NORTH CAROLINA REPORTS

VOLUME 227

This book is an exact photo-reproduction of the original Volume 227 of North Carolina Reports that was published in 1947.

Published by
THE STATE OF NORTH CAROLINA
RALEIGH
1979

Reprinted by
EDWARDS & BROUGHTON COMPANY
RALEIGH, NORTH CAROLINA

NORTH CAROLINA REPORTS

VOL. 227

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1946

SPRING TERM, 1947

FALL TERM, 1947

REPORTED BY

JOHN M. STRONG

RALEIGH
BYNUM PRINTING COMPANY
PRINTERS TO THE SUPREME COURT
1947

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.	9 Iredell Law	as	31	N. C.
1 Haywood	"	2	"	10 " "	"	32	"
2 "	"	3	"	11 " "	"	33	"
1 and 2 Car. Law Repository & N. C. Term	"	4	"	12 " "	"	34	"
1 Murphey	"	5	"	13 " "	"	35	"
2 "	"	6	"	1 " Eq.	"	36	"
3 "	"	7	"	2 " "	"	37	"
1 Hawks	"	8	"	3 " "	"	38	"
2 "	"	9	"	4 " "	"	39	"
3 "	"	10	"	5 " "	"	40	"
4 "	"	11	"	6 " "	"	41	"
1 Devereux Law	"	12	"	7 " "	"	42	"
2 " "	"	13	"	8 " "	"	43	"
3 " "	"	14	"	Busbee Law	"	44	"
4 " "	"	15	"	" Eq.	"	45	"
1 " Eq.	"	16	"	1 Jones Law	"	46	"
2 " "	"	17	"	2 " "	"	47	"
1 Dev. & Bat. Law	"	18	"	3 " "	"	48	"
2 " "	"	19	"	4 " "	"	49	"
3 & 4 " "	"	20	"	5 " "	"	50	"
1 Dev. & Bat. Eq.	"	21	"	6 " "	"	51	"
2 " "	"	22	"	7 " "	"	52	"
1 Iredell Law	"	23	"	8 " "	"	53	"
2 " "	"	24	"	1 " Eq.	"	54	"
3 " "	"	25	"	2 " "	"	55	"
4 " "	"	26	"	3 " "	"	56	"
5 " "	"	27	"	4 " "	"	57	"
6 " "	"	28	"	5 " "	"	58	"
7 " "	"	29	"	6 " "	"	59	"
8 " "	"	30	"	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, 1946—SPRING TERM, 1947—FALL TERM, 1947.

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,
PEYTON B. ABBOTT.†

SUPREME COURT REPORTER:

JOHN M. STRONG.

CLERK OF THE SUPREME COURT:

ADRIAN J. NEWTON.

MARSHAL AND LIBRARIAN:

DILLARD S. GARDNER.

*Resigned 1 July, 1947.
†Appointed 1 July, 1947.

JUDGES

OF THE

SUPERIOR COURTS OF NORTH CAROLINA

EASTERN DIVISION

Name	*District*	*Address*
C. E. Thompson[1]	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.
Paul B. Edmundson[2]	Goldsboro

WESTERN DIVISION

John H. Clement	Eleventh	Winston-Salem.
H. Hoyle Sink	Twelfth	Greensboro.
William G. Pittman	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[3]	Lexington.
George B. Patton[4]	Franklin
Charles L. Coggin[5]	Salisbury
George A. Shuford[6]	Asheville

EMERGENCY JUDGES

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

[1]Deceased. Succeeded by Chester R. Morris, Currituck, 25 March, 1947.
[2]Appointed 6 February, 1947.
[3]Resigned 1 September, 1947.
[4]Appointed 6 February, 1947.
[5]Appointed 1 September, 1947.
[6]Appointed 16 October, 1947.

SOLICITORS

EASTERN DIVISION

Name	*District*	*Address*
CHESTER R. MORRIS[1]	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[2]	Eleventh	Winston-Salem.
J. LEE WILSON[3]	Twelfth	Greensboro.
THOMAS G. NEAL[4]	Thirteenth	Laurinburg.
BASIL L. WHITENER	Fourteenth	Gastonia.
CHARLES L. COGGIN[5]	Fifteenth	Salisbury.
FOLGER TOWNSEND[6]	Sixteenth	Lenoir.
AVALON E. HALL	Seventeenth	Yadkinville.
C. O. RIDINGS	Eighteenth	Forest City.
JAMES S. HOWELL[7]	Nineteenth	Asheville.
JOHN M. QUEEN[8]	Twentieth	Waynesville.
R. J. SCOTT	Twenty-first	Danbury.

[1]Resigned 25 March, 1947. Succeeded by John W. Graham, Edenton, 28 March, 1947.
[2]Succeeded 1 January, 1947, by Walter E. Johnston, Jr.
[3]Succeeded 1 January, 1947, by Charles T. Haggan, Greensboro.
[4]Succeeded by M. G. Boyette, Carthage, 1 January, 1947.
[5]Resigned 1 September, 1947. Succeeded by John R. McLaughlin, Statesville.
[6]Succeeded 1 January, 1947, by James C. Farthing, Lenoir.
[7]Succeeded 1 January, 1947, by W. K. McLean, Asheville.
[8]Succeeded 1 January, 1947, by Dan K. Moore, Sylva.

SUPERIOR COURTS, FALL TERM, 1947

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 Parker

Beaufort—Sept. 15* (A); Sept. 22†; Oct. 6†; Nov. 3* (A); Dec. 1†.
Camden—Aug. 25.
Chowan—Sept. 8; Nov. 24.
Currituck—Sept. 1.
Dare—Oct. 20.
Gates—Nov. 17.
Hyde—Aug. 18†; Oct. 13.
Pasquotank—Sept. 15†; Oct. 6† (A) (2); Nov. 3†; Nov. 10*.
Perquimans—Oct. 27.
Tyrrell—Sept. 29.

SECOND JUDICIAL DISTRICT

Judge Williams

Edgecombe—Sept. 8; Oct. 13; Nov. 10† (2).
Martin—Sept. 15 (2); Nov. 17† (A) (2); Dec. 8.
Nash—Aug. 25; Sept. 15† (A) (2); Oct. 6†; Nov. 24*; Dec. 1†.
Washington—July 7; Oct. 20†.
Wilson—Sept. 1; Sept. 29†; Oct. 20* (A); Oct. 27† (2); Dec. 1 (A).

THIRD JUDICIAL DISTRICT

Judge Frizzelle

Bertie—Aug. 25 (2); Nov. 10 (2).
Halifax—Aug. 11 (2); Sept. 29† (A) (2); Oct. 20* (A); Nov. 24 (2).
Hertford—July 28; Oct. 13 (2).
Northampton—Aug. 4; Oct. 27 (2).
Vance—Sept. 29*; Oct. 6†.
Warren—Sept. 15*; Sept. 22†.

FOURTH JUDICIAL DISTRICT

Judge Stevens

Chatham—July 28† (2); Oct. 20.
Harnett—Sept. 1* (A); Sept. 15†; Sept. 29† (A) (2); Nov. 10* (2).
Johnston—Aug. 11*; Sept. 22† (2); Oct. 13 (A); Nov. 3†; Nov. 10† (A); Dec. 8 (2).
Lee—July 14*; July 21†; Sept. 8†; Sept. 15† (A); Oct. 27*; Dec. 8† (A).
Wayne—Aug. 18; Aug. 25† (2); Oct. 6† (2); Nov. 24 (2).

FIFTH JUDICIAL DISTRICT

Judge Harris

Carteret—Oct. 13; Dec. 1†.
Craven—Sept. 1*; Sept. 29† (2); Nov. 17† (2).
Greene—Dec. 1 (A); Dec. 8; Dec. 15.
Jones—Aug. 11†; Sept. 15; Dec. 8 (A).
Pamlico—Nov. 3 (2).
Pitt—Aug. 18†; Aug. 25; Sept. 8†; Sept. 22†; Oct. 20†; Oct. 27; Nov. 17† (A).

SIXTH JUDICIAL DISTRICT

Judge Burney

Duplin—July 21*; Aug. 25† (2); Sept. 29*; Dec. 1† (2).
Lenoir—Aug. 18*; Sept. 8 (A); Sept. 22†; Oct. 27 (A); Nov. 3† (2).
Onslow—July 14‡; Oct. 6; Nov. 17† (2).
Sampson—Aug. 4 (2); Sept. 8† (2); Oct. 20; Oct. 27†.

SEVENTH JUDICIAL DISTRICT.

Judge Nimocks

Franklin—Sept. 15† (2); Oct. 6*; Nov. 24† (2).
Wake—July 7*; Sept. 1* (2); Sept. 15† (A) (2); Sept. 29*; Oct. 13† (3); Nov. 3*; Nov. 10† (2); Nov. 24† (A); Dec. 1* (A) (2); Dec. 15†.

EIGHTH JUDICIAL DISTRICT

Judge Carr

Brunswick—Sept. 1; Sept. 15†.
Columbus—Aug. 25*; Sept. 22† (2); Nov. 10*; Nov. 17† (2).
New Hanover—July 21*; Aug. 11†; Aug. 18*; Oct. 6† (2); Oct. 27*; Nov. 3; Dec. 1† (2).
Pender—July 14†; Sept. 8*; Oct. 20†.

NINTH JUDICIAL DISTRICT

Judge Morris

Bladen—Aug. 4†; Sept. 15.*
Cumberland—Aug. 25*; Sept. 22† (2); Oct. 6* (A); Oct. 20† (2); Nov. 17* (2).
Hoke—July 28†; Aug. 18; Nov. 10.
Robeson—July 7† (2); Aug. 11*; Aug. 25† (A); Sept. 1* (2); Sept. 22* (A); Oct. 6† (2); Oct. 20* (A); Nov. 3*; Nov. 10† (A); Dec. 1† (2); Dec. 15.*

TENTH JUDICIAL DISTRICT

Judge Bone

Alamance—July 28†; Aug. 11*; Sept. 1† (2); Nov. 10† (A) (2); Nov. 24.*
Durham—July 14*; July 28† (A) (2); Sept. 1* (A) (2); Sept. 15† (2); Sept. 29† (A); Oct. 6*; Oct. 13† (A) (2); Oct. 27† (2); Dec. 1*.
Granville—July 21; Oct. 20†; Nov. 10.
Orange—Aug. 18; Aug. 25†; Sept. 29†; Dec. 8
Person—Aug. 4; Oct. 13.

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT
Judge Armstrong

Ashe—July 21† (2); Oct. 20*:
Alleghany—Sept. 29.
Forsyth—June 30* (2); Sept 1* (2); Sept. 15† (2); Sept. 29† (A); Oct. 6* (2); Oct. 20† (A); Oct. 27†; Nov. 10*; Nov. 17† (2); Dec. 1* (2).

TWELFTH JUDICIAL DISTRICT
Judge Warlick

Davidson—Aug. 18; Sept. 8† (2); Sept. 29† (A) (2); Nov. 17 (A) (2).
Guilford—Greensboro Division: July 7*; July 28*; Aug. 25† (2); Aug. 25* (A); Sept. 8* (A); Sept. 22† (3); Sept. 22* (A); Oct. 13*; Oct. 27* (3); Nov. 17† (2); Dec. 1† (A) (2); Dec. 1*; Dec. 15*.
Guilford—High Point Division: July 14*; Aug. 4†; Sept. 15* (A); Oct. 20*; Oct. 27† (A) (2); Dec. 8*.

THIRTEENTH JUDICIAL DISTRICT
Judge Rousseau

Anson—Sept. 8†; Sept. 22*; Nov. 10†.
Moore—Aug. 11*; Sept. 15†; Sept. 22† (A).
Richmond—July 14†; July 21*; Sept. 1†; Sept. 29*; Nov. 3†.
Scotland—Aug. 4; Oct. 27†; Nov. 24 (2).
Stanly—July 7; Sept. 1† (A) (2); Oct. 6†; Nov. 17.
Union—Aug. 18 (2); Oct. 13 (2).

FOURTEENTH JUDICIAL DISTRICT
Judge Pless

Gaston—July 21*; July 28† (2); Sept. 8* (A); Sept. 15† (2); Oct. 27† (A); Nov. 24* (A); Dec. 1† (2).
Mecklenburg—July 7* (2); July 28* (A) (2); Aug. 11* (2); Aug. 25*; Sept. 1† (2); Sept. 1† (A) (2); Sept. 15† (A) (2); Sept. 15* (A) (2); Sept. 29*; Sept. 29† (A) (2); Oct. 6† (2); Oct. 13† (A) (2); Oct. 27† (2); Oct. 27† (A) (2); Nov. 10*; Nov. 10† (A) (2); Nov. 17† (2); Nov. 24† (A) (2); Dec. 1* (A) (2); Dec. 8† (A); Dec. 15†.

FIFTEENTH JUDICIAL DISTRICT
Judge Nettles

Alexander—Aug. 25 (A) (2).
Cabarrus—Aug. 18*; Aug. 25†; Oct. 13 (2); Nov. 10† (A); Dec. 1† (A).
Iredell—July 28 (2); Nov. 3 (2).
Montgomery—July 7; Sept. 22†; Sept. 29; Oct. 27†.
Randolph—July 14† (2); Sept. 1*; Oct. 20† (A) (2); Dec. 1 (2).
Rowan—Sept. 8 (2); Oct. 6†; Oct. 13† (A); Nov. 17 (2).

SIXTEENTH JUDICIAL DISTRICT
Judge Alley

Burke—Aug. 4 (2); Sept. 22 (3); Dec. 8 (2).
Caldwell—Aug. 18 (2); Sept. 29† (A) (2); Nov. 24 (2).
Catawba—June 30 (2); Sept. 1† (2); Nov. 10*; Nov. 17†; Dec. 1† (A).
Cleveland—July 21 (2); Sept. 8† (2); Oct. 27 (2).
Lincoln—July 14; Oct. 13† (2).
Watauga—Sept. 15; Sept. 22 (A).

SEVENTEENTH JUDICIAL DISTRICT
Judge Clement

Avery—June 30 (2); Oct. 13 (2).
Davie—Aug. 25; Dec. 1†.
Mitchell—July 21† (2); Sept. 15 (2).
Wilkes—Aug. 4 (3); Sept. 29† (2); Dec. 8 (2).
Yadkin—Sept. 1; Nov. 17† (2).

EIGHTEENTH JUDICIAL DISTRICT
Judge Sink

Henderson—Oct. 6 (2); Nov. 17† (2).
McDowell—July 7† (2); Sept. 1 (2).
Polk—Aug. 18 (2).
Rutherford—Sept. 22† (2); Nov. 3 (2).
Transylvania—July 21 (2); Dec. 1 (2).
Yancey—Aug. 4 (2); Oct. 20† (2).

NINETEENTH JUDICIAL DISTRICT
Judge Pittman

Buncombe—July 7† (2); July 14 (A) (2); July 21*; July 28; Aug. 4† (2); Aug. 18*; Aug. 18 (A) (2); Sept. 1† (2); Sept. 15*; Sept. 15 (A) (2); Sept. 29† (2); Oct. 13*; Oct. 13 (A) (2); Oct. 27; Nov. 3† (2); Nov. 17*; Nov. 17 (A) (2); Dec. 1† (2); Dec. 15*; Dec. 15 (A) (2).
Madison—Aug. 25; Sept. 22; Oct. 20; Nov. 24.

TWENTIETH JUDICIAL DISTRICT
Judge Gwyn

Cherokee—Aug. 4 (2); Nov. 3 (2).
Clay—Sept. 29.
Graham—Sept 1 (2).
Haywood—July 7 (2); Sept. 15† (2); Nov. 17 (2).
Jackson—Oct. 6 (2).
Macon—Aug. 18 (2); Dec. 1 (2).
Swain—July 21 (2); Oct. 20 (2).

TWENTY-FIRST JUDICIAL DISTRICT
Judge Bobbitt

Caswell—June 30; Nov. 10 (2).
Rockingham—Aug. 4* (2); Sept. 1† (2); Oct. 20†; Oct. 27* (2); Nov. 24† (2); Dec. 8*.
Stokes—Aug. 18; Oct. 6*; Oct. 13†.
Surry—July 7 (2); Sept. 15; Sept. 22 (2); Dec. 15.

---

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

UNITED STATES COURTS FOR NORTH CAROLINA

DISTRICT COURTS

Eastern District—DON GILLIAM, *Judge*, Wilson.
Middle District—JOHNSON J. HAYES, *Judge*, Greensboro.
Western District—EDWIN YATES WEBB, *Judge*, Shelby.

EASTERN DISTRICT

Terms—District courts are held at the time and place as follows:

Raleigh, criminal term, fifth Monday after the fourth Monday in March and September; civil term, second Monday in March and September. A. HAND JAMES, Clerk.

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

Elizabeth City, fourth Monday in March and September. SADIE A. HOOPER, Deputy Clerk, Elizabeth City.

Washington, first Monday after the fourth Monday in March and September. GEO. TAYLOR, 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.
JOHN B. MCMULLAN, Elizabeth City, HOWARD H. HUBBARD, Clinton, Assistant United States Attorneys.
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, 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. OSCAR L. MCLURD, Clerk; WILLIAM A. LYTLE, Chief Deputy Clerk; VERNE E. BARTLETT, Deputy Clerk; MISS NOREEN WARREN, 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. OSCAR L. MCLURD, Clerk, Asheville.

Bryson City, fourth Monday in May and November. OSCAR L. MCLURD, 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.
OSCAR L. MCLURD, Clerk United States District Court, Asheville.

LICENSED ATTORNEYS

SPRING TERM, 1947; FALL TERM, 1947.

I, Edward L. Cannon, Secretary of the Board of Law Examiners of the State of North Carolina, do certify that the following named persons have duly passed examinations of the Board of Law Examiners as of the 27th day of March, 1947:

BOUTWELL, RUFUS CECIL, JR. ..... Durham.
CHAPPELL, STANTON HARRY ..... Candor.
FULK, FRANCES HOUSTON ..... Spencer.
HARKEY, HENRY LEE ..... Charlotte.
HILDEBRANDT, THOMAS GEORGE ..... Durham.
JAMES, JOSHUA STUART ..... Maple Hill.
LANGFORD, JOHN WILLIS ..... Durham.
LEE, SILAS POE ..... Willow Springs.
LEONARD, JOSEPH HAYWORTH ..... Lexington.
PAGE, JULIUS SWOFFORD ..... Drexel.
POTEAT, WILLIAM MORGAN ..... Wake Forest.
RENDLEMAN, WILLIAM JACOB ..... Salisbury.
SHUFORD, FORREST HERMAN, II ..... Raleigh.
SMITH, WILLIS, JR. ..... Raleigh.
STOTHART, EDWARD CLARENCE, JR. ..... Charlotte.
WHITLEY, WILFORD LLEWELLYN, JR. ..... Plymouth.
WILKINS, WILLIAM YARBOROUGH, JR. ..... Tryon.

BY COMITY

BAREFOOT, WILEY B. ..... Dunn, from District of Columbia
REED, NORRIS CUMMINGS, JR. ..... Trenton, from District of Columbia

Given over my hand and the seal of the Board of Law Examiners, this the 27th day of March, 1947.

(SEAL)

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

I, Edward L. Cannon, Secretary of the Board of Law Examiners of the State of North Carolina, do certify that the following named persons have duly passed examinations of the Board of Law Examiners as of the 8th day of August, 1947:

ALEXANDER, ELRETA MELTON ..... Greensboro.
BRADLEY, S. B. ..... Scotland Neck.
BRIGGS, JOHN HILERY, JR. ..... Lexington.
BRITT, NEILL LASANE ..... McDonald.
BROWDER, BANNISTER RANDOLPH, JR. ..... Winston-Salem.
BROWN, WILLIAM LAMONT ..... Pine Bluff.
BURKHIMER, WALTON PETER ..... Wilmington.
CARROLL, SEAVY ALEXANDER WESLEY ..... Fayetteville.
CARTER, MILTON FARRELL ..... Winston-Salem.
COHN, ROBERT ..... Winston-Salem.
DENNING, OLIVER TRENTON ..... Raleigh.
DILL, THOMAS GREEN ..... New Bern.

DONNELL, JACK LINDON.....Climax.
EDWARDS, BENNETT MOORE.....Wadesboro.
ELMORE, BRUCE ALEXANDER.....Bryson City.
FARMER, FANNIE MEMORY.....Raleigh.
FARRIS, ROBERT ARTHUR.....Wilson.
FLOYD, WALTER HAMMOND.....Tabor City.
GATLIN, MARVIN JACKSON.....Franklinville.
GAYLORD, LOUIS WOODSON, JR. .....Greenville.
HALL, DAVID MCKEE, JR. .....Sylva.
HATFIELD, WESTON POOLE.....Hickory.
HAYNES, WILLIAM COOK WILKINSON.....Charlotte.
HEAZEL, FRANCIS JAMES, JR.....Asheville.
HOGUE, CYRUS DUNLAP, JR. .....Wilmington.
HOLDEN, JOHN STALEY.....Louisburg.
HORN, CARL, JR. .....Salisbury.
HOWELL, LOGAN DOUGLAS.....Raleigh.
IRWIN, LEO HOWARD.....Sparta.
JENKINS, WILLIAM HARVARD.....Aulander.
KENNEY, WILFRED ALEXANDER.....Durham.
MCCORMICK, MILES JOSEPH.....Chapel Hill.
MCKINNON, HENRY ALEXANDER, JR. .....Lumberton.
MASHBURN, CHARLES EDWIN.....Marshall.
MOSER, THADDEUS HERNDON TUTTLE.....Asheboro.
MOUNT, LILLARD HAND.....Durham.
MURRAY, ROBERT FILGO.....Lenoir.
MYERS, CHARLES TRUETT.....Charlotte.
NIPPER, JULIAN RUSSELL.....Raleigh.
NORMAN, WINFORD WALTER.....Ararat.
PARROTT, MARION ARENDELL.....Kinston.
PEACOCK, CARVER, J. .....Durham.
POISSON, LOUIS JULIEN, JR. .....Wilmington.
POWELL, WALTER HOGUE, JR. .....Whiteville.
PRITCHARD, WARREN HARDING.....Spruce Pine.
REAVIS, DAVID LEE.....Winston-Salem.
REGAN, JAMES WILLIAM.....Lexington.
RENDLEMAN, JOHN THOMAS.....Salisbury.
RODMAN, OWEN GUION.....Washington.
SANSOM, JAMES JOSEPH, JR. .....Durham.
SAWYER, THOMAS BENJAMIN.....Greensboro.
SHUPING, CLARENCE LEROY, JR. .....Greensboro.
WARD, WILLIAM IRA, JR. .....Graham.
WATERS, ROBERT EDWARD.....Wilmington.
WHEELER, JOHN HERVEY.....Durham.
WOMBLE, CALDER WILLINGHAM.....Winston-Salem.
WOODALL, JACK CHARLES.....Durham.
WOODHOUSE, NOEL ROBERT SEYMOUR.....Chapel Hill.
WOOTEN, KENNETH FAY, JR. .....Raleigh.

BY COMITY

MAHONEY, JOHN JOSEPH, JR. .....Shelby, from Massachusetts
MCCONNELL, DAVID MOFFATT.....Charlotte, from South Carolina
RAMM, HANS HENRY.....Winston-Salem, from New York
WEASLER, GEORGE LEO.....Charlotte, from Minnesota

FINN, PHILIP SUDER, JR., Hendersonville—License ordered issued upon compliance with rules, having passed the written examination of March, 1947.

GEARHART, CALVIN REECE, Ashland, Kentucky—Passed written examination, license not issued at this date for failure to comply with the rules as to residence.

HANKS, WILLIAM JOSEPH, Purcell, Oklahoma—Passed written examination, license not issued at this date for failure to comply with the rules as to residence.

Given over my hand and the seal of the Board of Law Examiners, this the 8th day of October, 1947.

(SEAL)

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

CASES REPORTED

A

	PAGE
Adoption Statute, *In re Advisory* Opinion	708
Advisory Opinion *in re* House Bill No. 65	708
Advisory Opinion *in re House* Bill No. 276	705
Akin v. Bank	453
Allen, Privette v.	164
Artis, S. v.	371
Atlantic Coast Line R. R., Boyette v.	406
Atlantic Coast Line R. R., Coburn v.	695
Atlantic Coast Line R. R., Davis v.	561
Atlantic Greyhound Corp., Hoke v.	374
Atlantic Greyhound Corp., Hoke v.	412
Austin v. Hopkins	638

B

Baird, S. v.	517
Baker, Thomas v.	226
Baldwin, Sonotone Corp. v.	387
Bank, Akin v.	453
Bank v. Cherry	105
Bank v. Deal	691
Bank, Wescott v.	39
Bank, Wescott v.	644
Banks v. Shaw	172
Battle, *In re*	672
Bearden, Development Co. v.	124
Bell v. Brown	319
Bell v. Lumber Co.	173
Bell, S. v.	527
Benbow, Edwards v.	466
Benson, Smith v.	56
Beshears, Presnell v.	279
Bingham, Strickland v.	221
Blair, S. v.	70
Blanton, S. v.	517
Blue Bird Cab Co., Holmes v.	581
Board of Education v. Gallop	599
Boldin, S. v.	594
Boney v. Parker	350
Bottoms Truck Lines, Brown v.	65
Bottoms Truck Lines, Brown v.	299
Boyan v. Power Co.	697
Boyce v. Gastonia	139
Boyce v. White	640

	PAGE
Boyette v. R. R.	406
Boyles, S. v.	475
Brandis v. Trustees of Davidson College	329
Braxton, Suggs v.	50
Braznell, Trust Co. v.	211
Briggs, Haywood v.	108
Bright v. Bright	704
Brigman, English v.	260
Brockwell, Dixon v.	567
Brockwell, Martin v.	567
Brockwell, Wakefield v.	567
Brown, Bell v.	319
Brown, S. v.	383
Brown v. Truck Lines	65
Brown v. Truck Lines	299
Brunson, S. v.	558
Building Co., v. Jones	282
Building Corp., Tuttle v.	146
Bus Line, Utilities Com. v.	679

C

Cab Co., Holmes v.	581
Cab Co., Smith v.	572
Cab Co., Stewart v.	368
Camel City Cab Co., Smith v.	572
Cameron, Chandler v.	233
Cannon, S. v.	336
Cannon, S. v.	338
Carolina Casualty Insurance Co., Carroll v.	456
Carolina Upholstery Co., Lee v.	88
Carroll v. Insurance Co.	456
Carter, Harris v.	262
Carter v. Lilley	435
Carter v. Motor Lines	193
Carter Fabrics Corp., Proctor v.	698
Casualty Insurance Co., Carroll v.	456
Cauble v. Trexler	307
Cedar Works, Riddick v.	647
Chandler v. Cameron	233
Charlotte, Ledbetter, Treas. of. Purser v.	1
Charlotte Firemen's Retirement Asso., Trustees of, v. Wentz	117
Cherry, Land Bank v.	105
Cherry, S. v.	650
Childs, S. v.	558
Church, Penland v.	699
City Cab Co., Smith v.	572
City Coach Co. v. Transit Co.	391

PAGE

City of Charlotte Firemen's Retirement Asso., Trustees of, v. Wentz 117
City of Charlotte, Ledbetter, Treas. of, Purser v. 1
City of Elizabeth City, Lumber Co. v. 270
City of Elizabeth City, Winslow v. 270
City of Gastonia, Boyce v. 139
City of Winston-Salem, Ledford v. 698
Clary, Finance Co. v. 247
Coach Co. v. Transit Co. 391
Coast Line R. R., Boyette v. 406
Coast Line R. R., Coburn v. 695
Coast Line R. R., Davis v. 561
Coble v. Coble 547
Coburn v. R. R. 695
Cogdale, S. v. 59
Colbert v. Collins 395
Cole, S. v. 249
College, Trustees of Wake Forest, Reynolds Foundation v. 500
Collins, Colbert v. 395
Commerce Insurance Co., Manning v. 251
Comr. of Revenue v. McLean 201
Comr. of Revenue, Nesbitt v. 174
Compensation Comm. v. Harvey & Son Co. 291
Compensation Comm. v. Nissen 216
Conrad v. Goss 470
Cooper, Godwin v. 700
Corbett, Creech v. 276
Covington, S. v. 19
Cox v. Johnson 69
Cranford, Tomlins v. 323
Craver v. Spaugh 129
Creech v. Corbett 276
Creighton v. Snipes 90

D

Dave Steel Co., DeVine v. 684
Davenport v. Patrick 686
Davenport, S. v. 475
Davidson College, Trustees of, Brandis v. 329
Davis v. Indemnity Co. 80
Davis v. R. R. 561
Deal, Trust Co. v. 691
DeGraffenreid, S. v. 552

PAGE

DeMai, S. v. 657
Development Co. v. Bearden 124
DeVine v. Steel Co. 684
Dillon v. Wentz 117
Dixon v. Brockwell 567
Douglas, S. v. 696
Drug Co., Klassette v. 353
Duke Power Co., Boyan v. 697
Dupree v. Moore 626

E

Easley, Ingram v. 442
Edney, Russell v. 203
Edwards v. Beabow 466
Edwards v. Publishing Co. 184
Elder v. Johnston 592
Elizabeth City, Lumber Co. v. 270
Elizabeth City, Winslow v. 270
Eller v. Fletcher 345
English v. Brigman 260
Ervin, Wilson v. 396
Etheridge v. Leary 636
Ewing, S. v. 107
Ewing, S. v. 535
Exterminating Co. v. Wilson 96

F

Fabrics Corp., Proctor v. 698
Fairley, S. v. 134
Farmer, S. v. 474
Finance Co. v. Clary 247
Finance Corp. v. Guthrie 431
Firemen's Retirement Asso., Trustees of, v. Wentz 117
First-Citizens National Bank, Wescott v. 39
First-Citizens National Bank, Wescott v. 644
First National Bank, Akin v. 453
Flanner v. Saint Joseph Home 342
Fletcher, Eller v. 345
Flythe v. Wilson 230
Foreman-Blades Lumber Co. v. Elizabeth City 270

G

Gabriel v. Newton 314
Gallop, Board of Education v. 599
Gardner, S. v. 37
Gaskins v. Sidbury 468
Gastonia, Boyce v. 139

PAGE

Gastonia Transit Co., Coach Co. v. ... 391
Gause, S. v. ... 26
General Assembly Subsistence and Travel Allowance, *in re* Constitutionality of Proposed Bill ... 705
General Finance & Thrift Corp. v. Guthrie ... 431
Gentry v. Hot Springs ... 665
Gentry v. Hot Springs ... 668
Gibbs, S. v. ... 677
Gill, Comr. of Revenue, v. McLean ... 201
Gill, Comr. of Revenue, Nesbitt v. 174
Glosson v. Trollinger ... 84
Godwin v. Cooper ... 700
Godwin, S. v. ... 449
Goss, Conrad v. ... 470
Gray v. Weinstein ... 463
Greyhound Corp., Hoke v. ... 374
Greyhound Corp., Hoke v. ... 412
Guthrie, Thrift Corp. v. ... 431

H

Haithcock, S. v. ... 703
Hall, Lowe v. ... 541
Hall, Rogers v. ... 363
Hammett v. Miller ... 10
Harris v. Carter ... 262
Harvey & Son Co., Unemployment Compensation Comm. v. ... 291
Haywood v. Briggs ... 108
Heath, S. v. ... 475
Henderson Bus Line, Utilities Comm. v. ... 679
Hines, Owen v. ... 236
Hodges v. Hodges ... 334
Hoke v. Greyhound Corp. ... 374
Hoke v. Greyhound Corp. ... 412
Holmes v. Cab Co. ... 581
Hooper, S. v. ... 633
Hopkins, Austin v. ... 638
Horton, S. v. ... 250
Hot Springs, Gentry v. ... 665
Hot Springs, Gentry v. ... 668
Hough, S. v. ... 596
House Bill No. 65, *In re* Advisory Opinion ... 708
House Bill No. 276, *In re* Advisory Opinion ... 705
Hunning, S. v. ... 475
Hylton v. Mount Airy ... 622

I

In re Advisory Opinion *in re* House Bill No. 276 ... 705
In re Advisory Opinion *in re* House Bill No. 65 ... 708
In re Battle ... 672
In re Will of Neal ... 136
In re Will of Wallace ... 459
In re Will of West ... 204
Indemnity Co., Davis v. ... 80
Ingram v. Easley ... 442
Inman, S. v. ... 19
Insurance Co., Carroll v. ... 456
Insurance Co., Manning v. ... 251

J

James, S. v. ... 558
Jennette, Palmer v. ... 377
Johnson, Cox v. ... 69
Johnson, S. v. ... 587
Johnson, S. v. ... 702
Johnson v. Wallin ... 669
Johnston, Elder v. ... 592
Joint Stock Land Bank v. Cherry 105
Jones, Building Co. v. ... 282
Jones v. Jones ... 424
Jones, S. v. ... 47
Jones, S. v. ... 94
Jones, S. v. ... 170
Jones, S. v. ... 402
Jones, S. v. ... 475
Jones, S. v. ... 552
Jones, S. v. ... 561
Jones, S. v. ... 703
Jordon, S. v. ... 579
Junior Building Corp., Tuttle v. .. 146

K

Kelly, S. v. ... 62
Kelly, S. v. ... 103
King, S. v. ... 559
Kirksey, S. v. ... 445
Klassette v. Drug Co. ... 353
Klyman, Seligson v. ... 347
Knighten v. McClain ... 682
Koritz, S. v. ... 552

L

Lail, Triplett v. ... 274
Lampkin, S. v. ... 620
Land Bank v. Cherry ... 105
Law, S. v. ... 103

	PAGE
Leary, Etheridge v.	636
Ledbetter, Purser v.	1
Ledford v. Winston-Salem	698
Lee v. Rhodes	240
Lee v. Upholstery Co.	88
Legislative Subsistence and Travel Allowance, *In re* Constitutionality of Proposed Bill	705
Leno, Moche v.	159
Liggett Drug Co., Klassette v.	353
Light Co. v. Sloan	151
Likas, Metros v.	703
Lilley, Carter v.	435
Litteral, S. v.	527
Little, S. v.	701
Lowe v. Hall	541
Lumber Co., Bell v.	173
Lumber Co. v. Elizabeth City	270
Lumber Co., Winston v.	339
Mc	
McCain, S. v.	620
McClain, Knighten v.	682
McLaurin, Walker v.	53
McLean, Gill, Comr. of Revenue, v.	201
McLean v. Townsend	642
McLean, Utilities Comm. v.	679
McLeod, S. v.	411
M	
Manning v. Insurance Co.	251
Manufacturing Co., Marzelle v.	674
Martin v. Brockwell	567
Martin, S. v.	108
Marzelle v. Manufacturing Co.	674
Massengill, Moore v.	244
Mercer, Pinkham v.	72
Messer, S. v.	649
Methodist Church, Penland v.	699
Metros v. Likas	703
Miller, Hammett v.	10
Moche v. Leno	159
Montgomery, S. v.	100
Moore, Dupree v.	626
Moore v. Massengill	244
Moore, S. v.	326
Morgan, Privette v.	264
Moss-Marlow Building Co. v. Jones	282
Motor Lines, Carter v.	193
Motor Co., Taylor v.	365
Mount Airy, Hylton v.	622
Mumford, S. v.	132
N	
Nantahala Power & Light Co. v. Sloan	151
Nash v. Tarboro	283
National Bank, Akin v.	453
National Bank, Wescott v.	39
National Bank, Wescott v.	644
Neal, *In re* Will of	136
Nesbitt v. Gill, Comr. of Revenue	174
Newton, Gabriel v.	314
Nissen, Unemployment Compensation Comm. v.	216
N. C. Board of Education v. Gallop	599
N. C. Joint Stock Land Bank v. Cherry	105
N. C. Unemployment Compensation Comm. v. Harvey & Son Co.	291
N. C. Unemployment Compensation Comm. v. Nissen	216
N. C. Utilities Comm. v. McLean	679
O	
O'Dear, S. v.	649
Orkin Exterminating Co. v. Wilson	96
Owen v. Hines	236
P	
Palmer v. Jennette	377
Parker, Boney v.	350
Patrick, Davenport v.	686
Patuxent Development Co. v. Bearden	124
Pearce v. Rowland	590
Pearson v. Pearson	31
Penland v. Church	699
Phillips v. Phillips	438
Phillips, S. v.	277
Piedmont Publishing Co., Edwards v.	184
Pinkham v. Mercer	72
Polk County, R. R. v.	697
Powell, S. v.	19
Power Co., Boyan v.	697
Power Co. v. Sloan	151

	PAGE
Powers, S. v.	475
Presnell v. Beshears	279
Pritchard, S. v.	168
Privette v. Allen	164
Privette v. Morgan	264
Proctor v. Fabrics Corp.	698
Publishing Co., Edwards v.	184
Purcell, S. v.	560
Purser v. Ledbetter	1

R

Ragland, S. v.	162
R. R., Boyette v.	406
R. R., Coburn v.	695
R. R., Davis v.	561
R. R. v. Polk County	697
Red Hill Methodist Church, Penland v.	699
Retirement Asso., Trustees of, v. Wentz	117
Revels, S. v.	34
Reynolds Foundation v. Trustees of Wake Forest College	500
Rhodes, Lee v.	240
Richmond Cedar Works, Riddick v.	647
Riddick v. Cedar Works	647
Rierson v. York	575
Robinson v. Robinson	155
Rogers v. Hall	363
Rogers, S. v.	67
Rowland, Pearce v.	590
Russell v. Edney	203

S

Saint Joseph Home, Flanner v.	342
St. Paul Mercury & Indemnity Co., Davis v.	80
Sanders, S. v.	474
Seligson v. Klyman	347
Shaw, Banks v.	172
Sheppard v. Sykes	606
Shore, S. v.	517
Sidbury, Gaskins v.	468
Silver, S. v.	352
Ski-Land Manufacturing Company, Marzelle v.	674
Sloan, Light Co. v.	151
Smith v. Benson	56
Smith v. Cab Co.	572
Snipes, Creighton v.	90
Sonotone Corp. v. Baldwin	387
Southern R. R. v. Polk County	697
Spaugh, Craver v.	129
Stanley, S. v.	650
Stafford, Temple v.	630
S. v. Artis	371
S. v. Baird	517
S. v. Bell	527
S. v. Blair	70
S. v. Blanton	517
S. v. Boldin	594
S. v. Boyles	475
S. v. Brown	383
S. v. Brunson	558
S. v. Cannon	336
S. v. Cannon	338
S. v. Cherry	650
S. v. Childs	558
S. v. Cogdale	59
S. v. Cole	249
S. v. Covington	19
S. v. Davenport	475
S. v. DeGraffenreid	552
S. v. DeMai	657
S. v. Douglas	696
S. v. Ewing	107
S. v. Ewing	535
S. v. Fairley	134
S. v. Farmer	474
S. v. Gardner	37
S. v. Gause	26
S. v. Gibbs	677
S. v. Godwin	449
S. v. Haithcock	703
S. v. Heath	475
S. v. Hooper	633
S. v. Horton	250
S. v. Hough	596
S. v. Hunning	475
S. v. Inman	19
S. v. James	558
S. v. Johnson	587
S. v. Johnson	702
S. v. Jones	47
S. v. Jones	94
S. v. Jones	170
S. v. Jones	402
S. v. Jones	475
S. v. Jones	552
S. v. Jones	561
S. v. Jones	703
S. v. Jordon	579

	PAGE
S. v. Kelly	62
S. v. Kelly	103
S. v. King	559
S. v. Kirksey	445
S. v. Koritz	552
S. v. Lampkin	620
S. v. Law	103
S. v. Litteral	527
S. v. Little	701
S. v. McCain	620
S. v. McLæod	411
S. v. Martin	108
S. v. Messer	649
S. v. Montgomery	100
S. v. Moore	326
S. v. Mumford	132
S. v. O'Dear	649
S. v. Phillips	277
S. v. Powell	19
S. v. Powers	475
S. v. Pritchard	168
S. v. Purcell	560
S. v. Ragland	162
S. v. Revels	34
S. v. Rogers	67
S. v. Sanders	474
S. v. Shore	517
S. v. Silver	352
S. v. Stanley	650
S. v. Staton	409
S. v. Sturdivant	560
S. v. Sullivan	680
S. v. Thomas	71
S. v. Thomas	249
S. v. Thompson	19
S. v. Wallace	560
S. v. Warren	380
S. v. Watkins	560
S. v. Whorton	475
S. v. Wilson	43
S. v. Wolfe	461
S. v. Wood	47
S. v. Woolard	645
S. v. Yow	585
State Board of Education v. Gallop	599
State *ex rel.* McLean v. Townsend	642
State *ex rel.* Unemployment Compensation Com. v. Harvey & Son Co.	291
State *ex rel.* Unemployment Compensation Com. v. Nissen	216
State *ex rel.* Utilities Comm. v. McLean	679
State Trust Co. v. Braznell	211
Staton, S. v.	409
Steel Co., DeVine v.	684
Stewart v. Cab Co.	368
Strickland v. Bingham	221
Suggs v. Braxton	50
Sturdivant, S. v.	560
Sullivan, S. v.	680
Sumner v. Sumner	610
Superior Motor Co., Taylor v.	365
Sykes, Sheppard v.	606

T

Tarboro, Nash v.	283
Taylor v. Motor Co.	365
Temple v. Stafford	630
Temple v. Watson	242
Thomas v. Baker	226
Thomas, S. v.	71
Thomas, S. v.	249
Thompson, S. v.	19
Thompson, Williams v.	166
Thrift Corp. v. Guthrie	431
Thurston Motor Lines, Carter v.	193
Tomlins v. Cranford	323
Town of Hot Springs, Gentry v.	665
Town of Hot Springs, Gentry v.	668
Town of Mount Airy, Hylton v.	622
Town of Newton, Gabriel v.	314
Town of Tarboro, Nash v.	283
Townsend, McLean v.	642
Transit Co., Coach Co. v.	391
Trexler, Cauble v.	307
Triplett v. Lail	274
Trollinger, Glosson v.	84
Truck Lines, Brown v.	65
Truck Lines, Brown v.	299
Trust Co. v. Braznell	211
Trust Co. v. Deal	691
Trustees of Charlotte Firemen's Retirement Asso. v. Wentz	117
Trustees of Davidson College, Brandis v.	329
Trustees of Wake Forest College, Reynolds Foundation v.	500
Tuttle v. Building Corp.	146

U

Unemployment Compensation Comm. v. Harvey & Son Co.	291

PAGE

Unemployment Compensation Comm. v. Nissen 216
Universal Finance Co. v. Clary 247
Upholstery Co., Lee v. 88
Utilities Comm. v. McLean 679

W

Wachovia Bank & Trust Co. v. Deal 691
Wake Forest College, Trustees of, Reynolds Foundation v. 500
Wakefield v. Brockwell 567
Walker v. McLaurin 53
Wallace, *In re* Will of 459
Wallace, S. v. 560
Wallin, Johnson v. 669
Warren, S. v. 380
Watkins, S. v. 560
Watson, Temple v. 242
Weinstein, Gray v. 463
Wells v. Wells 614
Wentz, Dillon v. 117
Wescott v. Bank 39
Wescott v. Bank 644
West, *In re* Will of 204

PAGE

White, Boyce v. 640
White v. Woodard 332
Whorton, S. v. 475
Williams v. Thompson 166
Williams v. Young 472
Williams & McKeithan Lumber Co., Winston v. 339
Williamston Lumber Co., Bell v. 173
Wilson v. Ervin 396
Wilson, Exterminating Co. v. 96
Wilson, Flythe v. 230
Wilson, S. v. 43
Winslow v. Elizabeth City 270
Winston v. Lumber Co. 339
Winston-Salem, Ledford v. 698
Wolfe, S. v. 461
Wood, S. v. 47
Woodard, White v. 332
Woolard, S. v. 645

Y

Yellow Cab Co., Stewart v. 368
York, Rierson v. 575
Young, Williams v. 472
Yow, S. v. 585

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

Nesbitt v. Gill, Comr. of Revenue, 227 N. C., 174. Judgment affirmed 13 October, 1947.

S. v. Litteral and Bell, 227 N. C., 527. Bell's appeal. Petition for *certiorari* denied 13 October, 1947.

S. v. Koritz, 227 N. C., 551; *S. v. Watkins,* 227 N. C., 560; *S. v. James,* 227 N. C., 558; *S. v. Jones,* 227 N. C., 561; *S. v. King,* 227 N. C., 559; *S. v. Brunson,* 227 N. C., 558. Petition for *certiorari* denied 13 October, 1947.

ADVISORY OPINIONS RENDERED BY JUSTICES OF THE SUPREME COURT OF NORTH CAROLINA, COMPLETE WITH INDEX 705

CASES CITED

A

Abbitt v. Gregory....195 N. C., 203.... 577
Abernethy v. Burns....206 N. C., 370.... 169
Abernethy v. Ins. Co....213 N. C., 23.... 144
Adams v. Durham....189 N. C., 232.... 8
Adams, *In re*....218 N. C., 379.... 376
Aiken v. Ins. Co....173 N. C., 400.... 322
Airport Authority v. Johnson....226 N. C., 1.... 287
Akin v. Bank....227 N. C., 453.... 610
Albertson v. Wallace.... 81 N. C., 479.... 179
Alberty v. Greensboro....219 N. C., 649.... 699
Alexander v. Johnston....171 N. C., 468.... 461
Allen v. Salley....179 N. C., 147.... 351
Allen v. Taylor.... 96 N. C., 37.... 349
Allman v. R. R....203 N. C., 660.... 273
Anderson v. Doak.... 32 N. C., 295.... 432
Andrews v. R. R....200 N. C., 483.... 666
Angel v. Angel....127 N. C., 451.... 400
Applewhite Co. v. Etheridge....210 N. C., 433....432, 434
Armfield v. Moore.... 44 N. C., 157.... 131
Asbury v. Albemarle....162 N. C., 247.... 287
Asheville Division v. Aston.... 92 N. C., 588.... 246
Atkins v. Durham....210 N. C., 295....8, 9
Atkins v. Transportation Co....224 N. C., 688....89, 597
Atkinson v. Atkinson....225 N. C., 120.... 52
Avery v. Brantley....191 N. C., 396.... 688
Avery v. Pritchard.... 93 N. C., 266.... 376
Avery v. Stewart....134 N. C., 287....604, 605

B

Bailey v. Howell....209 N. C., 712.... 591
Bailey, *In re*....180 N. C., 30.... 138
Bailey v. McLain....215 N. C., 150.... 211
Bailey v. Matthews....156 N. C., 78.... 345
Bailey v. R. R....223 N. C., 244.... 89
Bailey v. Shannonhouse.... 16 N. C., 416.... 33
Bain v. Mfg. Co....203 N. C., 466.... 94
Baird v. Baird....223 N. C., 730.... 404
Balentine v. Gill....218 N. C., 496.... 52
Ballew v. R. R....186 N. C., 704.... 370
Ballinger v. Thomas....195 N. C., 517.... 341
Bane v. R. R....171 N. C., 328.... 656
Bank v. Bobbitt ....111 N. C., 194.... 606
Bank v. Bryson City ....213 N. C., 165.... 144
Bank v. Carr ....130 N. C., 479.... 61
Bank v. Comrs. of Yancey....195 N. C., 678.... 437
Bank v. Corl ....225 N. C., 96.... 514
Bank v. Derby ....218 N. C., 653.... 144
Bank v. Foote .... 77 N. C., 131.... 578
Bank v. Ins. Co. ....223 N. C., 390....23, 458
Bank v. Motor Co. ....216 N. C., 432.... 534

Bank v. Palmer .....153 N. C., 501..... 204
Bank v. Redwine .....171 N. C., 559..... 213
Bank v. Smith .....186 N. C., 635..... 215
Bank v. Sternberger .....207 N. C., 811..... 455
Bank v. Vass .....130 N. C., 590..... 215
Bank v. Worth .....117 N. C., 146..... 707
Barbee v. Thompson.....194 N. C., 411..... 593
Barbour v. State Hospital.....213 N. C., 515.....186, 192
Barco v. Owens.....212 N. C., 30.....593, 594
Barefoot, *Ex Parte*.....201 N. C., 393..... 430
Barker v. Ins. Co.....163 N. C., 175..... 473
Barker v. Palmer.....217 N. C., 519..... 144
Barker v. R. R.....125 N. C., 596..... 58
Barkley v. Realty Co.....211 N. C., 540.....239, 240
Barlow v. Gurney.....224 N. C., 223..... 408
Barnes v. Teer.....218 N. C., 122..... 64
Barrett v. Brewer.....153 N. C., 547..... 642
Barron v. Cain.....216 N. C., 282..... 52
Basket v. Moss.....115 N. C., 448.....312, 313
Batson v. Laundry Co.....206 N. C., 371..... 130
Battle v. Mercer.....187 N. C., 437..... 166
Baxter v. Irvin.....158 N. C., 277..... 630
Beach v. McLean.....219 N. C., 521..... 174
Beach v. Patton.....208 N. C., 134..... 90
Beam v. Rutledge.....217 N. C., 670.....99, 390
Beard v. R. R.....143 N. C., 137..... 325
Beard v. Sovereign Lodge.....184 N. C., 154.....280, 437
Beck v. Hooks.....218 N. C., 105..... 419
Bedsole v. Monroe..... 40 N. C., 313..... 239
Beeson v. Smith.....149 N. C., 142..... 55
Bell v. Danzer.....187 N. C., 224..... 341
Bell v. Harrison.....179 N. C., 190.....123, 613
Bell v. Raleigh.....212 N. C., 518..... 676
Bellamy v. Mfg. Co.....200 N. C., 676..... 648
Belvin v. Paper Co.....123 N. C., 138..... 116
Benedict v. Jones.....129 N. C., 475..... 400
Benevolent Society v. Orrell.....195 N. C., 405..... 513
Bennett v. Holmes..... 18 N. C., 486..... 131
Benson v. Johnston County.....209 N. C., 751..... 289
Bessemer Co. v. Hardware Co.....171 N. C., 728..... 165
Best v. Hardy.....123 N. C., 226..... 116
Best v. Utley.....189 N. C., 356..... 445
Bickett v. Tax Commission.....177 N. C., 433..... 178
Biggers v. Matthews.....147 N. C., 299..... 341
Bilyeu v. Beck.....178 N. C., 481.....196, 197
Blackburn v. Blackburn.....109 N. C., 488..... 456
Blackmore v. Winders.....144 N. C., 212.....282, 341
Bledsoe v. Nixon..... 69 N. C., 81..... 375
Blount v. Robeson..... 56 N. C., 73..... 609
Blum v. R. R.....187 N. C., 640..... 613
Board of Financial Control v.
Henderson County .....208 N. C., 569..... 289
Bogle v. R. R..... 51 N. C., 419..... 115
Bohannon v. Stores Co.....197 N. C., 755..... 90

Bond v. Wool....113 N. C., 20.... 241
Booker v. Highlands....198 N. C., 282.... 700
Boone v. Matheny....224 N. C., 250.... 194
Borders v. Cline....212 N. C., 472.... 344
Bowen v. Daugherty....168 N. C., 242.... 691
Bowers v. R. R....144 N. C., 684.... 90
Boyd v. Hawkins.... 37 N. C., 304.... 33
Boyd v. R. R....207 N. C., 390.... 408
Boyd v. Williams....207 N. C., 30.... 401
Boyden v. Achenbach.... 79 N. C., 539.... 625
Boyer v. Teague....106 N. C., 571.... 376
Bradshaw v. High Point....151 N. C., 517....5, 8
Brannon v. Sprinkle....207 N. C., 398.... 408
Branson v. Fentress.... 35 N. C., 165.... 344
Brantley v. Kee.... 58 N. C., 332.... 33
Braswell v. Johnston....108 N. C., 150.... 583
Brewer v. Ring....177 N. C., 476.... 465
Bridges v. Charlotte....221 N. C., 472....181, 290
Briggs v. Raleigh....195 N. C., 223....285, 286, 290
Brooks v. Griffin....177 N. C., 7.... 594
Brooks v. Stephens....100 N. C., 297.... 106
Brooks v. Woodruff....185 N. C., 288.... 467
Brown v. Aluminum Co. ....224 N. C., 766....648, 685, 686
Brown v. Clement Co. ....217 N. C., 47.... 700
Brown v. Harding ....170 N. C., 253.... 241
Brown v. Loftis ....226 N. C., 762.... 404
Brown v. Osteen ....197 N. C., 305.... 55
Brown v. Power Co. ....140 N. C., 333.... 153
Brown v. Products Co. ....222 N. C., 626.... 418
Brown v. R. R. ....195 N. C., 699.... 264
Brown v. R. R. ....202 N. C., 256.... 688
Brown v. R. R. ....204 N. C., 668.... 689
Brown v. Truck Lines ....227 N. C., 65....106, 300
Brown v. Ward ....221 N. C., 344.... 116
Brumley v. Baxter....225 N. C., 691....181, 287, 290
Bruton v. Smith....225 N. C., 584.... 341
Bryant v. Furniture Co....186 N. C., 441.... 423
Bryant v. Kinlaw.... 90 N. C., 337.... 246
Bryant v. Shields....220 N. C., 628.... 131
Bryson v. Lumber Co....204 N. C., 664.... 174
Buchanan v. Oglesby....207 N. C., 149.... 130
Buchanan v. Highway Comm....217 N. C., 173....93, 187, 319
Buffaloe v. Barnes....226 N. C., 313.... 43
Buie v. Buie.... 24 N. C., 87.... 203
Bullock v. Williams....212 N. C., 113.... 419
Burbage v. Windley....108 N. C., 357.... 311
Burden v. Harman.... 52 N. C., 354.... 275
Burgwyn v. Devereux.... 23 N. C., 583.... 430
Burleson v. Board of Aldermen...200 N. C., 30.... 8
Burris v. Creech....220 N. C., 302....342, 469
Burton v. Cahill....192 N. C., 505.... 673
Bushee v. Surles.... 77 N. C., 62.... 33
Butler v. Lupton....216 N. C., 653.... 465
Butner v. Spease....217 N. C., 82.... 419
Butner v. Whitlow....201 N. C., 749.... 420

Byers v. Byers....223 N. C., 85.... 469
Byrd v. Collins....159 N. C., 641....604, 605

C

Cab Co. v. Casualty Co. ....219 N. C., 788.... 210
Cab Co. v. Sanders ....223 N. C., 626.... 534
Cabe v. Parker-Graham-Sexton, Inc. ....202 N. C., 176.... 94
Caldwell v. Blount....193 N. C., 560.... 445
Caldwell v. R. R....218 N. C., 63.... 369
Calvert v. Carstarphen....133 N. C., 25.... 622
Cameron v. Cameron....212 N. C., 674.... 55
Cameron v. Power Co....137 N. C., 99.... 376
Campbell v. Laundry Co....190 N. C., 649.... 408
Cannon v. Cannon....225 N. C., 611.... 674
Cannon v. Cannon....226 N. C., 634.... 202
Capps v. Massey....199 N. C., 196.... 445
Carawan v. Clark....219 N. C., 214.... 55
Carlton v. Bernhardt-Seagle Co. 210 N. C., 655.... 186
Carroll v. Herring....180 N. C., 369.... 158
Carruthers v. R. R....218 N. C., 377....123, 203
Carter v. Anderson....208 N. C., 529.... 578
Carter v. Lilley....227 N. C., 435.... 694
Carter v. Motor Lines....227 N. C., 193.... 632
Carter v. Oxendine....193 N. C., 478.... 399
Cash Register Co. v. Townsend...137 N. C., 652.... 127
Cauble v. Trexler....227 N. C., 307.... 336
Cauley v. Sutton....150 N. C., 327.... 314
Causey v. Orton....171 N. C., 375.... 115
Causey v. Plaid Mills....119 N. C., 180.... 115
Cecil v. Lumber Co....197 N. C., 81.... 404
Chamblee v. Bank....211 N. C., 48....437, 694
Chancey v. R. R....174 N. C., 351....574, 575
Chandler v. Cameron....227 N. C., 233.... 342
Chandler v. Marshall....189 N. C., 301.... 473
Chesson v. Bank....190 N. C., 187....344, 345
Chisman, *In re* Will of....175 N. C., 420.... 211
Chozen Confections, Inc., v. Johnson ....220 N. C., 432.... 376
Christopher v. Fair Assn....216 N. C., 795.... 369
Clark v. Cagle....226 N. C., 230.... 375
Clark v. Dill....208 N. C., 421.... 640
Clark v. Homes, Inc. ....189 N. C., 703....437, 694
Clark v. Peebles....120 N. C., 31.... 165
Clark v. Sweaney....175 N. C., 280.... 195
Clark v. Woolen Mills....204 N. C., 529.... 94
Clayton v. Tobacco Co....225 N. C., 563.... 287
Cleve v. Adams....222 N. C., 211.... 131
Clodfelter v. State.... 86 N. C., 51.... 667
Clodfelter v. Wells....212 N. C., 823.... 420
Cobb v. Comrs. of Durham County ....122 N. C., 307.... 183
Cobb v. Fogalman.... 23 N. C., 440.... 272
Cobb v. R. R....172 N. C., 58.... 286
Coddington v. Stone....217 N. C., 714.... 157

Cole v. Funeral Home....207 N. C., 271.... 196
Cole v. Koonce....214 N. C., 188....369, 676
Cole v. R. R....211 N. C., 591.... 676
Coleman v. Whisnant....225 N. C., 494.... 342
Coley v. Dalrymple....225 N. C., 67....52, 365
Colgrove v. Koonce.... 76 N. C., 363.... 246
Combes v. Adams....150 N. C., 64.... 342
Comrs. of Buncombe County v. Scales ....171 N. C., 523.... 165
Comrs. of Hendersonville v. Webb ....148 N. C., 120....4, 5, 7, 8
Comrs. of Johnston v. Lacy, State Treasurer ....174 N. C., 141.... 285
Condor v. Secrest....149 N. C., 201.... 214
Conrad v. Foundry Co....198 N. C., 723.... 318
Construction Co. v. R. R....185 N. C., 43.... 370
Conway v. Ice Co....169 N. C., 577.... 676
Cook v. Moore....100 N. C., 294.... 106
Cook v. Telegraph Co....150 N. C., 428.... 375
Cook v. Vickers....141 N. C., 101.... 275
Cooper, *In re* Will of....196 N. C., 418.... 138
Cornelison v. Hammond....225 N. C., 535 59
Cory v. Cory....205 N. C., 205.... 418
Cotton v. Transportation Co....197 N. C., 709....196, 197
Cotton Mills v. Mfg. Co....218 N. C., 560....128, 282
Coulter v. Wilson....171 N. C., 537.... 246
Courtney v. Parker....173 N. C., 479.... 312
Covington v. James....214 N. C., 71.... 465
Cowles v. Cowles....121 N. C., 272.... 578
Craven, *In re* Will of....169 N. C., 561....211, 325
Craver v. Spaugh....226 N. C., 450.... 130
Crawford v. Crawford....214 N. C., 614.... 131
Credle v. Ayers....126 N. C., 11.... 349
Creech v. Linen Service Corp....219 N. C., 457.... 197
Creech v. Wilder....212 N. C., 162.... 33
Creighton v. Water Comrs....143 N. C., 171.... 153
Crissman v. Palmer....225 N. C., 472....66, 578
Crooks v. Jonas....204 N. C., 797.... 465
Croom v. Cornelius....219 N. C., 761.... 593
Crowell v. Parker....171 N. C., 392.... 347
Cummings v. R. R. ....217 N. C., 127.... 273
Current v. Webb....220 N. C., 425.... 131

D

Dailey v. Bay....215 N. C., 652.... 275
Davidson v. Arledge.... 88 N. C., 326.... 58
Davis v. Bass ....188 N. C., 200....399, 445, 455
Davis v. Harris ....178 N. C., 24.... 342
Davis v. Jeffreys ....197 N. C., 712....89, 370
Davis v. Land Bank ....217 N. C., 145.... 376
Davis v. Pearson ....220 N. C., 163.... 401
Davis v. R. R. ....136 N. C., 115.... 689
Davis v. Shaver .... 61 N. C., 18.... 242
Davis v. Veneer Corp. ....200 N. C., 263.... 648
Davis v. Wilmerding ....222 N. C., 639.... 465

Dawson v. Wood....177 N. C., 158.... 131
Deal v. Trust Co....218 N. C., 483.... 437
Deese v. Deese....176 N. C., 527....399, 445
DeHoff v. Black....206 N. C., 687....280, 282
Denny v. Snow....199 N. C., 773.... 273
Depriest v. Patterson.... 85 N. C., 376.... 578
Development Co. v. Bearden....227 N. C., 124.... 269
Dillon v. Wentz....227 N. C., 117.... 203
Dillon v. Winston-Salem....221 N. C., 512.... 699
Distributing Corp. v. Indemnity Co. ....224 N. C., 370.... 52
Dix-Downing v. White....206 N. C., 567.... 130
Dixon v. Brockwell....227 N. C., 567.... 613
Dixon v. Green....178 N. C., 205.... 282
Dixon v. Wake Forest....224 N. C., 624.... 666
Dobson v. Erwin.... 18 N. C., 570.... 336
Doster v. English....152 N. C., 339.... 630
Doyle v. Charlotte....210 N. C., 709.... 676
Dozier v. Leary....196 N. C., 12.... 399
Drake v. Connelly....107 N. C., 463.... 337
Drake v. Howell....133 N. C., 162....341, 342
Dry Forces, Inc., v. Wilkins....211 N. C., 560....512, 513
Duckett v. Lyda....223 N. C., 356.... 399
Duckworth v. Duckworth....144 N. C., 620.... 165
Duke v. Children's Com. ....214 N. C., 570.... 344
Dunbar v. Tobacco Growers....190 N. C., 608.... 376
Dunlap v. Guaranty Co....202 N. C., 651.... 345
Dunn v. Jones....195 N. C., 354.... 578
Dunn v. Marks....141 N. C., 232.... 166
Dunn v. Swanson....217 N. C., 279.... 144

E

Early v. Tayloe....219 N. C., 363....593, 594
Eaton v. Doub....190 N. C., 14.... 629
Edmundson v. Edmundson....222 N. C., 181.... 242
Edney v. Matthews....218 N. C., 171.... 269
Edwards v. Pub. Co....227 N. C., 184....303, 316
Eelkhout v. Cole....135 N. C., 583.... 498
Efird, *In re* Will of....195 N. C., 76.... 210
Elder v. R. R....194 N. C., 617.... 370
Eller v. Leather Co....222 N. C., 23.... 189
Ellington v. Ellington....103 N. C., 54.... 55
Elliott v. Board of Equalization..203 N. C., 749.... 5
Ellis v. Ellis....193 N. C., 216.... 445
Ellison v. Williamston....152 N. C., 147.... 4
Elvington v. Shingle Co....191 N. C., 515....341, 342
Emry v. Chappell....148 N. C., 327.... 352
English v. English.... 87 N. C., 497.... 578
Etheridge v. Etheridge....222 N. C., 616....194, 419, 420
Evans v. R. R....167 N. C., 415.... 345
Ex Parte Barefoot ....201 N. C., 393.... 430
Ex Parte Brogden ....180 N. C., 157....673, 674
Exchange Co. v. Bonner....180 N. C., 20.... 613

F

Faison v. Middleton....171 N. C., 170.... 430
Farrell v. R. R....102 N. C., 390.... 583
Faust v. Rohr....167 N. C., 360.... 322
Faw v. Whittington.... 72 N. C., 321....322, 323
Fawcett v. Mt. Airy....134 N. C., 125....5, 8, 287
Feimster v. Johnson.... 64 N. C., 259.... 115
Fellowes v. Durfey....163 N. C., 305.... 593
Ferguson v. Asheville....213 N. C., 569....18, 361, 676
Ferguson v. Ferguson....225 N. C., 375.... 430
Ferguson v. Glenn....201 N. C., 128.... 465
Ferrell v. Cotton Mills....157 N. C., 528.... 408
Ferrell v. Hales....119 N. C., 199.... 241
Fields v. Coleman....160 N. C., 11.... 345
Fields v. Plumbing Co....224 N. C., 841....318, 649
Finance Co. v. Clary....227 N. C., 247.... 433
Fisher v. Fisher....217 N. C., 70.... 445
Fisher v. Fisher....218 N. C., 42.... 445
Fisher v. Trust Co....138 N. C., 90.... 268
Fisher v. Trust Co....138 N. C., 224.... 239
Floars v. Ins. Co....144 N. C., 232.... 52
Foscue v. Ins. Co....196 N. C., 139.... 52
Foster v. Allison Corp....191 N. C., 166.... 204
Fowler v. Murdock....172 N. C., 349.... 630
Fox v. Mills, Inc....225 N. C., 580....66, 67, 300
Fox v. Yarborough....225 N. C., 606.... 345
Foxman v. Hanes....218 N. C., 722.... 534
Freeman v. Comrs. of Madison....217 N. C., 209.... 290
Freeman v. Dalton....183 N. C., 538....196, 197
Frisbee v. Cole....179 N. C., 469.... 173
Froneberger v. Lewis.... 70 N. C., 456.... 33
Froneberger v. Lewis.... 79 N. C., 426.... 269
Fuller, *In re* Will of....189 N. C., 509.... 211
Furniture Co. v. Cole....207 N. C., 840....323, 456

G

Gant v. Gant....197 N. C., 164.... 90
Gardiner v. May....172 N. C., 192.... 242
Gardner v. Ins. Co....163 N. C., 367.... 53
Gardner v. McDonald....223 N. C., 555.... 606
Gardner v. New Bern.... 98 N. C., 228.... 7
Garner v. Horner....191 N. C., 539.... 445
Garris v. Tripp....192 N. C., 211.... 399
Gasque v. Asheville....207 N. C., 821.... 361
Gates v. McCormick....176 N. C., 640.... 656
Gates v. Max....125 N. C., 139.... 69
Gatlin v. Tarboro.... 78 N. C., 119.... 179
Gatling v. Comrs. of Carteret County .... 92 N. C., 536.... 298
Gentry v. Hot Springs....227 N. C., 665....668, 669
George v. R. R....215 N. C., 773.... 656
Gibbs v. Russ....223 N. C., 349.... 169
Gilmer v. Holton.... 98 N. C., 26.... 638
Glenn v. Board of Education....210 N. C., 525.... 290
Godfrey v. Coach Co....200 N. C., 41.... 455

Godwin v. R. R. ....220 N. C., 281 89
Gold Mining Co. v. Lumber Co. ..170 N. C., 273 455
Goldsmith v. Samet ....201 N. C., 574 689
Gordon v. Chair Co. ....205 N. C., 739 648
Gordon v. Sanderson ..... 83 N. C., 1 202
Gorrell v. Alspaugh ....120 N. C., 362 322
Graham v. Wall ....220 N. C., 84 174
Grant v. Mitchell ....156 N. C., 15 684
Grant v. Reese ..... 94 N. C., 720 440
Grantham v. Kennedy ..... 91 N. C., 148 241
Green v. Green ....210 N. C., 147 618
Green v. R. R. ..... 73 N. C., 524 342
Greensboro v. Scott ....138 N. C., 181 ..... 7, 8
Grier v. Grier ....192 N. C., 760 ..... 196, 197
Griffin v. Graham ..... 8 N. C., 96 ..... 512, 513
Griffin v. R. R. ....138 N. C., 55 613
Grimes v. Grimes ....207 N. C., 778 ..... 440, 441
Grimes v. Guion ....220 N. C., 676 215
Gross v. Smith ....132 N. C., 604 473
Gudger v. Robinson Brothers Contractors, Inc. ....219 N. C., 251 345
Gurley v. Power Co. ....172 N. C., 690 196
Guthrie v. Gocking ....214 N. C., 513 418

H

Hagaman v. Bernhardt ....162 N. C., 381 656
Hambright v. Carroll ....204 N. C., 496 ..... 593, 594
Hampton v. Hawkins ....219 N. C., 205 89
Hampton v. Spinning Co. ....198 N. C., 235 130
Hancock v. Wilson ....211 N. C., 129 418
Hanie v. Penland ....193 N. C., 800 168
Harding v. Ins. Co. ....218 N. C., 129 70
Hardy v. Abdallah ....192 N. C., 45 215
Hardy v. Fryer ....194 N. C., 420 215
Hargrave v. King ..... 40 N. C., 430 364
Harris v. Distributing Co. ....172 N. C., 14 455
Harris, *In re* Will of ....218 N. C., 459 211
Harris v. R. R. ....220 N. C., 698 408
Harrison v. Brown ....222 N. C., 610 347
Harrison v. Carter ....226 N. C., 36 688
Harrison v. Insurance Co. ....207 N. C., 487 210
Harrison v. R. R. ....194 N. C., 656 89
Harshaw v. Harshaw ....220 N. C., 145 131
Hart v. Newland ..... 10 N. C., 122 70
Hartsfield v. New Bern ....186 N. C., 136 290
Harvester Co. v. Caldwell ....198 N. C., 751 39
Haskill v. Freeman ..... 60 N. C., 585 33
Hathaway v. Hathaway ..... 91 N. C., 139 138
Hawes v. Haynes ....219 N. C., 535 ..... 197, 632
Hayes v. Elon College ....224 N. C., 11 ..... 174, 303
Hedgcock v. Davis ..... 64 N. C., 650 4
Hedgepath v. Durham ....223 N. C., 822 408
Hedgepeth, *In re* Will of ....150 N. C., 245 211
Heefner v. Thornton ....216 N. C., 702 ..... 593, 594
Hegler v. Mills Co. ....224 N. C., 669 ..... 93, 174, 648, 685

Hendersonville v. Jordan.....150 N. C., 35.....4, 7
Herndon v. Massey.....217 N. C., 610.....127, 344
Herring v. Lumber Co.....159 N. C., 382.....312
Hester v. Traction Co.....138 N. C., 288.....7
Hewitt v. Urich.....210 N. C., 835.....419, 420
Heyer v. Bulluck.....210 N. C., 321.....471
Hightower v. Raleigh.....150 N. C., 569.....8
Highway Com. v. Hartley.....218 N. C., 438.....153, 154
Hilgreen v. Cleaners & Tailors, Inc. .....225 N. C., 656.....368
Hill v. Snider.....217 N. C., 437.....127
Hill v. Stansbury.....221 N. C., 339.....127, 267
Hill v. Stansbury.....223 N. C., 193.....707
Hilton v. Harris.....207 N. C., 465.....178
Hinnant v. Power Co.....189 N. C., 120.....683
Hinton v. Hinton.....196 N. C., 341.....557
Hinton, *In re* Will of.....180 N. C., 206.....209
Hinton v. R. R.....172 N. C., 587.....419
Hobbs v. Washington.....168 N. C., 293.....668
Hodges v. Hodges.....227 N. C., 334.....312
Hoke v. Greyhound Corp.....226 N. C., 332.....668
Hoke v. Greyhound Corp.....226 N. C., 692.....415
Holden v. Purefoy.....108 N. C., 163.....322
Holden v. Totten.....224 N. C., 547.....106
Holden v. Totten.....225 N. C., 558.....106
Hollingsworth v. Skelding.....142 N. C., 246.....574
Hollowell v. Borden.....148 N. C., 255.....8
Holmes v. Wharton.....194 N. C., 470.....688
Holt v. Holt.....114 N. C., 241.....593
Holt v. Ziglar.....163 N. C., 390.....138
Hopkins v. Barnhardt.....223 N. C., 617.....269, 368
Horne v. Smith.....105 N. C., 322.....116
Hornthal v. Burwell.....109 N. C., 10.....432
Horton v. Coach Co.....216 N. C., 567.....574
Hospital v. Nicholson.....190 N. C., 119.....609
Hotel Raleigh, *In re*.....207 N. C., 521.....229
House v. Abell.....182 N. C., 619.....347
Houston v. Monroe.....213 N. C., 788.....359, 361
Howland v. Asheville.....174 N. C., 749.....360
Howell v. Branson.....226 N. C., 264.....365
Howell v. Solomon.....167 N. C., 588.....618
Hubbard & Co. v. Horne.....203 N. C., 205.....214, 215
Hudgins v. White..... 65 N. C., 393.....578
Hudson v. Hudson.....208 N. C., 338.....471
Hughes v. Boone.....102 N. C., 137.....498
Hughes v. King..... 27 N. C., 203.....106
Hughes v. Pritchard.....122 N. C., 59.....335
Hulbert v. Douglas..... 94 N. C., 128.....246
Humphrey v. Board of Trustees..203 N. C., 201.....513
Hunsucker v. Corbitt.....187 N. C., 496.....198
Hunsucker v. Winborne.....223 N. C., 650.....395
Hunt v. High Point.....226 N. C., 74.....667
Hyatt v. McCoy.....194 N. C., 760.....416, 684

I

Ice Co. v. R. R. ..... 125 N. C., 17 577
Ingle v. Cassady ..... 208 N. C., 497 ..... 417, 419
Ingram v. Mortgage Co. ..... 208 N. C., 329 106
Ingram v. Power Co. ..... 181 N. C., 359 626
In re Adams ..... 218 N. C., 379 376
In re Bailey ..... 180 N. C., 30 138
In re Hotel Raleigh ..... 207 N. C., 521 229
In re Parker ..... 225 N. C., 369 50
In re Smith ..... 130 N. C., 638 122
In re Steele ..... 220 N. C., 685 707
In re TenHoopen ..... 202 N. C., 223 617
In re Will of Chisman ..... 175 N. C., 420 211
In re Will of Cooper ..... 196 N. C., 418 138
In re Will of Craven ..... 169 N. C., 561 ..... 211, 325
In re Will of Efird ..... 195 N. C., 76 210
In re Will of Fuller ..... 189 N. C., 509 211
In re Will of Harris ..... 218 N. C., 459 211
In re Will of Lowrance ..... 199 N. C., 782 460
In re Will of Hinton ..... 180 N. C., 206 209
In re Will of Jenkins ..... 157 N. C., 429 461
In re Will of Lowrance ..... 199 N. C., 782 460
In re Will of Perry ..... 193 N. C., 397 42
In re Will of Rawlings ..... 170 N. C., 58 210
In re Will of Redding ..... 216 N. C., 497 ..... 209, 211
In re Will of Smith ..... 163 N. C., 464 473
In re Will of Thomas ..... 111 N. C., 409 211
In re Will of Wall ..... 216 N. C., 805 461
In re Will of West ..... 227 N. C., 204 589
In re Will of Westfeldt ..... 188 N. C., 702 137
In re Will of Wolfe ..... 185 N. C., 563 138
Ins. Co. v. Cordon ..... 208 N. C., 723 629
Ins. Co. v. Disher ..... 225 N. C., 345 346
Ins. Co. v. McCraw ..... 215 N. C., 105 341
Ins. Co. v. Motor Lines, Inc. ..... 225 N. C., 588 168
Ins. Co. v. Unemployment Compensation Comm. ..... 217 N. C., 495 298
Ins. Co. v. Wells ..... 225 N. C., 547 331
Ins. Co. v. Wells ..... 226 N. C., 574 52
Isley v. Boon ..... 109 N. C., 555 ..... 604, 605
Ives v. R. R. ..... 142 N. C., 131 671

J

Jacobs v. Burgwyn ..... 63 N. C., 193 242
James v. Coach Co. ..... 207 N. C., 742 418
Jarrett v. Trunk Co. ..... 144 N. C., 299 136
Jefferson v. Sales Corp. ..... 220 N. C., 76 132
Jeffrey v. Mfg. Co. ..... 197 N. C., 724 ..... 196, 197
Jeffreys v. Hocutt ..... 193 N. C., 332 606
Jenkins, *In re* Will of ..... 157 N. C., 429 461
Jennings v. White ..... 139 N. C., 23 641
Jernigan v. Jernigan ..... 178 N. C., 84 204
Jernigan v. Neighbors ..... 195 N. C., 231 ..... 379, 630
Jessup v. Nixon ..... 186 N. C., 100 34

Johnson v. Duvall....135 N. C., 642.... 235
Johnson v. Hosiery Co....199 N. C., 38.... 192
Johnson v. Sidbury....225 N. C., 208.... 280
Johnson v. Sidbury....226 N. C., 345....123, 282
Johnson v. Smith....215 N. C., 322.... 352
Johnson v. Wagner....219 N. C., 235.... 331
Johnston v. Case....131 N. C., 491....58, 642
Johnston v. Gill, Comr. of Revenue....224 N. C., 638.... 180
Jolley v. Humphries....204 N. C., 672.... 593
Jones v. Casualty Co. ....140 N. C., 262.... 259
Jones v. Commissioners ....137 N. C., 579.... 7
Jones v. Gerock .... 59 N. C., 190....550, 551
Jones v. Gorman .... 42 N. C., 21.... 336
Jones v. Jones ....187 N. C., 589.... 165
Jones v. Marble Co. ....137 N. C., 237....374, 534
Jones v. New Bern....152 N. C., 64.... 7
Jones v. Realty Co. ....226 N. C., 303.... 346
Jones v. Whichard ....163 N. C., 241.... 471
Jordan v. Simmons....175 N. C., 537.... 376

K

Kadis v. Britt....224 N. C., 154....100, 391
Kearns v. Furniture Co....222 N. C., 438....93, 174, 648, 685
Keathly v. Branch.... 84 N. C., 202.... 246
Keaton v. Cobb.... 16 N. C., 439.... 33
Keen v. Parker....217 N. C., 378.... 242
Keener v. Goodson.... 89 N. C., 273.... 241
Keith v. Scales....124 N. C., 497.... 513
Keller v. Furniture Co....199 N. C., 413.... 422
Kelly v. Lumber Co....157 N. C., 175.... 235
Kelly v. Traction Co....132 N. C., 368....203, 613
Kendall v. Stafford....178 N. C., 461.... 707
Kennerly v. Dallas....215 N. C., 532.... 287
Kilpatrick v. Kilpatrick....176 N. C., 182.... 445
King v. Hobbs....139 N. C., 170....214, 215
King v. King....225 N. C., 639.... 242
King v. Rudd....226 N. C., 156.... 66
Klassette v. Drug Co....227 N. C., 353.... 676
Kornegay v. Everett.... 99 N. C., 30.... 214
Kramer v. R. R....127 N. C., 328.... 407

