Co.*, 325.

§ 55i. Workmen's Compensation Act—Subsequent Proceedings—Effect of Judgment.

Judgment denying recovery under the Workmen's Compensation Act on the ground that claimant's intestate was an independent contractor and not an employee, is conclusive as to the relationship in a subsequent action for wrongful death, but does not bar such action. *Deaton v. Elon College*, 433.

§ 59d. Recovery of Unemployment Compensation Taxes Paid Through Mistake.

The provision of the North Carolina Unemployment Compensation Act for refund of money is sufficiently broad to cover refund of money paid through mistake without raising technical distinctions between voluntary and involuntary payments, and defense to recovery on the ground that there is no remedy for recovery for taxes voluntarily paid is inapplicable. G. S., 96-10 (e). *B-C Remedy Co. v. Unemployment Compensation Comm.*, 52.

Section 26, ch. 377, Session Laws of 1943, which enlarges the time within which the application and refund of unemployment compensation taxes may be made from one to three years, is procedural and relates merely to the limitation on the authority of the commission to make refund, and therefore giving the statute retroactive effect does not violate any constitutional inhibition, but even if it should be considered strictly as a statute of limitations, retroactive effect would not impair obligations of contracts or destroy vested rights, and therefore would be constitutional. *Ibid.*

Section 26, ch. 377, Session Laws of 1943 (G. S., 96-10 [e]), *is held* to disclose the intent that its provisions be retroactive as well as prospective, and under the statute an employer may file claim for refund of taxes erroneously paid within three years of payment and the Commission may make refund, even though such refund was precluded under the terms of the prior statute because more than one year had elapsed from date of payment. *Ibid.*

Under the facts of this case formal application for refund of taxes paid *held* waived, and further, the Commission had authority to make the refund on its own initiative. *Ibid.*

MAYHEM.

§ 1. Nature and Elements of the Crime.

"To maim" as distinguished from "to wound" imports permanent injury. *S. v. Malpass*, 403.

§ 2. Prosecution and Punishment.

Where State's evidence fails to show permanent injury to privy parts of prosecuting witness, nonsuit should be allowed. *S. v. Malpass*, 403.

MORTGAGES.

§ 30a. Right to Foreclose and Defenses in General.

The right of the *cestui que trust* to foreclose upon default cannot be defeated on the ground that a county had purchased the equity of redemption, and that the entire transaction of the purchase of the land by an individual, his giving a purchase money deed of trust, and his sale to the county subject to the debt was a scheme to avoid constitutional and statutory prohibitions against incurrence of debt by the county, since the county acquired the land burdened with the debt and subject to the right of foreclosure. *Ins. Co. v. Guilford County*, 441.

Where the purchaser of notes secured by a deed of trust seeks foreclosure and also recovery for improvements placed on the property under trustor's agreement to convey the equity of redemption to him, his failure to establish a valid contract to convey does not defeat his right to foreclosure upon default, the contract to convey being relevant only to the issue of improvements. *Crain v. Hutchins*, 642.

§ 30b. Parties Entitled to Foreclose.

Anyone may purchase negotiable notes secured by a deed of trust without giving rise to the defense of voluntary payment. *Crain v. Hutchins*, 642.

§ 31b. Foreclosure by Action—Parties and Procedure.

Minor heirs at law appeared by their next friend and moved to set aside a tax foreclosure on the lands on the ground that they were not made parties to the tax foreclosure suit. Pending this motion, the holder of a mortgage intervened and joined in the allegations to set aside the tax foreclosure and demanded sale of the land to satisfy the mortgage. *Held:* Upon decree setting aside the tax sale, the mortgagee should have instituted suit to foreclose and secured the appointment of a guardian *ad litem* for the minors, and a decree of foreclosure of the mortgage, entered in the tax foreclosure suit, is contrary to the course and practice of the court. *Johnston County v. Ellis*, 268.

The jurisdiction of the clerk of the Superior Court to order foreclosure of a mortgage, G. S., 1-209 (e) ; G. S., 2-11, is conditioned upon his rendition of a default judgment in favor of the mortgage creditor against the mortgage debtor upon failure of an answer to a verified pleading where the sum due is capable of ascertainment by computation, and where it is necessary to hear evidence to ascertain title to the mortgage debt and the amount of the debt, the clerk is without jurisdiction to order foreclosure. *Ibid.*

§ 40. Agreements to Purchase at Foreclosure for Benefit of Mortgagor.

Such agreements create a parol trust, but jury's verdict that purchaser made no such agreement *held* conclusive, there being no prejudicial error committed in the trial. *McCorkle v. Beatty*, 338.

MUNICIPAL CORPORATIONS.

§ 2. Creation.

The Legislature has power to create a municipal authority to construct, maintain and operate an airport. *Airport Authority v. Johnson*, 1.

§ 5. Powers and Functions in General—Legislative Control and Supervision.

Municipalities are altogether creatures of the Legislature and the General Assembly has the power to confer on a municipality authority to extend to the public, beyond its own territorial limits, services similar to those enjoyed

by its own inhabitants, such as lights, water and sewerage. *Charlotte v. Heath*, 750.

§ 8. Private or Corporate Powers.

The City of Charlotte is given authority by its charter to extend its public services, including that of water and sewerage, to those living beyond the city limits, and to acquire the facilities used for said purposes, including pipe lines, Public-Local Laws of 1939, chapter 366, section 65, and this right being existent, the city has the right of condemnation for said purposes. G. S., 160-204. *Charlotte v. Heath*, 750.

§ 10. Meetings, Proceedings and Orders of Governing Board.

Official action of governing board is necessary to consent judgment against interests of city. *Bath v. Norman*, 502.

Presumption is in favor of official action of municipal governing body. *Spicer v. Goldsboro*, 557.

Order of board to pave parkway *held* sufficiently definite, the parkway being only portion of designated street remaining unpaved. *Ibid.*

§ 11c. Duties and Authority of Officers and Agents.

In this action by a municipality, a consent judgment was entered abandoning the municipality's claim to the property in litigation. Thereafter, the municipality moved to vacate the consent judgment on the ground of want of authority in the attorney for the municipality who signed the judgment. *Held:* The municipality could consent to the judgment only upon authorization granted by official action of its board of commissioners, and upon evidence tending to show at most authorization of the attorney by the mayor in a personal conversation, it was error to deny its motion to vacate. *Bath v. Norman*, 502.

§ 14a. Defects or Obstructions in Streets or Sidewalks.

Plaintiff instituted this action alleging that his intestate was killed as a result of the negligence of defendant municipality in failing to provide handrails or guards and sufficient light at a bridge which was a part of a city street. Defendant demurred on the ground that it was acting in its sovereign capacity and was immune from suit. *Held:* The demurrer should have been overruled, since the maintenance of guard rails and providing reasonably adequate light when appropriate is required of a city in discharge of its positive duty to maintain its streets in a reasonably safe condition for travel, G. S., 160-54. The doctrine of sovereign immunity obtains in this State only when the negligence alleged is solely or exclusively predicated on defect or negligence in the original construction. *Hunt v. High Point*, 74.

While a city may not be under legal necessity of lighting its streets at all, where a city does maintain street lights, it is negligent in failing to provide lighting which is reasonably required at a particular place because of a dangerous condition of the street. *Ibid.*

§ 25b. Control and Authority Over Streets.

A citizen who is a general taxpayer but not a landowner may not maintain a suit to enjoin the closing of a by-street in accordance with authorization granted by municipal resolution. *Shaw v. Tobacco Co.*, 477.

A municipality is not required to convert immediately to use for travel all portions of land acquired by it for a street, and nonuser or temporary user of

MUNICIPAL CORPORATIONS—*Continued.*

a portion of the street for other purposes, not inconsistent with its later conversion for travel when future traffic conditions should so require, does not constitute an abandonment of such portion for street purposes nor a dedication for such temporary purposes. *Spicer v. Goldsboro*, 557.

A "park" and a "parkway" are not synonymous: a parkway is merely a part of a street which is planted in trees, shrubs and grass for ornamentation and recreation, but which is subject to conversion into a driveway whenever, in the opinion of the constituted authorities, traffic conditions so require. *Ibid.*

§ 36. Nature and Extent of Municipal Police Power in General.

Municipalities have no inherent police powers and can exercise only those conferred by statute strictly construed. *Kass v. Hedgpeth*, 405.

A charter provision giving a municipality power to establish and regulate markets relates only to warehouses established and operated by the municipality and not to those operated by private individuals. *Clinton v. Ross*, 682.

A charter provision giving a municipality authority to regulate certain specified businesses and trades and the sale of certain specified commodities excludes authority over business ,trades and markets not specified. *Inclusio unius est exclusio alterius. Ibid.*

§ 37. Zoning Ordinances and Building Permits.

A decision of a municipal board of adjustment is reviewable solely for errors of law on the evidence presented by the record itself. G. S., 160-178. *Lee v. Board of Adjustment*, 107.

Since an optionee has no present right to erect a building on the land, the withholding of a building permit from him cannot in law impose any "undue and unnecessary hardship" upon him as a predicate for relief from an order of a municipal board of adjustment. G. S., 160-178. *Ibid.*

"Unnecessary hardship" as used in G. S., 160-178, does not mean a pecuniary loss to a single owner in being denied a building permit for a nonconforming structure pursuant to zoning regulations binding upon all alike. *Ibid.*

A municipal board of adjustment is an administrative agency which acts in a *quasi*-judicial capacity, and its authority to grant variance permits in exceptional cases is limited to such as are consonant with the general purpose and spirit of the zoning regulations, and it has no authority to amend the zoning regulations and permit the erection of a nonconforming structure, it being the sole function of the legislative body of the municipality to alter the zoning districts for changed conditions. *Ibid.*

Any owner whose property is affected has the right to apply to the courts for review of an order of a municipal board of adjustment. *Ibid.*

Neither a zoning ordinance nor an amendment thereto which is not adopted in accordance with the enabling provisions of statute, G. S., 160-175 and 160-176, is valid and effective as a zoning regulation. *Kass v. Hedgpeth*, 405.

This action was instituted by property owners against a tobacco warehouseman to restrain him from constructing an addition to his warehouse. The municipality had issued a building permit for the addition. The lower court found that defendant's warehouse does not constitute a nuisance, and that the amendment to a zoning ordinance prohibiting such structure was invalid as a zoning regulation, and plaintiffs did not show that power was conferred upon the city by general statute (G. S., 160-200) or by its charter to prohibit such structure. *Held:* Upon the record, there was error in continuing the restraining order to the hearing. *Kass v. Hedgpeth*, 405.

MUNICIPAL CORPORATIONS—*Continued.*

§ 40. Violation and Enforcement of Police Regulations and Ordinances.

Injunction will not lie to restrain enforcement of a municipal ordinance on the ground of unconstitutionality except when plaintiff would otherwise suffer irreparable injury to property or personal rights. *Lanier v. Warsaw*, 637.

G. S., 160-179, is a part of the Zoning Act, and the equitable remedy of injunction therein authorized applies only to the enforcement of zoning regulations promulgated under the Zoning Act. *Clinton v. Ross*, 682.