L

Lamm v. Mayo....217 N. C., 261.... 673
Land Co. v. Traction Co....162 N. C., 503....153, 154
Lassiter v. Cline....222 N. C., 271.... 303
Lassiter v. Tel. Co....215 N. C., 227.... 174
Lawrence v. Lawrence....226 N. C., 221.... 375
Lawson v. Key....199 N. C., 664.... 215
Lea v. Ins. Co....168 N. C., 478.... 53
Leach v. Page....211 N. C., 622....268, 282
Lee v. Barefoot....196 N. C., 107.... 467
Lee v. Board of Adjustment....226 N. C., 107.... 65
Lee v. Upholstery Co....227 N. C., 88.... 408

Lefkowitz v. Silver....182 N. C., 339....224, 456
Leggett v. Simpson....176 N. C., 3....673, 674
Leonard v. Maxwell, Comr. of Revenue....216 N. C., 89....179, 183
Leonard v. Transfer Co....218 N. C., 667....306
Lerch v. McKinne....187 N. C., 419....578
Lewis v. Steamship Co....132 N. C., 904....272
Light Co. v. Iseley....203 N. C., 811....331
Light Co. v. Moss....220 N. C., 200....153, 154
Likas v. Lackey....186 N. C., 398....455
Lindsey v. Speight....224 N. C., 453....347
Lineberger v. Phillips....198 N. C., 661....593, 594
Link v. Link....90 N. C., 235....335
Linville v. Nissen....162 N. C., 95....195, 196, 197
Little v. Holmes....181 N. C., 413....618
Liverman v. Cline....212 N. C., 43....196
Lockey v. Cohen, Goldman & Co.213 N. C., 356....93
Logan v. Harris....90 N. C., 7....241
Long v. Austin....153 N. C., 508....465
Love v. Lumberton....215 N. C., 28....186, 189, 316
Love v. Zimmerman....226 N. C., 389....465
Lowrance, *In re* Will of....199 N. C., 782....460
Lumber Co. v. Cedar Co. ....142 N. C., 411....235
Lumber Co. v. Corey ....140 N. C., 462....236
Lumber Co. v. Edwards ....217 N. C., 251....167
Luttrell v. Hardin....193 N. C., 266....419
Lynch v. Loftin....153 N. C., 270....242

Mc

McCabe v. Casualty Co....209 N. C., 577....52
McCall v. Galloway....162 N. C., 353....684
McClure v. Crow....196 N. C., 657....215
McCorkle v. Beatty....226 N. C., 338....198
McCracken v. Smathers....122 N. C., 799....465
McCune v. Mfg. Co....217 N. C., 351....131
McDonald v. Howe....178 N. C., 257....241
McDonald v. Morris....89 N. C., 99....246
McDowell v. Insane Asylum....101 N. C., 656....275
McGibboney v. Mills....35 N. C., 163....344
McGill v. Lumberton....215 N. C., 752....30, 589
McGowan v. Davenport....134 N. C., 526....400
McGuinn v. McLain....225 N. C., 750....349, 367
McKay v. Simpson....41 N. C., 452....214
McKeithen v. Blue....149 N. C., 95....605
McKimmon v. Caulk....170 N. C., 54....131
McKinnon v. Caulk....167 N. C., 411....399
McLamb v. Beasley....218 N. C., 308....197, 632
McLean v. McLean....84 N. C., 366....204
McLeod v. Hicks....203 N. C., 130....465
McMahan v. R. R....170 N. C., 456....153
MacMillan v. Trust Co....221 N. C., 352....77
McNeely v. Asbestos Co....206 N. C., 568....318
McNeill v. Fuller....121 N. C., 209....33
MacRae v. Unemployment Compensation Com. ....217 N. C., 769....187, 318

M

Mabe v. Winston-Salem....190 N. C., 486.... 360
Machinery Co. v. Post....204 N. C., 744.... 213
Madry v. Scotland Neck....214 N. C., 461.... 287
Maley v. Furniture Co....214 N. C., 589.... 319
Manhiem v. Taxi Corp....214 N. C., 689.... 369
Manning v. Ins. Co....227 N. C., 251.... 625
Manuel v. Comrs.... 98 N. C., 9.... 668
Mfg. Co. v. Bray ....193 N. C., 350.... 39
Mfg. Co. v. Building Co. ....177 N. C., 103.... 322
Mfg. Co. v. Lefkowitz ....204 N. C., 449.... 323
Mfg. Co. v. Moore ....144 N. C., 527.... 132
Mfg. Co. v. R. R. ....222 N. C., 330.... 210
Markham v Improvement Co....201 N. C., 117.... 361
Martin v. Bus Line....197 N. C., 720....196, 197
Martin v. Clegg....163 N. C., 528.... 349
Mason v. McCormick.... 75 N. C., 263.... 473
Mason v. Texas Co....206 N. C., 805.... 196
Massengill v. Abell....192 N. C., 240.... 471
Matthews v. Ins. Co....195 N. C., 374.... 52
Matthews v. Joyce.... 85 N. C., 258.... 241
Matthews v. Myatt....172 N. C., 230.... 639
May v. Getty....140 N. C., 310.... 322
May v. Mfg. Co....164 N. C., 262.... 642
Meece v. Commercial Credit Co..201 N. C., 139.... 577
Meisenheimer v. Alexander....162 N. C., 226.... 515
Mendenhall v. Mendenhall.... 53 N. C., 287.... 551
Mercantile Co. v. Mount Olive....161 N. C., 121....178, 183
Mercer v. Powell....218 N. C., 642.... 273
Merrell v. Stuart....220 N. C., 326.... 312
Messick v. Hickory....211 N. C., 531.... 209
Metcalfe v. Chambers....188 N. C., 805.... 337
Mica Co. v. Express Co....182 N. C., 669.... 345
Midgett v. Nelson....212 N. C., 41.... 169
Millar v. Wilson....222 N. C., 340.... 287
Miller v. Atkinson.... 63 N. C., 537.... 513
Miller v. Miller....205 N. C., 753.... 261
Miller v. Moore....222 N. C., 749.... 197
Miller v. Pierce....104 N. C., 389....322, 323
Miller v. Teer....220 N. C., 605.... 323
Millinery Co. v. Little-Long Co...197 N. C., 168.... 364
Milling Co. v. Highway Comm....190 N. C., 692.... 534
Mills v. Mills....195 N. C., 595.... 138
Mills v. Moore....219 N. C., 25....273, 360
Mills v. R. R....172 N. C., 266.... 575
Mining Co. v. Lumber Co....170 N. C., 273.... 455
Misenheimer v. Hayman....195 N. C., 613.... 196
Mitchell v. Melts....220 N. C., 793....273, 360, 420
Mitchell v. Parks....180 N. C., 634.... 673
Mitchem v. James....213 N. C., 673.... 465
Mizell v. Burnett.... 49 N. C., 249.... 342
Mobley v. Griffin....104 N. C., 112.... 58
Moffitt v. Asheville....103 N. C., 237.... 668
Montgomery v. Blades....217 N. C., 654....246, 352

Moore v. Dickson..... 74 N. C., 423..... 325
Moore v. Guano Co.....130 N. C., 229..... 447
Moore v. Ins. Co.....192 N. C., 580..... 64
Moore v. Jones.....226 N. C., 149..... 437
Moore v. Miller.....179 N. C., 396..... 58
Moore v. Moore.....224 N. C., 552..... 352
Moore v. R. R.....173 N. C., 311.....272, 273
Moore v. Sales Co.....214 N. C., 424.....187, 188, 318
Moore v. Trust Co.....178 N. C., 118..... 399
Moore v. Vallentine..... 77 N. C., 188..... 115
Morgan v. Benefit Society.....167 N. C., 262..... 169
Moring v. Ward..... 50 N. C., 272..... 160
Morris v. Allen..... 32 N. C., 203..... 335
Morris v. Holshouser.....220 N. C., 293..... 181
Mortgage Corp. v. Barco.....218 N. C., 154..... 58
Moskin Bros. v. Swartzberg.....199 N. C., 539.....99, 390
Motley v. Whitemore..... 19 N. C., 537..... 455
Motor Co. v. Credit Co.....219 N. C., 199..... 168
Motor Co. v. Insurance Co.....220 N. C., 168..... 210
Motsinger v. Perryman.....218 N. C., 15..... 144
Mullinax v. Hord.....174 N. C., 607..... 465
Murphy v. Webb.....156 N. C., 402..... 4
Murray v. R. R.....218 N. C., 392..... 360

N

Nash v. Comrs. of St. Pauls.....211 N. C., 301..... 144
Nash v. Royster.....189 N. C., 408..... 465
Nash v. Shute.....182 N. C., 528..... 131
Neely v. Statesville.....212 N. C., 365.....187, 315, 319
Neil v. Wilson.....146 N. C., 242..... 689
Newbern v. Leary.....215 N. C., 134..... 418
New Hanover County v. Sidbury 225 N. C., 679..... 168
Newsome v. Bunch.....144 N. C., 15..... 618
Nichols v. Fountain.....165 N. C., 166..... 666
Norton v. McLaurin.....125 N. C., 185..... 578

O

Ogburn v. Sterchi Brothers
Stores, Inc. .....218 N. C., 507..... 344
Ogle v. Gibson.....214 N. C., 127..... 370
Oil Co. v. Hunt.....187 N. C., 157..... 264
Oliphant v. R. R.....171 N. C., 303..... 555
Osborne v. Coal Co.....207 N. C., 545..... 90
Overman v. Sasser.....107 N. C., 432..... 115
Owens v. Phelps..... 92 N. C., 231..... 376
Owens v. Williams.....130 N. C., 165..... 336

P

Page v. Branch..... 97 N. C., 97..... 609
Palmer v. Jennette.....227 N. C., 377..... 630
Parker v. Coggins..... ....116 N. C., 71..... 337
Parker, *In re*.....225 N. C., 369..... 50
Parker v. Mott.....181 N. C., 435..... 473
Parker v. Potter.....200 N. C., 348..... 689

Parker v. R. R. ..... 123 N. C., 71 566
Parks v. Princeton ..... 217 N. C., 361 666
Parrish v. Armour ..... 200 N. C., 654 648
Parrish v. R. R. ..... 221 N. C., 292 267
Parrott v. Kantor ..... 216 N. C., 584 ..... 197, 632
Patterson v. McCormick ..... 181 N. C., 311 471
Patterson v. R. R. ..... 214 N. C., 38 ..... 127, 167, 267
Patterson v. R. R. ..... 219 N. C., 23 345
Patterson v. Trust Co. ..... 157 N. C., 13 473
Paul v. Davenport ..... 217 N. C., 154 42
Pearce v. Privette ..... 213 N. C., 501 282
Pearson v. Stores Corp. ..... 219 N. C., 717 ..... 688, 689, 690, 691
Pedrick v. R. R. ..... 143 N. C., 485 643
Pelletier v. Cooperage Co. ..... 158 N. C., 403 214
Pemberton v. Greensboro ..... 203 N. C., 514 167
Pemberton v. King ..... 13 N. C., 376 115
Penick v. Bank ..... 218 N. C., 686 513
Pentuff v. Park ..... 195 N. C., 609 376
Peoples v. Fulk ..... 220 N. C., 635 ..... 90, 365
Perry v. Hackney ..... 142 N. C., 368 469
Perry, *In re* Will of ..... 193 N. C., 397 42
Perry v. Sykes ..... 215 N. C., 39 574
Person v. Roberts ..... 159 N. C., 168 ..... 604, 605
Person v. Watts ..... 184 N. C., 499 ..... 4, 530
Peterson v. Wilmington ..... 130 N. C., 76 360
Phosphate Co. v. Johnson ..... 188 N. C., 419 311
Pickard v. Plaid Mills ..... 213 N. C., 28 648
Pike v. Seymour ..... 222 N. C., 42 376
Pitt v. Speight ..... 222 N. C., 585 116
Pittman v. Pittman ..... 107 N. C., 159 456
Place v. Place ..... 206 N. C., 676 ..... 399, 400
Poisson v. Pettaway ..... 159 N. C., 650 430
Porter v. R. R. ..... 97 N. C., 66 379
Powell v. Maxwell, Comr. of Revenue ..... 210 N. C., 211 ..... 180, 182
Powell v. Turpin ..... 224 N. C., 67 606
Power Co. v. Clay County ..... 213 N. C., 698 9
Powers v. Commercial Service Co. ..... 202 N. C., 13 39
Powers v. Sternberg ..... 213 N. C., 41 ..... 90, 597
Powers v. Wilmington ..... 177 N. C., 361 455
Prevatt v. Harrelson ..... 132 N. C., 250 58
Priddy & Co. v. Sanderford ..... 221 N. C., 422 ..... 157, 591
Pride v. R. R. ..... 176 N. C., 594 574
Provision Co. v. Maxwell, Comr. of Revenue ..... 199 N. C., 661 179
Pruitt v. Wood ..... 199 N. C., 788 ..... 376, 621
Public Utilities Co. v. Bessemer City ..... 173 N. C., 482 322
Pugh v. Allen ..... 179 N. C., 307 471
Purser v. Ledbetter ..... 227 N. C., 1 706

Q

Query v. Ins. Co. ..... 218 N. C., 386 66

R

Rader v. Coach Co. ..... 225 N. C., 537 ..... 66, 258, 300, 625
Ragan v. Ragan ..... 212 N. C., 753 106
Ragan v. Ragan ..... 214 N. C., 36 375
R. R. v. Asheville ..... 109 N. C., 688 145
R. R. v. Deal ..... 90 N. C., 110 115
R. R. v. Cherokee County ..... 177 N. C., 86 290
R. R. v. McGuire ..... 171 N. C., 277 323
R. R. v. Stewart ..... 132 N. C., 248 165
Raleigh v. Trustees ..... 206 N. C., 485 510
Ramsey v. Furniture Co. ..... 209 N. C., 165 575
Range Co. v. Carver ..... 118 N. C., 328 241
Rankin v. Oates ..... 183 N. C., 517 455
Rawlings, *In re* Will of ..... 170 N. C., 58 210
Raynor v. R. R. ..... 129 N. C., 195 64
Rector v. Mfg. Co. ..... 188 N. C., 807 337
Redding, *In re* Will of ..... 216 N. C., 497 209
Reich v. Cone ..... 180 N. C., 267 ..... 197, 632
Reid v. Coach Co. ..... 215 N. C., 469 689
Rental Co. v. Justice ..... 212 N. C., 523 349
Respass v. Jones ..... 102 N. C., 5 469
Revis v. Asheville ..... 207 N. C., 237 344
Rewis v. Ins. Co. ..... 226 N. C., 325 ..... 93, 187, 303, 316, 648, 685, 686
Reynolds v. Reynolds ..... 208 N. C., 578 ..... 43, 509
Rice v. R. R. ..... 130 N. C., 375 566
Richardson v. R. R. ..... 126 N. C., 100 342
Riddle v. Whisnant ..... 220 N. C., 131 ..... 197, 632
Ridenhour v. Ridenhour ..... 225 N. C., 508 375
Ridley v. R. R. ..... 116 N. C., 923 337
Riggan v. Green ..... 80 N. C., 237 55
Riley v. Jordan ..... 75 N. C., 180 322
Ritchie v. White ..... 225 N. C., 450 ..... 617, 620
Ritter v. Grimm ..... 114 N. C., 373 376
Roane v. McCoy ..... 182 N. C., 727 656
Roane v. Robinson ..... 189 N. C., 628 593
Robbins v. Hosiery Mills ..... 220 N. C., 246 ..... 318, 685
Roberts v. Baldwin ..... 151 N. C., 407 565
Roberts v. Grogan ..... 222 N. C., 30 626
Roberts v. Massey ..... 185 N. C., 164 213
Robinson v. Daughtry ..... 171 N. C., 200 236
Robinson v. Goldsboro ..... 135 N. C., 382 4
Robinson v. McAlhaney ..... 214 N. C., 180 263
Rodman v. Washington ..... 122 N. C., 39 8
Rodriguez v. Rodriguez ..... 224 N. C., 275 242
Rogers v. Black Mountain ..... 224 N. C., 119 197
Rollins v. Henry ..... 78 N. C., 342 241
Rollins v. Keel ..... 115 N. C., 68 471
Rollins v. Winston-Salem ..... 176 N. C., 411 18
Rose v. Patterson ..... 220 N. C., 60 365
Rosenbaum v. New Bern ..... 118 N. C., 83 179
Rostan v. Huggins ..... 216 N. C., 386 144
Rountree v. Fountain ..... 203 N. C., 381 273
Rudd v. Casualty Co. ..... 202 N. C., 779 491
Russell v. Cutshall ..... 223 N. C., 353 197

S

Salmon v. Pearce....223 N. C., 587.... 197
Sanders v. Ellington.... 77 N. C., 255.... 115
Sanders v. Griffin....191 N. C., 447.... 39
Sanders v. Sanders....167 N. C., 319.... 617
Sash Co. v. Parker....153 N. C., 130.... 4
Scarborough v. Robinson.... 81 N. C., 409.... 713
Schas v. Ins. Co....166 N. C., 55.... 458
Schnepp v. Richardson....222 N. C., 228.... 246
School v. Institution....117 N. C., 164.... 513
Scott v. Gillis....197 N. C., 223.... 99
Scott v. Lumber Co....144 N. C., 44.... 551
Sears v. Braswell....197 N. C., 515.... 314
Seawell v. Lumber Co....172 N. C., 320.... 578
Seawell v. R. R....132 N. C., 856.... 574
Sebastian v. Motor Lines....213 N. C., 770....369, 418
Shearin v. Hunter.... 72 N. C., 493.... 33
Sheek v. Sain....127 N. C., 266.... 344
Shell v. Roseman....155 N. C., 90.... 23
Shepard v. Leonard....223 N. C., 110....95, 96, 202, 269, 376
Sherrill v. Wilhelm....182 N. C., 673.... 401
Shirley v. Ayers....201 N. C., 51.... 418
Shives v. Cotton Mills....151 N. C., 290.... 630
Shober v. Wheeler....144 N. C., 403.... 268
Shuford v. Scruggs....201 N. C., 685.... 273
Shull v. Johnson.... 55 N. C., 202....673, 674
Shute v. Austin....120 N. C., 440.... 33
Sills v. Ford....171 N. C., 733.... 213
Simons v. Lebrun....219 N. C., 42.... 349
Simonton v. Simonton.... 80 N. C., 7.... 376
Simpson v. R. R....154 N. C., 51.... 363
Sinclair v. Worthy.... 60 N. C., 114.... 604
Sing v. Charlotte....213 N. C., 60.... 9
Singleton v. Cherry....168 N. C., 402.... 445
Slade v. Hosiery Mills....209 N. C., 823.... 186, 187, 315, 316, 318, 319
Sloan Bros. v. Sawyer-Felder Co.175 N. C., 657.... 432
Small v. Small.... 74 N. C., 16.... 239
Smathers v. Hotel Co....162 N. C., 346.... 613
Smith v. Brisson .... 90 N. C., 284.... 471
Smith v. Creamery Co. ....217 N. C., 468....186, 187, 188, 189, 318
Smith v. Duke University ....219 N. C., 628....196, 197
Smith v. Fite .... 92 N. C., 319....58, 59
Smith v. Hendersonville ....152 N. C., 617.... 8
Smith v. Hosiery Mills ....212 N. C., 661.... 382
Smith, *In re*....130 N. C., 638.... 122
Smith, *In re* Will of ....163 N. C., 464.... 473
Smith v. Lumber Co. ....147 N. C., 62.... 533
Smith v. McClung ....201 N. C., 648.... 465
Smith v. Mariakakis ....226 N. C., 100.... 197
Smith v. Moore ....142 N. C., 277.... 473
Smith v. Moore ....220 N. C., 165....197, 632
Smith v. New Bern .... 70 N. C., 14.... 8
Smith v. Sink ....211 N. C., 725.... 89
Smith v. Smith ....150 N. C., 81.... 592

Smith v. Smith ....199 N. C., 463.... 376
Smith v. Turnage-Winslow Co....212 N. C., 310.... 215
Smith v. Wharton ....199 N. C., 246.... 465
Smith v. Wilkins ....164 N. C., 135....179, 183
Smith v. Winston-Salem ....189 N. C., 178.... 455
Snyder v. Maxwell, Comr. of Revenue ....217 N. C., 617.... 181
Sorrell v. Sorrell....198 N. C., 460.... 609
Southern v. Cotton Mills Co....200 N. C., 165.... 186
Spain v. Hines....214 N. C., 432.... 144
Spearman v. Burial Assn....225 N. C., 185.... 144
Speas v. Woodhouse....162 N. C., 66....444, 445
Springer v. Shavender....116 N. C., 12.... 438
Springer v. Shavender....118 N. C., 33.... 438
Springs v. Doll....197 N. C., 240.... 420
Springs v. Refining Co....205 N. C., 444....115, 364
Sprinkle v. Spainhour....149 N. C., 223....444, 445
Staley v. Park....202 N. C., 155.... 198
Stallings v. Spruill....176 N. C., 121.... 577
Stanback v. Bank....197 N. C., 292.... 76
Stancil v. Gay.... 92 N. C., 462.... 202
Stanley v. Hyman-Michaels Co....222 N. C., 257....30, 589
Stanley v. Lumber Co....184 N. C., 302.... 416
Starnes v. Tyson....226 N. C., 395.... 203
S. v. Abernethy ....220 N. C., 226....164, 373, 491, 494, 497, 525
S. v. Absher ....226 N. C., 656.... 613
S. v. Adams ....133 N. C., 667....49, 587
S. v. Adams ....138 N. C., 688.... 540
S. v. Adams ....213 N. C., 243....493, 678
S. v. Alridge ....206 N. C., 850.... 495
S. v. Allen ....186 N. C., 302....385, 634
S. v. Allen ....224 N. C., 530.... 49
S. v. Alston ....215 N. C., 713.... 25
S. v. Alverson ....225 N. C., 29.... 643
S. v. Anderson ....208 N. C., 771.... 24
S. v. Andrew .... 61 N. C., 205.... 25
S. v. Artis ....227 N. C., 371.... 654
S. v. Bailey ....179 N. C., 724.... 492
S. v. Baldwin ....226 N. C., 295.... 171
S. v. Banner ....149 N. C., 519.... 492
S. v. Barbee ....197 N. C., 248.... 49
S. v. Batson ....220 N. C., 411.... 405
S. v. Beachum ....220 N. C., 531.... 411
S. v. Beal ....199 N. C., 278....23, 62, 383, 491, 534
S. v. Beard ....207 N. C., 673.... 523
S. v. Bell .... 65 N. C., 313.... 104
S. v. Bell ....205 N. C., 225.... 171
S. v. Bell ....212 N. C., 20.... 556
S. v. Bennett ....226 N. C., 82.... 533
S. v. Benton .... 19 N. C., 196.... 555
S. v. Benton ....226 N. C., 745....26, 613, 647
S. v. Best ....202 N. C., 9.... 587
S. v. Bethea ....186 N. C., 22.... 532
S. v. Biggs ....224 N. C., 23....23, 25
S. v. Bishop .... 73 N. C., 44.... 535

S. v. Blackwelder ....182 N. C., 899.... 493
S. v. Blevins ....138 N. C., 668.... 664
S. v. Bohanon ....142 N. C., 695....24, 492, 555
S. v. Boon .... 35 N. C., 244.... 634
S. v. Boswell ....194 N. C., 260.... 452
S. v. Brabham ....108 N. C., 793.... 532
S. v. Brackville ....106 N. C., 701.... 540
S. v. Brady ....107 N. C., 822....490, 494
S. v. Bridgers ....172 N. C., 879.... 196
S. v. Bridgers ....178 N. C., 733.... 62
S. v. Bright ....215 N. C., 537.... 411
S. v. Britt ....225 N. C., 364....61, 210, 404, 532
S. v. Brittain .... 89 N. C., 481.... 411
S. v. Brodie ....190 N. C., 554.... 532
S. v. Brooks ....224 N. C., 627....107, 621
S. v. Brooks ....225 N. C., 662.... 23
S. v. Broom ....222 N. C., 324.... 657
S. v. Brown ....203 N. C., 513.... 106
S. v. Brown ....204 N. C., 392.... 535
S. v. Brown ....218 N. C., 415.... 493
S. v. Brown ....225 N. C., 22.... 46
S. v. Bryant ....213 N. C., 752.... 663
S. v. Buchanan ....130 N. C., 660....96, 383
S. v. Burleson ....198 N. C., 61.... 39
S. v. Burnette ....213 N. C., 153.... 386
S. v. Burrage ....223 N. C., 129.... 411
S. v. Bynum ....175 N. C., 777.... 655
S. v. Calcutt ....219 N. C., 545....30, 589
S. v. Caldwell ....212 N. C., 484....24, 533
S. v. Cameron ....223 N. C., 464.... 534
S. v. Cannon ....218 N. C., 466.... 586
S. v. Capps ....134 N. C., 622.... 410
S. v. Carlson ....171 N. C., 818....104, 495
S. v. Carr ....196 N. C., 129.... 23
S. v. Carter ....129 N. C., 560.... 179
S. v. Carver ....213 N. C., 150.... 36
S. v. Casey ....201 N. C., 185.... 375
S. v. Casey ....201 N. C., 620.... 71
S. v. Chambers ....180 N. C., 705.... 339
S. v. Chambers ....218 N. C., 442.... 134
S. v. Cheek .... 35 N. C., 114.... 678
S. v. Claudius ....164 N. C., 521.... 495
S. v. Coal Co. ....210 N. C., 742.... 661
S. v. Coates ....130 N. C., 701.... 523
S. v. Coble ....177 N. C., 588.... 595
S. v. Cockman .... 60 N. C., 484.... 555
S. v. Cody ....224 N. C., 470.... 62
S. v. Colson ....222 N. C., 28....209, 534
S. v. Cooper ....205 N. C., 657....447, 556
S. v. Cope ....204 N. C., 28.... 597
S. v. Cox ....201 N. C., 357.... 534
S. v. Crandall ....225 N. C., 148.... 171
S. v. Crane ....110 N. C., 530.... 540
S. v. Craton .... 28 N. C., 164.... 411
S. v. Creech ....210 N. C., 700....678, 679

S. v. Crisp ....170 N. C., 785.... 664
S. v. Crook .... 91 N. C., 536.... 46
S. v. Crowson .... 98 N. C., 595.... 25
S. v. Dale ....218 N. C., 625....491, 497, 524, 525
S. v. Dalton ....206 N. C., 507.... 657
S. v. Daniels ....134 N. C., 641.... 556
S. v. Davis ....150 N. C., 851.... 105
S. v. Davis ....214 N. C., 787.... 45
S. v. Davis ....223 N. C., 54.... 531
S. v. Davis ....223 N. C., 381.... 411
S. v. Davis ....225 N. C., 117.... 598
S. v. Deal ....207 N. C., 448.... 523
S. v. DeBerry ....224 N. C., 834.... 202
S. v. DeGraffenreid ....223 N. C., 461....385, 386, 411
S. v. DeGraffenreid ....224 N. C., 517.... 492
S. v. DeJournette ....214 N. C., 575.... 325
S. v. Denton ....154 N. C., 641.... 656
S. v. Dickens ....215 N. C., 303.... 452
S. v. Diggs ....181 N. C., 550.... 495
S. v. Dilliard ....223 N. C., 446.... 404
S. v. Dixon ....101 N. C., 741.... 495
S. v. Dixon ....215 N. C., 161....178, 524
S. v. Dixon ....215 N. C., 438....447, 492
S. v. Douglass .... 63 N. C., 500.... 447
S. v. Dowell ....195 N. C., 523....45, 46
S. v. Dozier .... 73 N. C., 117.... 133
S. v. Draughon ....151 N. C., 667.... 532
S. v. Edwards ....205 N. C., 661....71, 375
S. v. Elkins ....187 N. C., 533.... 178
S. v. Ellerbe ....223 N. C., 770.... 663
S. v. Ellis ....210 N. C., 166....45, 452
S. v. Elmore ....212 N. C., 531.... 405
S. v. English ....164 N. C., 497....532, 555
S. v. Epps ....213 N. C., 709....45, 46, 62
S. v. Estes ....185 N. C., 752.... 452
S. v. Eurell ....220 N. C., 519.... 71
S. v. Exum ....213 N. C., 16.... 533
S. v. Farmer ....188 N. C., 243....621, 622
S. v. Ferrell ....205 N. C., 640.... 387
S. v. Feyd ....213 N. C., 617.... 385
S. v. Flemming ....130 N. C., 688.... 540
S. v. Forte ....222 N. C., 537.... 581
S. v. Foster ....172 N. C., 960.... 492
S. v. Foster ....185 N. C., 674.... 46
S. v. French ....225 N. C., 276.... 210
S. v. Friddle ....223 N. C., 258.... 534
S. v. Gardner ....226 N. C., 310....38, 540
S. v. Garland ....138 N. C., 675.... 664
S. v. Garner ....129 N. C., 536.... 329
S. v. Gause ....227 N. C., 26.... 589
S. v. Gay ....224 N. C., 141....328, 588
S. v. Georgia Co. ....112 N. C., 34.... 298
S. v. Gerard .... 37 N. C., 210.... 513
S. v. Gibson ....169 N. C., 318.... 104
S. v. Gibson ....196 N. C., 393.... 36

S. v. Glenn ..... 198 N. C., 79 664
S. v. Godwin ..... 138 N. C., 582 535
S. v. Godwin ..... 210 N. C., 447 375
S. v. Goldston ..... 201 N. C., 89 701
S. v. Gooch ..... 94 N. C., 982 376
S. v. Gooding ..... 194 N. C., 271 50
S. v. Gordon ..... 225 N. C., 757 493
S. v. Graham ..... 74 N. C., 646 163
S. v. Graham ..... 224 N. C., 347 37
S. v. Graham ..... 224 N. C., 351 678
S. v. Grainger ..... 223 N. C., 716 210
S. v. Grass ..... 223 N. C., 31 ..... 24, 533
S. v. Grier ..... 184 N. C., 723 678
S. v. Grier ..... 203 N. C., 586 25
S. v. Griggs ..... 223 N. C., 279 242
S. v. Grimes ..... 226 N. C., 523 46
S. v. Hairston ..... 222 N. C., 455 387
S. v. Hall ..... 214 N. C., 639 405
S. v. Hamlet ..... 206 N. C., 568 701
S. v. Hammond ..... 188 N. C., 602 46
S. v. Hampton ..... 210 N. C., 283 ..... 161, 383
S. v. Harbert ..... 185 N. C., 760 105
S. v. Hardee ..... 192 N. C., 533 491
S. v. Hargrove ..... 216 N. C., 570 322
S. v. Harrill ..... 224 N. C., 477 404
S. v. Harris ..... 195 N. C., 306 105
S. v. Harris ..... 213 N. C., 648 534
S. v. Harris ..... 216 N. C., 746 290
S. v. Harris ..... 223 N. C., 697 452
S. v. Harrison ..... 115 N. C., 706 24
S. v. Harrison ..... 145 N. C., 408 540
S. v. Harrison ..... 184 N. C., 762 531
S. v. Hartley ..... 193 N. C., 304 707
S. v. Hawkins ..... 214 N. C., 326 ..... 532, 533
S. v. Hege ..... 194 N. C., 526 45
S. v. Henderson ..... 216 N. C., 99 ..... 447, 556
S. v. Hensley ..... 94 N. C., 1021 ..... 447, 555
S. v. Herndon ..... 223 N. C., 208 493
S. v. Herring ..... 201 N. C., 543 452
S. v. Herron ..... 175 N. C., 754 96
S. v. Hill ..... 79 N. C., 656 105
S. v. Hill ..... 141 N. C., 769 452
S. v. Hill ..... 181 N. C., 558 ..... 328, 329
S. v. Hill ..... 223 N. C., 753 322
S. v. Holbrook ..... 223 N. C., 622 49
S. v. Hough ..... 138 N. C., 663 664
S. v. Howard ..... 129 N. C., 584 490
S. v. Howley ..... 220 N. C., 113 ..... 491, 495
S. v. Hudson ..... 218 N. C., 219 533
S. v. Hughes ..... 86 N. C., 662 134
S. v. Hunt ..... 134 N. C., 684 655
S. v. Hunter ..... 143 N. C., 607 163
S. v. Inman ..... 224 N. C., 531 531
S. v. Jackson ..... 199 N. C., 321 ..... 102, 386, 387
S. v. Jackson ..... 218 N. C., 373 105

S. v. Jeffreys ....117 N. C., 743....327, 328
S. v. Jenkins .... 78 N. C., 478.... 104
S. v. Johnson ....184 N. C., 637.... 661
S. v. Johnson ....199 N. C., 429.... 273
S. v. Johnson ....205 N. C., 610.... 701
S. v. Johnson ....220 N. C., 773.... 493
S. v. Johnson ....226 N. C., 266.... 22
S. v. Johnson ....226 N. C., 671.... 22
S. v. Jones ....222 N. C., 37....329, 588
S. v. Jones ....227 N. C., 94.... 376
S. v. Keaton ....206 N. C., 682.... 410
S. v. Keller ....214 N. C., 447.... 405
S. v. Kennedy ....169 N. C., 326.... 664
S. v. King ....227 N. C., 559....560, 561
S. v. Kirksey ....227 N. C., 445....555, 556
S. v. Knight ....169 N. C., 333.... 290
S. v. Knotts ....168 N. C., 173.... 491
S. v. Koritz ....227 N. C., 552....531, 558, 559, 560, 561
S. v. Landin ....209 N. C., 20.... 493
S. v. Langley ....204 N. C., 687.... 102
S. v. Lassiter ....208 N. C., 251.... 49
S. v. Law ....227 N. C., 103.... 96
S. v. Lawrence ....196 N. C., 562.... 540
S. v. Lea ....203 N. C., 13....96, 383, 491, 494, 525
S. v. Lea ....203 N. C., 316.... 375
S. v. Leak ....156 N. C., 643.... 329
S. v. Lee ....206 N. C., 472....30, 411
S. v. Levy ....187 N. C., 581....447, 555
S. v. Levy ....200 N. C., 586.... 524
S. v. Limerick ....146 N. C., 649.... 595
S. v. Lipscomb ....134 N. C., 689.... 411
S. v. Livingston ....202 N. C., 809.... 24
S. v. Lockey ....214 N. C., 525.... 46
S. v. Long ....143 N. C., 670.... 96
S. v. Lord ....225 N. C., 354....23, 492, 556
S. v. Love ....187 N. C., 32.... 210
S. v. Lowe ....204 N. C., 572.... 587
S. v. Lowery ....223 N. C., 598....597, 598
S. v. Lowry ....170 N. C., 730.... 163
S. v. Lueders ....214 N. C., 558.... 181
S. v. Lumber Co. ....153 N. C., 610.... 678
S. v. McAllister ....187 N. C., 400.... 45
S. v. McBryde .... 97 N. C., 393.... 134
S. v. McCanless ....193 N. C., 200.... 268
S. v. McDaniel .... 60 N. C., 245.... 634
S. v. McKinnon ....223 N. C., 160.... 493
S. v. McLean ....224 N. C., 704....385, 635
S. v. McLeod ....198 N. C., 649....163, 493
S. v. McLeod ....227 N. C., 411.... 649
S. v. McNair ....226 N. C., 462....25, 279
S. v. McNeill ....225 N. C., 560....46, 96
S. v. Mallard ....184 N. C., 667.... 447
S. v. Mangum ....116 N. C., 998.... 495
S. v. Mann ....219 N. C., 212.... 493
S. v. Manning ....221 N. C., 70.... 25

S. v. Martin ..... 191 N. C., 401 153
S. v. Massey ..... 86 N. C., 658 ..... 327, 328
S. v. Matthews ..... 121 N. C., 604 495
S. v. Matthews ..... 162 N. C., 542 540
S. v. Mays ..... 225 N. C., 486 ..... 163, 533
S. v. Melton ..... 187 N. C., 481 540
S. v. Merrick ..... 171 N. C., 788 ..... 30, 386
S. v. Miller ..... 225 N. C., 213 ..... 96, 202, 269
S. v. Minton ..... 61 N. C., 196 587
S. v. Mitchell ..... 89 N. C., 521 329
S. v. Moody ..... 222 N. C., 763 475
S. v. Moon ..... 178 N. C., 715 96
S. v. Moore ..... 104 N. C., 743 372
S. v. Moore ..... 120 N. C., 570 447
S. v. Moore ..... 204 N. C., 545 523
S. v. Moore ..... 210 N. C., 459 621
S. v. Moore ..... 210 N. C., 686 ..... 24, 337
S. v. Moore ..... 214 N. C., 658 663
S. v. Morgan ..... 25 N. C., 186 411
S. v. Morgan ..... 225 N. C., 549 ..... 106, 325
S. v. Morgan ..... 226 N. C., 414 ..... 269, 376
S. v. Morrison ..... 207 N. C., 804 586
S. v. Morrow ..... 220 N. C., 441 107
S. v. Mosley ..... 213 N. C., 304 613
S. v. Murphrey ..... 186 N. C., 113 452
S. v. Murray ..... 216 N. C., 681 533
S. v. Myers ..... 202 N. C., 351 ..... 24, 30
S. v. Nash ..... 226 N. C., 608 ..... 107, 621
S. v. Nelson ..... 200 N. C., 69 534
S. v. Newsome ..... 195 N. C., 552 ..... 24, 30, 533
S. v. Newton ..... 207 N. C., 323 540
S. v. Nichols ..... 215 N. C., 80 171
S. v. Noland ..... 204 N. C., 329 535
S. v. Nunley ..... 224 N. C., 96 105
S. v. Orrell ..... 75 N. C., 317 382
S. v. Overcash ..... 226 N. C., 632 613
S. v. Owenby ..... 226 N. C., 521 646
S. v. Ownby ..... 146 N. C., 677 646
S. v. Oxendine ..... 223 N. C., 659 ..... 24, 586, 587
S. v. Oxendine ..... 224 N. C., 825 ..... 36, 210
S. v. Page ..... 215 N. C., 333 ..... 61, 382
S. v. Parker ..... 132 N. C., 1014 447
S. v. Parker ..... 198 N. C., 629 595
S. v. Parker ..... 224 N. C., 524 405
S. v. Parks ..... 107 N. C., 821 337
S. v. Parris ..... 181 N. C., 585 678
S. v. Patterson ..... 78 N. C., 470 49
S. v. Patterson ..... 98 N. C., 660 ..... 710, 711, 713, 714
S. v. Patterson ..... 222 N. C., 179 46
S. v. Patrick ..... 48 N. C., 443 24
S. v. Payne ..... 213 N. C., 719 62
S. v. Pennell ..... 224 N. C., 622 664
S. v. Peoples ..... 131 N. C., 784 556
S. v. Perry ..... 225 N. C., 174 ..... 49, 171, 535
S. v. Peterson ..... 212 N. C., 758 64

S. v. Peterson ..... 226 N. C., 255 ..... 46, 96
S. v. Phifer ..... 65 N. C., 321 495
S. v. Potts ..... 100 N. C., 457 492
S. v. Powell ..... 100 N. C., 526 179
S. v. Powell ..... 219 N. C., 220 61
S. v. Pritchett ..... 106 N. C., 667 555
S. v. Quick ..... 72 N. C., 241 46
S. v. Ragland ..... 227 N. C., 162 373
S. v. Raper ..... 203 N. C., 489 215
S. v. Ratcliff ..... 199 N. C., 9 ..... 385, 387
S. v. Ray ..... 151 N. C., 710 95
S. v. Ray ..... 212 N. C., 725 534
S. v. Razook ..... 179 N. C., 708 46
S. v. Redditt ..... 189 N. C., 176 36
S. v. Register ..... 224 N. C., 854 62
S. v. Reitz ..... 83 N. C., 634 163
S. v. Rhinehart ..... 209 N. C., 150 613
S. v. Richardson ..... 216 N. C., 304 533
S. v. Rights ..... 82 N. C., 675 49
S. v. Riley ..... 113 N. C., 648 452
S. v. Rising ..... 223 N. C., 747 25
S. v. Ritter ..... 197 N. C., 113 ..... 494, 499, 525
S. v. Ritter ..... 199 N. C., 116 497
S. v. Roberts ..... 12 N. C., 259 24
S. v. Roberts ..... 189 N. C., 93 495
S. v. Robinson ..... 188 N. C., 784 410
S. v. Robinson ..... 213 N. C., 273 664
S. v. Rodgers ..... 217 N. C., 622 71
S. v. Rodman ..... 188 N. C., 720 533
S. v. Rountree ..... 181 N. C., 535 23
S. v. Sanders ..... 84 N. C., 729 24
S. v. Satterfield ..... 198 N. C., 682 598
S. v. Satterfield ..... 207 N. C., 118 387
S. v. Sawyer ..... 224 N. C., 61 ..... 382, 387
S. v. Scoggins ..... 225 N. C., 71 ..... 493, 532
S. v. Sheek ..... 219 N. C., 811 411
S. v. Shepherd ..... 220 N. C., 377 ..... 532, 534
S. v. Sherrard ..... 117 N. C., 716 172
S. v. Shew ..... 194 N. C., 690 ..... 50, 586
S. v. Shipman ..... 202 N. C., 518 494
S. v. Shook ..... 224 N. C., 728 ..... 210, 540
S. v. Sims ..... 213 N. C., 590 ..... 531, 556
S. v. Singleton ..... 183 N. C., 738 452
S. v. Smith ..... 136 N. C., 684 ..... 327, 328
S. v. Smith ..... 138 N. C., 700 498
S. v. Smith ..... 211 N. C., 93 36
S. v. Smith ..... 213 N. C., 299 533
S. v. Smith ..... 221 N. C., 400 ..... 23, 383, 525
S. v. Smith ..... 225 N. C., 78 ..... 61, 383
S. v. Spencer ..... 176 N. C., 709 163
S. v. Spruill ..... 214 N. C., 123 ..... 678, 679
S. v. Stancill ..... 178 N. C., 683 62
S. v. Stansell ..... 203 N. C., 69 598
S. v. Stanton ..... 118 N. C., 1182 447
S. v. Starling ..... 51 N. C., 366 452

S. v. Starnes ....220 N. C., 384....448, 571, 613
S. v. Stefanoff ....206 N. C., 443.... 533
S. v. Stephenson ....218 N. C., 258.... 23
S. v. Stevenson ....109 N. C., 730.... 179
S. v. Stitt ....146 N. C., 643.... 595
S. v. Stiwinter ....211 N. C., 278.... 540
S. v. Strickland ....208 N. C., 770.... 382
S. v. Sudderth ....184 N. C., 753.... 597
S. v. Suddreth ....223 N. C., 610.... 45
S. v. Sultan ....142 N. C., 569.... 555
S. v. Taylor ....213 N. C., 521....373, 655
S. v. Terry ....173 N. C., 761.... 492
S. v. Thomas ....220 N. C., 384.... 71
S. v. Thompson ....161 N. C., 238.... 163
S. v. Thompson ....224 N. C., 661.... 533
S. v. Thornton ....136 N. C., 610.... 46
S. v. Todd ....222 N. C., 346.... 279
S. v. Tola ....222 N. C., 406.... 106
S. v. Trott ....190 N. C., 674....678, 679
S. v. Turner ....119 N. C., 841.... 495
S. v. Vick ....213 N. C., 235.... 183
S. v. Vincent ....222 N. C., 543.... 23
S. v. Vinson .... 63 N. C., 335.... 493
S. v. Wagstaff ....219 N. C., 15.... 533
S. v. Walker ....226 N. C., 458....163, 532
S. v. Wall ....218 N. C., 566.... 595
S. v. Walls ....211 N. C., 487....447, 556, 557
S. v. Walsh ....224 N. C., 218....463, 613
S. v. Watson....208 N. C., 70.....107, 412, 475, 621, 649, 650, 696, 701
S. v. Watts ....224 N. C., 771.... 279
S. v. Weinstein ....224 N. C., 645....49, 105
S. v. Wells ....219 N. C., 354.... 525
S. v. Whedbee ....152 N. C., 770.... 495
S. v. Whitaker .... 89 N. C., 472.... 50
S. v. Whitehurst ....202 N. C., 631.... 25
S. v. Whitehurst ....212 N. C., 300.... 71
S. v. Whitener ....191 N. C., 659.... 25
S. v. Whiteside ....204 N. C., 710....494, 499
S. v. Wilcox ....132 N. C.,1120....372, 540
S. v. Williams ....121 N. C., 628.... 329
S. v. Williams ....185 N. C., 685.... 386
S. v. Williams ....186 N. C., 627.... 328
S. v. Williams ....209 N. C., 57.... 181
S. v. Willoughby ....180 N. C., 676.... 540
S. v. Wilson ....176 N. C., 751.... 532
S. v. Wilson ....217 N. C., 123.... 662
S. v. Wilson ....218 N. C., 556.... 535
S. v. Wilson ....218 N. C., 769.... 322
S. v. Wise ....225 N. C., 746....533, 635
S. v. Worth ....116 N. C.,1007.... 178
S. v. Wrenn ....198 N. C., 260.... 494
S. v. Wyont ....218 N. C., 505.... 382
Steele v. Coxe....225 N. C., 726.... 210
Steele, *In re*....220 N. C., 685.... 707

Steele v. Ins. Co.....196 N. C., 408..... 437
Stell v. Trust Co.....223 N. C., 550.....591, 592
Stephenson v. Watson.....226 N. C., 742..... 349
Stevens v. Turlington.....186 N. C., 191..... 323
Stilly v. Rice ..... 67 N. C., 178..... 33
Story v. R. R.....133 N. C., 59..... 64
Strickland v. Shearon.....193 N. C., 599..... 280
Sugg v. Credit Corp. .....196 N. C., 97..... 55
Sumner v. Lumber Co.....175 N. C., 654..... 671
Swicegood v. Swift & Co.....212 N. C., 396..... 197
Swink v. Horn.....226 N. C., 713..... 367
Swinson v. Mt. Olive.....147 N. C., 611..... 8
Sykes v. Boone.....132 N. C., 199..... 456
Sykes v. Sykes.....197 N. C., 37..... 565

T

Talley v. Granite Quarries Co.....174 N. C., 445..... 52
Tarault v. Seip.....158 N. C., 363..... 70
Tatem v. Paine..... 11 N. C., 64..... 467
Tayloe v. Tayloe.....108 N. C., 69..... 33
Taylor v. Dawson..... 56 N. C., 87..... 336
Taylor v. McMillan.....123 N. C., 390..... 335
Taylor v. Pope.....106 N. C., 267..... 166
Taylor v. Rierson.....210 N. C., 185..... 420
Taylor v. Smith.....116 N. C., 531..... 399
Taylor v. Taylor.....112 N. C., 27..... 322
Taylor v. Taylor.....197 N. C., 197..... 445
Teachey v. Gurley.....214 N. C., 288..... 609
Temple Co. v. Guano Co.....162 N. C., 87..... 364
Templeton v. Kelley.....216 N. C., 487..... 263
Templeton v. Kelley.....217 N. C., 164.....571, 589, 613
TenHoopen, *In re* .....202 N. C., 223..... 617
Thomas v. Baker.....227 N. C., 226..... 514
Thomas v. Gas Co.....218 N. C., 429..... 192
Thomas v. Hipp.....223 N. C., 515..... 640
Thomas, *In re* Will of.....111 N. C., 409..... 211
Thomas v. R. R.....218 N. C., 292..... 282
Thompson v. Lumber Co.....168 N. C., 226.....604, 605
Thompson v. Telegraph Co.....107 N. C., 449..... 613
Thompson v. Williams.....175 N. C., 696..... 376
Tickle v. Hobgood.....212 N. C., 762.....267, 283
Tillman v. O'Briant.....220 N. C., 714.....673, 674
Timber Co. v. Butler.....134 N. C., 50..... 336
Tindall v. Furniture Co.....216 N. C., 306..... 319
Tire Co. v. Lester.....190 N. C., 411..... 239
Tobacco Co. v. Maxwell, Comr. of Revenue .....214 N. C., 367..... 181
Tomlinson v. Detestatius..... 3 N. C., 284..... 33
Tribble v. Swinson.....213 N. C., 550.....197, 263, 632
Trimmer v. Gorman.....129 N. C., 161.....438, 694
Tripp v. Tobacco Co.....193 N. C., 614..... 469
Troitino v. Goodman.....225 N. C., 406..... 546
Truck Corp. v. Wilkins.....219 N. C., 327..... 433
Trust Co. v. Dunlop .....214 N. C., 196..... 167
Trust Co. v. Ins. Co. .....204 N. C., 282..... 534

Trust Co. v. McCoin ....206 N. C., 272.... 437
Trust Co. v. Ogburn ....181 N. C., 324....512, 516
Tryon v. Power Co....222 N. C., 200....332, 638
Turlington v. Lucas....186 N. C., 283.... 399
Turner v. Eford.... 58 N. C., 106.... 336
Turner v. Glenn....220 N. C., 620.... 215
Turner v. Reidsville....224 N. C., 42.... 181
Turpin v. Jarrett....226 N. C., 135.... 471
Twining v. Wilmington....214 N. C., 655.... 8
Tyson v. Frutchey....194 N. C., 750....197, 632

U

Underwood v. Dooley....197 N.C., 100.... 352
Unemployment Compensation
Com. v. Coal Co....216 N. C., 6.... 297
Unemployment Compensation
Comm. v. Ins. Co....215 N. C., 479.... 297
Unemployment Compensation
Comm. v. Ins. Co....219 N. C., 576.... 297
University v Gatling.... 81 N. C., 508.... 513
University v. Harrison.... 90 N. C., 385....688, 695
Utilities Com. v. Coach Co....216 N. C., 325.... 680
Utilities Com. v. Coach Co....218 N. C., 233.... 680
Utilities Com. v. Coach Co....224 N. C., 390....393, 680
Utilties Com. v. Kinston....221 N. C., 359....325, 680
Utilities Com. v. Trucking Co....223 N. C., 687.... 680

V

Vance v. Guy....224 N. C., 607.... 210
Vanderford v. Foreman....129 N. C., 217.... 348
Van Landingham v. Sewing Machine Co. ....207 N. C., 355....196, 632
Vaughn v. Booker....217 N. C., 479 197
Vaughan v. Vaughan....211 N. C., 354.... 375
Vaught v. Williams....177 N. C., 77....236, 552
Vestal v. Machine Co....219 N. C., 468....66, 258, 625

W

Waddell v. Aycock....195 N. C., 268.... 128
Waddell v. Cigar Stores....195 N. C., 434.... 160
Wade v. Sanders.... 70 N. C., 277.... 246
Wadford v. Gillette....193 N. C., 413....55, 326
Wadsworth v. Concord....133 N. C., 587.... 4
Waggoner v. Publishing Co....190 N. C., 829....312, 336
Walker v. Johnston.... 70 N. C., 576.... 157
Walker v. Phelps....202 N. C., 344.... 331
Walker v. Wilson....222 N. C., 66.... 361
Wall, *In re* Will of....216 N. C., 805.... 461
Wallace v. Wallace....210 N. C., 656.... 239
Waller v. Dudley....193 N. C., 354.... 622
Waller v. Hipp....208 N. C., 117.... 420
Walston v. Lowry....212 N. C., 23.... 671
Ward v. R. R....224 N. C., 696.... 210
Ward v. Smith....223 N. C., 141.... 23

Warlick v. Lowman....101 N. C., 548.... 275
Warner v. R. R.... 94 N. C., 250....688, 695
Warren v. Breedlove....219 N. C., 383.... 364
Warrenton v. Warren County....215 N. C., 342....288, 289
Warsaw v. Malone....159 N. C., 573.... 4
Washington v. Bus, Inc....219 N. C., 856.... 345
Water Co. v. Trustees....151 N. C., 171.... 8
Watkins v. Raleigh....214 N. C., 644....359, 361, 676
Weatherman v. Ramsey....207 N. C., 270.... 197
Weaverville v. Hobbs, Comr. Vets. Loan Fund....212 N. C., 684.... 289
Webb v. Telegraph Co....167 N. C., 483.... 469
Weill v. Weill....212 N. C., 764....157, 158
Wells v. Crumpler....182 N. C., 350....322, 323
Wells v. Ins. Co....211 N. C., 427.... 458
Wells v. Odum....205 N. C., 110.... 138
West, *In re* Will of....227 N. C., 204.... 589
West v. Lee....224 N. C., 79....512, 513
Westfeldt, *In re* Will of....188 N. C., 702.... 137
Westfeldt v. Reynolds....191 N. C., 802.... 471
Whichard v. Lipe....221 N. C., 53....52, 365
White v. Chappell....219 N. C., 652.... 574
White v. Comrs. of Johnston....217 N. C., 329.... 668
White v. Pleasants....225 N. C., 760.... 347
Whitehurst v. Garrett....196 N. C., 154.... 432
Whitsett v. Clapp....200 N. C., 647.... 513
Whitt v. Rand....187 N. C., 805....17, 360
Wilkerson v. Dunn.... 52 N. C., 125.... 33
Williams v. Honeycutt ....176 N. C., 102.... 456
Williams v. McRackan ....186 N. C., 381....261, 336
Williams v. McPherson ....216 N. C., 565.... 594
Williams v. Parsons....167 N. C., 529.... 341
Williams v. Rand ....223 N. C., 734.... 158
Williams v. Thomas ....219 N. C., 727.... 420
Williams v. Williams ....175 N. C., 160.... 444
Williams v. Williams ....215 N. C., 739.... 513
Williamson v. Cox....218 N. C., 177.... 471
Williamson v. Holt....147 N. C., 515.... 70
Williamson v. Williamson....224 N. C., 474.... 242
Willis v. Anderson....188 N. C., 479.... 236
Wilson v. Bus Lines....217 N. C., 586.... 574
Wilson v. Charlotte....206 N. C., 856.... 106
Wilson v. Polk....175 N. C., 490.... 195
Winborne, Utilities Comr., v. Browning ....206 N. C., 557.... 394
Winborne, Utilities Comr., v. Mackey ....206 N. C., 554.... 394
Winborne, Utilities Comr., v. Sutton ....206 N. C., 559.... 394
Winchester v. Cutler....194 N. C., 698.... 399
Winchester v. Brotherhood of R. R. Trainmen....203 N. C., 735.... 165
Winder v. Martin....183 N. C., 410.... 630
Winston-Salem v. Forsyth County ....217 N. C., 704.... 289

Withers v. Lane....144 N. C., 184.... 647
Witty v. Witty....184 N. C., 375.... 157
Wolfe, *In re* Will of....185 N. C., 563.... 138
Womack v. Carter....160 N. C., 286.... 267
Womack v. Eacker.... 62 N. C., 161.... 214
Wood v. Cherry.... 73 N. C., 110.... 456
Wood v. Miller....226 N. C., 567.... 303
Wood v. Sawyer.... 61 N. C., 251.... 325
Wood v. Wilder....222 N. C., 622.... 399
Woodcock v. Trust Co....214 N. C., 224....512, 513
Woodley v. Hassell.... 94 N. C., 157.... 335
Woody v. Brooks....102 N. C., 334.... 33
Woody v. Smith.... 65 N. C., 116.... 33
Wooten v. Outland....226 N. C., 245.... 674
Worthy v. Knight....210 N. C., 498....342, 469
Wright v. Grocery Co....210 N. C., 462.... 89
Wright v. Lake Waccamaw....200 N. C., 616.... 625
Wynne v. Small....102 N. C., 133.... 173

Y

Yadkin County v. High Point....219 N. C., 94.... 203
Yarborough v. Park Commission.196 N. C., 284.... 286
York v. Merritt.... 77 N. C., 213.... 336
Young v. Henderson.... 76 N. C., 420.... 7

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1946

JOHN R. PURSER, JR., ON BEHALF OF HIMSELF AND ALL OTHER PROPERTY OWNERS AND TAXPAYERS OF THE CITY OF CHARLOTTE, NORTH CAROLINA, v. L. L. LEDBETTER, TREASURER OF THE CITY OF CHARLOTTE, AND TREASURER OF CHARLOTTE PARK & RECREATION COMMISSION.

(Filed 11 December, 1946.)

1. Taxation § 4—

What is a necessary expense under Art. VII, sec. 7, of the State Constitution is a question for the courts, and while great weight will be given a legislative declaration in a statute that the expenditure of funds therein authorized is for a necessary expense, such declaration is not binding on the courts.

2. Municipal Corporations § 5—

Municipal corporations derive their powers almost solely from legislative enactment under Art. VIII, sec. 4, of the State Constitution, and are subject to statutory restrictions and regulations of their taxing power.

3. Municipal Corporations § 42—

Where a statute authorizing municipal expenditures for a certain purpose provides that the question of a bond issue pursuant thereto should be submitted to a vote, the provision for referendum, whether expressed in terms *permissive* or *mandatory*, is *prerequisite* to proceedings by the municipality thereunder.

4. Constitutional Law § 4—

The Constitution will be liberally construed in order to adapt it to changing conditions and advancing social needs, but such rule of construction cannot override limitations prescribing methods of orderly progress, chief among which are the restrictions upon the taxing and spending power.

5. Same—

Our Constitution is a limitation rather than a grant of powers.

6. Taxation § 4—

Approval of taxation by popular vote is the rule, and the power to impose a tax for a necessary expense without a vote is an exception to the rule. Art. VII, sec. 7, of the State Constitution.

7. Same—

The imposition of a tax or the expenditure of funds derived therefrom for municipal parks and recreational facilities is for a public purpose but it is not for a necessary municipal expense, Art. VII, sec. 7, of the State Constitution, and the expenditure of funds for this purpose derived from a tax imposed without a referendum will be enjoined by the courts. This result is not affected by the fact that the statute authorizing expenditure of funds for this purpose declares it to be for a necessary municipal expense, Session Laws 1945, ch. 1052.

APPEAL by plaintiff from *Robbitt, J.,* 19 October, 1946. From MECKLENBURG.

The Charlotte Park and Recreation Commission is an adjuvant Municipal corporation, created under chapter 151 of the Private Laws of 1927, as amended, and is in control of all public parks, playgrounds and recreational facilities of the City of Charlotte. The defendant Ledbetter is its treasurer, and also the treasurer of the City of Charlotte. In the present action it is sought to enjoin the expenditure of a fund in his hands, the proceeds of a tax levy authorized by the city in its budget for the fiscal year beginning 1 July, 1946, for park and recreational purposes, which tax was imposed under the following circumstances:

At a special election held in May, 1927, the qualified voters of the city authorized an annual levy of two cents upon the $100 valuation of property, and the city has continuously since said time levied this tax.

In May, 1939, at a special election, there was presented to the voters of the city the question of authorizing the levy of a tax not exceeding five cents on the $100 valuation, for park and recreational purposes which failed to carry.

In April, 1946, a special election was held, presenting to the qualified voters the question whether the governing body of the city should be authorized to levy each year, for park and recreational purposes, a tax not exceeding seven cents on the $100 valuation, which also failed to carry.

Subsequently, in its budget for the fiscal year beginning 1 July, 1946, the governing body of the city appropriated for "Parks and Recreation Commission" (a) the sum of $22,816 to be raised by the imposition of the two-cent tax theretofore authorized by popular vote, and (b) the further sum of $10,000 to be raised by *ad valorem* tax in addition thereto.

Pursuant to the budget appropriation, the governing body of the city levied the two cents theretofore authorized by vote, and in addition thereto an *ad valorem* tax estimated to be sufficient to raise the $10,000 specially appropriated. The imposition of the last named tax was not authorized by popular vote.

Of the taxes so collected there is now in the hands of the defendant treasurer, $6,745 which, unless restrained, he intends to disburse and expend upon the orders of the Park and Recreation Commission for parks and recreational purposes.

The Parks and Recreation system of the City of Charlotte, now under control of the aforesaid Commission, consists of a total of 460 acres located in different portions of the city, including a large armory-auditorium and an athletic stadium. Upon certain of the lands under its control, the Commission has installed playground equipment for children and adolescents, baseball diamonds, softball diamonds, tennis courts, a swimming pool and a nine-hole golf course. The Commission conducts during the summer months and while the public schools are not in session, a program of supervised recreation for children and adolescents upon its several equipped playgrounds.

The armory-auditorium is a source of income to the Commission, which habitually leases it to private persons for more or less public occasions. The athletic stadium is also a source of income, the Commission renting it out for the staging of athletic events. In the operation of the public swimming pool and in the operation of the public golf course, all who use these facilities are charged a fee therefor.

The total income of the Commission for the last fiscal year was in excess of $84,000.00; and its income from the two-cent tax levy was approximately $24,000.00. About three-fourths of its income was received from other than tax sources.

At the aforementioned hearing, Judge Bobbitt, upon these facts, rendered a judgment dissolving the injunction and dismissing the action. The plaintiff appealed.

Taliaferro, Clarkson & Grier for plaintiff, appellant.

John D. Shaw for defendant, appellee.

SEAWELL, J. Article VII, section 7, of the Constitution reads as follows:

"That no county, city, town or other municipal corporation shall contract any debt, or pledge its faith or loan its credit, nor shall any tax be levied or collected by any officers of the same, except for the necessary expense thereof unless by vote of the majority of the qualified voters therein."

The foregoing is one of the three sections of this Article which is excepted from the power of the General Assembly to alter. Whatever enthusiasms may be engendered or fostered in the name of progress, they can be indulged only within the limitation thus expressed and cannot be expanded beyond it either by legislative action or by judicial construction, provided these co-ordinate branches of the Government act within the terms of the political and official trusts committed to them.

Of the two, the judiciary has the last say. While the legislative construction of the Constitution is entitled to great weight, it is not binding upon the Court. *Hedgcock v. Davis,* 64 N. C., 650; *Sash Co. v. Parker,* 153 N. C., 130, 134, 69 S. E., 1; *Person v. Watts,* 184 N. C., 499, 503, 115 S. E., 336. The ultimate decision as to what constitutes a necessary expense is always for the courts.

And we may be permitted an interlude to say that a statute which declares certain things to be a necessary expense and immediately provides for a submission of the project to a popular vote, itself presents a question of legislative intent for decision of the Court. See 1945 Supplement to General Statutes of 1943. The Session Laws of 1945, chapter 1052, the "Recreation Enabling Law," sec. 160-156, caption, "Declaration of Policy," declares that the "Creation, establishment and operation of the recreation system is a governmental function and a necessary expense as defined by Article VII, section 7, of the Constitution of North Carolina," and in the same frame and connection, provides for a submission of the proposal to a vote of the qualified voters, regardless of whether voluntarily initiated by the Governing Body (sec. 160-159) or on petition of the requisite number of qualified voters (sec. 160-163). The suggestion by appellee that such a referendum only serves the purpose of advising the Governing Body in the exercise of its discretion and that an unfavorable result in the election may be immediately disregarded under a general power to tax for necessary municipal expense, has been dealt with in numerous decisions and the answer given is *contra. Ellison v. Williamston,* 152 N. C., 147, 67 S. E., 255; *Warsaw v. Malone,* 159 N. C., 573, 75 S. E., 1011; *Murphy v. Webb,* 156 N. C., 402, 72 S. E., 460; *Hendersonville v. Jordan,* 150 N. C., 35, 63 S. E., 167; *Commissioners v. Webb,* 148 N. C., 120, 61 S. E., 670; *Robinson v. Goldsboro,* 135 N. C., 382, 47 S. E., 462; *Wadsworth v. Concord,* 133 N. C., 587, 45 S. E., 948.

As we have heretofore observed, municipalities derive their powers almost wholly from legislative enactment under Article VIII, section 4, of the Constitution, and are subject to statutory restriction and regulation of the taxing power. *Justice Hoke,* speaking for the Court in *Ellison v. Williamston, supra,* said:

"We hold it to be a proper construction of the statute, *and others of similar import,* that where a legislature confers powers on a municipal

corporation to submit the question of a bond issue for an enterprise of this character, and the statute is still in effect, it is equivalent to legislative declaration and requirement that the sense of the voters shall be had before the undertaking is entered upon. True, we have decided in several of the more recent cases that where the question is presented as an open proposition, the obligations of the municipality incurred for the purpose indicated should be considered a necessary expense, that they do not come within the constitutional provision as to incurring municipal indebtedness, contained in Article VII, sec. 7, and that no vote of the people is ordinarily required. *Bradshaw v. High Point,* 151 N. C., 517, 66 S. E., 601; *Commissioners v. Webb,* 148 N. C., 120, 61 S. E., 670; *Fawcett v. Mt. Airy,* 134 N. C., 125, 45 S. E., 1029. But these and other decisions are also to the effect that, while there is no definite constitutional restraint in reference to indebtedness of this character, the question continues to be a matter of legislative regulation, and that the limitations and restraints established by the statute law must always be observed and complied with."

And further:

"When a statute of the Legislature provides for an election on a proposition of this character to incur indebtedness, even for a necessary expense, and the statute is still in force, such an Act is expressive of the legislative requirement that before the enterprise may be entered upon, an election must be held, *whether the act be expressed in terms permissive or mandatory,* and that any effort of the authorities to proceed without the sanction of popular approval so obtained, would be without warrant of law. To hold otherwise would be to declare that an act of our Legislature deliberately and formally passed, was utterly without significance. (Italics supplied.)

These clear-cut cases, undistinguishable from the case at bar, might be laid down as determinative of the present appeal; but because of the importance of the subject we prefer to rest decision on the Constitution rather than on an Act of the General Assembly which may be changed biennially or oftener.

We are not inadvertent to the uses of a written Constitution and the arguments that have been addressed to the propriety of a liberal construction so that it may aid, rather than retard, the march of progress. Concededly, from its nature and purpose, a constitution is intended to be a forward-looking document, expressing the basic principles on which government is founded; and where its terms will permit, is to be credited with a certain flexibility which will adapt it to the continuous growth and progress of the State. *Elliott v. Equalization Board,* 203 N. C., 749, 753, 166 S. E., 918. But when the Constitution provides how orderly progress may be fostered and advanced, and the process involves political

rights reserved or expressly secured to the people, the courts will be careful not to encroach on that prerogative, will be inclined to find in the provision itself the liberality and flexibility which the Constitution intends.

In *Helvering v. Davis*, 301 U. S., 619, 81 L. Ed., 1307, 109 A. L. R., 1319, *Justice Cardoza*, writing the opinion of the Court, observed:

"Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the nation. What is critical or urgent changes with the times."

And in *Gaizer v. Buck*, 203 Ind., 9, 179 N. E., 1, 82 A. L. R., 1348, it is said:

"The language of the Constitution (or statute) is generally extended to include new things and new conditions of the same class as those specified which were not known or contemplated when it was adopted."

This, however, is no more than an open-minded approach to the subject. Fully recognizing the propriety of that liberal construction necessary to keep the Constitution a living influence in the affairs of government, adapted to advancing social needs and improved concepts of the governmental function, we are still left the question whether with respect to the enterprise proposed by the City of Charlotte, the conditions precedent to judicial approval now exist,—whether the proposal, meritorious as it may be as a public purpose, may not be more properly embraced in a class with those comparatively more urgent causes which this Court, in obedience to the constitutional mandate as we have understood it, has left to approval by popular vote.

Our Constitution is one of limitations rather than of grants. Some of these limitations, coming from a simpler and franker age, may be austerely expressed,—but they lay down rules of administration still salutary in a democratic government. Undoubtedly, the restriction upon the taxing and spending power is one of the most important of these.

It is a matter of common knowledge that movements in recent years to enlarge the power of the Legislature over taxation have, paradoxically, resulted in amendments to the Constitution imposing even greater restriction. It would not be telling the whole truth to say that this attitude of the people is the product of history; it would be more accurate to say that history is the product of the attitude. Beyond doubt it strongly influenced the adoption of a provision which would largely put upon the people themselves the responsibility for the wisdom of incurring debt or submitting to taxation by requiring popular approval of the enterprise when currently presented.

Under Article VII, section 7, of the Constitution, approval of taxation by popular vote is the rule, direct imposition for necessary expense is the exception. Direct imposition of tax lies so narrowly within that

exception as to provoke the statement in Connor and Cheshire's Annotations, p. 315:

"This section indirectly, but explicitly, permits the exercise by municipal corporations of the power of making provision for necessary expenses, free from the restraints in other cases. *Gardner v. New Bern,* 98 N. C., 228, 3 S. E., 500; *Jones v. New Bern,* 152 N. C., 64, 67 S. E., 42."

And in *Jones v. Commissioners,* 137 N. C., 579, 599, 50 S. E., 291, it is said:

"The exception was partly made because it would be impracticable to refer all of these current expenses to popular approval, but an equally important reason was that local authority should not be withdrawn from all legislative provision and control."

The referendum is definitely recognized as an instrument of democratic government, widely used, and of great value. Where it is adopted in the Constitution it is entitled to respect and should not be abridged by withdrawal from its processes of the subjects with which it was intended to deal.

It may be conceded, as stated *supra,* that the term "necessary expenses" does not imply expenses without which government cannot exist. Still there is implied in it a certain degree of exigency, the essentials of frugality and economy, and a definite quality,—governmental in character,—which do not yield to arguments *ab convenienti* and which cannot be dismissed from the provision without depriving it of all significance. We do not believe that the framers of the Constitution intended that this highly protective restriction should be annulled by an unlimited power of redefinition so that in time the municipal expense budget might become a *potpourri* of subjects representing no real governmental need but rather the urge to find in a patriarchal government a panacea for all the discomforts to which the citizen may be subject.

Between the extremes there is a line, shifting with progress it may be, which the Court must seek with diligence and anxiety, with respect to every new proposal brought under review.

The trend of decision in this State is strongly against the contention of the appellee, and inclines us to the view that the judgment of the lower court is not consistent with the constitutional restriction.

The Court has in numerous instances passed upon municipal enterprises proposed as subjects of necessary expense, has admitted some, and rejected others. We suggest a three-way comparison between those admitted as necessary expenses, those rejected, and the proposal under review. We may be enlightened as to what accreditation the latter may have for the approved class, as judged *a sociis.*

Approved as necessary municipal expenses have been: Streets, *Young v. Henderson,* 76 N. C., 420; *Greensboro v. Scott,* 138 N. C., 181, 50

S. E., 589; *Commissioners v. Webb,* 148 N. C., 120, 61 S. E., 670; *Hendersonville v. Jordan,* 150 N. C., 35, 64 S. E., 167; *Jones v. New Bern,* 152 N. C., 64, 67 S. E., 173; sidewalks: *Hester v. Traction Co.,* 138 N. C., 288, 50 S. E., 711; *Commissioners v. Webb, supra; Smith v. Hendersonville,* 152 N. C., 617, 68 S. E., 145; water, and lights: *Fawcett v. Mt. Airy,* 134 N. C., 125, 45 S. E., 1029; *Water Co. v. Trustees,* 151 N. C., 171, 63 S. E., 742; sewerage: *Greensboro v. Scott, supra; Bradshaw v. High Point,* 151 N. C., 517; market house: *Smith v. New Bern,* 70 N. C., 14; *Swinson v. Mt. Olive,* 147 N. C., 611, 61 S. E., 569; municipal buildings: *Hightower v. Raleigh,* 150 N. C., 569, 65 S. E., 269. Some of these were held to be objects involving necessary expenses when first challenged and reviewed,—others, such as light, water and sewerage, had to knock at the Judicial Chamber repeatedly before admission.

Rejected are: Aid to public schools (where not an agency for the State), *Rodman v. Washington,* 122 N. C., 39, 30 S. E., 118; *Hollowell v. Borden,* 148 N. C., 255, 61 S. E., 638; hospitals: *Adams v. City of Durham,* 189 N. C., 232, 126 S. E., 611; *Burleson v. Board of Aldermen,* 200 N. C., 30, 156 S. E., 241.

As to the first class of purposes,—those for which tax may be levied directly, there can scarcely be a reasonable doubt of the question of governmental necessity. As to the second class, those which require approval by popular vote, it is hardly debatable that they are, by comparison in point of exigency, of greater public necessity than the enterprises now under review.

The Constitution plainly lays upon all agencies concerned with administration, including the courts, the duty to put first things first; not to lose perspective in spending tax money, which is said to be the lifeblood of government. So long as our conception of municipal power is such as to permit those who fight the battles of industry in crowded cities to be regarded as dispensable, and the casualties of accident and disease, directly caused or greatly augmented by congested living, as of no direct concern of municipal government, it is difficult to see how playgrounds and recreational facilities can be regarded as a necessary municipal expense.

Independently of any question as to the degree of social necessity, we believe that the activities proposed, however qualifying as a public purpose for which the municipality may provide by approval of the people, are too remote from the governmental function to be classed as objects of necessary public expense.

Our attention is called to *Atkins v. Durham,* 210 N. C., 295, 186 S. E., 330, in which recreational facilities were "under the facts" of the case held to be necessary expense; and to *Twining v. Wilmington,* 214 N. C., 655, 200 S. E., 416, which, on a similar factual situation, held to the contrary.

A careful study of *Atkins v. Durham, supra,* has led us to the conclusion that its authority should not be revived or extended; and it will, therefore, not be followed as a precedent. It may be said, however, that no commitment made upon the strength of that opinion while it was the "law of the land" will be disturbed. *Atkins v. Durham, supra,* is based almost wholly on *Hill v. Commissioner of Internal Revenue* before the U. S. Board of Tax Appeals, docket number 67105, 19 November, 1935, and the conclusion of that Board. The leading cases cited in the Tax Appeal report are from states which do not have a provision comparable to Article VII, section 7, of our Constitution. Here the section necessitates a distinction between "public purpose" and "necessary expense" which must be meticulously observed in exercising the taxing power. The welfare clause in the General Statutes conferring powers on municipalities, and usually found in their charters, cannot be cited or expanded to defeat the Constitution. A full discussion of the principle involved will be found in *Power Co. v. Clay County,* 213 N. C., 698, 192 S. E., 603. See also *Sing v. Charlotte,* 213 N. C., 60, 195 S. E., 271.

Also, the *Atkins case* proceeds on the theory that, by constitutional intent, the restriction may apply to some municipalities and not to others, depending upon population, industrial and other factors—a rule which if left to the governing bodies to apply, invades the province of the courts, and if left to the courts, is difficult, if not impossible, to apply. However such conditions may control the taxing authorities in determining, within the scope of their power, when a need, recognized by the Constitution as a necessary expense, arises in the particular jurisdiction, no such distinction is inherent in the constitutional provision. What is a necessary expense is a matter for the courts.

This decision closes no gate to the people of Charlotte, or of any other municipality, if they have the will to open it. The Constitution makes them trustees of their own progress. It neither drives them nor stays them, but leaves with them the responsibility for the wisdom of the venture.

The governing body has twice presented the question of the levy of this tax to the qualified voters of the City of Charlotte for their approval and it has been twice voted down. Disregarding this, the taxes were levied and collected. For the reasons stated it is our opinion, and we so hold, that the levy and collection of the tax was without warrant of law and the proposed expenditure should be restrained. The judgment to the contrary is reversed.

The cause is remanded to the court below for judgment and proceedings in accordance with this opinion.

Reversed and remanded.

R. A. HAMMETT, ADMINISTRATOR OF THE ESTATE OF ULYS H. HAMMETT, DECEASED, V. W. W. MILLER, JR., TRADING AS MILLER MOTOR EXPRESS.

(Filed 11 December, 1946.)

1. Appeal and Error § 40i—

An appeal from judgment as of nonsuit presents the question whether the evidence, considered in the light most favorable to plaintiff, is sufficient to be submitted to the jury.

2. Negligence § 1, 5—

In order to establish actionable negligence, plaintiff must show failure on the part of defendant to exercise proper care in the performance of some legal duty which defendant owed plaintiff under the circumstances, and that such negligent breach of duty was the proximate cause of the injury, which is that cause which produces the result in continuous sequence and without which the injury would not have occurred, under circumstances from which a man of ordinary prudence could have foreseen that such result was probable.

3. Automobiles § 8d—

G. S., 20-161 prohibiting the parking of a vehicle upon the paved portion of a highway, by its express terms, does not apply to highways within business or residential districts as defined by statute.

4. Same—

There is no State-wide statute in this State that requires lights to be displayed on vehicles parked in a business or residential district at nighttime.

5. Same—

The ordinances of the City of High Point, introduced in evidence in this case, do not require parking lights on vehicles parked on a street in conformity with its regulations except as specifically demanded by the city.

6. Same: Automobiles § 18h (2)—Evidence held insufficient to show that truck was parked on residential street in violation of ordinance.

The evidence disclosed that defendant's truck, parked on a street in a residential district of a city, was moved out of the position in which it was parked by the impact of the car colliding with it. The only evidence of its position before the collision was testimony of the driver of the car colliding with the truck that its right rear wheel was more than 12 inches from the curb in violation of ordinance of the municipality, and he further testified that he did not see the truck until the moment of impact, and that its left rear wheel was about eight feet from the curb. The truck was eight feet wide. *Held:* There was no sufficient evidence that the truck was parked in violation of the ordinance.

7. Same—

It is not negligence on the part of a municipality to have shade trees along its streets, and therefore the existence of such trees imposes no duty upon the driver of a vehicle in parking thereunder.

8. Automobiles § 18h (2)—Evidence held insufficient to show negligence in parking truck without lights at nighttime on residential street.

Plaintiff's evidence tended to show that the car in which intestate was riding collided with a truck parked without lights under shade trees at nighttime on a street in a residential district of a municipality. There was no evidence that the municipality specifically demanded parking lights on the vehicle, and it appeared that the municipal ordinance did not require parking lights in such district unless specifically demanded by it. There was no sufficient evidence that the truck was parked with its right rear wheel more than 12 inches from the curb in violation of municipal ordinance. *Held:* The evidence is insufficient to be submitted to the jury on the issue of negligence, and defendant's motion of nonsuit should be granted.

APPEAL by defendant from *Burgwyn, Special Judge,* at October Civil Term, 1946, of GUILFORD.

Civil action instituted in the Municipal Court of the City of High Point to recover for alleged wrongful death, G. S., 28-172, and G. S., 28-173, heard in Superior Court on plaintiff's appeal thereto from judgment as of nonsuit entered in the said Municipal Court.

The plaintiff alleges in his complaint these acts of negligence of defendant, acting through his servant and agent, Charles Byrd, in the course of his employment and the scope of his authority, proximately causing the death of his intestate, briefly stated: That defendant parked its truck (a) on the paved portion of English Street in the City of High Point, and left it standing there in the nighttime without lights; (b) in a dark place where it was partially obscured by a large tree with overhanging limbs and foliage, and (c) with the rear wheels extending more than twelve inches from the curb in violation of an ordinance of the City of High Point, section 8 of Article 5 of chapter G.