An ordinance prohibiting the operation of tobacco sales warehouses in certain sections of a municipality cannot be enforced by injunction under G. S., 160-179, as to a warehouse in operation prior to the adoption of zoning regulations by the municipality even if the ordinance be deemed a part of the later adopted zoning regulations when the zoning ordinance expressly excludes from its operation nonconforming uses existing prior to its adoption. *Ibid.*

Where a tobacco sales warehouse is operated within the business district but outside the fire district of a municipality, and the town has no charter or statutory authority to abate its operation, the city's right to injunctive relief to enforce its ordinance prohibiting the operation of tobacco sales warehouses in that section of the town must be determined in accordance with the general principles controlling the exercise of equity jurisdiction, treating the municipality on the same basis as any other litigant. *Ibid.*

A municipal corporation is not entitled under the general principles of equity to enjoin the operation of a tobacco sales warehouse in an area proscribed by its ordinance when the warehouse is located in the industrial section of the town but not in the fire district and is operated in the customary manner. *Ibid.*

Allegations that the operation of defendant's tobacco sales warehouse depreciates the value of property in close proximity thereto constitutes no basis for enjoining the operation of the warehouse, such injury incident to a lawful business operated in a lawful manner being *damnum absque injuria*. *Ibid.*

The fact that the customers of a tobacco sales warehouse congest traffic in the public streets adjacent thereto forms no basis for enjoining operation of the warehouse, since such condition is produced by the traveling public and is not directed to any condition inherent in the operation of the warehouse or to any conduct on the part of the proprietor. *Ibid.*

§ 41. Municipal Charges and Expenses.

The establishment and maintenance of an airport is a public purpose within the objects of municipal expenditure, and a city may appropriate funds therefor in proper instances. *Airport Authority v. Johnson*, 1.

The establishment and maintenance of an airport is not a necessary municipal expense and therefore a city may not incur debt or levy taxes therefor without submitting the question to a vote. *Ibid.*

A county and cities located therein may lawfully join in the construction, maintenance and operation of an airport if each of them is benefited by it. G. S., 63-4. *Ibid.*

A municipal corporation may appropriate funds to a *quasi*-municipal corporation created by the Legislature when such corporation is an agency of the municipality in the performance of a public function having a reasonable connection with the convenience and necessity of the contributing municipality. *Ibid.*

In determining whether the purpose of a *quasi*-municipal corporation is a public purpose as a predicate for the appropriation of municipal funds in its

MUNICIPAL CORPORATIONS—*Continued.*

aid, the terms of the creating act are not controlling, but the courts will ascertain whether its purpose in fact has a reasonable relationship to the convenience and necessity of the contributing municipality. *Ibid.*

Greensboro-High Point Airport Authority *held* agency of the municipalities for performance of public services. *Ibid.*

§ 48. Parties Who May Sue.

General taxpayer may not maintain suit to enjoin closing of by-street in accordance with municipal resolution. *Shaw v. Tobacco Co.*, 477.

NEGLIGENCE.

§ 1. Acts and Omissions Constituting Negligence in General.

Actionable negligence is the failure to perform some duty which under the circumstances one owes to another, which failure results in injury to the latter. *Highway Comm. v. Transportation Corp.*, 371.

§ 4e. Obstructions and Dangerous Conditions of Lands.

Duty of owner to warn independent contractor, an experienced electrician, employed to repair private transmission system, that high tension wire was placed low on pole in manner usually reserved for light circuit wires, *quære*, since evidence disclosed that injury and death resulted solely or currently from contractor's negligence in grasping wire with bare hands while standing on wet ground, when two safe methods of doing the work were open to him. *Deaton v. Elon College*, 433.

§ 5. Proximate Cause.

Proximate cause is essential element of actional negligence. *Rountree v. Thompson*, 553; *Hoke v. Grephound Corp.*, 692.

Ordinarily the question of proximate cause is a question of fact for the jury. *Hoke v. Greyhound Corp.*, 692.

§ 9. Anticipation of Injury.

Evidence that plaintiff interposed herself between defendant and his assailant in a fight, and was injured by the blow intended for defendant, is insufficient to take the case to the jury on the issue of negligence, since defendant could not have reasonably foreseen or anticipated the injury. *Harrington v. Taylor*, 769.

§ 18. Competency and Relevancy of Evidence.

In an action to recover for injuries sustained by a patron of a theatre in a fall on the foyer floor, allegedly as a result of some foreign, slippery substance on the floor, the admission of evidence, over objection, that there were approximately 230 other patrons of the theatre that day and that none of them fell while walking on the foyer floor, even if such negative evidence is incompetent, does not constitute prejudicial error when it appears that the circumstance relied on by defendant was established by other testimony admitted without objection. *Webb v. Theatre Corp.*, 342.

§ 19b (1). Nonsuit on Issue of Negligence in General.

Nonsuit is proper upon failure of proof of proximate cause. *Rountree v. Thompson*, 553.

Nonsuit *held* proper where evidence shows injury could not have been reasonably foreseen. *Harrington v. Taylor*, 769.

NEGLIGENCE—*Continued.*

§ 19b (2). Sufficiency of Evidence and Nonsuit—Res Ipsa Loquitur.

Res ipsa loquitur does not apply in action based on negligence against tenant upon showing of burning of barn while in possession of tenant. *Rountree v. Thompson*, 553.

§ 19c. Nonsuit on Issue of Contributory Negligence.

Involuntary nonsuit on the issue of contributory negligence is proper only when that conclusion is the only one which can be reasonably drawn from plaintiff's evidence, without considering defendant's evidence except in so far as it explains plaintiff's evidence and is not in conflict therewith. *Hobbs v. Drewer*, 146.

§ 20. Instructions.

Instruction that defendants must have offered evidence satisfying jury on issue of contributory negligence *held* for error as depriving defendants of right of jury to consider plaintiff's admissions and testimony elicited on cross-examination. *Hobbs v. Drewer*, 146.

§ 21. Issues and Verdict.

The "more than a scintilla" rule of evidence applies equally to the issues of negligence and contributory negligence, and if diverse inferences may reasonably be drawn from the evidence upon the issue of contributory negligence, some favorable to plaintiff and some favorable to defendant, the issue must be submitted to the jury. *Phillips v. Nessmith*, 173.

While the burden of proving contributory negligence is on defendant, if there is any competent evidence tending to establish this defense, whether from the plaintiff or defendant, or inferences of fact are fairly deducible therefrom tending to support this affirmative defense, defendant is entitled to have the issue submitted to the jury under approximate instructions, and a peremptory instruction for plaintiff on the issue is reversible error. *Kennedy v. Smith*, 514.

NUISANCES.

§ 3a. Noise and Disturbance.

A tobacco warehouse may not be held to be a nuisance in the absence of a finding that its operation would injuriously affect the health, safety, morals, good order or general welfare of the community, or infringe upon the property rights of individual complainants. *Kass v. Hedgpeth*, 305; *Clinton v. Ross*, 682.

PARENT AND CHILD.

§ 4a. Right to Custody and Control.

A decree directing that a minor child remain in the custody of its paternal aunt as the agent of its father in effect awards the custody to the father subject to the provision that the child be cared for in the home of its aunt, and upon proper findings such decree, entered in a contest for the custody between the father and mother, is in accord with the decisions of this State. *In re DeFord*, 189.

Decree was entered in the lower court awarding the custody of the child to its father, with provision that its mother might take the child to her domicile in another state each year during vacation time and that the father or his agent might go and get the child at his own expense just prior to the beginning of each school year and return it to the domicile provided by him in this

PILOTS—*Continued.*

While the owner of a vessel has the right to assume that a pilot is familiar with the river and its waters and has knowledge of vessels of standard types, in this case a turret type vessel, it may not assume knowledge on the part of the pilot of peculiarities and faulty equipment not common to all vessels of the type, importing danger in the navigation contracted for. *Ibid.*

The presumption of negligence arising when a vessel strikes a stationary object is not applicable against the owner when the maneuver is under the control of a pilot. *Ibid.*

The owner of a ship is not under duty to equip it with engines capable of counteracting an unexpected action on the part of the pilot in time to avoid injury to the property of third persons. *Ibid.*

PLEADINGS.

§ 2. Joinder of Causes.

G. S., 1-123, will be liberally construed to the end that all justiciable controversies between the parties may be consolidated when the facts as to all may be stated as a connected whole, are so related in scope that they may be examined in connection with each other, and are connected with the same subject matter which constitutes one general right. *Pressley v. Tea Co.*, 518.

The fact that a connected story may be told of the transactions between the parties constituting the bases of several causes of action is not alone sufficient to justify the consolidation of the causes in the complaint, but it is also necessary that the causes be connected with the same subject of action. *Ibid.*

§ 3a. Statement of Cause of Action in General.

A pleading should allege the ultimate facts upon which the right to relief is predicated and not the evidential facts which must be proven to establish the ultimate facts. *Brown v. Hall*, 732.

§ 6. Time for Filing Answer.

Whether the executor of the deceased mortgagor and the purchaser of the property *pendente lite*, *lis pendens* having been duly filed, should be allowed to make themselves parties and file answer some eight years after time for filing answer has expired, rests in the sound discretion of the trial court. *King v. Rudd*, 156.

An order of the clerk permitting the administrator of a deceased mortgagor and the purchaser of the property *pendente lite*, to make themselves parties and file answer some eight years after expiration of time therefor, entered without notice to plaintiffs, is subject to approval or disapproval by the judge. *Ibid.*

§ 15. Office and Effect of Demurrer.

A demurrer to the pleadings and a demurrer to the evidence are different in purpose and effect: the first challenges the sufficiency of the pleadings, the second the sufficiency of the evidence. *Coleman v. Whisnant*, 258.

Upon demurrer the pleading will be liberally construed and the demurrer overruled if facts sufficient to entitle the pleader to some relief can be gathered from the pleading. *Pearce v. Pearce*, 307.

A demurrer to an answer should be overruled if sufficient facts can be gathered from the pleading to entitle defendant to some relief, notwithstanding that the answer fails to state separately the cause or causes relied on for affirmative relief and the matters relied on as defenses, as required by G. S., 1-138 and Rule 20 (2). *Ibid.*

PLEADINGS—*Continued.*

A demurrer tests the sufficiency of the complaint, liberally construed, to allege facts constituting a cause of action, admitting for this purpose the truth of the allegations of fact, and the demurrer will be overruled unless the pleading is fatally defective. G. S., 1-151. *Ferrell v. Worthington*, 659.

§ 16. Time of Filing Demurrer.

Where a demurrer for misjoinder of parties is not interposed until after answer is filed it is too late to be considered as a matter of right but is addressed to the sound discretion of the court, and its adverse ruling thereon is not subject to review. *Western N. C. Conference v. Talley*, 654.

§ 19b. Demurrer for Misjoinder of Parties and Causes.

The complaint alleged that plaintiff employee was injured by the negligence of defendant employer, that when plaintiff had partially recovered he returned and requested light work, that defendant demanded that plaintiff sign a release for the negligent injury, and that upon plaintiff's refusal, defendant discharged him. *Held:* The cause of action for negligent injury and the cause of action for wrongful discharge have no interdependent connection and are not connected with the same subject matter, and defendant's demurrer for misjoinder should have been allowed. *Pressley v. Tea Co.*, 518.

Even when two causes of action are improperly joined in the complaint, the action need not be dismissed upon demurrer. *Ibid.*

Demurrer for misjoinder of parties which is not interposed in apt time is addressed to discretion of court. *Western N. C. Conference v. Talley*, 654.

§ 22b. Scope and Extent of Amendment by Permission of Trial Court.

In claim and delivery instituted by a widow on the ground of ownership of the property in suit by allotment to her in her year's allowance, an amendment permitting her to allege title by gift *inter vivos* from her husband does not change the nature of the action but merely affects the source of title, and the court has the discretionary power to permit such amendment. *James v. James*, 399.

§ 28. Nature and Grounds for Judgment on the Pleadings.

A motion for judgment on the pleadings admits, for the purpose of the motion, the allegations in the pleading of the adverse party. *Ingle v. Board of Elections*, 454.