Defendant, answering, denies the allegations of negligence alleged in the complaint, and as further defense avers: (1) That at the time Charles Byrd was not engaged in any business of the defendant nor was he acting within the scope of his authority or in the course of his employment by defendant; (2) that the death of plaintiff's intestate was the proximate result of the negligence of the driver of the automobile in which he was riding at the time, in that he was operating same recklessly and in violation of provisions of G. S., 20-141, and not by any negligence of the said Byrd; (3) that section 11 of Article VI of chapter G of the Ordinances of the City of High Point relating to parking lights is specifically pleaded; and (4) that the driver of another vehicle approaching in the opposite direction failed to dim his lights in violation of provisions of G. S., 20-181, and the vision of the driver of the automobile in which plaintiff's intestate was riding was obscured and he failed to see defendant's truck as he ought to have done, in which event the negligence of the driver of the other vehicle or of the driver of the automobile in which

plaintiff's intestate was riding, or both, was the proximate cause of the death of plaintiff's intestate.

Upon the trial in the Municipal Court of the City of High Point these facts as of 7 July, 1945, appear to be uncontroverted: Defendant, a resident of Mecklenburg County, North Carolina, is engaged in the transportation of freight by motor vehicles over the highways of this and other states, and as such owns and operates among other large tractor-trailers, a 1942 White tractor and trailer. Defendant's driver, Charles Byrd, had been driving defendant's truck from Charlotte, North Carolina, to Richmond, Virginia. And the truck was parked on the north or west side of English Street, in the City of High Point, North Carolina, headed in the direction of Thomasville, and allowed to stand as so parked from about six or seven o'clock in the evening until ten o'clock at night, when an automobile in which plaintiff's intestate was riding as passenger collided with same, causing the death of said intestate.

And upon the said trial in addition to the uncontroverted facts hereinabove stated, plaintiff offered in evidence an ordinance of the City of High Point, chapter G, Article 5, section 8 of the 1945 Code of Ordinances of the City of High Point, which reads as follows: "Parking parallel to curb—Where not otherwise indicated by this chapter all vehicles shall park parallel to the curb and not more than twelve inches therefrom."

Plaintiff then offered evidence tending to show this factual setting at the scene, and at the time of the collision on English Street, at No. 1114 where Charles Byrd lives, between Pope Street on the east and Kennedy Street on the west, a residential district:

English Street is a public highway, and is Route numbers 10, 29 and 70, and is very heavily traveled. It runs about northeast to southwest. It is paved, and is about forty feet wide from curb to curb, with a line marked in the center. The curbs are flush with the sidewalks. The truck of defendant was parked on its right side of the street in front of the house where Charles Byrd lives. "The street is practically straight at the point," as expressed by one witness, but "curves at the left in front of the truck and . . . to the right in the rear of the truck," and as expressed by another, "right at the point English is straight, down below and up above is a curve. It is a pretty good little distance." The grade is down hill toward Thomasville. The nearest street lights to the truck, in the opinion of one witness, where ninety steps of about three feet to the step, in front,—and one hundred and forty-two steps back of it. Another witness placed light at Kennedy Street, 200 feet away, and one up around that curve at Pope Street. Next to the Byrd house on the east is the King house, and on the west, in order named, are the Varner house and No. 1118, the W. L. Wright house. Across and at an angle

down English Street from the point of the accident, there is No. 1119, where B. E. Nobles lives. A car was parked in front of this, the Nobles house. "The trailer is about 28 or 30 feet long and . . . about 8 feet wide at the rear end."

In the light of the above setting, which evidence for plaintiff tends to show, plaintiff introduced certain witnesses, who testified in pertinent part as follows:

Witness Walter R. Lovings (driver of the car in which intestate was riding at time of his injury and death), testified, on direct examination: "We drove slow through town and started home. We were going by way of English Street to West End to Reading Street where we lived. . . . We ran into Miller's tractor-trailer . . . I hit the left rear of the trailer . . . The right front wheel of my car struck the left tire of the trailer. The top part of the body of my car at the right side of the windshield came in contact with the trailer. The trailer had no lights on it. It was close to 10:00 at night. It was dark. I had my lights burning. There was other traffic on English Street in front of me about the time of the collision. A car was coming around the curve trying to straddle the middle line. About the time I dimmed my lights I hit the truck. The lights on the car that was meeting me were bright. I was traveling about two or three feet on the right of the center line of the street. This tractor-trailer was parked sitting in an angle to the curb . . . of about 8 or 10 feet. It was not parked parallel to the curb. The rear right-hand wheels of the trailer were more than a foot away from the curb. If the tractor and trailer had been parked against the curb or within a foot of the curb I would not have hit it. The street was dark where the trailer was parked. There were trees on the right-hand side of the street where this truck was parked. The limbs hung down low to the road and covered the back end of the truck . . . I was going in the same direction the truck was headed. Just as I saw the truck, I hit it. The car that was meeting me passed me at the same time I had the collision . . . I was traveling 20 to 25 miles an hour at the time of the accident. As I met the car that was traveling in the opposite direction I dimmed my lights. When lights are dimmed they are down low to the ground. The truck I collided with had no lights either in front or rear." Then on cross-examination, he further testified: "I had brakes on my car. I could have stopped if I had seen the truck in time . . . By the time I saw the truck I hit it. Tree limbs hanging down shaded it. They covered the truck from my vision as I was going west on English Street. The limbs did not hang to the ground and I don't know exactly how far out in the street these trees project. I know they covered the truck . . . I saw the other car coming from toward Thomasville . . . He had bright lights on his car. The bright lights blinded me was one reason I didn't see the truck. I started to pull over. By the time I saw the

truck I hit it. I don't think I would have seen the truck if the fellow with the bright lights had not been coming. I don't know. It all happened so quick and sudden . . . All I know is that I was going down the street and the man coming toward me had bright lights and they blinded me and I didn't see the truck and ran into it. . . . The truck was not moving when I struck it. I hit the truck pretty hard. I demolished my car . . . The front end of it was jammed up under the cab part. The right door was knocked off . . . and 'it squished the car back on Hammett and killed him' . . . If you stand out in Pope Street you can see down there . . . I saw the truck after I struck it. I just noticed the back of it . . . it was sitting at an angle to the curb . . . I am not positive that the rear end of the tractor-trailer was 8 or 10 feet out in the street from the curb. I don't know about measuring. That's my opinion. The rear tire of that truck was out in the street 8 or 10 feet, something like that. At least 8 feet. The man approached me from around the curve and didn't dim his lights. I dimmed mine . . . When his lights hit me he was about as far away as the middle of the room back there. His lights kept shining in my eyes until he got opposite me. I saw the truck just as I hit it. I hadn't seen it before I hit it." .

Witness W. L. Wright, living at 1118 English Street, testified: "I was the first man at the car after the accident. . . . The tractor-trailer moved forward 6 or 8 feet and the front wheels ran up on the sidewalk. After the accident the rear of the trailer was possibly three feet away from the curb . . . Just before the accident I saw a car coming from the direction of Thomasville meeting the Lovings boy. It had very bright lights . . . English Street starts to curve right there in front of my house,—that is, west towards Thomasville from where the collision occurred. I couldn't tell how far the street is straight going towards the center of town. I should say that anybody standing in English Street at Pope Street can see a truck parked at 1114 English. The street has a small grade. The grade starts about Byrd's home. It is a gradual slant . . . I noticed the bright lights of the car going toward the center of town just before the collision. I guess that is what caused the boy to hit the truck, because the car blinded him. I know there is a big maple in front of King's, the next house to Charles Byrd, that does overhang the street—just a little bit."

Witness B. E. Nobles, on direct examination, testified: "I live at about thirty minutes after the collision. I looked at it and looked around. The back wheels were some distance from the curb . . . It was at least a foot or maybe more. This was the rear wheel on the trailer . . . The right front wheel of the tractor was on the sidewalk . . . The Chevrolet was demolished."

Witness W. F. Hunt testified: "I noticed and examined the truck 1119 English Street . . . I was sitting on my front porch when the

collision took place. I had seen the truck parked in front of the Byrd place before the accident . . . I saw a car coming in the direction from Thomasville immediately before the accident. It had unusually bright lights. There was a car parked in front of where I live and this car pulled over a little further. I saw the other car that Hammett was coming in from the other way and about the time they met, or possibly a little afterwards, the collision happened. The car Hammett was riding in dimmed its lights. The Lovings car was being driven with normal speed, around 20 to 25 miles . . . There was a tree standing in Mr. King's yard . . . The limbs were standing out in front of the street some . . . The car meeting Lovings was coming around the curve from towards West End by my house . . ." Then, on cross-examination, "There were many automobiles traveling on English Street at this point . . . They were passing there all the time . . . There would have been room for people traveling west on English Street to get around this truck with safety if a man hadn't been coming from the other way with bright lights on his car; the man coming from the other way with bright lights, coming around a curve, when he saw this car parked in front of my house, naturally he pulled over further and that is how he came to be driving where he was. He pulled out on account of passing the car that was in front of my house. He was going toward High Point with bright lights. There is a center line in English Street. It is a good broad place. An 8-foot truck parked against the curb would leave 12 feet clear to the center line . . ."

And witness C. W. Thomas testified: "I heard the impact . . . I went up there to the truck . . . When I got there no lights were burning on the tractor-trailer. The tractor-trailer was parked in an angle to the curb. The rear wheels were out 3 feet or more and the right front wheels were up on the sidewalk. There is a tree up above the truck and one in front of it. You could walk under the limbs of the tree back of the truck. It was a kind of foggy, cloudy night. It rained later on in the night . . . I live about 300 feet from the scene of this collision. I was in the vicinity before the collision. I crossed English Street in front of the truck at Kennedy Street . . . I saw this truck parked there. I didn't have any difficulty in seeing the truck. I went home and I heard the impact. Pretty bad crash from the way it sounded . . . I saw the Chevrolet. It was near about demolished."

Defendant, reserving exception to refusal of his motion for judgment as in case of nonsuit entered at close of plaintiff's evidence, offered in evidence: An ordinance of the City of High Point, chapter G, Article 6—section 11, which reads as follows: "Lights on parked vehicles. Parking lights upon a vehicle, when such is lawfully parked at night on a street in accordance with this chapter, shall not be required, except where specifically demanded by the city."

Defendant then offered testimony as follows: W. C. Pemberton, a police officer of the City of High Point, testified in pertinent part: "I was called to investigate the collision . . . When I got there there were lights on the tractor-trailer. It was parked horizontal to the curb. The rear wheels of the trailer were within four inches of the curb. The front wheels were flush with the curb and the front wheels of the tractor were up over the curb on the sidewalk." Then, continuing on cross-examination: "I arrived at the scene of the collision about 10:13 p.m. I measured the width . . . and the length of the truck and the width of the street. The truck was 42 or 43 feet long and . . . about 8 feet wide. The tractor-trailer appeared to have moved forward and rolled up on the sidewalk . . . where the accident occurred they parked parallel to the curb."

C. C. Tilley, a civil engineer, testified: "I made the plat and the measurements on it . . . on July 15th. Just east of 1114 English the street is straight for a distance of 330 feet. From that point east it is on a slight curve. The curvature of English Street at Pope Street and beyond is not sufficient to interfere with the vision of a person approaching 1114 English Street for a distance of 650 feet. I made a test 612 feet east of 1114 English Street. . . . There is a street light at the intersection of English and Pope Streets. Pope Street is 420 feet from 1114 English. There is a street light at the intersection of Kennedy and English. That is 203 feet from 1114 English. On English Street a curve starts practically half way between 1114 English Street and Kennedy. From the west in the daytime a car parked in front of 1114 English could be seen for 400 feet away . . . A car approaching 1114 English from the west and reaching a point opposite Kennedy Street, its lights would be shining approximately in front of 1114 English Street. When he reached a point 100 feet from 1114, the lights would be shining straight up, right-hand side . . ."

J. F. Perkins, Director of Public Utilities of the City of High Point, testified: "I am familiar with the street lights in the vicinity of 1114 English Street July 7, 1945. The street lights in that vicinity were located one at Pope and the other at Kennedy . . . These lights have 400 candlepower. It is a good bright light. A person approaching 1114 English from the direction of town could see a man in front of 1114 English Street 200 feet away . . . I checked it."

R. I. Barr, State Highway patrolman, testified: ". . . I came along right after it occurred . . . The city police were there . . . the front wheel of the tractor was on the curb and the rest of the wheels were down in the street. The right rear wheel of the trailer was about six inches or the width of your hand from the curb."

Motion of defendant for judgment as in case of nonsuit at the close of all the evidence was allowed, and judgment in accordance therewith

was signed. Plaintiff appealed to Superior Court, assigning as error, among others, the ruling of the court in granting the motion for nonsuit.

Upon hearing in Superior Court, the exception of plaintiff to the judgment of nonsuit was sustained, and the judgment reversed, and the cause remanded to the Municipal Court of the City of High Point. From judgment signed in accordance therewith, defendant appeals to Supreme Court and assigns error.

Walser & Wright and York & Dickson for plaintiff, appellee.
Gold, McAnally & Gold for defendant, appellant.

WINBORNE, J. The challenge of defendant to the judgment entered in Superior Court raises for decision the question as to whether the evidence offered on the trial in the Municipal Court of the City of High Point, taken in the light most favorable to plaintiff, as we must do in considering judgments as in case of nonsuit, is sufficient to make out a case of actionable negligence on the part of the defendant and to require the submission to the jury of an issue with respect thereto.

In order to establish actionable negligence, "The plaintiff must show: First, that there has been a failure to exercise proper care in the performance of some legal duty which the defendant owed to plaintiff, under the circumstances in which they were placed; and, second, that such negligent breach of duty was the proximate cause of the injury--a cause that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such result was probable under all the facts as they existed." *Whitt v. Rand,* 187 N. C., 805, 123 S. E., 84.

Applying this principle to the evidence in the present case in the light of the allegations of negligence set out in the complaint, we are of opinion and hold that the evidence fails to show a breach of legal duty on the part of the defendant within the purview of the allegations of the complaint.

As to the allegation that defendant was negligent in parking and leaving standing its truck on the paved portion of English Street in the City of High Point in the nighttime without lights: It is noted that the State-wide statute, G. S., 20-161, providing that "no person shall park or leave standing any vehicle upon the paved portion of any highway," expressly directs its provisions to such portions of highways as are "outside of a business or residential district" as defined by statute. Hence, the parking or leaving standing of any vehicle in a business or residential district is not a violation of the State statute. And the evidence in the present case shows that English Street is a residential district. Moreover, there is no State-wide statute in this State that requires lights

to be displayed on vehicles parked in business or residential districts. Also, it is seen from the provisions of section 11 of the ordinances of the City of High Point, pertaining to lights at night on parked vehicles, introduced in evidence, that parking lights upon a vehicle, lawfully parked on a street in conformity with chapter G of the ordinances of the City of High Point, are not required, except as specifically demanded by the city. In the present case there is no evidence that the city demands that vehicles parked at night on English Street be lighted.

Furthermore, with respect to the allegation that defendant parked its truck with the rear wheels standing more than 12 inches from the curb, in violation of section 8 of Article 5 of chapter G of the ordinances of the City of High Point: Is there evidence that the truck of defendant was parked in violation of this ordinance? We do not think there is. The only evidence as to how the truck was parked with respect to the curb, before the collision in question, comes from the driver of the automobile in which plaintiff's intestate was riding. And he testifies, "I saw the truck just as I hit it. I hadn't seen it before I hit it." Moreover, an analysis of his testimony in regard to the position in which the truck of defendant was parked in relation to the curb, shows that he speaks of the position after the collision. And all the evidence tends to show that the force of the impact when the truck was hit by the automobile in which plaintiff's intestate was riding, moved the truck, and forced it over the curb and upon the sidewalk. In this connection it is also noted that the evidence tends to show that the rear end of the trailer was about eight feet wide,—and the driver of the automobile gives as his opinion that "the rear tire of the truck was out in the street at least 8 feet."

And it is not negligence on the part of a municipality to have shade trees along its streets. *Ferguson v. Asheville,* 213 N. C., 569, 197 S. E., 146, citing *Rollins v. Winston-Salem,* 176 N. C., 411, 97 S. E., 211. Hence, no duty in respect thereto rested upon defendant in parking the truck upon such street.

While the case presents a deplorable, tragic and untimely ending of a young life, the evidence is insufficient to support a finding that it was proximately caused by the parking of the truck of defendant. Other causes are apparent.

The judgment of Superior Court is

Reversed.

STATE v. GRANGER THOMPSON, CLIFF INMAN, CALVIN COVINGTON AND STACY POWELL.

(Filed 11 December, 1946.)

1. Rape § 1—

In order to constitute the crime of rape the carnal knowledge of prosecutrix must be attained forcibly and against her will.

2. Rape § 4—

Testimony of prosecutrix that she "did not object to the intercourse . . . because . . . I was afraid they would kill me" and that she did not consent and used as much force as she could to prevent defendant from having sexual intercourse with her, is sufficient evidence that the intercourse was attained by force and against her will.

3. Rape § 1—

"Force" necessary to constitute rape need not be actual physical force. Fear, fright, or coercion may take the place of force.

4. Criminal Law § 81f—

On appeal from the overruling of defendants' demurrers to the evidence the Supreme Court is not concerned with the weight of the testimony or with its truth or falsity, but only whether the evidence is sufficient to carry the case to the jury and sustain the indictment, considering the evidence in the light most favorable to the State and giving it the benefit of every fact and inference of fact which may be reasonably deduced therefrom.

5. Criminal Law § 52a—

Equivocation on the part of prosecutrix would not justify taking the case from the jury.

6. Criminal Law § 33—

The finding by the trial court upon conflicting evidence that the confessions offered in evidence were not obtained by threats, assaults, beatings and ill treatment, is conclusive.

7. Same—

A confession cannot be held as a matter of law to have been made under compulsion of hope because of the fact that officers, after a defendant had expressed a desire to speak, advised that it would be better for defendants to tell the truth. The distinction between such admonition and advice to confess guilt or language inducing a defendant to make an untrue statement, pointed out.

8. Same—

A voluntary confession is admissible in evidence against the party making it; an involuntary one is not. A confession is voluntary in law when, and only when, it is in fact voluntarily made.

9. Same—

The voluntariness of a confession is primarily a question for the trial court, and its decision in respect thereto can be reviewed only upon mat-

ters of law, viz., the standard for determining whether a confession is involuntary, what evidence is competent upon the question, and whether the evidence is sufficient to support the trial court's findings.

10. Criminal Law § 78e (2)—

An exception to the statement of a contention of the State is unavailing when defendant makes no objection at the time and fails to call the matter to the court's attention at any time during the trial so as to afford opportunity for correction.

11. Rape § 4—

Testimony in this case *held* sufficient to show that defendant was guilty of rape as a principal, co-conspirator, or aider and abettor, and such defendant's motion to nonsuit was properly overruled.

12. Rape § 4—

The evidence tended to show that prosecutrix was attacked and ravished by three defendants in turn, and that the fourth defendant returned as the last of the three was committing the act, and that then the fourth defendant carnally knew prosecutrix. *Held:* It is for the jury to determine whether prosecutrix was prevented from fiercely resisting the fourth defendant from fear or the exhibition of force, or whether under the circumstances resistance would have been futile and might have been fatal.

13. Criminal Law § 53d—

The charge of the court in this case *held* to have complied with the statutory requirement that the court state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon. G. S., 1-180.

APPEAL by defendants from *Williams, J.*, at April Term, 1946, of ROBESON.

Criminal prosecution on indictment charging the defendants with rape.

The evidence for the State tends to show that on the night of 17 March, 1946, around the hour of midnight, the defendants severally had sexual intercourse with the prosecuting witness, Mrs. Dorothy Lou Fry, who testified: "I did not object to the intercourse these defendants had with me because I was so frightened, I was afraid they would kill me; it was against my wishes and against my will. . . . I did not consent; I used as much force as I could to keep them from having sexual intercourse with me."

Three of the defendants, Granger Thompson, Stacy Powell and Calvin Covington, admitted having to do with the prosecutrix, but contended that it was commercialized vice, or prostitution, and that the prosecutrix complained only upon their failure to pay the stipulated price. The defendant, Cliff Inman, denied having anything to do with the prosecutrix, and pleaded an alibi.

The prosecutrix is a white woman, married and the mother of three children. She accompanied Frank Straughan, a white man, also married but not her husband, into the colored section of the Town of Lumberton on Sunday night in order that he might get a drink of whiskey. They were not strangers to that portion of the town. The defendants are Negroes.

Straughan's car was stopped in the dark near Granger Thompson's house, and would not start again under its own battery. Straughan asked the defendants to push his car, which they did, even to pushing it into the ditch, but were unable to start it. The defendants "went off and talked awhile" and then Inman suggested that he would go down the road and get a chain, if Straughan would go with him, so as to move the car by tying it to his own car. He would not go alone. While Straughan and Inman were gone to get the chain, the other defendants, accompanied or forcibly took the prosecutrix to an unfinished house about a block away and there had intercourse with her, Thompson first, Powell second, and Covington third. In the meantime, Inman had returned, helped Straughan start his car, went to the unfinished house, and the prosecutrix says: "While Covington was having intercourse with me, Inman came to the door and Inman had sexual intercourse with me after Covington did." Straughan drove back to town looking for the prosecutrix, and the prosecutrix says Inman carried her home in his Ford car. Inman testified that he took the chain back, after helping Straughan start his car, and then went to his home.

Three of the defendants, Thompson, Powell and Covington, were arrested that night and brought to Raleigh early Monday morning and lodged in the State's Prison for safekeeping. Covington made several statements to the officers in the nature of confessions before leaving Lumberton, and repeated them in the presence of Thompson and Powell in the jail at Lumberton and again a day or two later in the State's Prison at Raleigh.

Immediately upon his arrest by officers Stanley Hardee and Cliff Britt, and again while going to police headquarters in Lumberton, Covington declared he wanted to tell the truth about the matter. Officer Hardee said to him, "It would be better to go on and tell us the truth than try to lie about it. . . . I told him it would be better to come on and tell the truth." Covington told them that Thompson and Powell forcibly took the prosecutrix from the Straughan car and carried her to the unfinished house. That he went along. All had connection with her.

Later, in the presence of Thompson and Powell in the State's Prison at Raleigh, Covington repeated his inculpatory statements, and Thompson and Powell also confessed to ravishing the prosecutrix. In consequence of Thompson's statement, Cliff Inman was arrested and brought to Raleigh. The other defendants then repeated their statements in the

presence of Inman, to which Inman replied: "I didn't have anything to do with it. I went and got a chain."

Upon the trial, the three defendants, Thompson, Powell and Covington, repudiated their confessions and sought to have them excluded on the ground that they were involuntary. The judge heard the evidence, *pro* and *con*, and admitted them as voluntary statements in the nature of confessions. The testimony of the defendants and that of the sheriff and the arresting officers was in sharp conflict as to the treatment accorded the defendants while they were under arrest and before any statements were made. The officers at the State's Prison testified that upon their arrival there the defendants showed no signs of ill treatment such as they contended they were subjected to, both in Lumberton and on their way to Raleigh.

Verdict: Guilty of the crime of rape as to each of the defendants.

Judgment: Death by asphyxiation as to all four of the defendants.

The defendants appeal, assigning errors.

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

J. S. Bowser and L. P. Harris for defendants Thompson, Powell, and Covington.

Herman L. Taylor of counsel.

Johnson & Johnson for defendant Inman.

STACY, C. J. We have here for determination (1) the sufficiency of the evidence to carry the cases to the jury, (2) the competency of evidence, particularly the confessions, and (3) the adequacy and correctness of the charge.

I. THE CASES AGAINST THOMPSON, POWELL AND COVINGTON:

Specifically, the question posed by the demurrers is whether the evidence permits the inference that sufficient "force" was used to constitute rape. The prosecution says, "Yes"; the defendants say, "No." Carnal knowledge of the prosecutrix by three of the defendants is admitted. If such knowledge were attained "forcibly and against her will," it was rape; otherwise not. *S. v. Johnson*, 226 N. C., 671; *S. c., ibid.*, 266, and cases there cited. We think the issue was one for the twelve. True, the prosecutrix unwittingly says she did not "object to the intercourse" which the defendants had with her, but this was predicated upon the reason stated that she feared for her life, and "it was against my wishes and against my will." She further says: "I did not consent; I used as much force as I could to keep them from having sexual intercourse with me." It is conceded that the "force" necessary to constitute rape, need

not be actual physical force. 52 C. J., 1024. Fear, fright, or coercion, may take the place of force. 44 Am. Jur., 903.

In considering the demurrers to the evidence, we are not concerned with the weight of the testimony, or with its truth or falsity, but only with its sufficiency to carry the cases to the jury and to sustain the indictment. *S. v. Vincent,* 222 N. C., 543, 23 S. E. (2d), 832; *S. v. Smith,* 221 N. C., 400, 20 S. E. (2d), 360; *S. v. Rountree,* 181 N. C., 535, 106 S. E., 669. And in passing upon this question it is not to be overlooked that the State is entitled to the benefit of every fact and inference of fact pertaining to the matters involved which may reasonably be deduced from the evidence. *S. v. Stephenson,* 218 N. C., 258, 10 S. E. (2d), 819; *S. v. Carr,* 196 N. C., 129, 144 S. E., 698. "The practice is now so firmly established as to admit of no questioning that, on a motion to nonsuit, the evidence is to be considered in its most favorable light for the prosecution." *S. v. Beal,* 199 N. C., 278, 154 S. E., 604. Viewed in this wise, we conclude that the demurrers were properly overruled. Even equivocation on the part of the prosecutrix, if such there were, which is unconceded, would not take the case from the jury. *Ward v. Smith,* 223 N. C., 141, 25 S. E. (2d), 463; *Bank v. Ins. Co.*, 223 N. C., 390, 26 S. E. (2d), 862; *Shell v. Roseman,* 155 N. C., 90, 71 S. E., 86.

The three defendants who made statements to the officers in the nature of confessions stressfully contend that these confessions were erroneously admitted in evidence, because they say, the statements were (1) extracted by fear, or (2) induced by hope. The first reason assigned is untenable in the light of the record; the second may require some analysis.

1. The allegation that the confessions were provoked by assaults, beatings and ill treatment on the part of the officers, while the defendants were in their custody, was fully investigated by the trial court, as was his duty under the law. *S. v. Brooks,* 225 N. C., 662, 36 S. E. (2d), 238. The testimony of the defendants in this respect was categorically denied by the officers who had them in charge. Likewise, the officers at the State's Prison testified that upon their arrival there, the defendants showed no signs of having been assaulted or mistreated. On this conflict of evidence, the trial court found that the allegation of extortion of the confessions by threats and violence was without foundation in fact. The conclusion is definitive under our practice. *S. v. Lord,* 225 N. C., 354, 34 S. E. (2d), 205; *S. v. Biggs,* 224 N. C., 23, 29 S. E. (2d), 121, and cases there cited.

2. The allegation that the confessions were induced by the flattery of hope, presents a different question. Anno. 7 A. L. R., 423. There is no conflict in the evidence on this point. The officers themselves testify that they told Covington, "It would be better to go on and tell us the truth than try to lie about it. . . .; it would be better to come on and

tell the truth." These admonitions, however, were given after Covington had expressed a desire to tell the truth about the matter, and apparently in response to such declaration or expression.

It will be noted the suggestion made by the officers was, that Covington "tell us the truth," or "come on and tell the truth," not that he confess his guilt, such as appeared in the cases of *S. v. Anderson,* 208 N. C., 771, 182 S. E., 643, and *S. v. Livingston,* 202 N. C., 809, 164 S. E., 337, which are cited and relied upon by the defendants as authorities for their position here. The rule generally approved is, that "where the prisoner is advised to tell nothing but the truth, or even when what is said to him has no tendency to induce him to make an untrue statement, his confession, in either case, is admissible." *S. v. Harrison,* 115 N. C., 706, 20 S. E., 175; *S. v. Myers,* 202 N. C., 351, 162 S. E., 764; *S. v. Moore,* 210 N. C., 686, 188 S. E., 421; *S. v. Bohanon,* 142 N. C., 695, 55 S. E., 797; *S. v. Caldwell,* 212 N. C., 484, 193 S. E., 716; *S. v. Gee Jon,* 46 Nev., 418, 211 P., 676, 30 A. L. R., 1443.

Tested by the above standard and the rationale of the decided cases, the impression is gained that the ruling of the trial court is in line with the authoritative decisions on the subject. The circumstances of the present record appear to be without exact parallel in any of the cases examined. See Anno. 24 A. L. R., 703. We cannot say as a matter of law that the confessions were made under the impulsion of hope. *S. v. Myers, supra.* No promise of escape or lighter sentence was suggested or held out by the officers to induce them. *S. v. Bohanon, supra.* The defendants were advised to tell nothing but the truth. That such "would be better for them" accords with the teachings of experience that "open and frank responses by innocent persons arrested under misapprehension are generally powerful aids in securing their prompt discharge from custody." *S. v. Grass,* 223 N. C., 31, 25 S. E. (2d), 193; *S. v. Oxendine,* 223 N. C., 659, 27 S. E. (2d), 814. Moreover, the confessions were repeated several days later, far removed from the local scene, and under circumstances quite different from those obtaining when the defendants were first arrested. *S. v. Moore, supra; White v. State,* 129 Miss., 182, 91 So., 903, 24 A. L. R., 699.

It all comes to this: Confessions are either voluntary or involuntary. A voluntary confession is admissible in evidence against the party making it; an involuntary one is not. 22 C. J. S., 1424. A confession is voluntary in law when—and only when—it was in fact voluntarily made. *S. v. Newsome,* 195 N. C., 552, 143 S. E., 187; *S. v. Patrick,* 48 N. C., 443; *S. v. Roberts,* 12 N. C., 259. "Confessions are to be taken as *prima facie* voluntary, and admissible in evidence, unless the party against whom they are offered allege and show facts authorizing a legal inference to the contrary"—*Dillard, J.,* in *S. v. Sanders,* 84 N. C., 729.

The voluntariness of a confession is primarily a question for the trial court. *S. v. Alston,* 215 N. C., 713, 3 S. E. (2d), 11; *S. v. Whitener,* 191 N. C., 659, 132 S. E., 603. It is only when some question of law arises in connection with the court's determination of the matter that the competency of a confession may be reviewed on appeal. *S. v. Manning,* 221 N. C., 70, 18 S. E. (2d), 821. Of course, the standard for the determination, or what facts render a confession involuntary, is a question of law, and may be reviewed by the appellate tribunal. *S. v. Biggs, supra; S. v. Grier,* 203 N. C., 586, 166 S. E., 595; *S. v. Crowson,* 98 N. C., 595, 4 S. E., 143. "What amounts to such threats or promises as render confessions inadmissible, as being *not voluntary;* what evidence the judge will hear to establish the facts of threats or promises; and whether there be any evidence to show that the confessions were not voluntary are questions of law, and the decision upon them is subject to review in the Supreme Court"—First Headnote, *S. v. Andrew,* 61 N. C., 205.

The defendants also assign as error certain portions of the charge. It was recited as a contention of the State, in replying to the issue of consent, raised by the defendants' plea, that the jury ought not to find there was any consent on the part of the prosecutrix, "because it was contrary to the training and natural instinct that she should permit a person of the opposite race to have sexual intercourse with her." No objection was interposed at the time this contention was given; nor was it called to the court's attention at any time during the trial so as to afford an opportunity of correction, if correction were needed or desired. In these circumstances, the exception is without avail. *S. v. McNair,* 226 N. C., 462; *S. v. Rising,* 223 N. C., 747, 28 S. E. (2d), 221.

The remaining assignments of error made by the defendants, Thompson, Powell and Covington, require no special elaboration. They are without substantial merit, and none can be sustained.

II. THE CASE AGAINST INMAN:

There is evidence tending to show that Cliff Inman was a principal, co-conspirator, or aider and abettor in the crime charged. *S. v. Johnson, supra.* The testimony of the prosecutrix was sufficient to make him a principal; that of Straughan and the prosecutrix to make him a co-conspirator or an aider and abettor. *S. v. Whitehurst,* 202 N. C., 631, 163 S. E., 683; *S. v. Johnson, supra.* His demurrer to the evidence was properly overruled. The credibility of the witnesses was for the jury.

The point is made with much emphasis that the testimony of the prosecutrix as to her resistance is too weak as against the defendant Inman. The circumstances must be considered. We think it was for the jury to say whether the prosecutrix was prevented from fiercely

resisting by terror or the exhibition of force, or was "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.

It is also advanced on behalf of the defendant Inman that the trial court omitted 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. A careful perusal of the charge instills the thought that it is free from successful attack on the ground suggested. *Cf. S. v. Benton,* 226 N. C., 745, where the meaning and significance of the statute received full consideration.

A searching investigation of the entire record fails to reveal any reversible error on the part of the trial court. Hence, the verdict and judgments as to all four of the defendants will be upheld.

No error.

STATE v. LEN GAUSE, ALIAS LYNN GAUSE, ALIAS "SCOOPER" GAUSE, ALIAS LEON GAUSE.

(Filed 11 December, 1946.)

1. Homicide § 27h—

Where all the evidence tends to show murder perpetrated by lying in wait, the court properly limits the jury to a verdict of guilty of murder in the first degree or a verdict of not guilty, G. S., 14-17, but where the evidence tending to show that defendant intentionally killed deceased with a deadly weapon is susceptible to more than one inference as to whether defendant was lying in wait, it is error for the court to fail to submit the question of defendant's guilt of murder in the second degree. G. S., 15-172.

2. Criminal Law §§ 53k, 78e (2)—

The requirement that a misstatement of the contentions must be brought to the trial court's attention in apt time does not apply to a statement of the contentions of the State which erroneously defines the intensity of proof resting upon it as the greater weight of the evidence rather than beyond a reasonable doubt.

3. Criminal Law § 77d—

The Supreme Court is bound by the record.

APPEAL by defendant from *Parker, J.,* at June Term, 1946, of NEW HANOVER.

Criminal prosecution instituted in the County of Brunswick, State of North Carolina, upon indictment charging defendant with the murder of one H. J. Williamson,—and upon motion of defendant removed to the County of New Hanover for trial.

The evidence offered upon the trial in Superior Court, as shown in the case on appeal and necessary to a proper understanding of the questions considered in disposing of this appeal, tends to show this pertinent factual situation: H. J. Williamson, a white man, died from gunshot wounds received on Saturday night, 23 February, 1946. At that time he resided in the Gause Landing community, southwest of the town of Shallotte, on the public road leading in general northeast to southwest direction, from that town to Gause Landing, in Brunswick County, North Carolina. The front steps of the house were seven yards from the edge of the road. Defendant, nicknamed Scooper, then resided west of and about three-quarters of a mile from the Williamson home. Between these two houses, Will Hill resided about one hundred yards from the Williamson home. Joe Gause, a brother of defendant, resided beyond the home of defendant, something like a mile and a quarter from the Williamson home. In going from and to his home and to and from Shallotte, defendant would pass the Williamson home along the public road.

On the late afternoon of the above date, before dark, defendant and another colored man, named Luke Gause (of no kin to defendant), who lived between the Williamson home and Shallotte, were traveling along the public road going in the direction of defendant's home and passing the Williamson home. Defendant was cursing, for which Williamson, who was in front of his home, upbraided him. An altercation between the two ensued. Williamson, a very strong and robust man, weighing 235 pounds and much larger than defendant, knocked defendant down with his fist. Defendant came up with a knife. Whereupon, Williamson got his gun from his front porch (having just put it there after shooting rabbits) and shot at defendant two or three times, running him off down the road toward the Will Hill house, where he stopped. He said he was shot. He tried in vain to buy a gun from Will Hill. Then he went on in direction of his own home.

About an hour later, around 8 o'clock, and after dark, H. J. Williamson was shot while sitting in the front or sitting room of his home, next to the window in the west end of the house. The shot was from without the house, and through the window.

Will Hill, as witness for the State, testified: That he heard one shot after dark; that before that he heard "someone passing talking . . . more like men than women"; that they went right up the road . . . toward Shallotte; that after they passed, he heard a gun fire—and that "it might have been fifteen minutes, something like that."

Luke Gause, also witness for the State, testified: That after Mr. Williamson shot "behind Scooper," Ches Gause and Mosser Hill, colored men, came over to Mr. Williamson's and they and he (Luke) stayed there about fifteen minutes; that they then went, in the direction of

defendant's home, to George Bland's; that, after staying there about 25 or 30 minutes, he and Ches came back up the road,—Ches turning off to go to his home before they reached Mr. Williamson's house; that it was dark then, and a gun fired when he passed Mr. Williamson's; that he "didn't see anybody with any gun, just heard it fire"; and that he was about 75 yards away, and went "in the opposite direction."

Joe Gause, also a witness for the State, testified: That defendant, his brother, came to his house around 8 or 8:30 on night of 23 February, 1946; that he had a 12-gauge gun which he left there; that "he was all wet up and muddy"; that "his hands were bleeding, blood dripping off his fingers"; that he said Mr. Williamson had shot him three times; that "I understood him to say he had shot him back"; that defendant wanted to be carried to his mother's, to get her to do something for the wounded place where he was shot; and that on the way a car came up behind the truck and defendant jumped out and ran.

Defendant surrendered the following Wednesday.

An alleged confession of defendant was offered in evidence in which a statement in part as follows is attributed to him: "that . . . Mr. Jim shot him and hit him in the hand and he started running and . . . he shot him in the other hand"; that "he went on home and got a 12-gauge shotgun and picked up two shells . . . and started back to shoot Mr. Jim, as Mr. Jim had shot him; that he met up with Luther Gause and Charles Gause and they walked down the road with him until they got opposite Charles Gause's home and Charles said he would go on home, and went on home, but that Luther Gause proceeded down the road with him and that Luther walked on when he got to Mr. Williamson's, and that he looked through the window and saw Mr. Williamson sitting in the room; that the curtain was half down; that he . . . knew it was him and aimed at him along about the shoulder and shot him . . . but that he turned and ran . . . and went to his father-in-law's house where his wife was and told them that he had shot Mr. Williamson because Mr. Williamson had shot him; that he went to his brother Joe Gause's and told Joe he had shot Mr. Jim, and left his gun at Joe's . . ."

There was other evidence tending to show that there were eleven perforations in the skin across the upper arm and chest (in diameter about three inches) of the body of H. J. Williamson; that there were 11 or 12 holes in the window and screen; and that a wadding (indicating buck shot) fired from a 12-gauge gun, was found in the yard about twenty feet from the end of the house.

Further evidence was offered by the State tending to show the sanity of defendant, and by the defendant tending to show that he was not sane,—one doctor being of opinion that he is an imbecile.

Verdict: Guilty of murder in the first degree as charged in the bill of indictment.

Judgment: Death by the administration of lethal gas as provided by law.

Defendant appeals to Supreme Court and assigns error.

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

Joseph W. Ruark and Varser, McIntyre & Henry for defendant, appellant.

WINBORNE, J. Defendant assigns as error, among others, these portions of the charge of the court to the jury:

"You may, as you find the facts to be from the evidence under the instruction of law of the court, return one of two verdicts; either guilty of murder in the first degree, or not guilty." Exception No. 26.

"The court instructs you that there is no evidence in this case of murder in the second degree or manslaughter. It is the law of this State that a murder which shall be perpetrated by means of lying in wait shall be deemed to be murder in the first degree." Exception No. 27.

"Lying in wait is being in ambush for the purpose of murdering another. It implies a hiding or secreting of one's self. To constitute lying in wait within the meaning of the statute law, which the court has read to you, providing that all murder perpetrated by means of lying in wait shall be murder in the first degree, three things must concur, to wit, waiting, watching and secrecy." Exception No. 28.

"The State of North Carolina contends that you should find and be satisfied beyond a reasonable doubt from the evidence in this case that on 23 February, this year, in Brunswick County, the defendant Gause as a result of what took place between him and H. J. Williamson, in front of Williamson's house in the afternoon, and of Williamson striking him and practically knocking him down, and of Williamson shooting him and wounding him in the hands, went and procured a 12-gauge shotgun and procured a shell in order to shoot H. J. Williamson; that he had sufficient intelligence to procure the shotgun and to procure a shell and to put this shell in the shotgun and about an hour after he and Williamson had been in front of Williamson's home to go to the home of Williamson; that he looked through the window and saw Mr. Williamson and had enough intelligence to know that it was Mr. Williamson, and that standing out on the ground, looking through the window there at Williamson, recognized Williamson; that the defendant was there in ambush for the purpose of murdering H. J. Williamson; that he was waiting, watching and in secrecy; that he deliberately aimed at him, and while lying in wait under those circumstances willfully and intentionally shot H. J. Williamson, killing him with the shotgun wounds, and that

he is guilty of murder in the first degree, and that you should be so satisfied by the greater weight from the evidence in the case, and return as your verdict guilty of murder in the first degree." Exception No. 30.

In connection with the above instructions, defendant contends that the court erred (1) in restricting the jury to the return of one of two verdicts,—guilty of murder in the first degree, or not guilty, without including a third,—guilty of murder in the second degree, and (2) in stating the contention of the State with respect to the burden of proof.

It is the law in this State that where all the evidence on the trial for murder tends to show murder in the first degree in that a murder has been perpetrated by lying in wait, G. S., 14-17, the trial court may instruct the jury to render only one of two verdicts, guilty of murder in the first degree or not guilty. *S. v. Newsome,* 195 N. C., 552, 143 S. E., 187; *S. v. Myers,* 202 N. C., 351, 162 S. E., 764. But where on such trial the evidence tends to show that the intentional killing was with a deadly weapon, and more than one inference may be drawn from the evidence in respect to lying in wait, it is error for the trial court to fail to charge the jury that a verdict of murder in the second degree may be returned. G. S., 15-172. *S. v. Newsome, supra. S. v. Merrick,* 171 N. C., 788, 88 S. E., 501; *S. v. Lee,* 206 N. C., 472, 174 S. E., 288.

Applying the definition of lying in wait as given by the court to the evidence offered on the trial below, we are of opinion that more than one reasonable inference may be drawn therefrom, and that there is error in the failure of the court to include murder in the second degree in the verdicts the jury might return in the case.

Moreover, the rule of law as to the degree of proof set forth in stating the contentions of the State as shown in the portion of the charge to which Exception No. 30 relates, is manifestly erroneous. Ordinarily a misstatement of contentions must be called to the attention of the court at the time, or else it will be deemed to be waived. But not so as to statements of a contention with respect to applicable law. *McGill v. Lumberton,* 215 N. C., 752, 3 S. E. (2d), 324, and cases cited. *S. v. Calcutt,* 219 N. C., 545, 15 S. E. (2d), 9; *Stanley v. Hyman-Michaels Co.,* 222 N. C., 257, 22 S. E. (2d), 570.

Doubtless the use of the words "greater weight of evidence" instead of "beyond reasonable doubt" was a slip of the tongue or an error in transcribing. Nevertheless, it appears in the record, and we must accept it as it comes to us.

As the case goes back for a new trial, it is not amiss to say that should the jury find from the evidence beyond a reasonable doubt that the defendant killed the deceased with a deadly weapon, but failed to find from the evidence beyond a reasonable doubt that he killed the deceased while lying in wait, the law would presume no more than murder in the

second degree, and the burden would be upon the State to show premeditation and deliberation to make out the capital offense.

For reasons stated, let there be a

New trial.

ALEXANDER PEARSON, PEARL AVIS PEARSON, BOYD GODBOLD AND BETTY LOU GODBOLD AND JULINA GODBOLD, THE LAST TWO NAMED BEING MINORS AND APPEARING BY THEIR NEXT FRIEND, MAGGIE PEARSON, AND MAGGIE PEARSON, ADMINISTRATRIX OF THE ESTATE OF MARTHA GODBOLD, DECEASED, v. PEARL G. PEARSON, INDIVIDUALLY, AND AS EXECUTRIX OF THE ESTATE OF W. S. PEARSON.

(Filed 11 December, 1946.)

1. Executors and Administrators § 12c: Trusts § 5b—

An administrator or executor in possession of lands of the estate under a court order permitting him to continue the farming operations thereon, who purchases the lands at a foreclosure sale of a mortgage thereon, nothing else appearing, holds title as a trustee for the estate, and his purchase will be set aside as a matter of course at the instance of the interested parties.

2. Same: Limitation of Actions § 5c—

Where an administrator in possession purchases lands of the estate at the foreclosure of a mortgage thereon, an action to have him declared a trustee of a constructive trust does not begin to run, in the absence of demand and refusal, until he completes and closes the administration.

3. Executors and Administrators § 26—

An estate is not settled and the duties of administration continue until all debts have been paid or all assets of the estate exhausted.

4. Estoppel § 11b: Adverse Possession § 17: Equity § 3—

In an action to recover land, defendant's plea of estoppel, adverse possession and laches set up affirmative defenses, and defendant has the burden of proof thereon.

5. Adverse Possession § 19: Equity § 3—

Where an administrator is in possession of lands of the estate under order of court permitting him to continue farming operation thereon, and he purchases at the foreclosure sale of a mortgage on the lands and remains in possession, in the absence of evidence offered by him tending to show when his possession became adverse to the devisees and that it was open, notorious and adverse to them so as to put them on notice, his motion to nonsuit in their action to have him declared a trustee of a constructive trust upon his defenses of adverse possession and laches should be denied.

APPEAL by plaintiffs from *Alley, J.*, at March Term, 1946, of RICHMOND. Reversed.

Action to try title to land and to have defendant Pearl G. Pearson declared the holder of the title thereto as trustee for the use and benefit of plaintiffs.

W. S. Pearson, the testator of defendant executrix, was administrator *d. b. n., c. t. a.,* of A. L. Pearson. While acting as such and while in possession of the *locus,* farming the same under order of court, he purchased the land at a foreclosure sale. He left a will in which he devised the land to his wife, the defendant. She assumed possession, claiming the same as her own. Thereupon this action was instituted by devisees and the representatives of deceased devisees under the will of A. L. Pearson.

Defendant pleads (1) the three-year, seven-year, and ten-year statutes of limitations, (2) estoppel by release, (3) seven years' possession under color, and (4) laches.

In the trial below plaintiffs offered certain evidence appearing of record and rested. The court sustained defendant's motion to dismiss as in case of nonsuit and entered judgment dismissing the action. Plaintiffs excepted and appealed.

Fred W. Bynum and George S. Steele, Jr., for plaintiffs, appellants.

McLeod & Webb and Varser, McIntyre & Henry for defendant, appellee.

BARNHILL, J. Plaintiffs' evidence tends to show the following facts:

W. S. Pearson was appointed administrator *d. b. n., c. t. a.,* in 1925 to succeed J. R. Bennett, resigned executor. He went into possession of the *locus* in the spring of 1925 under an order of court permitting him to continue the farming operations. At that time the mortgage indebtedness on the eight-horse farm containing 330 acres was $1,900. Other indebtedness, including over $2,000 due W. S. Pearson, amounted to approximately $5,350. He never thereafter filed an account of his administration. In 1927 he told Moncu Chavis (excluded by the court below) "he was not going to pay the mortgage—he was going to let the mortgagee sell it, and he was going to buy it." The trustee foreclosed the mortgage outstanding at the time of the death of A. L. Pearson and W. S. Pearson became the purchaser. On 30 January, 1930, the trustee executed foreclosure deed to him individually. He remained in possession until his death in June, 1944.

We cannot say this evidence, as a matter of law, fails to disclose that plaintiffs possess a valid and enforceable interest in the *locus.*

While, strictly speaking, real estate is not an asset in the hands of the administrator, it is an asset to which he may have recourse when the personal estate is insufficient to discharge the debts and the costs of

administration. G. S., 28-148; *Creech v. Wilder,* 212 N. C., 162, 193 S. E., 281. Here it had been sequestered by the court and placed in the hands of the administrator. He was in actual possession. He had the right, with the approval of the court, to mortgage the land, G. S., 28-82, or, at a sale thereof, to purchase for the protection of the estate. G. S., 28-183; *Woody v. Smith,* 65 N. C., 116. Yet he made no application to be permitted to borrow the relatively small amount due the mortgagee to protect the land from sale under foreclosure. Instead he elected to borrow a much larger sum in his own name and purchase for his own benefit. Having purchased, he has never accounted for the excess above the amount due the mortgagee, or disclosed the results of his farming operations, or the financial status of the estate at the time of the foreclosure sale.

A trustee who acquires an outstanding title adverse to that of his *cestuis que trustent* is considered in equity as having acquired it for their benefit and cannot set it up as his own. *Brantly v. Kee,* 58 N. C., 332; *Haskill v. Freeman,* 60 N. C., 585; *Keaton v. Cobb,* 16 N. C., 439; *Boyd v. Hawkins,* 37 N. C., 304; 54 A. J., 175. "A purchase of testator's land by executors, at their own sale, whether directly or indirectly, and however fair, is fraudulent in law." (3rd syllabus) *Shute v. Austin,* 120 N. C., 440. It will, as of course, be set aside at the instance of the parties interested. *Stilly v. Rice,* 67 N. C., 178; L. R. A., 1918 B, 13n, 36n; *Froneberger v. Lewis,* 70 N. C., 456; *Shearin v. Hunter,* 72 N. C., 493; *Tayloe v. Tayloe,* 108 N. C., 69; *McNeill v. Fuller,* 121 N. C., 209; *Tomlinson's Executors v. Detestatius's Executors,* 3 N. C., 284; *Creech v. Wilder, supra; Stianson v. Stianson,* 6 A. L. R., 280.

The rule which prohibits an executor or administrator from purchasing at his own sale applies where the sale is brought about by another. 21 A. J., 735; Anno. 77 A. L. R., 1514, 1521.

The administrator is a trustee and so, in the absence of demand and refusal, any statute of limitations which bars an action by the legatee or distributee to recover his share of the estate does not begin to run until the administrator completes and closes the administration. *Creech v. Wilder, supra; Bailey v. Shannonhouse,* 16 N. C., 416; *Wilkerson v. Dunn,* 52 N. C., 125; *Bushee v. Surles,* 77 N. C., 62; *Woody v. Brooks,* 102 N. C., 334. And until the debts have been paid, or the assets of the estate exhausted, the estate is not settled and the duties and obligations of the administration continue. *Creech v. Wilder, supra.* Hence it does not appear from the evidence offered that the claim of plaintiffs is barred by any statute of limitations.

The defenses pleaded by the defendant are affirmative in nature and, as to them, the burden is on her. There is no testimony in the record sufficient to sustain either of them.

It does not appear when, if ever, Pearson ceased to occupy the land under the order permitting him as administrator to continue the farming operations. Neither is there any evidence which would compel the conclusion as a matter of law that he was at any time in the open, notorious, adverse possession thereof, claiming it as his own, so as to put the devisees on notice. Likewise there is no evidence of alleged facts constituting laches upon which the defendant relies.

Jessup v. Nixon, 186 N. C., 100, 118 S. E., 908, cited by defendant, is factually distinguishable.

The unchallenged evidence appearing in this record is sufficient to require its submission to a jury. Hence the judgment below is

Reversed.

STATE v. JOHN W. REVELS AND ROOSEVELT REVELS.

(Filed 11 December, 1946.)

1. Assault § 8d—

Intent to kill may be inferred from the nature of the assault, the manner in which it is made, the conduct of the parties, and other relevant circumstances.

2. Assault § 13—

Evidence tending to show that defendants, acting in concert, made a malicious, unprovoked assault with a knife upon an unarmed victim, inflicting a wound requiring twenty-six stitches externally and three internally to close, is sufficient evidence from which the jury may infer intent to kill, and therefore is sufficient to overrule defendants' motion to nonsuit on the charge of felonious assault, and to support the judge's submission to the jury of the question of defendants' guilt of assault with a deadly weapon with intent to kill. The distinction between an inference which may be drawn from the evidence and a presumption arising upon the evidence pointed out.

3. Criminal Law § 81c (4)—

Where a general verdict of guilty on all counts is returned, the verdict is sufficient to uphold the judgment imposing concurrent sentences if any one of the counts is sound, and therefore on appeal exceptions relating to other counts are immaterial and need not be reviewed.

APPEAL by defendants from *Williams, J.,* at April Term, 1946, of ROBESON.

Under several indictments, consolidated for trial, the defendants, among other counts not pertinent to this review, were charged with felonious assault with a deadly weapon with intent to kill, and inflicting

serious injuries not resulting in death on John Baxley, Billie James Baxley and Charlie Rogers, respectively.

There was evidence on the part of the State tending to show that the persons assaulted were traveling in a wagon drawn by mules, towards home from Lumberton, where they had bought some supplies which were being carried on the wagon. The wagon was about two-thirds across an intersecting road when defendants, in a car carrying no lights, ran into the tongue of the wagon, knocking off Charlie Rogers and the three-year-old grandson of Baxley, crushing the hand of the child and doing other injuries. The defendants did not stop. After picking up Rogers and the hurt child, Baxley drove the wagon in the direction of home. In about 15 or 20 minutes the defendants, still driving without lights, overtook the wagon from behind. The two Revels went around, caught the mules and stopped the wagon. They then demanded pay for damage to the automobile and told the occupants of the wagon, "You are going to pay us before you leave here." When Baxley refused, they ran upon him, and the mules broke and ran. The defendants then got hold of the wagon, one of them cut Baxley across the hand, severing the leaders to the bone. Rogers was cut in the back so severely it took twenty-six stitches "on the outside" and three "on the inside" to close the wounds. The three-year-old child was also cut during the assault in addition to the wounds received in the collision. The wounds were knife wounds, and severe. Those on Baxley severed the leaders on one hand, and those on Rogers produced severe hemorrhage.

There was evidence on the part of defendants in contradiction.

The defendants demurred to the evidence as being insufficient to sustain an inference of felonious assault, or intent to kill, and moved for judgment of nonsuit with respect to said charge. The motion was overruled and defendants excepted.

The judge instructed the jury, in indicating the verdicts permissible under the evidence, that they might find the defendants guilty under all the counts. The defendants excepted, contending that there was no evidence of felonious assault or intent to kill.

There was a general verdict of guilty, and thereupon the defendants were sentenced to be confined in the State's Prison for a term of not less than five nor more than seven years, the sentences to run concurrently.

The defendants appealed.

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

John S. Butler for defendants, appellants.

SEAWELL, J. The appellants present two questions for review: Whether the case should have been nonsuited, on the demurrers to the

evidence, with respect to the charge of felonious assault; and whether the court erred in its instruction to the jury, that they might, as a permissible verdict, find the defendants guilty on all counts, thus including the charge of felonious assault. The exceptions are, of course, interrelated, the propriety of the instruction depending upon the validity of the judgment overruling the demurrers. We turn our attention to that question.

The appellants contend that there was no evidence of an intent to kill. They do not contend, considering the specific nature of the demurrer, that there was not evidence of (1) an assault; (2) the use of a deadly weapon; (3) the infliction of a serious injury; (4) not resulting in death. All these, however, they contend, taken together, do not engender an inference of the intent to kill; and cite *S. v. Redditt,* 189 N. C., 176, 126 S. E., 506; *S. v. Carver,* 213 N. C., 150, 195 S. E., 349; and quote from *S. v. Gibson,* 196 N. C., 393, 145 S. E., 772.

We fear that the significance of the cited cases has escaped the defense. In all of these cases the Court was dealing with the question of presumptions; with erroneous instructions to the jury that assault with a deadly weapon inflicting serious injury not resulting in death, raised a *presumption* of felonious assault, or intent to kill, thus burdening the defendant with the necessity of proving his innocence of an element of the crime—the intent to kill,—which it was incumbent on the State to prove beyond a reasonable doubt. We quote from *S. v. Gibson, supra:*

"The admission on proof of an assault with a deadly weapon, resulting in serious injury but not in death, cannot be said, *as a matter of law,* on the present record, to establish a presumption of felonious intent, or intent to kill, sufficient to overcome the presumption of innocence, raised by a plea of traverse, and cast upon defendant the burden of disproving his guilt." (Italics supplied.)

This Court has never said—indeed could not say—that the circumstances attending such an assault might not afford evidence of a felonious assault, or an assault with intent to kill. Such intent may be inferred from the nature of the assault, the manner in which it is made, the conduct of the parties, and other relevant circumstances. *S. v. Smith,* 211 N. C., 93, 189 S. E., 175; *S. v. Oxendine,* 224 N. C., 825, 829, 830, 32 S. E. (2d), 648. Without cataloguing the evidence we may say that a person who uses a lethal weapon so savagely as to open a wound in the body of his unarmed victim which causes severe hemorrhage and takes twenty-six stitches externally and three internally to close, may be held by the jury to have had a homicidal intent, although death did not ensue. *S. v. Redditt, supra,* is not in conflict with this view; it deals with certain *presumptions* which arise out of the killing and which are not otherwise present; not with *inferences* which might be drawn from the circumstances of the assault. Persons intending to inflict a punishment

short of death could have been more careful in selecting the instrument and less prodigal in its use. Fortunately the wound, serious as it was, did not cause death, but that, apparently, was not due to any restraint on the part of the assailants.

There was ample evidence that the defendants acted in concert. Since there was a general verdict of guilty on all counts, and the sentences imposed are to run concurrently, we need not inquire whether the assault on the infant Baxley could be differentiated in evidentiary aspects from the other counts. *S. v. Graham,* 224 N. C., 347, 350, 30 S. E., 151.

The demurrers to the evidence were properly overruled. Defendants' challenge to the trial presents no sufficient reason why the result should be disturbed. On the record we find

No error.

STATE v. DR. G. D. GARDNER.

(Filed 11 December, 1946.)

Criminal Law § 32½—

A written statement made by defendant and evidence of oral statements made by him to officers disclosing that defendant had made a telephone call to the Acting Coroner on the afternoon of the date in question, and testimony of a witness that when he called at defendant's home a short time after the hour in question, defendant stated that he had called the Acting Coroner *is held* a sufficient identification of defendant as the person who made the call to admit of testimony by the Acting Coroner as to the telephone conversation had with a person purporting to be defendant.

APPEAL by defendant from *Bobbitt, J.,* at January Term, 1946, of BUNCOMBE.

Criminal prosecution tried upon indictment charging the defendant with the murder of one Mrs. Lois E. Cordell.

The evidence tends to show that Lois E. Cordell died about 1:30 p.m., on 23 October, 1945, as a result of abortional injuries inflicted in the performance of an abortion. An autopsy was performed on the body of the deceased the day she died by Dr. Curtis Crump, Acting Coroner and expert physician and pathologist. Three other physicians, each admitted to be an expert, were present when the autopsy was performed. The autopsy revealed approximately a pint of blood and blood clots in the abdominal cavity. This seemed to be all the blood in the body; whereas, according to the evidence, there should have been about five quarts. The whole front half of the womb showed a jagged perforation which measured approximately four by two inches. Other lacerations and

tears were found, which need not be described here. All the doctors agreed that Lois E. Cordell died within fifteen to thirty minutes after the abortional injuries were inflicted and two of them were of the opinion that she probably died during the performance of the abortion. Dr. Crump testified that there was no evidence of peritonitis, and that in his opinion if these injuries were inflicted prior to 7:30 in the morning and she died at 1:30 p.m., that day, peritonitis would have set in with the amount of damage that was present in her womb.

The State also introduced evidence tending to show that the defendant, on 22 October, 1945, went to the Warren Safe & Lock Company in Asheville, to get a surgical instrument repaired. No one was in who could repair the instrument and the defendant said he could not wait. He took a piece of No. 18 galvanized stove pipe wire and repaired the instrument, leaving about ¾ of an inch of the wire twisted on top of the rivet. The defendant said he could sterilize it and use it.

Verdict: Guilty. Judgment: Imprisonment in the State's Prison for a term of not less than five nor more than seven years.

The defendant appeals, assigning error.

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

Henry C. Fisher and J. W. Haynes for defendant.

DENNY, J. This case was before us on a former appeal in which a new trial was granted. *S. v. Gardner,* 226 N. C., 310, 37 S. E. (2d), 913.

The first assignment of error is based on an exception to the admission of the testimony, over objection, of the Acting Coroner of Buncombe County, Dr. Curtis Crump, who, in response to a question about a telephone call, testified: "I received that telephone call shortly after 3:30 p.m., and Dr. Gardner, or a man purporting to be Dr. Gardner, stated that he had called his lawyer and his lawyer had advised him to call the Coroner concerning a deceased individual which he had at his house, his home. He gave the report that the patient had just been left at his home at 918 Haywood Road by a taxi and that the taxi had immediately driven off before he could find out any further information. He stated that the patient had died before any aid could be given by him or he could ascertain what was wrong with her."

The defendant contends this evidence was admitted without proper identification of the person with whom Dr. Crump talked, over the telephone, shortly after 3:30 p.m., on 23 October, 1945, for it to be admissible. He further contends Dr. Crump's testimony was highly prejudicial in that it tended to create the impression that the deceased had been left at the home of Dr. Gardner in the afternoon and not in the

morning of 23 October, 1945, as set forth in defendant's statement previously made and offered in evidence by the State.

The exception cannot be sustained. The written statement of Dr. Gardner and evidence of oral statements made by him, to the officers at the time he gave his written statement, admitted in evidence without objection, disclose that the deceased was left by a taxi driver at the home of Dr. Gardner on Haywood Road about 7:00 or 7:30 a.m., on the morning of 23 October, 1945. The girl died at approximately 1:30 p.m., that day. Dr. Gardner stated to the officers: "There was quite a delay in his attempt to get the Acting Coroner on the telephone." The defendant called an attorney to find out the name of the Acting Coroner, and after obtaining the information, he said: "He . . . called Dr. Crump, the Acting Coroner, and told him that this girl was there and that she had died and that he did not know who she was."

The record further discloses that an undertaker was called and went to the home of Dr. Gardner for the body. The undertaker arrived about 4:00 p.m., on the day in question. Dr. Gardner answered the door bell and stated "That he had called the Coroner and had permission . . . to remove the body." The undertaker communicated with Dr. Crump and then removed the body of the deceased to his place of business, where the autopsy was performed a few hours later.

We think there was ample evidence tending to identify the defendant as the person who called Dr. Crump over the telephone on the afternoon of 23 October, 1945, and that evidence as to the conversation at that time was properly admitted. *Sanders v. Griffin,* 191 N. C., 447, 132 S. E., 157; *S. v. Burleson,* 198 N. C., 61, 150 S. E., 628; *Harvester Co. v. Caldwell,* 198 N. C., 751, 153 S. E., 325; *Cf. Mfg. Co. v. Bray,* 193 N. C., 350, 137 S. E., 151, and *Powers v. Commercial Service Co.,* 202 N. C., 13, 161 S. E., 689.

We have carefully considered the additional exceptions and the assignments of error based thereupon, and they are without merit.

In the trial below, we find

No error.

ULYSSES S. WESCOTT v. THE FIRST & CITIZENS NATIONAL BANK OF ELIZABETH CITY, LEE DILL ROBBINS, A MINOR, ELNORA D. ROBBINS, A MINOR (HOWARD S. WHALEY, THEIR GUARDIAN AD LITEM), AND ROBERT C. LOWRY, ADMINISTRATOR OF ULYSSES C. ROBBINS.

(Filed 11 December, 1946.)

1. Wills § 15—

The right to dispose of property by will is conferred and regulated by statute, and therefore letters written by a member of the armed forces

which are not offered or proven in the manner or form prescribed by the statutes, G. S., 31-3, G. S., 31-26, are ineffectual as a testamentary disposition of property.

2. Trusts § 3a—

Letters disclosing the intent of a depositor that bank deposits made by him should be held for his use and benefit and that he should have exclusive control over the funds, though expressing a desire that in the event of his death the fund should go to a named "beneficiary," are insufficient to establish an express trust, there being no evidence of intention to transfer or assign a present beneficial interest in the funds deposited.

3. Gifts §§ 1, 4—

Letters disclosing the intent of a depositor that bank deposits made by him should be held for his use and benefit and that he should have exclusive control over the funds, though expressing a desire that in the event of the depositor's death the fund should go to a named "beneficiary," are insufficient to show either a gift *inter vivos* or a gift *causa mortis*.

4. Executors and Administrators § 8—

Where, in an action to determine ownership of funds deposited by a deceased member of the armed forces, letters written by him are introduced in evidence disclosing his intention to retain sole control over the funds deposited by him for his own use and benefit but expressing the desire that in the event of his death the funds should go to a named "beneficiary," but the letters are not proven as a will, *held* the letters are ineffectual as a testamentary disposition of the funds, and are insufficient to establish an express trust or show a gift *inter vivos* or *causa mortis*, and his administrator is entitled to the funds, there being no facts which would give rise to an inference of a family settlement.

5. Executors and Administrators § 29—

In an action by a claimant of funds deposited by a deceased soldier, against the bank, the soldier's administrator and his minor next of kin, judgment that counsel fees for defendants should be paid from the funds is without error.

APPEAL by plaintiff and defendants from *Thompson, J.*, in Chambers, 11 September, 1946. From PASQUOTANK.

This was an action to have plaintiff declared entitled to a fund deposited in defendant Bank by Ulysses C. Robbins, a soldier, now deceased.

The administrator of the deceased and his next of kin, represented by guardian *ad litem*, as well as the Bank, were made parties defendant. The defendant Bank filed answer alleging that it was a mere stakeholder, but questioning the right of the plaintiff to the fund as against the administrator and the next of kin who are minors. Answers on the part of the other defendants were filed admitting the allegations of the complaint. No issues of fact were raised requiring the intervention of a jury (Session Laws 1945, chapter 142).

Judgment was rendered for plaintiff, but certain allowances from the fund were made, to which plaintiff excepted. Plaintiff and defendants appealed.

Robt. B. Lowry and Geo. J. Spence for plaintiff, appellee, Ulysses S. Wescott.

Wilson & Wilson for defendant Bank.

W. C. Morse, Jr., for defendant Robert C. Lowry, Administrator.

Forrest V. Dunstan for Howard S. Whaley, Guardian ad Litem.

DEFENDANTS' APPEAL.

DEVIN, J. The question presented by the defendants' appeal is whether the facts found by the trial judge, which were unquestioned, were sufficient to constitute an express trust in favor of the plaintiff with respect to the deposits made in defendant Bank by the deceased soldier.

Ulysses C. Robbins was a sergeant in the United States Army serving in 1945 in Italy in a Quartermaster Truck Company. During this time deposits were made by him and accepted by the Bank pursuant to instructions contained in a typewritten letter from Robbins to the Bank, dated Italy, 15 January, 1945, in which letter Robbins stated he had heretofore sent to his grandfather, the plaintiff Wescott, residing in Elizabeth City, sums of money to be deposited "in one of the banks in the city, for me." Robbins further wrote the Bank: "I wish to establish an account with your Bank. . . . Please deposit the money that I will send regularly to this account. I would like to make this an "in trust for" account so I am the only person who can withdraw from it. In case I become deceased I would like to make an agreement with you so as to make my beneficiary my grandfather, whose name and address is stated above, eligible to receive the money only after I have been deceased for five years." The deposits were credited on the books of the Bank in name of "Sgt. Ulysses C. Robbins, Quartermaster Truck Co." The deposits to the last date, 9 June, 1945, totaled $6,900.

The record further shows that 24 February, 1945, plaintiff Wescott deposited in savings account in defendant Bank $800, which had been sent by Robbins to the plaintiff to be deposited. This was placed by the Bank to the credit of "Ulysses C. Robbins, deceased, by Ulysses S. Wescott, Agt."

On 22 January, 1945, Robbins wrote to plaintiff from Italy as follows: "I sent some money to the bank awhile back for my bank account. I didn't know whether I already had it in my name or yours, however I started it in my name. I made an agreement if something should happen to me my money would not be payable to my beneficiary until

five (5) years after the war. I plan to use this money for my business after the war and why the five years is anything could happen. I could be reported dead and then not be dead. I have a good partner for my business and some day I hope you will meet him. I want to go back to school after the war and study business and law. I am planning on letting the Government send me there and if nothing happens I intend to go to N. Y. U. New York University. Of course this is just my future dreams and I guess every soldier has them."

The Adjutant General of U. S. Army reported to the plaintiff that Ulysses C. Robbins was killed in Italy 19 June, 1945, as result of injuries incurred while driving a government vehicle. The death of Ulysses C. Robbins was a fact admitted by all parties, and so found by the court. Upon the death of Robbins the fund became immediately available either for the plaintiff or for the defendant administrator for distribution to the next of kin.

Neither of the letters of Robbins was offered or proven in the manner and form prescribed by the statutes so as to constitute a valid disposition of the property to take effect after his death, and therefore may not be regarded as affording basis for awarding the fund to the plaintiff on that ground. G. S., 31-3; G. S., 31-26. The right to dispose of property by will is conferred and regulated by statute. *Paul v. Davenport,* 217 N. C., 154, 7 S. E. (2d), 232; *In re Perry,* 193 N. C., 397, 137 S. E., 145.

Nor may these letters be held to create a trust in favor of the plaintiff enforceable in a court of equity. An express trust has been defined as "a fiduciary relationship with respect to property, subjecting the person by whom the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it." 1 Restatement Law of Trusts, 6. The term signifies the relationship resulting from the equitable ownership of property in one person entitling him to certain duties on the part of another person holding the legal title. 54 Am. Jur., 21. To constitute this relationship there must be a transfer of the title by the donor or settler for the benefit of another. *Coon v. Stanley,* 230 Mo. App., 524. The gift must be executed rather than executory upon a contingency. *Cazallis v. Ingraham,* 119 Me., 240.

Here the essentials of an express trust are lacking. There was no evidence of a transfer or assignment of a present beneficial interest in the fund deposited in the defendant Bank. There was only evidence of a desire that in the event of the depositor's death the grandfather should be the beneficiary. That was the only sense in which the words "beneficiary" or "in trust for" were used, and these were coupled with express directions to the Bank that the depositor should remain the sole owner of the deposits, and that they were intended for his own use and benefit.

He declared that only in the event of his own death should the plaintiff become "eligible" to receive this money. The Bank so understood, and placed the deposits to the credit of Ulysses C. Robbins. The letters of Robbins evidence a desire only to secure for his own use the money he was sending back from overseas, and do not seem to contain definite expression of purpose or intention thereby to make a testamentary disposition of the fund. No present beneficial interest was conveyed. *Coon v. Stanley, supra.*

Nor is the evidence sufficient to show a gift *inter vivos* or *causa mortis. Buffaloe v. Barnes,* 226 N. C., 313, 39 S. E. (2d), 599. Nor are there here any facts which would give rise to the inference of a family settlement justifying the disposition of the fund to the plaintiff. *Reynolds v. Reynolds,* 208 N. C., 578, 182 S. E., 341. The fund should be turned over to the defendant administrator of Ulysses C. Robbins for disposition according to law.

On defendants' appeal the judgment is reversed.

PLAINTIFF'S APPEAL.

The facts found by the court below were sufficient to justify the allowance made in the judgment, to be paid from the fund, to the counsel for defendant Bank and to the counsel for the administrator and guardian *ad litem.* The court directed that the appeal be perfected for the determination of the legal questions involved.

On plaintiff's appeal the judgment is

Affirmed.

STATE v. JERRY WILSON.

(Filed 11 December, 1946.)

1. Intoxicating Liquor § 2—

In a county which has not elected to come under the Alcoholic Beverage Control Act, the Turlington Act, as modified by the later statute, is in full force and effect. G. S., 18-61.

2. Intoxicating Liquor § 4a—

A person living in a county which has not elected to come under the Alcoholic Beverage Control Act may lawfully transport to and keep in his private dwelling, for his own use, not more than one gallon of tax-paid liquor, but subject to this exception, possession within such territory of any quantity of liquor is *prima facie* evidence that its possession is in violation of G. S., 18-2.

3. Same—

The provision of G. S., 18-11, making it lawful to possess liquor in a private dwelling for family purposes, is an exception to the general rule, and the burden of proof in respect thereto is on defendant.

4. Intoxicating Liquor § 9d—

Where, in a prosecution for unlawful possession of intoxicating liquor for the purpose of sale in a county which has not elected to come under the Alcoholic Beverage Control Act, G. S., 18-2, the State offers evidence that defendant had in his possession approximately 17½ gallons of liquor, and there is no evidence that defendant's possession was for the use of himself, his family and *bona fide* guests, defendant's motion to nonsuit is properly denied, since G. S., 18-11, applies. Prosecutions under G. S., 18-50, distinguished on the ground that that statute creates no presumption or rule of evidence from the fact of possession.

5. Intoxicating Liquor § 9c—

In a prosecution under G. S., 18-2, evidence tending to show that the liquor in defendant's possession was non-tax-paid is competent.

6. Intoxicating Liquor § 9f—

In a prosecution for unlawful possession of intoxicating liquor for the purpose of sale in a county which has not elected to come under the Alcoholic Beverage Control Act, the court may properly charge the law in the language of G. S., 18-11, and G. S., 18-13, since the law therein stated constitutes a material part of the law of the case.

7. Criminal Law § 14—

On appeal to the Superior Court from a municipal county court having exclusive original jurisdiction of the offense charged, the solicitor may amend the warrant or put defendant on trial under a bill of indictment charging the same offense. Whether, in addition thereto, the solicitor may incorporate in the bill of indictment related counts charging violations of the same section of the Act under which defendant was prosecuted in the municipal county court, *quære.*

APPEAL by defendant from *Nettles, J.,* at June Term, 1946, of GUILFORD. No error.

Criminal prosecution on warrant-bill of indictment charging unlawful possession of intoxicating liquor for the purpose of sale.

Officers acting under a search warrant found in the home of defendant approximately 17½ gallons of liquor in pint and ⅘ pint containers. Defendant was arrested and tried in the municipal-county court on a warrant issued by a magistrate. He was found guilty of unlawful possession of intoxicating liquors for the purpose of sale as charged in the warrant and he appealed to the Superior Court.

At the April Term, 1946, pending trial, the court withdrew a juror and ordered a mistrial. Thereupon, apparently at the same term, the grand jury returned a bill of indictment in the case containing three

counts: (1) transporting, (2) unlawful possession for the purpose of sale, and (3) unlawful possession of intoxicating liquors.

The cause was again called for trial at the June Term. In apt time the defendant moved to dismiss or vacate the bill of indictment for want of jurisdiction for that the municipal-county court has exclusive original jurisdiction of all misdemeanors committed in the area which embraces the defendant's home and the court has no authority to proceed under a bill of indictment on the counts contained therein. The motion was overruled and defendant excepted.

The court in its charge submitted to the jury only the count of unlawful possession for the purpose of sale. There was a verdict of guilty. The court pronounced judgment and the defendant appealed.

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

Shelley B. Caveness for defendant, appellant.

BARNHILL, J. Guilford County has not elected to come under the Alcoholic Beverage Control Act. Chap. 49, P. L. 1937, G. S., Chap 18, Art. 3. Hence the Turlington Act, Chap. 1, P. L. 1923, G. S., Chap. 18, Art. 1, as modified by the general provisions of the Alcoholic Beverage Control Act, is in full force and effect within that territory. G. S., 18-61; *S. v. Davis,* 214 N. C., 787, 1 S. E. (2d), 104.

A person living in territory in which ABC Stores are not operated may lawfully transport to and keep in his private dwelling, for his own use, not more than one gallon of tax-paid liquor, and such possession raises no presumption against him. *S. v. Suddreth,* 223 N. C., 610, 27 S. E. (2d), 623. Subject to this exception, possession within such territory of any quantity of liquor is *prima facie* evidence that it is possessed for the purpose of sale, barter, etc., in violation of G. S., 18-2. *S. v. Hege,* 194 N. C., 526, 140 S. E., 80; *S. v. McAllister,* 187 N. C., 400, 121 S. E., 739.

This rule applies even when the liquor is in a private dwelling. *S. v. Dowell,* 195 N. C., 523, 143 S. E., 133. The provision contained in G. S., 18-11, making it lawful to possess liquor in a private dwelling for family purposes, constitutes an exception to the general rule, and the burden of proof in respect thereto is on the defendant. *S. v. Dowell, supra; S. v. Epps,* 213 N. C., 709, 197 S. E., 580.

The charge against defendant is laid under Sec. 2 of the Turlington Act, G. S., 18-2. The officers found in his possession approximately 17½ gallons of liquor in pint and ⅘ pint containers, together with a number of empty cartons, stored in an inner room under lock and key. *S. v. Ellis,* 210 N. C., 166, 185 S. E., 663. The defendant offered no testimony and there was no evidence offered by the State which tends to

show that defendant was in possession of the liquor for the use of himself, his family, and his *bona fide* guests. G. S., 18-11; *S. v. Foster,* 185 N. C., 674, 116 S. E., 561; *S. v. Hammond,* 188 N. C., 602, 125 S. E., 402; *S. v. Dowell, supra; S. v. Epps, supra.* Hence the court committed no error in overruling the motion to dismiss as in case of nonsuit. *S. v. Hammond, supra.*

It likewise follows that evidence tending to show the State tax had not been paid on the liquor seized was competent.

S. v. Peterson, 226 N. C., 255, *S. v. McNeill,* 225 N. C., 560, and *S. v. Lockey,* 214 N. C., 525, 199 S. E., 715, relied on by defendant, are not in point. In each of those cases the defendant was prosecuted under G. S., 18-50. This section of the general code is a part of the Alcoholic Beverage Control Act and makes it unlawful to possess illicit liquor for sale or to sell either illicit or tax-paid liquor, but it creates no presumption or rule of evidence. *S. v. Peterson, supra.* When the State proceeds under this section it must prove the offense charged unaided by any presumption. Here, as we have noted, the State proceeded under G. S., 18-2, which is a part of the Turlington Act. When the defendant is prosecuted under this section, G. S., 18-11, a part of the same Act, applies. Herein lies the distinction.

The charge of the court to which exceptions are entered was bottomed on and in the language of G. S., 18-11 and 18-13. The law as therein stated constitutes a material part of the law of the case. Therefore the assignments of error based on these exceptions cannot be sustained.

But the defendant insists that in any event the court below erred in overruling his motion to dismiss for want of jurisdiction in the Superior Court. We cannot so hold.

At the trial in the Superior Court, on an appeal from an inferior court having exclusive original jurisdiction, the solicitor may amend the warrant, *S. v. Patterson,* 222 N. C., 179, 22 S. E. (2d), 267, *S. v. Brown,* 225 N. C., 22, *S. v. Grimes,* 226 N. C., 523, or he may put the defendant on trial under a bill of indictment, charging the same offense, returned in the case. *S. v. Razook,* 179 N. C., 708, 103 S. E., 67; *S. v. Thornton,* 136 N. C., 610; *S. v. Crook,* 91 N. C., 536; *S. v. Quick,* 72 N. C., 241. The appeal vests jurisdiction in the court. Thereafter all questions of procedure and pleadings, including the form in which the charge is to be stated, come within the purview of the presiding judge.

Neither of the two additional counts contained in the bill of indictment was submitted to the jury. No evidence was offered in relation thereto which was not competent on the count submitted. Hence we need not now decide whether the court could incorporate in the warrant or bill of indictment related counts charging violations of the same section of the Act under which defendant is prosecuted. Sec. 2, Ch. 1, P. L. 1923.

We have carefully examined the other assignments of error and find in them no cause for disturbing the judgment.

In the trial below we find

No error.

STATE v. LONNIE JONES AND CLARENCE WOOD.

(Filed 11 December, 1946.)

1. Larceny § 5—

The possession of property some 16 or 20 days after the alleged theft, while a pertinent circumstance, is insufficient to raise the presumption that the possessor was the thief.

2. Same—

Defendants were tried on consolidated bills of indictment, one charging larceny of Dominick and yellow chickens from one person and the other larceny of White Rock chickens from another person. *Held:* Evidence that on the day after the alleged theft defendants sold a number of "white chickens," introduced without limiting it to the second bill, either in its admission or the instruction to the jury, raises no presumption in regard to the larceny of the property described in the first bill, and an instruction on the presumption arising from recent possession must be held for reversible error upon appeal from a verdict of guilty referring only to the first bill.

3. Same—

The presumption arising from the recent possession of stolen property does not apply until the identity of the property is established.

4. Criminal Law §§ 54b, 60—

Verdicts and judgments in criminal cases ought to be clear and free from ambiguity or uncertainty.

APPEAL by defendants from *Gwyn, J.*, at August Term, 1946, of YADKIN.

Criminal prosecution upon indictment charging the defendants (1) with breaking and entering a house, occupied by John Henry Stokes, with intent to steal 18 hens and 1 rooster, of the value of $35.00, the property of John Henry Stokes; (2) with the larceny of said hens and rooster, valued at $35.00, the property of John Henry Stokes, and (3) with receiving the said property knowing it to have been feloniously stolen.

In a second bill, the defendants are charged (1) with breaking and entering a house, occupied by Riley Ashburn, with intent to steal 18 White Rock hens, of the value of $35.00, the property of Riley Ashburn; (2) with the larceny of said hens, valued at $35.00, the property of

Riley Ashburn, and (3) with receiving said property knowing it to have been feloniously stolen.

By consent the two bills were consolidated and the defendants were tried on both at the same time, as the two charges arise out of transactions immediately connected, or apparently so.

The record discloses that John Henry Stokes and Riley Ashburn are community neighbors living in Yadkin County, about 10 miles west of Yadkinville on the Yadkinville-North Wilkesboro Highway. Each has a chicken house on his farm. The Stokes' chicken house is 75 or 80 yards from his dwelling and is enclosed with a wire fence.

On the night of 11 February, 1946, or during the early hours of the 12th, both chicken houses were entered and 15 or 20 Dominick and yellow hens and one Ancona rooster, of the value of $20.00, were taken from John Henry Stokes' chicken house and 18 White Rock hens, of the value of $27.00, were stolen from Riley Ashburn's chicken house.

It is in evidence that on 12 February, 1946, the defendant Jones sold some white chickens in Greensboro. A man who looked like the defendant Wood was with him at the time. Wood is a son-in-law of Jones. They live together in Lee County some 135 miles from the scene of the alleged crimes.

Thereafter, about the first of March, the sheriff found 26 chickens and one Ancona rooster in Clarence Wood's yard. Mrs. John Henry Stokes identified the rooster as hers. This was around the 4th or 5th of March.

There was other evidence tending to connect the defendants with the alleged crimes.

The counts for receiving in both bills were withdrawn from the jury by the trial court.

Verdict: "On the charge of feloniously breaking and entering the building of John Henry Stokes we find the defendants both guilty on both counts."

Judgments: Lonnie Jones, 2 years in the State's Prison on the first count in each bill, and 2 years in the State's Prison on the larceny count in each bill, these latter sentences to be suspended on terms. Clarence Wood: 12 months in the State's Prison on the first count in each bill, and 2 years in the State's Prison on the count for larceny in each bill, these latter sentences to be suspended on terms.

The defendants appeal, assigning errors.

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

D. E. McIver and Gavin, Jackson & Gavin for defendants.

STACY, C. J. We are disposed to think there must have been some error in recording the verdict in this case. It makes no reference to the

second bill. Indeed, it may be doubted whether it sufficiently refers to the first to support a judgment. *S. v. Allen,* 224 N. C., 530, 31 S. E. (2d), 530; *S. v. Lassiter,* 208 N. C., 251, 179 S. E., 891; *S. v. Barbee,* 197 N. C., 248, 148 S. E., 249; *S. v. Perry,* 225 N. C., 174, 33 S. E. (2d), 869, and cases there cited. But however this may be, there appears to be an inadvertence in the charge in respect of the presumption arising from the recent possession of stolen property, which requires another hearing.

The court instructed the jury as follows: "Another principle of law the court will call to your attention is, that where property is stolen, and where a person is found in the recent possession of such stolen property, then such recent possession of such stolen property raises a presumption of fact that the person who is in such recent possession is the thief. That he committed the larceny, but such presumption is strong or weak according to the length of time which has passed between the time of the commission of the larceny and the time when the person is found in possession of it." Exception.

It would appear that the only evidence to which this instruction could properly apply is that tending to show the Ancona rooster in the possession of Clarence Wood at his home in Lee County some 16 or 20 days after the alleged theft. This possession, while a pertinent circumstance, would seem to be without presumptive significance under what was said in *S. v. Holbrook,* 223 N. C., 622, 27 S. E. (2d), 725; *S. v. Weinstein,* 224 N. C., 645, 31 S. E. (2d), 920, and cases there cited.

The evidence tending to show that the defendant Jones, accompanied by some one who looked like the defendant Wood, sold a number of "white chickens" in Greensboro on 12 February, 1946, raises no presumption that they were stolen from John Henry Stokes. His were not white chickens. And even if this evidence be regarded as pointing to the "White Rock hens" of Riley Ashburn, it would be limited to the charge contained in the second bill of indictment. It is not so limited in the court's instruction, and the verdict speaks only to the bill concerning the chickens stolen from John Henry Stokes. It was inappropriate as applied to this bill. *S. v. Adams,* 133 N. C., 667, 45 S. E., 553.

Then, too, there is no evidence that the chickens sold in Greensboro were White Rock hens—only that they were white chickens. The identity of the fruits of the crime must be established before the presumption of recent possession can apply. The presumption is not in aid of identifying or locating the stolen property, but in tracking down the thief upon its discovery. *S. v. Rights,* 82 N. C., 675; *S. v. Patterson,* 78 N. C., 470.

Again referring to the condition of the record, we may add that verdicts and judgments in criminal cases ought to be clear and free from ambiguity or uncertainty. The matters involved—the enforcement of the

criminal law and the liberty of the citizen—are worthy of exactitude. *S. v. Shew,* 194 N. C., 690, 140 S. E., 621; *S. v. Whitaker,* 89 N. C., 472; *S. v. Gooding,* 194 N. C., 271, 139 S. E., 436; *In re Parker,* 225 N. C., 369, 35 S. E. (2d), 169.

The defendants' remaining exceptions, some of which have been pressed with confidence and vigor, especially the assignment that they are charged with misdemeanors and have been punished as for felonies, G. S., 14-72, are pretermitted as they may not arise on another hearing.

New trial.

FRED SUGGS v. S. L. BRAXTON, TRADING AND DOING BUSINESS AS BRAXTON AUTO SERVICE, AND SOUTHEASTERN FIRE INSURANCE CO.

(Filed 11 December, 1946.)

1. Insurance § 50—

Where in an action on an automobile collision policy, plaintiff alleges coverage under a binder, which binder shows that the insurance thereby contracted expired prior to the occurrence of the collision and that the premium received by insurer was the ratable amount to the date of expiration, insurer's motion to nonsuit is properly allowed notwithstanding evidence tending to show modification or extension of the insurance coverage when such evidence is not predicated upon allegations in the complaint.

2. Pleadings § 24c—

The theory of the complaint determines the recovery, and proof not supported by allegation is unavailing.

3. Same: Trial § 23a—

A material variance between the allegation and proof may be taken advantage of by motion for judgment as of nonsuit.

APPEAL by defendant Southeastern Fire Insurance Company, from *Burney, J.,* at February Term, 1946, of COLUMBUS. Reversed.

This was an action to recover collision insurance on an automobile. Plaintiff alleged that defendant Braxton was an automobile dealer, and also agent of defendant Insurance Company; that 6 February, 1945, plaintiff borrowed of defendant Braxton $500 and to secure the loan executed to Braxton a mortgage on one Buick automobile in the amount loaned plus $115 to cover interest and collision, theft and fire insurance on the automobile; that the insurance obtained by Braxton was "under binder No. 554" issued by defendant Insurance Company. It was alleged that plaintiff's automobile on 17 March, 1945, was wrecked in collision, entailing loss in full amount of the insurance.

The defendant Insurance Company, in its answer, denied that any binder issued by it covering plaintiff's automobile was in force at the time of the alleged collision. It was admitted, however, at the trial that defendant Insurance Company issued its binder No. 554 on plaintiff's automobile, and that the automobile was damaged in collision 17 March, 1945.

At the trial the plaintiff, being called upon to produce any insurance policy or binder issued by defendant, admitted that he had no such binder or policy and was unable to produce same. Plaintiff's testimony as to his dealings with defendant Braxton was admitted by the court only against Braxton and not against defendant Insurance Company.

Defendant Braxton testified for plaintiff that he was agent of defendant Insurance Company, and that 27 January, 1945, he was notified by defendant Insurance Company that it had decided to discontinue automobile finance insurance, and that after 15 February it would not accept any further business of this kind. He further testified that the binder No. 554 referred to in the plaintiff's complaint was issued 6 February, 1945, by the Vice-President of defendant Insurance Company, who was in Braxton's office at that time; that this binder covered plaintiff's automobile and was the only binder ever issued that did do so.

It was contended by the plaintiff that defendant Insurance Company agreed with Braxton, its agent, to allow this binder to remain in effect until 11 April, 1945, or until Braxton could get some other company to take over the business.

The defendant Insurance Company offered duplicate of the binder No. 554, referred to, written by Basinger in Braxton's office, to which was attached a list of all the automobiles covered by the binder, including that of plaintiff Suggs, 6 February, 1945, showing coverage to 1 March, 1945. In connection therewith Basinger testified that the premium paid to defendant Insurance Company by defendant Braxton for the plaintiff Suggs on the Suggs automobile was $9.10 to 1 March, 1945, and that the binder expired on that date.

The motion of defendant Insurance Company for judgment of nonsuit, entered at close of plaintiff's evidence and renewed at close of all the evidence, was denied and exception noted. The motion of defendant Braxton for judgment of nonsuit was allowed.

Issues submitted to the jury as to the liability of defendant Insurance Company were answered in favor of plaintiff, and from judgment on the verdict defendant Insurance Company appealed.

Powell & Powell for plaintiff, appellee.

B. Irvin Boyle and Varser, McIntyre & Henry for defendant Insurance Company, appellant.

DEVIN, J. Plaintiff did not appeal from the judgment of nonsuit entered as to the defendant Braxton, and hence we are not concerned on this appeal with the question of the liability of defendant Braxton under the evidence offered.

As to the other defendant, the Southeastern Fire Insurance, the plaintiff bottomed his action specifically on insurance coverage "under binder No. 554." This binder was issued 6 February, 1945, by the Vice-President of defendant Insurance Company and was admittedly the only binder or policy ever issued by the defendant covering plaintiff's automobile. This binder showed that the period for which the insurance was thereby contracted expired 1 March, 1945, and it further appeared that the premium received by the defendant was the ratable amount due to that date.

From an examination of the pleadings in connection with the evidence offered, it is apparent that testimony, if otherwise competent, tending to show modification or extension of insurance coverage, would not avail the plaintiff here in view of the allegation in his complaint that his claim for loss occurring 17 March, 1945, was under binder No. 554 which in unequivocal terms limited the coverage to 1 March, 1945. Under his pleading his sole reliance was upon the coverage expressed in this binder and the binder shows the insurance had expired when the loss occurred. *Matthews v. Ins. Co.,* 195 N. C., 374, 142 S. E., 233. No other insurance contract is alleged. The one shown in the record excludes liability after 1 March, 1945. *Ins. Co. v. Wells,* 226 N. C., 574, 183 S. E. (2d), 743; *McCabe v. Casualty Co.,* 209 N. C., 577, 183 S. E., 743; *Foscue v. Ins. Co.,* 196 N. C., 139, 144 S. E., 689; *Distributing Corp. v. Indemnity Co.,* 224 N. C., 370, 30 S. E. (2d), 377; *Floars v. Ins. Co.,* 144 N. C., 232, 56 S. E., 915.

Plaintiff's recovery is to be had, if at all, on the theory of the complaint and not otherwise. *Coley v. Dalrymple,* 225 N. C., 67, 33 S. E. (2d), 477; *Atkinson v. Atkinson,* 225 N. C., 120, 33 S. E. (2d), 666; *Balentine v. Gill,* 218 N. C., 496, 11 S. E. (2d), 456; *Barron v. Cain,* 216 N. C., 282, 4 S. E. (2d), 618. The plaintiff is bound by the allegations in his complaint. Proof to avail must correspond with the allegations. As was said in *Whichard v. Lipe,* 221 N. C., 53, 19 S. E. (2d), 14, "The plaintiff must make out her case *secundum allegata,* and the Court cannot take notice of any proof unless there be a corresponding allegation (citing cases). Where there is a material variance between the allegation and the proof this defect may be taken advantage of by motion for judgment as of nonsuit." *Talley v. Granite Quarries Co.,* 174 N. C., 445, 93 S. E., 995.

The meaning and effect of a binder in the law of insurance is discussed in *Distributing Corp. v. Indemnity Co.,* 224 N. C., 370, 30 S. E.

(2d), 377; *Lea v. Ins. Co.*, 168 N. C., 478, 84 S. E., 769; *Gardner v. Ins. Co.*, 163 N. C., 367, 79 S. E., 806; 29 Am. Jur., 158.

On this record we conclude that defendant Insurance Company's motion for judgment of nonsuit should have been allowed, and that the judgment must be

Reversed.

TILDON WALKER v. FLOYD A. McLAURIN, INDIVIDUALLY AND AS ADMINISTRATOR OF S. J. McLAURIN, DECEASED, CLARENCE R. McLAURIN, RAYMOND K. McLAURIN, JAMES S. McLAURIN, MILES H. McLAURIN, AND MRS. VARA McLAURIN RAY.

(Filed 11 December, 1946.)

1. Insane Persons § 12—

Where a lease containing an option is attacked on the ground of want of mental capacity of lessor, and it appears that lessor's mental condition remained unchanged until his death, the refusal of the court to submit an issue tendered by lessee optionee as to lessor's ratification of the agreement is without error.

2. Insane Persons § 11—

An agreement entered into by a person who is mentally incompetent, but who has not been formally so adjudicated, is voidable and not void.

3. Same: Descent and Distribution § 12—

Where an incompetent person purports to enter into a contract, after his death his heirs may ratify the agreement or they may disaffirm it, and acceptance of benefits thereunder with knowledge of the facts is a ratification of the agreement precluding a subsequent disaffirmance.

4. Same—

In this action for specific performance of an option contained in a lease, the administrator and heirs of deceased lessor denied the existence of a valid option upon allegations that at the time of its execution lessor did not have sufficient mental capacity to execute the agreement. Plaintiff introduced evidence that after lessor's death one of the heirs directed plaintiff to pay the rent to him as administrator of the estate. *Held:* It was error for the court to refuse to submit an issue as to the ratification of the agreement by defendant heirs as alleged in plaintiff's reply.

APPEAL by plaintiff from *Williams, J.*, at March Term, 1946, of CUMBERLAND.

Civil action for specific performance.

The plaintiff obtained a purported lease and option on 27 April, 1940, for certain premises owned by J. S. McLaurin, in Cumberland County. The lease and option to be effective for a period of five years beginning 1 May, 1940. The annual rental was $90.00, payable in quarterly pay-

ments of $22.50. The agreement provided for the sale of the property to the plaintiff at any time during the existence of the lease, for a consideration of $1,200.00, payable $300.00 in cash, and the balance in four equal annual installments of $225.00 each, the deferred payments to be secured by a purchase money lien upon the premises conveyed. The agreement was filed for registration in the office of the Register of Deeds for Cumberland County, 30 April, 1940.

S. J. McLaurin died 16 February, 1942, and Floyd A. McLaurin is the duly appointed and acting administrator of his estate.

The defendants denied the existence of a valid option, alleging that at the time of its execution S. J. McLaurin did not have mental capacity to enter into a legal and binding contract.

The following issues were answered as indicated; the first two by consent, the remaining three by the jury:

"1. Was the contract of lease and option for the land therein described executed by S. J. McLaurin and the plaintiff, as alleged in the complaint? Answer: Yes.

"2. Prior to the expiration of the lease, did the plaintiff accept the option to purchase the land, so notify the defendants, offer to pay the purchase price, and demand the deed therefor, as alleged in the complaint? Answer: Yes.

"3. At the time of its execution, was the late S. J. McLaurin without sufficient mental capacity to make a valid contract, as alleged in the answer? Answer: Yes.

"4. If so, did the plaintiff have knowledge of such facts and circumstances as would put a reasonably prudent person upon inquiry to ascertain the mental condition of said S. J. McLaurin? Answer: Yes.

"5. What was a fair market value of the property in question described in said lease and option on 27 April, 1940? Answer: $1,850.00."

From judgment on the verdict, the plaintiff appeals, assigning error.

Lacy S. Collier and Robert H. Dye for plaintiff.

James R. Nance and W. C. Downing for defendant.

DENNY, J. The plaintiff assigns as error the refusal of the court to submit two issues as to the ratification of the alleged lease and option by (1) the lessor, and (2) after his death by the defendant heirs, as alleged in the reply.

We find no error in the trial below affecting the issues submitted, nor do we think there is any evidence on the record to warrant the submission of an issue as to the ratification of the contract by the lessor. His want of mental capacity to enter into a legal and binding contract on 27 April, 1940, appears to have continued until his death. But we do

think there is some evidence tending to show ratification of the contract on the part of at least some of the defendants.

An agreement entered into by a person who is mentally incompetent, but who has not been formally so adjudicated, is voidable and not void. *Carawan v. Clark,* 219 N. C., 214, 13 S. E. (2d), 237; *Wadford v. Gillette,* 193 N. C., 413, 137 S. E., 314; *Beeson v. Smith,* 149 N. C., 142, 62 S. E., 888; *Ellington v. Ellington,* 103 N. C., 54, 9 S. E., 208; *Riggan v. Green,* 80 N. C., 237; 28 Am. Jur., 714; 17 C. J. S., 484.

Four of the six defendants testified that in their opinion their father, S. J. McLaurin, did not have sufficient mental capacity, on 27 April, 1940, to enter into a valid contract. S. J. McLaurin died 16 February, 1942. The alleged lease and option purported to be in effect until 1 May, 1945. It is admitted that the rent was paid in accordance with the terms of the alleged agreement. The evidence tends to show that Floyd A. McLaurin, one of the defendants, instructed the plaintiff to pay the rent which accrued under the terms of the agreement, after 16 February, 1942, to him as administrator of the estate of S. J. McLaurin.

If the defendants knew that S. J. McLaurin was not mentally competent to enter into a contract on 27 April, 1940, but also knew that notwithstanding his mental condition such a contract was executed, they had the right to disaffirm the agreement immediately upon his death. *Cameron v. Cameron,* 212 N. C., 674, 194 S. E., 102; *Warren v. Federal Land Bank,* 157 Ga., 464, 122 S. E., 40. And, if the defendants knew the terms of the agreement, and that it contained an option for the purchase and sale of the property, and notwithstanding that knowledge, they elected to accept the rents according to the terms of the lease until its expiration, such conduct would constitute a ratification of the contract.

Where an incompetent person purports to enter into a contract, after his death his heirs may ratify the agreement or they may disaffirm it. Williston on Contracts, Revised Edition, sec. 253, p. 744; *Meadows v. Thomas,* 187 Ind., 216, 118 N. E., 811; *Downham v. Holloway,* 158 Ind., 626, 64 N. E., 82; *Atkinson v. McCulloh,* 149 Md., 662, 132 A., 148, and in *Hendricks v. Stark,* 99 Fla., 277, 126 So., 293, it is said: "One of the most familiar applications of the rule relating to the acceptance of benefits arises in the case of contracts. It has been repeatedly held that a person by the acceptance of benefits may be estopped from questioning the validity and effect of a contract; and, where one has an election to ratify or disaffirm a conveyance, he can either claim under or against it, but he cannot do both, and, having adopted one course with knowledge of the facts, he cannot afterwards pursue the other." *Brown v. Osteen,* 197 N. C., 305, 148 S. E., 434; *Sugg v. Credit Corp.,* 196 N. C., 97, 144 S. E., 554.

Whether or not the defendants or any one or more of them ratified the contract under consideration, is a question for the jury.

The judgment below is stricken out, and the cause remanded for a partial new trial on a proper issue as to whether or not the defendants, or any one or more of them, ratified the alleged contract.

Partial new trial.

SARAH CLARK SMITH AND HUSBAND, LEON SMITH, v. C. L. BENSON AND G. W. HESTER.

(Filed 11 December, 1946.)

1. Ejectment § 15—

Where, in an action to recover possession of real property and damages for trespass thereon, defendant denies plaintiff's title and defendant's trespass, nothing else appearing, plaintiff has the burden of proving title in himself and trespass by defendant.

2. Ejectment § 10—

In an action involving title to real property, the State not being a party, title is conclusively presumed out of the State without presumption in favor of either party, G. S., 1-36, and plaintiff must rely upon the strength of his own title.

3. Ejectment § 17—

Where, in an action for the recovery of real property in which defendant denies plaintiff's title, plaintiff seeks to establish title by adverse possession under color, but fails to offer evidence fitting the description in the deed relied on as color of title to the land in dispute, nonsuit is proper.

4. Adverse Possession § 9c—

A deed is color of title only for the land designated and described therein.

5. Ejectment § 17—

Nonsuit is properly entered in an action involving title to real property upon failure of plaintiff to establish title to the land in question, the action being unlike a processioning proceeding which may not be dismissed as in case of nonsuit.

APPEAL by plaintiffs from *Williams, J.*, at April Term, 1946, of BLADEN.

Civil action to recover land and for damages for trespass thereon.

Plaintiff alleges in his complaint that he is the owner in fee simple of a certain tract or parcel of land containing 101 acres, more or less, in Whites Creek Township, Bladen County, North Carolina, specifically described, including among other calls, this one: "then with the various

courses of the old survey as described in a deed from John McNorth to Israel Moore, Henry Spaulding and Samuel Blanks, dated February 28, 1893, and duly recorded in Book of Deeds 'AA,' pp. 109, records of Bladen County, reference to which is hereby made, and made a part hereof for a full and accurate description," and that defendants have trespassed upon said land to the damage of plaintiff in stated amount.

Defendants, answering, deny in the main the allegations of the complaint, and aver that if the court should find that plaintiffs own the tract of land described in the complaint, and the description therein contained covers any part of the lands of the defendants, therein described and claimed by defendants, then they deny plaintiffs' ownership of that part thereof. And for a further answer and defense, defendants set up ownership of the lands, to which they assert claim as above stated, by reason of adverse possession particularly under the seven year statute, the twenty year statutes, and the thirty year statute.

Upon the trial plaintiff offered in evidence these exhibits: (1) A deed from A. O. Trust and wife to A. A. Clark, dated 24 May, 1917, and registered 1 June, 1917, in Book 67 at page 502 of registry of Bladen County, purporting to convey a tract of land of same description as that set forth in the complaint herein.

(2) A deed from A. A. Clark to Sarah Clark, dated 5 March, 1937, and registered 9 March, 1937, in book 96 at page 251 of registry of Bladen County, purporting to convey "a certain tract of land containing 101 acres more or less, and being the same land conveyed by A. O. Trust to A. A. Clark by deed dated May 24, 1917, and recorded in the office of the Register of Deeds of Bladen County in Deed Book 67, on page 502."

(3) A survey of the disputed line, made by Bullard and Robbins, surveyors, in August, 1945.

Plaintiff also offered the testimony of A. A. Clark, who testified that he entered into possession of the land he bought from A. O. Trust at the time he bought it, at which time there were no improvements on it; that he has since cleared up probably 10 or 20 acres of the land and built a house and tobacco barn on it; that he has cut and removed timber within the past two years and before that time "wood for tobacco barns and such"; that since conveying the land to his daughter, the plaintiff, Sarah Clark Smith, he has worked the land; had it worked; that he is familiar with the lines and boundaries of the land described in the complaint and has a map of the land made by Mr. Robbins; that C. L. Benson and G. W. Hester entered upon the land and cut and removed some timber from the west side; that the deed referred to in the description in the Trust deed, and described in the complaint, containing the call as hereinabove set forth running "thence with the various courses, etc.," was burned, and the record book was burned; that when Mr. Robbins and Mr. Bullard made the survey he pointed out to them the

McNorth line and the beginning corners; and that "the disputed line is known as the Sam Blank's line."

Plaintiff further offered the testimony of A. A. Robbins, surveyor appointed by the court, whose testimony tends to show that he did not attempt to run the line described in the deed "thence with the various courses of the old survey as described in a deed from John McNorth to Israel Moore, Henry Spaulding and Samuel Blank."

Defendants, reserving exception to refusal of the court to grant their motion for judgment as of nonsuit at close of plaintiff's evidence, offered evidence in support of their contentions and claims.

And motion of defendants for judgment as of nonsuit at the close of all the evidence was allowed and judgment signed.

Plaintiffs appeal to Supreme Court and assign error.

H. H. Clark and Edward B. Clark for plaintiffs, appellants.
Robert J. Hester, Jr., and McLean & Stacy for defendants, appellees.

WINBORNE, J. Is there error in the judgment as of nonsuit from which this appeal is taken? This is the sole question for consideration,—and the answer is No.

Where in an action for the recovery of land and for trespass thereon defendant denies plaintiff's title and defendant's trespass, nothing else appearing, issues of fact arise both as to title of plaintiff and as to trespass by defendant,—the burden of proof as to each being on plaintiff. *Mortgage Corp. v. Barco,* 218 N. C., 154, 10 S. E. (2d), 642.

In such an action plaintiff must rely upon the strength of his own title. This requirement may be met by various methods which are specifically set forth in *Mobley v. Griffin,* 104 N. C., 112, 10 S. E., 142; *Prevatt v. Harrelson,* 132 N. C., 250, 43 S. E., 800; *Moore v. Miller,* 179 N. C., 396, 102 S. E., 627, and many other decisions.

Moreover, in all actions involving title to real property title is conclusively presumed to be out of the State unless it be a party to the action, G. S., 1-36, but "there is no presumption in favor of one party or the other, nor is a litigant seeking to recover land otherwise relieved of the burden of showing title in himself." *Moore v. Miller, supra.*

In the light of that presumption plaintiffs in the present action, assuming the burden of proof, elect to show title in themselves by adverse possession, under known and visible lines and boundaries and under color of title for seven years, G. S., 1-38, which is one of the methods by which title may be shown. In pursuing this method a deed offered as color of title is such only for the land designated and described in it. *Davidson v. Arledge,* 88 N. C., 326; *Smith v. Fite,* 92 N. C., 319; *Barker v. R. R.,* 125 N. C., 596, 34 S. E., 701; *Johnston v. Case,* 131 N. C., 491, 42 S. E., 957.

In *Smith v. Fite, supra,* this headnote epitomizes the opinion of *Smith, C. J.,* for the Court: "Where a party introduces a deed in evidence, which he intends to be used as color of title, he must prove that its boundaries cover the land in dispute, to give legal efficacy to his possession." In other words, the plaintiff must not only offer the deed upon which he relies, but he must by proof fit the description in the deed to the land in question.

While the present action is for the recovery of land and for trespass thereon, the controversy seems to hinge around the location of the disputed line known as the Sam Blank's line. And as to this, the testimony of the surveyor A. A. Robbins, appointed by the court, tends to show that he did not attempt to run the line. Furthermore, there is no evidence in the record showing its location.

This case is unlike processioning proceeding wherein when a *bona fide* dispute arises between landowners as to the true location of the boundary line between them, the case may not be dismissed as in case of nonsuit. *Cornelison v. Hammond,* 225 N. C., 535, 35 S. E. (2d), 633.

The judgment below is

Affirmed.

STATE v. JOE COGDALE.

(Filed 11 December, 1946.)

1. Criminal Law § 79—

Assignments of error not set out in appellant's brief are deemed abandoned. Rule of Practice in the Supreme Court, No. 28.

2. Criminal Law § 52a—

Where a defendant bases his motions to nonsuit solely on the insufficiency of evidence identifying him as the perpetrator of the crime, the fact that the crime was committed as charged being admitted, testimony of prosecuting witness positively identifying defendant as her assailant is alone sufficient to sustain the overruling of defendant's motions, particularly under the rule that the evidence must be taken most favorably to the State.

3. Criminal Law § 35—

In this prosecution for breaking and entering otherwise than burglariously and for assault with intent to commit rape, testimony of prosecuting witness relative to her having called her nephew, whom she knew was not in the house, in order to frighten her assailant, *is held* competent as part of the *res gestæ.*

4. Criminal Law § 42b—

The court has the discretionary power to permit the solicitor to ask a witness leading questions.

5. Criminal Law § 48c—

A general objection to testimony which is competent for the purpose of corroboration is untenable.

6. Criminal Law § 79—

Exceptions to the admission of evidence will be deemed abandoned when appellant's brief fails to point out any ground of objection.

7. Criminal Law § 81c (3)—

The admission of evidence, even if incompetent, does not entitle defendant to a new trial when defendant does not make it appear that he was prejudiced thereby.

8. Criminal Law § 81c (1)—

Appellant has the burden not only of showing error but also that the alleged error affected his rights substantially and not merely theoretically.

9. Criminal Law § 81c (4)—

Where defendant is found guilty on each of two counts charging offenses of the same grade, and the sentences imposed are to run concurrently, error in the trial relating to one count alone is harmless, it being necessary that defendant show prejudicial error relating to both counts before he is entitled to a new trial.

APPEAL by defendant from *Carr, J.*, at June Term, 1946, of CRAVEN.

The defendant was tried upon two bills of indictment, which were consolidated for the purpose of trial. One bill of indictment charged the felonious breaking and entering, otherwise than burglariously, with the intent to commit a felony therein, the dwelling house of one Mrs. Charlie Ipock, and the other bill of indictment charged that the defendant did commit an assault upon Mrs. Ipock, with intent to commit rape. The jury returned a verdict of "guilty of breaking and entering with intent to commit a felony" and "guilty of assault with intent to commit rape," whereupon the court entered judgment that the defendant be confined in the State's Prison on each of said charges for a period of ten (10) years, the said sentences to run concurrently.

From the foregoing judgment the defendant appealed to the Supreme Court, assigning errors.

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

H. P. Whitehurst and L. T. Grantham for defendant, appellant.

SCHENCK, J. In the record the appellant makes fourteen assignments of error, but in his brief he sets out only eleven exceptions, the remain-

ing three exceptions in the record are therefore taken as abandoned. Rule 28, Rules of Practice in the Supreme Court, 221 N. C., 562 (563).

The first exception set out in appellant's brief is Exception 17, which relates to the action of the court in overruling the defendant's motion for judgment as in case of nonsuit lodged when the State had introduced its evidence and rested its case, which motion was renewed at the close of all the evidence and likewise overruled. The exception of the defendant to the court's action in each instance is untenable. The defendant in his brief conceded that the crime was committed as related by the prosecutrix, but testified that he knew nothing of such crime and was never present at the scene, and relies solely on his alibi, therefore it is only necessary for us to consider whether there was sufficient evidence as to the identity of the defendant as the perpetrator of the crime to overcome the motion for judgment as in case of nonsuit. This evidence appears in the testimony of the prosecuting witness herself, wherein said witness identified the defendant as the person who came into her dwelling and said she was positive of her identification. With this alone, and particularly under the rule that upon motions of this sort the evidence must be taken most favorably to the State, the action of the court in overruling the motion when first lodged and when renewed was correct.

The next exceptive assignments of error set out in appellant's brief are Nos. 1, 2, 9, 10, 12, 13, 14 and 15, which related to statements in the prosecuting witness' testimony relative to her having called her nephew who she knew was not in the house in order to frighten the defendant and cause him to leave. This evidence was competent as part of the *res gestæ*. *S. v. Smith,* 225 N. C., 78, 33 S. E. (2d), 472. Objection is also made that certain questions propounded by the Solicitor to the prosecuting witness were leading. This Court has repeatedly held that as to whether leading questions may be asked is in the discretion of the court. *Bank v. Carr,* 130 N. C., 479, 41 S. E., 876; Lockhart on Evidence, par. 274, p. 325. Certain evidence was objected to generally, which was clearly competent for the purpose of corroborating, which rendered the general objection untenable. Exceptions to certain other evidence noted seem to have been abandoned, as in no respect is it stated in what way they were erroneous. *S. v. Britt,* 225 N. C., 364, 34 S. E. (2d), 408. Certain evidence to the effect that the officers visited the home of one Mrs. Chadwick was objected to and exception noted. However, it does not appear how this evidence was prejudicial to the defendant even if it was irrelevant. Evidence does not constitute reversible error unless it is prejudicial. No prejudice appears in this record, therefore these exceptions cannot be sustained. *S. v. Powell,* 219 N. C., 220, 13 S. E. (2d), 232; *S. v. Page,* 215 N. C., 333, 1 S. E. (2d), 887.

It will be noted that all of the exceptions argued under this general heading relate to the admission of evidence offered by the State which

the defendant claims should have been excluded. A careful study of the evidence assailed in each instance clearly reveals that even if in some instances the evidence was immaterial or irrelevant, or perhaps incompetent, it is not prejudicial to the defendant and he is not entitled to a new trial. This Court has repeatedly held that in order to obtain an award for a new trial on appeal for error committed in a trial of the lower court, the appellant must show error positive and tangible, that has affected his rights substantially and not merely theoretically, and that a different result would have likely ensued. *S. v. Beal,* 199 N. C., 278, 154 S. E., 604; *S. v. Bridges,* 178 N. C., 733, 101 S. E., 29; *S. v. Stancill,* 178 N. C., 683, 100 S. E., 241; *S. v. Payne,* 213 N. C., 719, 197 S. E., 573.

We have examined the exceptions in the record taken to the charge and find in them no substantial error.

The defendant was tried on a bill of indictment containing two counts, each of which constitutes a felony of willfully, unlawfully breaking and entering the dwelling house of Mrs. Charlie Ipock with intent to commit a felony and of assault on Mrs. Charlie Ipock with intent to commit rape, and was found guilty on each count, and was sentenced to the State Prison for a period of ten years on each of said counts to run concurrently. Either count contained in the bill of indictment was sufficient to support the judgment of the court, and when a defendant is charged with two counts in a bill of indictment of separate offenses of the same grade, and the jury returns a verdict of guilty as to both counts, error in the trial of one count is harmless and does not entitle the defendant to a new trial as the verdict on the count in which there appears no error is sufficient to support the judgment of the court; it, therefore, follows that in this case prejudicial error must be found as to both counts before the defendant is entitled to a new trial. *S. v. Register,* 224 N. C., 854, 29 S. E. (2d), 464; *S. v. Epps,* 213 N. C., 709, 197 S. E., 580; *S. v. Cody,* 224 N. C., 470, 31 S. E. (2d), 445.

On the record we find no prejudicial error.

No error.

STATE v. W. J. KELLY.

(Filed 11 December, 1946.)

1. Automobiles § 30d—

In a prosecution for drunken driving, evidence that defendant was found intoxicated at his place of business some 12 to 14 hours after the time of the offense charged, without evidence that the state of intoxication was a continuous one, is incompetent and its admission is prejudicial error entitling defendant to a new trial.

2. Criminal Law § 29f: Evidence § 26—

Whether the existence of a state of affairs at one time is competent to show the existence of the same state at another time is a question of materiality or remoteness to be determined upon the facts of each particular case in accordance with the nature of the subject matter, the length of time intervening, and a showing, if any, as to whether conditions had remained unchanged.

APPEAL by defendant from *Phillips, J.*, at April Term, 1946, of ANSON.

Criminal prosecution tried upon a warrant charging the defendant with the unlawful operation of a motor vehicle on the public highways while under the influence of intoxicants.

Verdict: Guilty. Judgment: Ninety days on the roads. The defendant appeals, assigning error.

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

B. M. Covington for defendant.

DENNY, J. The State offered evidence tending to show that the defendant operated his automobile on Highway 74, within the city limits of Wadesboro, on Friday, 1 December, 1944, about 11:40 p.m., while under the influence of an intoxicant. The defendant offered evidence tending to show he was not under the influence of an intoxicant at the above time. The evidence is in sharp conflict.

The defendant assigns as error the admission of evidence, over his objection, to the effect that he was found drunk in his place of business on the following Saturday afternoon, and to the court's instruction to the jury in connection therewith, in the following language: "Gentlemen of the jury, the condition of the defendant on Saturday afternoon will only be considered by you as tending to show what his condition was at the time he is alleged to have been driving his car drunk and for no other purpose."

The State contends that where there is evidence of defendant's intoxication at the time in question, that evidence of his intoxication several hours afterwards should not be held inadmissible but should be allowed; and that the remoteness should go to its weight and not to its admissibility. If the rule be otherwise, where is the line to be drawn between evidence that is too remote and evidence that is not?

More than twelve hours elapsed between the time the defendant is charged with operating his automobile while under the influence of liquor and the following Saturday afternoon when he was found drunk in his place of business. We do not think evidence that the defendant

was drunk on Saturday afternoon, some twelve or fourteen hours after the time in question, is admissible as evidence or corroborative evidence as to the condition of the defendant at the time he was driving his automobile the night before. 32 C. J. S., 579, p. 433, *et seq.*

The State did not offer evidence tending to show that the defendant was intoxicated continuously from 11:40 p.m., on 1 December, until the afternoon of the next day. None of the witnesses for the State saw the defendant after midnight Friday until the following afternoon.

Where the line is to be drawn between evidence that is too remote and evidence that is not, is not a new question. The rule in this respect, which is in accord with our decisions, is given by Stansbury on Evidence, sec. 90, p. 170, as follows: "Whether the existence of a particular state of affairs at one time is admissible as evidence of the same state of affairs at another time, depends altogether upon the nature of the subject matter, the length of time intervening, and the extent of the showing, if any, on the question of whether or not the condition had changed in the meantime. The question is one of the materiality or remoteness of the evidence in the particular case."

This Court said in the case of *Raynor v. R. R.*, 129 N. C., 195, 39 S. E., 821: "A man may be drunk at 11 o'clock in the forenoon and sober up by 3:45 in the afternoon, or *vice versa*, he may be sober in the forenoon and by 3:45 in the afternoon be drunk. Neither drunkenness nor soberness is a necessarily continuing state. Both conditions are liable to rapid and frequent fluctuations. Therefore, plaintiff's condition four hours after last seeing him could neither be evidence nor corroborative evidence as to his real condition when seen. *Story v. R. R.*, 133 N. C., 59, 45 S. E., 349; *Moore v. Insurance Co.*, 192 N. C., 580, 135 S. E., 456.

Evidence tending to show the speed of defendant's truck a quarter of a mile away from the scene of the wreck was held admissible in the case of *S. v. Peterson*, 212 N. C., 758, 194 S. E., 498. Evidence as to the speed of plaintiff's car three or four miles from the scene of the accident was held properly excluded in *Barnes v. Teer*, 218 N. C., 122, 10 S. E. (2d), 614.

While the defendant does not contend that the evidence adduced in the trial below was insufficient to carry the case to the jury, he does insist that he is entitled to a trial free from prejudicial error. In this we concur.

There are other meritorious exceptions presented on this record, but since there must be a new trial, we deem it unnecessary to discuss them.

New trial.

MONTROSE BROWN (ADMINISTRATRIX), MRS. JAMES F. BROWN (WIDOW), LILLIE MAY BROWN AND CHARLES BROWN (MINOR CHILDREN) OF JAMES F. BROWN, DECEASED (EMPLOYEE), v. L. H. BOTTOMS TRUCK LINES, INC. (EMPLOYER), AND LUMBER MUTUAL CASUALTY COMPANY (CARRIER).

(Filed 11 December, 1946.)

Master and Servant § 55d: Appeal and Error § 40a—

Exceptions and assignments of error to the judgment, findings of fact, and conclusions of law of the Superior Court in affirming an award of the Industrial Commission present the sole question of whether the findings are sufficient to support the judgment and does not present the competency or sufficiency of the evidence to support the findings or any one of them.

APPEAL by defendants from *Pless, J.*, at September Term, 1946, of GUILFORD. Affirmed.

Claim for compensation under the Workmen's Compensation Act for the death of James F. Brown, alleged to have resulted from accidental injury while in the employment of defendant Truck Lines.

The award by the Industrial Commission was in favor of claimants. The defendants noted exceptions, and appealed to the Superior Court.

In the Superior Court the findings of fact and conclusions of law of the Industrial Commission were approved and affirmed, the court holding that deceased's death resulted from injuries by accident arising out of and in the course of his employment by the defendant Truck Lines. Appeal entries: "To the foregoing ruling, the defendants except and to the signing thereof again except and give notice of appeal to the Supreme Court." Assignments of error: "The only exceptions are to the judgment of Judge Pless, findings of fact, and conclusions of law."

Wm. E. Comer for plaintiffs, appellees.

Charles W. Taylor and Ehringhaus & Ehringhaus for defendants, appellants.

DEVIN, J. The question for decision on the defendants' appeal in this case is that presented by their exception to the judgment below, and "to the signing thereof." The only exceptions pointed out in appellants' assignments of errors are "to the judgment of Judge Pless, findings of fact, and conclusions of law."

Limiting our consideration to the exceptions thus brought forward on the appeal, it follows that many of the questions debated on the argument are not presented for decision. The exception to the judgment raises only the question whether the facts found are sufficient to support the judgment. *Lee v. Adjustment Board,* 226 N. C., 107, 37 S. E. (2d),

128. An exception to the signing of the judgment presents only the question whether error appears on the face of the record. *King v. Rudd,* 226 N. C., 156, 37 S. E. (2d), 116; *Crissman v. Palmer,* 225 N. C., 472, 35 S. E. (2d), 422; *Query v. Ins. Co.,* 218 N. C., 386, 11 S. E. (2d), 139.

In *Rader v. Coach Co.,* 225 N. C., 537, 35 S. E. (2d), 609, 610, the applicable principles were stated as follows: "The defendants excepted to the judgment in the court below. This is the only exception appearing in the record. Defendants' only assignment of error is in the following language: 'The defendants assign as error the approval and affirmation of the findings of fact and conclusions of law of the North Carolina Industrial Commission as will appear by judgment in the record.' The exception to the judgment presents the single question, whether the facts found and admitted are sufficient to support the judgment. It is insufficient to bring up for review the findings of fact or the evidence upon which they are based. . . . On an appeal to this Court from the judgment of the Superior Court affirming an award of the Industrial Commission, this Court may consider and pass on only the contention of the appellant that there was error in matters of law at the hearing in the Superior Court. This contention must be presented to this Court by assignments of error based on exceptions to the specific rulings of the trial judge. Where there is a single assignment of error to several rulings of the trial court and one of them is correct, the assignment must fail. It must stand or fall as a whole." This statement of the rule is supported by many authorities cited by *Justice Barnhill.*

In *Vestal v. Vending Machine Co.,* 219 N. C., 468, 14 S. E. (2d), 427, it was said: "This defendant excepts 'to the rulings of the court and findings of fact upon which the judgment was signed.' His assignment of error is 'that the court erred in its rulings and findings of fact.' This is a broadside exception and assignment of error. It fails to point out or designate the particular finding of fact to which exception is taken. Nor is it sufficient to challenge the sufficiency of the evidence to support the findings or any one of them."

The rule was reaffirmed in *Fox v. Mills, Inc.,* 225 N. C., 580, 35 S. E. (2d), 869, from which we quote: "In conformity with the view expressed in the *Rader case* (225 N. C., 537), it must be held here that an exception to the judgment affirming an award by the Industrial Commission is insufficient to bring up for review the findings of fact or the competency or sufficiency of the evidence to support the findings and conclusions of the Industrial Commission." In that case the exception was "to the foregoing judgment," and this Court said, "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."

In the *Fox case, supra,* approved appellate procedure in cases arising under the North Carolina Workmen's Compensation Act was pointed out.

We are of opinion and so hold that the defendants' exception to the ruling of the trial judge and to his findings of fact and conclusions of law cannot be sustained, and that no error appears on the face of the record.

The judgment accordingly is

Affirmed.

STATE v. JAMES FRED ROGERS.

(Filed 11 December, 1946.)

1. Rape § 25—

Evidence tending to show that defendant assaulted prosecutrix, leaving his finger marks on her throat and tearing her dress, that prosecutrix escaped from him, ran to a near-by house and stated that a man had tried to rape her, *is held* sufficient to be submitted to the jury on a charge of assault with intent to commit rape.

2. Criminal Law § 52a—

Upon motion to nonsuit, the evidence is to be taken most strongly against defendant and if there is more than a scintilla of evidence of guilt, defendant's motion to nonsuit is properly denied.

APPEAL by defendant from *Hamilton, Special Judge,* at Extra July Criminal Term, 1946, of MECKLENBURG.

The defendant was tried upon a bill of indictment charging that James Fred Rogers did, unlawfully, willfully and feloniously, commit an assault upon Geneva Malcolm, a female, with the intent to rape, ravish, and carnally know Geneva Malcolm forcibly and against her will. When the State had introduced its evidence and rested its case, the defendant lodged a motion for judgment as in case of nonsuit and dismissal of the action, which motion was overruled, to which ruling of the court the defendant preserved exception, whereupon the defendant indicated that he would introduce no evidence and renewed his motion for judgment as in case of nonsuit and dismissal of the action, which motion was again overruled and defendant preserved exception. The trial of the action then proceeded upon evidence introduced by the State, and the jury returned a verdict of "guilty as set forth in the bill of indictment." The court entered judgment that defendant be confined in the State's Prison for a period of ten (10) years, which judgment was subsequently stricken out and a judgment that the defendant be confined

in the State's Prison for a period of seven (7) years entered in lieu thereof. From this judgment the defendant appealed to the Supreme Court, assigning errors.

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

J. M. Scarborough for defendant, appellant.

SCHENCK, J. Only two assignments of error appear in the record, namely: (1) Refusal of the court to grant motion of defendant for judgment as in case of nonsuit at the close of the State's evidence, and (2) Refusal of the court to grant motion of defendant for judgment as in case of nonsuit at the close of all the evidence. Both of the assignments of error are set out in appellant's brief, and since the same and only question is posed by both exceptions, namely: Was there sufficient evidence to carry the case to the jury, such assignments of error are discussed together. We are of the opinion, and so hold, that the answer to the question posed is in the affirmative.

It should be remembered that the question for our decision is: Was there sufficient evidence to carry the case to the jury and to sustain the indictment.

The testimony of the prosecuting witness, Geneva Malcolm, was in substance that the defendant James Fred Rogers and his companion Ralph West picked her up at the Bandana, a place about four miles from Charlotte on the Concord Road, about 11 o'clock a.m., and that Rogers said he would be glad to take her to town. She didn't know him then. After she got in the car, they stopped at several places to get drinks. She only took a sip or two. On the way back from Belmont to Charlotte Rogers got in the back seat and choked her, and that Ralph West jumped on the defendant Rogers with a flash light and she ran up to the home of Mr. and Mrs. Moraski, about one-half mile away, and told them what had happened and they took her to her father. He (Rogers) didn't do anything to her but he tried to. She had bruises all over her leg and was burnt with a cigarette, and had finger marks on her neck. Her dress was torn.

Mrs. John Moraski testified that the prosecuting witness came to her house and told her a man had tried to rape her and her dress was very wrinkled and she had marks on her neck and that she (Mrs. Moraski) took witness to her home on Beatty's Ford Road. There was other corroborative evidence.

The defendant in his brief contends that the evidence tends to show that he at no time committed an assault with the intent to commit rape, as charged in the bill, and that if the evidence tends to show any intent on defendant's part it was an intent to have the witness commit a crime

against nature, and there being a variance between the charge in the bill and the evidence, the action should have been dismissed upon motion of the defendant. We do not concur in this contention.

In case of demurrer to the evidence and motion to dismiss the action the evidence must be taken most strongly against the defendant, and if there is more than a scintilla of evidence tending to prove the plaintiff's contention it must be submitted to the jury. *Gates v. Max,* 125 N. C., 139, 34 S. E., 266.

Affirmed.

JOHN L. COX ET UX v. J. W. JOHNSON ET UX.

(Filed 11 December, 1946.)

Fraud § 5—

The law will not permit one to predicate an action for fraud upon a representation which he knows to be false, for he cannot be deceived by that which he knows.

APPEAL by plaintiffs from *Nettles, J.,* at May Term, 1946, of GUILFORD—(High Point Division).

Civil action for fraud in the sale of land.

There is allegation and evidence tending to show that plaintiffs purchased a 73-acre farm near High Point from the defendants, known as Crisco Farm, taking deed therefor on 26 October, 1945, with assurances from the male defendant that it had a tobacco allotment of 9.4 acres; whereas in fact the allotment had been reduced to 7.9 acres to the knowledge of the defendant. The defendant claimed that he did not know of the reduction, but plaintiffs' evidence is to the contrary.

The plaintiff offered as a witness the defendants' tenant in 1945, Eli Nelson, who testified as follows: "The plaintiff in this case came to me along in September and discussed with me the tobacco allotment on the place. I say it was the middle of September on up until he bought it. He was down there different times. I reckon we discussed it five or six times. I told him more than once that the acreage had been reduced. He said that was all right, that he would fix that. . . . As well as I remember, that was about October 6th. I told him then and there it had been reduced an acre and a half. . . . I said there is an acre and a half that has been moved but Mr. Johnson denies it, and he said he did not know anything about it. . . . That was before Mr. Cox bought the place."

From judgment of nonsuit entered at the close of plaintiff's evidence, he appeals, assigning errors.

James B. Lovelace for plaintiffs, appellants.

York & Dickson for defendants, appellees.

STACY, C. J. If it be conceded that the representation in respect of the tobacco allotment was false and was made with knowledge of its falsity, or with reckless disregard of its truth or falsity, and with intent to deceive, nevertheless it appears from plaintiff's own evidence that he knew of the reduction in the tobacco allotment before purchasing the land. The law will not permit one to predicate an action for fraud upon a representation which he knows to be false, for he cannot be deceived by that which he knows. *Harding v. Ins. Co.,* 218 N. C., 129, 10 S. E. (2d), 599; *Tarault v. Seip,* 158 N. C., 363, 74 S. E., 3; *Williamson v. Holt,* 147 N. C., 515, 61 S. E., 384, 17 L. R. A. (N. S.), 240; *Hart v. Newland,* 10 N. C., 122; 23 Am. Jur., 942.

No error has been made to appear in the judgment of nonsuit. It will therefore be upheld.

Affirmed.

STATE v. C. C. BLAIR.

(Filed 11 December, 1946.)

Embezzlement § 1—

The offense of embezzlement is exclusively statutory, and the statute does not embrace a vendor in an executory contract of purchase and sale.

APPEAL by defendant from *Hamilton, Special Judge,* at March Term, 1946, of GUILFORD. Reversed.

Criminal prosecution under bill of indictment charging that defendant, being "the agent, consignee, clerk, employee and servant" of C. A. Nash and P. W. Hendrix, did feloniously embezzle $400 entrusted to him by said Nash and Hendrix.

The money delivered to the defendant was received and accepted as earnest money.

There was a verdict of guilty. The court pronounced judgment on the verdict and defendant appealed.

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

Z. H. Howerton for defendant, appellant.

PER CURIAM. The embezzlement statute creates an offense unknown at common law. It applies only to the classes of persons therein named.

S. v. Whitehurst, 212 N. C., 300, 193 S. E., 657; *S. v. Eurell,* 220 N. C., 519, 17 S. E. (2d), 669. It does not embrace a vendor in an executory contract of purchase and sale. Hence the court below erred in denying the defendant's motion to dismiss as in case of nonsuit.

The defendant did not appeal from the judgment pronounced in the case (4430) consolidated and tried with this indictment. Hence, said judgment is not affected by this opinion.

The judgment below (4477) is

Reversed.

STATE v. DUNCAN THOMAS.

(Filed 11 December, 1946.)

Criminal Law § 67—

An appeal to the Supreme Court does not lie from a discretionary determination of an application by defendant for a new trial on the ground of newly discovered evidence.

APPEAL by defendant from *Parker, J.,* at 19 August, 1946, Term, of HOKE.

Criminal prosecution upon two bills of indictment charging defendant with receiving stolen property, to wit, a certain quantity of tobacco, knowing the same to be stolen. Verdict: Guilty as charged in both cases. Judgments imposed at November Term, 1945, and affirmed on appeal to Supreme Court at Spring Term, 1946, 226 N. C., 384, 38 S. E. (2d), 166. Thereafter, at August Term, 1946, of Superior Court of Hoke County, defendant filed motion for a new trial on account of newly discovered evidence,—supporting same by certain affidavits. The judge presiding, being of "opinion that the affidavits offered do not meet the test for a new trial as laid down in *S. v. Casey,* 201 N. C., 620, and *S. v. Edwards,* 205 N. C., 661, and similar cases," denied the motion in his discretion, and entered judgment in accordance therewith.

Defendant appeals therefrom to Supreme Court, and assigns error.

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

Franklin S. Clark and W. S. Britt for defendant, appellant.

PER CURIAM. Appeal to this Court does not lie from a discretionary determination of an application for a new trial on the ground of newly discovered evidence. See *S. v. Rodgers,* 217 N. C., 622, 8 S. E. (2d), 927, and cases cited. Hence, the appeal in the present case is

Dismissed.

STELLA PINKHAM, WIDOW; LULA CAYTON AND HUSBAND, H. L. CAYTON; LELA CONGLETON AND HUSBAND, J. M. CONGLETON; JOHN R. PINKHAM, UNMARRIED; AND JATHER PINKHAM, UNMARRIED, v. THE UNBORN CHILDREN OF JATHER PINKHAM, WHO MAY BE LIVING AT THE TIME OF HIS DEATH, AND THE HEIRS OF SUCH CHILDREN OF JATHER PINKHAM AS MAY BE DEAD AT HIS DEATH, AND THE NEXT OF KIN OF SAID JATHER PINKHAM, AND L. E. MERCER, GUARDIAN AD LITEM.

(Filed 18 December, 1946.)

1. Estates § 10: Deeds § 6½—

In determining the validity of a deed revoking a voluntary conveyance of future interests limited to persons not *in esse*, G. S., 39-6, the equitable jurisdiction of the court over trust estates is not involved.

2. Deeds § 6½—

The power to revoke a voluntary conveyance of future interests limited to persons not *in esse* under the provisions of G. S., 39-6, rests solely in the grantor conveying such interests, and where deeds are executed by the owner of lands to each of his children for the purpose of dividing his lands among them, the fact that each of the children joins in the deeds to the others gives them no right upon the death of the grantor to revoke the contingent limitation over to unborn children of one of them, since they cannot succeed the grantor in the power of revocation and are strangers to that power.

3. Constitutional Law § 23—

There is no vested right in a continuance of the common or statute law, and ordinarily a right created solely by statute may be taken away by repeal or by new legislation.

4. Same: Deeds § 6½—

The right to revoke a voluntary conveyance of future interests in lands limited to persons not *in esse* is a personal power and privilege created by statute and not a vested right within constitutional protection.

5. Same: Deeds § 6½—

The power to revoke a voluntary conveyance of future interests in lands limited to persons not *in esse* is not a property right, although the rights created by the exercise of the power of revocation are property rights within constitutional protection.

6. Constitutional Law § 24: Deeds § 6½—

Even though the statutory power of revocation of a voluntary conveyance of future interests in lands limited to persons not *in esse* be regarded as a vested right, the amendment of G. S., 39-6, by Session Laws of 1943, ch. 437, giving the grantor six months after its effective date to exercise the right of revocation or to file notice of intention to do so, is a reasonable limitation, and therefore the application of the limitation of the amendment to deeds executed prior to its effective date is constitutional.

7. Constitutional Law § 24—

Where a statute imposing a limitation or restricting the time within which a right may be exercised grants a reasonable time for the exercise of the rights therein affected, delay in the publication of such law has no bearing upon the reasonableness of the limitation since everyone is held to have knowledge of general statutes from their effective dates.

8. Same—

Unless arbitrarily exercised, there is a legislative discretion as to the reasonableness of the time allowed for the exercise of rights affected by a change in the statutory limitations.

APPEAL by plaintiff from *Frizzelle, J.*, at October Term, 1946, of BEAUFORT.

By consent of parties this controversy was heard and determined by Judge Frizzelle without the intervention of a jury. From his findings of fact, supplemented by reference to the record, we endeavor to assemble the facts.

On 10 January, 1936, John E. Pinkham and wife, Stella, E. G. Jefferson and wife Cleva, H. L. Cayton and wife Lula, J. M. Congleton and wife Lela, and John R. Pinkham and wife Gladys, executed to William Pinkham and Jather Pinkham the deed presently summarized, which was recorded in the Beaufort County Registry on 13 January, 1936.

This deed conveys several parcels of land fully described therein, all of which was at the time owned by John E. Pinkham with the exception of a one-half interest in the Rascoe tract, which one-half was held by the plaintiffs under a prior deed.

The *habendum et tenendum* clause in the deed reads as follows:

"TO HAVE AND TO HOLD, unto the said Jather Pinkham and William Pinkham for and during the term of their natural lives or either of them, subject to the conditions hereinafter set out, and then to such children of the said Jather Pinkham and William Pinkham as may be living at the time of their death and to the heirs of such children as may be dead and should both die without children, then to their next of kin, reserving, however, an estate for the natural lives of John E. Pinkham and Stella Pinkham or either of them in the land herein conveyed and this conveyance is made expressly subject to the life estate of John E. Pinkham and wife, Stella Pinkham. A condition of this conveyance to the aforesaid parties is that they shall not in any manner encumber by mortgage or otherwise convey their life estate herein granted and should said parties attempt to encumber or convey said life estate, then his or their interest in said land shall cease and determine and said estate shall vest immediately thereupon in the remaindermen above set out."

Contemporaneously therewith, John E. Pinkham apportioned and conveyed to his other children the land he wished them to have, and the whole matter was in the nature of a family settlement, the children of Pinkham joining in each deed for the purpose of renouncing any future claim.

The deed does not contain a provision that the future interest conveyed shall be irrevocable; and the judge found that it was voluntary, without consideration.

The parties to the deed were thus related: John E. Pinkham was the husband of Stella Pinkham (the second wife and not the mother of his children), and the father of Cleva Jefferson, Lula Cayton, Lela Congleton, John R. Pinkham, William Pinkham and Jather Pinkham.

John E. Pinkham died 14 June, 1944, leaving surviving him as his next of kin and heirs at law, his widow, Stella Pinkham, and all of the above named children except William, who died intestate in June, 1943, and without heirs except the brothers and sisters above named. Jather, still living, remains unmarried.

On 30 January, 1946, all the living heirs at law of John E. Pinkham, parties to the above deed, in their several names executed to themselves as grantees, also by name, a conveyance purporting to be a "Deed of Revocation," granting to the parties of the second part in fee and as tenants in common, all of the lands theretofore conveyed in the John E. Pinkham deed of 10 January, 1936, above described. The deed recites the execution of the prior deed, refers to authority of the statute, and formally and in terms purports to revoke the interest thereby conveyed. This revocation deed was recorded in Beaufort County Registry, 31 January, 1946.

On the facts found, Judge Frizzelle held that the "revocation deed" executed 30 January, 1946, was ineffectual to revoke any interest conveyed by the terms of the deed executed 10 January, 1936, by John E. Pinkham and others to William Pinkham and Jather Pinkham and their unborn children, and rendered judgment accordingly.

From this judgment the plaintiffs appealed.

Junius D. Grimes, John A. Mayo, and LeRoy Scott for plaintiffs, appellants.

L. E. Mercer for defendants, appellees.

SEAWELL, J. To fully understand what is involved in this appeal, and the basis of decision, it is necessary to refer chronologically to legislation in this State permitting and regulating revocation of future interests conveyed by voluntary deeds to persons not *in esse*. Changes in the law during the course of the transactions under review have to do with their validity and are challenged by the plaintiffs as infringing rights pro-

tected by the Constitution when applied to the power of revocation they now seek to assert. The original grant of the power of revocation must be interpreted, defined and distinguished as to the nature of the right conferred and as to those who are exclusively privileged to exercise it.

The deed of John E. Pinkham and others which the plaintiffs seek to revoke was executed 10 January, 1936. At that time C. S., 996, was in force, providing in part as follows:

"The grantor in any voluntary conveyance in which some future interest in real estate is conveyed or limited to a person not *in esse* may, at any time before he comes into being, revoke by deed such interest so conveyed or limited. This deed of revocation shall be registered as other deeds; and the grantor of like interest for a valuable consideration may, with a joinder of a person from whom the consideration moved, revoke said interest in like manner."

The deed purporting to revoke the interest conveyed to the unborn children of William and of Jather Pinkham was executed on 30 January, 1946, and recorded 31 January. Meantime, several amendments had been made to the statute and it stood then as it stands now in G. S., 39-6.

To the statute as above quoted from C. S., 996, the Session Laws of 1943, chapter 437, had added the last three provisions, which we quote:

"Provided, further, that this section shall not apply to any instrument hereafter executed creating such a future contingent interest when said instrument shall expressly state in effect that the grantor, maker, or trustor may not revoke such interest: Provided, further, that this section shall not apply to any instrument heretofore executed whether or not such instrument contains express provision that it is irrevocable unless the grantor, maker or trustor shall within six months after the effective date of this proviso either revoke such future interest, or file with the trustee an instrument stating or declaring that it is his intention to retain the power to revoke under this section: Provided, further, that in the event the instrument creating such estate has been recorded, then the revocation or declaration shall likewise be recorded before it becomes effective."

The plaintiffs challenge the constitutionality of the provisions on the theory that they retroactively destroy or adversely affect a vested right created by the former statute,—the right to revoke the future interest in lands limited to the unborn children of Jather Pinkham.

Before we reach the constitutional question presented by appellants, we must first consider whether they are in position to raise it with respect to the lands owned by John E. Pinkham at the time of the conveyance, deferring the discussion of their status as to the one-half interest in the Rascoe tract, which under the findings of fact, belonged to them.

In the statute under review, North Carolina has gone further than most of her sister states in advancing the destructibility of future interests limited to persons not *in esse.* In many of the states this result is accomplished by court action between properly constituted parties with a guardian *ad litem* representing the unborn children, the court acting within its equitable jurisdiction. We are familiar with the application of the principle in cases involving family settlements, sale of property where there is remainder limited to persons not *in esse,* and other instances where such a contingent interest is brought within reach, either by statute law or by judicial practice, or both.

Under the statute reviewed, the result is accomplished by direct action without the intervention of the court through a simple revocation of the interest by the grantor. Since the Court is not sitting in chancery in the present action, the guardian *ad litem* has no power to aid the Court and the Court no power to aid the guardian *ad litem* in any equitable compromise. It must affirm or disaffirm a *fait accompli,* deriving its validity, if it has any, from the act of revocation. The power given is extraordinary, and, while never seriously questioned, the Court should be careful to see that it is not extended beyond its intended limits.

1. The constitutionality of the statute with respect to revocation of future interests limited to persons not *in esse,* was sustained in *Stanback v. Bank,* 197 N. C., 292, 148 S. E., 313, on the theory that the interest had not vested because of the contingency involved. In dealing with such interests the statute is in line with modern trends both in legislation and judicature, and reflects an advanced public policy in providing for readjustments to social and family necessities which supervene before vesting of the interest, of greater importance than the prospect involved in a contingency that may never happen.

But the statute does not pave the way for an utter defeat of the contingent interest by putting it in the power of persons who had no hand in its making to recall the gift at their will and in their own interest. The statute, in so many words, confers the power of revocation on the grantor, recognizing his original ownership and leaving to him the privilege of making, by the act of revocation, what is virtually a new disposition. By no principle of law of which we are aware, could the plaintiffs, who are described as heirs at law of John E. Pinkham, succeed him in the power or right conferred by the statute, and exercise it to thwart the intent of the grantor, or recall or recapture the grant. To put it plainly, they are strangers to the power.

In the use of the term "grantor" the statute implies the person from whom the future estate or interest derived, and not a person who had no interest in the property, or power of disposition, although made a formal grantor for reasons not essential to its conveyance, or for the simultaneous conveyance of other interest. The fact that certain of the

plaintiffs joined in the deed made by John E. Pinkham is of no legal significance in respect to the lands then owned and conveyed by him, since their joinder was not essential to the grant.

We, therefore, reach the conclusion that the deed executed by plaintiffs 30 January, 1946, purporting to be a revocation deed, is ineffectual to revoke any interest in his own lands conveyed in the original deed of John E. Pinkham.

2. Nothing else appearing, the plaintiffs would have the present power of revocation with respect to the one-half interest in the Rascoe tract of which they were the owners and as to which they were grantors in the original Pinkham deed. But the question arises whether, since the plaintiffs did not act within the period limited by the statute, the power has not been constitutionally withdrawn.

The 1943 amendment, containing the powers above set out, was no doubt enacted to resolve a doubtful situation which had arisen through uncertainty as to the effect of the statute—C. S., 996—on the revocability of trusts, and the incidence of Federal taxation on trusts already set up, or hereafter to be created. It was intended to bring North Carolina into line with other states where the irrevocability of trusts could be assured to the grantor or settler when made. It was a question whether the statute, if considered as expressing a settled public policy, might not prevail over an express provision in the instrument purporting to make the disposition irrevocable, with the result that no trust could be made irrevocable by act of the grantor. The need of clarification was pointed out, and the amendment foreshadowed, by Professor Lowndes of Duke University Law School, writing upon the subject, "Federal Taxation as Applied to North Carolina Trusts for Unborn and Unascertained Beneficiaries," in 20 N. C. Law Review, page 278.

In 3 Scott, Trusts (1938), sec. 340, the North Carolina statute is treated as expressing the public policy of the State. The achievement of irrevocability through separate waiver was rendered difficult by the necessity of a consideration for the waiver,—a condition which could rarely be met. *MacMillan v. Trust Co.* (1942), 221 N. C., 352, 20 S. E. (2d), 276.

To make this statute prospective only, would not go far in remedying the existing situation since it would leave all existing trusts of that character, many of them of vast proportion, subject to the same uncertainty, largely depriving the legislation of any present value, as well as promoting discrimination. The Act, therefore, provides a period within which the grantor or settler under prior deeds might exercise the power, or file a written declaration of the intention to retain it.

The validity of the 1943 amendment is, for the first time, made the subject of appellate review. The economic importance of the result

is at once apparent; but the principles on which decision must rest remain the same.

It is said that no person has a vested right in a continuance of the common or statute law. It follows that, generally speaking, a right created solely by the statute may be taken away by its repeal or by new legislation. 16 C. J. S., Constitutional Law, sec. 223, *et seq.*

It is exceptively true that rights may accrue under a statute, or even be conferred by it, of such character as to be regarded as contractual and which cannot be defeated by subsequent legislation; 12 Am. Jur., Constitutional Law, p. 38, sec. 406; but we need not pursue that suggestion further as the power of revocation given by the statute is manifestly not of that character.

The appellants denominate it a "vested right"; the statute gives it no label. As a matter of public policy, expressing the current legal and social philosophy in respect to the use, control and succession of property generally, important to the public welfare and economy as well as to the individual, the Legislature conferred the right of revocation of contingent interests of persons not *in esse* upon the public, or upon that class of the public which might, in the course of events, have occasion to use it,—and to be repeated as often as occasion arose.

As a "right" in so far as the plaintiffs here are concerned, it was peripatetic, or wandering, and did not settle upon them until they had something to convey and had actually created the future contingent interest to which it might apply. Then the right accrued, in the sense that it might be presently exercised; but not in the sense of a *vested right* as that term is commonly understood and applied in constitutional law. And we are unable to find in it those inherent qualities that are necessary to give it the body and significance of a constitutionally protected property right, as it is here claimed to be.

The word "right" is a generic term, including, among many other meanings,—power, privilege, prerogative, immunity. In the dictionary of the law its meaning is restricted, specialized; qualified by the fact, or combination of facts, out of which the right arises. There has been no satisfactory general rule to aid us in making the distinction, which is necessary here, between mere personal powers and privileges created by statute or existing at common law and subject to legislative withdrawal, and those to be recognized as "vested rights" under constitutional protection. When dealing with rights of the latter class it will be found that text writers and courts are usually forced to define them in terms of themselves, or "beg the question." 2d Austin, Jurisprudence, sec. 1138. In determining what are rights or powers of the first class mentioned, resort is usually made to illustration. Our limited space forbids drawing examples from these illustrations, abundant as they are, for comparison with the power under review. We can only refer to easily

accessible texts where they may be found. Cooley's Constitutional Limitations, Vol. 2, p. 770, *et seq.;* 16 C. J. S., Constitutional Law, sec. 215, *et seq.;* 12 Am. Jur., Constitutional Law, sec. 583, *et seq.* In Selected Essays on Constitutional Law, Vol. 2, p. 266, there is an exhaustive and enlightening treatise dealing with the subject.

The distinction must be made that the power of revocation is one protected within the law, but not against the law. It is evident that a power, although it is in some way connected with property, does not thereby become a property right. However, respecting property rights thought qualified to be included within the constitutional protection, although no exact and all-inclusive definition is practicable, we submit the following description of such a right as sufficient for our present purposes:

"First, it would seem that a right cannot be considered a vested right unless it is something more than such a mere expectancy as may be based upon an anticipated continuance of the present general law; it must have become a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemption for a demand made by another." Cooley's Constitutional Limitations, Vol. 2, p. 749.

Powers of the kind under review are generally regarded as "imperfect" or "inchoate" rights which may be taken away by statute before their attempted exercise, although, when exercised before the statutory withdrawal, the resulting estate is a vested right which cannot be retroactively affected. Directly in point is *Jennings v. Capen* (Illinois), 151 N. E., 900. In that case, by prior public law, the life tenant and reversioner had the power to destroy the contingent remainder by deed. Before the exercise of the power it was destroyed by subsequent legislation. It was held that the power was not a vested right but a mere inchoate right which the legislature could take away. See also *Peoples Loan and Exchange Bank v. Darlington,* 54 S. C., 413, 32 S. E., 513. We think this correctly states the principle of law which should be followed in the instant case.

Our conclusion is that the appellants had no vested right in the power of revocation they sought to exercise. It was a mere personal power or privilege, solely created by statute, reflecting the existing public policy and was subject to change or withdrawal at the pleasure of the Legislature at any time before its exercise and before the happening of the contingency of which it speaks.

Supposing it to be of a more stubborn and resistant character, as contended by the plaintiffs, the limitation for its exercise provided in the statute would still be within the legislative power. Statutes of limitation which are reasonable in their application may be applied to the

remedy if it does not unreasonably affect the right, and when the statute is not complied with, the owners may find the right foreclosed.

The appellants point out that the time limit put upon the exercise of the power of revocation was unreasonable; and that because of delay in the publication of the laws they may have been prejudiced. The courts have found no set rule to apply to such a situation than that which was long ago expressed by *Thorpe, C. J.* (1355):

"Although proclamation be not made in the county, everyone is bound to take notice of that which is done in Parliament; for as soon as the Parliament has concluded anything, the law intends that every person hath notice thereof, for the Parliament represents the body of the whole realm." Quoted in The Ann, 1 Fed. Cases, 397 (1812).

Generally speaking, unless arbitrarily exercised, there is a legislative discretion as to the reasonableness of the time allowed in a limitation and under the circumstances of this case it must be held that the time provided here is reasonable. *Turner v. New York,* 168 U. S., 90, 42 L. Ed., 392; *Wheeler v. Jackson,* 137 U. S., 245, 34 L. Ed., 659; *Davis v. Nation,* 82 Kan., 410, 108 Pac., 853.

The appellants are not in position to raise this question since the attempted exercise of the revocation was not made until 30 January, 1946, a period of nearly three years after the law went into effect.

Our conclusion is that the power of revocation did not constitute a vested right within the constitutional protection against statutory withdrawal, and the attempt to exercise it was of no effect.

The judgment of the court below is

Affirmed.

A. C. DAVIS v. ST. PAUL MERCURY & INDEMNITY COMPANY.

(Filed 18 December, 1946.)

1. Insurance § 60—

A provision in a policy of theft insurance that mysterious disappearance of property insured shall be presumed to be due to theft binds the parties to a rule of evidence so that proof of the myterious disappearance of insured property raises a rebuttable presumption that it was stolen, and insured is not required to introduce evidence excluding the probability that the property was mislaid or lost or evidence of circumstances pointing to larceny as a more reasonable hypothesis.

2. Same—

In an action on a policy of theft insurance which provides that mysterious disappearance of property insured shall be presumed to be due to theft, any evidence tending to show that the property was lost or mislaid

or that its disappearance was not due to theft, should be considered by the jury as evidence tending to rebut the presumption of theft arising from proof of the mysterious disappearance of the property.

3. Same—

In an action on a policy of theft insurance, the burden of proof remains at all times upon insured to prove that property insured was stolen, aided by any rule of evidence or presumption arising under the terms of the insurance contract.

4. Same—

In this action on a policy of theft insurance which provided that the mysterious disappearance of insured property should be presumed to be due to theft, plaintiff's evidence tended to show that while on a fishing trip with a friend, the boat capsized, and that when he emerged from the lake, he discovered that his money had disappeared from his pocket. *Held:* The evidence was sufficient to be submitted to the jury upon the issue, and the refusal of insurer's motion to nonsuit was without error.

5. Same—

In an action on a policy of theft insurance which provides that mysterious disappearance of property insured shall be presumed to be due to theft, the submission of an issue as to whether insured's property mysteriously disappeared is error, since the issue relates only to the existence of the presumption and not to the fact of larceny or theft, and is insufficient to support a judgment for insured.

APPEAL by defendant from *Nettles, J.,* at June Term, 1946, of GUILFORD.

Civil action instituted in the municipal court of Greensboro to recover on a policy of insurance against loss by theft.

On 16 June, 1945, plaintiff put $97 in currency in his pocket and went on a fishing trip with a friend. The boat capsized and he was thrown in the water. After recovering his tackle, poles, and other articles of personal property in the boat, he went ashore. After emerging from the lake he, for the first time since leaving home, felt for his money and discovered that in some manner it had disappeared.

At the time, defendant had outstanding and in full force a "residence and outside theft policy" insuring plaintiff against loss by theft. It contained the following provision:

"Theft. The word 'theft' includes larceny, burglary and robbery. Mysterious disappearance of any insured property shall be presumed to be due to theft."

The plaintiff filed claim with defendant, alleging loss by theft. The claim was denied. Thereupon plaintiff instituted this action in the Greensboro municipal court and obtained judgment, from which defendant appealed to the Superior Court.

At the trial in the Superior Court defendant tendered the following issue:

"Did the plaintiff sustain the loss by theft in accordance with the terms and provisions of the policy of insurance issued to him by the defendant?"

The court declined to submit the issue tendered and defendant excepted.

It thereupon submitted two issues as follows:

"1. Did the property of the plaintiff mysteriously disappear?

"2. In what amount, if any, is the defendant indebted to the plaintiff?"

The jury having answered the first issue "Yes" and the second "$97.00," the court entered judgment on the verdict and defendant appealed.

A. C. Davis for plaintiff, appellee.
Sapp & Moore for defendant, appellant.

BARNHILL, J. The defendant's exceptive assignments of error present two questions for decision: (1) Is there evidence, sufficient to be submitted to a jury, tending to show that plaintiff sustained a loss by theft, and (2) did the court err in declining to submit the issue tendered?

Decision of the first question requires an interpretation of the provision "mysterious disappearance of any insured property shall be presumed to be due to theft" incorporated in the policy as a part of the definition of theft.

Under the old policies it was not necessary for the insured to offer direct proof of the theft. He could, and of necessity usually did, rely on circumstantial evidence. If he was able to make proof of facts and circumstances sufficient to justify the inference of theft as the more rational hypothesis, his case was submitted to the jury. However, theft is usually committed in secret. When property is stolen it ordinarily mysteriously disappears. But all mysterious disappearances are not the result of theft. Hence, frequently, proof of the mysterious disappearance of property alone was held insufficient to support a verdict; and if there was no evidence of a breaking and entry or other circumstance pointing to theft as the more probable cause of the loss, a recovery under the policy was not permitted. Thus, the insured, under the old policies, oftentimes found his claim contested and encountered difficulty in making out a case for the jury.

This new provision, stipulating that the mysterious disappearance of insured property shall be presumed to be due to theft, was incorporated in such policies to answer the obvious objection to the old and to afford a somewhat larger measure of protection to the insured.

This more liberal definition of theft, thus provided, creates a rule of evidence binding on the parties. Proof of the mysterious disappearance of insured property, nothing else appearing, is proof of theft. Evidence excluding the probability that the property was mislaid or lost

is not required and proof of circumstances pointing to larceny as the more rational inference is not essential. It is stipulated that the inference of theft arises, as of course, upon proof of a mysterious disappearance.

This conclusion or inference is more than a mere permissive inference. Theft is to be presumed, and to presume means to take for granted until the contrary is proved, *Morford v. Peck,* 46 Conn., 380, *Green v. Maloney,* 30 A., 672, *S. v. Evans,* 41 A., 136; to deem, *Cooper v. Slaughter,* 57 So., 477; to accept as being entitled to belief without examination or proof, *Ferrari v. Interurban St. Ry. Co.,* 103 N. Y. S., 134. So then it is agreed that when insured property mysteriously disappears it shall be deemed or taken for granted that it was stolen.

But, in our opinion, it does not constitute an irrebuttable presumption. Theft is presumed or taken for granted unless the contrary is made to appear. The surrounding facts and circumstances, if any, which tend to show that the property was lost or mislaid or that its disappearance was not in fact due to theft are to be considered by the jury in arriving at a verdict, the burden of proof being at all times on the plaintiff.