§ 30. Time for Making and Necessity for Motions to Strike.

A motion to strike made before pleading or expiration of extension of time to plead, is made as a matter of right, while such motion not made in apt time is addressed to the discretion of the court. *Brown v. Hall*, 732.

§ 31. Grounds for Motions to Strike.

Allegations in an answer of a prior action instituted by the plaintiff and incorporating in the answer the summons and complaint of such prior action, not for the purpose of pleading pendency of such action, it appearing from the allegation that voluntary nonsuit had been taken therein, is properly stricken upon motion of plaintiff on the ground of irrelevancy. *Brown v. Hall*, 732.

Irrelevant and redundant or evidential matter may be stricken from a pleading upon motion of the party aggrieved thereby, G. S., 1-153, and the order striking such matter from the pleading does not deprive the pleader of any substantial right. *Ibid.*

PRINCIPAL AND AGENT.

§ 7a. Power and Authority to Bind Principal in General.

A county is subject to the general rule that where it has no capacity to do a contemplated act it is without power to appoint an agent for that purpose. *Ins. Co. v. Guilford County*, 441.

§ 7e. Power and Authority to Bind Principal—Undisclosed Principal.

The principal is liable upon discovery, but both principal and agent cannot be held liable and plaintiff must elect which he will hold. *Walston v. Whitley & Co.*, 537.

§ 12d. Liability of Agent—Agent for Undisclosed Principal.

An agent is liable on the contract where the principal is not disclosed, and the principal is liable upon discovery. However, the party aggrieved must elect as to which he shall hold liable and cannot hold them both. *Walston v. Whitley & Co.*, 537.

Ordinarily, an agent is not liable in an action by a third party for breach of warranty upon a sales contract in which he has acted fully within his authority or within its apparent scope, and contracted only in that capacity. *Ibid.*

PRINCIPAL AND SURETY.

§ 4. Statutory Provisions.

The provision of G. S., 53-90, requiring officers and employees of a bank to give bond in an amount required by the directors and upon such form as may be approved by the commissioner of banks, is the only statutory provision which becomes a part of the bond. *Indemnity Co. v. Hood*, 706.

§ 6b. Renewals of Bonds of Private or Corporate Officers.

Where a bond guaranteeing the payment of any loss sustained through the dishonesty of a bank official while "in the continuous employment of a bank" after a specified date, is kept in force for a period of years by the payment of the stipulated annual premium, recovery on the bond is limited to the maximum liability therein stipulated for losses occurring during the life of the bond, and the contention that the surety is liable for defalcations to the amount of the penal sum of the bond for each of the years during which the bond is kept in force, is untenable. *Indemnity Co. v. Hood*, 706.

PROCESS.

§ 8d. Service on Foreign Corporations—Service on Secretary of State.

Whether a foreign corporation is "doing business" in this State so as to subject the corporation to service of process by service on the Secretary of State, G. S., 55-38, is not susceptible to an all-embracing rule but must be determined by the facts of each case under the general rule that it is "doing business" here if it transacts some substantial part of its ordinary business in this State, the quality and nature of its activities rather than a mechanical and quantitative appraisal thereof being determinative. *Harrison v. Corley*, 184.

When a corporation comes into this State and "does business" herein without domesticating or appointing a process agent, it accepts the provisions of G. S., 55-38, as to service of process. *Ibid.*

When a foreign corporation accepts the provisions of G. S., 55-38, by engaging in business here without domesticating or appointing a process agent, it

PROCESS—*Continued.*

may not withdraw its assent by departing this jurisdiction so as to defeat a suit instituted on a cause which arose while it was engaged in business here. *Ibid.*

§ 3. Defective Process and Amendment.

The court has the power to allow an amendment *nunc pro tunc* to an original order of publication of the summons so as to conform with the facts as to the newspaper in which the order was published and the number of times of publication therein. *Smith v. Smith*, 506.

§ 6. Service by Publication.

G. S., 1-99, does not specifically require that the order for publication of notice of summons state that the newspaper in which the publication is ordered to be printed is the one "most likely to give notice to the person to be served." *Smith v. Smith*, 506.

Since an order for publication of notice of summons is made by a court of record, there is a presumption in favor of the rightfulness of its decrees, and it will be presumed that the statutory findings and determination have been made without specific adjudication in the order to that effect. *Ibid.*

PUBLIC OFFICERS.

§ 4b. Prohibition Against Holding Two Public Offices Simultaneously.

The judgeship of a United States Zonal Court in Germany would seem to carry some of the attributes of sovereignty which would perforce invest the incumbent with governmental authority, in which event it would be an office or place of trust or profit under the United States, or a department thereof, so that the acceptance of an appointment to such office or place of trust by a judge of the Superior Court of North Carolina would *ipso facto* vacate the State office. N. C. Constitution, Art. XIV, sec. 7. *In re Phillips*, 773.

One who holds an office or place of trust under authority of this State forfeits such office or place of trust when he accepts another office or place of trust which is forbidden by the Constitution or is incompatible with the office or place of trust already held. The acceptance of the second forbidden or incompatible office or place of trust, operates *ipso facto* to vacate the first. *Ibid.*

§ 11. Amount of Compensation.

The resolution of a county board of commissioners recited that the chairman for two years previous had been performing the duties of all time chairman, and stipulated that he was to continue to devote his entire time to county affairs, acting as whole-time chairman, and that his compensation thereafter should be $350 per month. G. S., 153-20. *Held:* The resolution imposed no additional duties upon the chairman but was solely to adjust the chairman's compensation, and therefore, under the facts of this case, the board of commissioners was without authority to increase the salary above that prescribed by the pertinent statute. (Ch. 427, Public-Local Laws of 1927.) *Stansbury v. Guilford County*, 41.

RAILROADS.

§ 4. Accidents at Crossings.

Where plaintiff alleges negligence on the part of defendant railroad company in failing under the circumstances to maintain lights, watchman or guards at a public crossing, but plaintiff's evidence discloses that the lights

RAILROADS—*Continued.*

on his car were burning and that he ran into the train, nonsuit is proper for failure of evidence tending to show any causal relation between the negligence complained of and the injury. *Hopkins v. R. R.*, 655.

RAPE.

§ 1. Elements of the Offense.

Carnally knowing any female of the age of twelve years or more by force and against her will is rape. *S. v. Johnson*, 671.

"Force" as an element of rape may be either actual or constructive, and submission under fear or duress may take the place of actual physical force. *Ibid.*

§ 1½. Parties and Offenses.

The single crime of rape may be committed by more than one offender, and a person who is present and aids and abets the actual ravisher, is a principal and equally guilty. *S. v. Johnson*, 671.

§ 2. Indictment for Rape.

An indictment charging that defendant with force and arms did unlawfully, willfully and feloniously ravish and carnally know the prosecuting witness, a female, by force and against her will, *is held* sufficient to support a verdict of guilty of the capital offense and judgment of death pronounced thereon. *S. v. Herring*, 213.

An indictment for rape of a female twelve years of age or more under G. S., 14-21, which fails to charge that the offense was committed forcibly and against her will is fatally defective, it being necessary in order to support the death penalty that both these elements be alleged and proven. *S. v. Johnson*, 266; *S. v. Benton*, 745.

§ 4. Sufficiency of Evidence and Nonsuit in Prosecution for Rape.

In this prosecution for rape, evidence tending to show that defendant choked and beat the prosecuting witness and by the use of force had sexual intercourse with her against her will, together with testimony of an admission made by defendant to the chief of police that defendant had feloniously assaulted prosecutrix, *is held* sufficient to be submitted to the jury, and defendant's motion for a directed verdict of not guilty was properly refused. *S. v. Herring*, 213.

Evidence that prosecutrix, a thirteen-year-old girl, had been criminally assaulted and ravished by the use of force, and evidence identifying defendant as the perpetrator of the crime *held* sufficient to be submitted to the jury upon the question of defendant's guilt of the capital crime of rape. *S. v. Walker*, 458.

Evidence of guilt of both defendants of rape, one as perpetrator and other as aider and abettor, *held* sufficient. *S. v. Johnson*, 671.

§ 8. Elements of Offense of Carnally Knowing Female Under 12 Years of Age.

In a prosecution for ravishing and carnally knowing or abusing a female person under the age of twelve years, neither force nor lack of consent need be alleged or proven, since by virtue of the statute such child is presumed incapable of consenting. G. S., 14-21. *S. v. Johnson*, 266.

Carnally knowing and abusing any female child under the age of twelve years is rape. *S. v. Johnson*, 671.

RAPE—*Continued.*

§ 19e. Instructions in Prosecution for Carnal Knowledge of Female Between Ages 12 and 16.

In a prosecution under G. S., 14-26, the repeated use of the term "statutory rape" in the charge will not be held for prejudicial error when the charge contains a correct definition, and properly places the burden of proof on the State, as to each essential element of the offense. *S. v. Bullins*, 142.

§ 23. Prosecution and Punishment for Assault on a Female.

The punishment for a simple assault committed by a man or boy over 18 years of age upon a female, is in the discretion of the court, such assault being expressly excluded from the proviso of G. S., 14-33, limiting punishment to a fine of $50 or imprisonment of 30 days. *S. v. Jackson*, 66.

Defendant entered a plea of simple assault upon his daughter and a *nol. pros.* was entered on the charge of assault on his wife. Judgment was entered that the defendant be confined in jail and work the roads for two years, suspended upon payment of $100 for the use and benefit of his wife and $50 monthly thereafter for her benefit. Defendant excepted and appealed. *Held:* The court was without power to suspend the execution of the judgment on the conditions over the objection of the defendant, since the form of punishment imposed is neither sanctioned by statute nor assented to by defendant. Defendant was not placed on probation and G. S., ch. 15, Art. 20, is not involved in the decision. *Ibid.*

The failure of the court, in defining assault on a female, to state that the perpetrator must be a male over eighteen years of age will not be held for error on defendant's appeal, since there is a presumption that defendant is over eighteen years of age and the burden rests upon him to show the contrary. *S. v. Herring*, 213.

Where warrant charging assault on female is amended after verdict to charge assault on female by man or boy over 18 years of age, verdict of guilty will not support sentence as for general misdemeanor. *S. v. Grimes*, 523.

§ 24. Assault With Intent to Commit Rape.

In order to constitute an assault with intent to commit rape it is not necessary that the intent continue throughout the assault, it being sufficient if at any time during the assault the defendant intends to accomplish his purpose notwithstanding any resistance on the part of prosecutrix. *S. v. Petry*, 78.

In order for a conviction under G. S., 14-22, there must be an assault by a male upon a female with intent to commit rape, which felonious intent is the intent to gratify his passion upon her at all events against her will and notwithstanding any resistance she may make. *S. v. Overcash*, 632.

Felonious intent is alone insufficient to constitute the offense defined by G. S., 14-22, and therefore immoral advances cannot constitute the offense until they reach the point where they are offensive to the woman and constitute an assault. *Ibid.*

§ 25. Prosecutions for Assault With Intent to Commit Rape.

In this prosecution for assault with intent to commit rape, the blouse offered in evidence *held* competent for the purpose of corroborating the testimony of witnesses as to tears about the shoulder, and inconsistencies in the testimony of prosecutrix on the question of whether the blouse was in the same condition at the trial as it was immediately after the assault affects only the question of credibility. *S. v. Petry*, 78.