What then constitutes a mysterious disappearance?

"Disappear" means to cease to be known, to be lost, Webster New Int. Dic.; to cease to appear, vanish from sight, pass away, New Cent. Dic.; and "disappearance" means removal from sight, vanishing, Webster, New Int. Dic.; the act of disappearance, a vanishing, cessation, New Cent. Dic.

So then a mysterious disappearance within the meaning of the policy embraces any disappearance or loss under unknown, puzzling or baffling circumstances which arouse wonder, curiosity, or speculation, or circumstances which are difficult to understand or explain. A mysterious disappearance is a disappearance under circumstances which excite, and at the same time baffle, wonder or curiosity. Webster, New Int. Dic.

Consideration of the testimony in the light of this interpretation of the meaning of the term as used in the policy leads us to conclude there is evidence tending to show a "mysterious disappearance" of plaintiff's money. How did it get out of his pocket? When did he cease to have it? Where did it vanish? If it was lost when plaintiff fell in the pond why did it not come to the surface where it could be seen? These are unanswered questions which tend to puzzle or baffle the mind, excite curiosity, and generate speculation as to just what did happen.

This showing alone is sufficient to repel the motion to dismiss as in case of nonsuit. If the jury shall find therefrom that the property did in fact mysteriously disappear, then such finding compels the inference of theft, unless the facts and circumstances surrounding the disappearance are such as to rebut the presumption the parties have agreed shall arise from the proof of the mysterious disappearance. This is for the jury to decide.

It is true, as argued by defendant, that inasmuch as the only person with plaintiff was a man of high character, it is plausible to conclude the money was not stolen. It is likewise possible that it was lost when he fell in the water. These are speculations or surmises generated by the circumstances surrounding the mysterious disappearance. These circumstances must be considered by the jury in arriving at a verdict. They do not, as a matter of law, rebut the presumption of theft.

But the policy is a theft policy. The hazard insured against is that of theft. It does not cover or purport to cover property mislaid or lost. Nor does it insure against any and all mysterious disappearances. It merely provides that "mysterious disappearance of any insured property shall be presumed to be due to theft."

Thus, under the issues submitted, the jury found the existence of the presumption, but not of the fact, of larceny or theft. The verdict is insufficient to support a judgment. An issue in the nature of the one tendered by defendant, which will require the jury to find specifically that the property was or was not stolen, must be submitted. To that end the case is remanded for a

New trial.

T. L. GLOSSON v. MRS. VIRGINIA LOU WARREN TROLLINGER, INDIVIDUALLY, AND TRADING AS H. W. TROLLINGER AND CALVIN SLADE.

(Filed 18 December, 1946.)

Automobiles §§ 12g, 18j—Whether officer of law was operating vehicle with due regard for safety within meaning of statute exempting him from prima facie speed limits, held for jury.

In this action by a deputy sheriff to recover for injuries sustained in a collision between his automobile and a truck, the evidence tended to show that the deputy sheriff, after the truck passed him on the highway, followed the truck on wet, slippery pavement in a residential district of a municipality at a speed in excess of forty miles per hour, that as the deputy sheriff started up beside the truck to siren it to a stop to warn or arrest the driver for excessive speed, he saw another car coming in the opposite direction and dropped back behind the truck and then hit the back of the truck when the truck suddenly stopped without warning signal in order not to hit a car in front of it which had suddenly stopped without warning. *Held:* Under the provisions of G. S., 20-141, and G. S., 20-145, relating to *prima facie* speed limits and the exemption of officers of the law from such limits in attempting to apprehend violators of the law while operating vehicles with due regard for safety, the issue of contributory negligence was properly submitted to the jury, and the charge of the court upon the application of the statutes *is held* without error. G. S., 1-180.

GLOSSON *v.* TROLLINGER.

APPEAL by plaintiff from *Frizzelle, J.*, at May Term, 1946, of ALAMANCE.

Civil action to recover damage to automobile allegedly caused by actionable negligence of defendants.

Plaintiff alleges in his complaint that on 19 June, 1945, he was deputy sheriff of Alamance County, and that while proceeding in his automobile toward the plant of the Burlington Mills, along a street known as Midway Avenue, in the city of Burlington, North Carolina, it was damaged as the proximate result of negligence of defendant Calvin Slade in the operation of a truck belonging to *feme* defendant Trollinger, in the course of his employment by her and within the scope of his authority, in that, summarily stated, said truck was operated (1) without proper mirror for view of highway to rear in violation of provisions of G. S., 20-126, and (2) at a rate of speed in excess of forty miles per hour in a residential district in violation of provisions of G. S., 20-141, and (3) in that the truck was stopped on the highway without first seeing that such movement could be done in safety, and without giving signal as required, in violation of provisions of G. S., 20-154.

Defendants, answering, deny plaintiff's allegations of negligence, and aver that at the time mentioned defendant Calvin Slade was operating a truck belonging to *feme* defendant in connection with her coal yard business; that the weather was rainy and the pavement was wet, and that the automobile owned and operated by plaintiff suddenly crashed into the rear end of the truck operated by Calvin Slade as he had brought said truck to a stop behind another car headed in the same direction. And for a further defense, defendants aver that the "automobile operated by plaintiff was not being operated in the chase or apprehension of violators of the law or of persons charged with or suspected of any such violation, but was being operated by plaintiff at a high and unlawful rate of speed and in reckless disregard of safety of others," and that these defendants "plead such acts as contributory negligence on the part of the plaintiff, and as the sole, direct, proximate cause of said collision."

Upon the trial below, plaintiff, as witness for himself, testified to substantially these facts: On afternoon of 19 June, 1945, while he, a deputy sheriff of Alamance County, was traveling in his automobile toward the city of Burlington, between the city of Graham and the railroad, the truck of *feme* defendant, driven by defendant Calvin Slade, traveling at speed of forty-five miles per hour, passed him, and continued to travel at that speed something like a quarter of a mile, until it slowed down to ten miles per hour at a filling station corner, a right angle curve, and then proceeded at a speed of forty miles per hour along Midway Avenue toward Burlington Mills until it suddenly stopped, on its right hand side of the paved surface of the street at a point near the entrance to the Hardin house, about 100 to 150 yards before reaching another right hand

curve at the Burlington Mills building, without giving any signal of intention to stop. After the truck passed plaintiff he "fell in behind" it and drove his automobile about fifty feet "right behind the truck," at about the speed the truck was traveling, until near the entrance to the Hardin house. And plaintiff described what followed in this manner: "I started up beside him to siren him. When I pulled up beside him there was another car coming around the sharp curve into Midway Avenue so I dropped back behind him to let that car go by. That car was meeting us. When I dropped back behind him he slammed on his brakes all of a sudden and stopped right in front of me. He did not give any signal before he stopped . . . I hit him behind . . . It was raining pretty hard and the road was wet and slick . . . At a time when I was 150 yards from a right hand curve, I was traveling in excess of 40 miles per hour immediately behind the truck . . . and over a road that I knew ran into a right angle curve at the Burlington Mills building. I collided with the rear of defendant's truck without having had time to apply my brakes . . . I was a car length behind him . . . As I turned to the left of the highway to go past this truck, I saw another car meeting us and also another car on Midway Avenue immediately in front of the truck driven by Calvin Slade. I did not see the car in front of Calvin Slade stop at the entrance into the Hardin house to make a left hand turn going into it . . . After the collision took place, I found a Chevrolet automobile driven by Mrs. Hardin stopped on the highway opposite the entrance to the driveway into the Hardin house, and the truck was something like 5 or 6 feet from that car."

On the other hand, defendant Calvin Slade, as witness for defendants, testified in pertinent part as follows: "I was on my way back to the coal yard. As I went along the highway up Midway Avenue toward Burlington Mills, I came up behind another car which was being driven by a woman. I was driving between 35 and 40, I think, and she was right in front of me. She was driving about the same speed when it came around the curve, and she stopped mighty near crossways of the road, and I stopped behind her. She did not give me any signal and I didn't give any signal, I didn't have time. I didn't know Mr. Glosson was behind me. The highway was wet and slick. I stopped my truck about five foot behind the car . . . After Mr. Glosson ran into the back end of the truck, it knocked her car toward the house. My bumper hit her trunk . . . I had stopped my truck before Mr. Glosson hit the rear of it . . ."

The case was submitted to the jury upon the usual issues as to negligence of defendants, contributory negligence of plaintiff, and damages. The jury answered the issues as to both negligence of defendants and contributory negligence of plaintiff in the affirmative.

Pursuant thereto the court signed judgment that plaintiff take nothing by the action, and that he be taxed with the cost, from which he appeals to Supreme Court and assigns error.

Long & Long for plaintiff, appellant.
Cooper, Sanders & Holt for defendants, appellees.

WINBORNE, J. Plaintiff, as appellant, assigns as error (1) the submission of the issue as to contributory negligence, (2) the charge of the court with reference to provisions of G. S., 20-145, and (3) the failure of the court to apply the provisions of G. S., 20-145, to the facts in the case.

It is pertinent, therefore, to turn first to the statute, G. S., 20-141, pertaining to restrictions upon speed of motor vehicles in this State. It provides in pertinent part that no person shall drive a motor vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing, and that where no special hazard exists a speed of twenty-five miles per hour in any residential district shall be lawful, but any speed in excess thereof "shall be *prima facie* evidence that the speed is not reasonable or prudent and that it is unlawful." But Section G. S., 20-145 of Article 3 of the Motor Vehicles Act of 1937 provides, in so far as pertinent to case in hand, that "The speed restrictions set forth in this article shall not apply to vehicles when operated with due regard for safety under the direction of the police in the chase or apprehension of violators of the law or of persons charged with or suspected of any such violation . . . This exemption shall not, however, protect the driver of any such vehicle from the consequence of a reckless disregard of the safety of others."

In the light of these two statutes, the evidence shown in the case on appeal in the record in present action is sufficient to justify and support the submission of an issue of contributory negligence. In that connection, a reading of the charge of the court discloses that plaintiff was given full benefit of the provisions of G. S., 20-145. Also, it would seem that the presiding judge, in charging the jury, substantially complied with the provisions of G. S., 1-180, in declaring and explaining the law arising upon the evidence in the case. And the evidence presents in the main issues of fact for the jury,—and in the judgment on the jury's verdict, we find

No error.

JOHN EARL LEE, JR., v. CAROLINA UPHOLSTERY COMPANY.

(Filed 18 December, 1946.)

Negligence §§ 19b (1), 19c—Plaintiff's evidence held to disclose contributory negligence as a matter of law and that injury from defendant's negligence could not have been foreseen.

Plaintiff's evidence tended to show that after loading his truck from an elevator on defendant's premises he moved the truck some 8 feet from the building to tie the load down, that while so doing the rope slipped in his hand causing him to lose balance, and that in taking some 3 to 5 steps backward in attempting to regain his balance, he fell into the open elevator pit to his injury. *Held:* Plaintiff's own evidence discloses that his own negligence in handling simple instrumentalities under his own control was the proximate cause or one of the proximate causes of his injury; and further, if defendant were negligent in moving its elevator without notice to plaintiff, defendant could not have anticipated or foreseen the independent act of negligence on the part of plaintiff which was a proximate cause of the injury, and defendant's motion to nonsuit should have been allowed. This result obtains even though plaintiff be regarded as an invitee, and therefore whether plaintiff was an invitee or a licensee need not be determined.

APPEAL by defendant from *Burgwyn, Special Judge,* at April Term, 1946, of GUILFORD. Reversed.

This was an action to recover damages for personal injury alleged to have been caused the plaintiff by the negligence of the defendant.

Issues of negligence, contributory negligence and damage were submitted to the jury and answered in favor of the plaintiff.

From judgment on the verdict defendant appealed.

Gold, McAnally & Gold and Schoch & Schoch for plaintiff, appellee.
York & Dickson for defendant, appellant.

DEVIN, J. The appeal presents the question of the sufficiency of the evidence to warrant submission of the case to the jury. The defendant assigns error in the denial by the trial court of its motion for judgment of nonsuit. Exception on this ground was noted in apt time.

At the outset it may be observed that plaintiff was a truck driver in the employ of R. D. Fowler Motor Lines, Inc., and that an award of compensation for the injury here complained of was made him under the Workmen's Compensation Act, and that this action was instituted pursuant to the subrogation provisions of the Act. G. S., 97-10.

The plaintiff's evidence tended to show that on the occasion alleged he was engaged with another in loading on the truck of which he was the driver certain articles of furniture, to wit, sofa beds, at the place of business of the defendant. These sofa beds were brought down in an

elevator in defendant's plant and loaded on the truck which was backed up near the elevator. The elevator was lowered to a position where it was level with the floor of the truck, about 3 feet from the ground, to facilitate loading. When the truck was fully loaded, the plaintiff drove the truck six or eight feet away from the building, so that he could tie the load down on the back of the truck. For this purpose plaintiff was using a rope running through rings on the rear of the truck. While the plaintiff was engaged in this operation, and in endeavoring to tighten the rope around the merchandise in the back part of the truck, the rope slipped out of his hand, and he was thrown off balance, and caused to take three or four or five steps backward trying to regain his balance, and fell backward into the open elevator pit and was injured. Plaintiff's fellow employee was on top of the load at the time.

It was alleged that the defendant was negligent in that it moved the elevator without notice to the plaintiff and without putting in place gate or guard, and further that the elevator was not properly equipped. The defendant denied negligence on its part, and pleaded the contributory negligence of the plaintiff in bar of his recovery.

Examining plaintiff's testimony in the light of defendant's plea, it becomes apparent that his fall was primarily due to his permitting the rope to slip out of his hand. As the rope and the method used were of plaintiff's own choosing, the conclusion is inescapable that his careless handling of appliances with which he was familiar caused him to lose his balance and step backward, resulting in his fall. The truck had been fully loaded. The defendant's part of the operation in bringing the articles down where they could be conveniently loaded on the truck by the Truck Lines' employees had been completed. The plaintiff himself moved the truck away from defendant's plant six or eight feet, and stopped at a place selected by him so that he at his own convenience could secure the rear end of the load. Plaintiff was an experienced truckman and was doing the work in his own way.

We think it sufficiently appears from plaintiff's own evidence that his injury was proximately caused by his own negligence or that his own negligence concurring with any negligence on the part of the defendant contributed to his injury as a proximate cause thereof and without which it would not have occurred. *Atkins v. Transportation Co.*, 224 N. C., 688, 32 S. E. (2d), 209; *Bailey v. R. R.*, 223 N. C., 244, 25 S. E. (2d), 833; *Godwin v. R. R.*, 220 N. C., 281, 17 S. E. (2d), 137; *Hampton v. Hawkins*, 219 N. C., 205, 13 S. E. (2d), 227; *Smith v. Sink*, 211 N. C., 725, 192 S. E., 108; *Wright v. Grocery Co.*, 210 N. C., 462, 187 S. E., 564; *Davis v. Jeffreys*, 197 N. C., 712, 150 S. E., 488; *Harrison v. R. R.*, 194 N. C., 656, 140 S. E., 598.

It is unnecessary to decide the question debated here, whether under the circumstances disclosed the plaintiff should be regarded as an invitee

or a licensee, for if it be conceded that plaintiff was an invitee and that a duty was imposed upon the defendant consequent upon and commensurate with that relationship, it is difficult to perceive how the defendant could reasonably have foreseen that the plaintiff, after moving the truck a convenient distance away from the building, and while attempting to tie on the load with a rope, would permit the rope to slip out of his hand and step backward four or five steps into the elevator shaft. One of the elements of proximate cause essential in the establishment of actionable negligence is foreseeability. *Gant v. Gant,* 197 N. C., 164, 148 S. E., 34; *Bohannon v. Stores Co.,* 197 N. C., 755 (759), 150 S. E., 356; *Beach v. Patton,* 208 N. C., 134, 179 S. E., 446; *Peoples v. Fulk,* 220 N. C., 635 (639), 18 S. E. (2d), 147. "Persons are held liable by the law for the consequence of their acts which they can and should foresee, and by reasonable care and prudence guard against." *Osborne v. Coal Co.,* 207 N. C., 545, 177 S. E., 796. "The law does not require omniscience." *Gant v. Gant, supra.* It must be made to appear that the injury was the material and probable consequence of the negligent act and ought to have been foreseen in the light of the attending circumstances. *R. R. v. Kellogg,* 94 U. S., 469; *Bowers v. R. R.,* 144 N. C., 684, 57 S. E., 453. If it be conceded that defendant was negligent in moving the elevator without notice to plaintiff, leaving an unguarded opening, yet when the plaintiff by an independent act of negligence on his own part, which defendant could not have foreseen, brought about the injury, the condition created by the defendant would be regarded as "merely a circumstance to the accident and not its proximate cause." *Powers v. Sternberg,* 213 N. C., 41, 195 S. E., 88; *Kline v. Moyer,* 325 Pa., 357; 111 A. L. R., 406. It was an occurrence for which the defendant may not be held responsible on the evidence offered in this case. *Bohannon v. Stores Co., supra.*

For the reasons stated we conclude that the defendant was entitled to the allowance of its motion for judgment of nonsuit, and that the judgment below must be

Reversed.

ALEX CREIGHTON, EMPLOYEE, v. W. E. SNIPES, F. R. SNIPES, SR., AND F. R. SNIPES, JR., TRADING AS DIXIE LUMBER COMPANY, INSURED BY FIDELITY & CASUALTY COMPANY; AND/OR W. E. (WADE) SNIPES, INDIVIDUALLY, INSURED BY FARM BUREAU MUTUAL AUTOMOBILE INSURANCE COMPANY.

(Filed 18 December, 1946.)

1. Master and Servant § 39b—

Evidence tending to show that in moving a sawmill from one location to another the employee was under the detailed supervision of the employer's

foreman but that there was an agreement that when the sawmill was ready for operation at its new location the employee would operate it as an independent contractor, does not support a contention that the employee was an independent contractor while working in moving the sawmill, and an injury received by him during this operation is compensable under the Workmen's Compensation Act.

2. Master and Servant § 39f—Evidence held to support finding that at time of injury claimant was employee of partnership and not of partner individually.

The evidence tended to show that the partnership operated a lumber company and that one of the partners individually owned and operated a sawmill, that the sawmill had been used by the lumber company on its premises under a rental agreement and was being moved to another location to cut lumber owned by the lumber company. The evidence also tended to show that an employee in operating the sawmill and in moving it to a new location was working under the supervision of the superintendent of the lumber company and was paid by it, though his wages were charged against the account of the partner individually. The employee was injured by accident while engaged in moving the sawmill to the new location. *Held:* The evidence sustains the finding of the Industrial Commission that at the time of the injury the employee was employed by the lumber company, and such finding is conclusive even though the evidence might support a finding to the contrary.

3. Master and Servant § 55d—

Findings of fact of the Industrial Commission which are supported by competent evidence are conclusive on the courts even though there may be evidence which would have supported a finding to the contrary.

APPEAL by defendants, Wade E. Snipes, F. R. Snipes, Sr., and F. R. Snipes, Jr., trading as Dixie Lumber Company, and Fidelity & Casualty Company, from *Carr, J.*, at April Term, 1946, of GUILFORD.

Claim for compensation under the Workmen's Compensation Act.

The pertinent facts are as follows:

1. The Dixie Lumber Company is a partnership, composed of Wade E. Snipes, F. R. Snipes, Sr., and F. R. Snipes, Jr. Wade E. Snipes was, at the time the claimant was injured, the manager of the partnership. He also owned two sawmills which he contends were operated by him individually.

2. The Fidelity & Casualty Company is the insurance carrier for the Dixie Lumber Company. Farm Bureau Mutual Automobile Insurance Company is carrier for Wade E. Snipes individually.

3. In July, 1944, Alex Creighton, the claimant, was employed by Wade E. Snipes to saw lumber at a sawmill located on the yard of Dixie Lumber Company. Creighton's wages were 90 cents an hour. He was not informed whether he was employed to work for Snipes individually or for the Dixie Lumber Company. Dixie Lumber Company paid his wages. Snipes testified the sawmill was being used by the Dixie Lumber

Company under a rental agreement. The sawing on the yard of Dixie Lumber Company was finished about 7 August, 1944. Thereafter, Alex Creighton was employed to make certain repairs to the sawmill, and to move it to a new location. His wages for this work were to continue at 90 cents an hour. The work not only involved repairs to the sawmill, but required the building of certain bridges and clearing a road to the new site. The timber to be sawed belonged to Dixie Lumber Company. Creighton was to operate the mill on a rental basis after it was moved and put in operation.

4. On 12 August, 1944, while engaged in work in connection with the moving of the sawmill, the claimant was seriously injured.

5. W. O. Willard was foreman of Dixie Lumber Company. The repairs to the sawmill, the selection of the new site and all other work in connection with its removal to the new location, was supervised in detail by the foreman of the Dixie Lumber Company. Dixie Lumber Company furnished the material necessary to repair the sawmill, the lumber to build the bridges and the trucks to move the mill. Creighton was directed by the foreman of the Lumber Company to purchase certain items needed in the repair of the sawmill and to have them charged to the Dixie Lumber Company. The partnership also furnished some of its regular employees to assist in building the bridges and in moving the sawmill.

Wade E. Snipes testified: "I actually run and manage the business, to my best judgment for the partnership. I actually run my own business for myself. The Dixie Lumber Company pays Willard . . . this was an interlocking proposition, benefitting myself and benefitting my company." The evidence also tends to show that the foreman of the Dixie Lumber Company and Snipes exercised supervision of the lumber plant and the sawmill.

6. There was evidence tending to show that all wages paid to Creighton and other workers at the sawmill were charged to Wade E. Snipes individually, on the books of the partnership. It is admitted, however, Creighton knew nothing of this arrangement. There is no evidence tending to show that material furnished for the repair of the sawmill by the Dixie Lumber Company, or the lumber used in the construction of the bridges, was charged to Snipes, individually. The foreman of Dixie Lumber Company, Mr. Willard, testified: "I didn't know when I took instructions from Mr. Wade Snipes as to whether he was giving instructions for himself, the Dixie Lumber Company, or what-not. He's the man that signed the checks and paid me. . . . I didn't know anything about the bookkeeping and things like that."

The North Carolina Industrial Commission found that the claimant was an employee of Wade E. Snipes, F. R. Snipes, Sr., and F. R. Snipes, Jr., trading as Dixie Lumber Company, at the time of his injury,

and that the injury arose out of and in the course of his employment. Award to claimant for compensation was made. Defendant, Dixie Lumber Company, and its insurance carrier, Fidelity & Casualty Company, appealed to the Superior Court. Exceptions were duly filed, challenging the findings of fact and conclusions of law, for that the findings of fact were not supported by competent evidence.

In the Superior Court the award of the Industrial Commission was in all respects affirmed. These defendants appealed to the Supreme Court, assigning error.

G. C. Hampton, Jr., for plaintiff.

Sapp & Moore for F. R. Snipes, Sr., F. R. Snipes, Jr., and Wade E. Snipes trading as Dixie Lumber Company, and Fidelity & Casualty Company of New York.

Smith, Wharton & Jordan and Arthur O. Cooke for Wade Snipes, individually, and Farm Bureau Mutual Automobile Insurance Company.

DENNY, J. The appealing defendants insist that Alex Creighton, at the time of his injury, was an independent contractor and that there is no competent evidence to sustain the finding of the Commission that at such time he was an employee of Dixie Lumber Company.

There is evidence tending to show that Creighton had agreed that when the sawmill was ready for operation at its new location, he would operate it as an independent contractor. We do not think, however, the evidence supports the contention that such a relationship existed at the time of claimant's injury.

The appellants also contend that if an employer-employee relationship existed at the time of claimant's injury, it existed between claimant and Wade E. Snipes, individually, and not between him and the Dixie Lumber Company.

We think the finding of the Commission that at the time of claimant's injury, he was an employee of Dixie Lumber Company is supported by competent evidence. Moreover, where the evidence is such as to permit either a finding that a claimant, at the time of his injury, was or was not an employee of an employer the determination of the Industrial Commission is conclusive on appeal, *Hegler v. Mills Co.*, 224 N. C., 669, 31 S. E. (2d), 918; since under our practice, if there is any competent evidence to support a finding of fact of the Industrial Commission, such finding is conclusive on appeal, even though there is evidence that would have supported a finding to the contrary. *Rewis v. Ins. Co.*, 226 N. C., 325, 38 S. E. (2d), 97; *Kearns v. Furniture Co.*, 222 N. C., 438, 23 S. E. (2d), 310; *Buchanan v. Highway Com.*, 217 N. C., 173, 7 S. E. (2d), 383; *Lockey v. Cohen, Goldman & Co.*, 213 N. C., 356, 196 S. E., 342;

Clark v. Woolen Mills, 204 N. C., 529, 168 S. E., 816; *Bain v. Mfg. Co.,* 203 N. C., 466, 166 S. E., 301; *Cabe v. Parker-Graham-Sexton, Inc.,* 202 N. C., 176, 162 S. E., 223.

The judgment of the Superior Court will be upheld.

Affirmed.

STATE v. CLARENCE CLAIBORNE JONES.

(Filed 18 December, 1946.)

1. Criminal Law § 79—

Assignments of error not brought forward and discussed in appellant's brief are deemed abandoned. Rule of Practice in Supreme Court, No. 28.

2. Bigamy § 4—

In a prosecution upon an indictment charging defendant with aiding and abetting bigamy by entering into a marriage with a person then married and not divorced, evidence tending to show that the bigamous marriage was contracted in another state ousts the jurisdiction of our courts and requires dismissal, G. S., 14-183. Since the indictment specifically charged the commission of the crime by contracting the bigamous marriage, evidence that defendant, with knowledge, took the prosecutrix from this State for the purpose of consummating the bigamous marriage, would be unavailing, even if it be conceded that this is evidence of aiding and abetting bigamy.

3. Criminal Law § 12b—

The courts of this State have no jurisdiction over an offense committed in another, and when the evidence, whether for the State or the defendant, shows that the offense was committed out of this State, jurisdiction is ousted.

4. Criminal Law §§ 12a, 83—

The Supreme Court on appeal will take notice of want of jurisdiction and dismiss the action *ex mero motu.*

5. Indictment § 24—

The indictment controls the prosecution, and evidence not supported by the indictment is unavailing.

APPEAL by defendant from *Hamilton, Special Judge,* at April (A) Term, 1946, of DURHAM.

Criminal prosecution on bill of indictment charging that defendant did aid and abet one Joyce Britt Luty in the commission of the crime of bigamy.

On 2 December, 1945, the defendant, at the request of the prosecutrix, Joyce Britt Luty, took her, E. C. Rice, and Maggie Mae Poole to Ches-

terfield County, S. C., so that Rice and Mrs. Poole could get married. Defendant and prosecutrix were married at the same time and by the same magistrate. They returned to North Carolina and lived together a few days, after which prosecutrix left defendant. Thereupon he had her indicted for larceny and she, in turn, had him arrested on this charge.

There was evidence tending to show that prosecutrix was married to one Luty and had not been divorced and that defendant was aware of her marital status at the time they entered into the contract of marriage in South Carolina. Evidence also tends to show that at the time they left Durham for South Carolina defendant and prosecutrix had not agreed to get married. There is some evidence they reached this agreement when in Sanford and some to the effect they did not so agree until after they reached South Carolina.

There was a verdict of guilty. The court pronounced judgment and defendant excepted and appealed.

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

J. M. Templeton and W. T. Hatch for defendant, appellant.

BARNHILL, J. In the court below counsel for defendant duly excepted to the refusal of the court to dismiss the action as in case of nonsuit. In the case on appeal these exceptions are the basis of an assignment of error. However, counsel employed to prosecute the appeal to this Court inadvertently failed to bring them forward or discuss them in their brief. They are deemed to be abandoned. (Rule 28.) Even so, they direct our attention to a fatal defect in the jurisdiction of the court below, of which we must take notice. *Shepard v. Leonard,* 223 N. C., 110, 25 S. E. (2d), 445.

Bigamy as defined by G. S., 14-183, is committed when the second marriage is contracted. *S. v. Ray,* 151 N. C., 710, 66 S. E., 204. Cohabitation is not an essential element of the crime. *Cleveland v. State,* 271 Pac., 863.

Thus in *S. v. Ray, supra,* this Court held that one who contracts a bigamous marriage in another State is not subject to indictment and punishment for bigamy in this State even though, after the bigamous marriage, the parties cohabit in this State.

Following the decision in the *Ray case* the Legislature amended the statute, adding the provision: "If any person being married shall contract a marriage with any other person outside of this State, which marriage would be punishable as bigamous if contracted within this State, and shall thereafter cohabit with such person in this State, he shall be guilty of a felony and shall be punished as in cases of bigamy." Chap. 26, P. L. 1913. But this amendment creates a new and separate

offense commonly known as bigamous cohabitation. *S. v. Moon,* 178 N. C., 715, 100 S. E., 614; *S. v. Herron,* 175 N. C., 754, 94 S. E., 698.

The charge against the defendant is specific. It is alleged in the bill of indictment that he "did . . . aid and abet in bigamy by entering into wedlock with one Joyce Britt Luty . . ." The bigamous marriage was solemnized in South Carolina. Hence the act of defendant in becoming a party to that contract, as charged in the bill, was likewise committed in that State. The State of South Carolina was the sovereign whose authority was flouted when the bigamous marriage was celebrated. The courts of this State have no jurisdiction to impose punishment therefor.

"When it appears, whether in the evidence for the State or defendant, that the offense was committed out of the State, jurisdiction is ousted." *S. v. Long,* 143 N. C., 671; *S. v. Buchanan,* 130 N. C., 660; *S. v. Lea,* 203 N. C., 13 (25), 164 S. E., 737.

This Court will take notice of a want of jurisdiction and dismiss the action *ex mero motu. Shepard v. Leonard, supra; S. v. Miller,* 225 N. C., 213.

There is some evidence that defendant took the prosecutrix from this State to South Carolina for the purpose of consummating the bigamous marriage, knowing at the time she then had a living husband. Conceding, *arguendo* only, that this constitutes some evidence of aiding and abetting bigamy, it cannot save the case from dismissal. The one specific charge in the bill is that he aided and abetted in bigamy by becoming a party to the bigamous marriage. This act was committed in South Carolina. As he is indicted, so must he be tried. *S. v. Peterson,* 226 N. C., 255; *S. v. McNeill,* 225 N. C., 560; *S. v. Law, post,* 103.

The solicitor, if he deems it advisable, may send a bill charging bigamous cohabitation.

The judgment below must be vacated and the defendant discharged. Reversed.

ORKIN EXTERMINATING COMPANY, INC., v. W. H. WILSON.

(Filed 18 December, 1946.)

1. Appeal and Error § 40d—

Where appellant has made no request for findings, his exceptions to each of the findings of fact will not be sustained when the findings are supported by the evidence.

2. Contracts § 7a: Injunctions § 4a—

Restrictive covenants in a contract of employment, executed when an employee is raised from a service man to general manager, providing that

the employee for a period of two years from the termination of the employment should not engage in the same business within a defined territory comprising thirteen counties of the State or solicit or sell the employer's customers, *are held* reasonable in regard to time and territory and enforceable by restraining order.

APPEAL by defendant from *Rousseau, J.*, at 16 September Term, 1946, of FORSYTH.

Civil action to restrain defendant for a period of two years from 14 January, 1946, from (1) calling upon or soliciting any of the customers of plaintiff or (2) selling to any of said customers any exterminating, fumigating or pest control service, or (3) engaging in such business in the Winston-Salem territory, or (4) violating any of the covenants and agreements contained in his certain contract with plaintiff, heard upon notice to show cause why temporary restraining order should not be made permanent for said period of time.

When the case came on for hearing, upon such notice, the parties, together with their counsel, being present, plaintiff offered evidence, and defendant in reply offered evidence, all as appears of record, and, after argument of counsel, the court found facts, briefly stated, as follows:

Prior to 29 March, 1945, defendant was employed by plaintiff as service man and paid upon hourly basis, 72 cents per hour, for services rendered. On 29 March, 1945, plaintiff and defendant entered into another contract by the terms of which plaintiff employed defendant as manager of its business in the Winston-Salem territory, comprising thirteen counties in and around the city of Winston-Salem and in the State of North Carolina, at salary of $200 per month, etc.

In this contract it is recited that plaintiff is engaged in the exterminating, fumigating and termite control business, which requires secrecy in connection with the methods and systems employed in eradicating and controlling certain pests; that it had established and was then maintaining at great expense large, valuable and extensive trade with substantial number of customers, whose names were within the exclusive knowledge of plaintiff and of great value to it; and that a great loss and damage will be suffered by plaintiff if, during the term of the contract or for a period of two years immediately following termination of same, defendant should for himself or on behalf of or in conjunction with any others, call upon, solicit, sell or endeavor to sell or solicit any customers of plaintiff, or use any of the methods or systems employed by it in its business within said territory, etc., for which, by reason of his financial condition, defendant could not be compelled by law to respond in damages in any action at law.

The contract further shows that the parties "for and in consideration of the premises and mutual covenants therein contained, and by them

respectively to be kept and performed," agreed upon the terms of the employment. And defendant therein agreed, summarily stated, that at no time during the term of the agreement or for a period of two years immediately following the termination of the employment will he, for himself or on behalf of any other person, persons, firm, partnership or corporation, (1) call upon any customer of plaintiff in said territory for the purpose of soliciting or selling any exterminating, fumigating or termite control service, or (2) directly or indirectly solicit, divert or take away any such customers, or (3) engage in the pest control business or in any business engaged in such eradication or control within said territory, or (4) disclose to any person any of the secrets, methods or systems used by plaintiff in or about its business, or (5) service contracts and accounts or work in said territory for himself or any other selling any kind of pest control service, or any service items or products for exterminating or control as aforesaid handled by plaintiff or any products incidental to its business.

And the court further finds as facts: That prior to 1 July, 1946, employment between plaintiff and defendant was terminated and defendant returned to Winston-Salem and organized the Wilson Exterminating Company for the purpose of exterminating, eradicating and controlling the certain pests to which the business of plaintiff related, within the city of Winston-Salem and the surrounding territory, and on the date of the institution of this suit defendant was the active manager of said company; that after organizing said business the defendant solicited customers of plaintiff and as result of such solicitation some of the plaintiff's former customers terminated their contracts with plaintiff, and gave their pest control business to defendant; and that at the time of the insitution of this action the defendant was violating the restrictive covenants contained in the contract of 29 March, 1945, between plaintiff and defendant.

Plaintiff offered evidence tending to show (1) that the amount of business covered by the terminations of contracts with the plaintiff through the efforts of defendant amount to a total loss of $299 per month to plaintiff, and (2) that at the present time there are five other exterminating companies, together with plaintiff, engaged in the same business as that conducted by plaintiff in this case, which are operating in the city of Winston-Salem, and which have conducted pest control business in the Winston-Salem territory in competition with each other.

Thereupon the court "upon the basis of the foregoing findings of fact" and upon basis of the evidence offered upon hearing, ordered, decreed and adjudged that the plaintiff is entitled to an order restraining the defendant from violating the restrictive covenants contained in the contract between parties within the Winston-Salem territory, and for the period of two years from 14 January, 1946, and further ordered and

decreed that the defendant be so enjoined within said territory for said period.

Defendant appeals therefrom to Supreme Court, and assigns error.

Womble, Carlyle, Martin & Sandridge for plaintiff, appellee.

Ratcliff, Vaughn, Hudson & Ferrell and T. D. Carter for defendant, appellant.

WINBORNE, J. The record discloses that defendant, appellant, excepts (1) to each of the findings of fact, and (2) to each of the conclusions of law contained in the judgment, and (3) to the signing of the judgment, and assigns each as error.

As to the first assignment: The findings of fact appear to be supported by the evidence. In fact, the findings only relate (a) to the contracts between the parties, both of which are in writing, and as to which there does not appear to be any controversy; and (b) to defendant's breach of the restrictive covenants,—findings as to which are not inconsistent with admission made by defendant in his answer which he offered in evidence on the hearing. Moreover, the record fails to show that defendant requested or suggested other findings of fact.

As to the second assignment: The conclusions of law appear to be in keeping with well settled general principles of law as applied in former decisions of this Court. See *Scott v. Gillis,* 197 N. C., 223, 148 S. E., 315; *Moskin Bros. v. Swartzberg,* 199 N. C., 539, 155 S. E., 154; *Beam v. Rutledge,* 217 N. C., 670, 9 S. E. (2d), 476.

The judgment below may be approved aptly upon authority of these cases. Indeed, the factual situation in the *Moskins case* is strikingly similar to that in the present action, and there, as here, the employee was manager of the employer's business. And in respect thereto the Court had this to say: "It is obvious that in the performance of his duties as such manager, the employee acquired an intimate knowledge of his employer's business, and had a personal association with his customers, which, when his employment terminated for any cause, would enable the employee, if employed by a competitor of his employer, to injure the business of the latter. We think the covenant is reasonable in its terms and not unreasonable in time or territory."

Moreover, in the *Beam case, supra,* referring to restrictive covenant there involved, the Court through *Stacy, C. J.,* makes this pertinent observation: "The parties themselves when the instant contract was made, regarded the restriction as reasonable. They are dealing with a situation of which both were familiar . . . It is limited both as to time and place. We cannot say that the restraint put upon defendant by his contract is unreasonable as presently applied."

The case of *Kadis v. Britt,* 224 N. C., 154, 29 S. E. (2d), 543, is distinguishable from the present case in factual situation.

As to the third assignment: In the light of what has been said above, the exception to the signing of the judgment becomes formal.

The judgment below is

Affirmed.

STATE v. BENNY MONTGOMERY.

(Filed 18 December, 1946.)

1. Homicide § 25—

Evidence tending to show the commission of murder in the perpetration of a robbery and identifying defendant as the perpetrator of the crime is sufficient to be submitted to the jury on capital charge of murder in the first degree, and defendant's motion for judgment as of nonsuit was properly denied.

2. Criminal Law § 78c—

Where there is no valid objection to the evidence taken by defendant during the trial and no assignment of error based upon the admission or exclusion of the evidence, it will be deemed that no error was committed in the taking of the evidence.

3. Same—

Where there is no assignment of error to the charge, it will be deemed that the charge was without error.

4. Criminal Law § 61b—

Where the judgment upon a verdict of guilty of murder in the first degree states that the defendant had been convicted of murder, the cause must be remanded in order that it appear on the face of the judgment that the conviction was for murder in the first degree, since the judgment alone is certified to the warden of the State Penitentiary. G. S., 14-17; G. S., 15-188; G. S., 15-189; G. S., 15-190.

APPEAL by defendant from *Armstrong, J.,* at August Term, 1946, of UNION. No error in the trial; remanded for judgment on the verdict.

Criminal prosecution on indictment charging the defendant with the murder of one William Marvin Mangum.

The verdict returned by the jury at the trial is that the defendant Benny Montgomery is "guilty of murder in the first degree."

The judgment in the action as shown by the record is as follows: "Benny Montgomery, you have been indicted, tried and convicted by a jury of your county of the murder of one William Marvin Mangum. The law prescribes, in General Statutes of North Carolina, Section 14-17,

that the punishment for your crime is death. The judgment of the Court, therefore, is that you be remanded to the common jail of Union County and there remain until the adjournment of this Court.

"It is ordered that you be conveyed by the High Sheriff of Union County to the penitentiary of the State of North Carolina, at Raleigh, North Carolina, and by such sheriff be delivered to the warden of said penitentiary; and it is further ordered and adjudged and decreed that you remain in the custody of said warden until Friday, the fifteenth day of November, 1946, and that on said day and between the hours of ten in the forenoon and three o'clock in the afternoon that you be taken by the said warden to the place provided for execution in said penitentiary; and it is further adjudged that the said warden (deputy warden, or such other person as may be designated according to law), then and there take you, the said Benny Montgomery, into the permanent death chamber which has been provided in said penitentiary and there and therein cause you to inhale lethal gas of sufficient quantity to cause death, to be administered to you, and to continue said inhaling of said lethal gas by you until you are dead; and may God have mercy on your soul.

"This the 22nd day of August, 1946.

FRANK M. ARMSTRONG, Judge presiding."

The defendant excepted to the judgment and appealed to the Supreme Court, assigning errors in the trial.

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

Coble Funderburk for defendant, appellant.

SCHENCK, J. The evidence offered by the State at the trial of this action was admitted without prejudicial error. This evidence tended to show that William Marvin Mangum was stabbed and fatally wounded on the highway in Union County, on 1 June, 1946, at approximately eleven o'clock a.m., and while returning to his home from delivering milk in Monroe, North Carolina, and while he was on the dirt road to his own house, a little less than a quarter mile from his home, was killed by being stabbed with some sharp instrument, so that he bled to death. His pocketbook, containing $84.87, was missing. The defendant Benny Montgomery was indicted for the crime of murder in the first degree and was tried at the August Criminal Term of the Superior Court of Union County on said indictment. The jury returned a verdict of guilty of murder in the first degree, and, from judgment of death pronounced thereon, the defendant appealed to the Supreme Court.

There are five exceptive assignments of error in the record, namely: (1) To the court's overruling of the defendant's demurrer to the State's

evidence as to the capital crime; (2) To the court's overruling defendant's motion for a judgment as of nonsuit at the close of the State's evidence; (3) To the court's overruling defendant's motion for judgment as of nonsuit at the close of all the evidence; (4) To the court's overruling defendant's motion to set aside the verdict and order a new trial; (5) To the court's pronouncing judgment as set forth in the record.

The evidence was sufficient to sustain the indictment and the verdict of "guilty of murder in the first degree." The credibility of the witnesses and the probative effect of the evidence were for the determination of the jury.

The evidence offered by the State supports the contention that the defendant is the man who stabbed and fatally wounded William Marvin Mangum on the 1st day of June, 1946. It is in evidence that the defendant admitted he had stabbed the deceased with a knife. There was no error in the refusal of the court to dismiss the action as in case of nonsuit at the close of the State's evidence. The defendant offered none. No valid objection to the evidence was made by the defendant during the trial and there was no assignment of error in the defendant's appeal to this Court based upon the admission or rejection of evidence. Therefore, it is taken that no error was committed in the taking of the evidence, nor was there any assignment of error in the charge of the court to the jury. Therefore, it is taken that the jury was properly instructed by the court in respect to the verdict which they should return upon the facts as they might find them to be from the evidence. The charge was full, fair and correct. The verdict as returned by the jury cannot be set aside or disturbed by this Court; it must stand as returned. *S. v. Jackson,* 199 N. C., 321, 154 S. E., 402.

There is error, however, in the form of the judgment in this action. It does not appear on the face of the judgment that the defendant has been convicted of a crime which is punishable by death under the law of this State. It appears only that the defendant has been convicted of murder. It does not appear that he has been convicted of murder in the first degree. The crime of murder in the first degree is punishable by death, while all other kinds of murder are punishable by imprisonment in the State's Prison. G. S., 14-17. The judgment appearing in the record is not sufficient to justify the execution of the defendant by the warden of the State's Prison. It should appear on the face of the judgment, which is alone certified to the warden, that defendant has been convicted of a capital felony. G. S., 15-188; G. S., 15-189; G. S., 15-190.

The action must be remanded to the Superior Court of Union County, to the end that a proper judgment on the verdict as returned by the jury, may be rendered. *S. v. Langley,* 204 N. C., 687, 169 S. E., 405. It is so ordered.

Remanded.

STATE v. JAMES LAW AND MATTHEW KELLY.

(Filed 18 December, 1946.)

1. Intoxicating Liquor § 8—

Where a vehicle is seized by a municipal police officer for illegal transportation of intoxicating liquor, the vehicle is in the custody of the officer or of the law and not the municipality. G. S., 18-6.

2. Indictment § 9—

The object of an indictment is to inform the prisoner with what he is charged, as well to enable him to make his defense as to protect him from another prosecution for the same criminal act.

3. Indictment § 20: Larceny § 4—

The indictment charged larceny of a vehicle the property of a municipality. The evidence tended to show that the automobile had been seized by a municipal police officer for illegal transportation of intoxicating liquor and placed by him in the municipal parking lot, and that the car was taken therefrom by defendants during the night. *Held:* There is a fatal variance between charge and proof in that the vehicle was not the property of the municipality.

4. Indictment § 19: Criminal Law § 52a—

A fatal variance between an indictment and proof may be taken advantage of by motion to nonsuit, since in such instance there is no sufficient evidence to support the charge as laid in the indictment.

APPEAL by defendants from *Rousseau, J.*, at July Term, 1946, of FORSYTH.

Criminal prosecution on indictment charging the defendants, in one count, with the larceny of an automobile, of the value of $700.00, the property of the City of Winston-Salem; and, in a second count, with receiving said automobile, of the value of $700.00, the property of the City of Winston-Salem, knowing it to have been feloniously stolen or taken in violation of G. S., 14-71.

The record discloses that on the night of 15 April, 1946, Oscar Morrison, a police officer of the City of Winston-Salem, discovered an automobile on one of the city streets from which a 5-gallon container full of nontax-paid whiskey had just been taken and which had evidently been transported therein contrary to law. He took possession of the automobile, drove it to the city lot and parked it for the night.

The automobile was stolen from the city lot during the night, and there is evidence, circumstantial and presumptive, tending to connect the defendants with its disappearance.

The defendants offered no evidence.

Verdict: Guilty as to each defendant.

Judgment: Imprisonment in the State's Prison for not less than 2 nor more than 4 years as to both defendants.

Defendants appeal, assigning errors, and relying chiefly upon their motion to nonsuit.

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

William H. Boyer, Sally J. Jackson, and H. Bryce Parker for defendants.

STACY, C. J. The question for decision is whether there is a fatal variance between the indictment and the proof. *Stare decisis* would seem to require an affirmative answer.

Conceding that the automobile in question, even if originally the property of one of the defendants, was the subject of larceny while in the custody of the officer who had seized it under authority of law, still it does not follow that its ownership was properly laid in the City of Winston-Salem. The City had no property right in it, special or otherwise. Only the officer who seized the property was authorized to hold it, take and approve bond for its return "to the custody of said officer," and to hold it subject to the orders of the court. G. S., 18-6. A conviction under the present bill would not perforce protect the defendants against another prosecution with the right to the property laid in the seizing officer or in the custody of the law. *S. v. Bell,* 65 N. C., 313. The City of Winston-Salem, no doubt, owns a number of automobiles, such as would fit the description in the bill, but none of these was stolen. "The object of an indictment is to inform the prisoner with what he is charged, as well to enable him to make his defense as to protect him from another prosecution for the same criminal act." *S. v. Carlson,* 171 N. C., 818, 89 S. E., 30.

Usually a fatal variance results, in larceny cases, where title to the property is laid in one person and the proof shows it to be in another. *S. v. Jenkins,* 78 N. C., 478. "In all cases the charge must be proved as laid." *S. v. Bell, supra.*

The question of variance may be raised by demurrer to the evidence or by motion to nonsuit. "It is based on the assertion, not that there is no *proof* of a crime having been committed, but that there is none which tends to prove that the particular offense charged in the bill has been committed. In other words, the proof does not fit the allegation, and, therefore, leaves the latter without any evidence to sustain it. It challenges the right of the State to a verdict upon its own showing, and asks that the court, without submitting the case to the jury, decide, as matter of law, that the State has failed in its proof"—*Walker, J.,* in *S. v. Gibson,* 169 N. C., 318, 85 S. E., 7. To like effect are the decisions in *S. v.*

Weinstein, 224 N. C., 645, 31 S. E. (2d), 920; *S. v. Jackson,* 218 N. C., 373, 11 S. E. (2d), 149; *S. v. Harris,* 195 N. C., 306, 141 S. E., 883; *S. v. Harbert,* 185 N. C., 760, 118 S. E., 6; *S. v. Nunley,* 224 N. C., 96, 29 S. E. (2d), 17; *S. v. Davis,* 150 N. C., 851, 64 S. E., 498; *S. v. Hill,* 79 N. C., 656.

The present conviction will be set aside, the demurrer to the evidence sustained, and the solicitor allowed to send another bill, if so minded.

Reversed.

N. C. JOINT STOCK LAND BANK OF DURHAM v. SOL CHERRY AND WIFE, EMMA MAY BRITT CHERRY, W. M. WARREN AND PERCY B. HOLDEN.

(Filed 18 December, 1946.)

1. Appeal and Error § 40a—

A sole exception to the signing of the judgment presents only the question whether the judgment is supported by the record.

2. Judgments § 20a—

The Superior Court has the power, on motion in the cause after notice, to correct clerical errors in the judgment and to make the record speak the truth.

APPEAL by defendant Holden from *Grady, Emergency Judge,* at March Term, 1946, of DURHAM. Affirmed.

Motion in the cause by the plaintiff and W. L. Totten, assignee of record of the judgment, to correct certain clerical errors in the judgment.

The court found the facts, without objection, and entered order correcting the judgment so as to conform to the facts found.

The defendant Holden excepted and appealed.

Bennett & McDonald and R. M. Gantt for plaintiff, appellee.

J. Faison Thomson and Kenneth A. Pittman for defendant, appellant.

DEVIN, J. The findings of fact made by the court below were unchallenged by exception. From these it appears that the plaintiff Bank instituted suit in the Superior Court of Durham County and obtained judgment against the above named defendants, including the defendant Holden, for the balance due on an obligation under seal, which the defendant Holden had assumed and in writing promised to pay. Defendant Warren was not served. No answer was filed. Judgment was rendered by Judge E. H. Cranmer, presiding, at October Term, 1934, of Durham Superior Court.

However, as the result of an inadvertence, in the original judgment signed by Judge Cranmer the name of Judge G. V. Cowper appeared in the premises, and under the signature of Judge Cranmer appeared the words "Clerk of Superior Court." The date was incorrectly stated. A corrected judgment was at the time entered on the minute and judgment dockets of the court. Motion in the cause to correct the original judgment was filed 6 April, 1944.

Transcript of the judgment in proper form as docketed had been sent to and recorded in Greene County where defendant Holden resides. Holden instituted suit in that county against Totten to restrain execution, on the ground that the judgment was void. Questions involved in that suit were considered by this Court and the facts stated on two appeals in the case entitled *Holden v. Totten,* reported in 224 N. C., 547, 31 S. E. (2d), 635, and 225 N. C., 558, 35 S. E. (2d), 635, 636. On the last appeal in that case this Court said: "Here, the apparent irregularity of the judgment may be corrected on motion in the cause in Durham County."

The motion in the original cause was heard by Judge Grady, who found the facts and ordered the judgment corrected to speak the truth as found by him. The appellant excepted to the ruling of Judge Grady, and his only assignment of error is "that the court signed the judgment amending a former judgment." There was no exception to any finding of fact made by the court, nor is the truth of the material facts found controverted. The evidence was sufficient to support the conclusion and order of the court. *Brown v. Truck Lines, ante,* 65; *Ingram v. Mortgage Co.,* 208 N. C., 329, 180 S. E., 594; *Wilson v. Charlotte,* 206 N. C., 856, 175 S. E., 306.

The power of the Superior Court, on motion in the cause after notice, to correct clerical errors in the judgment and to make the record speak the truth may not be denied. *S. v. Morgan,* 225 N. C., 549, 35 S. E. (2d), 621; *S. v. Tola,* 222 N. C., 406, 23 S. E. (2d), 321; *Ragan v. Ragan,* 212 N. C., 753, 194 S. E., 458; *S. v. Brown,* 203 N. C., 513, 166 S. E., 396; *Cook v. Moore,* 100 N. C., 294, 6 S. E., 795; *Brooks v. Stephens,* 100 N. C., 297, 6 S. E., 81; *Hughes v. King,* 27 N. C., 203; McIntosh, 732.

Questions debated here as to the effect of the order appealed from are not presented on this appeal and have not been considered or decided. On the record before us the ruling of Judge Grady must be upheld.

Judgment affirmed.

STATE v. WOODROW EWING.

(Filed 18 December, 1946.)

Criminal Law § 80b (4)—

Where defendant fails to file statement of case on appeal within time allowed, the motion of the Attorney-General to docket and dismiss will be granted, but when defendant has been convicted of a capital felony, this will be done only after an inspection of the record fails to disclose error.

MOTION by State to docket case, affirm judgment, and dismiss appeal.

Attorney-General McMullan and Assistant Attorney-General Bruton for the State.

STACY, C. J. At the March Term, 1946, Bladen Superior Court, before Williams, J., and a jury, the defendant herein, Woodrow Ewing, was prosecuted upon indictment charging him with the murder of one Carmell Louise Miller Ewing, which resulted in a verdict of "Guilty of First Degree Murder" and sentence of death as the law commands on such conviction. G. S., 14-17.

From the judgment of the law thus pronounced, the defendant gave notice of appeal to the Supreme Court and the statutory time was prescribed for serving statement of case on appeal and for preparing exceptions or countercase. No appeal bond was designated. The defendant was remanded to the custody of the sheriff.

The statutory time allowed for perfecting the appeal has expired, and the Clerk certifies that the "attorney appointed by the court to represent the defendant . . . has personally made it known to me that he would not perfect the appeal . . . to the Supreme Court." The motion of the Attorney-General to docket and dismiss is supported by the record, and will be allowed. *S. v. Nash,* 226 N. C., 609; *S. v. Watson,* 208 N. C., 70, 179 S. E., 455.

No error appears on the face of the record proper. *S. v. Brooks,* 224 N. C., 627, 31 S. E. (2d), 754; *S. v. Morrow,* 220 N. C., 441, 17 S. E. (2d), 507.

Judgment affirmed. Appeal dismissed.

STATE v. EUNICE MARTIN.

(Filed 18 December, 1946.)

APPEAL by defendant from *Pless, J.*, at May Term, 1946, of FORSYTH.

Criminal prosecution tried upon indictment charging defendant with the murder of one Bernice Martin.

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 Bruton, Rhodes, and Moody for the State.

W. Reade Johnson and James M. Hayes for defendant.

DENNY, J. We have carefully considered all the defendant's exceptions and they are without merit. Moreover, a careful examination of the entire record leads us to the conclusion that the defendant has been given a fair and impartial trial, free from error. Every contention of the defendant was given in his Honor's charge to the jury. A charge in which the defendant admits there is no error and to which he entered no exception.

No error.

ZOA L. HAYWOOD (WIDOW), v. WILLIS BRIGGS, GUARDIAN FOR MRS. MARY E. MIDDLETON, MRS. MARY E. MIDDLETON, R. H. RIGSBEE AND WIFE, LELIA N RIGSBEE, ROSA L. FULFORD AND HUSBAND, W. A. FULFORD, MATTIE T. BITTING, UNMARRIED, D. L. BOONE, D. L. BOONE, SUCCESSOR COMMISSIONER OF THE COURT IN THE CASE OF SALLIE A. RIGSBEE, ET AL., AGAINST ZOA L. HAYWOOD, ET AL.; FIDELITY BANK OF DURHAM, N. C., TRUSTEE IN THAT CERTAIN DEED OF TRUST FROM SALLIE A. RIGSBEE, COMMISSIONER, RECORDED IN BOOK OF MORTGAGES 252, AT PAGE 437, IN THE REGISTER OF DEEDS OFFICE OF DURHAM COUNTY, AND THE PRUDENTIAL INSURANCE COMPANY OF AMERICA.

(Filed 31 January, 1947.)

1. Estates § 9a: Landlord and Tenant § 15½—

The death of the life tenant terminates a lease executed by her and all rights or agreements therein created, and title passes to the remaindermen by operation of law unaffected by the lease.

2. Estates § 9b: Fixtures § 4—

The remaindermen are not privies to a lease executed by the life tenant, and upon the death of the life tenant, her lessees are not entitled to

assert against the remaindermen an agreement in the lease giving lessees the right to remove improvements placed upon the land by them.

3. Estates § 9b: Fixtures § 5—

While by agreement between lessor and lessee, fixtures which would otherwise be classified as realty may be deemed personalty and removable as trade fixtures, such right of removal cannot be asserted by lessee of a life tenant as against the remaindermen, since the remaindermen were not in privity. In the instant case, no equities were involved since lessees erected a tobacco warehouse on the premises with full knowledge of the limited estate of lessor and required bonds of lessor to protect themselves against the termination of the lease by operation of law.

4. Estates § 9a: Landlord and Tenant § 15½—

The fact that lessees of a life tenant are permitted to remain in possession for several months after the death of the life tenant before institution of action by the remaindermen to assert their title, does not bar the remaindermen or constitute an acquiescence by them in a provision of the lease giving lessees the right to remove improvements, since upon the death of the life tenant the lease is void and is not subject to confirmation by the remaindermen.

APPEAL by the plaintiff and the defendants Briggs, Middleton, Rigsbee, Fulford and Bitting, from *Frizzelle, J.*, at June Term, 1946, of DURHAM. Modified and affirmed.

This was a petition for the sale for partition of certain real property in Durham by the surviving children and remaindermen under the will of the late Atlas M. Rigsbee. The proceeding was instituted 5 March, 1946.

The property described in the petition was devised by the testator to his daughter Sallie A. Rigsbee for life with remainder in fee, on failure of issue, to the testator's surviving children. These are all parties to the proceeding. Sallie A. Rigsbee died unmarried and intestate 19 September, 1945.

In this proceeding F. G. Satterfield, J. G. Satterfield and Walker Stone, doing business under the firm name of Satterfield & Stone, were permitted, over objection, to intervene. They filed pleadings alleging that pursuant to certain leases executed to them by Sallie A. Rigsbee on two of the lots described, in 1925 and 1935, renewed in 1944, they had erected two large tobacco auction warehouses (both under same roof), at a total approximate cost of some $73,000, and that by the terms and provisions of these leases they had the right to remove the buildings from these lots at the expiration of the leases or when by devolution of the title the leases were terminated. They asked authority of the court to remove the buildings.

The parties to the original proceeding denied the interveners' right to the buildings on the ground that whatever rights the interveners had

under the leases expired at the death of the lessor, that none of the remaindermen was party to either of the leases, and that the buildings were permanent structures and erected with full knowledge and understanding that Sallie A. Rigsbee had only a life estate in the lots leased to them. They further allege that interveners had protected themselves against the contingency of the falling in of the life estate during their term by requiring substantial bonds from the lessor.

It was admitted that interveners used the buildings erected by them on the leased lots as tobacco auction warehouses, known as Liberty Warehouse 1 and 2, during the entire period covered by the leases, and since the death of the life tenant have continued to occupy and use the warehouse during the tobacco marketing seasons of 1945 and 1946. No consent to its use, or waiver of any right by any of the remaindermen was shown. The lease of 1925 was for fifteen years with privilege of extension for five years additional. The lease of 1935 was for ten years, and the lease of 1944 was for five years. The annual rental began with $2,800, and the highest was $4,280, but the amount was made subject to the varying conditions of the tobacco market.

It was not controverted that the buildings referred to were erected on concrete foundations, with 100,000 feet of floor space, partially concrete. It was stated that the buildings covered half a city block.

Each of the leases contained the provision that in consideration of the fact that the lessor had only a life estate in the lots, the lessor should give bond in penal sums of $30,000, $5,000, and $35,000, respectively, conditioned upon lessees' peaceful occupancy, with further condition that "if by reason of the death of the lessor during said term, or if for any cause lessees shall be put out of possession of said premises," the obligation to be in full force.

Judge Frizzelle heard the matter on the appeal from the order of the clerk permitting interveners to be made parties, and also on the merits as to the rights of the parties under the allegations in the pleadings, and, after finding the facts, adjudged that interveners were proper and necessary parties, and further that the buildings erected by the interveners on the leased lots were trade fixtures and as such the personal property of the interveners, and that they were entitled to remove them within a reasonable time after the death of the life tenant.

The plaintiff and defendants remaindermen excepted and appealed.

Brawley & Brawley, Victor S. Bryant, and Egbert L. Haywood for the appellants.

Fuller, Reade, Umstead & Fuller, Basil M. Watkins, and A. H. Graham, Jr., for appellees.

DEVIN, J. There was no controversy as to the facts. The question of law presented is whether the lessees of the life tenant, after the death of their lessor, were entitled, as against the remaindermen, to remove the buildings which had been erected by them on the leased premises.

It was provided in each of the leases that all improvements and fixtures placed on the premises by the lessees should remain the property of the lessees, with right of removal, at the termination of the leases whether by expiration of time or by act of law, within a reasonable time. But the remaindermen were not parties to either of the leases and were not bound by any of the terms wherein expressed. As to these leases the remaindermen were strangers. There was no privity between the lessees and the present owners of the fee. Upon the death of the life tenant the title to the real property passed by operation of law to the remaindermen unaffected by any leases the life tenant had executed or any agreements she had made with respect thereto. The life tenant could not create an estate to endure beyond the termination of her own estate, nor could the lessees thereafter claim any rights under her leases. Tiffany Real Prop., 3rd Ed., 247; *Armstrong v. Rodemacher,* 199 Iowa, 928; *Matter of O'Donnell,* 240 N. Y., 99; *Jones v. Shufflin,* 45 W. Va., 731, 31 S. E., 934. So that, upon the death of Sallie A. Rigsbee, nothing else appearing, the remaindermen were entitled to the immediate possession of the lots described, and also to all structures placed thereon and so attached to the freehold as to constitute a part of the realty.

Recognizing these principles of law, the interveners, the lessees of the life tenant, however, base their claim upon the general principles of law relating to trade fixtures, and contend that under the circumstances of the case the buildings erected by them come within the definition of trade fixtures, and independent of any express agreement the structures were stamped with the character of personal property, and hence removable at their option. They contend that this position is available to them against the remaindermen.

In view of the fact that the buildings here claimed by the interveners consist of two large warehouses under one roof, erected on concrete foundations, with 100,000 feet of floor space, covering half a city block, it is somewhat difficult to conceive of them as personal property, but conceding that under the rule stated by *Mr. Justice Story* in *Van Ness v. Pacard,* 27 U. S., 137, and by virtue of the agreement between the life tenant, lessor, and the lessees, they may be so regarded, it would seem to follow that within the period covered by the leases and during the lifetime of the lessor the lessees would have had the right to remove the buildings from the lots described, if this could have been done without injury to the freehold. *Olymphia Lodge v. Kelly,* 142 Wash., 93; *Davidson v. Mfg. Co.,* 99 Mich., 501; *Schultz v. Motor Co.,* 243 Ky., 459; *Pennington v. Black,* 261 Ky., 728. But we do not think, under the

circumstances of this case, this right can now be maintained against the remaindermen. They were in no wise bound by the leases, and to them the fee simple unencumbered title to the real property passed under the will of Atlas M. Rigsbee immediately upon the falling in of the life estate. The erections were by those who were strangers to the title as thus devolved and without privity.

The general principles of law relating to the question presented by the appeal in this case have been frequently stated. From 36 C. J. S., 967, we quote: "A lessee from the tenant for life has no greater rights than the tenant for life himself. The lessee's rights cannot be increased by an agreement with the tenant for life, not assented to by the remainderman, giving the lessee the right of removal." In 22 A. J., 744, it was said, "Where the fixtures are of such a character that, in the absence of any contract on the subject, they constitute, in law, a permanent accession to the estate, it has been held that a tenant for life cannot, by contract with his tenant, so far bind the remainderman as to authorize the removal of such fixtures by his lessee after the termination of the life estate." From 1 Tiffany Real Prop., 3rd Ed., page 88, we quote: "Since a tenant for life cannot, in the absence of an express power, create an estate extending beyond the measure of his own estate, it follows that if such tenant leases for a term of years, and the life estate comes to an end by reason of his death or of that of the *cestui que vie,* the interest of the lessee also comes to an end, and he cannot retain the possession against the reversioner or remaindermen. Even though the reversioner or remainderman desires to continue or to revive the lease made by the life tenant, he cannot do so, since he is not in privity with the latter." And again from the same author, page 247: "In the absence of a statutory power or of an express power to that effect in the creation of the estate, one having a limited estate in land cannot, as against the person entitled in reversion or remainder, create an estate to endure beyond the normal time for termination of his own estate. This self-evident principle has been applied in the case of the making of a lease for years by a tenant for his own or another's life, the rights of the remainderman or reversioner being recognized as superior to any claim on the part of the lessee."

In *Sanders v. Sutlive Bros.,* 187 Iowa, 300, the first headnote states the pertinent holdings in these words: "A lease made by a life tenant terminates upon his death." In the annotation of this case in 6 A. L. R., 1513, the cases cited as holding fixtures erected by lessee of life tenant not removable after death of lessor are *Jones v. Shufflin,* 45 W. Va., 729; *White v. Arndt,* 1 Whart. (Pa.), 91; *Demby v. Parse,* 53 Ark., 526; *Hafflick v. Stober,* 11 Ohio St., 482; while *Ray v. Young,* 160 Iowa, 613, holds the contrary view.

In *Jones v. Shufflin,* 45 W. Va., 729, it appeared that after the death of the life tenant the lessee sought to remove a building which he had erected on a lot leased him by the life tenant. The lessee's claim was based on the law of fixtures. The Court said: "The law is well settled that the remainderman is entitled to the property with all improvements thereon at the expiration of the life tenancy. . . . This rule prevails more strictly between tenant for life or his lessee and the remainderman, the latter of whom is not bound by any agreement between the tenant for life and his lessee under which the lessee may have erected buildings on the land. The plaintiff, being entitled to the remainder, and not having consented to the lease, is in no wise bound thereby, and the improvements come to her as though they had been placed thereon by a stranger. If a building is erected on land against the will of the landowner, or without his consent, it becomes realty, and cannot be removed therefrom without the commission of waste. The defendant in this case acted with open eyes."

In *Matlock v. Kline,* 280 Mo., 139, the Court used this language: "The unquestioned limitation of the estate of the life tenant does not preclude him from making a lease for any number of years, as it will be held valid only during his life, terminate at his death, and have no effect upon the estate of the remainderman."

The question involved in *Hafflick v. Stober,* 11 Ohio St., 482, was the claim of the lessee of the life tenant after the determination of the life estate to remove a barn erected by him on leased premises. This was denied under authority of *White v. Arndt,* 1 Wharton's Rep., 91, the Court holding the remainderman "was not bound by any agreement between the tenant for life and his lessee under which the lessee may have erected buildings on the land." The Court in this case also said: "The general rule is, that the tenant must remove fixtures put up by him before he quits the possession on the expiration of his lease; if not removed during the term, they become the property of the landlord (citing authorities). In the case of tenants for life and at will, however, whose terms, from the nature of the tenancy, are of uncertain duration, this rule is relaxed, and they, or their representatives, have been allowed the right to remove fixtures after the expiration of their term. *Lawton v. Lawton,* 3 Atk., 13. But cases of this kind have, so far as we can ascertain, been confined to fixtures which the tenant was entitled to remove as a matter of legal right, without reference to any contract on the subject; and *White v. Arndt,* above referred to, is a direct authority against the extension of such right of removal, after the expiration of the term, to things which cannot be removed except in virtue of a special contract."

Apparently the Court here sought to draw a distinction between those cases where personal property as such was attached to the freehold, and

those cases where the fixtures were essentially realty and could be regarded as personalty only by reason of a special contract to that effect. We deem it unnecessary here to pursue this line of distinction or rest our decision upon it. We think the effect of the death of the life tenant was the extinguishment of the estate for years. *Matter of O'Donnell,* 240 N. Y., 99. See also *Stewart v. Matheny,* 66 Miss., 21; *Sanders v. Sutlive Bros.,* 163 Iowa, 172; *Scurry v. Anderson,* 191 Iowa, 1058.

The interveners cite *Ray v. Young,* 160 Iowa, 613, in support of their position. In that case the facts were in many respects similar to those in the case at bar. The defendant Young rented in 1909, a shop on a lot belonging to the life tenant for one year with privilege of five with "privilege of adding to this building and removing same at expiration of lease." The rent was paid to 1 January, 1912. Lessee erected a building for use as garage and repair shop in good faith and without knowledge that the lessor had only a life estate. The life tenant died June, 1911, and the defendant remained in possession throughout 1911 with the acquiescence of the remainderman. Thereafter lessee's attempt to remove the building he had erected was restrained at the suit of the remainderman. The Supreme Court reversed, the Court holding that the lessee had a reasonable time after the death of the life tenant within which to remove the building. In coming to this conclusion the Court seems to have been influenced by what it regarded as the equitable rule, under the facts of that case, as against what it termed the absolute legal right of the remainderman.

In the case at bar, however, the interveners took their lease and erected permanent buildings with full knowledge that the lessor had only a life estate. It was so stated in the leases. And to protect themselves against the contingency of the death of the life tenant during the term they required of her bonds aggregating $70,000. The penalty of these bonds was to be decreased each year conformable to the length of the term "to the date or time when the lessees shall be put out of possession of said property."

The interveners also cite *Merrell v. Garver,* 54 Ind. App., 514, but we do not think this case lends material support to their position. There the assignee of the lessee was held entitled to claim a barn and shed as personalty against the remainderman, but the lease and contract under which the buildings were erected, with right of removal, were executed by the ancestor from whom the remaindermen derived their title. In that case the Court said: "It may be stated as a general proposition of law that permanent improvements made by a life tenant cannot be charged to the remainderman without his consent, express or implied, and that upon the termination of the life estate such improvements pass as part of the realty." See also *Bache v. Coal Co.,* 127 Ark., 397.

The doctrine of fixtures has been frequently considered by this Court, but none of the decisions bear directly on the question here presented. These cases usually arose out of the relationship of landlord and tenant, or where the claim for the removal of fixtures which had been attached to the freehold by the tenant was based upon an agreement or understanding express or implied on the part of the owner. *Pemberton v. King,* 13 N. C., 376; *Feimster v. Johnson,* 64 N. C., 259; *Moore v. Vallentine,* 77 N. C., 188; *Sanders v. Ellington,* 77 N. C., 255; *Overman v. Sasser,* 107 N. C., 432, 12 S. E., 64; *Causey v. Plaid Mills,* 119 N. C., 180, 25 S. E., 253; *Causey v. Orton,* 171 N. C., 375, 88 S. E., 513. See also *Greenville v. Base Ball Club,* 205 S. C., 495, 32 S. E. (2d), 777.

There is authority for the position that by agreement between the lessor and lessee with respect to fixtures attached to the land for the purpose of trade, so as to constitute trade fixtures within the meaning of the law, structures which would otherwise be classified as realty may become impressed with the character of personalty even as against third parties. But we do not think the circumstances here are such as to invoke that principle in favor of the interveners. *Hafflick v. Stober, supra; Jones v. Shufflin, supra.* In *R. R. v. Deal,* 90 N. C., 110, the right of the railroad, after abandonment of right of way, to remove a depot building, as against the claim of the owner of the land, was upheld. And in *Springs v. Refining Co.,* 205 N. C., 444, 171 S. E., 635, involving rights to fixtures as between landlord and tenant, *Chief Justice Stacy* in writing the opinion upheld "the right of the tenant to show the intention of the parties, if contrary to the strict rules of the common law."

It seems to be generally held that what is a fixture and its incidents are to be determined by the manifested intention of those concerned. *Pennington v. Black,* 261 Ky., 728; *Meig's Appeal,* 62 Pa., 28; *Davis v. Eastham,* 81 Ky., 116; *In re Shelar,* 21 F. (2), 136; *Cameron v. County Gas & Oil Co.,* 277 Mich., 442; *Demby v. Parse,* 53 Ark., 526; *Biallas v. March,* 305 Mich., 401; *Schultz v. Motor Co.,* 243 Ky., 459; *San Diego Bank v. San Diego Co.,* 105 P. (2), 94; 77 A. L. R., 1400. However, as was said in *Dobschultz v. Holliday,* 82 Ill., 371, "No doubt the parties could agree among themselves they would treat the engine and other fixtures as personalty, but their private agreement could not change the character of the property so far as the remaindermen were concerned." This statement was quoted with approval in *U. S. v. 19.86 acres of land,* 141 F. (2), 344.

There is no privity here between the lessees of the life tenant and the remaindermen. In *Bogle v. R. R.,* 51 N. C., 419, *Chief Justice Pearson* remarked, "If a tenant for life of land make a lease for years and dies, the term for years is so utterly void as not even to be capable of confirmation by the remaindermen." On death of the life tenant her lessee did not become the lessee of the remaindermen. "In absence of any

agreement between the parties there is no obligation on the part of the lessor to pay the lessee for improvements erected by the lessee upon the demised premises, though the improvements are such that by reason of annexation to the freehold they become part of the realty and cannot be moved by the lessee." *Barnhill, J.*, in *Brown v. Ward,* 221 N. C., 344, 20 S. E. (2d), 324, quoted with approval in *Pitt v. Speight,* 222 N. C., 585, 24 S. E. (2d), 350. What was said in *Belvin v. Paper Co.,* 123 N. C., 138, 31 S. E., 655, with respect to rights of the lessee to remove fixtures from the land may not be held applicable to a lessee of the life tenant who has died and where rights of remaindermen have intervened, in respect to buildings of the character shown in this case. The personal property of the lessees and those articles used in connection with the premises but which did not become a part of the realty did not pass to the remaindermen. See also *Best v. Hardy,* 123 N. C., 226, 31 S. E., 391. Articles of personal property affixed to the freehold for the better temporary use of the realty are usually treated as trade fixtures, and the intent with which they are so placed becomes material. *Horne v. Smith,* 105 N. C., 322, 11 S. E., 373.

While the decision of the question here presented, and ably argued on both sides, is not without difficulty, we reach the conclusion that we should not depart from the well settled principles of the law of real property in order to aid the interveners in a situation in which they have been placed as result of a contingency which they had fully considered, and against which they undertook to make provision by the requirement of bonds from their lessor. Nor may the fact that interveners remained in possession for several months before action was taken by remaindermen to assert their title be held to bar them or constitute acquiescence. *Stewart v. Matheny,* 66 Miss., 21.

For the reasons stated, the ruling of the court below that interveners were entitled to remove the buildings from lots 1 and 2 described in the petition must be held for error. So much of the judgment below as adjudges the title of appellants to the land described in the petition and remands the cause to the clerk of the Superior Court of Durham County for further orders with respect to the sale of said lands is affirmed. The costs of the appeal will be taxed against the interveners.

Modified and affirmed.

J. F. DILLON, W. L. GRAHAM, P. L. RHODES, S. H. HONEYCUTT, C. D. WERNER, C. J. BALDWIN, G. H. SIKES, C. C. THOMAS, TRUSTEES OF CHARLOTTE FIREMEN'S RETIREMENT FUND ASSOCIATION, v. J. H. WENTZ, MRS. A. E. MOODY, MRS. PANSY F. CASHION, GUARDIAN OF PRUETT L. BLACK, JR., J. M. MUNDAY, J. C. PALMER, AND W. H. PALMER, DEFENDANTS ON BEHALF OF THEMSELVES AND AS REPRESENTATIVES OF THE MEMBERSHIP OF THE CHARLOTTE FIREMEN'S RETIREMENT FUND ASSOCIATION, AND ALL CLASSES OF CLAIMANTS AGAINST SAID ASSOCIATION.

(Filed 31 January, 1947.)

1. Municipal Corporations § 11½: Mutual Benefit Associations § 1—

An organization of municipal firemen operated under private laws of the Legislature (ch. 12, Private Laws of 1933; ch. 307, Private Laws of 1941) which is under the exclusive control of the active members thereof and the trustees elected by them, and which requires a two-thirds vote of the active members to authorize the municipality to make deductions from salaries of the firemen for the benefit of the association, is an unincorporated mutual benefit association.

2. Municipal Corporations § 11½: Mutual Benefit Associations § 4—

Where firemen of a municipality are required to be members of an unincorporated mutual benefit association whose funds are raised entirely by contributions from its members without municipal participation therein, *held* upon abandonment of the purposes of the association by common consent, the members of the municipal fire department are not legally bound to continue making contributions to the association.

3. Mutual Benefit Associations § 6—

An unincorporated mutual benefit association of firemen of a municipality operating under private laws to provide retirement benefits to its members may be discontinued and its assets liquidated under an amendment or repeal of the private laws upon abandonment of its purposes by common consent. Ch. 423, Session Laws of 1945.

4. Mutual Benefit Associations § 5—

A member of a mutual benefit association has a mere expectancy and no vested right in its assets until a claim for benefits under the provisions of the association has matured.

5. Same—

Where the retirement fund of an unincorporated mutual benefit association is created wholly or in part from contributions by its members, an accrued annuity or benefit, unlike a pension, constitutes a vested interest in the assets of the association.

6. Mutual Benefit Associations § 6—

Upon the dissolution of an unincorporated mutual benefit association of firemen of a municipality, those members or their dependents who have accrued annuities or benefits, either under the provisions of the original organization or under an amendment authorizing benefits for non-service

connected disabilities or for refund of a part of their contributions upon dismissal or resignation from the fire department (ch. 307, Private Laws of 1941) have a vested right, and their claims must be satisfied in full before distribution of the remainder of the assets to the active members. Transfer of membership to the State Retirement System cannot extinguish such vested rights.

7. Same—

Upon the dissolution of an unincorporated mutual benefit association, accrued claims may be satisfied by computing the present cash value of an annuity under provisions of the mortuary tables, and it is not necessary that the total assets of the association be held in trust for the payment of such claims.

8. Appeal and Error § 6a—

Where judgment is entered in accordance with prayer of a party, notwithstanding that his prayer for relief be in the alternative, such party is not entitled to challenge the correctness of the provisions of the judgment inserted at his request or in conformity with his prayer.

APPEAL by defendants J. H. Wentz and Lawrence B. Yandle, by and through his guardian J. M. Yandle, from *Olive, Special Judge,* at May Term, 1946, of MECKLENBURG.

This is an action instituted by the trustees of the Charlotte Firemen's Retirement Fund Association, for the dissolution of the Association and the distribution of its assets in the approximate sum of $60,000.00.

It was agreed by all parties that the court should hear this cause without a jury.

The pertinent facts upon which judgment was entered below, are as follows:

On 7 March, 1932, certain members of the Fire Department of the City of Charlotte, N. C., entered into a written agreement, under the terms of which they were to make contributions from their salaries to a fund for the purpose of providing benefits upon retirement and for disability. However, no benefits were granted under the provisions of the agreement.

The Association obtained the passage of an Act which is Chapter 12 of the Private Laws of 1933, entitled: "An Act to Establish for the City of Charlotte, the Charlotte Firemen's Retirement Fund Association." The fund created under the voluntary agreement was administered under the provisions of the Act. The Act provided for the payment of certain benefits to members of the Association, upon retirement after twenty years' service; provided the member had reached the age of fifty-five years. It also provided for the payment of benefits to members of the Association who might be retired on account of injury or disease incurred in line of duty irrespective of length of service. The Act further provided for the payment of benefits to the widow and

minor children under sixteen years of age, of a deceased member of the Association.