RAPE—*Continued.*

Evidence *held* sufficient upon question of whether assault was committed with intent to commit rape. *Ibid.*

In this prosecution for assault with intent to commit rape, the charge *is held* to have correctly placed the burden on the State to prove each essential element of the offense beyond a reasonable doubt. *Ibid.*

In a prosecution for assault with intent to commit rape, an instruction which fully explains the element of felonious intent, and instructs the jury that defendant would be guilty if he laid his hands on prosecutrix with such intent, must be held for reversible error for failing to charge upon the essential element of assault, since if defendant's advances were made with the consent of prosecutrix, defendant would not be guilty of the offense. *S. v. Overcash*, 632.

RECEIVERS.

§ 13. Actions on Claims.

Exceptions filed and made a part of the record are not void as a matter of law because not filed within the first three days of the term of court commencing next after the filing of the receiver's report, in the absence of motion or order, G. S., 55-153, and a judgment entered on the basis that such exceptions were not before the court for consideration will be remanded. *Benson v. Roberson*, 103.

REFERENCE.

§ 9. Exceptions and Preservation of Grounds of Review.

Exceptions to the rulings of the referee must be brought forward in order for them to be presented for determination by the judge. *Clark v. Cagle*, 230.

§ 10. Duties and Powers of Court Upon Review.

Upon appeal in a consent reference the Superior Court has the power to confirm the findings of the referee in whole or in part, to set aside the findings in whole or in part and substitute other findings supported by the evidence. *Ramsey v. Nebel*, 590.

REFORMATION OF INSTRUMENTS.

§ 5. Retention of Benefits as Defense.

The owner of land conveyed same and took a deed of trust for the purchase price. The purchaser transferred same to defendant county subject to the deed of trust, the entire transaction being for the purpose of evading the constitutional and statutory provisions relative to the incurrence of debt by the county, the purchaser of the land being in effect the agent of the county in obtaining the property. In an action to foreclose the deed of trust the county set up a cross action to reform and cancel the deed of trust, to strike out the debt assumption agreement in the deed to it and to substitute the county as the grantee in the original deed, alleging legal and moral fraud in the transaction. *Held:* The assumption of the debt by the county in contradiction of constitutional and statutory prohibitions is void as a matter of law without the necessity of invoking fraud, but the county is not entitled to reform the instruments so as to acquire the property free from encumbrance and thereby retain the benefits of the very transaction attacked by it, and the trustor is entitled to foreclose. *Ins. Co. v. Guilford County*, 441.

REFORMATION OF INSTRUMENTS—*Continued.*

§ 7. Pleadings.

Complaint *held* sufficient to allege cause of action for reformation of bill of sale of partnership assets on ground of mutual mistake. *Ferrell v. Worthington*, 609.

REMOVAL OF CAUSES.

§ 6. Waiver of Right to Seek Removal.

A party who invokes the jurisdiction of the State court and seeks and obtains the indulgence of the court in the matter of filing additional pleadings or motions, waives his right to seek removal of the cause to the Federal court. *Trust Co. v. Henderson*, 649.

RETIREMENT SYSTEMS.

§ 9. Membership in Local Governmental Employees' Retirement System.

A policeman, who is a member of and entitled to the benefits of the Law Enforcement Officers' Benefit and Retirement Fund, G. S., 143-166, is not also eligible to become a member of the Local Government Employees' Retirement System, G. S., 128-24 (2). *Gardner v. Retirement System*, 465.

§ 18. Funds of Law Enforcement Officers' Retirement System.

The additional cost in criminal cases provided by G. S., 143-166, is not intended to be used to compensate the officers who make the arrests or participate in the prosecutions, but is to be paid to the State Treasurer and by him received, G. S., 147-68, as public funds for disbursement under the provisions of the statute for the purposes of the Law Enforcement Officers' Retirement Fund. *Gardner v. Retirement System*, 465.

SALES.

§ 13a. Operation and Construction of Warranties in General.

Uniform sales act is not in effect in North Carolina or Virginia. *Price v. Goodman*, 223.

§ 14. Express Warranties.

In this action to recover for breach of warranty in the sale of oil burning tobacco curers, the complaint alleged that defendant manufacturer warranted the curers to be of best grade, quality and efficiency and that they would generate sufficient heat to satisfactorily cure tobacco in the minimum time required, that the maximum temperature which could be obtained with the curers without smoking and clogging up the flues was about 100 degrees of temperature, whereas about 180 degrees of temperature are required for efficient curing, so that the curers required thirteen days instead of the four days and five nights normally required for curing tobacco. *Held:* The allegations are sufficient to allege breach of warranty as to quality and capacity and defendant's demurrer should have been overruled. *Walston v. Whitley & Co.*, 537.

Representations as to quality and capacity or other inherent characteristics of machinery which are referable to ordinary and customary standards, constitute warranties and not mere expressions of opinion, but it is necessary that the intent to warrant appear in the form of the expressions, aided in proper cases by circumstances surrounding the transactions. *Ibid.*

SALES—*Continued.*

§ 17. Parties to Warranty; Manufacturer and Retailer.

In an action against the manufacturer and dealer for breach of warranty in the sale of tobacco curers, a complaint which alleges that the dealer acted as agent for the manufacturer in making the sale, without allegation that the agent exceeded his authority or allegation of circumstances tending to show that the agent expressly or impliedly intended to incur personal liability, is demurrable on the part of the alleged agent. *Walston v. Whitley & Co.*, 537.

§ 20. Actions for Purchase Price.

Breach of warranty in a sales contract is an affirmative plea, whether as a defense or as ground for recovery of damages, and the seller is not required to anticipate or negative such defense, but the burden is on the purchaser pleading such defense to establish it by the greater weight of the evidence. *Price v. Goodman*, 223.

§ 27. Actions and Counterclaims for Breach of Warranty.

In this action on executed sales contract in which purchaser pleaded breach of warranty as counterclaim, special damages were not pleaded, and therefore were not recoverable, and in view of answer of jury in negative to issue of damages for breach of warranty, action of trial court in limiting recovery thereon to purchase price was not prejudicial. *Price v. Goodman*, 223.

Special damages, while most frequently applicable to executory contracts, are recoverable in proper cases for breach of executed sales contracts, but in all instances the party sought to be charged must have been duly informed at the time of making the contract of the circumstances out of which the damages may arise, and such special damages must be properly pleaded. *Ibid.*

A complaint alleging damage to plaintiff's tobacco crop and loss of a large part of it through breach of warranty as to quality and capacity of tobacco curers manufactured by defendant, with allegations that at the time of purchase defendant was advised of special circumstances as to the amount of tobacco plaintiff had to cure and that if it was not cured in apt time serious and substantial loss would result, *held* not demurrable on the ground that the complaint alleged only remote or speculative damages. *Walston v. Whitley & Co.*, 537.

SEALS.

§ 3. Evidence and Burden of Proving Adoption of Seal.

Where execution of instrument under seal is admitted, parol evidence that principal did not intend to adopt printed word "Seal" is incompetent. *Bell v. Chadwick*, 598.

§ 4. Effect of Seals.

A seal imports consideration. *Coleman v. Whisnant*, 258.

Instruments under seal require no consideration to support them. *Crotts v. Thomas*, 385.

STATE.

§ 1c. State Treasurer.

Moneys paid into the hands of the State Treasurer by virtue of a State law become public funds for which the Treasurer is responsible, and may be disbursed only in accordance with legislative authority. State Constitution, Art. XIV, sec. 3. *Gardner v. Retirement System*, 465.

STATUTES.

§ 9. Construction of Amendments.

The legal effect of an amendment is the re-enactment of the old statute with the amendment incorporated in it, and the amendment, from its adoption, has the same effect as if it had been a part of the statute when first enacted. *Hoke v. Greyhound Corp.*, 332.

§ 11. Construction and Operation of Criminal and Penal Statutes.

Where the statute which creates an offense prescribes the penalty for its violation, the particular remedy thus prescribed is exclusive of all other remedies. *Clinton v. Ross*, 682.

TAXATION.

§ 2. Limitation on Tax Rate.

Upkeep of county buildings, upkeep and maintenance of county home for the aged and infirm, expense of holding courts, and maintenance of jail and jail prisoners are general expenses and must be covered in the fifteen-cent levy limited for general purposes. Constitution, Article V, section 6. *R. R. v. Duplin County*, 719.

Where a county's tax rate for general county purposes is fifteen cents, its levy for poor relief is limited to a tax rate of five cents. G. S., 153-9 (6). *Ibid.*

Where the tax records of the county disclose a fifteen-cent levy for general purposes and a seven-cent levy for the county poor, two cents of the seven-cent levy is patently excessive and no part thereof can be justified for items of general expense, but where, in an action by a taxpayer to recover the amount paid under protest under the two-cent levy, defendant county introduces resolutions of the board correcting its records to show that two cents of the seven-cent levy was for administration of old age assistance and aid to dependent children, and for salaries of the county accountant and farm agent, nonsuit is proper, since such purposes are for special purposes with special approval of the Legislature, G. S., 108-17, *et seq.*, G. S., 108-44, *et seq. Ibid.*

§ 3. Limitation on Increase of Indebtedness.

During the fiscal year 1944-45 a county made funds available at a banking institution to pay its bonds, and its account was charged with the checks used therefor. The bonds were due 1 July, 1945, and the bonds were marked paid and returned to the county during July, 1945. *Held:* The indebtedness was outstanding at the end of the fiscal year 1944-45 and may not be computed as a reduction in outstanding indebtedness for that fiscal year within the meaning of Art. V, section 4, of the Constitution of North Carolina. *Coe v. Surry County*, 125.

§ 4. Necessary Expenses.

The establishment and maintenance of an airport is not a necessary municipal expense and therefore a city may not incur debt or levy taxes therefor without submitting the question to a vote. *Airport Authority v. Johnson*, 1.

§ 5. Public Purpose.

The establishment and maintenance of an airport is a public purpose within the objects of municipal expenditure, and a city may appropriate funds therefor in proper instances. *Airport Authority v. Johnson*, 1.

TAXATION—*Continued.*

§ 9. Tax on One Municipality for Benefit of Another.

A municipal corporation may appropriate funds to a *quasi*-municipal corporation created by the Legislature when such corporation is an agency of the municipality in the performance of a public function having a reasonable connection with the convenience and necessity of the contributing municipality. *Airport Authority v. Johnson*, 1.

§ 40c. Foreclosure of Tax Lien.

Where a tax collector accepts checks in payment of taxes and thereupon issues tax receipts, and such checks are returned unpaid without negligence on the part of the tax collector in presenting them for payment, and the tax collector thereupon immediately corrects his records, G. S., 105-382, and settles with the county for the taxes, *held:* the tax collector may institute an action under G. S., 105-414, to enforce the tax lien. *Miller v. McConnell*, 28.

§ 40d. Limitations.

In an action by a political subdivision to enforce a lien for taxes under G. S., 105-414, no statute of limitations is applicable, since the sovereign is not mentioned therein and the maxim *nullum tempus occurrit regi* applies. *Miller v. McConnell*, 28.

Where tax collector accepts checks which are returned unpaid, in his action under G. S., 105-414, limitations prescribed by C. S., 441 and 8037, are not applicable. *Ibid.*

§ 40f. Judgments in Foreclosure Proceedings.

An action to foreclose a lien for delinquent taxes is *in rem* and a personal judgment may not be obtained against the owner for the amount of the taxes. *Miller v. McConnell*, 28.

Where in an action under G. S., 105-414, the complaint describes the real estate sought to be foreclosed to enforce the tax lien, the order of foreclosure is restricted to the described real estate and so much of the judgment as authorizes the sale of other lands is in excess of the jurisdiction of the court. *Ibid.*

TELEPHONE AND TELEGRAPH COMPANIES.

§ 2. Liability for Failure to Send or Deliver Message.