Under the terms of this Act, in the event a member of the Association resigned or was dismissed from the Charlotte Fire Department, he forfeited all his rights or interest in and to the fund.

The above Act was amended by Chapter 307, Private Laws of 1941, so as to require a refund of seventy-five per cent of all moneys a member had paid into the Association in the event of dismissal or resignation from the Charlotte Fire Department. This Act also provided for the payment of certain benefits to members for disability incurred not in line of duty as a fireman of the City of Charlotte.

The City of Charlotte made no financial contribution to the Association. Both Acts authorized the Treasurer of the City of Charlotte to make a monthly deduction from the salary of each member due him by the City of Charlotte, not to exceed five per cent of his monthly salary, said deduction not to exceed $10.00, and to turn the proceeds over to the Treasurer of the Board of Trustees of the Association. The per centum of monthly deductions from the salary of each member of the Association had to be determined by a two-thirds vote of the active membership of the Association. All regular members of the Fire Department of the City of Charlotte were required to be members of the Charlotte Firemen's Retirement Fund Association.

The income of the Association for the years 1944 and 1945 was not sufficient to pay the benefits due and payable by it during those years.

Chapter 423 of the 1945 Session Laws of North Carolina, provided for the discontinuance of the Association in the event the City of Charlotte elected to have its employees become eligible for membership in the North Carolina Local Governmental Employees' Retirement System. This Act also authorized the institution of an action in the Superior Court of Mecklenburg County, to determine whether the Association should be dissolved, and, if so, how its assets should be distributed.

In November, 1945, seventy-nine out of the ninety-nine members on active duty with the Charlotte Fire Department voted to make no further contributions to the Association, and so notified the Treasurer of the City of Charlotte. All deductions for the benefit of the Association were discontinued as of 15 December, 1945.

The City of Charlotte entered the North Carolina Local Governmental Employees' Retirement System 1 February, 1946.

J. H. Wentz, one of the appellants herein, and four others were receiving benefit payments on 15 December, 1945, pursuant to the provisions of the 1933 Act.

Lawrence B. Yandle, the other appellant herein, and two others, were receiving benefit payments on the above date pursuant to the provisions of the 1941 Act. Yandle's disability was not incurred in line of duty.

No other person had any matured claim against the Association at the time of the hearing below.

At the close of the evidence the appellants tendered the following prayer for judgment: "The defendants, J. H. Wentz and J. M. Yandle, guardian for Lawrence B. Yandle, in apt time request the Court to adjudge that all of the assets held by the plaintiffs as trustees of the Charlotte Firemen's Retirement Fund Association, be held as a trust fund for payment of benefits to J. H. Wentz in the amount of $100 per month, and to J. M. Yandle, guardian of Lawrence B. Yandle, in the amount of $40 per month so long as they shall be entitled thereto, and that none of said assets be paid out by said trustees for any purpose whatever except for the payment of said benefits to said J. H. Wentz and J. M. Yandle, guardian of Lawrence B. Yandle, and to others who are entitled to draw monthly benefits from said fund, and for payment of expenses from said funds authorized by law, and that the Court enjoin said trustees from paying any of said funds to any members of the Fire Department who in past years contributed to said fund but voluntarily stopped contributions thereto in violation of the law creating the fund, and who are still members of the Fire Department and therefore under the provisions of the law not being entitled to any refund; and defendants, J. H. Wentz and J. M. Yandle, guardian for Lawrence B. Yandle, further pray the Court to adjudge, if the Court does not hold as above prayed, that the present cash value of an income of $100 per month for J. H. Wentz and the present cash value of a monthly income of $40 to Lawrence B. Yandle, be determined under the mortuary tables of the State of North Carolina according to their ages on the date of judgment in this cause and that the present cash value so determined be paid to them in full out of the assets in the hands of said trustees before any distribution of any part thereof is made to any persons other than those who are at present entitled to draw monthly benefits from the fund and who are similarly entitled to their respective present cash value."

Prayer refused by the court, except as embodied in the judgment of the court.

Based upon the foregoing facts, the court found as a matter of law "that the Association has been rendered insolvent or in imminent danger thereof, that it has abandoned the objects and purposes for which it was organized, that there is no practical method by which its existence could be continued without injury to its members, and that its right to continued existence has been forfeited, and that the dissolution thereof, the liquidation of its assets and the distribution of its funds in the manner hereinafter set forth is equitable, fair and just to all parties to this action."

Whereupon his Honor signed judgment dissolving the Association and directing, among other things, that all the benefits payable monthly for

life to retired members of the Association, under the provisions of the 1933 Act shall be paid in full, the present cash value of such monthly income as may be determined under the mortuary tables of the State of North Carolina according to their ages on 15 December, 1945; and further directing that those receiving similar benefits pursuant to the provisions of the 1941 Act, shall have the present cash value of their respective benefits determined in like manner, but that the claims of such beneficiaries shall be paid *pro rata* with the claims of the active members of the Association, as of 18 March, 1946. The respective claims of the active members of the Association were ordered to be ascertained on the basis of seventy-five per cent of the total sum each member has paid into the Association.

The defendants J. H. Wentz and J. M. Yandle, guardian for Lawrence B. Yandle, in apt time, filed exceptions to the findings of fact and conclusions of law as set forth in the judgment, and appealed to the Supreme Court, assigning error.

Brock Barkley for W. H. Palmer and other active members of Charlotte Fire Department and Charlotte Firemen's Retirement Fund Association.

Goebel Porter, Frank H. Kennedy, and Nathaniel G. Sims for J. H. Wentz and J. M. Yandle, Guardian for Lawrence B. Yandle.

DENNY, J. The City of Charlotte having elected to have its employees become eligible for participation in the North Carolina Local Governmental Employees' Retirement System, and its active firemen having joined said System, the question presented on this appeal is: Shall the Charlotte Firemen's Retirement Fund Association be dissolved and its assets liquidated, and, if so, how shall the assets of the Association be distributed?

A careful consideration of the Acts under which this Association operated leads us to the conclusion that its status was that of an unincorporated mutual benefit association. And when the operations of such an association have been discontinued and its purposes abandoned by common consent, "a court of equity will decree its dissolution and distribute such assets as remain, after the payment of its indebtedness, among its members according to the amount contributed or paid by each." 38 Am. Jur., 589. The Association at all times was under the exclusive control of the active members thereof and the trustees elected by them. The City of Charlotte had no authority to make any deductions from the salaries of its firemen for the benefit of the Assosciation, until the firemen themselves by a two-thirds vote of the active members thereof, fixed the amount to be deducted from their respective salaries. The City of Charlotte at no time had any interest in or control of the funds of the

Association. Therefore, the contention of the appellants that the members of the Fire Department of the City of Charlotte are legally bound to continue making contributions to the Association for the benefit of the appellants and other beneficiaries of the Association, is without merit. It is the general rule that laws creating benefits of this character may be amended or repealed, and that mutual benefit associations may be discontinued and their assets liquidated. And until a member of such an Association has a matured claim within the terms of the Act creating the fund, he has no vested right therein. His interest in the fund is a mere expectancy. *Pennie v. Reis,* 132 U. S., 464, 33 L. Ed., 426; *Passaic Nat. Bank & Trust Co. v. Eelman,* 116 N. J., 279, 183 Atl., 677; *Retirement Board of Alleghany County v. McGovern,* 316 Penn., 161, 174 A., 400; *Griffith v. Rudolph,* 298 Fed., 672.

The question as to whether or not the assets of this Association could be transferred to and administered by the North Carolina Local Governmental Employees' Retirement System, under the provisions of G. S., 128-25, is not raised or presented on this appeal. Hence, we think on the record before us, the court very properly ordered the dissolution of the Association.

If the appellants were mere pensioners and their pensions were being paid by the City of Charlotte out of tax funds, they would have no vested interest which could be enforced as to future payments. 40 Am. Jur., 981. "No person has a vested right to his pension. Pensions are the bounties of the government, which Congress has the right to give, withhold, distribute, or recall, at its discretion." *Walton v. Cotton,* 60 U. S., 19, 15 L. Ed., 658; *U. S. v. Teller,* 107 U. S., 64, 27 L. Ed., 352; *Frisbie v. U. S.,* 157 U. S., 160, 39 L. Ed., 657; 54 A. L. R., 943n. Pensions are charitable gifts. *In re Smith,* 130 N. C., 638, 41 S. E., 802; *People ex rel. Donovan v. Retirement Board Policemen's Annuity & Benefit Fund,* 326 Ill., 579, 158 N. E., 220, 54 A. L. R., 940; *Re Snyder,* 93 Wash., 59, 160 Pac., 12, affirmed in 248 U. S., 539, 63 L. Ed., 410. But a different situation arises where the annuity or benefit has accrued and is payable out of a retirement fund created wholly or in part from contributions made by the members of the retirement system. *Stevens v. Minneapolis Fire Department Relief Asso.,* 124 Minn., 381, 145 Minn., 35; *Trotzier v. McElroy,* 182 Ga., 719, 186 S. E., 817; *Retirement Board of Alleghany County v. McGovern, supra.*

The appellants and other beneficiaries whose claims had accrued and who were receiving life benefits from the Association at the time the order for its dissolution was signed, have a vested interest in the accumulated assets of the Association. Such claimants, whether receiving benefits under the 1933 or 1941 Act, are entitled to have their claims satisfied in full before the active members of the Association are entitled to receive anything. For so long as this Association was functioning, its

active members had no vested interest in its assets. Under the terms of the 1941 Act, it was necessary for a member to resign or be dismissed, not as a member of the Association, but as a member of the Fire Department of the City of Charlotte, in order for him to be entitled to a refund of seventy-five per cent of all moneys he had paid into the Association. The transfer of his membership from this Association to the State Retirement System is not tantamount to a resignation or dismissal from the Fire Department of the City of Charlotte. Consequently, the judgment of the court below is erroneous in so far as it holds that the claims of the beneficiaries under the 1941 Act and the claims of the active members for a refund of seventy-five per cent of the total contributions made by them to the Association, are on a parity and should be paid *pro rata*.

The active firemen of the City of Charlotte, who were members of this Association on 18 March, 1946, regardless of their present status of employment, are entitled to receive *pro rata* on the total of their respective contributions to the Association, all the remaining assets of the Association after the matured claims referred to above have been satisfied in accordance with the judgment of the court below as modified herein.

Finally, the appellants insist that the assets of this Association should not be liquidated but held intact by its trustees as a trust fund, for the payment of the monthly benefits of those whose claims have vested or matured prior to the institution of this action. In this we do not concur.

Moreover, the appellants are not in a position to object to that portion of the judgment below which provides for the payment of their claims on the basis of their cash value as of 15 December, 1945, as may be determined under the mortuary tables of the State of North Carolina, according to the age of the respective claimants on the above date. The judgment in that respect is in conformity with their prayer, and they are bound thereby. *Johnson v. Sidbury*, 226 N. C., 345, 38 S. E. (2d), 82; *Carruthers v. R. R.*, 218 N. C., 377, 11 S. E. (2d), 157. "A party cannot complain of an instruction given at his own request." *Bell v. Harrison*, 179 N. C., 190, 102 S. E., 200. Neither should he be permitted to challenge the correctness of provisions contained in a judgment which were inserted at his request or in conformity with his prayer. Ordinarily an appeal will not lie from an order entered at the request of a party, and "it is immaterial that such request was in the alternative," *Larson v. Hanson*, 210 Wis., 705, 242 N. W., 184. *Boyer et al. v. Burton*, 79 Ore., 662, 149 Pac., 83; *Silcox v. McLean*, 36 N. M., 196, 11 Pac. (2d), 541; *Schoren v. Schoren*, 110 Ore., 272, 222 Pac., 1096; *Blumenfeld & Co. v. Hamrick*, 18 Ala. App., 317, 91 Sou., 914; *In re Gurnsey's Estate*, 61 Cal., 178, 214 Pac., 487; *State v. Howell*, 139 La., 336, 71 Sou., 529.

The judgment of the court below, except as modified herein, is affirmed. Modified and affirmed.

PATUXENT DEVELOPMENT CO. v. ELLEN L. BEARDEN, ADMINISTRATRIX OF THE ESTATE OF O. H. STUTTS, DECEASED, AND ELLEN L. BEARDEN, INDIVIDUALLY.

(Filed 31 January, 1947.)

1. Pleadings § 30—

The court is bound to strike from a pleading matters which are irrelevant or redundant within the purview of G. S., 1-153, when motion therefor is made within the statutory period, the relief being a matter of right and not of discretion in such instance.

2. Pleadings § 31—

Where the facts alleged as a basis for a purported second cause of action are insufficient to constitute a cause of action, they should be stricken upon motion aptly made, since such matters are irrelevant and redundant as to the first cause of action and would tend to confuse the issue raised by it.

3. Fraud § 9—

To state a cause of action for legal fraud the complaint must set out with sufficient particularity facts from which legal fraud arises.

4. Same—

To state a cause of action for actual fraud, the complaint must allege fraudulent intent and the acts constituting the fraud.

5. Executors and Administrators § 13g: Trusts § 5b—

An administrator acts in a fiduciary capacity in the control and disposition of assets of the estate and he cannot purchase assets at a sale under order of court to his own profit and the detriment of the estate.

6. Same: Fraud § 9—

Allegations that an administratrix arranged to have stock of a corporation owned by the estate and sold under order of court transferred to her, without stipulating whether the stock was purchased directly at the sale or from one who was a *bona fide* purchaser at the sale, is insufficient to state a cause of action.

7. Executors and Administrators §§ 13g, 15h: Judgments § 27c—

The attack, on the ground of fraud, of the allotment to the widow of property as a part of her year's allowance, and of the sale of personalty of the estate, ordered and confirmed by the court, is an attack upon judgments requiring allegation and proof of actual fraud.

8. Executors and Administrators § 15g: Fraud § 9—

In an action by a creditor of the estate, allegations that the administratrix "arranged" to have a share of stock belonging to the estate allotted to

the widow as a part of her year's allowance at a nominal sum regardless of its true worth, without allegation of fraudulent intent and without particularizing the fraudulent acts, is insufficient to state a cause of action to have the allotment set aside on the ground of fraud.

9. Executors and Administrators § 13g: Fraud § 9—

Allegations that the administratrix sold assets of the estate under order of court for a nominal amount when she knew or should have known that the assets were solvent and could and should have been collected in full, without allegation of fraudulent intent, are insufficient in an action by a creditor of the estate to have the sale set aside.

10. Fraud § 9—

Where in an action against an administratrix the facts alleged do no more than raise a suspicion of wrongdoing, however grave, they are insufficient to state a cause of action for fraud, and allegation that the acts of defendant were "a fraud upon the court" and "a fraud upon the creditors" of the estate, is a mere conclusion of the pleader or a *brutum fulmen.*

APPEAL by defendants from *Armstrong, J.,* at February Term, 1946, of MOORE.

The plaintiff's pleading purports to set up several related causes of action in 22 paragraphs, which we attempt to analyze and summarize rather than quote in full.

First: Paragraphs 1-6, complaint alleges an indebtedness claimed to be due the plaintiff by the intestate Stutts, in the sum of $3,614.64, which, it is said, has been presented to the defendant administratrix in itemized form and refused payment.

Second: In paragraphs 7-22, under the heading "Second Cause of Action," are grouped allegations of administrational and personal misconduct on the part of the defendant affecting her liability to the plaintiff in the following manner:

1. It is alleged that defendant's intestate had organized a company known as the "Locklear Investment Corporation," and procured the same to be incorporated, with three shares of stock, two of them qualifying shares in the hands of the attorney and secretary of the concern, respectively. These shares of stock, it is alleged, carried with them the ownership of a valuable house, furnishings, lots and curtilage in the Knollwood settlement in Moore County. The corporation, it is said, belonged to Stutts and entitled him, at his death, to be in possession of all the stock. The corporation is described in one paragraph as a "going concern," and in another as "dormant." That defendant "in furtherance of her duties," filed a petition with the clerk of the Superior Court for permission to sell "certain shares of stock" at private sale and report to the court. It is alleged that after $500 had been paid for release of the stock, the defendant "arranged" to have one share allotted to the widow of Stutts, who is defendant's sister, as part of her year's allowance

at the nominal sum of $25; and "arranged" to have the remaining shares transferred to her, the defendant, in her individual capacity, regardless of their true worth.

2. That defendant administratrix had petitioned the court to order a sale at auction of sundry accounts receivable, assets of the estate, reciting that she had been unable to collect them and deemed them insolvent; that they had been thus sold and had been purchased by Hilda L. Stutts, widow of the deceased, for the sum of $25, which sale was reported to the court, reciting that the bid was as much as could be obtained, and was confirmed by the court which so found.

In a separate paragraph, the complaint alleges that defendant "knew or could with diligence have ascertained" that a large number of the accounts receivable, including $1,385.02 against Locklear Investment Corporation, were solvent and could have been collected, in full for the benefit of creditors. And in still another paragraph, alleges that the allotment of one-third of the outstanding capital stock of the Locklear Corporation to the widow at the price of $50 in her year's allowance, the sale of the accounts receivable to a member of administratrix' family for $25, and the securing of a confirmation thereof by the court, was a fraud upon the creditors of the estate, and ought not to stand.

The plaintiff alleges it is entitled to have the order allotting the one share of stock to Hilda Stutts, the widow (who is not a party) vacated; and the orders and decrees under which the accounts receivable were sold by auction to the said Hilda Stutts and the sale confirmed, set aside.

There is no specific allegation in the complaint as to whether the defendant Bearden became the purchaser of the two shares of stock she is alleged to hold directly at the private sale ordered by the court or indirectly from some other person.

The prayer demands: That the defendant Bearden, individually, be declared to hold the stock acquired by her as trustee for the estate of Stutts; that she be required to account for rents received from the property at Knollwood; that the allotment of the stock to Hilda Stutts, and the sale of accounts receivable to her be vacated and set aside.

Within the time provided by the statute the defendant moved to strike out a certain paragraph of the first cause of action, alleging that plaintiff had offered to settle the controversy by arbitration; and all of the stated second cause of action as irrelevant, redundant and prejudicial. The motion was made before the clerk, was resisted by the plaintiff for lack of jurisdiction in that court, and was dismissed on that ground. The defendant appealed to the Superior Court.

At the hearing before the Clerk, the plaintiff voluntarily consented to striking out the references to arbitration in the statement of the first cause of action.

Upon the hearing of the appeal, the defendant, still insisting on her right to have the remaining matter to which objection had been made stricken out, interposed a demurrer *ore tenus* to the part of the complaint denominated as a "Second cause of Action" as not stating a cause of action.

The trial court overruled both the motion to strike and the demurrer. Defendant appealed.

J. Talbot Johnson and Ehringhaus & Ehringhaus for plaintiff, appellee.

U. L. Spence for defendant, appellant.

SEAWELL, J. Since the defendant made her motion to strike within the statutory period her demand to have irrelevant and redundant matter stricken from the complaint comes here for review as a matter of right and not of judicial discretion. G. S., 1-153; *Herndon v. Massey,* 217 N. C., 614, 8 S. E. (2d), 914; *Hill v. Stansbury,* 221 N. C., 339, 20 S. E. (2d), 308; *Patterson v. R. R.,* 214 N. C., 38, 198 S. E., 364. If the matter sought to be deleted is found to be of the character described in the statute, the court has no alternative but to strike it out. It is not only a right of the defendant, but one of the several statutory aids to code pleading, by which the controversy is kept in bounds or confined to the real issues.

In the situation presented by this appeal, it makes little difference whether we give our attention to the motion to strike or to the demurrer, —discussion comes to the same end. If the plaintiff has not stated a cause of action in the second section of the complaint, that part is wholly irrelevant and redundant, and its further presence would confuse the issue upon the alleged indebtedness, with which it has nothing to do.

It will be noted that this part of the complaint purports to attack the validity of the several judgments mentioned on the ground of fraud; and that all of these proceedings, until overthrown, stand as authority for the several acts of the administratrix which are challenged in the complaint.

Whatever may be the facts beyond the complaint, the pleading will be of no avail unless it sets up with sufficient particularity facts from which legal fraud arises or, where proof of actual fraud is necessary to relief, specifically alleges the fraud—that is, the fraudulent intent—and particularizes the acts complained of as fraudulent so that the court may judge whether they are at least *prima facie* of that character. *Hill v. Snider,* 217 N. C., 437, 8 S. E. (2d), 202; *National Cash Register Co. v. Townsend,* 137 N. C., 652, 50 S. E., 306.

Considered as liberally as the statute requires, we are of the opinion that the pleading falls short of precedential standards both with respect

to the allegations of legal fraud, supposing that to be intended, and the still more exacting charges of actual fraud.

(a) It is true that an administrator under court appointment acts in a fiduciary capacity in the control, custody and disposition of the property and assets of the estate, and he cannot, through a divided personality, become the purchaser at his own sale to his own profit and the detriment of those for whom he is trustee. But there is no allegation in the complaint that the defendant administratrix did this; only a charge that she "arranged" to have the stock transferred to her; in what way is left to surmise, whether by purchase at her own sale or from another *bona fide* purchaser and after confirmation.

(b) Regarding the allotment of the share of stock to the widow of Stutts as part of her year's allowance, the complaint goes no further in its particulars than to say plaintiff "arranged" to have it done regardless of its true value; and in regard to the order of sale of insolvent accounts says that the defendant "knew or should have known and with due diligence have ascertained that a large number of said accounts receivable," allegedly aggregating a large amount, "were solvent and could have and should have been collected in full."

It is true that it is said in a separate paragraph that these transactions were "a fraud upon the court" and "a fraud upon the creditors," but standing in the connection made and in the absence of a more specific allegation, this general denunciation may be considered as a conclusion of the pleader, 37 C. J. S., pp. 370-371, or a mere *"brutum fulmen," Anderson Cotton Mills v. Mfg. Co.,* 218 N. C., 560, 11 S. E. (2d), 371.

In order to prevail on either of the items (b) under consideration, actual fraud must be present and, of course, alleged and proved under applicable rules. This requires, as above stated, a specific allegation both of the fraudulent intent and of the acts constituting the fraud; *Waddell v. Aycock,* 195 N. C., 268, 142 S. E., 10. Actual fraud involves corrupt and fraudulent intent,—much more than mere indifference to duty or negligence in its performance, which in the instant case might find relief by resort to the administration bond. The plaintiff, whether from mere politeness or conscientious restraint we need not inquire, has failed to charge such fraudulent intent or to substitute therefor any euphemism of like import, and the specification, if it may be called such, of particulars of the supposed fraudulent transactions are not sufficient to clearly infer actual fraud or to form the basis for the admission of proof of such fraud.

A general denunciation of a course of conduct or a series of transactions as fraudulent which does no more than raise a suspicion of wrongdoing, however grave, is not sufficient to put the defendant to answer or to sustain the pleading upon demurrer.

It is to be noted, as stated above, that we are considering what is virtually an attack made upon the orders and judgments which constitute the authority of the administratrix in the several transactions set forth in the complaint. In view of the conclusion reached we do not find it necessary to discuss the jurisdiction and procedure which may hereafter become matters of importance, and they are not to be considered as foreclosed by want of direct discussion upon this appeal.

The demurrer to the "second cause of action" should have been sustained and the matter stricken from the complaint. The judgment to the contrary in the court below is reversed and the cause is remanded for further proceedings and for such action as the parties may be advised to take.

Reversed and remanded.

CHARLES ARTHUR CRAVER AND LUNA L. CRAVER v. WM. E. SPAUGH, ADMINISTRATOR OF LAURA HANES, DECEASED.

(Filed 31 January, 1947.)

1. Judgments § 33a—

A judgment of nonsuit does not bar a subsequent action on the same cause instituted within one year unless the evidence is substantially identical, and therefore the plea of *res judicata* to the second cause cannot be determined from the pleadings alone. G. S., 1-25.

2. Appeal and Error § 40d—

When the judgment below does not set forth in detail the facts found by the court and there is no request for such findings, it is presumed that the court, upon proper evidence, found the essential facts necessary to support the judgment entered.

3. Judgments § 32—

Where a fact is in issue or its establishment is necessary to support judgment rendered, the judgment is *res judicata* as to such fact even though no specific finding may have been made in reference thereto, and the same matter may not again be litigated by the parties or their privies in the same or any other court.

4. Same—Denial of motion to set aside judgment is res judicata as to matters necessary to determination of the motion.

In an action on claims against an estate defendant administrator pleaded the bar of the statutes of limitations, G. S., 1-52 (1), G. S., 28-112. Plaintiffs in reply pleaded agreement not to plead the statutes. Judgment of dismissal was entered. Plaintiffs moved to set aside the judgment for excusable neglect, G. S., 1-220. The court found that plaintiffs do not have a meritorious cause of action and denied the motion to set aside.

Held: The finding of the court was necessarily predicated upon preliminary determination that the claims were barred and that there was no valid enforceable agreement not to plead the bar of the statutes, and therefore the denial of the motion to vacate is *res judicata* as to these matters and is a bar to a subsequent action by plaintiffs on the same claims.

APPEAL by plaintiffs from *Rousseau, J.*, at September Term, 1946, of FORSYTH. Affirmed.

Civil action heard on plea in bar.

This action was instituted 26 June, 1946, after the opinion in *Craver v. Spaugh,* 226 N. C., 450, was rendered. The first and second causes of action alleged in the complaint in the former action are restated in identical language. The defendant sets up the same defenses pleaded in the former action. In addition he alleges and asserts that plaintiffs are estopped to maintain this action (1) by the judgment of nonsuit or dismissal entered at the February Term, 1946, and, (2) by the judgment of Pless, J., entered at the March Term, denying the motion of the plaintiffs to vacate the judgment entered at the February Term, as affirmed on appeal, *Craver v. Spaugh, supra,* and he pleads said judgments as a bar to any recovery in this action.

On motion of plaintiffs the plea in bar was heard preliminary to trial and sustained. Judgment dismissing the action was entered and plaintiffs appealed.

John J. Ingle and Walser & Wright for plaintiffs, appellants.

Ratcliff, Vaughn, Hudson & Ferrell and T. D. Carter for defendant, appellee.

BARNHILL, J. The judgment dismissing the former action entered at the February Term, 1946, is not, on this record, a bar to the maintenance of this action. G. S., 1-25. A former judgment of nonsuit is *res judicata* as to a second action when and only when it is made to appear that the second action is between the same parties, on the same cause of action, and upon substantially the same evidence. *Hampton v. Spinning Co.,* 198 N. C., 235, 151 S. E., 266; *Batson v. Laundry,* 206 N. C., 371, 174 S. E., 90. The plea cannot be determined from the pleadings alone. *Dix-Downing v. White,* 206 N. C., 567, 174 S. E., 451; *Buchanan v. Oglesby,* 207 N. C., 149, 176 S. E., 281; *Batson v. Laundry, supra; Hampton v. Spinning Co., supra.*

Does the judgment entered at the March Term, denying the motion of plaintiffs to vacate the judgment of dismissal, as affirmed by this Court, *Craver v. Spaugh,* 226 N. C., 450, bar the plaintiffs' right to maintain this action? We are constrained to answer in the affirmative.

There were two ultimate questions of fact at issue at the hearing on that motion: (1) excusable neglect, and (2) meritorious cause of action. On the second question the court found as a fact that "the plaintiffs do not have a meritorious cause of action, and have no reasonable hope of successfully prosecuting their alleged claims." The full import of this conclusion can be appraised only by a review of the particular facts upon which it was based.

The alleged cause of action for services rendered was barred by the three-year, G. S., 1-52 (1), and the six-months, G. S., 28-112, statutes of limitations at the time the first action was instituted 8 September, 1945, unless there was a valid and enforceable agreement not to plead such statutes in defense. It does not clearly appear whether the claim on which the second cause of action is bottomed was asserted in the claim filed 10 July, 1942. If so, it is barred by G. S., 28-112, and if not, the alleged conversion occurred more than three years prior to the institution of the first action to recover therefor. G. S., 1-52 (1). So then, this claim was likewise stale and unenforceable unless kept alive by the asserted contract not to plead the statutes of limitations.

It follows that before the court below could conclude or find plaintiffs had no meritorious cause of action it was compelled to make the preliminary particular finding (1) that the asserted claims were barred by the statutes of limitations pleaded by defendant, and (2) there was no valid enforceable agreement by defendant not to plead the bar of said statutes.

When the judgment below does not set forth in detail the facts found by the court and there is no request for such findings, it is presumed that the court, upon proper evidence, found the essential facts necessary to support the judgment entered. *McCune v. Mfg. Co.*, 217 N. C., 351, 8 S. E. (2d), 219, and cases cited.

When a fact has been directly tried and decided it cannot be contested again between the same parties or their privies in the same or any other court. *Bennett v. Holmes,* 18 N. C., 486; *Armfield v. Moore,* 44 N. C., 157; *Dawson v. Wood,* 177 N. C., 158, 98 S. E., 459; *McKimmon v. Caulk,* 170 N. C., 54, 86 S. E., 809; *Nash v. Shute,* 182 N. C., 528, 109 S. E., 353; *Crawford v. Crawford,* 214 N. C., 614, 200 S. E., 421; *Current v. Webb,* 220 N. C., 425, 17 S. E. (2d), 614; *Harshaw v. Harshaw,* 220 N. C., 145, 16 S. E. (2d), 666; *Bryant v. Shields,* 220 N. C., 628, 18 S. E. (2d), 157; *Cleve v. Adams,* 222 N. C., 211, 22 S. E. (2d), 567.

"It is a fundamental principle of jurisprudence that material facts or questions which were in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment therein, and that such facts or questions become *res judicata* and may not again be litigated in a subsequent action between the same parties . . .,

regardless of the form the issue may take in the subsequent action . . ." 30 A. J., 920.

This rule prevails as to matters essentially connected with the subject matter of the litigation and necessarily implied in the final judgment, although no specific finding may have been made in reference thereto. If the record of the former trial shows that the judgment could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties. 30 A. J., 929.

At the hearing on the motion to vacate the former judgment the bar of the statutes of limitations and the existence of an enforceable agreement not to plead such statutes were decisive questions directly at issue. If the plaintiffs did not offer all available evidence on these questions they refrained from so doing at their peril. *Jefferson v. Sales Corp.*, 220 N. C., 76, 16 S. E. (2d), 462; *Mfg. Co. v. Moore,* 144 N. C., 527. As to them, they have had a day in court and an opportunity to be heard. The facts found by the court at that hearing are conclusive. They preclude any recovery in this cause.

Therefore, the judgment below must be

Affirmed.

STATE v. EUGENE HAMILTON LEWIS MUMFORD.

(Filed 31 January, 1947.)

1. Burglary §§ 2, 3—

Burglary is a common law offense, the elements of which are the breaking and entering during the nighttime of a dwelling or sleeping apartment with intent to commit a felony therein. Whether the building is occupied at the time affects only the degree. G. S., 14-51.

2. Burglary § 4—

House breaking or nonburglarious breaking is a statutory and not a common law offense, G. S., 14-54, and under the statute it is unlawful to enter a dwelling with intent to commit a felony therein, either with or without a breaking.

3. Burglary § 14—

In a prosecution for nonburglarious entry, evidence of a breaking, when available, is always relevant, but proof of a breaking is not essential to sustain conviction, and therefore nonsuit for want of such evidence is properly denied.

APPEAL by defendant from *Williams, J.*, at July Term, 1946, of DURHAM. No error.

Criminal prosecution under two bills of indictment consolidated for the purpose of trial, charging (1) an assault with intent to commit rape, and (2) a felonious nonburglarious breaking and entering of the residence of one J. N. Street.

On the morning of 13 July, 1945, all the members of the family of J. N. Street left their home located on Geer Street in the City of Durham. About noon his daughter returned from high school. Finding the front door locked, she entered through a window, changed clothes, and went to the back porch. Noticing that the screen door on the back porch was unlocked, she started to lock it when defendant rushed out of the bathroom which opened on the porch, grabbed her, and began choking her. Finally she broke away and ran. A few days later she identified the defendant as her assailant.

There was evidence tending to show that holes had been punched through the wire screen near the lock to the screen door opening on the back porch, but it does not appear that the lock was disturbed or that the screen door or windows were closed or that a breaking was effected.

The jury returned the verdict of guilty on the charge of housebreaking and guilty of an assault on a female in the felonious assault charge. The court pronounced judgment on each verdict and defendant appealed from the sentence imposed on the verdict under the bill charging a felonious breaking and entering.

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

Fuller, Reade, Umstead & Fuller for defendant, appellant.

BARNHILL, J. The assignments of error relied on by defendant present only one question for decision: Was the evidence offered on the charge of nonburglarious entry such as to warrant the submission of the case to the jury? The answer to this question depends upon whether proof of a breaking is essential to sustain a conviction.

Burglary is a common law offense. To warrant a conviction thereof it must be made to appear that there was a breaking and entering during the nighttime of a dwelling or sleeping apartment with intent to commit a felony therein. That the building was or was not occupied at the time affects the degree. G. S., 14-51.

But defendant is not charged with the crime of burglary. He is indicted under G. S., 14-54. The offense there defined, commonly referred to as housebreaking or nonburglarious breaking, is a statutory, not a common law, offense. *S. v. Dozier,* 73 N. C., 117.

As first enacted this statute simply made it unlawful for a person to willfully break into any storehouse where any merchandise or any personal property is kept, or any uninhabited house, with intent to commit

a felony therein. Chap. 166, Public Laws, 1874-5. In 1879 it was amended so as to make it unlawful also to enter a dwelling house in the nighttime, otherwise than by breaking, with intent to commit a felony. Chap. 323, Public Laws, 1879. In the Code of 1883 the statute, as amended, was redrafted so as to provide in part: "If any person shall break or enter a dwelling house of another otherwise than by a burglarious breaking . . . with intent to commit a felony or other infamous crime therein" he shall be guilty of a felony. Sec. 996, Code 1883; Sec. 3333, Rev. 1905. In 1919 the section was again revised and the language "break and enter" used in reference to uninhabited houses, storehouses and similar buildings was deleted. C. S., 4235.

That section, now G. S., 14-54, is captioned "Breaking into or entering houses otherwise than burglariously" and makes it a crime for any person, with intent to commit a felony therein, to break or enter the dwelling of another, otherwise than by a burglarious breaking; or any uninhabited house; or any storehouse or similar building where personal property shall be.

Thus from the beginning, in respect to a dwelling, it is the entering otherwise than by a burglarious breaking, with intent to commit a felony, that constitutes the offense condemned by the Act. A breaking is not now and has never been a prerequisite of guilt and proof thereof is not required. *S. v. McBryde,* 97 N. C., 393; *S. v. Hughes,* 86 N. C., 662; *S. v. Chambers,* 218 N. C., 442, 11 S. E. (2d), 280.

Under the statute it is unlawful to break into a dwelling with intent to commit a felony therein. It is likewise unlawful to enter, with like intent, without a breaking. Hence, evidence of a breaking, when available, is always relevant, but absence of such evidence does not constitute a fatal defect of proof.

It follows that in overruling the demurrer to the evidence and denying the motion for a directed verdict the court below committed no error. The verdict and judgment must be sustained.

No error.

STATE v. LUTHER FAIRLEY.

(Filed 31 January, 1947.)

1. Criminal Law § 79—

Assignments of error not set out in appellant's brief are deemed abandoned. Rule of Practice in the Supreme Court, No. 28.

2. Homicide § 27f—

There was evidence on behalf of the State that defendant brought on the difficulty or willingly entered into the combat, and evidence on behalf

of defendant that after combat joined he ran up the road, pursued by his antagonist, that defendant motioned his antagonist to stop and did not fire the fatal shot until defendant had retreated some 100 yards. *Held:* An instruction stating the State's contention that defendant was not entitled to perfect self-defense "unless he withdrew from the combat" without reference to defendant's evidence or contention that he did in fact withdraw from the combat must be held for reversible error.

3. Criminal Law § 53k—

Where the court states contention of the State on a particular phase of the case it is error for the court to fail to state defendant's opposing contention arising out of the evidence on the same aspect of the case. G. S., 1-180.

APPEAL by defendant from *Williams, J.*, at January-February Term, 1946, of ROBESON.

Criminal action wherein the defendant Luther Fairley was tried on a bill of indictment charging him with murder, but the solicitor, before the trial, announced that the State would request conviction of no greater degree of unlawful homicide than murder in the second degree. The jury returned a verdict of guilty of manslaughter and the court pronounced judgment thereon that the defendant be imprisoned in the State's Prison for a term of not less than fourteen nor more than eighteen years. From said judgment the defendant appealed, assigning errors.

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

McKinnon & Seawell and L. J. Britt for defendant, appellant.

SCHENCK, J. There are sixteen assignments of error in the record, many of which are taken as abandoned since they are not set out in the appellant's brief. Rule 28, Rules of Practice in the Supreme Court, 221 N. C., 562. Others are brought forward and discussed, but we pass them over except the 11th, which seems to be valid.

Under Exception No. 11, the defendant contends that the trial court committed error in not defining what the jury might consider a withdrawal from an affray willingly entered into. The following, with respect to withdrawal, was charged:

"If you find that the defendant Fairley was willing to enter into and did enter into the combat with the deceased with a deadly weapon, then the defendant would not be excused for taking the life of deceased to save his own life, no matter to what extremity he might be reduced, unless he withdrew from the combat; for he thereby brought the necessity resulting upon himself by his own criminal conduct, and in such event he would be guilty of manslaughter at least."

There is evidence on behalf of the prosecution that the defendant brought on the difficulty, or willingly entered into the combat with the

deceased, and there is also evidence to the effect that the defendant ran up the road with the deceased and Will Baker after him, and that at the time of the fatal shooting the defendant was "backing back, motioning his hand . . . he was turning around in a half run, fast walk, this hand (left hand) like he was motioning for him to go back. . . . I would say George Dixon backed this old colored man down the road about 25 yards . . . Not a soul was hurt and no harm was done until he had run him 100 yards."

This evidence would indicate that the defendant was trying to quit the combat and endeavoring so to notify the deceased. At any rate, it would seem to require an instruction in respect of the defendant's contention about the matter, since the right of perfect self-defense had been denied the defendant, under the above instruction, "unless he withdrew from the combat." This was all that was said on the subject of withdrawing from the combat.

The judge is not required to give the contentions of the parties, but when he undertakes to state the position of one side on any particular phase of the case, it would seem that, in fairness, he ought to state the opposing contentions which arise out of the evidence on the same aspect of the case. And so the law is written. "Having undertaken to tell the jury how they should answer that issue if they found such facts according to plaintiff's contention, it was manifestly incumbent upon the court to state the defendant's contention in respect to such phase of the evidence and to instruct the jury how to answer the issue should they sustain such contention." *Jarrett v. Trunk Co.*, 144 N. C., 299, 56 S. E., 937.

For the deficiency in the charge, as indicated, the defendant is entitled to another hearing. G. S., 1-180. It is so ordered.

New trial.

IN THE MATTER OF THE WILL OF STELLA NEAL.

(Filed 31 January, 1947.)

1. Wills § 15—

A paper writing admitted to probate in common form as the last will and testament of the deceased stands until declared void by a competent tribunal and, until so set aside, stands as against unprobated paper writings previously executed by deceased. G. S., 31-19.

2. Wills § 17—

Where propounders offer for probate separate and inconsistent paper writings successively executed by deceased, and the clerk admits the one executed last in point of time as constituting the last will and testament of deceased revoking all prior wills, and propounders do not prosecute an appeal from the clerk's refusal to admit the prior instruments to probate,

upon caveat to the paper writing probated, caveators are not entitled to an order that the prior paper writings be admitted to probate for the purpose of attacking all of the paper writings in the one action.

APPEAL by propounders from *Harris, J.*, at April Term, 1946, of FRANKLIN.

Motion to amend caveat so as to include other paper writings which purport to be prior wills of Stella Neal, deceased, to the end that the entire issue of *devisavit vel non* may be determined in one proceeding.

On 13 November, 1944, four paper writings, without subscribing witnesses, purporting to be dated respectively, 1 May, 1940, marked Exhibit "D," 4 January, 1943, marked Exhibit "C," 10 April, 1943, marked Exhibit "B," 12 June, 1943, marked Exhibit "A," each purporting to be the last will and testament of Stella Neal, deceased, was offered for probate in the office of the clerk, Franklin Superior Court, and the clerk being of opinion that the last paper writing in point of time, Exhibit "A," constituted the last will and testament of the deceased and revoked all prior wills, admitted the same to probate, and declined to admit the three prior instruments to probate. From this ruling the propounders excepted and gave notice of appeal to the judge of the Superior Court, but no further action seems to have been taken on this appeal.

Thereafter, on 24 February, 1945, a caveat was filed to the paper writing, marked Exhibit "A" and admitted to probate as the last will and testament of Stella Neal, deceased.

At the April Term, 1946, Franklin Superior Court, the caveators asked to amend their caveat so as to include the paper writings, marked Exhibits "B," "C" and "D," to the end "that the question of testacy or intestacy of the said Stella Neal, deceased, may be determined in this proceeding or action."

On the hearing of the motion, the cause was remanded to the clerk with instructions that Exhibits "B," "C" and "D" be admitted to probate, and the caveators were allowed to amend their caveat as prayed.

From this ruling the propounders, Watch Tower Bible and Tract Society and Mary Jane Hinton, appealed, assigning errors.

John F. Matthews and Charles P. Green for propounders, appellants.

E. C. Bulluck and Malone & Malone for caveators, appellees.

SCHENCK, J. The order of the Superior Court must be vacated for two reasons: First, the correctness of the clerk's action in refusing to probate Exhibits "B," "C" and "D" was not before the court, as the propounders had either abandoned their appeal or were not pressing it; and, second, no one is now propounding any of the three paper writings

marked Exhibits "B," "C" and "D" as the last will and testament of the deceased.

Nor are the caveators asking that they be probated as "wills." *In re Will of Westfeldt,* 188 N. C., 702, 125 S. E., 531. In the caveat it is alleged that each of said paper writings is "inconsistent with the paper writing" presented to the clerk, marked Exhibit "A," and probated as the last will and testament of the deceased; and, further, that each paper writing is "inconsistent with all the other paper writings." *In re Will of Wolfe,* 185 N. C., 563, 117 S. E., 804. The real purpose of the caveators is "to set them up and knock them down." Sufficient unto the day are the problems thereof. Up to now no one is sponsoring their probation as wills. Why try an anticipatory cause of action which may never arise? *Hathaway v. Hathaway,* 91 N. C., 139; *In re Bailey,* 180 N. C., 30, 103 S. E., 896.

Moreover, the paper writing last in point of time, marked Exhibit "A," has been admitted to probate in common form as the last will and testament of the deceased. It is provided by G. S., 31-19, that "Such record and probate is conclusive in evidence of the validity of the will, until it is vacated on appeal or declared void by a competent tribunal." *Holt v. Ziglar,* 163 N. C., 390, 79 S. E., 805. Of course, the order of the clerk adjudging the paper writing, marked Exhibit "A," to be fully proved in common form is not "conclusive in evidence of the validity of the will," under this section, on the issue of *devisavit vel non,* raised by the caveat filed thereto. *Wells v. Odum,* 205 N. C., 110, 170 S. E., 145. But as between the probated instrument and the prior purported wills, the former stands until "declared void by a competent tribunal." *Mills v. Mills,* 195 N. C., 595, 143 S. E., 130. Until so set aside, it is presumed to be the will of the testatrix. *In re Will of Cooper,* 196 N. C., 418, 145 S. E., 782.

Error and remanded.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1947

S. N. BOYCE, ON BEHALF OF HIMSELF AND ALL OTHER CITIZENS AND TAXPAYERS OF THE CITY OF GASTONIA, WHO MAY DESIRE TO JOIN HIM IN THIS ACTION AGAINST CITY OF GASTONIA AND PIEDMONT & NORTHERN RAILWAY COMPANY, v. CITY OF GASTONIA AND PIEDMONT & NORTHERN RAILWAY COMPANY.

(Filed 26 February, 1947.)

1. Municipal Corporations § 26—

Municipal corporations have statutory authority to grant franchises for public utilities upon reasonable terms for a period not exceeding sixty years with power to renew at the expiration of that period. G. S., 160-2.

2. Contracts § 8—

The laws existing at the time and place of a contract form a part of it.

3. Municipal Corporations § 26—

Where a franchise granted by a municipality fails to stipulate a term, the statutory term of sixty years will be read into the contract as a part thereof. G. S., 160-2.

4. Municipal Corporations § 29: Constitutional Law § 23—

A franchise to construct and operate a street railway over designated streets is not a mere license but is a property right which may not be taken away except by due process of law.

5. Municipal Corporations § 29—

A provision in a franchise for a street railway that the grantee should save the city harmless from all damages or loss on account of anything growing out of the construction and operation of the said railway cannot be construed as a reservation of right in the city to revoke the franchise at will.

6. Same: Municipal Corporations § 41: Constitutional Law § 17—Contract of city to remove tracks of public utility in consideration of abandonment of franchise, in order to improve street, is for necessary expense and valid.

The State Highway Commission agreed to appropriate a sum of money for the improvement of a city street upon condition that tracks and facilities of a street railway company be removed therefrom. The railway company was operating under a franchise having twenty years before its expiration, which provided that the railway company should save the city harmless from any damage resulting from the construction of its tracks. The city entered into a contract with the railway company providing that in consideration of abandonment of its franchise along said street the city would acquire for it an alternate right of way and would remove the tracks from the street. The court found that the amounts to be expended by the city under the contract are substantially less than the loss which would be sustained by the railway company. *Held:* The provision to save the city harmless does not give it power to revoke the franchise at will, and the contention that the railway company would be liable under this clause for the loss to the city of the appropriation by the Highway Commission in the event the tracks were not removed, and that therefore the funds to be expended by the city were without consideration and would constitute a special emolument not in consideration of public service, is untenable. Constitution of N. C., Art. I, Sec. 7.

7. Eminent Domain § 5—

A provision in a contract by a city to acquire for a public utility a right of way of a designated width with such additional width as in the judgment of the railroad company would be required for cuts and fills delegates to the railway company only authority to say what additional width will be required to take care of proper slopes of cuts and fills, which is a matter of engineering rather than a delegation of authority, and is valid.

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

APPEAL by plaintiff from *Alley, J.*, at December Term, 1946, of GASTON.

Civil action to enjoin defendant city from spending public funds derived from taxation or other sources in carrying out and performing its part of a contract with defendant Railway Company, whereby in consideration of said Railway Company agreeing to surrender and abandon its franchise right to continue to operate electric trains and cars, along Franklin Avenue in said city, and to the removal of its tracks and facilities from said avenue, the city has agreed to acquire and transfer to the Railway Company a part of an alternate right of way so as to enable the Railway Company to reach its present freight station and terminal facilities in said city without operating along said avenue—entered into in connection with the city's undertaking to widen and improve Franklin Avenue.

When the cause came on for hearing in Superior Court, all the parties waived a jury trial, and agreed that the court should find the facts, and determine the case on its merits. After hearing the pleadings and affidavits, and argument of counsel for plaintiff and for defendants, and upon facts admitted in the pleadings, the court finds facts, pertinent to questions involved on this appeal, substantially as follows:

1. On 10 September, 1908, the Mayor and Board of Aldermen of the City of Gastonia, by ordinance and resolution duly adopted, granted unto W. S. Lee and L. C. Harrison, their successors, lessees and assigns a franchise and right "to own, construct, equip, maintain and operate a line or lines of street railway, run by electricity or other motive power" for the transportation of passengers and freight, with incidental rights, all as specifically set forth therein, upon certain conditions and provisos, among others:

"(D) Said W. S. Lee and L. C. Harrison, their heirs, lessees, and assigns, shall be liable to compensate the said city of Gastonia against, and save it harmless from, all damages, or loss that said city may suffer on account of anything that shall grow out of the construction or operation of said railway . . .

"(G) That this ordinance shall take effect from and after its acceptance by the said W. S. Lee and L. C. Harrison, which acceptance shall be filed with the Clerk of said city of Gastonia."

The said franchise, through assignments, has been duly transferred to, and is now owned by the defendant Railway Company,—a common carrier of freight and passengers.

2. Defendant, Railway Company, acting under and pursuant to said franchise, has invested large amounts of money in constructing railway tracks, an overhead trolley system, and other necessary and appropriate appliances and facilities along Franklin Avenue in the city of Gastonia for a distance of approximately three miles, and in constructing sidetracks from its tracks on said avenue to numerous industries located adjacent thereto, and for many years has conducted and carried on a freight and passenger service over its tracks located on said avenue, and sidetracks leading therefrom, and derived, and is now deriving substantial revenues from such business.

3. At the time said franchise was granted by the city of Gastonia to W. S. Lee and L. C. Harrison, and at the time the tracks and other facilities of defendant Railway Company were constructed over and along Franklin Avenue, there was very little vehicular and other traffic over said avenue as compared with the traffic thereover in recent years and at the present time. And for some years after the construction of said tracks, travel over the avenue by the general public was not materially interfered with by reason of the operation of cars and trains of said Railway Company over and along said avenue; but in recent years

Franklin Avenue has become and is now one of the busiest streets in the city of Gastonia and one of the busiest highways in the State, with almost constant stream of vehicular and other traveling traffic at all hours of the day and part of the night, by members of the public.

4. The city of Gastonia has duly undertaken the project of widening, re-surfacing and improving said Franklin Avenue; and in order to improve same so as properly and adequately to provide for the use thereof by the general public, including the general public of the city, in traveling over and along said avenue, it is necessary and essential that the tracks and other facilities of defendant Railway Company be removed therefrom, and that said railway company surrender and abandon its right to continue to operate over and along said avenue for the remainder of the term of its franchise.

5. In connection with the project, and for the purpose of widening, and improving said Franklin Avenue, the North Carolina State Highway and Public Works Commission has agreed to appropriate to the city $750,000 upon the condition that the tracks and other facilities of defendant Railway Company be removed therefrom, and that said Railway Company surrender and abandon its right to continue to operate its trains and cars over and along said avenue for the remainder of the term of its franchise, in order thereby to eliminate the highway hazards incident to such operation.

6. On 14 October, 1946, the defendant City entered into a contract with the defendant Railway Company by which in consideration of the city acquiring and vesting in the Railway Company, its successors and assigns, title to new rights of way "at least twenty (20) feet in width, together with such additional width as may, in the judgment of the Railway Company, be required for cuts and fills, and shall be located approximately as shown on the blueprint" attached thereto, for the relocation of the Railway Company's line of railway so as to enable it to reach its present freight station and terminal facilities in said city without having to operate along Franklin Avenue, all as set forth therein, the Railway Company will construct its line of railway along said new right of way, and upon its completion, as therein set forth, will abandon all operations along Franklin Avenue, except crossing switch tracks for purpose of serving industries, and, with consent and approval of such State and Federal agencies as are required, will permit the city to remove as a part of the improvement of Franklin Avenue the tracks and other equipment of the Railway Company now located along said avenue,—the tracks and equipment so removed to be turned over and delivered to the Railway Company.

7. The removal of the Railway Company's tracks and facilities from Franklin Avenue and the surrender and abandonment of its right to operate over and along said avenue are necessary and essential parts of

the city's project to widen and improve said avenue. And the funds to be expended by the city, under said contract of 14 October, 1946, unless it be restrained therefrom, will be expended by it in consideration of the surrender and abandonment by the Railway Company of its right to continue to operate its trains and cars over and along Franklin Avenue and the removal of the Railway Company's tracks and other facilities from said avenue, and same will be expended by the city as a necessary municipal expense of the improvement of said avenue.

8. The amounts to be so expended by the city "are very substantially less than the loss which will be sustained by said Piedmont & Northern Railway Company on account of the removal of its tracks and facilities from Franklin Avenue and on account of the surrender and abandonment by said Railway Company of its right to continue to operate over and along said Franklin Avenue for the remainder of the term of its franchise and are substantially less than the amount which the city would in all probability be required to pay said Railway Company if the city should undertake by means of legal proceedings to require the removal of said tracks and the discontinuance of the Railway Company's right to continue to operate over and along said avenue."

Upon the foregoing facts, the court concluded and held as a matter of law: "That the City of Gastonia had the authority to enter into said agreement of October 14, 1946, with the Piedmont & Northern Railway Company, and has the authority to carry out and perform its part of said agreement, and that the expenditures of funds, to be expended by the City of Gastonia under and pursuant to said agreement, will be valid and legal as a necessary municipal expense of said City for the widening and improvement of said Franklin Avenue."

The court thereupon entered judgment denying the prayer of plaintiff for a restraining order, and dismissed the action at cost of plaintiff.

To the conclusion of law as set forth in the foregoing judgment and to entry of the judgment plaintiff excepted and appeals to Supreme Court and assigns error.

Bulwinkle & Howard and S. B. Dolley for plaintiff, appellant.

Ernest R. Warren and James B. Garland for the City of Gastonia, appellee.

W. S. O'B. Robinson, Jr., and W. B. McGuire, Jr., for Piedmont & Northern Railway Company, appellee.

WINBORNE, J. Appellant in brief filed in this Court concedes that: "It is well settled in this State that construction, maintenance and improvement of streets is a necessary expense for municipalities," and "that it is immaterial what 'medium of exchange' is used in paying for said improvement as long as the same can be reduced to a money value."

Thereupon, appellant so conceding challenges the authority of the city of Gastonia to carry out and perform its agreement of 14 October, 1946, upon two grounds:

(1) That since it is found as a fact that the North Carolina State Highway and Public Works Commission has agreed to appropriate a sum of money for the widening and improving of Franklin Avenue in the city of Gastonia, but only upon condition that the tracks and other facilities of said Railway Company be removed therefrom, and that its franchise be surrendered and abandoned, in so far as it relates to said avenue, the city will lose such sum of money if the condition be not met; that such loss comes within the purview of the clause within the franchise that "the holder thereof shall be liable to compensate the said city of Gastonia against, and save it harmless from, all damages or loss that said city may suffer on account of anything that should grow out of the construction and operation of said railway"; that, hence, the payment of the expense of removing the tracks and of buying a new right of way is a responsibility assumed by defendant Railway Company as assignee of the franchise; and that, therefore, when the city undertakes to bear such expense, it is granting to the Railway Company a special emolument, not in consideration of public service, in violation of Article I, Section 7, of the North Carolina Constitution.

Such construction, we think, is somewhat strained.

In this connection the General Assembly of North Carolina has authorized cities and towns "to grant upon reasonable terms franchises for public utilities,—such grants not to exceed the period of sixty years, unless renewed at the end of the period granted." G. S., 160-2. This authority as so written became effective 11 March, 1907, and was in effect on the date when the franchise under consideration was granted. See P. L. 1907, Chapter 978.

The laws existing at the time and place of a contract form a part of it. See *Nash v. Bd. Comm.*, 211 N. C., 301, 190 S. E., 475; *Bank v. Town of Bryson City*, 213 N. C., 165, 195 S. E., 398; *Abernethy v. Ins. Co.*, 213 N. C., 23, 195 S. E., 20; *Spain v. Hines*, 214 N. C., 432, 200 S. E., 25; *Rostan v. Huggins*, 216 N. C., 386, 5 S. E. (2d), 162, 126 A. L. R., 410; *Dunn v. Swanson*, 217 N. C., 279, 7 S. E. (2d), 563; *Barker v. Palmer*, 217 N. C., 519, 8 S. E. (2d), 610; *Motsinger v. Perryman*, 218 N. C., 15, 9 S. E. (2d), 511; *Bank v. Derby*, 218 N. C., 653, 12 S. E. (2d), 260; *Spearman v. Burial Assn.*, 225 N. C., 185, 33 S. E. (2d), 895, 161 A. L. R., 1297.

Moreover, as stated in 38 Am. Jur., 227, Municipal Corporation, Section 542, "The franchise of a public service corporation or other grantee, granted by a municipality, expires at the end of the specified time where the charter of the municipal corporation expressly provides that all franchises and privileges granted by it shall be limited to a

specified number of years. Such a limitation is as much a part of the franchise as if it were expressly included therein. Hence, although the provisions of a municipal ordinance granting a franchise, where taken by themselves, indicate an estate in perpetuity, the grant must be deemed to be one for years where the municipal charter expressly declared that all franchises shall be limited to a specified term of years from the granting thereof." See *Denver v. N. Y. Tr. Co.,* 229 U. S., 123, 33 S. Ct., 657, 57 L. Ed., 1101.

Applying these principles to case in hand, it would seem that the franchise now owned by defendant Railway Company would be for a term of sixty years from the granting thereof, 10 September, 1908, and that it has now more than twenty years to run.

Furthermore, this Court in construing the statute G. S., 160-2, held in the case of *Railway Company v. Asheville,* 109 N. C., 688, 14 S. E., 316, that after a city, by ordinance, has granted a right to construct a street railway line over certain streets, it cannot by subsequent ordinance arbitrarily annul such license. Indeed, the grant of such right is not a mere license, but a property right protected by the Constitution from arbitrary revocation or destruction, and may not be taken except by due process of law. 38 Am. Jur., 217, Municipal Corporations, Sec. 536-7. To like effect are decisions of the U. S. Supreme Court in *Owensboro v. Cumberland Tel. & Tel. Co.,* 230 U. S., 58, 57 L. Ed., 1389; *Boise Artesian H & C Water Co. v. Boise City,* 230 U. S., 84, 57 L. Ed., 1400.

Hence, it may not be said with reason that the parties intended the indemnity clause in the franchise as a reservation of right in the city to revoke the franchise at will and without due process of law. In fact, appellees forcefully contend that the expense to be incurred does not arise out of an exercise of right under the franchise, but out of the abandonment and extinction of those rights, and is the price which the city shall pay for their abandonment and extinction. The Court finds that the amounts to be expended by the city of Gastonia pursuant to said agreement are very substantially less than the loss which will be sustained by the defendant Railway Company.

(2) Appellant next contends that the provision in the contract of 14 October, 1946, relating to the width of the new rights of way constitute an unlawful delegation of authority by the city to the Railway Company. The only authority delegated is to say what additional width will be required to take care of proper slopes of cuts and fills. This is more nearly an engineering matter than a delegation of authority. The contention is without merit.

The burden is on the appellant to show error. On this record he has failed to do so. Hence, the judgment below is

Affirmed.

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

RALPH D. TUTTLE v. JUNIOR BUILDING CORPORATION.

(Filed 26 February, 1947.)

1. Corporations § 22—

G. S., 55-26.11, which requires the holders of ⅔ of its stock to approve the action of the directors of a corporation in selling the entire corporate property, does not apply to the sale of realty by a corporation having general power to buy and sell real estate, and the fact that such corporation is an incorporated fraternal association and contracts to sell its building designated as the fraternal order building does not bring the transaction within the statute when the building is not used for permanent office, home or other facility in carrying on its business.

2. Same—Nonsuit on ground that plaintiff's evidence disclosed that sale of realty by corporation had not been approved by majority of directors, held error.

In this action against a corporation for specific performance of an agreement to convey realty, plaintiff introduced evidence that he dealt directly with responsible officers of the corporation and that at a meeting, attended by less than a majority of the directors, he was informed that his offer had been accepted after a meeting, and the agreement was concluded. Plaintiff also introduced a copy of a letter from the corporation to the bank stating that the corporation enclosed deed for delivery when plaintiff should pay the balance of the purchase price. *Held:* Nonsuit on the ground that plaintiff's evidence disclosed that the sale of the property had not been authorized by a majority of the corporation's directors as required by statute, was error. G. S., 55-26.9; G. S., 55-26.10.

3. Same—

Evidence tending to show that a corporation had executed a deed for real estate and placed it in escrow raises a presumption that the deed, being under seal, was executed by authority.

APPEAL by plaintiff from *Warlick, J.*, at October Term, 1946, of STOKES.

The plaintiff brought this action to secure specific performance of a contract for the purchase and sale of a building and lot in the Town of Walnut Cove owned by the defendant but not occupied by it.

The defendant is a corporation under the laws of this State, the Certificate of Incorporation containing the following paragraphs relating to the purpose of its organization and its powers:

"Third: The objects for which this corporation is formed are as follows:

"To purchase that certain parcel of real estate now owned by Walnut Cove Council No. 211, Jr. O. U. A. M.; to own and to operate; to lease, to rent; to execute leases for considerations; to transfer; assign; sell and convey this real property; and/or to otherwise dispose of same.

"To purchase and/or otherwise acquire real and personal property; to own and operate; maintain; or dispose of the same by rent, lease or sale."

The following were respectively officers, directors and stockholders of the corporation:

"J. G. H. Mitchell was President and Director; W. N. Wheeler was Vice-President and Director; Dr. C. J. Helsabeck was Second Vice-President and Director; W. F. Marshall, Secretary and Director; J. D. Johnson, Treasurer and Director; J. J. Taylor, Director; R. J. Scott, Director; C. E. Davis, Stockholder; and J. L. Welch, stockholder; Dr. V. L. DeHart, stockholder."

Negotiations for the purchase and sale of the property having been instituted, the plaintiff made the following offer:

"October 22, 1945
Junior Order Building Corporation
Walnut Cove, N. C.

"Gentlemen:

"I hereby make the following offer for the building and lot which you now own in Walnut Cove, N. C., on Main Street, which includes all the Old Mercantile Building and the Old P. O. Building.

"I will give you $10,000 cash upon delivery of a good and sufficient deed. $500 check is herewith enclosed as part payment, leaving a balance of $9,500.

"I am to receive possession of the property on November 1, 1945, and to receive all rents thereafter. I understand that you are to pay all taxes due including 1945.

"I understand further that the Junior Order and the Masons are to have the use of the Hall same as they now have free for three years from July 1st, 1945.

"I am to have 30 days from the date of acceptance of this offer in which to make the final payment.

"I am to assume the payment of Commissions to J. A. Dillon on this contract.

Yours very truly,
RALPH D. TUTTLE,
R. D. Tuttle."

W. F. Marshall, secretary for the defendant corporation, and Mr. Odell Jones came to see the plaintiff and told him that they had had

a meeting and agreed to sell him the building provided he would rent two rooms of it to somebody for a shirt factory or knitting mill office. To this the plaintiff assented and the rental price was agreed upon.

Plaintiff testified that the directors and some stockholders met that afternoon and discussed the preparing of the deed and fixing up the papers, again stating that they had accepted plaintiff's offer provided they could get together on the rental agreement, which they did.

At that meeting there were present, Marshall, J. D. Johnson, the treasurer, C. J. Helsabeck, V. L. DeHart, and Joe Welch. Marshall said they wanted it drawn up and got ready as quickly as possible since they wanted to dissolve the corporation.

Plaintiff told him that he would have the money ready any time he could get the deed, but in the contract he had 30 days in which to take it up. Plaintiff testified, "Mr. Marshall called me on Saturday afternoon and told me that Mr. R. J. Scott had prepared the deed and had it ready and I told him to mail it to the bank as per instructions and I got a letter from Mr. Marshall that afternoon or Sunday morning. A copy of the letter Mr. Marshall wrote the bank was sent to me." It is as follows:

"I am enclosing herewith a deed from the Junior Building Corporation, properly drawn and signed, to Mr. Ralph D. Tuttle deeding to him the property of the Junior Building Corporation. I am enclosing also herewith a contract from him to the town leasing unto the town the old postoffice building and the Red Cross room for a period of six months from November 1, 1945, for him to sign. Also there is enclosed a check from Tuttle Mor. Company to the Junior Building Corporation for $500; a part payment on the building. When he delivers to you a check for $9,500, I understand that it is in order for you to deliver him the deed.

"I have heard nothing further from the shirt factory but since we have until Monday or Tuesday of next week to hear from the parties, we are withholding writing a check from the Town to Mr. Tuttle for the rent as stipulated by the contract. We will give them more time to let us hear from them before we go into the contract with the Town.

"This is my understanding of the agreement and is in accordance with such instructions given to me by the stockholders of the Junior Building Corporation.

Yours very truly,
W. F. MARSHALL,
William F. Marshall."

Pursuant to the letter the plaintiff went over to the bank on Tuesday morning after the deed and asked Mr. Johnson for it and gave him the

balance of the money, $9,500.00. He was informed by Mr. Johnson that the deed had been withdrawn and was not there. Plaintiff was unable at that time to get any explanation.

The defendants offering no evidence, demurred to plaintiff's evidence and moved for judgment as of nonsuit. The motion was sustained and from the ensuing judgment plaintiff appealed.

P. W. Glidewell, Sr., and A. C. Davis for plaintiff, appellant.

R. J. Scott and Fred Folger for defendant, appellee.

SEAWELL, J. The defendant contends that the interchanges between the parties as above set out do not constitute a binding contract for the sale of the lands in question for that those who dealt with the plaintiff in the acceptance of his offer had no authority to make such contract, and that this want of authority appears so definitely in plaintiff's evidence as to support a judgment of nonsuit.

This want of authority, it is claimed, appears in this way: Inasmuch as the building and lot in controversy constituted the entire property of the corporation it could only be conveyed on approval by a two-thirds vote of its stockholders, which the record does not disclose to have been given, G. S., 55-26.11; and that in any event the property could not have been conveyed except by specific corporate action upon a vote of at least a majority of the directors, and that no such meeting was held and no such majority vote obtained.

As to the first contention, construing the charter of defendant, it appears that it has general power to buy and sell real estate as its regular business and the specific mention of the Junior Order Building and lot does not exempt it from such power or segregate it from such property acquired generally for such purpose. The defendant occupied no part of it. It was not used for a permanent office, home or other facility in carrying on the business in which it was engaged or in which it might engage, but was a part of its stock in trade. Hence G. S., 55-26.11, has no application to its contemplated sale.

G. S., 55-26.9, gives the power "to sell, transfer and convey any part of its corporate property in the course of its regular business." G. S., 55-26.10, empowers a corporation (applying to corporations generally) "to sell, transfer and convey any part of its corporate real or personal property when authorized so to do by its board of directors."

Whether there is intended a distinction between subsections 9 and 10 which would relieve a corporation trading in real estate as a regular business from the necessity of calling on the directorate for authority for each particular sale we need not inquire. Under the agency doctrine authority to make a valid contract of sale may be referable to or implied from other considerations to which, when present, it was not the purpose

of section 10 to apply an overall restriction. Williston on Contracts, Sec. 271.

But aside from this, plaintiff's right to go to the jury on the evidence presented would not be defeated, even considering that the authority to make a binding sales contract must depend, ultimately, on action by the board of directors, either by specific or general delegation of powers, however or whenever conferred.

It is assumed by appellee that the meeting of the stockholders and directors mentioned in the evidence, at which the plaintiff was informed that his offer had been accepted and at which certain details as to the rental of offices in the building were agreed upon, was the only meeting at which any action by the directors could have been taken. That is not a necessary inference. Prior to that meeting the plaintiff had been informed that his offer had been accepted and that statement was repeated to him in the meeting which he attended as a conferee.

But we do not think that the right of the plaintiff rests upon this narrow ground. Under the Agency Doctrine the apparent authority of the officers of the corporation with whom the plaintiff dealt may have been derived, and in trading corporations of this kind usually is derived, from sources other than formal action of the directors on each particular offer as made; and the supposed defect in plaintiff's evidence is not of such a nature as to relieve the defendant from establishing its defense. Williston on Contracts, Vol. 1, Sec. 271, pp. 786, 787.

The plaintiff dealt directly with responsible officers of the corporation. The offer and its acceptance by them was complete in every detail. But the evidence of plaintiff goes much further. Notwithstanding much of the evidence relating to the transaction was rejected on objection by defendant, enough remains which tends to show that a deed was properly executed by officers of the corporation, designated by statute, and by agreement was put in escrow at the State Planters Bank to be lifted by the plaintiff on payment of the balance of the purchase price, $500 having already been paid and accepted. He promptly appeared at the bank and paid in the money, but was informed the deed had been withdrawn. He was subsequently informed that defendant had "changed its mind."

If the instrument thus put in escrow was what the evidence tends to show that it was—a deed—it bore the seal of the corporation and raised the presumption that it was executed by authority. Fletcher, Cyc. Corporations, Vol. 2, sec. 486, *et seq.*

At this point it is not necessary for us to go into the question of authority, or power, to withdraw the deed from escrow without consent of the plaintiff. We say, however, that from the circumstances detailed in the evidence there is an inference of authority to make a binding contract not negatived by anything we find in plaintiff's evidence, con-

sidered in its most favorable light, and the evidence ought to have been submitted to the jury. The judgment of nonsuit is, therefore,

Reversed.

NANTAHALA POWER & LIGHT COMPANY, PETITIONER, v. MRS. GEORGIA SLOAN, RESPONDENT.

(Filed 26 February, 1947.)

1. Evidence §§ 25, 42f—

The failure of the answer to deny an allegation of the complaint is an admission of the fact alleged which is as binding on the parties as if found by the jury, and therefore evidence offered to prove such fact is irrelevant.

2. Eminent Domain § 8—

Where petitioner, the owner of an easement theretofore acquired over respondent's lands, imposes an additional burden thereon, respondent is entitled to recover for the taking of the additional land and injury, if any, to the remainder of the premises, which is to be measured by the difference in the fair market value of the lands subject to the prior easement, immediately before and immediately after the placing of the additional burden thereon.

3. Eminent Domain § 18c—

In proceedings to assess damages for the taking of an additional easement over respondent's land, petitioner is entitled to have the existence of the prior easement considered upon the question of damages.

4. Same—

Where it is admitted that petitioner held a prior easement on the premises, and the parties stipulate that the sole question for determination is the compensation to be paid for additional easement, the existence of the prior easement is established and petitioner has the benefit thereof, and therefore judgment in the condemnation proceedings wherein the prior easement was obtained is irrelevant and incompetent for the purpose of showing the existence of the prior easement.

5. Same—

Evidence of compensation paid for an original easement on respondent's land in 1928 is too remote to be competent to establish the value of an additional easement taken in 1943.

6. Same—

The amount paid under a consent judgment in proceedings to assess compensation for the taking of lands under the power of eminent domain is incompetent to establish the value of the lands upon a subsequent taking of additional lands of respondent, since compromise settlements are not fair indications of market value.

APPEAL by respondent from *Nettles, J.*, at August Term, 1946, of MACON.

This is a condemnation proceeding.

The Town of Franklin, in 1925, constructed a hydroelectric plant near said Town and thereafter instituted a condemnation proceeding against the owners of the property in controversy in this proceeding for the purpose of establishing an easement on said property for a reservoir created by a dam twenty-five feet in height.

A consent judgment was entered in that proceeding, on 16 July, 1928, granting an easement in favor of the Town of Franklin, which judgment also fixed the amount of damages which this respondent and the heirs at law of J. S. Sloan, deceased, were entitled to recover of the Town of Franklin by reason of the construction and maintenance of said reservoir.

It is admitted that the petitioner, Nantahala Power & Light Company, thereafter acquired the hydroelectric plant constructed by the Town of Franklin, including the easement acquired by said Town on respondent's property.

In 1943, the petitioner raised the level of the water in the reservoir created by the original dam one vertical foot, and instituted this proceeding for the purpose of acquiring an easement for the additional burden created thereby.

Prior to the introduction of evidence, it was stipulated that the petitioner went into possession of the premises described in the petition and answer on 4 May, 1943, for the purposes described in the petition, and that the only issue to be determined in this cause is the amount of compensation to which the respondent is entitled by reason of the taking of the additional land and compensation for the injury, if any, to the remainder of the premises.

Over the objection of the respondent the petitioner was permitted to introduce the consent judgment referred to above.

The jury assessed respondent's damages at $1,000.00, and judgment was entered accordingly.

Respondent appealed to the Supreme Court, assigning error.

G. L. Houk and Geo. B. Patton for petitioner.

Jones & Jones and Jones & Ward for respondent.

DENNY, J. The sole question presented on this appeal, is whether or not the court below committed error in permitting the petitioner, over the objection of the respondent, to introduce the consent judgment which established the original easement on the premises of the respondent, which easement is now held by the petitioner, and also fixed the damages which this respondent and the children and heirs at law of J. S. Sloan were entitled to recover as compensation therefor.

The appellee insists that the consent judgment was offered only for the purpose of establishing the prior easement and not as evidence on the question of damages. We think the position of the appellee is untenable. If it had been necessary to introduce the consent judgment in order to show the existence of the original easement, we would have an entirely different factual situation from that which is presented on this record. *Creighton v. Water Commissioners,* 143 N. C., 171, 55 S. E., 511.

Here the existence and the extent of the original easement are alleged in the petition and not denied in the answer. Therefore, the respondent admitted the existence and extent of the petitioner's easement prior to raising its dam one vertical foot. Such admission is as binding on the parties as if found by the jury, and "evidence offered in relation thereto is irrelevant." *S. v. Martin,* 191 N. C., 401, 132 S. E., 14.

Furthermore, the parties stipulated before the introduction of any evidence, to go to the jury only on the question of damages, and it is clear that this case was tried upon the theory that the only compensation or damages which the respondent is entitled to recover is for the taking of the additional land described in the pleadings and for the injury, if any, to the remainder of the premises. Hence, the respondent is entitled to recover the difference in the fair market value of her property immediately prior to 4 May, 1943, the date the additional burden was placed thereon by the petitioner, and the fair market value of the property immediately thereafter. *Light Co. v. Moss,* 220 N. C., 200, 17 S. E. (2d), 10; *Highway Com. v. Hartley,* 218 N. C., 438, 11 S. E. (2d), 314; *Land Co. v. Traction Co.,* 162 N. C., 503, 78 S. E., 299; *Brown v. Power Co.,* 140 N. C., 333, 42 S. E., 954.

We are not unmindful of the fact that the petitioner in proceedings of this character, is entitled to have the existence of its prior easement considered in mitigation of damages. *McMahan v. R. R.,* 170 N. C., 456, 87 S. E., 237; *Creighton v. Water Commissioners, supra; Brown v. Power Co., supra.* The sole purpose of showing an existing easement when assessing damages for an additional one, is to allow recovery only for the difference in the fair market value of respondent's land subject to the existing easement, immediately before and immediately after subjecting it to the additional easement. However, it was not necessary for the appellee to introduce the consent judgment in the former proceeding, in order to have the full benefit of the law in this respect, in the trial below.

It having been admitted that the petitioner held an easement on the premises of the respondent for the maintenance of its dam at a 25-foot level, and the inquiry before the jury having been limited to the amount of compensation the respondent was entitled to recover as damages to the premises of the respondent, by raising the height of the petitioner's

dam one additional foot, the judgment was admissible in this proceeding, if admissible at all, only upon the question of damages.

The Town of Franklin, pursuant to the terms of the consent judgment entered in 1928, paid this respondent and her children, the heirs at law of J. S. Sloan, the sum of $1,200.00 in full settlement for all damages growing out of the erection of the Town's hydroelectric plant and the construction and maintenance of its 25-foot dam, which plant is now owned, maintained and operated by the petitioner herein. Evidence of the price paid for the original easement in 1928 is inadmissible to establish the value of the additional land taken in 1943. It is too remote. "When the evidence is too remote in point of time to throw any light on the fact at issue, to wit, the fair market value of the property at the time of the taking, it is incompetent and should be excluded." *Highway Com. v. Hartley, supra.*

Ordinarily the price paid in settlement in condemnation proceedings is not admissible as evidence to show the value of the condemned land, or the value of land similarly situated. 18 Am. Jur., 996.

Moreover, the judgment introduced herein is inadmissible for a further reason. It was a consent judgment. The reason for rejecting such judgments as evidence of market value, is succinctly stated in *Howard v. Providence,* 6 R. I., 514, as follows: "Upon grounds of public policy, offers made in compromise of suits, pending litigation, are not to be used in evidence against the party making them. 1 Greenl. Ev., 192. We do not see that such evidence ought to be any guide to the jury in establishing damages. When a party buys his peace, or compromises a pending suit, many considerations may influence him; the trouble, vexation, and cost of a lawsuit, payment of counsel, time expended in attending litigation, and other matters, may induce him, for the avoiding of trouble, to pay in compromise far more than the value of the thing in controversy." Likewise, a respondent, for the same reasons, may accept in compromise far less than the value of the thing in controversy. Such compromise settlements are not fair indications of market value. *Light Co. v. Moss, supra.* See also 18 Am. Jur., 996, and the numerous authorities cited therein. The market value of property is the price it will bring when it is offered by one who desires, but is not compelled to sell it, and is purchased by one who is under no necessity to buy it. *Light Co. v. Moss, supra; Land Co. v. Traction Co., supra.*

For the reasons stated, we think the respondent is entitled to a new trial, and it is so ordered.

New trial.

CHARLES O. ROBINSON AND W. G. GAITHER, TRUSTEES UNDER THE WILL OF CHARLES H. ROBINSON, FOR HIS GRANDCHILDREN, v. C. O. ROBINSON, JR., AND WIFE, FLORA ROBINSON, W. B. ROBINSON AND WIFE, JANE ROBINSON, C. H. ROBINSON, UNMARRIED, MARY LEIGH GAITHER OVERTON AND HUSBAND, H. H. OVERTON, W. G. GAITHER, JR., UNMARRIED, BETTIE GAITHER, UNMARRIED, ELIZABETH HANES STRUBING AND HUSBAND, PHILIP H. STRUBING, ALEX S. HANES, JR., AND WIFE, ANN WRIGHT HANES, DELPHINE MUSE AND HUSBAND, MAURICE MUSE, AND MARY ROBINSON HANES.

(Filed 26 February, 1947.)

1. Wills § 31—

The primary purpose in interpreting wills is to ascertain what the testator desired to be done with his estate.

2. Wills § 33c—

The law favors the early vesting of estates.

3. Same—

A devise and bequest of property in trust for the benefit of testator's grandchildren with provision that when the youngest should reach the age of twenty-one the trustee should divide up and deliver the property to them in equal parts, *is held* to vest the beneficial interest in testator's grandchildren living at the time of his death, no contrary intent appearing from the will, and therefore where one of the grandchildren marries and dies before the termination of the trust, his share should be paid to his widow under the provisions of his will in the settlement of the trust estate.

APPEAL by certain defendants from *Burgwyn, Special Judge,* at October Term, 1946, of PASQUOTANK.

Civil action under Uniform Declaratory Judgment Act, G. S., 1-253, *et seq.,* to determine certain questions of construction arising under the last will and testament of the late Charles H. Robinson.