An action to recover for failure to transmit an interstate message is governed by the Federal decisions, and plaintiff may not recover damages for mental anguish, or punitive damages, or any state statutory penalty. *Ward v. Tel. Co.*, 175.

TRESPASS.

§ 6. Issues, Verdict and Judgment.

Plaintiff alleged a cause of action in trespass. Defendant denied the trespass and set up a prescriptive right to cross plaintiff's land. The issues submitted related solely to the assertive prescriptive right. *Held:* An issue of trespass was raised by the pleadings, and upon the jury's verdict in plaintiff's favor, a provision of the judgment that defendant be restrained from crossing the land of plaintiff must be stricken and a new trial ordered, since defendant's user is presumed permissive and the judgment based upon a contrary assumption without a verdict is unwarranted in law. *Speight v. Anderson*, 492.

TRESPASS—*Continued.*

§ 9. Nature and Elements of Forcible Trespass.

It is not necessary to constitute the crime of forcible trespass or forcible entry that the owner should have made vocal protest to the entry, it being sufficient if the aggressors have knowledge, however acquired, that their entry is against the will of the owner, and the manner and purpose of the invasion, the show of force, and the conduct of the offenders, is of such intimidating character as to put the occupants in fear and make it apparent that the ordinary means of resisting trespass would be ineffectual. G. S., 14-126. *S. v. Gibson*, 194.

§ 10. Prosecutions for Forcible Trespass.

Evidence *held* insufficient on charge of attempt to commit burglary but sufficient on charge of forcible trespass. *S. v. Gibson*, 194.

TRIAL.

§ 15. Motions to Strike Evidence.

Plaintiff instituted suit for absolute divorce on ground of adultery. Defendant set up cross-action for divorce *a mensa et thoro* alleging, *inter alia*, adultery on the part of plaintiff. At the close of the evidence defendant took a voluntary nonsuit on her cross-action. *Held:* Evidence of adultery on the part of plaintiff was competent at the time of its introduction, and in the absence of motion to strike when defendant withdrew her cross-action, plaintiff's contention that he was unduly prejudiced by its admission is untenable. Rule 21. *Ziglar v. Ziglar*, 102.

§ 16. Withdrawal of Evidence.

Where evidence is admitted conditionally and later excluded and the jury instructed not to consider it, any error in its admission is corrected and an exception to its admission cannot be sustained. *Graham v. Spaulding*, 86.

§ 21. Office and Effect of Motion to Nonsuit.

A demurrer to the pleadings, G. S., 1-127, and a demurrer to the evidence, G. S., 1-183, are different in purpose and effect: the first challenges the sufficiency of the pleadings, and the second the sufficiency of the evidence. *Coleman v. Whisnant*, 258.

Motion to nonsuit must be renewed at close of all the evidence. *S. v. Perry*, 530.

§ 22a. Consideration of Evidence on Motion to Nonsuit in General.

On motion to nonsuit, the evidence will be considered in the light most favorable to plaintiff. *Toler v. Savage*, 208; *Ireland v. Ins. Co.*, 349; *Highway Comm. v. Transportation Corp.*, 371; *Deaton v. Elon College*, 433; *Swink v. Horn*, 713.

On motion to nonsuit, plaintiff is entitled to the benefit of every fact and inference of fact pertaining to the issues involved which may be reasonably deduced from the evidence. *Lore v. Zimmerman*, 389; *Swink v. Horn*, 713.

§ 22b. Defendant's Evidence on Motion to Nonsuit.

On motion to nonsuit, the evidence is to be considered in the light most favorable to plaintiff, and defendant's evidence which tends to impeach or contradict plaintiff's evidence will not be considered. *Deaton v. Elon College*, 433.

TRIAL—*Continued.*

§ 23a. Sufficiency of Evidence to Overrule Nonsuit in General.

Where plaintiff's evidence tends to establish each essential element of his cause of action, defendant's motion to nonsuit is properly denied notwithstanding his evidence in contradiction thereto, since conflicting evidence raises an issue of fact for the jury. *Brown v. Loftis*, 762.

§ 24. Nonsuit on Ground That Plaintiff's Evidence Establishes Bar or Affirmative Defense.

Defendant's contention that it was entitled to nonsuit for that plaintiff's own evidence established its affirmative defense that it had canceled the policy in suit by mailing notice of cancellation is untenable when plaintiff testifies that he did not receive such notice and thus raises a conflict in the evidence on the issue. *White v. Ins. Co.*, 119.

§ 27. Directed Verdict in General.

Where the evidence is conflicting it is error for the court to give an instruction which has the effect of a directed verdict for either party. *Perry v. Trust Co.*, 667.

§ 29. Directed Verdict or Peremptory Instruction in Favor of Party Having Burden of Proof.

The party having the burden of proof upon an issue is not entitled to a peremptory instruction upon conflicting evidence. *White v. Ins. Co.*, 119.

§ 31a. Form, Requisites and Sufficiency of Instructions in General.

Use of concrete illustrations in charge not approved. *Rea v. Simowitz*, 379.

§ 31b. Statement of Evidence and Explanation of Law Arising Thereon.

An instruction that defendants must have offered evidence satisfying the jury by its greater weight that plaintiff was guilty of contributory negligence in order for the jury to answer that issue in the affirmative must be held for reversible error in depriving defendants of their right to have plaintiff's admissions and the testimony of plaintiff's witnesses, as well as that elicited on cross-examination, considered by the jury on the issue. *Hobbs v. Drewer*, 146.

The failure of the court to charge the jury upon the principle of *respondeat superior* cannot be held for error as failing to declare and explain the law arising on the evidence when it appears that defendant admitted the existence of the relationship of master and servant between itself and the alleged tortfeasor and its liability for any negligence on his part, and that the case was tried throughout on this theory. G. S., 1-180. *Webb v. Theatre Corp.*, 342.

Instruction that the jury should not consider the testimony of named witnesses upon the issue of undue influence, but might consider their testimony upon the issue of testamentary capacity *is held* too indefinite. *In re Will of Lomax*, 498.

§ 31d. Charge on Burden of Proof.

Where the burden is on plaintiffs to establish their cause by clear, strong and convincing proof, the court may instruct the jury as to the dictionary definitions of these terms, since "clear," "strong" and "convincing" are used in the ordinary and accepted sense. *McCorkle v. Beatty*, 338.

A charge which fails to instruct the jury as to the burden of proof upon one of the issues must be held for prejudicial error, since the burden of proof is a substantial right. *Crain v. Hutchins*, 642.

TRIAL—*Continued.*

§ 31e. Expression of Opinion by Court on Weight or Credibility of Evidence.

An instruction having the effect of making the expectancy of life set out in the mortuary tables definitive and conclusive is a prohibited expression of opinion on the evidence. *Starnes v. Tyson*, 395.

This action in replevin was instituted by a widow to obtain possession of an automobile from her father-in-law. There was conflicting evidence as to whether the car had been purchased by defendant or plaintiff's husband. Plaintiff introduced letters from her husband disclosing that he regarded the car as his and intended making a gift *inter vivos* of it to her. After charging upon the evidence of title, the court, in charging upon the evidence of gift instructed the jury to answer the issue in plaintiff's favor if they were satisfied by the greater weight of the evidence of the elements of a gift *inter vivos*. *Held:* The court inadvertently overlooked the fact that title was still in issue, and the instruction must be held for error as an expression as to the weight and sufficiency of the evidence on the question of title. G. S., 1-180. *James v. James*, 399.

§ 36. Form and Sufficiency of Issues.

Issues submitted by the court are sufficient when they present to the jury proper inquiries as to all determinative facts and afford the parties opportunity to introduce all pertinent evidence and to apply it fairly, and when the issues submitted are sufficient an exception to the refusal to submit other issues is untenable. *Miller v. McConnell*, 28.

§ 39. Form and Sufficiency of Verdict.

A verdict may be given significance and correctly interpreted by reference to the pleadings, the facts in evidence, admissions of the parties, and the charge of the court. *Jernigan v. Jernigan*, 204.

§ 49. Motions to Set Aside Verdict as Being Against Weight of Evidence.

The setting aside of a verdict on the ground that it is contrary to the weight of the evidence is addressed solely to the discretion of the trial court. G. S., 1-207. *Ziglar v. Ziglar*, 102; *Bailey v. McCotter*, 160; *Webb v. Theatre Corp.*, 342.

§ 53. Trial by Court Under Agreement of Parties.

The consent of both parties is necessary to authorize the court to hear the evidence, find the facts and declare the law arising thereon, without a jury, and in the absence of mutual consent, the judgment of the court is void and may be set aside upon motion as a matter of right. *Bennett v. Templeton*, 676.

TRUSTS.

§ 2b. Actions to Establish Parol Trusts.

The burden is upon plaintiffs to establish an alleged parol trust asserted by them by clear, strong and convincing proof, which words have their ordinary and accepted sense. *McCorkle v. Beatty*, 338.

In an action to establish a parol express trust based upon an alleged agreement to purchase property at the foreclosure sale for the benefit of the plaintiff, the mortgage debtor, financial distress of the plaintiff and evidence of the real value of the property are competent to establish the reasonableness of plaintiff's contention that he sought the agreement in the face of an immi-

nent forced sale at which the price would be fixed by the high bid. But where defendants admit that plaintiff sought the agreement, the exclusion of such evidence is not prejudicial. *Ibid.*

§ 3a. Written Trusts in General.

The facts agreed disclosed that testator paid for certain stock with his own funds and had the certificates issued to himself and niece as joint tenants with right of survivorship, but had the stock in his exclusive possession at the time of his death. *Held:* The transaction does not constitute a testamentary disposition of the stock, nor a gift *causa mortis*, nor create a trust. *Buffaloe v. Barnes*, 313.

§ 12. Property Subject to Trust.

The will in suit set up a trust and provided that the net income should be divided among testator's wife and children, and upon termination of the trust upon the death of both trustees that a second trust with a corporate trustee be set up for the share of one daughter, A, and the balance of the *corpus* divided among the other children. There was no provision for any limitation over. *Held:* Upon the death of one of the children without issue, "A" took her *pro rata* part by inheritance unaffected by the second trust. *Welch v. Trust Co.*, 357.

§ 14a. Supervisory Powers of Courts of Equity.

Courts of equity have general, inherent, exclusive, supervisory jurisdiction over trusts and the administration thereof. In the exercise of that power they may authorize whatever is necessary to be done to preserve a trust from destruction. The prime consideration is the necessity for the preservation of the estate. *Trust Co. v. Rasberry*, 586.

§ 14b. Authority and Powers of Trustee in General.

The will in suit set up a trust and named an executor and executrix to handle the estate, giving them or the survivor of them the power to sell or improve unproductive real estate, to invest the personalty or the proceeds of sale of realty in Government bonds or in the improvement of realty, in their discretion, with provision that upon the death of either, the powers therein delegated should be exercised by the survivor, and upon the death of both, the trust should terminate and the *corpus* divided. *Held:* The powers conferred by the will were personal and discretionary. *Welch v. Trust Co.*, 357.

Where the powers conferred upon the executor or trustee named in a will are personal and discretionary, such powers, as a general rule, cannot be exercised by a substitute or successor, nor can the court appoint another in the event of the death, incompetency or other failure of the designated person. *Ibid.*

§ 20. Power to Sell Trust Property.

Court of equity has jurisdiction to grant trustee authority to sell part of realty to make assets to pay debts of trust upon finding such action was necessary to preserve trust. *Trust Co. v. Rasberry*, 586.

And fact that adult beneficiaries join in trustee's petition for this relief does not limit court's powers to sale for reinvestment under G. S., 41-11. *Ibid.*

TRUSTS—*Continued.*

§ 29. Termination or Forfeiture of Trust Upon Failure of Objectives or Beneficiaries.

Where educational program, the object of testator's beneficence, was continued under another name at one of original institutions, beneficiary had not ceased to exist, and trust was not defeated. *Trust Co. v. Board of National Missions*, 546.

Where a will sets up a trust and provides that the net income should be divided among named beneficiaries, and upon the termination of the trust, the *corpus* divided among them, without limitation over, *held* the death of a beneficiary terminates the trust as to her share, and such share descends to her heirs at law. *Welch v. Trust Co.*, 357.

§ 30. Termination for Want of Competent Trusts.

The will in this case set up a trust and conferred personal and discretionary powers upon the executor and executrix named therein, with provision that upon the death of both of them the *corpus* should be divided among named beneficiaries. The executrix died, and the executor was removed for cause. *Held:* Since the powers cannot be exercised by a substitute or successor, the removal of the executor has the same effect in regard to the trust as though he had died, and the trust is terminable. *Welch v. Trust Co.*, 357.

Bequest to unincorporated school will be upheld as bequest in trust to parent incorporated organization. *Trust Co. v. Board of National Missions*, 546.

VENDOR AND PURCHASER.

§ 3. Consideration.

The lease is a sufficient consideration to support specific performance of the option to purchase granted therein. *Crotts v. Thomas*, 385; *Trust Co. v. Frazelle*, 724.

§ 5a. Construction and Operation of Options in General.

An option in a lease, which gives the lessee the right to purchase the leased premises at any time before the expiration of the lease, is a continuing offer to sell on the terms set forth in the option, and may not be withdrawn by the lessor within the time limited. *Crotts v. Thomas*, 385.

Neither a lease nor an option therein granted lessee to purchase is terminated by the death of lessor, the obligations therein created not being personal but being covenants running with the land. *Trust Co. v. Frazelle*, 724.

§ 7. Purchase Price.

Where an option obligates the vendor to sell at a price to be agreed upon but not to exceed a stated sum, such sum may be accepted by the optionee as the purchase price without further negotiation. *Crotts v. Thomas*, 385.

Nothing else appearing, interest begins to run as a matter of law on the balance of the purchase price under a contract to convey from the date of the execution of the contract and the taking of possession by the purchaser, and not on the date set for the execution of the deed. *Ins. Co. v. Wells*, 574.

§ 8. Description and Amount of Land.

The option in suit described the *locus in quo* by metes and bounds, containing "30 acres more or less," and provided for the payment of a stipulated price per acre. *Held:* The description was sufficiently definite, since in the event of any real controversy as to the acreage contained therein the maxim

VENDOR AND PURCHASER—*Continued.*

id certum est quod certum reddi potest applies, and upon tender by the purchaser of the purchase price for 30 acres plus a sum to take care of any overage, the vendor's contention that the acceptance was not in accord with the offer is untenable. *Crotts v. Thomas*, 385.

§ 19a. Necessity for Tender of Purchase Price.

Where the purchaser is ready, able and willing to pay the price stipulated, and notifies the vendor of his election to exercise the option, the vendor is under duty to prepare and tender good and sufficient deed, and the purchaser is not required to tender the purchase price before delivery of the deed. *Crotts v. Thomas*, 385.

Where an option does not require payment or tender of purchase price until delivery of deed, and vendors refuse to execute deed upon request, tender of the purchase price is not required. *Trust Co. v. Frazelle*, 724.

VENUE.

§ 2a. Actions Involving Realty.

In an action to recover balance due on contract for construction of a building and for the sale of the property to satisfy the laborers' and materialmen's lien duly filed in the county where the land is situate, defendants are entitled as a matter of right to the removal of the action from the county of plaintiff's residence to the county in which the land lies, upon their motion duly made. *Penland v. Church*, 171.

Plaintiff may not successfully contend that his action is for a money judgment only in order to prevent removal of the action to the county wherein the land is situate when he seeks to recover not only the balance due on his contract of construction, but also seeks to enforce his laborers' and materialmen's lien by sale of the property. *Ibid.*

WILLS.

§ 3. Testamentary Intent.

Fact that person paying for stock has certificates issued in the name of himself and niece as joint tenants with right of survivorship, does not constitute testamentary disposition of stock. *Buffaloe v. Barnes*, 313.

§ 17. Nature of Caveat Proceedings.

A caveat proceeding is *in rem* and many of the ordinary rules relating to order of proof and argument do not obtain. *In re Will of Lomax*, 498.

§ 23b. Evidence on Issue of Mental Capacity.

G. S., 8-51, applies to caveat proceedings notwithstanding that they are *in rem*, with the exception that beneficiaries under the will are competent to testify as to transactions with deceased testator solely upon the issue of testamentary capacity. *In re Will of Lomax*, 498.

§ 23c. Evidence on Issue of Undue Influence.

The prohibition against a beneficiary testifying as to transactions with deceased testator on the question of undue influence relates solely to transactions with the deceased, and a beneficiary is competent to testify as to circumstances tending to show undue influence on the part of the propounder unrelated to any transaction which the witness had with testator. G. S., 8-51. *In re Will of Lomax*, 498.

WILLS—*Continued.*

§ 23½a. Order of Proof.

Caveators by admitting the due execution of the will and its probate in common form cannot deprive the court of its discretionary control over the order of proof or complain that propounders were permitted to open the evidence to prove the formal execution of the will *per testes* in solemn form, nor are caveators prejudiced or deprived of any substantial right if propounders exceed the necessity of a *prima facie* case by introducing competent evidence on the issue of mental capacity. *In re Will of Lomax*, 498.

§ 24½. Argument of Counsel.

Where both propounders and caveators introduce evidence, the right to the opening and concluding arguments is within the discretion of the trial judge, and further, since propounders have the burden of the issue, the concluding argument is appropriately theirs. *In re Will of Lomax*, 498.

§ 31. General Rules of Construction.

Will must be construed to effectuate intent of testator as gathered from language used interpreted from four corners, and circumstances surrounding testator are competent to enable court to construe language from his viewpoint. *Trust Co. v. Board of National Missions*, 546.

§ 33c. Vested and Contingent Interests and Defeasible Fees.

The law favors the early vesting of estates. *Patterson v. Brandon*, 89.

Testator devised real estate to his wife for life, remainder to his sister "if she looks after and takes proper care of my beloved wife," without limitation over. *Held:* Testator's sister took a vested remainder and the language of the proviso was insufficient to work a forfeiture upon the failure of the remainderman to take care of testator's wife. *Ibid.*

§ 33d. Estates in Trust.

The will in suit set up a trust and provided that the net income should be divided among testator's wife and children, and upon termination of the trust upon the death of both trustees that a second trust with a corporate trustee be set up for the share of one daughter, A, and the balance of the *corpus* divided among the other children. There was no provision for any limitation over. *Held:* Upon the death of one of the children without issue, "A" took her *pro rata* part by inheritance unaffected by the second trust. *Welch v. Trust Co.*, 357.

Where educational program, the object of testator's beneficence, was continued under another name at one of original institutions, beneficiary had not ceased to exist, and trust was not defeated. *Trust Co. v. Board of National Missions*, 546.

Bequest to unincorporated school will be upheld as bequest in trust to parent incorporated organization. *Ibid.*

§ 34. Designation of Devisees and Legatees and Their Respective Shares.

The general rule in this jurisdiction is that where an equal division is directed among a class of beneficiaries, even though they may be described as heirs of deceased persons, or heirs or children of living persons, the beneficiaries take *per capita* and not *per stirpes;* but this rule does not apply if testator indicates the beneficiaries are to take by families or by classes as representatives of deceased ancestors. *Wooten v. Outland*, 245.

WILLS—*Continued.*

In a bequest or devise, as well as under the statute of distributions or the canons of descent, where the beneficiaries take as representatives of an ancestor they take *per stirpes*, but when they take directly under a bequest or devise as individuals and not in a representative capacity, and the testator provides that the division or distribution shall be in equal proportions, they take *per capita*. *Ibid.*

A devise of lands to be equally divided among the heirs of named aunts and uncles of testatrix, requires the division to be made *per capita* under the general rule in this jurisdiction. *Ibid.*

§ 39. Actions to Construe Wills.

Where, in the trustees' action to construe a will and for advice in the administration of the testamentary trust, the decision of the Supreme Court adjudicates the matters and directs the trustees to proceed, and holds that the administration of the trust belongs in the first instance to the trustees, *held* upon the certification of the decision to the Superior Court, the matters adjudicated are not properly before it, and, there being no additional request for instructions from the trustees, a beneficiary of the trust may not invoke the jurisdiction of the court for the purpose of giving additional instructions to the trustees or to require them to file their report with provision that any party interested might file exceptions thereto within a time specified. *Cannon v. Cannon*, 634.

The Superior Court has jurisdiction over a proceeding under the Declaratory Judgment Act instituted by an executor to determine, *inter alia*, the validity of assignment of interest by a legatee, G. S., 1-254, and motions in the Supreme Court on appeal by assignor and assignee to dismiss for want of jurisdiction will be denied. *Trust Co. v. Henderson*, 649.

§ 40. Right of Widow to Dissent from Will.

A widow is given the right to dissent from the will of her husband by statute, G. S., 30-1, upon notice given in person or by attorney duly authorized in writing, and the statute does not require previous notice to the executors or devisees. *In re Estate of Smith*, 169.

While motion to set aside divorce decree is pending, it is error for the court to strike out widow's dissent from will. *Ibid.*

§ 44. Election.

The doctrine of election under a will is based upon the principle that a person cannot take benefits under the will and at the same time reject its adverse provisions. *Lamb v. Lamb*, 662.

In order for the doctrine of election under a will to apply, the intent of the testator to put the beneficiary to an election must clearly appear from the instrument. *Ibid.*

The doctrine of election under a will does not apply where, upon a fair and reasonable construction of the will it appears that testator mistakenly thought the property of the beneficiary he purports to dispose of was his own, nor where the beneficiary receives no alternative benefit under the will in lieu of the property purportedly disposed of. *Ibid.*

A bequest of any part of a certain fund which testator may not have disposed of prior to his death, will not support the doctrine of election when there is no evidence that the beneficiary actually received any amount thereunder, since the court will not assume that any part of the fund remained undisposed of at testator's death. *Ibid.*

WILLS—*Continued.*

Testator and his wife owned a tract of land by entireties. Testator devised "my interest" therein to his wife, with remainder over to designated beneficiaries, with further provision that the will should "not affect the deed" to him and his wife which created the estate by entireties. *Held:* It is apparent that testator believed he had a disposable interest in the estate by entiretis and was attempting to devise only such interest and not any interest of his wife, and further, the intent to put his wife to her election does not appear, and therefore the doctrine of election is not applicable. *Ibid.*

§ 46. Nature of Title and Rights and Liabilities of Devisees.

The cost of repairs to real property which are ordered by testator or by his authorized agent, and which are completed prior to his death, are chargeable against the executors; but other repairs made after testator's death when title had vested in the devisees, in the absence of a finding or evidence that thy had been contracted for by testator or someone authorized by him, is chargeable against the devisees. *Buffaloe v. Barnes*, 313.

GENERAL STATUTES CONSTRUED.

G. S.

1-17. Has no application to a proceeding to set aside a void judgment of foreclosure. *Johnston County v. Ellis*, 269.

1-23; 1-25. Evidence that plaintiff filed claim in admiralty in due time and that immediately after claim was dismissed in United States District Court for want of jurisdiction, plaintiff instituted this action, *held* sufficient to overrule nonsuit on ground of bar of statutes of limitation. *Highway Comm. v. Transportation Corp.*, 371.