Upon hearing in Superior Court these facts found by the presiding judge, briefly stated, are pertinent to determination of the questions involved:

1. Charles H. Robinson, resident of Elizabeth City, North Carolina, died on 25 November, 1930, leaving a last will and testament, dated 16 February, 1928, and a codicil thereto, dated 10 August, 1929. In the will this provision appears: "Fifth. I will and bequeath to my Executors hereinafter named to be held in trust for my grandchildren, all my lands in Camden County, N. C., and all my lands in Baltimore County, Md., together with any money on deposit with the C. H. Robinson Co. as shown on the books of said Company in an account under the heading of 'C. H. Robinson Trust Account.' My Executors are hereby empowered to sell any part of said lands, and to use the proceeds of

such sales for the improvement of the balance of the lands unsold, or to place the proceeds of such sales in Trust in some Bank or Trust Company to be held as a Trust fund for the benefit of my Grand Children, at the discretion of said Executors. When the youngest of my Grand Children shall reach the age of Twenty one years, an equal division of this Trust shall be made in value of any lands unsold and of money on deposit held in trust for my Grand Children, and conveyed to my Grand Children by my Executors, share and share alike in value." . . . "Tenth. I hereby appoint as Executors of this my last Will, my son, Charles O. Robinson and sons in law, Alex S. Hanes and W. G. Gaither, to settle and distribute my estate as herein provided."

And the codicil to the will reads as follows: "In case my Executors consider it advisable in order to facilitate the handling of the Trust to my Grand Children provided in clause 5 of my will, to organize a Stock Company with no par value stock. They are hereby authorized to do so, and to convey the property of said trust to said Stock Company, In which case the stock of said Company is to be held in Trust in equal amounts for each of my Grand Children, and the affairs of said Company closed and a distribution of its assets made as provided in my Will equally to my Grand Children, when the youngest one of them reach the age of twenty one years."

2. At the time of the preparation of the will, and at the time of his death, Charles H. Robinson had nine grandchildren, namely, C. O. Robinson, Jr., W. B. Robinson, C. H. Robinson, Mary Leigh Gaither (now Overton), W. G. Gaither, Jr., Bettie Gaither, Alex S. Hanes, Jr., Elizabeth Hanes Strubing, and Charles Robinson Hanes.

3. Charles R. Hanes died 13 September, 1943, without children or issue, but survived by his wife, Delphine C. Hanes, to whom by his last will and testament, prepared and executed after he had arrived at the age of twenty-one years, he devised and bequeathed all of his estate for her own use and benefit forever, and appointed her as executrix with powers set out therein.

4. That said Delphine C. Hanes has since intermarried with defendant Maurice Muse.

5. All of the said grandchildren of Charles H. Robinson are now of full age, the youngest having reached the age of twenty-one years on 28 July, 1946.

6. The property composing the *corpus* of the trust estate provided for in said Fifth section of the will of Charles H. Robinson consists of certain lands and moneys.

7. The surviving Executors, Alex S. Hanes having died, as trustees of the trust set up in the fifth item of the said will, being ready and able to close the trust committed to them and to make final accounting and distribution thereof, sought the advice and direction of the court in

respect, in the main, as to whether the distribution should be in eight parts to the eight surviving grandchildren, or in nine parts to them and to the widow of Charles Robinson Hanes.

The court being of opinion (1) that each of the nine grandchildren of Charles H. Robinson, as aforenamed, living at the time of his death, took under said will a vested interest in one-ninth of the said trust property, the enjoyment and possession of which being deferred until the termination of the trust, that is, when the youngest grandchild reached the age of twenty-one years, and (2) that the defendant, Delphine Muse, has succeeded to the interest of her late husband, the said Charles Robinson Hanes, entered judgment so adjudging, and directing the Executors as trustees as aforesaid to make distribution in accordance with such opinion.

To so much of the judgment as holds (1) that Charles Robinson Hanes became vested with an interest in said trust property prior to his death, and (2) that defendant, Delphine Muse, is the owner of such interest and entitled to receive one-ninth of the trust estate, the defendants, C. O. Robinson, Jr., W. B. Robinson, C. H. Robinson, Mary Leigh Gaither Overton, W. G. Gaither, Jr., Bettie Gaither, Alex S. Hanes, Jr., and Elizabeth Hanes Strubing, severally, except and appeal to Supreme Court, and assign error.

John H. Hall for all appealing defendants except Mary Leigh Gaither Overton, Alex. S. Hanes, Jr., and Elizabeth Hanes Strubing, for whom no brief is filed.

Womble, Carlyle, Martin & Sandridge for defendant Delphine C. Muse.

WINBORNE, J. The basic question here involved: Did the grandchildren of the late Charles H. Robinson, living at the date of his death, acquire vested interests in the trust estate created under the fifth item of his will? The decisions of this Court point to an affirmative answer. See *Walker v. Johnston,* 70 N. C., 576; *Witty v. Witty,* 184 N. C., 375, 114 S. E., 482; *Weill v. Weill,* 212 N. C., 764, 194 S. E., 462; *Coddington v. Stone,* 217 N. C., 714, 9 S. E. (2d), 420; and *Priddy & Co. v. Sanderford,* 221 N. C., 422, 20 S. E. (2d), 341, and cases cited, where applicable principles are enunciated and applied. Decision here may aptly be made on authority of these cases.

It is declared in the *Walker case* that: "When a legacy is given to a class—as to the children of A—with no preceding estate, only such as can answer to the roll call at the death of the testator can take, for the ownership is then to be fixed and the estate must devolve upon those who answer the description." Also in the *Coddington case* the Court states that the absence of any limitation over upon the contingency of the death of the beneficiary has been considered to raise a strong inference

that it was the intention of the testator to confer an immediate estate vested at his death. And, continuing, "It is generally held, nothing else appearing in the will to the contrary, where an estate is devised to a trustee in an active trust for the sole benefit of persons named as beneficiaries with directions to divide up and deliver the estate at a stated time, this will have the effect of vesting the estate immediately upon the death of the testator. The intervention of the estate of the trustee will not have the effect of postponing the gift itself, but only the enjoyment . . . The rule is, we think, applicable to an estate in trust of mixed personalty and realty."

Moreover, the primary purpose in interpreting all wills is to ascertain what the testator desired to be done with his estate. *Carroll v. Herring,* 180 N. C., 369, 104 S. E., 892; *Williams v. Rand,* 223 N. C., 734, 28 S. E. (2d), 247. And the law favors the early vesting of estates. *Weill v. Weill, supra,* and cases cited.

In the will and codicil presently being considered, such expressions as these in the will, "I will and bequeath to my executors . . . to be held in trust for my grandchildren," and "to be held as a trust fund for the benefit of my grandchildren," and in the codicil, "the stock of said company is to be held in trust in equal amounts for each of my grandchildren," clearly manifest an intention of the testator to make an immediate gift to each of his grandchildren. And careful consideration of other provisions of the will fails to show a contrary intention on the part of the testator.

Thus, under the above principles of law as applied to the case in hand, the court below correctly held that each of the grandchildren of the late Charles H. Robinson living at the time of his death took under his will a vested interest in one-ninth of the trust estate created, the enjoyment and possession only being deferred until the termination of the trust. Therefore, the grandson Charles Robinson Hanes, living at the time of the death of his grandfather, acquired a vested interest in the trust estate, and the same passed under his will to his wife, the defendant Delphine Muse.

The judgment below is

Affirmed.

SPERO MOCHE v. JOE LENO, NELSON PITCHI AND DAN PITCHI, TRADING AS RED APPLE CAFE.

(Filed 26 February, 1947.)

1. Landlord and Tenant § 2—

A lease for a term of years is personal property, and is governed by the rules of law applicable to personal property and not by the requirements of law for the conveyance of real property.

2. Common Law § 1—

So much of the common law as is not destructive of or repugnant to, or inconsistent with, our form of government and which has not been abrogated or repealed by statute, or become obsolete, is in full force and effect in this State. G. S., 4-1.

3. Landlord and Tenant § 2—

A seal is not necessary to the validity of a lease regardless of the length of the term. The common law, which did not require leases to be in writing, is in full force and effect, modified only by the statutory requirement that a lease of more than three years be in writing, G. S., 22-2.

APPEAL by plaintiff from *Bone, J.*, at October Term, 1946, of WILSON.

Action of summary proceeding in ejectment begun in court of justice of the peace, and heard in Superior Court on appeal thereto by plaintiff from judgment for defendants.

For purposes of this appeal, these are the essential facts: Upon trial *de novo* in Superior Court, the parties stipulated that plaintiff is the owner of premises, referred to as Red Apple Cafe, of which defendants are in possession, claiming possession under a paper writing, dated 10 September, 1940, not under seal, but signed by Birdie S. Buford and Joe Leno, purporting to be a lease for a period of five years, commencing 1 October, 1940, with privilege in lessee for renewing for an additional period of five years next thereafter. Plaintiff then offered the paper writing in evidence for purposes of attack for that, and of showing that it is not under seal. When plaintiff rested his case, defendants offered the paper writing without limiting the purpose,—it having been registered prior to date plaintiff acquired title. Other evidence pertaining to other features of the case were offered by the parties respectively.

At the close of all the evidence the case was submitted to the jury on this issue: "Is the plaintiff entitled to the immediate possession of the premises described in the affidavit of the plaintiff in the above captioned proceedings?" Under peremptory instruction from the court, the jury answered the issue "No."

From judgment on the verdict, plaintiff appeals to Supreme Court, and assigns error.

Connor, Gardner & Connor and J. A. Jones for plaintiff, appellant.
Lucas & Rand for defendants, appellees.

WINBORNE, J. Does the validity of a lease of real estate for a term of more than three years, required by statute, G. S., 22-2, to be in writing, depend upon whether it is or is not under seal? Basically, the correctness of the peremptory instruction given by the court below which plaintiff assigns as error rests upon the answer to this question. That instruction indicates a holding that a seal is not an essential part of such lease. While this particular question has not been considered heretofore by this Court, consideration of pertinent principles of law leads the Court to agree with such holding.

At common law a lease of land for a term of years, however long, was not required to be in writing. This, however, was changed by the statute of frauds. Tiffany on Real Property, 3rd Ed., Vol. 1, p. 119. 35 C. J., 971, L & T 48 (2). Nevertheless, at common law a seal was not essential to the validity of such lease. 3 Thompson on Real Estate, Permanent Ed., 170.

In this State this Court in *Moring v. Ward,* 50 N. C., 272, defines a lease for years as "a contract by which one agrees, for a valuable consideration, called rent, to let another have the occupancy and profits of the land for a definite time." Also, that there is a distinction between a lease and sale of real estate is pointed out in *Waddell v. Cigar Stores,* 195 N. C., 434, 142 S. E., 585, where *Adams, J.,* uses this language: "In the case before us it is not proposed to convey the legal title . . . but to execute a lease which, except as modified by statute, is treated as a chattel real, falling within the classification of personal property. It is obvious that between a sale and a lease of real property there is a distinction, which often calls for application of diverse principles."

Furthermore, the text writers state that estates less than freehold, called "estate for years," however long, created by lease, have been classified almost invariably as personal, and not real property, and governed by the rules of law applicable to other kinds of personal property. 35 C. J., 970 and 971, L & T, Sec. 47 A (1) and Sec. 48 (2). Tiffany on Real Property, 3rd Ed., Vol. 1, pp. 34 and 109, Secs. 25 and 73.

Tiffany, Sec. 25, *supra,* states that "Estates less than freehold include primarily estates for a fixed period, the termination of which is capable of ascertainment from the beginning, called 'estates for years.'" The author further states (Sec. 73) that "such interests have almost invariably been classified as personal, and not real property, even though the estate be limited to endure for a thousand years, and have, together with other similar estates of less duration, borne the generic term of 'chattels real.'"

In summary, it appears to be well settled that a lease for a term of years is personal property. And, hence, it is governed by the rules of law applicable to personal property, and not by the requirements of law for the conveyance of real property, by deed signed, sealed and delivered.

In the light of these principles, it seems to be the universal rule that written leases for a term of years are not required to be under seal. Thompson on Real Estate, *supra,* treating of necessity of seal, has this to say: ". . . The universal rule today, both in this country and in England, is that the written document which furnishes evidence of a demise sufficient to satisfy the Statute of Frauds need not be under seal." And, continuing, the author says: "Some statutes expressly provide that a lease for a term of years is required to be under seal; but in the absence of such provision, no seal is required, regardless of the length of the term." And in 32 Am. Jur., 59, Landlord & Tenant, Sec. 38, subject "Seal," this pertinent declaration appears: "In the absence of a statute expressly providing otherwise, a lease for a term of years, however long, is not required to be under seal; and the provision of the statute of frauds requiring leases for a term longer than a specified term to be in writing would not, of course, require that the written instrument be also under seal."

Furthermore, in this State it is provided by statute that so much of the common law "as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State . . . not abrogated, repealed, or become obsolete" is in full force and effect in this jurisdiction. See *S. v. Hampton,* 210 N. C., 283, 186 S. E., 251.

While the General Assembly of North Carolina has enacted a statute, G. S., 22-2, which 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 parties to be charged therewith . . .," the statute does not require that such writing be under seal. Hence, it would seem that the common law, modified by the statutory requirement that a lease of more than three years be in writing, is in full force and effect in this State, and the seal is not an essential part of such lease.

In view of what is said above, other assignments brought forward on this appeal need not be considered.

The judgment below is

Affirmed.

STATE v. OTIS RAGLAND.

(Filed 26 February, 1947.)

1. Criminal Law § 31e: Constitutional Law § 35—

Testimony of an officer that he took one of the shoes defendant was wearing when apprehended and fitted it into footprints found at the scene of the crime is competent and does not invade the constitutional protection against self-incrimination.

2. Criminal Law § 29a—

Defendant was charged with committing rape after his escape with other prisoners from custody. A voluntary statement that he had falsely accused another of the prisoners with having committed the crime was admitted in evidence without objection. *Held:* Testimony of the sheriff that defendant had made inquiry as to whether the other prisoners had been apprehended is relevant and competent.

3. Criminal Law § 34a—

Declarations and admissions of a defendant are competent against him in a criminal action.

APPEAL by defendant from *Stevens, J.*, at December Term, 1946, of MARTIN.

Criminal prosecution tried upon an indictment charging the defendant with rape.

The evidence tends to show that on 8 November, 1946, the prosecutrix, a married woman, was alone at her home. The defendant, whom the prosecutrix did not know at that time, but does know now, passed near her home between 12:00 noon and 12:30 p.m. Between 12:30 and 1:00 o'clock p.m., of the same day, she had gone to the pump, which is two or three steps from her porch, to get water for dinner. Immediately thereafter the defendant jumped into the kitchen, threw his hand over her face, knocked her glasses off, choked her, put a coat over her head, overpowered her and had sexual intercourse with her against her will.

A voluntary statement made by the defendant was introduced in evidence without objection. The substance of the statement is to the effect that the defendant and Chester Morris and several other prisoners, escaped from a prison camp on 3 November, 1946. That the defendant spent the night of 7 November, 1946, in a tobacco barn near the home of the prosecutrix. He went to the house and saw a white woman standing at the pump getting water. When she went into the house, he walked up on the porch. He saw her standing in the room. He then picked up a coat that was on the porch, went into the room, put the coat over her head; then the statement reads: "I knew that I was wrong and I left the coat over her head; and ran back to the railroad track through

some woods I came in. Shortly I was caught and taken back to Martin County jail and made a false statement to Sheriff Roebuck and Deputy that Chester Morris, one of the prisoners who escaped with me, was the one who committed the crime on the white woman. I told Sheriff Roebuck, trying to protect myself, and what I said about Chester Morris was all wrong."

The defendant offered no evidence.

Verdict: Guilty of rape. Judgment: Death by asphyxiation. The defendant appeals, assigning errors.

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

H. L. Swain for defendant.

DENNY, J. The defendant's first exception is to the admission of the testimony of Sheriff Roebuck, relative to the similarity of the tracks made by the shoe the defendant was wearing on his right foot at the time he was arrested, and tracks leading from the house of the prosecutrix. The defendant contends that when the Sheriff was permitted to testify that he took one of the shoes the defendant was wearing and fitted it into the tracks leading from the home of the prosecutrix, and that the tracks corresponded with the imprint made by the defendant's shoe, it was tantamount to requiring the defendant to give testimony against himself. Under our decisions the exception cannot be sustained.

It is well settled with us that the similarity of footprints is admissible in evidence as tending to identify the accused as the one who perpetrated the crime. The probative value of such evidence depends upon the attendant circumstances. *S. v. Walker,* 226 N. C., 458, 38 S. E. (2d), 531; *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. Thompson,* 161 N. C., 238, 76 S. E., 249; *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 last cited case, this Court said: "An officer who arrests a prisoner has a right to take any property which he has about him, which is connected with the crime charged, or which may be required as evidence."

The second exception is directed to the prejudicial effect of the Sheriff's testimony to the effect that the defendant had made inquiry of him as to whether or not Chester Morris and the other escaped prisoners had been captured. This exception cannot be sustained. The defendant in his voluntary written statement, signed by him, and admitted in evidence without objection, stated that he, Chester Morris and other prisoners had escaped from the prison camp on 3 November, 1946, and that he had wrongfully tried to implicate Morris as "the one who committed the

crime on the white woman." Moreover, declarations and admissions of a defendant are competent against him in a criminal action. *S. v. Abernethy,* 220 N. C., 226, 17 S. E. (2d), 25.

The remaining exceptions are without merit.

We find no error in the trial below.

No error.

LOTTIE A. PRIVETTE v. MOSES B. ALLEN.

(Filed 26 February, 1947.)

1. Appeal and Error §§ 10a, 31b—

Upon exception and appeal from judgment denying a motion upon facts found and incorporated in the judgment, the record constitutes the case on appeal, and appellant is not required to serve a statement of case on appeal, and motion to dismiss for his failure to do so will be denied. G. S., 1-282.

2. Ejectment § 14—

Neither formal order fixing the amount of the defense bond required of defendant in actions for the recovery of real property, nor notice to plaintiff, is required. G. S., 1-111.

3. Same—

Where, in an action in ejectment, defendant, after consultation with the clerk, tenders justified bond in the minimum amount required by the statute, G. S., 1-111, and the clerk accepts the bond and makes notation thereof on the records, there is a substantial compliance with the statute and plaintiff's motion to strike the answer is properly denied, plaintiff's remedy if he deems the bond insufficient being by motion in the cause.

APPEAL by plaintiff from *Stevens, J.,* at September Term, 1946, of NASH. Affirmed.

Action in common law ejectment and for damages for the wrongful detention of real property, heard on motion.

In her complaint the plaintiff alleges (1) the ownership by her and the wrongful detention by defendant of a certain tract of land in Nash County, and (2) damages for the wrongful detention thereof in the sum of $2,000. She prays judgment accordingly.

In apt time the defendant filed a defense bond, duly justified, in the sum of $200, together with an answer in which he alleges that plaintiff holds title to said land in trust for him and that he is the beneficial owner thereof. Thereafter plaintiff filed a motion to strike the answer for that the bond filed is not in accordance with the provisions of G. S., 1-111, in that it was not in an amount fixed by the clerk, for judgment by default, and for the appointment of a receiver.

When the motion came on to be heard the judge below found the facts and upon the facts found concluded that the "bond filed on June 24, 1946, by the defendant was fixed by the Clerk of the Superior Court of Nash County and filed according to law." It thereupon denied the motion of plaintiff but, in its discretion, required defendant to execute a bond in the sum of $1,200. Plaintiff excepted and appealed.

L. L. Davenport and Hobart Brantley for plaintiff, appellant.

O. B. Moss for defendant, appellee.

BARNHILL, J. The defendant moves to dismiss the appeal for that the plaintiff failed to serve a statement of case on appeal as required by G. S., 1-282. The motion is denied.

The motion to strike was heard by the judge. He found the facts which are incorporated in his judgment. The correctness of this judgment is the only question posed for decision, and that is presented by the exception noted. Hence no service or settlement of a case on appeal was required. The record constitutes the case to be filed in this Court. *Commissioners v. Scales,* 171 N. C., 523, 88 S. E., 868; *Bessemer Co. v. Hardware Co.,* 171 N. C., 728, 88 S. E., 867; *Winchester v. Brotherhood of R. R. Trainmen,* 203 N. C., 735, 167 S. E., 49; *Duckworth v. Duckworth,* 144 N. C., 620; *Clark v. Peebles,* 120 N. C., 31; *R. R. v. Stewart,* 132 N. C., 248.

A formal order fixing the amount of the defense bond to be filed by a defendant in an action to recover real property is not required. G. S., 1-111. Nor is notice to the plaintiff a condition precedent.

The judge found as a fact:

"That the attorney for the defendant consulted the said Clerk about filing a bond in this case before answer was filed; that at that time the said Clerk read Statute, G. S. 1-111, which Statute refers to bonds in cases of that kind; that said Clerk advised said attorney for the defendant that he would have to give a minimum bond of $200; that if the plaintiff or her counsel objected or made motion to increase the bond, said Clerk would have to hear the matter as to the rental value of the land, and that defendant's attorney would have to execute additional bond in accordance with the findings of the said Clerk, and that they would proceed temporarily on this basis until the motion was made . . ."

Thereupon a justified bond in the sum of $200, together with answer, was tendered to and accepted by the clerk, and notation thereof was duly made on the records in the clerk's office. This constitutes a substantial compliance with the statute. If plaintiff deemed the bond insufficient her remedy was by motion in the cause. *Jones v. Jones,* 187 N. C., 589, 122 S. E., 370.

The court below entered an order adjudging the bond filed insufficient in amount and requiring defendant to file another bond in the sum of $1,200 "to protect rents and profits and in lieu of the appointment of a receiver." This bond, conditioned as required by statute, was promptly furnished. This is all plaintiff has any right to demand. *Taylor v. Pope,* 106 N. C., 267; *Dunn v. Marks,* 141 N. C., 232. Hence her exceptive assignment of error is without merit.

Battle v. Mercer, 187 N. C., 437, 122 S. E., 4, cited and relied on by plaintiff, is factually distinguishable.

The judgment below is

Affirmed.

T. LACY WILLIAMS, ADMINISTRATOR OF THE ESTATE OF JAMES H. THOMPSON, v. SARAH THOMPSON, CITY OF RALEIGH, COUNTY OF WAKE, AND THE UNKNOWN HEIRS OF JAMES H. THOMPSON.

(Filed 26 February, 1947.)

1. Pleadings § 31—

On a motion to strike, the test of relevancy of a pleading is whether the pleader has the right to offer in evidence at the trial the facts relied upon to sustain the plea, and if such facts, when established, constitute a cause of action or defense.

2. Same—

If the ultimate fact pleaded in a reply is not inconsistent with the cause of action alleged in the complaint and constitutes a defense, in whole or in part, to a plea for affirmative relief set up in the answer, it should not be stricken.

3. Pleadings § 13—

The right to reply is not restricted to cases in which defendant pleads a counterclaim, but a reply is proper if the answer alleges facts which, if established, entitles defendant to some relief. G. S., 1-140; G. S., 1-141.

4. Limitation of Actions § 1—

Lapse of time does not discharge a liability but merely bars recovery.

5. Limitation of Actions § 15—

Statutes of limitations, except those annexed to the cause of action itself, must be pleaded.

6. Same: Pleadings § 13—

The petition for the sale of land to make assets allege the existence of a claim by the defendant municipality, without admitting its amount or validity. The municipality filed answer asserting a lien for taxes, street assessments, and other items, and prayed judgment therefor. *Held:* Plaintiff was entitled to set up the plea of the statute of limitations by way of reply to the answer.

WILLIAMS *v.* THOMPSON.

APPEAL by defendant City of Raleigh from *Thompson, J.*, at October Term, 1946, of WAKE. Affirmed.

Special proceedings to sell land to make assets, heard on motion to strike plaintiff's reply.

In his petition plaintiff alleges that the City of Raleigh "has a claim of an undetermined amount against said estate for paving assessments and taxes." The City, answering, asserted a first lien for 1944 taxes in the total sum of $7.45, and a lien, second only to the lien for taxes, against the first tract described in the petition for street assessments in the sum of $295.71, with interest from 16 May, 1927, and a lien for charges for sewer connections in the amount of $24 and for water connections in the amount of $29.56, with interest from 16 May, 1927. It prays (1) for judgment for said amounts, (2) that said judgment be declared a specific lien on said property, and (3) for the appointment of a commissioner to make sale.

The plaintiff, replying, pleads the ten-year statute of limitations in bar of said defendant's right to recover the pleaded street assessments and sewer and water connection charges. Thereupon, said defendant moved to strike plaintiff's reply "upon the grounds that 1. No new matter was pleaded by said defendant in its answer, and SECOND that no affirmative relief was prayed by the said defendant in the said answer."

The clerk denied the motion and defendant City of Raleigh appealed to the judge of the Superior Court. When the cause came on to be heard in the court below the judgment of the clerk was affirmed and said defendant appealed to this Court.

Murray Allen for plaintiff, appellee.

P. H. Busbee and John G. Mills, Jr., for appellant City of Raleigh.

BARNHILL, J. On a motion to strike the test of relevancy of a pleading is the right of the pleader to offer in evidence at the trial the facts relied upon to sustain the plea which, if established, will constitute a cause of action or a defense. And so, if the ultimate fact pleaded in a reply is not inconsistent with the cause of action alleged in the complaint and constitutes a defense, in whole or in part, to a plea for affirmative relief set up in the answer, it should not be stricken. *Patterson v. R. R.*, 214 N. C., 38, 198 S. E., 364; *Trust Co. v. Dunlop*, 214 N. C., 196, 198 S. E., 645; *Pemberton v. Greensboro*, 203 N. C., 514, 166 S. E., 396.

The right to reply is not restricted to cases in which the defendant pleads a counterclaim. G. S. 1-140, 1-141. If it alleges facts, upon the proof of which the court should give some relief, it is properly filed. *Lumber Co. v. Edwards*, 217 N. C., 251, 7 S. E. (2d), 497.

The lapse of time does not discharge the liability. It merely bars recovery. *Insurance Co. v. Motor Lines, Inc.*, 225 N. C., 588. Hence the statutes of limitations (except when annexed to the cause of action itself, *Hanie v. Penland*, 193 N. C., 800, 138 S. E., 165) are not available to a litigant as a defense unless pleaded. *Insurance Co. v. Motor Lines, Inc., supra; New Hanover County v. Sidbury*, 225 N. C., 679; *Motor Co. v. Credit Co.*, 219 N. C., 199, 13 S. E. (2d), 230.

Here the petitioner alleges the existence of the City's claim without admitting its amount or validity. When the City filed an answer asserting a lien for taxes, street assessments, and other items, and prayed judgment therefor, the plaintiff, for the first time, was in a position to plead the bar of the ten-year statute of limitations. This plea was properly made by way of reply to the answer.

The judgment below is

Affirmed.

STATE v. GEORGE E. PRITCHARD.

(Filed 26 February, 1947.)

1. Criminal Law § 81c (2)—

The court's statement of contentions will not be held for reversible error even if inexact in some particulars when the alleged error is without material significance on the record.

2. Criminal Law § 81c (1): Attorney and Client § 4—

A party is entitled to appear *in propria persona*, G. S., 1-11, and when a defendant insists upon this right notwithstanding his ability to employ counsel and the efforts of the trial judge to assign him counsel, it cannot be pressed successfully on appeal that he was prejudiced by the action of the trial court in failing to provide counsel and in permitting him wide latitude in the introduction of evidence.

3. Elections § 23e—

In this prosecution for willfully publishing and circulating false reports, derogatory on their face, against a candidate with intent to affect the chances for nomination, G. S., 163-196 (11), no prejudicial error in the trial was made to appear and therefore the verdict and judgment is upheld.

APPEAL by defendant from *Hamilton, Special Judge*, at September Term, 1946, of BEAUFORT.

Criminal prosecution on warrant charging the defendant with publishing and causing to be circulated in a Camden County Primary Election held 25 May, 1946, derogatory reports concerning W. I. Halstead,

a candidate for nomination to the office of Representative in the General Assembly.

The record recites an arraignment of the defendant under the warrant, but omits to record his plea. At the instance of the defendant, the cause was removed to Beaufort County. A trial was there had, and the jury returned a verdict of guilty. The defendant was sentenced to 12 months on the roads. He appeals, assigning as error certain contentions given by the court in its charge to the jury and the failure of the court to assign him counsel for the hearing.

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

H. S. Ward for defendant.

STACY, C. J. The record reveals an unusual proceeding—manifestly difficult to conduct. The defendant insisted on trying his own case, which he had a right to do under the statute. G. S., 1-11. He proved to be a poor lawyer and an unwise client. After conviction, he employed counsel to prosecute an appeal. This has been done with as much skill as the record would permit.

It appears that the defendant took the witness stand and admitted the publication and circulation of the reports as alleged in the warrant. They are derogatory on their face. The jury found that they were false and were circulated willfully, with intent to affect the chances for nomination of the candidate named. This resulted in a conviction under the statute, G. S., 163-196, subsection 11, and judgment as above indicated.

Apparently the defendant sought to defend the publication and circulation of the reports on the ground that they were supported by personal transactions which he previously had with the candidate. The jury did not accept his version of the matter. In fact, all the evidence was to the contrary, save that of the defendant's own expression of belief.

The exceptions addressed to the statement of contentions are pointed in the main to matters other than the truthfulness of the charges. Even if inexact in some particulars, they would seem to be without material significance on the record as presented.

The failure to provide the defendant with counsel cannot be held for error in the light of the trial. He was able to pay counsel, but preferred "to go it alone." *Abernethy v. Burns,* 206 N. C., 370, 173 S. E., 899. Indeed, the court sought to assign the defendant counsel, showed him every consideration, and gave him a wide latitude in the introduction of evidence. This liberality, it is now suggested, while otherwise intended, was in reality hurtful to the defendant. *Gibbs v. Russ,* 223 N. C., 349, 26 S. E. (2d), 909; *Midgett v. Nelson,* 212 N. C., 41, 192 S. E., 854; *Morgan v. Benefit Society,* 167 N. C., 262, 83 S. E., 479. The point was

seriously pressed at bar, but we are unable to perceive wherein the defendant was prejudiced by the action of the trial court. His conviction was induced by his own testimony.

No irregularity sufficient to upset the verdict or the judgment has been made to appear. Hence the result:

No error.

STATE v. JOHNNIE JONES.

(Filed 26 February, 1947.)

1. Criminal Law § 14—

Where in the trial in Recorder's Court defendant is found guilty on the first count and not guilty on the second, and appeals to the Superior Court, the charge on the second count is not before the Superior Court and a conviction on the second count in the Superior Court will be set aside as a nullity.

2. Disorderly Conduct § 2—

Defendant was charged with disorderly conduct at a public place "by using indecent language." The municipal ordinance provided that it should be unlawful to disturb the good order, peace and quiet of the town. The evidence disclosed that defendant was told by an officer to move his car from a zone newly marked for loading, that defendant inquired when "all this God damn stuff" was started in the town, and that the officer immediately arrested him because he had "run his mouth" and was "killing time." *Held:* The record fails to support the charge.

APPEAL by defendant from *Stevens, J.*, at October Term, 1946, of EDGECOMBE.

Criminal prosecution upon two warrants: In the first, it is alleged that "in said county and in the Town of Tarboro (or the Town of Princeville), on or about the 16th day of February, 1946, the above named defendant unlawfully and wilfully violated the laws of the State of North Carolina or ordinances of said Town, acting in a disorderly manner on Granville St., by using indecent language, contrary to the statutes in such cases made and provided." In the second, the defendant is charged with resisting arrest and attempting to assault an officer with a deadly weapon.

From judgment of guilty in the magistrate's court on the first warrant, the defendant appealed to the Superior Court.

In the Recorder's Court, the defendant was declared guilty of resisting arrest, but not guilty of attempting to assault an officer with a deadly weapon. From the judgment pronounced, the defendant appealed to the Superior Court.

The two appeals, on the separate warrants, were consolidated and heard together in the Superior Court, as both charges arise out of the same transaction.

On Saturday, 16 February, 1946, the defendant drove his car into the Town of Tarboro and parked it in a space which had "just been marked off" as a loading zone. The defendant was drinking but not drunk. The chief of police insisted that he move his car. After some hesitancy, the defendant got in his car, but "seemed mad, and started cursing." He said to the officer: "When did you all start all this God damn stuff around here?" The chief of police, thereupon reached over and cut his switch off and told the defendant he was under arrest. "That was all the cursing he did but was killing time." A number of people were on the sidewalk near enough to hear what was said.

At the close of the State's evidence, judgment of nonsuit was entered on the charge of resisting arrest, and the case was submitted to the jury on the remaining counts in the two warrants.

Verdict: Guilty of disorderly conduct (first warrant) and guilty of attempting to assault an officer (second warrant).

Judgment: Thirty days in jail on first warrant to run concurrently with sentence on second warrant; six months on the roads on second warrant.

Defendant appeals, assigning errors.

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

P. H. Bell for defendant.

STACY, C. J. The charge of attempting to assault an officer with a deadly weapon was not before the Superior Court. *S. v. Nichols,* 215 N. C., 80, 200 S. E., 926; *S. v. Perry,* 225 N. C., 174, 33 S. E. (2d), 869. The defendant had been acquitted on this count in the Recorder's Court, and his appeal on the second warrant was limited to the count of resisting arrest. See *S. v. Crandall,* 225 N. C., 148, 33 S. E. (2d), 861, and cases there cited. *Cf. S. v. Baldwin,* 226 N. C., 295, 37 S. E. (2d), 898; *S. v. Bell,* 205 N. C., 225, 171 S. E., 50. When judgment of nonsuit was entered on this count, there remained nothing but the charge of disorderly conduct as contained in the first warrant.

The first warrant is artlessly drawn. Its imprecision is conceded. Indeed, it may be doubted whether it sufficiently charges any offense. But however this may be, the record hardly supports the charge of "acting in a disorderly manner on Granville St. by using indecent language."

The ordinance of the Town of Tarboro provides: "Disturbing of Peace. It shall be unlawful to disturb the good order, peace and quiet of the town." *S. v. Sherrard,* 117 N. C., 716, 23 S. E., 157.

If this be the ordinance which the defendant is charged with violating, so far as the record discloses, the only "indecent language" used by the defendant was an inquiry addressed to the chief of police, who immediately arrested the defendant, not so much for the inquiry, but because "he had run his mouth so much" and "was killing time" in getting his car out of the loading zone. The peace of the town seems to have been in the hands of the officers, who apparently were swift to enforce it, even to the point of harshness.

On the record as presented, we are constrained to hold that the prosecution on the first warrant must fail. This entitled the defendant to his discharge.

Reversed.

ROY M. BANKS AND WIFE, LIZZIE M. BANKS, v. J. PAUL SHAW.

(Filed 26 February, 1947.)

Deeds § 3—

When it is properly made to appear that the notary took the acknowledgment of grantors and the private examination of the wife, but inadvertently omitted the name of the husband from his certificate, the certificate can be amended subsequently to speak the truth, no rights of creditors or third parties being involved.

APPEAL by defendant from *Thompson, J.,* at October Term, 1946, of WAKE. Affirmed.

J. M. Broughton and C. Woodrow Teague for plaintiffs, appellees.

Wilson & Bickett for defendant, appellant.

DEVIN, J. The purpose of the action is to determine the title to land, the subject of a contract to convey. The defect complained of is that plaintiffs' title is derived under foreclosure of a deed of trust from T. A. Whitaker and wife, and that this deed of trust duly executed, probated and registered, showed notarial acknowledgment only by the wife. It was properly made to appear and not controverted that the notary took the acknowledgment of the grantors and the private examination of the wife, but inadvertently omitted the name of the husband from his certificate. Subsequent to the foreclosure the notary amended his certificate to speak the truth, attached it to the deed of trust, and the deed of trust with amended certificate in due form was again registered. No rights of third parties or creditors have intervened.

It appears that the deed of trust was properly executed and acknowledged. Hence the omission in the notary's certificate was a matter of proof. The certificate could be amended subsequently to speak the truth, no rights of creditors or third parties being involved. *Frisbee v. Cole,* 179 N. C., 469, 102 S. E., 890. In *Wynne v. Small,* 102 N. C., 133, 8 S. E., 912, it was said: "If the records and *quasi* records omit to speak the truth, they should be corrected when they fail to do so, that they may possess, as they import, absolute verity in all their recitals."

The court below properly held that the plaintiffs' title was good, and that defendant should be required to accept deed for the land in accordance with the terms of the contract.

Judgment affirmed.

ELI BELL ET AL. v. WILLIAMSTON LUMBER CO. ET AL.

(Filed 26 February, 1947.)

Master and Servant § 55d—

The findings of the Industrial Commission that deceased was not an employee of defendant but an employee of independent contractors for defendant, is conclusive when supported by the evidence even if the record be such as would permit a contrary finding.

APPEAL by plaintiffs from *Burgwyn, Special Judge,* at September Term, 1946, of MARTIN.

Proceeding under Workmen's Compensation Act to determine liability of defendants to father and mother, dependents of Abraham Bell, deceased employee.

According to the findings of the Industrial Commission, the deceased was employed by J. B. Nicholson and View Nicholson in their logging operations for the Williamston Lumber Company. He came to his death by accident arising out of and in the course of his employment. The Nicholsons do not have as many as five persons in their employ. Hence they are not subject to the provisions of the Workmen's Compensation Act. The deceased was not an employee of the Williamston Lumber Company, but of the Nicholsons, who were independent contractors.

Upon these findings, which are supported by the evidence, compensation was denied.

Upon appeal to the Superior Court, the determination of the Industrial Commission was upheld.

The plaintiffs appeal, assigning errors.

P. H. Bell for plaintiffs, appellants.

Norman & Rodman for defendants, Lumber Co. and Insurance Co., appellees.

PER CURIAM. The case turns on whether the Nicholsons were agents of the lumber company or independent contractors. The Commission found that they were independent contractors, and the Superior Court has approved. *Beach v. McLean,* 219 N. C., 521, 14 S. E. (2d), 515; *Graham v. Wall,* 220 N. C., 84, 16 S. E. (2d), 691; *Bryson v. Lumber Co.,* 204 N. C., 664, 169 S. E., 276; *Hayes v. Elon College,* 224 N. C., 11, 29 S. E. (2d), 137. Even if the record were such as to permit a contrary finding, the determination of the Industrial Commission would be conclusive on appeal. *Hegler v. Mills Co.,* 224 N. C., 669, 31 S. E. (2d), 918. To accept the plaintiffs' version of the matter would require a rejection of the opposing inferences which support the fact-finding body. *Kearns v. Furniture Co.,* 222 N. C., 438, 23 S. E. (2d), 310; *Lassiter v. Tel. Co.,* 215 N. C., 227, 1 S. E. (2d), 542.

No reversible error has been made to appear.

Affirmed.

P. M. NESBITT v. EDWIN M. GILL, COMMISSIONER OF REVENUE OF NORTH CAROLINA.

(Filed 5 March, 1947.)

1. Taxation § 1c—

The word "trades" as used in Sec. 3, Art. V of the State Constitution means any employment or business engaged in for gain or profit.

2. Same—

The purchase of horses or mules for the purpose of resale, at wholesale or retail, is a trade within the meaning of Sec. 3, Art. V, of the State Constitution, and the imposition of a license tax on such trade, is valid.

3. Same—

In imposing license taxes on trades and professions it is not required that there be uniformity, but it is sufficient if the selection and classification of the subjects for such taxation be reasonable and just and the tax apply alike in its exactions and exemptions to all persons belonging to the prescribed class or business.

4. Taxation § 14—

The $3.00 per head tax on horses and mules required to be paid by dealers purchasing such animals for resale is not a privilege tax for the right to purchase horses or mules nor an *ad valorem* tax on the animals purchased, but is merely the method prescribed by statute for the deter-

mination of the amount of license tax to be paid by those engaging in the business.

5. Taxation § 1c—

In determining whether a license tax is just and equitable, the fact that in levying a tax upon a particular business, such business is exempt from some other comparable tax may be considered.

6. Same—

The imposition of an additional license tax of $3.00 per head on horses and mules, required to be paid by dealers purchasing such animals for resale, G. S., 105-47, is a just and equitable manner for determining the amount of license tax to be paid by such dealers, based upon the quantity of business done by them, particularly in view of the fact that such sales have been exempt from the 3% sales tax and the head tax substituted.

7. Taxation § 7—

The license tax imposed on dealers purchasing horses or mules for resale by G. S., 105-47, both in its provisions for graduation according to the number of carloads of horses or mules purchased for resale and the head tax on such animals purchased for resale, is imposed and the exceptions to the head tax are applicable regardless of whether such animals are raised in this State or are shipped into the State from other states, and therefore the statute makes no discrimination between local or interstate commerce.

8. Statutes § 6—

A statute will not be declared unconstitutional unless it is clearly so.

9. Same—

If a statute is susceptible to two interpretations, one constitutional and the other unconstitutional, the former will be adopted.

10. Taxation § 7: Constitutional Law § 31—

A state cannot levy a tax which directly or indirectly imposes an undue burden upon interstate commerce.

11. Same—

The license tax imposed by G. S., 105-47, on dealers purchasing horses and mules for resale applies regardless of whether the animals are raised in this State or are shipped into the State, and therefore the tax is a levy on a local business and does not place a burden upon interstate commerce.

12. Taxation § 1c—

Under the provisions of G. S., 105-47, a dealer is exempt from the head tax on horses and mules therein imposed: (1) On horses and mules purchased from another dealer within the State who has paid the tax; (2) On horses and mules received in part payment; and (3) On horses and mules repossessed for failure of a purchaser to pay the purchase price, and such exemptions are based upon reasonable distinctions and apply to all dealers alike and therefore do not violate any provisions of the State or Federal Constitutions.

13. Same—

In levying a license tax upon a business or trade, transactions may be exempted from tax liability so long as the exemptions apply alike to all engaged in the business and are based upon reasonable and pertinent distinctions.

BARNHILL, J., dissenting in part.

DEVIN, J., joins in the opinion of BARNHILL, J.

APPEAL by plaintiff from *Bobbitt, J.*, at December Term, 1946, of BUNCOMBE.

This is an action to recover taxes paid under protest.

The plaintiff, a citizen and resident of Buncombe County, North Carolina, on or about 15 March, 1943, purchased seventy-eight horses from ranches located in the State of Montana, and had them shipped to him at Asheville, N. C., during the months of June and July, 1943. Thereafter, on or about 3 April, 1945, the plaintiff paid the defendant, under protest, the sum of $407.40, which represented the taxes due the State, by the plaintiff, including penalties for late filing, under the provisions of Section 115 of the Public Laws of 1939, G. S., 105-47. Demand for the refund of the tax and penalties was duly made. The defendant refused to make the refund, and this action was duly instituted.

Upon the pleadings and evidence offered in the trial below, the court held: That the tax levied by the aforesaid statute is a valid license or privilege tax upon the business of purchasing horses and/or mules for resale within the State of North Carolina; that it applies alike to purchases of horses and/or mules raised within or without the State and is applicable only to horses and/or mules purchased for resale within the State of North Carolina, and entered judgment that plaintiff recover nothing by his action and that the same be dismissed. Plaintiff appeals to the Supreme Court, assigning error.

Lamar Gudger and Don C. Young for plaintiff.

Attorney-General McMullan and Assistant Attorneys-General Spruill and Moody for defendant.

DENNY, J. The plaintiff alleges and contends that Section 115 of the Revenue Act of 1939, as amended, purporting to levy the tax involved herein, is unconstitutional, in that: (1) Purchasing horses and/or mules for resale, is not a trade or profession within the meaning of Article V, Section 3, of the Constitution of North Carolina; (2) The levy of a head tax of $3.00 upon horses and/or mules purchased for the purpose of resale exacted by subsection (a) of Section 115, of said Revenue Act, as amended, is a tax on property and as such is unconstitutional and void, being in violation of the aforesaid Section of our State Constitu-

tion; (3) The Act does not levy a head tax on horses and/or mules raised in North Carolina and is therefore, in contravention of Article I, Section 8, clauses 1 and 3, of the Constitution of the United States; and (4) The head tax levied under the Act imposes an undue burden upon interstate commerce by subjecting interstate purchases of horses and/or mules to the risk of multiple taxation and by exempting "horses and/or mules which are acquired or received as a result of an allowance for credit for horses and/or mules taken in part payment on horses and/or mules subject to the tax imposed in this section" from said tax.

The pertinent parts of Section 115, of the Revenue Act of 1939, as amended, now G. S., 105-47, read as follows:

"Every person, firm, or corporation engaged in the business of purchasing for the purpose of resale, either at wholesale or retail, horses and/or mules shall apply for and procure from the commissioner of revenue a state license for the privilege of engaging in such business in this state and shall pay for such license an annual tax for each location where such business is carried on as follows:

"Where not more than one carload of horses and/or mules is purchased for the purpose of resale . . . $25.00.

"Where more than one carload and not more than two carloads of horses and/or mules are purchased for the purpose of resale . . . $50.00.

"Where more than two carloads of horses and/or mules are purchased for the purpose of resale . . . $100.00.

"For the purpose of calculatng the amount of tax due under the above schedule, a carload of horses and/or mules shall be twenty-five (25).

"(a) In addition to the annual licenses levied in this section, every person, firm, or corporation, engaged in the business of purchasing for the purpose of resale, either at wholesale or retail, horses and/or mules shall pay a tax of three dollars ($3.00) per head on all such horses and/or mules purchased for the purpose of resale. 'Purchase' shall be taken to mean and shall include all horses and/or mules acquired or received as a result of outright purchase or on consignment, account or otherwise for resale, either at wholesale or retail: Provided, however, that 'purchases' shall not include the acquisition of horses and/or mules which are acquired or received as a result of an allowance for credit for horses and/or mules taken in part payment on horses and/or mules subject to the tax imposed in this section nor shall it include horses and/or mules which have been repossessed as a result of nonpayment of the original sales or purchase price. 'Purchases' shall include all horses and/or mules acquired for the purpose of resale, either at wholesale or retail, whether such horses and/or mules are shipped into this state by railroad or brought in otherwise. . . .

"(b) The additional per head tax levied in this section on purchase of horses and/or mules purchased for the purpose of resale, either at whole-

sale or retail, shall be due and payable immediately upon receipt of such horses and/or mules within this state."

Article V, Section 3, of our State Constitution, among other things, provides that "The power of taxation shall be exercised in a just and equitable manner. Taxes on property shall be uniform as to each class of property taxed. . . . The General Assembly may also tax trades, professions, franchises and incomes." The appellant contends that the business of purchasing horses and/or mules for the purpose of resale in North Carolina is not a trade within the meaning of the above section of our Constitution. This contention is not in accord with the uniform decisions of this Court. In defining the meaning of the word "trades," as used in the above section of our Constitution, in the case of *S. v. Worth,* 116 N. C., 1007, 21 S. E., 204, this Court said: "The word trade is often used in a more restricted sense to mean either the particular occupation of a mechanic or a merchant; but where it is used in defining the power to tax its broadest signification is given to it and it is interpreted as comprehending not only all who are engaged in buying and selling merchandise but all whose occupation or business it is to manufacture and sell the products of their plants. It includes in this sense any employment or business embarked in for gain or profit." This interpretation as to the meaning of the word "trades," as used in the above section of our Constitution, has been approved in *Mercantile Co. v. Mount Olive,* 161 N. C., 121, 76 S. E., 690; *Bickett v. Tax Commission,* 177 N. C., 435, 99 S. E., 415; *S. v. Elkins,* 187 N. C., 533, 122 S. E., 289; *Hilton v. Harris,* 207 N. C., 465, 177 S. E., 411; and *S. v. Dixon,* 215 N. C., 161, 1 S. E. (2d), 521. Hence, we hold that when a person, firm or corporation, in North Carolina, engages in the business of purchasing for the purpose of resale, either at wholesale or retail, horses and/or mules, such person, firm or corporation is a dealer in said animals, and as such is pursuing a trade within the meaning of that term as used in Article V, Section 3, of our State Constitution.

The appellant challenges the validity of the per head tax on the ground that it is a property and not a privilege or license tax, and lacks that uniformity required for *ad valorem* taxes.

Prior to the enactment of Section 115, of the Revenue Act of 1939, as amended, any person, firm or corporation engaged in the business of purchasing and selling horses and/or mules in North Carolina, was required to pay a minimum license tax of $12.50 for the privilege of selling one carload of horses and/or mules, and $5.00 for each additional carload purchased. In computing the tax twenty-five horses and/or mules were considered a carload and when a car contained in excess of that number an additional tax of twenty-five cents per head in excess of twenty-five, was required to be paid. In addition thereto, a sales tax of 3% was levied for the privilege of carrying on said business. In 1939,

the annual license and head tax, was substituted, as set forth herein, and the sales of horses and/or mules were expressly exempted from the sales tax. G. S., 105-169, Subsection (n).

The General Assembly is not restricted to uniformity as between trades or professions in levying a privilege or license tax. However, the tax must apply equally to all persons belonging to the prescribed class upon which it is imposed. *Gatlin v. Tarboro,* 78 N. C., 122; *Smith v. Wilkins,* 164 N. C., 136, 80 S. E., 168; *Provision Co. v. Maxwell, Comr. of Rev.,* 199 N. C., 661, 155 S. E., 557; *Leonard v. Maxwell, Comr. of Rev.,* 216 N. C., 89, 3 S. E. (2d), 316. If a privilege or license tax is reasonable and just, and applies alike in its exactions and exemptions to all persons belonging to the prescribed class or business, it is not objectionable under the provisions of the Constitution of North Carolina for lack of uniformity. In *Leonard v. Maxwell, Comr. of Rev., supra, Stacy, C. J.,* in speaking for the Court, said: "In levying a sales tax as a license or privilege tax, the General Assembly may set apart certain trades, callings, or occupations for imposition of the tax and exclude others from its operation. *Smith v. Wilkins,* 164 N. C., 136, 80 S. E., 168. The tax may be fixed at a flat rate for some, graduated as to others, and withheld from others. *S. v. Carter,* 129 N. C., 560, 40 S. E., 11; *S. v. Powell,* 100 N. C., 526, 65 S. E., 424. One business may be taxed and another left untaxed. *Carmichael v. Coal & Coke Co.,* 201 U. S., 495, 109 A. L. R., 1327. Reasonable selection or classification of the subjects for such taxation may be made by the General Assembly and different rates or different modes and methods of assessment applies to different classes. *Rosenbaum v. New Bern,* 118 N. C., 83, 24 S. E., 1; *S. v. Stevenson,* 109 N. C., 730, 14 S. E., 385, 26 A. L. R., 595. A wide latitude is accorded the taxing authorities in the selection of subjects for taxation, particularly in respect of occupation taxes. *Oliver Iron Mining Co. v. Lord,* 262 U. S., 172."

The amount of a privilege or license tax may be determined by the population of the city or town in which the business is to be conducted. Or, it may be determined by gross sales or the aggregate number of sales of a commodity handled—such as cotton. *Albertson v. Wallace,* 81 N. C., 479, 103 A. L. R., 26n; *Smith v. Wilkins, supra.* It has been the practice of our General Assembly for many years to levy what is considered a nominal sum for an annual license for engaging in some classes of trades and to levy in addition thereto, an additional privilege or license tax measured by some reasonable method for ascertaining the volume of business transacted in the State. In *Albertson v. Wallace, supra,* it is said: "We see no just objection to the mode adopted for ascertaining and determining the amount of the privilege tax and making it dependent upon the extent of the business of which the amount of the aggregate purchases may be as accurate a test or measure as any

other that could be adopted. This mode of taxing is, in our opinion, eminently fair and reasonable in its operation. A specific tax of a definite sum upon a trade, without regard to the extent of the trader's operations, and pressing with the same force on one whose business is small as upon the large operator, would be very unequal. The ability to pay increases with an increased and successful business, and it is just and proper to gauge the sums to be paid upon that principle. This is what the statute undertakes to do, and no more, and it lies within the discretion of the taxing power to levy the privilege tax under this rule."

In requiring the payment of a head tax by dealers in horses and/or mules, the General Assembly did not levy a tax on the privilege or right to purchase horses and/or mules, nor did it levy an *ad valorem* tax on the animals purchased, but the statute expressly levies the tax on every person, firm or corporation engaged in the business of purchasing horses and/or mules for the purpose of resale. The General Assembly adopted this method as a fair and reasonable one for ascertaining the amount of such tax to be paid, in addition to the annual license tax. In determining whether or not the power to tax has been exercised in a "just and equitable manner," the Court may take into consideration the fact that in levying a particular license or privilege tax upon a business, such business is exempt from some other comparable tax. *Cudahy Packing Co. v. Minnesota,* 246 U. S., 450, 62 L. Ed., 827; *Maine v. Grand Trunk Railway Co.,* 142 U. S., 217, 35 L. Ed., 994; *Powell v. Maxwell, Comr. of Revenue,* 210 N. C., 211, 186 S. E., 326; *Johnston v. Gill, Comr. of Rev.,* 224 N. C., 638, 32 S. E. (2d), 30. In view of the fact that the sales of horses and/or mules have been exempted from the 3% sales tax, and the head tax substituted, we think the levy is just and equitable and not in conflict with the provisions of our State Constitution.

The appellant also attacks the validity of the head tax on the ground that the Act discriminates as between local and interstate commerce, in that, under the terms of the Act, the tax does not apply to North Carolina bred horses and/or mules. The statute provides that " 'Purchase' shall be taken to mean and shall include all horses and/or mules acquired or received as a result of outright purchase or on consignment, account or otherwise for resale either at wholesale or retail." We do not think there is any ambiguity in the above provision of the statute, but that it is clear that the aggregate amount of the head tax is measured by the number of horses and/or mules purchased for resale, except such purchases as may be expressly exempted therefrom by other provisions in the statute.

The amount of the tax to be paid at the time of obtaining the annual license is graduated according to the number of carloads of horses and/or mules purchased for resale. For the purpose of calculating the amount of the tax due under the above schedule, a carload of horses and/or mules

shall be twenty-five. We do not think the general levy is changed or limited by a further provision in the Act that "purchases shall include horses and/or mules acquired for the purpose of resale, either at wholesale or retail, whether such horses and/or mules are shipped into this State by railroad or brought in otherwise." We are of the opinion this further provision was inserted to emphasize the fact that all the horses and/or mules brought into the State may not be shipped over railroads or in carload lots, but that the tax is assessed on all horses and/or mules brought in regardless of the manner of transportation.

The appellant further contends the levy is limited to foreign bred horses and/or mules, since the head tax on the business of purchasing horses and/or mules for resale, does not become due and payable until the dealer receives such animals "within this State." However, we think this provision in the statute merely fixed the time the tax becomes due and payable and applies with equal force to purchases made within the State. It simply means a dealer is not required to pay the tax when he purchases horses and/or mules for resale until such animals come into his possession within the State, regardless of the date of purchase or the origin of the shipment.

An Act of the General Assembly will not be held invalid as violative of the Constitution unless it so appears beyond a reasonable doubt. And when there is reasonable doubt as to the validity of a statute, such doubt will be resolved in favor of its constitutionality. *Brumley v. Baxter,* 225 N. C., 691, 36 S. E. (2d), 281, 162 A. L. R., 930; *Turner v. Reidsville,* 224 N. C., 42, 29 S. E. (2d), 211; *Bridges v. Charlotte,* 221 N. C., 472, 20 S. E. (2d), 825; *Morris v. Holshouser,* 220 N. C., 293, 17 S. E. (2d), 115, 137 A. L. R., 733; *Snyder v. Maxwell,* 217 N. C., 617, 9 S. E. (2d), 19; *Tobacco Co. v. Maxwell,* 214 N. C., 367, 199 S. E., 405. If a statute is susceptible of two interpretations, one constitutional and the other not, the former will be adopted. *S. v. Lueders,* 214 N. C., 558, 200 S. E., 22; *S. v. Williams,* 209 N. C., 57, 182 S. E., 711.

The remaining question is to determine whether or not this section of our Revenue Act imposes an undue burden upon interstate commerce.

It is well settled that a State cannot levy a tax which directly or indirectly imposes an undue burden upon interstate commerce. *Gwin, White & Prince v. Henneford,* 305 U. S., 434, 83 L. Ed., 272; *Baldwin v. Seelig,* 294 U. S., 511, 79 L. Ed., 1032; 101 A. L. R., 55. This does not mean, however, that interstate commerce is to be relieved wholly of state taxation. In the case of *Western Live Stock v. Bureau of Revenue,* 303 U. S., 250, 82 L. Ed., 823, *Stone, C. J.,* speaking for the Supreme Court of the United States, said: "It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business. 'Even interstate business must pay its way,' . . . and the

bare fact that one is carrying on interstate commerce does not relieve him from many forms of state taxation which add to the cost of his business."

The appellant is relying strongly upon the case of *Gwin, White & Prince v. Henneford, supra,* in which the State of Washington undertook to levy a tax measured by the gross receipts of the appellant derived from its business of marketing fruit shipped from the State of Washington to points outside the State, including foreign countries. The appellant was engaged exclusively in interstate commerce. The tax was held invalid because it discriminated against interstate commerce, in that it imposed upon it, merely because interstate commerce was being done, the risk of a multiple burden to which local commerce was not exposed.

In the case of *Western Live Stock v. Bureau of Revenue, supra,* the State of New Mexico levied a privilege tax of 2% of amounts received from the sale of advertising space by one engaged in the business of publishing newspapers or magazines. The appellants, who sold to advertisers outside the State, space in a magazine they published in New Mexico and circulated to subscribers within and without the State, challenged the validity of the tax on the ground that it was an undue burden on interstate commerce. The Court said: "In the present case the tax is, in form and substance, an excise conditioned on the carrying on of a local business, that of providing and selling advertising space in a published journal, which is sold to and paid for by subscribers, some of whom receive it in interstate commerce. The price at which the advertising is sold is made the measure of the tax. This Court has sustained a similar tax said to be on the privilege of manufacturing, measured by the total gross receipts from sales of the manufactured goods both intra and interstate. *American Mfg. Co. v. St. Louis, supra* (250 U. S., 462, 33 L. Ed., 1087, 39 S. Ct., 522). The actual sales prices which measured the tax were taken to be no more than the measure of the value of the goods manufactured, and so an appropriate measure of the value of the privilege, the taxation of which was deferred until the goods were sold." And in *American Mfg. Co. v. St. Louis, supra,* the Court said: "The city might have measured such tax by a percentage upon the value of all goods manufactured, whether they ever should come to be sold or not, and have required payment as soon as, or even before, the goods left the factory."

In applying the principle laid down in the above decisions, we hold the tax under consideration is a levy on a local business for the privilege of engaging in such business, and does not place a burden upon interstate commerce. *Powell v. Maxwell, Comr. of Revenue, supra.* Therefore, the risk of multiple taxation is not involved. Consequently, the further contention that the various exemptions contained in the Act make it discriminatory and in contravention of the commerce clause, is without merit.

The General Assembly has exempted those engaged in the business of buying and selling horses and/or mules from paying the head tax on certain purchases, exchanges and repossessions. The law simply provides: (1) A dealer is relieved of the payment of a head tax when purchasing horses and/or mules from another dealer within the State who has paid the tax; (2) That in selling horses and/or mules, the dealer will be exempt from paying a head tax on any horses and/or mules he may accept in part payment thereof; and (3) Such dealer is exempted from paying an additional head tax on any horses and/or mules he may find it necessary to repossess as a result of the nonpayment of the original sales or purchase price. Whether or not the General Assembly acted wisely in granting these exemptions, is not before us for decision. We do think, however, it had the power to grant them without violating any of the provisions of our State or Federal Constitution. In levying a tax for the privilege of engaging in business, certain transactions may be exempted from tax liability so long as the exemptions apply alike to all who are engaged in business within the particular classification and "reasonable and pertinent bases for said classification and exemptions are readily discernible," *Leonard v. Maxwell, Comr. of Revenue, supra. Smith v. Wilkins, supra; Mercantile Co. v. Mount Olive, supra; Cobb v. Commissioners,* 122 N. C., 307, 30 S. E., 338; *Stewart Machine Co. v. Davis,* 301 U. S., 548, 81 L. Ed., 799, 109 A. L. R., 1293.

In granting these exemptions we find no arbitrary or unjust exercise of the "power to tax" on the part of the General Assembly.

The judgment of the court below is

Affirmed.

BARNHILL, J., dissenting in part: Insofar as the majority conclude that the "per carload" privilege tax levied under G. S. 105-47 is valid and enforceable I concur. However, I cannot subscribe to the conclusion that the additional "per head" tax is a license or privilege tax and as such is a lawful exercise of the taxing power. In my opinion it constitutes an undue and unlawful burden on interstate commerce.

North Carolina is not a stock-raising state. The number of horses and mules raised in this State for sale on the market is so negligible they constitute only an infinitesimal fraction of the total. Certainly 98% or more are shipped into the State. *S. v. Vick,* 213 N. C., 235, 195 S. E., 779. Perhaps the consciousness of this fact prompted the Legislature, in defining "purchase," to use the significant language "whether such horses and/or mules are shipped into this state by railroad or brought in otherwise"; and later to provide that the tax "shall be due and payable immediately upon receipt of such horses and/or mules within this state."

Under the taxing provision of the Act, A buys horses and mules out of the State and has them shipped into the State for resale. He must pay a franchise tax of $3 per head. He resells by carload lot to B, C, and D, dealers who purchase for resale. They pay the carload tax but pay no per head tax. Thus the purchaser whose mules are shipped into the State pays while the dealer whose source of supply is within the State does not pay.

This, in a nut shell, presents my views. The question is one of construction. If I correctly read the statute it is, as a privilege tax, so clearly in contravention of the Federal Constitution as interpreted by the United States Supreme Court further discussion or citation of authority is unnecessary. I vote to affirm as to the per carload tax and reverse as to the per head tax.

DEVIN, J., joins in this opinion.

W. F. EDWARDS, EMPLOYEE, v. PIEDMONT PUBLISHING COMPANY, EMPLOYER, AND MARYLAND CASUALTY CO., CARRIER.

(Filed 5 March, 1947.)

1. Master and Servant § 55d—

In reviewing an award to plaintiff by the Industrial Commission, approved by the Superior Court, the evidence will be considered in the light most favorable for the establishment of the claim, since the findings of fact and the permissible inferences to be drawn therefrom are conclusive when supported by any competent evidence.

2. Master and Servant § 40b—

The word "accident" as used in the Workmen's Compensation Act is an unlooked for and untoward event which is not expected or designed by the injured employee. G. S., 97-2 (f).

3. Same—Evidence held to sustain finding that rupture of intervertebral disc of back while lifting weight was result of an accident.

The evidence tended to show that the employee lifted a plate weighing 40 or 50 pounds in the regular and usual course of his employment, and while handing it to the pressman with his body in a twisted position, felt a sharp pain. Expert testimony was introduced to the effect that the employee had ruptured an intervertebral disc and that the lifting of the weight in the manner described was sufficient to have produced the injury. Plaintiff employee admitted that on two different occasions, several years previously, when he arose from a sitting position he had a catch in his back. *Held:* The evidence is sufficient to support the finding of the

Industrial Commission that the injury resulted from an accident. G. S., 97-2 (f); G. S., 97-52.

SEAWELL, J., concurring in result.

APPEAL by defendants from *Olive, Special Judge,* at February Term, 1946, of FORSYTH. Affirmed.

This was a proceeding under the Workmen's Compensation Act for compensation for an injury sustained by the plaintiff while in the employ of defendant Publishing Company. The Industrial Commission found, under the evidence offered, that the plaintiff had sustained an injury by accident arising out of and in the course of his employment by the defendant, and awarded compensation under the Act. On appeal to the Superior Court the defendants' exceptions were overruled and the findings and conclusions of the Industrial Commission were affirmed.

Defendants appealed to this Court, assigning error in the ruling of the trial judge.

No counsel for claimant.
W. C. Ginter for defendants, appellants.

DEVIN, J. The defendants challenge the correctness of the ruling below on the ground that there was no competent evidence to sustain the finding that the injury complained of was "by accident" within the meaning of the Workmen's Compensation Act. G. S., 97-2 (f). They do not controvert the fact that the injury, if properly determined to have been by accident, arose out of and in the course of plaintiff's employment by defendant Publishing Company.

The pertinent facts as found by the hearing commissioner and affirmed by the full commission, were as follows: "The commissioner finds that on February 3, 1945, the claimant in this case was employed as a learner and on said date and in the course of his regular employment, he was required to lift a plate from the floor and hand it to the pressman; and in doing so, the claimant handed the plate to the pressman to his right and at the time his body was in a twist from the position in which he was standing; and at that time he felt an excruciating pain in his low back and hip and turned very white and pale and had to lie down. He was seen in a day or two by Dr. Vernon Lassiter, who strapped his back and treated him for strained muscle. The claimant worked with difficulty for several days up until about the 17th of February. He was seen by Dr. R. A. Moore on March 7th, and Dr. Moore diagnosed his condition as a ruptured intervertebral disc and operated on him on the 14th of March. The claimant was disabled as a result of said injury and operation until the 10th of June, upon which date his disability following the operation was terminated."

These findings seem to be in accord with the evidence offered. Plaintiff testified that in the course of his employment and in the performance of his work he picked up a plate off the floor, the plate weighing between 40 and 50 pounds, and made one step with his left foot and had to turn and hand the plate to the pressman over to his right, "kind of twisting"; that he twisted around and handed it to the boy and felt a severe pain in the lower part of his back and hip. "I never had a pain like that before." He said he did not slip but "twisted." Dr. Moore testified the plaintiff described his injury as having been sustained while he was lifting a plate, and that he felt something give way in his back. He gave his opinion that the lifting of the plate in the manner described was sufficient to have produced the injury he found, and that in his opinion it was thus caused.

The defendants call attention to admission by the plaintiff that on two different occasions, several years before, when he arose from a sitting position he had a catch in his back, "above the beltline." They also point to evidence tending to show that plaintiff had been doing similar work for three months, and that on the occasion of his injury he picked up the plate and "handed it over to the right in the normal, usual way." Defendants contend this evidence indicates a pre-existing injury, or physical weakness, and negatives the idea of unusual conditions or unexpected consequences, and hence that the finding that the injury resulted from an accident was unsupported. G. S., 97-52.

However, in view of the finding by the statutory fact-finding body, the plaintiff is entitled to have the evidence considered in the light most favorable for the establishment of his claim, for, if there be any competent evidence to support the findings of the Industrial Commission, these findings must be held conclusive of the facts and of the permissible inferences to be drawn therefrom. *Southern v. Cotton Mills Co.,* 200 N. C., 165, 156 S. E., 861; *Carlton v. Bernhardt-Seagle Co.,* 210 N. C., 655, 188 S. E., 77; *Barbour v. State Hospital,* 213 N. C., 515, 196 S. E., 812; *Dickey v. Cotton Mills* (S. C.), 39 S. E. (2d), 501.

An accident, as the word is used in the Workmen's Compensation Act, has been defined as "an unlooked for and untoward event which is not expected or designed by the injured employee." *Love v. Lumberton,* 215 N. C., 28, 1 S. E. (2d), 121; *Smith v. Creamery Co.,* 217 N. C., 468, 8 S. E. (2d), 231. "A result produced by a fortuitous cause." *Slade v. Hosiery Mills,* 209 N. C., 823, 184 S. E., 844. "An unexpected or unforeseen event." Webster. "An unexpected, unusual or undesigned occurrence." Black.

The question here presented is whether, taking into consideration all the circumstances connected with plaintiff's claim, the rupture of his intervertebral disc occurred on 3 February, 1945, and, if so, whether it was the result of such an unlooked for and untoward event, produced by lifting

the plate and handing it to another in a "twisted" position as described by the plaintiff, as to come within the definition of an injury by accident, and hence to furnish the basis for an award of compensation under the remedial provisions of the Act. The Industrial Commission has so found and the Superior Court has affirmed.

This ruling must be upheld. The evidence of the sudden and unexpected displacement of the plaintiff's intervertebral disc under the strain of lifting and turning as described lends support to the conclusion that the injury complained of should be regarded as falling within the category of accident, rather than as the result of inherent weakness, or as being one of the ordinary and expected incidents of the employment. *Smith v. Creamery Co.*, 217 N. C., 468, 8 S. E. (2d), 231; *MacRae v. Unemployment Comp. Com.*, 217 N. C., 769, 9 S. E. (2d), 595; *Moore v. Sales Co.*, 214 N. C., 424, 199 S. E., 605; *Com. Casualty Ins. Co. v. Hoage*, 75 F. (2d), 677; *Dixon v. Norfolk Ship & Dry Dock Corp.* (Va.), 28 S. E. (2d), 617; *Giguere v. Whiting Co.* (Vt.), 98 A. L. R., 196. See also *Rewis v. Ins. Co.*, 226 N. C., 325, 38 S. E. (2d), 97.

We find nothing in *Neely v. Statesville*, 212 N. C., 365, 193 S. E., 664; *Slade v. Hosiery Mills*, 209 N. C., 823, 184 S. E., 844, or *Buchanan v. Highway Com.*, 217 N. C., 173, 7 S. E. (2d), 382, to militate against the conclusion reached on the facts here presented.

Judgment affirmed.

SEAWELL, J., concurring in result: I concur in the result reached in this case, but dissent from the principle on which it is based. The effect of the decision is to adopt the minority view that confines compensation to injuries wholly external,—that is, injuries caused by external force, accidentally applied,—and does not regard the unexpected breaking or giving way of the body tissues under the strain or load of the usual employment as "injury by accident" within the meaning of Section 97-2f of the Workmen's Compensation Act, G. S., Chapter 97. The proper definition of this term has an important bearing on the coverage of the Act, and its administration by the Industrial Commission.

The claimant, without counsel in the court below, was not represented by counsel here, and filed no brief, and apparently had no counsel before the Industrial Commission where the claim originated. The defendant was represented by counsel throughout the proceedings. For that, among other reasons, not wholly out of regard for the claimant, who seems to be cast in the role of *propositus*, but in the interest of the many who may have just claims for compensation which should not be foreclosed by decision upon a question which may be more or less academically posed, I venture to state my reasons for disagreeing with the Court.

To understand the question raised by the appeal, I must add somewhat to the statement of fact in the main opinion. Claimant's evidence, as

given by his co-worker, discloses that the work being done by Edwards was in the usual way of lifting and handling the type plate and passing it to his companion, and that there was no unusual load lifted. The claimant himself so stated, and added that he did not slip, but handled the plate in the same manner he had been doing since his employment some 2½ months ago. If there is any significance to be attached to the position of claimant's body when he passed the plate laterally to his co-worker, it does not appear in the evidence. The plaintiff had been doing that for months. The evidence is clear of any pretense that the work was not being done in the ordinary way incident to the employment. And yet, in my opinion, the claimant is entitled to compensation: Because the displacement of the vertebral disc, an occurrence both unusual and unexpected by the worker,—and in fact by anyone else,—satisfies every essential definitional requirement of "injury by accident" within the meaning of the Compensation law.

In *Smith v. Creamery Co.,* 217 N. C., 468, 8 S. E. (2d), 231, this question was presented to the Court and was decided in accordance with the well established rule in cases cited *infra.* The Court said:

"In *Moore v. Sales Co.,* 214 N. C., 424, 199 S. E., 605,—also a hernia case—the same question was raised, but was not decided, because the Court thought that the essentials of external accident were present under the facts of the case. And this case might be disposed of in a similar way if the Court thought it could, with any further propriety, evade an issue which is squarely laid before us, and is likely to arise again and again."

And further:

"This Court has never attempted definitely to align itself with the minority view that a sudden disruption or breaking of the bones or tissues of the body under the strain of strenuous labor, such as lifting, wholly unusual and unexpected, may not be considered as an element of accident leading to compensable injury . . . If the plaintiff had burst a blood vessel or broken a leg or pulled a tendon under the strain, there would be little argument."

The purport of the decision is not veiled under any subtlety of expression.

I do not question the right of the Court to overrule or disregard *Smith v. Creamery Co., supra,* without assigning any reason for it. It cannot be distinguished. The question is when, in the advancing and receding tide of opinion, some landmark will be left on the beach upon which the profession and others interested may safely rely.

I am not interested in this phase of case history as I am in the propriety and consequences of the present decision.

The language used in our Compensation Laws, "injury by accident," appears in identical form in most of the compensation laws of the sev-

eral states. They are generally derived directly or mediately from the British Workmen's Compensation Act of 1897, 61-61 Vict. 1897 C. 37, and the Act of 1906, 6 Edward VII, 1906, C. 58, which uses this phrase; and the cases cited here are either identical or comparable in expression. Quoting from *Fenton v. Thornley,* A. C. 443, "The expression 'accident' is used in the popular and ordinary sense of the word as denoting an unlooked for mishap or an untoward event which is not expected or designed. If a man, in lifting a weight or trying to move something not easily moved, were to strain a muscle or rick his back, or rupture himself, the mishap in ordinary parlance would be described as an accident. Anybody would say that the man had met with an accident in lifting a weight or trying to move something too heavy for him."

That construction, with great uniformity, is given to the phrase wherever it occurs in the Workmen's Compensation Laws of the several states. *Giguere v. Whiting Co.,* 98 A. L. R., 196, 200; *Stevenson v. Lee Moore Contracting Co.,* 45 N. M., 354, 115 Pac. (2d), 333. "Injury by accident" and "accidental injury" are considered convertible terms.

"Accident" as used in our Workmen's Compensation Laws, has been defined as an unlooked for and untoward event which is not expected or designed by the injured employee." *Love v. Lumberton,* 215 N. C., 28, 1 S. E. (2d), 121; *Smith v. Creamery Co., supra.* In this definition there is no connotation of the distinction now sought to be made.

As I have said, the position taken by the appellants is decidedly against the weight of authority in states where the statutory definition of compensable injury is identical with ours or couched in comparable language, as most of them are. Horovitz, Workmen's Compensation Laws, pp. 88, *et seq.;* Schneider, Workmen's Compensation (perm. ed.), 1945, Vol. 4, pp. 388, *et seq.; Giguere v. Whiting Co., supra; Lumbermen's Mutual Casualty Co. v. Grigg,* 190 Ga., 277, 9 S. E. (2d), 84 (1940); *Strahorn v. Chapman Construction Co.* (S. C.), 224 S. E. (2d), 116 (1943); *Webster v. Fry Roofing Co.* (Tenn.), 146 S. E. (2d), 946; *Dixon v. Norfolk Shipbuilding & D. D. Corp.* (Va.), 28 S. E. (2d), 617 (1944); *Smith v. Creamery Co., supra; Dove v. Alpena Hide & Leather Co.,* 198 Mich., 132, 164 N. W., 253, quoted in *Eller v. Leather Co.,* 222 N. C., 23, 21 S. E. (2d), 809; *Jones v. Town of Hamden,* 192 Conn., 523 (1942), 29 Atl. (2d), 772; *McCormack Lumber Co. v. Department of Labor,* 7 Wash. (2d), 40, 1941, 108 Pac. (2d), 807; *Clover v. Hughes,* A. C., 242, 3 B. W. C. C., 275; *Brown's case,* 123 Me., 424, 123 Atl., 421.

Space forbids me to multiply citations. They may be found with appropriate quotations in the authorities cited *supra,* upon the pages indicated.

In *Commercial Casualty Ins. Co. v. Hoage,* 75 F. (2d), 677 (Ky.), it is said:

". . . An accidental injury may occur notwithstanding that the injured is then engaged in his usual and ordinary work, and likewise the injury need not be external. It is enough if something unexpectedly goes wrong with the human frame. And so, an award of damages has been sustained in a case in which the injured was lifting a weight resulting in the breaking of a blood vessel, or the straining of a muscle, or a hernia. Hence it is that 'accidental injury' includes any injury which is unexpected or not designed, and just as much includes injury sustained by an employee subject to physical infirmities as injury to one who is strong and robust."

In *Moore v. Mumford Printing Co.* (N. H.), 185 A., 165, it is said:

"Obviously the same definition of the word 'accident' is to be used whether that word is to be applied to cause or effect." (The statute uses the phrase "injury by accident.")

In *Zappela v. Industrial Ins. Commission,* 82 Wash., 316, 144, p. 54, it is said:

"To hold with the Commission that if a machine breaks, any resulting injury to a workman is within the act but if the man breaks, any resulting injury is not within the act, is too refined to come within the policy of the act as announced by the legislature and the language of the court in its interpretation."

In *Gilliland v. Ash Grove Lime & Cement Co.,* 104 Kan., 771, 180, p. 793, 796 (a case of pulmonary hemorrhage while breaking and loading rock) the Court said:

"The evidence warranted a finding that the physical structure of the man gave way under the strain of his usual labor . . . the term accident applies to him as clearly as it would apply to what happened to the car if it had broken down under the assumed circumstances."

In *Webster v. Roofing Co., supra,* the Court said:

"If, as a result of a strain in lifting some heavy article for his employer, an employee dislocates his vertebrae or breaks his wrist or ruptures a blood vessel, it could hardly be insisted that such injury was not accidental."

A similar illustration is used in *Brown v. Otto Nelson Co.,* 123 Me., 424, 123 Atl., 421, 422, 60 A. L. R., 1293:

"If a laborer, performing a usual task in his wanted way, by reason of strain breaks his wrist, nobody would question the accidental nature of the injury. If, instead of the wrist it is an artery that breaks, the occurrence is just as clearly an accident."

In cases of the kind we are considering, involving strain from lifting or moving heavy bodies,—the most common source of injury to the body tissues and parts of the human frame generally,—we find many cases in which our courts, apparently realizing that the petitioner ought to be compensated under the act, have rather grasped at questionable distinc-

tions; magnifying slight differences in the *weight lifted* or the *strain experienced* or the circumstances which brought them about as being of an accidental nature, thus avoiding the issue as to where the accident really lay. These distinctions are both confusing and challengeable, and merely serve to suspend judgment, or defer the issue for subsequent determination. Whether a workman has been subjected to a *heavy* lift where his employment requires lifting, or to a *severe* strain, is related to his individual strength and condition and not to any standard of huskiness, which cannot be defined, is impossible of application, and has no real existence in actual experience. "Employers take workmen 'as is,' that is, without any warranty as to any state of health known or unknown." Horovitz, *supra*, p. 83. And, we may add, with such strength as they then possess. Insurance carriers know this fact and we may safely assume that it is reflected in their actuarial tables and in the rates which are ultimately absorbed either by the employee or the consumer. The measure of strength which the individual employee may safely put forth, and the condition of underlying disease or weakness which may be aggravated and is, nevertheless, compensable, must be determined by reference to the workman himself.