1-38. Deed purporting to convey lands is color of title even though void for matters *dehors* record, such as want of title in grantor. *Lofton v. Barber*, 481.

1-40. Where structure of adjacent lot encroaches on plaintiff's lot, plaintiff is not estopped by silence and does not lose title until twenty years adverse possession. *Ramsey v. Nebel*, 590.

1-43. Is not applicable where tenant claims under title derived from landlord. *Lofton v. Barber*, 481.

1-46. Allegations that plaintiff's claim had accrued more than ten years prior to institution of action and was barred by statutes of limitation *held* sufficient pleading of statute although no specific reference to particular sections is made. *Jennings v. Morehead City*, 606.

1-64; 1-65. Next friend and guardian *ad litem* are distinct; where next friend obtains judgment setting aside tax foreclosure sale, he does not represent minors upon a hearing thereafter had at the instigation of an intervening mortgagor to foreclose his mortgage on the lands. *Johnston County v. Ellis*, 269.

1-67. Guardian *ad litem* for insane person must file answer upon service, even in divorce action. *Smith v. Smith*, 544.

1-74. Cause of action for wrongful death does not abate upon death or removal of personal representative instituting the action. *Harrison v. Miller*, 36.

1-97 (3). Process may be served on insane person under this section in all classes of actions. *Smith v. Smith*, 544.

1-99. Order of publication need not state that newspaper in which publication is ordered is one most likely to give notice to defendant. *Smith v. Smith*, 506.

1-123. Causes must be connected with same subject matter in order to be joined in complaint. *Pressley v. Tea Co.*, 518.

1-127. Demurrer to evidence challenges sufficiency of evidence. *Coleman v. Whisnant*, 258.

1-127; 1-183. Demurrer to evidence and demurrer to pleadings are different in purpose and effect. *Coleman v. Whisnant*, 258.

1-132. Action need not be dismissed upon demurrer even if causes are improperly joined in complaint. *Pressley v. Tea Co.*, 518.

1-138. Where answer is sufficient to entitle defendant to some relief, demurrer thereto should be overruled notwithstanding that answer fails to state separately defenses and causes for affirmative relief. *Pearce v. Pearce*, 307.

1-149. Permitting solicitor to cross-examine defendant in regard to allegation in complaint in civil action for purpose of impeachment does not impinge statute. *S. v. McNair*, 462.

GENERAL STATUTES CONSTRUED—*Continued.*

G. S.

1-151. Demurrer will be overruled unless pleading, liberally construed, is fatally defective. *Ferrell v. Worthington*, 609.

1-153. Allegations in answer setting up prior action in which voluntary nonsuit was taken *held* properly stricken. *Brown v. Hall*, 732.

1-180. Recapitulation of all the evidence is not required by the statute. *S. v. Thompson*, 651.

Failure to charge upon principle of *respondeat superior* not error when relationship is admitted and theory of trial is predicated on defendant's liability for any negligence of the servant. *Webb v. Theatre Corp.*, 342.

Failure to charge upon degree of circumstantial proof required for conviction *held* not error, the burden having been placed on the State to prove guilt beyond a reasonable doubt. *S. v. Shoup*, 69.

Remark of court in sustaining objection to further cross-examination *held* not expression of opinion by court. *S. v. Stone*, 97.

Charge *held* for error as expressing opinion on weight and credibility of evidence. *S. v. Benton*, 745.

New trial awarded for remarks of court impeaching credibility of witness and intimating that fact had been established. *S. v. Owenby*, 521.

Where misstatement of admission affects burden of proof, charge must be held for prejudicial error. *S. v. Ellison*, 628.

Charge having effect of making mortuary table definitive and conclusive violates this section. *Starnes v. Tyson*, 395. Charge *held* for error as expressing opinion on evidence. *James v. James*, 399.

General exception to charge is insufficient to present contention of error in failing to charge on particular phase of case. *Brown v. Loftis*, 762; *S. v. Beatty*, 765.

1-194. Superior Court may set aside findings in whole or in part and substitute other findings supported by evidence. *Ramsey v. Nebel*, 590.

1-207. Setting aside of verdict on ground it is contrary to weight of evidence is addressed solely to discretion of trial court. *Ziglar v. Ziglar*, 102.

1-209 (e); 1-211. Clerk has no jurisdiction to order foreclosure when it is necessary to hear evidence to ascertain title to mortgage debt and the amount thereof. *Johnston County v. Ellis*, 269.

1-211. Failure of plaintiff to move promptly for judgment by default after he is entitled thereto does not work discontinuance of action. *King v. Rudd*, 156.

1-220. Evidence *held* insufficient to establish excusable neglect. *Whitaker v. Raines*, 526.

1-234. Death of judgment debtor does not destroy right to priority but merely precludes execution and remits judgment creditor to personal representative. *Moore v. Jones*, 149.

1-254. Superior Court has jurisdiction of proceeding instituted by executor to determine validity of assignment of interest by legatee, and motions by legatee and assignee in Supreme Court to dismiss for want of jurisdiction, denied. *Trust Co. v. Henderson*, 649.

1-271. Appellant appealing solely for purposes of delay is not "party aggrieved." *Stephenson v. Watson*, 742.

GENERAL STATUTES CONSTRUED—*Continued.*

G. S.

1-282. Exception to charge entered only after charge had been incorporated in appellee's statement of case is not timely. *Searcy v. Logan*, 562.

1-283. Parties have no supervision over judge in settlement of case on appeal except to see that duty is performed; remedy to bring up additional matters of record is by *certiorari*. *Lindsay v. Brawley*, 468.

1-373. Where in bankruptcy proceedings, homestead is allotted subject to specified judgment, judgment creditor is not required to have homestead reallotted. *Sample v. Jackson*, 408.

1-399. When sole seizin is pleaded and matter transferred to civil issue docket, burden is on petitioner to show title by tenancy in common as alleged; but in this case, negative answer to sole issue submitted as to whether respondent's deed was obtained by undue influence, *held* sufficient, interpreted in light of pleadings, evidence and theory of trial, to sustain judgment that respondent was owner of land. *Jernigan v. Jernigan*, 204.

4-1. Survival of causes of action from wrongful injury, whether resulting in death or not, is purely statutory. *Hoke v. Greyhound Corp.*, 332.

6-7. After decision on appeal modifying and affirming judgment of Superior Court on appeal from referee, allowances constituting items of costs may be adjudged. *Clark v. Cagle*, 231.

8-5; 160-272. In absence of evidence that municipal ordinance had been certified or had been published in book form, exclusion of evidence of police chief as to contents of ordinance was without error. *Toler v. Savage*, 208.

8-46. Rule for admeasurement of damages for death of child under ten years of age is same as for ages set out in mortuary table. *Rea v. Simowitz*, 379. Mortuary table is merely evidence of life expectancy. *Starnes v. Tyson*, 395.

8-51. Testimony by maker of notes as to transactions with decedent payee tending to establish non-liability is properly excluded. *Perry v. Trust Co.*, 667.

Beneficiary may testify as to transactions with decedent relative to testamentary capacity but not transactions relating to undue influence. *In re Will of Lomax*, 498.

8-57. Although wife may be competent to testify against husband to prove fact of marriage in prosecution for bigamous cohabitation, testimony by her that they had not been divorced is incompetent. *S. v. Setzer*, 216.

14-1, -2, -3, -71. Sentence of imprisonment at hard labor for not less than three nor more than five years upon plea of *nolo contendere* to charge of receiving stolen goods of value of $75.00, knowing them to have been stolen is within limits prescribed by statute. *S. v. Mounce*, 159.

14-17. Use of word "aforethought" no longer required in charging upon murder in first degree. *S. v. Hightower*, 62. Murder in perpetration or attempted perpetration of robbery is murder in first degree. *S. v. Bennett*, 82.

Homicide committed in perpetration of capital crime of rape is murder in first degree. *S. v. King*, 241.

GENERAL STATUTES CONSTRUED—*Continued.*

G. S.

14-21. Carnally knowing female under 12 years of age, or carnally knowing female 12 years of age or more by force and against her will, is rape. *S. v. Johnson*, 671. Force may be constructive. *Ibid.*

Indictment for rape must use words "by force" or their equivalent. *S. v. Benton*, 745.

In prosecution for rape of female 12 years old or more indictment must charge force; but in prosecution for rape of female under 12 neither force nor want of consent need be alleged or proven. *S. v. Johnson*, 266.

14-22. Felonious intent, without assault, is insufficient to constitute the crime. *S. v. Overcash*, 632.

14-26. Repeated use of words "statutory rape" in charge will not be held for error when charge correctly defines the offense. *S. v. Bullins*, 142.

14-29. Temporary injury to private parts is not mayhem. *S. v. Malpass*, 403.

14-33. Punishment for simple assault by male over 18 upon female is in discretion of court, it being expressly excluded from provisions of this section. *S. v. Jackson*, 66; *S. v. Grimes*, 523.

14-39. Kidnapping defined. *S. v. Witherington*, 211.

14-51, -52. Where upon indictment for first degree burglary, supported by evidence, solicitor announces he will ask only for burglary in second degree, conviction of guilty "as charged" will be set aside. *S. v. Jordan*, 155.

14-55. Finding of implements in constructive possession of defendant, which implements, as matter of common knowledge are implements of housebreaking, sufficient to support conviction under this section. *S. v. Baldwin*, 295. Offenses of being armed with intent to break and enter and of possession of implements of housebreaking are distinct. *Ibid.*

14-126. Vocal protest to entry by owner is not necessary to constitute crime of forcible trespass if circumstances are such that it is apparent that ordinary means of resisting trespass would be ineffectual. *S. v. Gibson*, 194.

14-183. To establish bigamous cohabitation State must show (1) marriage of defendant to spouse still living, (2) unlawful marriage in another state that would have been bigamous if contracted here, cohabitation thereafter in this State. Admission that second marriage was "lawful" without evidence that first marriage had not been annulled or parties divorced *held* insufficient to establish second element of offense. *S. v. Setzer*, 216.

15-173. Motion to nonsuit must be renewed after close of all evidence in order to present sufficiency of evidence for review. *S. v. Perry*, 530. Failure to demur to evidence concedes its sufficiency. *S. v. Jackson*, 760.

Testimony by State's witness that defendant made declaration of innocence does not justify nonsuit, since such self-serving declaration does not rebut any proof adduced by the State. *S. v. Baldwin*, 295.

Contention that State's voluntary nonsuit on one count established innocence on another like count *held* untenable. *Ibid.*

15-182. Affidavit for appeal *in forma pauperis* must be filed during trial term or within ten days thereafter. *S. v. Harrell*, 743.

GENERAL STATUTES CONSTRUED—*Continued.*

G. S.

17-39. Jurisdiction of court in *habeas corpus* to determine custody of children in contest between husband and wife, although statutory, is equitable, and order may be enforced by attachment for contempt even though based on consent of parents. *In re Biggers*, 647.

18-6; 18-48. Court may at subsequent term enter order *nunc pro tunc* for forfeiture of vehicle used for illegal transportation of liquor. *S. v. Maynor*, 645.

18-50. In prosecution under this section no presumption of intent to sell arises from unlawful possession of illicit liquor. *S. v. Peterson*, 255. Conviction under this section on insufficient evidence cannot be upheld because evidence is sufficient to sustain conviction under G. S., 18-48. *Ibid.*

20-7; 20-34. It is negligence *per se* to drive car without license or to permit person under legal driving age to operate vehicle, but plaintiff must show that violation of statute was proximate cause. *Hoke v. Greyhound Corp.*, 692.

20-138. Definition of "under the influence" of intoxicants or drugs. *S. v. Carroll*, 237; *S. v. Bowen*, 601.

20-141. Speed in excess of that which is reasonable and prudent under circumstances is negligence notwithstanding that it may be less than *prima facie* limits prescribed. *Hoke v. Greyhound Corp.*, 692. Plaintiff has burden of showing that excessive speed was proximate cause. *Ibid.*

20-146. Violation of this statute is negligence *per se*, but plaintiff has burden of showing proximate cause. *Hoke v. Greyhound Corp.*, 692.

20-148. Violation of this statute is negligence *per se*, but plaintiff has burden of showing proximate cause. *Hoke v. Greyhound Corp.*, 692.

Evidence *held* sufficient for jury on questions of negligence in violating this section and proximate cause. *Wallace v. Longest*, 161.

20-155. Statute applies when two vehicles enter intersection at approximately same time, and not when vehicle to the left has already entered intersection. *Kennedy v. Smith*, 514.

20-166. Failing to stop at scene is offense, and showing of good faith by stopping at filling station some distance away and procuring help for person injured does not exculpate. *S. v. Brown*, 681.

22-2. Writing must describe the land with certainty or refer to matters *aliunde* from which description can be made certain. *Searcy v. Logan*, 562.

Verbal agreement to lease for one year with privilege of renewal for four successive years comes within statute of frauds. *Wright v. Allred*, 113.

Verbal agreement by remainderman to rent lands during life of life tenant comes within statute of frauds. *Davis v. Lovick*, 252.

General denial of contract as alleged is sufficient pleading of statute of frauds. *Harvey v. Linker*, 711.

28-31. When will is found after letters of administration have been issued, letters must be revoked. *Harrison v. Carter*, 36.

28-33. Upon revocation of letters of administration, clerk is required to immediately appoint successor, the law contemplating a continuity in succession until estate is fully administered. *Harrison v. Carter*, 36.

GENERAL STATUTES CONSTRUED—*Continued.*

G. S.

28-105. Proceeds of sale of lands by personal representative to make assets remain realty until all liens against land are paid in order of priority. *Moore v. Jones*, 149.

28-111. Where claim against estate is not referred and is rejected, action thereon is barred in six months of receipt of notice of rejection. *Craver v. Spaugh*, 450.

28-172; 28-173; 28-174; 28-175. Causes of action for wrongful injury survive, and when injury results in death, recovery may be had for suffering and medical expenses incurred prior to death and damages for wrongful death. *Hoke v. Greyhound Corp.*, 332.

28-172; 28-181. Cause of action which survives against successor personal representative also survives in his favor. *Harrison v. Carter*, 36.

31-1. Statute does not require that widow give notice to executor or devisees of intention to dissent from will. *In re Estate of Smith*, 169.

41-4. To determine effectiveness of limitation over the roll must be called as of the date of the death of the first taker. *Turpin v. Jarrett*, 135.

41-11. Does not apply to petition by trustee and adult beneficiaries to sell part of realty to preserve and protect bulk of trust property. *Trust Co. v. Rasberry*, 586.

42-3. When lease contains no forfeiture clause for failure to pay rent this statute applies, and forfeiture under the statute is not effective until expiration of ten days after demand. *Trust Co. v. Frazelle*, 724.

42-26; 42-28. Jurisdiction of justice of the peace in summary ejectment is purely statutory, and one of jurisdictional facts is existence of relationship of landlord and tenant. *Howell v. Branson*, 264.

49-2. Warrant or indictment must charge that failure to support illegitimate child was willful. *S. v. Morgan*, 414. 28-112.

50-3. Requirement that summons be returnable to county in which either plaintiff or defendant reside is not jurisdictional but relates to venue. *Smith v. Smith*, 506.

50-5. In action for divorce on ground of adultery, allegation that misconduct was without adequate provocation is not required. *Brooks v. Brooks*, 280. Complaint *held* sufficient to state cause of action for divorce on ground of adultery. *Pearce v. Pearce*, 307.

50-5 (4); 50-6. Evidence that plaintiff took temporary work in another state, but intended to return to this State and remain a citizen of North Carolina *held* sufficient. *Welch v. Welch*, 541.

50-6. Evidence of cohabitation during plaintiff's furloughs less than two years before institution of action *held* sufficient to divorce on ground of separation. *Mason v. Mason*, 740.

50-7. Divorce from bed and board may be granted on any ground set forth in the statute. *Lawrence v. Lawrence*, 624.

50-7 (4). In action under this section, plaintiff must set out with particularity language and conduct of defendant relied upon and allege and prove that such misconduct was without adequate provocation. *Lawrence v. Lawrence*, 624; *Brooks v. Brooks*, 280.

Allegation of actual physical violence is not required. *Pearce v. Pearce*, 307. Complaint *held* sufficient to allege cause for divorce from bed and board. *Ibid.*

GENERAL STATUTES CONSTRUED—*Continued.*

G. S.

50-11. Proviso of statute that absolute divorce on grounds of two years separation should not affect alimony under prior decrees relates to alimony allowed by decree of court and not to allowances under prior separation agreement. *Stanley v. Stanley*, 129.

50-15. Statute does not provide that adultery of wife bars right to subsistence *pendente lite*. *Lawrence v. Lawrence*, 221.

50-16. Prior separation agreement which provides subsistence to wife does not deprive her of right to order of court for subsistence *pendente lite*. *Butler v. Butler*, 594.

In suit for alimony without divorce, plaintiff is not required to file affidavit provided in G. S., 50-8, but is required to verify complaint. *Hodges v. Hodges*, 570.

Cross-action for alimony without divorce cannot be maintained in husband's action for divorce on ground of separation. *Ericson v. Ericson*, 474.

Evidence *held* insufficient to show constructive abandonment, G. S., 50-7 (1), relied on as predicate for alimony without divorce. *Blanchard v. Blanchard*, 152.

Since adultery alone is sufficient ground for alimony without divorce, failure of complaint, alleging adultery and causes of action for divorce from bed and board, to allege that defendant's misconduct was without provocation, is not fatal. *Brooks v. Brooks*, 280.

52-12; 52-13. Deed of separation not executed as required by statute is void. *Pearce v. Pearce*, 307.

53-90. Provisions of this statute are only statutory provisions becoming part of bank cashier's fidelity bond. *Indemnity Co. v. Hood*, 706. Payment of premiums for successive years on bond of official during continuous employment by bank, does not have effect of making insurer liable for penal sum for each year. *Ibid.*

55-38. Defendant corporation *held* "doing business" in this State so as to subject it to service of process by service on the Secretary of State. *Harrison v. Corley*, 184.

55-153. Exceptions filed and made a part of record are not void as matter of law because not filed within first three days of term of court commencing next after filing of receiver's report. *Benson v. Roberson*, 103.

63-4. County and cities located therein may lawfully join in the construction and maintenance of joint airport. *Airport Authority v. Johnson*, 1.

96-10 (e). Is retroactive as well as prospective in effect. *B-C Remedy Co. v. Unemployment Compensation Comm.*, 52.

105-382. Where tax collector accepts check and issues tax receipt, but upon return of check without negligence in presenting it, immediately corrects records, he may institute suit for taxes. *Miller v. McConnell*, 28.

105-414. In action under this statute limitations prescribed by C. S., 441, 8037, are not applicable. *Miller v. McConnell*, 28. Order of foreclosure is limited to real estate described in complaint. *Ibid.*

108-17; 108-44. Administration of old age assistance and aid to dependent children is for special purpose with special approval of Legislature. *R. R. v. Duplin County*, 719.

GENERAL STATUTES CONSTRUED—*Continued.*

G. S.

110-39. To aid and abet "in moral delinquency" is not synonymous with causing a minor to be "adjudged a delinquent." *S. v. Bullins*, 142.

128-24 (2); 143-166. Policeman who is member of Officers' Benefit and Retirement Fund is not eligible for membership in Local Governmental Employees' Retirement System. *Gardner v. Retirement System*, 465.

136-67. Neither way of ingress and egress existing by consent of landowner nor easement obtained by prescription is neighborhood public road. *Speight v. Anderson*, 492.

136-96. Withdrawal from dedication *held* effective. *Foster v. Atwater*, 472. Withdrawal of dedication *held* ineffectual as against vested appurtenant rights of purchasers of lots in subdivision. *Evans v. Evans*, 581. Statute does not apply to lot purchased prior to its effective date. *Ibid.*

147-68. Additional costs provided by G. S., 143-166, are public funds to be disbursed as required by law. *Gardner v. Retirement System*, 465.

153-9 (6). Where tax rate for general purposes is 15 cents, tax rate for poor is limited to 5 cents, but additional levy may be made for administration of old age assistance and aid to dependent children, and salaries of county accountant and farm agent. *R. R. v. Duplin County*, 719.

153-20. Emoluments of chairman of board of county commissioners may not be increased upon his appointment as manager when no additional duties are imposed. *Stansbury v. Guilford County*, 41.

153-114. County Commissioners may amend records to make them speak the truth and to conform to this statute. *R. R. v. Duplin County*, 719.

160-54. City is required to provide handrails and sufficient light at bridge when appropriate in discharge of duty to maintain streets in reasonably safe condition. *Hunt v. High Point*, 74.

160-175; 160-176. Neither zoning ordinance nor amendment thereto which is not adopted in accordance with statute is valid. *Kass v. Hedgpeth*, 405.

160-178. Decision of municipal board of adjustment is reviewable solely for errors of law. *Lee v. Board of Adjustment*, 107. Optionee has no present right to erect building, and therefore withholding of building permit from him cannot in law impose "undue and unnecessary hardship." *Ibid.* Board of adjustment has no authority to amend zoning regulation and permit erection of nonconforming structure. *Ibid.*

160-179. Injunction authorized by this section applies only to enforcement of zoning regulations promulgated under zoning act. *Clinton v. Ross*, 682.

160-200. General statute does not confer power on municipalities to enjoin construction of addition to tobacco warehouse. *Kass v. Hedgpeth*, 405.

160-204; 160-205. City of Charlotte has power to condemn land for sewer line to serve community outside its limits. *Charlotte v. Heath*, 750.

163-147. Where there are two or more vacancies for Supreme Court to be filled by nomination, candidate must designate which vacancy he seeks nomination. *Ingle v. Board of Elections*, 454.

CONSTITUTION OF NORTH CAROLINA, SECTIONS OF, CONSTRUED.

ART.

I, sec. 11. Introduction of incriminating papers taken from accused does not violate this section. *S. v. Shoup*, 69.

I, sec. 16. Imprisonment of husband for failure to pay simple judgment for debt due wife under separation agreement not adopted as order of court violates this section. *Stanley v. Stanley*, 129.

IV, sec. 8. Jurisdiction of Supreme Court on appeal is limited to matters of law or legal inference. *S. v. Thompson*, 651.

IV, sec. 27. Jurisdiction of justice of the peace in summary ejectment is purely statutory. *Howell v. Branson*, 264.

V, sec. 4. Bonds maturing 1 July, 1945, and paid when due are outstanding at the end of fiscal year 1944-1945 even though funds for payment are made available by county prior to end of fiscal year. *Coe v. Surry County*, 125.

V, sec. 6. Upkeep of county buildings, county home, and expenses of holding courts and maintenance of jail and jail prisoners, are general county expenses limited to tax rate of 15 cents. *R. R. v. Duplin County*, 719.

XIV, sec. 3. Moneys paid into hands of State Treasurer by virtue of State law are State funds. *Gardner v. Retirement System*, 465.

XIV, sec. 7. Acceptance of judgeship of United States Zonal Court by judge of Superior Court would constitute double office holding. *In re Phillips*, 773.