The restricted definition of "injury by accident" insisted upon by the appellant, although recognized by a small minority of the jurisdictions dealing with similar statutory expressions, is contrary to the meaning assigned to it in the country from which we derived it,—definitions which we are supposed to have inherited along with the phrase itself (*Fenton v. Thornley, supra*), and which have been freely adopted in this country. The adoption of the rule contended for would exclude a large class of cases which ought to be compensable under the act if its main and basic purposes are to be served.

In the leading case of *Fenton v. Thornley Co., supra* (in which the factual situation was similar to that in the case at bar), *Lord MacNaghten,* in writing the final opinion of the House of Lords, said:

"It does seem to be extraordinary that anybody should suppose that when the advantage of insurance against accident at their employers' expense was being conferred on workmen, Parliament could have intended to exclude from the benefit of the Act some injuries ordinarily described as 'accidents' which beyond all others merit favorable consideration in the interest of workmen and employers alike. A man injures himself by doing some stupid thing, and it is called an accident, and he gets the benefit of the insurance. It may even be his own fault, and yet compensation is not to be disallowed unless the injury is attributable to 'serious and wilful misconduct,' on his part. A man injures himself suddenly and unexpectedly by throwing all his might and all his strength and all his energy into his work by doing his very best and utmost for his employer, not sparing himself or taking thought of what may come upon

him, and then he is told that his case is outside the Act because he exerted himself deliberately, and there was an entire lack of the fortuitous element! I cannot think that that is right."

This opinion expresses the rule of the English courts which has been widely adopted in this country and is the prevailing rule at this time.

In every jurisdiction where similar laws have been enacted, as far as my research extends, a liberal construction is demanded, particularly of the coverage clauses. *Johnson v. Asheville Hosiery Co.*, 199 N. C., 38, 153 S. E., 591; *Barbour v. State Hospital*, 213 N. C., 515, 516, 196 S. E., 812; *Thomas v. Raleigh Gas Co.*, 218 N. C., 429, 11 S. E. (2d), 297; *Brown v. Bristol Block Co.*, 94 Vt., 123, 128, 108 Atl., 922; *Giguere v. Whiting Co., supra.* It is important to both labor and industry that the law should be uniform in those states which adopt it. And, in view of the compromises and mutual concessions made by employers and employees alike for the security of both of them, neither can be benefited and both may be harmed, in a continued fight to limit the field of liability beyond the reasonable purpose of the act and a fair interpretation of its covering provisions reasonably construed—often a controversy foreign to the desire of either party.

The humanitarian purpose in this and similar laws is an outstanding feature and none the less so is the economic security thus afforded, certainly as important to labor as it is to industry. In view of both these purposes and to maintain the balance thus created the coverage of the Act is most important, and any decision we make with regard to it should keep that principle steadily in mind. In the exchange both parties have paid an economic price. Neither should have what it gets reduced below the price it was supposed to pay.

The apprehension that the more liberal construction of the definition of compensable injury will lead to compensation of all injuries sustained in the employment is not well founded; and it has never been given that interpretation in any jurisdiction of which I am aware. It will bring into the coverage of the Act workmen whose injuries are as much caused by accident as those which are supposed to be compensable under the narrow construction now about to be applied, and will bring within the benefits of the law many deserving cases to which, in my judgment, it was intended to apply.

In the present case it could hardly be disputed that what occurred was an accident. The spinal column is one of the best protected bits of machinery in the body. The discs upon which the vertebrae rotate and which cushion its solid segments are not subject to displacement several times a day or month or year. God is not so poor an engineer. Considering the nature of the employment, it is not contrary to reason or experience that an accident should be precipitated by the incidence of the employment when the duties are routinely performed in the ordi-

nary way,—a way, however, which proved beyond the strength of the worker or the stoutness of his frame. It may well come about when, perhaps because of a concurring weakness, the usually reliable defensive mechanism of the body is caught "off balance." The fact that the injured parts had not succumbed to earlier strains is not significant. It was simply a case of the pitcher going to the well once too often. Even if predisposed by prior trauma incurred in the employment, the result was an accident compensable under the law,—untoward, unexpected, undesigned, and distinctly marked as to time, place and circumstance.

For the reason stated, the judgment of the Superior Court sustaining the award should be affirmed.

R. F. CARTER AND D. W. CARTER, CO-PARTNERS, TRADING AND DOING BUSINESS AS OAK GROVE CAFE, v. THURSTON MOTOR LINES, INC.

(Filed 5 March, 1947.)

1. Automobiles § 18h (2)—

Evidence that a truck ran into a building at the intersection of public highway is sufficient evidence of negligence on the part of the driver of the truck to take the issue to the jury.

2. Master and Servant § 22a: Principal and Agent § 10—

The doctrine of *respondeat superior* applies only when the relation of master and servant or principal and agent is shown to exist between the wrongdoer and the person sought to be charged, at the time and in respect to the very transaction out of which the injury arose.

3. Automobiles § 24e—

Evidence tending to show that the truck causing the injury had painted on its side the name of defendant, a corporation engaged in freight transportation by truck, and that the injury was caused by the negligence of the driver of the truck, *is held* insufficient to make out a *prima facie* case under the doctrine of *respondeat superior*, and defendant's motion to nonsuit should have been allowed, some evidence of the agency of the driver at the time and in respect to the transaction out of which the injury arose being necessary in addition to evidence of ownership and negligence.

4. Evidence § 42d—

A declaration of an agent, even though it be part of the *res gestæ*, is not competent against the alleged principal unless the fact of agency is established *aliunde*.

5. Evidence § 7a—

Where the allegations of the complaint are denied, the burden is on plaintiff to offer evidence in support of each essential element of his

cause of action or facts from which a presumption in his favor in regard thereto arises, and thus establish his case.

SEAWELL, J., dissenting.

APPEAL by defendant from *Frizzelle, J.*, at May Term, 1946, of ALAMANCE. Reversed.

Civil action for damages resulting from the alleged negligent operation of a truck of the tractor-trailer type.

Plaintiffs operate a cafe in a two-story brick building located at the intersection of N. C. Highways Nos. 10 and 54. Their living quarters are located on the second floor. About 1:15 a.m., 7 September, 1945, plaintiffs heard "an awful noise." On investigation they found that a motor vehicle of the tractor-trailer type had run into the building. The vehicle had the name of defendant painted on the sides of the trailer and truck. The stock in trade of plaintiffs was damaged and they were forced to remain closed for some time. Plaintiff testified, over objection of defendant, that Belton King said at the time that he was driving the truck; that he fell asleep and lost control of the truck, and "tore it all to pieces."

There was a verdict for plaintiffs. From judgment on the verdict the defendant appealed.

J. Elmer Long and Clarence Ross for plaintiff, appellee.

Long & Long for defendant, appellant.

BARNHILL, J. There is ample evidence of negligence on the part of the driver of the truck which ran into the building occupied by plaintiffs. *Etheridge v. Etheridge,* 222 N. C., 616, 24 S. E. (2d), 477; *Boone v. Matheny,* 224 N. C., 250, 31 S. E. (2d), 364. The plaintiffs seek to hold the defendant liable for the damages they sustained as a result thereof under the doctrine of *respondeat superior.* The defendant denies all the essential allegations in the complaint, so that plaintiffs are put to proof of every fact necessary to support a recovery. Thus the question posed by this appeal is this: Is there any evidence sufficient to warrant the submission of the case to the jury on the issue of defendant's liability under the doctrine of *respondeat superior?*

There is evidence that the name of defendant corporation was painted on the sides of the truck and trailer; and one of plaintiffs referred to the truck as "the Thurston Motor Lines truck." Defendant in its answer admits that it is engaged in the business of hauling merchandise and freight by motor truck and trailer for profit over and upon the highways of North Carolina and other states. The record discloses this and nothing more. There is no evidence that the truck was loaded or un-

loaded, or that it had ever been used in the business of defendant. Neither is there any evidence that the driver was then, or had ever been, in the employ of the defendant.

The doctrine of *respondeat superior* applies only when the relation of master and servant, employer and employee, or principal and agent is shown to exist between the wrongdoer and the person sought to be charged for the result of the wrong, at the time and in respect to the very transaction out of which the injury arose. This is so well recognized that it may be said to be axiomatic.

The question is: Does evidence tending to show that defendant was the owner of the truck which caused the damage, together with proof of negligence of the driver, make out a *prima facie* case for the jury as against the owner?

On this question there is a decided conflict of judicial opinion. Decisions fall into at least three major groups: (1) Some courts hold that proof of ownership alone is, *prima facie,* sufficient, in the absence of positive evidence that the driver was not an employee of defendant; (2) others that proof of ownership plus general employment is sufficient; and (3) still others that there must be some evidence that the driver was an employee, about his master's business at the time of and in respect to the very transaction out of which the injury arose. See 9 Blashfield, Pt. 2 Auto L. & P., 368, *et seq.;* Anno. 43 A. L. R., 899, where North Carolina is listed in the third class.

In the light of this conflict of opinion and decided lack of harmony in other jurisdictions, we must look to cases decided by this Court to ascertain what rule we have adopted and what course we have pursued, for the rule prevailing in this jurisdiction is, after all, controlling here.

In *Linville v. Nissen,* 162 N. C., 95, 77 S. E., 1096, the Court, quoting from *Durham v. Straus,* 38 Pa. Sup. Ct., 621, said: "The plaintiff must not only show that the person in charge was defendant's servant, but the further fact that he was at the time engaged in the master's business. Evidence of the mere ownership of the machine is insufficient."

Thereafter in *Clark v. Sweaney,* 175 N. C., 280, 95 S. E., 568, and *Wilson v. Polk,* 175 N. C., 490, 95 S. E., 849, *Clark, C. J.,* used language seemingly intended to restrict the decision in the *Linville case, supra.* But the Court did not overrule the principle there stated. In the *Polk case* it was said by way of *obiter:* "The Court did not hold in that (the Linville) case that proof of the ownership of the automobile, and that it was being driven by the minor son of the owner was not evidence to go to the jury. These are facts which usually call for explanation from the defendant owner." In the *Sweaney case* the defendant owned the automobile. His son was driving and his wife was a passenger at the time of the collision. Immediately after the collision the defendant appeared and directed his son to carry plaintiff home on

his, defendant's, automobile. A divided Court held this evidence sufficient to be submitted to the jury.

On the other hand, the Court, in *Freeman v. Dalton,* 183 N. C., 538, 111 S. E., 863, expressly approved the language used in the *Linville case.* Then in *Misenheimer v. Hayman,* 195 N. C., 613, 143 S. E., 1, *Adams, J.*, speaking for the Court, says: "Unquestionably there is evidence of the driver's negligence, and in our opinion there is sufficient evidence of the defendant's ownership of the truck. The defendant contends, however, that if this be admitted it would still be incumbent upon the plaintiff to show that the driver was engaged in the performance of the defendant's business. This, of course, is a correct proposition . . ." To like effect are *Bilyeu v. Beck,* 178 N. C., 481, 100 S. E., 891, and *Grier v. Grier,* 192 N. C., 760, 130 S. E., 617.

These and other decisions rendered during the same period of time left the law in a somewhat confused or uncertain state. Then, at the Fall Term, 1929, three cases, in which the question was directly involved, were decided by this Court. In *Cotton v. Transportation Co.,* 197 N. C., 709, 150 S. E., 505, the defendant was the owner of the machine and the driver was defendant's employee. *Stacy, C. J.,* speaking for the Court, discussed some of the prior decisions and affirmed the judgment of nonsuit on the grounds there was no evidence the driver was about his master's business in respect to the transaction out of which the injury arose. In *Martin v. Bus Line,* 197 N. C., 720, 150 S. E., 501, there was likewise evidence of ownership and general employment. The *Chief Justice,* in affirming a judgment of nonsuit, cites the *Linville case,* reconciles prior decisions, outlines the facts which must be made to appear in order to make out a *prima facie* case, and says: "The plaintiff must offer 'some evidence which reasonably tends to prove every fact essential to his success' (*S. v. Bridgers,* 172 N. C., 879, 89 S. E., 804)." See also *Linville v. Nissen, supra; Gurley v. Power Co.,* 172 N. C., 690, 90 S. E., 943; *Mason v. Texas Co.,* 206 N. C., 805, 175 S. E., 291; *Liverman v. Cline,* 212 N. C., 43, 192 S. E., 849; *Cole v. Funeral Home,* 207 N. C., 271, 176 S. E., 553; *Van Landingham v. Sewing Machine Co.,* 207 N. C., 355, 177 S. E., 126; *Smith v. Duke University,* 219 N. C., 628, 14 S. E. (2d), 643.

Then in *Jeffrey v. Mfg. Co.,* 197 N. C., 724, 150 S. E., 503, *Brogden, J.*, frankly recognized the sharp division in judicial opinion as to what evidence is sufficient to make out a *prima facie* case under the doctrine of *respondeat superior,* cited cases in other jurisdictions holding that proof of ownership by defendant plus negligence by the driver is sufficient, and then met the issue squarely by saying: "In North Carolina the decisions are not in full accord, but the general principle is that mere ownership plus negligence is not sufficient to constitute a *prima facie* case."

Whatever the lack of full accord may have been prior to that time, since the rendition of these decisions, this Court has adhered consistently to the rule thus stated. They settled the question in this jurisdiction. In every case, since decided, in which the question has been at issue, the Court has held that to charge the owner of a motor vehicle for the neglect or default of another there must be some evidence of the agency of the driver at the time and in respect to the transaction out of which the injury arose, and that proof of ownership alone is not sufficient to warrant or support an inference of such agency.

We have repeatedly held that proof of general employment is not sufficient. *Linville v. Nissen, supra; Jeffrey v. Mfg. Co., supra; Martin v. Bus Line, supra; Tribble v. Swinson,* 213 N. C., 550, 196 S. E., 820; *Parrott v. Kantor,* 216 N. C., 584, 6 S. E. (2d), 40; *McLamb v. Beasley,* 218 N. C., 308, 11 S. E. (2d), 283; *Creech v. Linen Service Corp.,* 219 N. C., 457, 14 S. E. (2d), 408; *Smith v. Duke University, supra; Salmon v. Pearce,* 223 N. C., 587, 27 S. E. (2d), 647.

Even more significant is the fact that we, time and again, have either sustained or directed a judgment of nonsuit where there was evidence of ownership by the defendant plus negligence of the driver. Among those cases in which this has occurred are these: *Linville v. Nissen, supra; Reich v. Cone,* 180 N. C., 267, 104 S. E., 530; *Bilyeu v. Beck, supra; Freeman v. Dalton, supra; Grier v. Grier, supra; Martin v. Bus Line, supra; Cotton v. Transportation Co., supra; Weatherman v. Ramsey,* 207 N. C., 270, 176 S. E., 568; *Tyson v. Frutchey,* 194 N. C., 750, 140 S. E., 718; *Swicegood v. Swift & Co.,* 212 N. C., 396, 193 S. E., 277; *Parrott v. Kantor, supra; Vaughn v. Booker,* 217 N. C., 479, 8 S. E. (2d), 603; *McLamb v. Beasley, supra; Hawes v. Haynes,* 219 N. C., 535, 14 S. E. (2d), 503; *Riddle v. Whisnant,* 220 N. C., 131, 16 S. E. (2d), 698; *Smith v. Moore,* 220 N. C., 165, 16 S. E. (2d), 701; *Miller v. Moore,* 222 N. C., 749, 21 S. E. (2d), 874; *Russell v. Cutshall,* 223 N. C., 353, 26 S. E. (2d), 866; *Rogers v. Black Mountain,* 224 N. C., 119, 29 S. E. (2d), 203; *Smith v. Mariakakis,* 226 N. C., 100.

It may be suggested that in some of these cases evidence of the non-agency of the driver was developed through witnesses for the plaintiff. But the value of the cited and like cases as authorities on the question here presented rests squarely upon the all-important fact that, notwithstanding proof of ownership by defendant plus negligence by the driver, a judgment of nonsuit was directed in each.

In deciding whether there is sufficient evidence to be submitted to a jury, we must consider the testimony in the light most favorable to the plaintiff. If evidence of ownership plus negligence of the driver is sufficient to make out a *prima facie* case, judgment of nonsuit was not in order. The plaintiff, having offered evidence of ownership plus negligence, made out a *prima facie* case. Credibility was for the jury and

not the Court. And so, on the motion to dismiss, the Court could not have considered evidence tending to contradict the inference of agency arising from the proof of ownership even though such evidence came from witnesses for the plaintiff (other than the plaintiff himself).

So then in this State the rule is this: Evidence tending to show that defendant owned the vehicle which caused the damage and that such damage proximately resulted from the negligent manner in which the driver operated the same is not sufficient, *prima facie,* to charge the defendant under the doctrine of *respondeat superior.* There must be some evidence of the agency of the driver at the time and in respect to the transaction out of which the injury arose.

To particularize is to exclude, and so we would not attempt to formulate a definition of "some evidence" applicable in all cases. That question must be decided in the light of the attendant circumstances in each case as it arises.

If view of our conclusion in respect to the motion to nonsuit the assignment of error based on the exception to the admission of the statement of the driver becomes immaterial. However, it is not amiss to note that even if said statement constitutes a part of the *res gestæ,* (and this we do not decide), it is not admissible against this defendant as evidence, either of negligence or agency, for the reason the record fails to disclose any testimony tending to show that he was at the time the agent of defendant. *McCorkle v. Beatty,* 226 N. C., 338; *Staley v. Park,* 202 N. C., 155, 162 S. E., 202.

The agency must be shown *aliunde* before the agent's admission will be received. *Hunsucker v. Corbitt,* 187 N. C., 496, 122 S. E., 378, and cited cases.

The trouble with this case is not with the law, but with the record. The plaintiff stopped short of making good his allegations. He now seeks to save himself by invoking the aid of legal presumptions, but these, too, need some facts to make them effective. It is alleged that the truck was engaged in the defendant's business at the time of the injury. This is denied. No evidence was offered to prove it. It is the rule with us that the plaintiff must make out his case.

For the reasons stated the judgment below must be

Reversed.

SEAWELL, J., dissenting: There are two reasons for my dissent; one is personal,—the desire that I may not be presumed, by acquiescence, to share in the views of the majority; the other is the hope that at some time and in some way we may bring our decisions more consistently in line with the modern rule applicable to this motor vehicle and trucking age.

There is no commendatory expression in the opinion of the rule adopted,—or as I might say in deference to the majority view of its derivation, the rule adhered to,—or the wisdom or propriety of applying it to cases of which the case at bar is typical, arising out of modern conditions of automobile traffic. It merely invokes precedent. Perhaps the significance of many of the cases cited in the opinion will remain controversial, but whatever their import the rule deduced is too severely challenged by the changes which have taken place in comparatively recent years in the extent and pattern of automobile traffic, and the incidence of these two factors on accepted theories of legal proof in establishing the essentials of recovery for negligent injury to persons or property, to deny the propriety of readjustment.

As long as it was a neighborhood affair the plaintiff in such a suit might overcome the inconveniences of existing local rules of evidence, even to the proof of matters supposed to be within the peculiar knowledge of the defendant. A different picture is now presented. The vast nation-wide increase in passenger and freight traffic by truck, the number of concerns engaged in it, and the scale of their operations throughout the country have multiplied public contacts, increased the probability of personal and property injury, and made more difficult the establishment of facts necessary to recovery.

I think, therefore, the right answer to the question presented to us on the appeal is to be found not so much in a review of our own cited cases for guidance as in constructive attention to rules of evidence which have been successfully applied in other jurisdictions without infraction of any fundamental principle of procedure, or imposing undue hardship on the litigant parties. We must face the fact that in matters of this kind rules of evidence grow out of our experience with the probative facts and the reliability of the inferences we commonly draw from them. The inferences that may be drawn from the possession and operation of another person's bicycle or pleasure car, so often the object of loan or accommodation and suitable for private use, are certainly not those which may be drawn from the control and operation of a truck used commercially or in transportation of freight over a wide territory, through many states. For one thing, in the latter case the probability of the use of such a car for a private purpose is vastly diminished; and on the principle of regularity we may assume the contrary, which is commonly true. The presumption is normal and natural.

The distinction is important and generally observed in cases where this rule is applied.

The majority rule, which is the rule contended for by the appellees and applied in the trial court, may be thus stated:

"Where the ownership of such a car is admitted or established and it is found to be in the control of a person other than the owner, and

being operated by such person, a presumption or inference arises that the person in charge is the employee and servant of the owner and acting within the scope of his employment." As thus stated it has the support of an impressive weight of authority and well reasoned opinion throughout the country. Huddy, Automobile Law, Vol. 15-16, sec. 161, *et seq.;* 9 Blashfield (1941), Sec. 64, and cases cited; 42 A. L. R., Annotation 898; 74 A. L. R. (1931), 951-968; 96 A. L. R. (1935), 634-645; 1945 A. L. R. Supplement to Annotations, p. 159; *Hartig v. American Ice Co.,* 290 Pa., 21, 137 Atl., 867; *Silent Sales Corp. v. Station,* 45 Fed. (2d), 471; *Telarico v. Bickers Office Furniture Co.,* 298 Pa., 211, 149 Atl., 883; *Mahan v. Steward Sand Co.,* 211 Mo. App., 256, 243 S. W., 407; *Crowell v. Padolsky,* 98 N. J. L., 552, 120 Atl., 23; *Giblin v. Dudley Hardware Co.,* 44 R. I., 371, 117 Atl., 481; *Enea v. Pfister,* 180 Wis., 329, 192 N. W., 1018; *Alhbern v. Griggs,* 158 Minn., 11, 196 N. W., 652; *Mahan v. Walker,* 97 N. J. L., 304, 117 Atl., 609.

In a number of states,—for instance, New York, Massachusetts, Connecticut, Tennessee—it has been made a rule of evidence by statute. In most cases, including those cited *supra,* it is judicially recognized as based on sound inferences from the fact of ownership of the truck and its control and operation by a person other than the owner.

In *Finney v. Frevel,* 37 Atl. (2d), 923, 925 (1944), it is said:

"Ownership being thus established, a *prima facie* presumption arises that the operator of the vehicle was a servant and agent of the owner, *Pa. R. R. Co. v. Lord,* 159 Md., 518, 526, 151 Atl., 400; *Gutheridge v. Gorsuch, supra,* 177 Md., 109, 114, 115, 8 Atl. (2d), 885. A reasonable presumption also arises that the servant and agent was acting in the scope of his employment and upon the business of the master and this presumption exists until rebutted. *Erdman v. Horkheimer Co.,* 169 Md., 204, 181 Atl., 221; *Phipps v. Milligan,* 174 Md., 438, 199 Atl., 498; *Gutheridge v. Gorsuch, supra.*"

In *Frick v. Bickel* (Ind. App. Ct., 1944), 54 N. E. (2d), 435, it is said:

"The rule is accepted in this state that where a plaintiff seeks to hold the owner of a car liable for injuries inflicted when the car was being operated by another, proof of the ownership makes out a *prima facie* case. This is on the theory that the fact of ownership justifies an inference or raises a presumption that the driver of the car is the agent of the owner and that he is driving it in pursuit of the owner's business."

In *Enea v. Pfister,* 180 Wis., 329, 192 N. W., 1018, 1019, it is said:

"We regard this as a just and reasonable rule. It is generally an easy matter to prove the ownership of a car that inflicts injury. The public records afford evidence of this fact. But the question of whether the car was at the time being operated in the prosecution of the defendant's business is a matter peculiarly within the knowledge of the defendant,

and one upon which it is at times exceedingly difficult for the plaintiff to obtain proof. The exigencies of justice require the application of such a rule, which we approve and adopt. *Borger v. McKeith,* 198 Wis., 315, 224 N. W., 102, 103 (1944)."

As I have stated, this rule has been adopted in several states by statutory enactment, and that suggestion is made here. The Court, however, is not in position to admit a *non possumus.* The supervision of adjective law is a part of its *raison d' etre.* It is purely a judicial question, involving rules of procedure and evidence, and should be settled in the simple manner applied in other jurisdictions, by leaving to the facts and circumstances of the case the inferences to which our common experience entitles them.

Moreover, the question before us is not moot. The contribution which courts make to sound jurisprudence is an incidental and abstract thing, a matter of slow accretion, often leaving much vicarious sacrifice and suffering in its wake. The most genuine and enduring contribution we can make to that end is to do justice in the particular case, while the right is still alive, on principles which are worthy to survive.

The plaintiffs have not contended that they have made out more than a *prima facie* case. The circumstances in evidence call for clarification by the defendant of facts peculiarly within its knowledge. It chose to risk an adverse verdict, and that result should not be disturbed.

SCHENCK and DEVIN, JJ., concur in dissent.

EDWIN GILL, COMMISSIONER OF REVENUE, v. L. L. McLEAN.

(Filed 5 March, 1947.)

1. Appeal and Error § 1—

If the Superior Court is without jurisdiction of a proceeding the Supreme Court obtains no jurisdiction by an appeal.

2. Courts § 2—

Jurisdiction is essential to a valid proceeding.

3. Appeal and Error § 3—

Where a proceeding to garnishee funds in a bank account belonging to a delinquent taxpayer, G. S., 105-242, is dismissed for want of jurisdiction, neither the garnishee nor the alleged delinquent taxpayer is the "party aggrieved," G. S., 1-271, and neither may prosecute an appeal.

4. Appeal and Error § 6a—

A party who moves for dismissal is in no position to complain of judgment of dismissal even though entered on a ground other than the one advanced by him.

APPEAL by respondents from *Bobbitt, J.*, at October Term, 1946, of MADISON.

Proceeding under Section 913 of the Revenue Act, G. S., 105-242, to garnishee bank account belonging to delinquent taxpayer.

It is alleged that on 26 March, 1946, the Commissioner of Revenue served notice of garnishment, and attached funds in the Bank of French Broad belonging to L. L. McLean, for delinquent Schedule "B" taxes amounting to $18,127.50 for period from 6-1-42 to 4-12-45—Sec. 115: Horse and Mule Audit.

Thereafter, on 5 April, 1946, the Bank of French Broad filed with the Commissioner of Revenue "Report and Answer," alleging that both the tax against the taxpayer and the garnishment against the Bank of French Broad were unconstitutional. Within ten days from receipt of this report and answer, the Commissioner of Revenue sent to the garnishee statement of his objections, and at the same time transmitted to the Superior Court of Madison County copy of all the proceedings.

The matter was heard at the October Term, 1946, Madison Superior Court, upon motion by taxpayer and garnishee to dismiss the proceeding for that no notice had been served on the taxpayer.

Thereupon, "the proceeding, in so far as said papers on file herein constitute a proceeding" was dismissed for want of jurisdiction.

From this ruling, both the taxpayer and the garnishee bank gave notice of appeal.

Attorney-General McMullan and Assistant Attorney-General Spruill for plaintiff, appellee.

Harold K. Bennett for L. L. McLean, appellant.

Don C. Young for the Bank, appellant.

STACY, C. J. If the Superior Court had no jurisdiction in the premises, we are likewise without authority to entertain the appeal. *Gordon v. Sanderson,* 83 N. C., 1; *S. v. Miller,* 225 N. C., 213, 34 S. E. (2d), 143. Jurisdiction is essential to a valid proceeding. *Cannon v. Cannon,* 226 N. C., 634; *Shepard v. Leonard,* 223 N. C., 110, 25 S. E. (2d), 445; *S. v. DeBerry,* 224 N. C., 834, 32 S. E. (2d), 617; *Stancill v. Gay,* 92 N. C., 462. But however this may be, neither the garnishee nor the alleged delinquent taxpayer is the "party aggrieved," G. S., 1-271, by the dismissal of the proceeding, within the meaning of the appeal statute. McIntosh on Procedure, 767. No rights have been adjudicated, and

neither appellant has been hurt by the judgment. Both have "jumped before they were spurred" by any action of the court. *Starnes v. Tyson,* 226 N. C., 395, 38 S. E. (2d), 211; *Yadkin County v. High Point,* 219 N. C., 94, 13 S. E. (2d), 71. The *status quo ante* remains undisturbed.

Moreover, the judgment of dismissal was invited by the appellants. They are in no position to complain. *Dillon v. Wentz, ante,* 117; *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; *Buie v. Buie,* 24 N. C., 87.

Appeal dismissed.

H. W. RUSSELL, AS ANCILLARY ADMINISTRATOR IN THE STATE OF NORTH CAROLINA OF LINDA GALE EUBANKS, DECEASED, v. JOHN H. EDNEY.

(Filed 5 March, 1947.)

Judgments § 27g—

A nonresident served by publication is entitled to an order setting aside a judgment by default and inquiry, G. S., 1-212, upon good cause shown, within one year after rendition of the judgment or notice thereof, and such notice means actual notice, and therefore evidence disclosing that defendant did not have actual notice of the pendency of the action is sufficient to support the trial court's finding that he had no notice thereof. G. S., 1-108.

APPEAL by plaintiff from *Gwyn, J.,* 26 November, 1946. From POLK. Affirmed.

Carlisle, Brown & Carlisle and M. R. McCown for plaintiff, appellant.

M. M. Redden for defendant, appellee.

DEVIN, J. This case comes to us upon the plaintiff's appeal from an order of the judge below setting aside a judgment in the cause theretofore rendered in favor of plaintiff by default and inquiry. G. S., 1-212.

The ruling appealed from was based upon the finding by the court that the defendant was a nonresident of this State, that he was not personally served with process, that he had no notice of the institution and pendency of the action, and that he had a meritorious defense. The motion to vacate the judgment was filed within a few days after its rendition and immediately upon defendant's learning of the action.

The only exception noted by plaintiff appellant was to the finding that defendant did not have notice of the action, and that his neglect, if any, was excusable. Plaintiff's contention that the defendant had notice of the pendency of the action in Polk County, North Carolina, was based upon a letter written by plaintiff's counsel, residing in Spar-

tanburg, South Carolina, to Mr. C. T. Graydon, an attorney residing in Columbia, South Carolina, who had appeared for Edney in another action for the same cause in South Carolina, in which it was stated, "An attachment proceeding has been begun against Mr. Edney in North Carolina upon the same cause of action." It was not stated when or in what county in North Carolina the action had been instituted, and no other communication or information was given. Mr. Graydon replied to plaintiff's counsel that he would not represent Edney outside the State of South Carolina. He informed Edney of the letter he had received and advised him if any papers were served on him to bring them to him and he would tell him what to do. No papers were served on defendant or notice of any kind given him. Defendant "is practically illiterate and cannot read except plain print." It seems, however, that Edney, who owned some property in Henderson County, North Carolina, did go to that county and was informed no suit had been brought against him there.

The facts found were sufficient to warrant the conclusion that defendant had no notice of the pendency of the action, and to support the order setting aside the default judgment and permitting defendant to answer. The statute, G. S., 1-108, allows a nonresident against whom summons has been served by publication, upon good cause shown, to defend after judgment, or at any time within one year after notice thereof, and within five years after its rendition, and the notice referred to in the statute in such case means actual notice. *McLean v. McLean,* 84 N. C., 366; *Bank v. Palmer,* 153 N. C., 501, 69 S. E., 507; *Jernigan v. Jernigan,* 178 N. C., 84, 100 S. E., 184; *Foster v. Allison Corporation,* 191 N. C., 166, 131 S. E., 648.

The legal right to defend may not be lost from failure to answer unless due to neglect arising after actual notice of the proceedings. *Bank v. Palmer, supra.*

The ruling by the court below that under the facts found the default judgment should be set aside and defendant allowed to answer must be Affirmed.

IN THE MATTER OF THE LAST WILL AND TESTAMENT OF HARDY WEST, DECEASED.

(Filed 19 March, 1947.)

1. Wills § 23b—

In cases of doubtful testamentary capacity, testator's exclusion from his bounty of those related to him by blood is competent.

2. Trial § 31f—

The court is not required to give the contentions of the litigants at all, but where the court undertakes to state the contentions of one party upon a particular phase of the case it is incumbent upon the court to give the contentions of the other party upon the same aspect. G. S., 1-180.

3. Same: Appeal and Error § 6c (6)—

As a general rule the ground for objecting to the statement of contentions must be brought to the court's attention in apt time to afford opportunity for correction in order for an exception based thereon to be considered, but this rule has many exceptions based upon the importance of the inadvertence and its probable prejudicial effect.

4. Trial § 31f: Wills § 25—

In this caveat proceeding caveator strongly contended that the fact that testator left half his estate to two Negroes and only half to those related to him by blood disclosed mental incapacity. Propounders contended upon supporting evidence that the Negroes were testator's natural children. *Held:* The court having given caveator's contentions upon this phase of the case, it was error for the court not to have given propounders' contentions in explanation thereof.

5. Appeal and Error § 39f—

While a charge must be considered contextually, such construction cannot be invoked to reconcile conflicting instructions upon a material aspect which are not inter-explanatory or correctional and remain repugnant after such construction.

6. Trial § 31d: Wills § 25: Appeal and Error § 39h—

In a caveat proceeding an instruction to the effect that the burden was on caveator to prove mental incapacity by the greater weight of the evidence but that if the preponderance of the evidence on the issue was on the side of propounders to answer the issue as contended by propounders, *is held* contradictory and confusing and constitutes prejudicial error.

7. Wills § 26—

Where a will is attacked on the ground of undue influence and mental incapacity it is the better practice to submit separate issues in regard thereto rather than the single issue of *devisavit vel non*.

8. Wills § 22—

A caveat proceeding is *in rem* with the burden on propounders to prove the formal execution of the paper, and the burden on caveator to prove by the greater weight of the evidence undue influence or mental incapacity when relied upon by him.

APPEAL by propounders from *Olive, Special Judge,* at November Term, 1946, of WAYNE.

This proceeding involves a contest over the last will and testament of Hardy West, a resident of Wayne County.

West, a bachelor, lived alone in what has been referred to as his "ancestral home,"—a property derived in part by descent from his mother and part acquired by purchase. It consisted of a farm, dwelling house and out houses which, with several tracts added by West from time to time, was estimated to be worth about $20,000.

West was prosperous up to the time of his death and had accumulated considerable personal property. He personally conducted his business and farming operations, and the marketing of his produce up to the time of his death, although in his last years he was in bad health, in a dropsical condition which needed and received hospitalization, medical and surgical treatment.

In a separate dwelling in the "yard" lived Gertrude Sherard, an unmarried colored woman who had cooked and washed for West and lived "around his house" for about 20 years. During that time there were born to her two children, the boy, Earl, and a girl, Burnice. At the time of Hardy West's death Earl was about 17 years old and Burnice 12 or 13.

On West's trips away from the farm, made in connection with his business, getting in supplies and marketing his crop, he was in later years usually accompanied by Earl Sherard. To him, at different times, West had given two automobiles, and frequently gave him money, particularly when he requested it, in sums of $10, more or less, for his spending. Gertrude Sherard, the mother, had died some months before the making of the will. For some time prior to the execution of the will, L. D. West, a nephew of Hardy and son of Walter West, the caveator, returned from military service and with his wife and children took up his abode with his uncle.

The will makes an approximately equal division of the real estate and personal property, devises the real estate to L. D. West and Earl Sherard, respectively, for life, with remainders to their children upon named contingencies not necessary to consider at this time, and bequeathes the personalty one-half to L. D. West and one-half to Earl Sherard upon stated terms. A trusteeship is set up for the two minor beneficiaries, Earl and Burnice Sherard. The will having been probated in common form, W. L. West, brother of the testator, filed a caveat, setting up a want of mental capacity on the part of the testator and undue influence exercised upon him by persons unnamed in the petition. L. D. West aligned himself with the caveator, his father.

The executors undertook to propound the will in solemn form under the single issue *devisavit vel non.*

The adverse testimony relating to testamentary capacity came principally from the caveator and those related by family ties. Testifying to the testamentary capacity of West, and affirming the same, were a large number of persons who, the evidence indicates, had been in intimate

contact with him in business relations up to the time of his death and others who observed him and had communications with him, who gave as their opinion that he was in full possession of his mental faculties, had sufficient mental capacity to know his property, the objects of his bounty, and to fully understand the full force and effect of his will; that he was of sound mind.

In the cross-examination of these witnesses there was repeated recurrence of questions so formulated as to bring out the fact that West had devised about one-half of his property, including that descended from his mother, to Negroes, to the exclusion of his brother or white relatives. Answers to some of these questions were to the effect that the Negroes to whom he gave the property were his own children. There was further evidence that testator had said, "The only ones that cared about him and would do anything for him, were these two children, Earl and Burnice Sherard."

Typical of these questions is the following:

"Q. If you had known that the will referred to of Hardy West devised approximately half of his real estate to a Negro boy and girl, would that change your opinion as to whether or not on March 21, 1946, he knew and appreciated the natural objects of his bounty?"

"A. I would have to know all the circumstances surrounding his life and his way of life."

A similar inquiry brought this response from the witness:

"I heard that he gave the major portion of his property to two Negro boys. The fact that he left his property to a Negro boy and girl would not affect my opinion of his mental capacity. I think he knew who were the natural objects of his bounty."

"Q. In your opinion was that a natural disposition for a white man to make of his property?"

"A. There are circumstances."

And, again, upon the same query:

"The fact that he devised property that he received from his mother to some colored boy would not affect my opinion. I think he placed it like he wanted it. I think the giving of that land to the colored children was a natural disposition of his property."

Similar questions brought various answers, one of the witnesses stating in positive language that Earl and Burnice Sherard were children of Hardy West.

Upon this state of the evidence the propounders except to the instructions given to the jury by the court for that in stating the contention of the parties, the contentions of the caveator with respect to the phase of the case above mentioned were stated at length, whereas the explanation of what might be regarded as an unusual disposition of the property in giving it to those not the natural objects of his bounty was not given at

all, no reference having been made in the charge to the fact or the possibility that Earl and Burnice Sherard were the natural children of the testator.

There is further exception to the charge respecting the burden of evidence contained in the following passage:

"Gentlemen of the jury, the Court instructs you that the evidence, if believed by you, would establish the formal execution of the paper writing dated March 21, 1946, as the last will and testament of Hardy West and that said paper writing so executed by him is his valid will, unless you should find from the evidence and by its greater weight, the burden being upon the caveator, in respect to mental capacity, that at the time of its execution Hardy West did not have the mental capacity which the law requires for the execution of a will. (By 'greater weight of the evidence' we simply mean that the evidence in your minds must be over-balanced on the side of the caveators before they would have carried the burden of proof by the greater weight of the evidence upon the mental capacity issue.) Propounders except to foregoing portion of charge in parentheses.

"(If it has been so over-balanced they would have carried the burden of proof by the greater weight of the evidence, but if it is over-balanced on the side of the propounders, that is, that he did have sufficient mental capacity, it would be your duty to answer the issue as the propounders contend.) Propounders except to foregoing portion of charge in parentheses."

And, further:

"(If, on the other hand, you are satisfied from the evidence and by its greater weight that he did not have sufficient mental capacity, it would be your duty to answer the issue NO, as contended by the caveators, and if it is over-balanced in your minds the slightest degree as to mental capacity, they would have carried the burden of proof by the greater weight and it would be your duty to answer the issue NO. If you are not so satisfied by the greater weight, and believe the evidence as to the formal execution of the will, it would be your duty to answer the issue YES.)"

As stated, the issue submitted to the jury was:

"Is the paper writing dated March 21, 1946, offered in evidence, and every part thereof, the last will and testament of Hardy West, deceased?"

The jury answered the issue, "NO."

To the ensuing judgment the propounders objected and excepted, and appealed.

B. F. Aycock, N. W. Outlaw, and Langston, Allen & Taylor for propounders, appellants.

J. Faison Thomson for caveators, appellees.

SEAWELL, J. The only exceptions taken at the trial are to the instructions given the jury, and the formal exception to the judgment taken to preserve them on appeal. We consider two of these exceptions: The first suggesting an inadequacy in stating the propounders' contentions, and the second relating to the burden of proof between the propounders and the caveators.

1. Our attention is directed to the objection that in stating the several contentions of the propounders and the contentions upon the evidence relating to the natural objects of the testator's bounty in its bearing on testamentary capacity, the court fully stated those of the caveator, and failed to state those of the propounders, which were in the nature of an explanation and necessary to remove a prejudicial effect from the minds of the jury.

The burden of the repeated questions on cross-examination addressed to the witnesses who affirmed the mental capacity of the testator seems to put as much emphasis on the fact that the objects of his bounty were Negroes as it does upon the fact that they were strangers to the blood.

We are not required at this time to say to what extent testamentary capacity may be impeached by infractions of, or want of conformity to traditions, customs, standards of the testator's community or section, which are supposed to strongly influence personal conduct. In cases of doubtful testamentary capacity, however, evidence of an exclusion of those who, by ties of blood, might be supposed to be the natural objects of the testator's bounty has been accepted as bearing upon the question of mental capacity. *In re Will of Hinton,* 180 N. C., 206, 104 S. E., 341; *In re Redding's Will,* 216 N. C., 497, 5 S. E. (2d), 544.

The fact is that the evidence affords a tangible basis for the contention that Earl and Burnice Sherard were the natural children of the testator, however immoral the suggested relation. In view of the prominence given it in the trial, the fact that they were of Negro blood gives added emphasis to the necessity of adverting to the explanatory circumstances in stating the propounders' contentions.

It is not required by G. S., 1-180, or other statute, that the contentions of the litigants be stated at all, although it is found to be a convenient method of integrating and presenting to the jury the subjects for consideration; *S. v. Colson,* 222 N. C., 28, 21 S. E. (2d), 808; and there is no rule making it mandatory. "When, however, the judge states the contentions of one of the parties, he must fairly charge also as to the contentions of the adversary litigant." *S. v. Colson, supra; Messick v. Hickory,* 211 N. C., 531, 535, 191 S. E., 43.

The contentions of the propounders were based on evidence relating to the same aspect of the case. *Messick v. Hickory, supra.*

As a general rule, an exception to a statement of the contentions will not be sustained on appeal unless the matter was called to the attention

of the court at the time and an opportunity given to correct it. *S. v. Grainger,* 223 N. C., 716, 28 S. E. (2d), 828; *S. v. Britt,* 225 N. C., 364, 34 S. E. (2d), 408; *Steele v. Coxe,* 225 N. C., 726, 732, 36 S. E. (2d), 288; *Vance v. Guy,* 224 N. C., 607, 612, 31 S. E. (2d), 766; *Mfg. Co. v. R. R.,* 222 N. C., 330, 23 S. E. (2d), 32.

But there are so many exceptions to the rule that we may safely say that each case must be referred to the particular circumstances, to be decided upon the importance of the incident and its probable prejudicial effect. *S. v. Love,* 187 N. C., 32, 121 S. E., 20.

We understand the delicacy of the matter handled by the court below and the danger which might attend magnification of this phase of the trial. It is our opinion, however, that the situation demanded a fuller statement of the propounders' contention upon this phase of the evidence, and the failure to give it was error.

2. The instructions as to the burden of proof must have left the jury in doubt where to place it, either with respect to the issue at large or the several questions embraced within it. We were assured by appellees that the charge, considered contextually, relieves it from prejudicial effect.

A charge, it is true, must be considered contextually, when challenged for error. *S. v. French,* 225 N. C., 276, 45 S. E. (2d), 157; *S. v. Shook,* 224 N. C., 728, 32 S. E. (2d), 329; *Motor Co. v. Insurance Co.,* 220 N. C., 168, 16 S. E. (2d), 847; *Harrison v. Insurance Co.,* 207 N. C., 487, 177 S. E., 423; *Cab Co. v. Casualty Co.,* 219 N. C., 788, 15 S. E. (2d), 295. But where there are conflicting instructions it often becomes a serious question as to the impression made on the jury when the charge is so taken. When the passages are not inter-explanatory or correctional, and, after being considered contextually are still repugnant, the court should be slow to assume that there was no prejudicial effect. *Ward v. R. R.,* 224 N. C., 696, 32 S. E. (2d), 221; *S. v. Oxendine,* 224 N. C., 825, 32 S. E. (2d), 648. We think the final instructions given as to the respective burdens of the propounders and the caveators were contradictory and confusing.

The probate of a will in solemn form under caveat is a proceeding *in rem.* Where the will is attacked for want of testamentary capacity or undue influence it is, perhaps, preferable to submit separate issues directly pertinent to these questions; McIntosh, Civil Procedure, p. 547; *In re Efird's Will,* 195 N. C., 76, 141 S. E., 460; *In re Rawlings' Will,* 170 N. C., 58, 86 S. E., 794; but the practice is often otherwise. In the case at bar the single issue of *devisavit vel non* was submitted. Upon this issue it was incumbent upon the court to resolve the inquiry into the several questions involved, so as to properly assign the burden as to each, rather than to treat the issue integrally.

Regarding the proceeding as *in rem,* it is the established rule here that the propounders have carried their burden when the formal execu-

tion of the will has been shown; subject, of course, to the successful attack made upon it by the caveators upon the ground of undue influence or mental incapacity. The burden of establishing these contentions by the greater weight of the evidence rests upon the caveators. *Bailey v. McLain,* 215 N. C., 150, 161, 1 S. E. (2d), 372; *In re Fuller's Will,* 189 N. C., 509, 127 S. E., 549; *In re Chisman's Will,* 175 N. C., 420, 95 S. E., 769; *In re Thomas' Will,* 111 N. C., 409, 16 S. E., 226; *In re Hedgpeth,* 150 N. C., 245, 251, 63 S. E., 1025; *In re Will of Redding, supra,* p. 499; *In re Will of Harris,* 218 N. C., 459, 11 S. E. (2d), 310; *In re Craven's Will,* 169 N. C., 561, 86 S. E., 587. There was no question as to the execution of the will raised by the petition nor did the caveators dispute it.

In the instant case, as we may observe, his Honor seemed to place the burden first upon the caveators, then upon the propounders to support the affirmative or negative of the issue by preponderating evidence, without discrimination as to their respective burdens.

For these reasons the propounders are entitled to a trial *de novo.* It is so ordered.

New trial.

STATE TRUST COMPANY, A CORPORATION, v. CHARLES W. BRAZNELL, J. M. LONG AND WIFE, L. M. LONG.

(Filed 19 March, 1947.)

1. Reformation of Instruments § 6—

A lessee may maintain an action against his lessor's grantee to reform the deed to make it express the true contract in respect to the leasehold estate.

2. Reformation of Instruments § 3—

As a general rule, an instrument may not be reformed for a naked mistake of law, but where by reason of error of expression or mistake as to the force and effect of the language used, the contract fails to express the true intent of the parties, reformation will lie to correct the mistake of fact induced by error of law.

3. Same—Mutual mistake in failing to include effective provision in instrument because of reliance on ineffectual language justifies reformation.

The evidence disclosed that in the negotiations for the sale of the *locus in quo* the fact of the existence of plaintiff's leasehold estate and grantor's intent to protect same was known to all parties and that provision to protect lessee's interest under his unrecorded lease was inserted in the original option, in the contract to convey and in the deed. The provision inserted in the deed was ineffectual for this purpose because of want of sufficient description of the leasehold estate. *Held:* The mistake of the parties as to the legal effect of the provision inserted in the deed was a

mistake of law, but the failure of the deed, because of reliance upon the language used, to contain an effective provision intended by the parties to be included therein, is a mistake of fact justifying reformation.

4. Registration § 4: Deeds § 15—

While registration is the sole method of charging subsequent purchasers with notice, where a grantee accepts a conveyance of real property subject to an outstanding claim or interest evidenced by an unrecorded instrument executed by his grantor, he takes the estate burdened by such claim or interest and by his acceptance of the deed agrees to stand seized subject to the unrecorded instrument and estops himself from asserting its invalidity.

5. Trial § 7—

Which of two defendants, defendants having offered no evidence, shall make the last argument to the jury is within the discretion of the presiding judge.

APPEAL by defendant Braznell from *Pless, J.*, at January Term, 1947, of HENDERSON.

Civil action to remove cloud from leasehold estate of plaintiff and to reform a deed from defendants Long to defendant Braznell.

In October, 1945, W. B. Hodges and the estate of C. D. Weeks owned the four-story building at the corner of Fourth Avenue and Main Street in Hendersonville, N. C., known as Commercial Building. The first floor thereof was constructed for use of a banking institution and the plaintiffs occupied the same under a ten-year lease from Hodges and Weeks. The executor of the will of C. D. Weeks was authorized to sell at private sale subject to confirmation by the court.

Hodges and Crowell, executor, agreed to sell said building to defendants Long provided the purchasers would agree to lease the banking room to plaintiff for a term of fifteen years. Thereupon, on 15 October, 1945, Long and wife executed an agreement to lease said premises to plaintiff for fifteen years, the agreement to become effective as a lease in the event and upon the day the Longs acquired title to the property. Thereafter, on 29 October, 1945, Hodges and Crowell, executor, separately executed and delivered to the Longs two deeds, each conveying a one-half interest in said building. These deeds contain the following:

"This conveyance is subject to lease with Southern Bell Telephone Company expiring May 1, 1948, and also lease with State Trust Company, dated October 16, 1945, for a term of fifteen years, and is subject to any party wall agreements of record."

On 30 March, 1946, the Longs delivered to F. W. Ewbank option or contract to convey said building for $110,000. This option was never exercised. However, there were negotiations between the Longs and Carl W. Braznell, agent of defendant Braznell, Ewbank acting as a go-

between. These negotiations culminated in a deed from the Longs to defendant Braznell dated 3 June, 1946, containing the following:

"It is understood and agreed that this conveyance is made subject to the leases of the several tenants; . . ."

During the negotiations the plaintiff's lease contract was discussed and it was understood that the Longs were selling subject to existing leases, particularly the lease of plaintiff, and that it was to be so stipulated in the deed. The lease contract was delivered to Ewbank and later by him delivered to Braznell.

Braznell recorded his deed and then notified plaintiff he would not accept the monthly rental of $250 theretofore paid and would not recognize any alleged lease under which it claimed. Plaintiff then recorded its lease and instituted this action, alleging that defendant's demands and claims cast a cloud upon its leasehold estate. It also seeks to reform the deed from Long to Braznell for mutual mistake of the parties by including a provision adequately protecting its rental contract.

At the trial below issues on the allegations of mutual mistake of the parties were submitted to the jury and answered by them in favor of plaintiff. From judgment on the verdict defendant Braznell appealed.

Jonathan Jackson, L. B. Prince, and R. L. Whitmire for plaintiff, appellee.

Smathers & Meekins for defendant Charles W. Braznell, appellant.

Morgan & Ward for defendants Long, appellees.

BARNHILL, J. The court below made no ruling in respect to the reservation contained in the deeds from Hodges and Crowell, executor, to Long and wife. Hence the question of its sufficiency to protect the leasehold rights of plaintiff is not presented for decision.

The defendant concedes that plaintiff "stands in the shoes or sits in the seat" of the Longs under whom it claims, and it may maintain this action to reform the deed to make it express the true contract in respect to its leasehold interest. *Sills v. Ford,* 171 N. C., 733, 88 S. E., 636; *Bank v. Redwine,* 171 N. C., 559, 88 S. E., 878; *Machinery Co. v. Post,* 204 N. C., 744, 169 S. E., 629; *Roberts v. Massey,* 185 N. C., 164, 116 S. E., 407.

There is evidence in the record tending to show that (1) the contract of purchase and sale was made subject to existing leases; (2) it was understood and agreed that the deed of conveyance should contain a provision fully protecting the leasehold rights of plaintiff and other tenants; and (3) this intent was inadequately expressed and a valid, enforceable provision was omitted by mutual mistake of the parties.

At the very inception of the somewhat extended negotiations Long discussed with Ewbank the outstanding leases and the rental income

from the building. He advised Ewbank that he would not under any conditions sell unless these leases, particularly the lease to plaintiff, were fully protected. Ewbank advised Carl W. Braznell (agent of defendant in active charge of the negotiations) by letter that the bank had a fifteen-year lease. He fully discussed this and other leases with Braznell and advised him of the conditions under which the Longs would sell. Braznell was furnished with a statement of monthly income from the building showing that the State Trust Company rental was $250 per month. Provision was inserted in the original option, in the contract to convey and in the deed, attempting to protect the rights of plaintiff. Ewbank actually acquired possession of Long's copy of the leases, made them available to the defendant, and later delivered them to him. At the time the deed was delivered Braznell was informed that the leases were there in Ewbank's office for his inspection. Braznell had his attorney prepare the deed and his attorney, on his behalf, inserted in the deed a provision attempting to make the conveyance subject to outstanding leases. Thus the intent of the parties is apparent.

There is, to be sure, some evidence in the record tending to support the inference that Braznell knew the language used in the deed was not sufficient to protect the plaintiff's lease and that he had the deed prepared and tendered to plaintiff as a proper and full expression of the contract of the parties, intending at the time to take advantage of the insufficiency of the reservation so soon as the deed was delivered and recorded. But it is more charitable to assume that he was acting in good faith in an honest attempt to express the will of the parties than to conclude he made a deliberate and successful effort to mislead and deceive the Longs. In either event he cannot now complain.

But the defendant contends that the Longs used the language they intended to use, believing it adequately expressed the intent of the parties. Thus, he says, there was a mistake of law and not of fact.

A bare, naked mistake of law affords no grounds for reformation. This, however, is the general rule, qualified by many exceptions. *Pelletier v. Cooperage Co.*, 158 N. C., 403, 74 S. E., 112; *Hubbard and Co. v. Horne*, 203 N. C., 205, 165 S. E., 347.

Where the error of law induces a mistake of fact, that is, where, by reason of an error of expression or mistake as to the force and effect of the language used, the contract fails to express the intent of the parties, equity will afford relief. *McKay v. Simpson*, 41 N. C., 452; *Womack v. Eacker*, 62 N. C., 161; *Kornegay v. Everett*, 99 N. C., 30; *Condor v. Secrest*, 149 N. C., 201; *King v. Hobbs*, 139 N. C., 170; *Pelletier v. Cooperage Co., supra;* Anno. 141 A. L. R., 828, 834; 3 Pom. Eq. Jur., 298.

"The phrase 'mutual mistake' means a mistake common to all the parties to a written instrument and usually relates to a mistake concern-

ing its contents or its legal effect." *Hubbard and Co. v. Horne, supra.* "It is wholly immaterial whether . . . the parties failed to make the instrument in the form they intended, or misapprehended its legal effect." *King v. Hobbs, supra;* 45 Am. Jur., 615.

All the parties conceived that the language used adequately protected the outstanding leases. This was a mistake of law. They intended to include in the deed a provision which would fully protect plaintiff and other tenants. By reason of the use of language mistakenly believed to be, but which was not, sufficient to accomplish the common purpose, such provision does not appear in the deed. They intended the deed to include what it does not include. This constitutes a mistake of fact justifying reformation.

Even so, the defendant insists, the plaintiff claims under an unrecorded lease for more than three years and no notice, however full and formal, will supply want of registration. G. S., 47-18; *Smith v. Turnage-Winslow Co.,* 212 N. C., 310, 193 S. E., 685; *Bank v. Smith,* 186 N. C., 635, 120 S. E., 215; *Lawson v. Key,* 199 N. C., 664, 155 S. E., 570; *McClure v. Crow,* 196 N. C., 657, 146 S. E., 713; *Grimes v. Guion,* 220 N. C., 676, 18 S. E. (2d), 170; *Turner v. Glenn,* 220 N. C., 620, 18 S. E. (2d), 197. He alleges in his answer that he had no "proper and legal notice" of the outstanding lease. This want of notice by registration seems to have been the "theme song" of his defense in the court below. He presents the question here by exception to the failure of the court below to charge the jury that he had the right to rely on the public registry of the county.

This principle which relates notice to registration only is strictly adhered to by this Court. But relief here is not granted on the basis of notice.

When a grantee accepts the conveyance of real property subject to an outstanding claim or interest evidenced by an unrecorded instrument executed by his grantor, he takes the estate burdened by such claim or interest. By his acceptance of the deed he ratifies the unrecorded instrument, agrees to stand seized subject thereto and estops himself from asserting its invalidity. *Bank v. Vass,* 130 N. C., 590; *Bank v. Smith, supra; Hardy v. Fryer,* 194 N. C., 420, 139 S. E., 833; *Hardy v. Abdallah,* 192 N. C., 45, 133 S. E., 195.

The defendants, having offered no evidence, were entitled, as a matter of right, to the concluding argument. Rule 3, Rules of Practice in the Superior Courts, 221 N. C., 574; *S. v. Raper,* 203 N. C., 489, 166 S. E., 314. This right was accorded them. But the defendant excepts for that the court permitted counsel for the defendants Long to make the last argument. This, as between the two defendants, was within the discretion of the presiding judge. Hence the exception is without merit.

We have examined the other exceptive assignments of error brought forward and discussed in defendant's brief. They fail to point out cause for a new trial.

In the trial below we find

No error.

STATE OF NORTH CAROLINA, ON RELATIONSHIP OF THE UNEMPLOYMENT COMPENSATION COMMISSION OF NORTH CAROLINA, v. MRS. IDA W. NISSEN, TRADING AS THE NISSEN BUILDING, AND METROPOLITAN LIFE INSURANCE COMPANY.

(Filed 19 March, 1947.)

1. Master and Servant § 58—

Whether a mortgagee who takes possession of and operates the mortgaged building under an agreement assigning rents is an agent of the mortgagors or an employer of workers engaged in the operation of the building, must be determined by the provision of the agreement, and the fact that the mortgagee, in its other activities in this State, is an employer as defined by the Unemployment Compensation Act is immaterial. G. S., 96-8 (e).

2. Master and Servant § 1: Principal and Agent § 1—

An agreement under which the mortgagee, after default, takes over the management of the mortgaged building with authority to appoint an agent to collect the rents in the place and stead of mortgagors, with provision that the mortgagors should save the mortgagee harmless from any acts or omissions of agents or employees employed in the operation of the building and expressly limiting the liability of the mortgagee to the duty to account for moneys actually received by it pursuant to the agreement, constitutes the mortgagee an agent of mortgagors and not an employer in respect to those employed in the operation of the building.

3. Master and Servant § 59e—

Where a mortgagee in possession after default operates the mortgaged building as agent for the mortgagors under the terms of an agreement assigning rents, the mortgagors are the employers of workers engaged in the operation of the building and are entitled to have the Unemployment Compensation Commission transfer from the name of the mortgagee to their name the reserve account on wages earned by the employees during the period of such operation.

4. Same—

G. S., 96-9 (c) (4), does not require mutual consent of the parties for the transfer of a reserve credited to a particular "employer" under a misapprehension of the facts or the status of the person, firm or corporation making the contribution. Further, the Unemployment Compensation Act did not require mutual consent for such transfer prior to the amendment of 1945.

APPEAL by defendant, Mrs. Ida W. Nissen, trading as Nissen Building, from *Pless, J.*, at March Term, 1946, of FORSYTH.

Civil action heard by his Honor, J. Will Pless, Jr., without a jury, on exceptions filed by Mrs. Ida W. Nissen, trading as Nissen Building, upon appeal from the opinion of the North Carolina Unemployment Compensation Commission, denying her application for the transfer of the reserve account in the name of the Metropolitan Life Insurance Company, on wages earned during the years 1937 to 1 December, 1944, by the workers engaged in the operation of the Nissen Building in Winston-Salem, N. C., pursuant to the terms of the agreement assigning the rents to the Metropolitan Life Insurance Company, dated 8 April, 1933.

On 12 October, 1926, W. M. Nissen and wife, Ida W. Nissen, executed a deed of trust to the Wachovia Bank & Trust Company, Trustee for the Metropolitan Life Insurance Company, on the Nissen Building to secure their note executed to the Metropolitan Life Insurance Company in the sum of $600,000.00.

The Nissens defaulted in the payment of the principal, interest and taxes as required by the terms of the aforesaid deed of trust. Hence, the Insurance Company took an assignment of the rents.

George W. Nissen had acted as Manager of the Nissen Building for several years prior to the execution of the agreement, assigning the rents to the Insurance Company. He was continued in that capacity. No mention is made about the employment of workers to operate the building in the agreement assigning the rents or in the letter from the Metropolitan Life Insurance Company appointing George W. Nissen as agent for the property. He was instructed "to effect collection of all rents, etc., that may now be due and unpaid and which will hereafter become due and to pay thereout only the current usual and ordinary expenditures necessary for the operation and maintenance of the building, but you will incur no unusual or extraordinary expenditures without first obtaining our written approval. . . . You will account to us by the 25th of each month, beginning with the current month, for the rents collected to that date with statement giving the names of the tenants, location of space occupied, rent collected, period for which rent is paid and the amounts of any arrears together with statement of authorized expenditures, vouchers for the same, check for the net receipts, less your commission of 5% on the gross rents collected."

W. M. Nissen died in 1934, having devised his interest in the Nissen Building to his wife, Mrs. Ida W. Nissen, who is now the sole owner thereof.

It was stipulated by counsel: "That at the time the Unemployment Compensation Commission Act went into effect and now, the Metro-

politan Life Insurance Company was and is an employer in its own right and was and is subject to said Act on account of certain of its employees in North Carolina. . . . Contributions made by Metropolitan Life Insurance Company on wages of employees employed at the Nissen Building were paid out of general funds of the Metropolitan and were charged against the net operating income of the Nissen Building, thereby reducing the amount of such income available for reduction of the note of W. M. Nissen. The net operating income of the building was at all times sufficient to cover the amount of such contributions."

His Honor overruled the appellant's exceptions to the findings of fact and the conclusions of law of the Unemployment Compensation Commission of North Carolina, and affirmed the opinion of the Commission.

The defendant, Mrs. Ida W. Nissen, trading as Nissen Building, appealed to the Supreme Court, assigning error.

W. D. Holoman, Chas. U. Harris, R. B. Overton, and R. B. Billings for Unemployment Compensation Commission.

Deal & Hutchins for Mrs. Ida W. Nissen.

Womble, Carlyle, Martin & Sandridge for Metropolitan Life Insurance Company.

DENNY, J. The appellant contends she is entitled to have the reserve account in the name of Metropolitan Life Insurance Company on wages earned by the workers engaged in the operation of the Nissen Building, from 1 January, 1937, to 1 December, 1944, credited to her account. She bases her claim on two grounds: (1) That under the terms set out in the Agreement assigning the rents to the Metropolitan Life Insurance Company, said Company was not authorized to act as an employer in the operation of the Nissen Building, but was authorized to act only in the place and stead of the owner as agent or trustee; and (2) That a mortgagee in possession is not permitted to use rents for its own benefit.

The appellees, on the other hand, contend that the employees engaged in the operation of the Nissen Building were employees of the Metropolitan Life Insurance Company, and since it is conceded that the Metropolitan Life Insurance Company, at the time the Unemployment Compensation Act went into effect, was and still is an employer in its own right, as defined in subsection (f) of the above Act, that the reserve account now in controversy was properly credited to the Metropolitan Life Insurance Company, and cannot be transferred to the appellant without its consent.

The pertinent part of Section 96-8 (e), effective prior to the 1945 Session of the General Assembly, reads as follows: "Whenever any employing unit contracts with or has under it any contractor or subcontractor for any employment which is part of its usual trade, occupa-

tion, profession or business, unless the employing unit as well as each such contractor or subcontractor is an employer by reason of subsection (f) of this section or section 96-11 (c), the employing unit shall for all the purposes of this chapter be deemed to employ each individual in the employ of such contractor or subcontractor for each day during which such individual is engaged in performing such employment; except that each such contractor or subcontractor who is an employer by reason of subsection (f) of this Section or Section 96-11 (c) shall alone be liable for the contributions measured by wages paid to individuals in his employ . . ."

The above provision merely determines who shall be liable for the contributions to the Unemployment Compensation Commission on wages paid to employees as between an employing unit and a contractor or subcontractor under certain specified circumstances. But the mere fact that the Metropolitan Life Insurance Company was an employer in North Carolina, as defined by the Unemployment Compensation Act, does not mean necessarily that it was the employer in the operation of the Nissen Building. Its status in connection with the operation of the Nissen Building must be determined by the provisions contained in the agreement under which it acted.

The Metropolitan Life Insurance Company took over the management of the Nissen Building under an agreement designated "Assignments of Rents," which agreement was dated 8 April, 1933. W. M. Nissen, the owner, was designated therein as "the party of the first part," and the Metropolitan Life Insurance Company as "the party of the second part." The agreement, among other things, authorized the party of the second part "to employ an agent or agents to rent and manage said property and to collect the said rents and other revenues thereof, and to pay the reasonable value of his or their services out of the rents and revenues received and in all respects to act in the place and stead of and to have all of the powers as owner as possessed by the said party of the first part for the purposes aforesaid . . ." And the agreement further provided: "It is hereby covenanted and agreed that the party of the first part shall save and hold harmless and hereby releases and agrees to hold harmless the party of the second part from any liability for any and all acts, agreements, actions, claims, rights and demands which the party of the first part now has or by virtue of these presents may hereafter have against the party of the second part for any act heretofore done by the party of the second part or hereafter done by the party of the second part or hereafter to be done or performed by the party of the second part, in connection with these premises, or of any rights or obligations hereunder, or by reason of the acts or omissions by the party of the second part, and the party of the first part covenants and agrees to and with the party of the second part that any act done or

performed or omitted by any such agent or employee shall not be, nor be construed to be, an act of the party of the second part, nor shall the party of the second part be responsible therefor. Nothing herein contained shall release or operate to release the party of the second part from its duties to account for all moneys actually received by it pursuant to the terms hereof, but such right shall not extend to any sums collected by an employee or agent of the party of the second part, provided the said party of the second part shall have used reasonable care and diligence in employing the said employee or agent."

An employer is responsible for the acts of his agents and employees performed in due course of the employment. Here, the manager and other employees of the Nissen Building were not to act for or on behalf of the Metropolitan Life Insurance Company, nor was the Insurance Company to be held liable for their acts. The liability of the Insurance Company is expressly limited to that of an agent, acting for and in the place and stead of W. M. Nissen, and charged only with the duty to account for all moneys received by it pursuant to the agreement.

The agreement referred to herein was executed nearly four years prior to the effective date of the Unemployment Compensation Act. When the Act went into effect and the Metropolitan Life Insurance Company was called upon to make the contributions required on the wages of the employees engaged in the operation of the Nissen Building, we think under the terms of the agreement under which it was collecting the rents, it should have made the remittances to the Unemployment Compensation Commission, as the agent of the Nissen estate, or as agent of Mrs. Ida W. Nissen, after the estate of W. M. Nissen was administered and closed.

Consequently, we hold that whatever reserve has been created and is now credited to the Metropolitan Life Insurance Company by the Unemployment Compensation Commission by reason of contributions made by the Metropolitan Life Insurance Company on wages of employees employed at the Nissen Building at Winston-Salem, N. C., and charged to the operating income of said building, should be transferred to the credit of Mrs. Ida W. Nissen, trading as Nissen Building.

We are not unmindful of the statute G. S., 96-9, subsection 4, which authorizes the Commission to transfer a reserve fund only upon the mutual consent of the parties. However, we do not think the law applies where such reserve was credited to a particular person, firm or corporation under a misapprehension of the facts or the status of the person, firm or corporation making the contribution. Moreover, the mutual consent of the parties concerned was not required for the transfer of a reserve account by the Unemployment Compensation Act prior to the enactment of Chapter 522, ss. 11-16, 1945 Session Laws.

While the appellant strongly contends in her brief that she is entitled to the relief sought on the ground that a mortgagee, in possession, is not permitted to use rents for its own benefit, in view of the conclusion we have reached herein, we deem it unnecessary to consider that question.

The judgment of the court below is reversed and this cause remanded for judgment in accord with this opinion.

Reversed and remanded.

J. P. STRICKLAND v. C. E. BINGHAM, ET UX.

(Filed 19 March, 1947.)

1. Brokers § 13—

A party who enters into a contract with a real estate broker to purchase certain lands may not maintain an action against the broker for specific performance upon the later acquisition of title to the lands by the broker, the right of action under the contract being against the owner and not the real estate agent.

2. Brokers § 5—

Since it is a matter of common knowledge that a real estate broker is an agent with restricted powers, generally speaking, one who deals with him is held to a knowledge of the extent of the agent's authority.

3. Trusts § 5b—Defendant may not be declared trustee ex maleficio upon evidence which shows no fiduciary relationship at time he purchased lands.

A real estate broker had an option giving him exclusive selling rights to a certain tract of land for a specified period. Plaintiff, with knowledge of the agency, entered into a contract with the broker to purchase the lands. In order to aid plaintiff in raising the purchase price, the broker entered into an agreement to sell certain *choses* in action owned by plaintiff. The broker failed to sell the *choses* in action, and after his option with the owner expired, purchased the lands himself. *Held:* The agreement to sell the *choses* in action was a separate contract having no legal effect upon the broker's option, and plaintiff is held to a knowledge of the expiration date of the option, at which time the authority of the broker to sell the *choses* in action for the purpose of effectuating the sale terminated, and therefore at the time of the purchase of the land by the broker no fiduciary relationship existed between him and plaintiff, and plaintiff is not entitled to have the broker declared trustee of a constructive trust on the ground that the broker's failure to sell the *choses* in action was motivated by a fraudulent intent to delay and defeat plaintiff in the purchase of the land.

4. Contracts § 23—

Plaintiff's evidence tended to show an agreement by defendant to sell certain notes for not less than a stipulated amount, failure of perform-

ance by defendant, and later independent sale of the notes by plaintiff for an amount less than the price stipulated in the agreement. Plaintiff offered no evidence of want of diligence on the part of defendant or of defendant's ability to sell the notes under the conditions imposed, or of any change in the market value of the notes. *Held:* Defendant's motion to nonsuit was properly allowed.

APPEAL by plaintiff from *Harris, J.*, at November Term, 1946, of JOHNSTON.

The defendant Bingham, described as a realtor, was engaged in the business of buying and selling real estate. From the owner, A. H. Morgan, he had an exclusive option for the purchase and sale of the lands described in the complaint, consisting of a 238.95 acre farm encumbered by a deed of trust to the Prudential Insurance Company, in the sum of $1,750, bearing interest. The defendant and plaintiff entered into an agreement whereby the land was to be conveyed to the plaintiff at the purchase price of $5,000 upon condition that plaintiff assume the indebtedness on the property and pay the balance of the purchase price.

The plaintiff declared himself unable to pay the purchase price at which the land was offered unless he could sell certain mortgage notes held by him on lands in South Carolina, amounting to about $17,000. These notes were hypothecated with the First-Citizens Bank & Trust Company as collateral to a $4,000 loan, were secured by a mortgage subject to a prior mortgage for $600, and were to be paid in installments covering 36 years.

To aid in the transaction the defendant undertook the sale of these notes in behalf of the plaintiff. The plaintiff testified that defendant was to sell the notes at a discount of not more than 20 per cent and apply the proceeds as far as necessary to the purchase price of the land and account to him for the balance. The plaintiff further testified that the indebtedness to defendant in connection with his farming operations, later undertaken, was to be paid out of these notes; and an assignment was made to defendant to secure nearly $2,000 indebtedness. The plaintiff paid $135 on the purchase price (it appears to have been applied to an installment on the Prudential Insurance Company loan) and was let into possession of the land. There he became indebted to the defendant in a substantial sum for mules, equipment and supplies in cultivating the farm. Plaintiff testified that meantime, the notes not having been sold by defendant, he employed Mr. Pool, an attorney at law, to sell them for what he could get for them; and under this authority the notes were sold for $11,250.

Although defendant's option or contract to purchase the land from Morgan had expired, upon demand of Morgan that the transaction be closed, Bingham paid Morgan for the land and took title to himself and wife.

After the Morgan deed was delivered to Bingham, plaintiff, on demand, vacated the property and authorized his attorney, Mr. Pool, to settle with the defendant. The extent of the authority is questioned by plaintiff's testimony in which he says he gave authority only to settle matters concerning the advancements made to him. He testified, however, "After the notes were sold I did not have much money. My attorney was to settle it. Mr. Pool sold the papers for $11,500 and he had full power and authority to make the settlement. He came back and told me he had settled and I told him it was perfectly satisfactory with me."

Further testimony was given by A. H. Morgan, the owner of the land, that he had given Mr. Bingham an exclusive option upon the land, expiring in 1943; that because of a sickness he wanted his business straightened out and that Mr. Bingham paid him for the land and he executed a deed to Bingham and his wife.

At the conclusion of the plaintiff's evidence, the defendant demurred thereto and moved for judgment as of nonsuit. The motion was allowed and judgment entered. Plaintiff appealed.

Levinson, Pool & Batton for plaintiff, appellant.
Wellons & Canaday for defendants, appellees.

SEAWELL, J. The plaintiff's theory of the case may be understood from his demands for relief; (a) that defendants be adjudged to hold the legal title to the land in trust for the plaintiff and account to him for rentals arising from their unlawful occupancy; (b) that defendants be required to convey the lands in controversy to plaintiff in the specific performance of the contract between the plaintiff and the male defendant Bingham, or, in lieu thereof, pay plaintiff the sum of $5,000 purchase price for the land as damages; (c) that plaintiff recover of the defendant Bingham damages alleged to be suffered by reason of defendant's failure to sell plaintiff's notes as agreed.

If in both *allegata* and *probata* any of these demands could find support, nonsuit would be improper. Passing by the complaint, to which no demurrer was made, we do not find that the evidence was of a character to be submitted to the jury on above demands or any aspect of the case as presented in the record.

Neither the option contract given to Bingham by Morgan, nor the contract between Strickland and Morgan appears in the record, although the curtain is partly lifted by parol evidence. The Court has no desire to reconstruct a Java Man from a piece of jaw bone, but certain assumptions must be made, or inferences drawn from the fragmentary evidence, before the plaintiff can secure even an initial standing in court. The

corollaries cannot be evaded, although they may be embarrassing to recovery.

The plaintiff testified that he knew Bingham to be the agent of Morgan, who owned the land, and dealt with him as such. He, therefore, made no contract with defendant for land then owned by him or thereafter to be acquired by him, but did make only such a contract as a known broker or agent might make in binding his principal to make a conveyance. This was not good for specific performance against Bingham,—gave plaintiff no cause of action against him for specific performance. Such a right, if subsisting at the time, could only be enforced against Morgan, the principal and owner. As a matter of fact, as will be seen later, the Morgan option had long expired.

The trust theory is made to depend on the existence of a fiduciary relation between the plaintiff and the defendant Bingham, when the latter took title, making that act a violation of fiduciary duty, so as to make him *ex maleficio* trustee, or as sometimes said, trustee *de son tort,* for plaintiff in a constructive trust. See, for definitions, *Lefkowitz v. Silver,* 182 N. C., 339, 109 S. E., 56, 23 A. L. R., 1491. The factual situations out of which such a trust may arise are innumerable. The plaintiff's situation fails to follow the pattern in a vital particular: its want of relevancy to the fact of purchase.

The fiduciary relation, it is contended, was brought about by the agreement under which defendant undertook to aid plaintiff in selling the long-term mortgage notes upon which he depended to finance the purchase. As to this, the plaintiff in his testimony charges, but does not attempt to support by evidence, that defendant's failure to sell these notes was motivated by the corrupt intent to delay and defeat him in the purchase of the land.

Since a real estate broker is commonly classed and understood to be an agent with restricted powers, generally speaking, one who deals with him is held to a knowledge of the extent of the agent's authority. 8 Am. Jur., p. 1017, sec. 59; 12 C. J. S., p. 331, sec. 129 (b); *Payne v. Jennings,* 144 Va., 126, 131 S. E., 209; *Seery v. Morris Realty Corp.,* 138 Va., 572, 113 S. E., 869.

In the absence of misrepresentation,—and none is suggested,—the plaintiff must be held to have known that the collection of the notes by Bingham was no part of his purchase contract but was a wholly collateral and incidental agreement to aid plaintiff in the financing of his project. Neither was it an *addendum* to the Morgan option to Bingham.

In so far as it concerned the rights of plaintiff, the contract between him and Bingham, through which the principal, Morgan, might be bound, was provisional and conditioned upon the ability of Strickland to pay the purchase price of the lands, and the actual payment thereof, within the period provided in the Morgan option. Again, in that respect,

the plaintiff is within the rule above stated; his right to purchase expired with the Morgan option upon which it was based, and he is held to a knowledge of that important date. The option expired almost a year before Bingham purchased and took title to the land.

Any obligation on the part of Bingham to sell the notes for plaintiff was necessarily subordinated to the purpose of sale and was coterminous with the authority given under the Morgan option. Hence there was no fiduciary relation existing between them by virtue of that agreement at the date of purchase, if in legal effect there ever had been.

Whatever fault may be attributed to the failure of Bingham to market plaintiff's notes, and whatever liability therefor may have arisen, must have occurred within the period lying between the purchase agreement and the expiration of Bingham's option; and must be considered on its own merits as a separate cause of action. It is only necessary to say that the plaintiff asserts in his evidence that it caused him damage without attempting to support the claim by evidence. There is no evidence that there was any change in the market upon which the notes might have been sold or that the defendant was not diligent in the task that he had undertaken, or that he was able to dispose of the notes under the conditions imposed upon him. The mere fact that another agent, Mr. Pool, after the matter had been taken out of defendant's hands, sold the notes for what he could get, and realized thereupon $11,500, raises no inference of defendant's negligence or bad faith, nor does it afford any measure of plaintiff's loss.

Several of the transactions referred to in the evidence are shown to have occurred after the expiration of the Morgan option. At what time the plaintiff took the sale of the notes out of defendant's hands does not appear. The evidence does disclose the fact, however, that plaintiff, after he had received the proceeds of the notes and was in a position to apply them on the purchase, made no tender of the money to Bingham or any other person, although he now says that he was ready and willing to complete the purchase and pay the money.

Plaintiff's evidence strongly indicates that there was an accord and satisfaction in respect to all the matters growing out of the transaction between him and the defendant through the agency of Mr. Pool, plaintiff's attorney, but upon this we need not pass.

Upon consideration of the whole record, we find no error in allowing the motion to nonsuit. The judgment, therefore, is

Affirmed.

MASON P. THOMAS v. JAMES A. BAKER ET AL.

(Filed 19 March, 1947.)

1. Corporations § 21—

Where the president of a corporation, with the tacit approval of the directors, assumes general managerial duties, and thereafter the directors in fixing the president's salary take into consideration such additional duties, the authorization for payment for such services authorizes the performance of such services, and constitutes a ratification and approval of the president's managerial functions.

2. Corporations § 5—

Where the directors of a corporation are evenly divided in a dispute as to whether its president should exercise managerial powers, and by reason of such division are unable to elect any officers of the corporation or resolve their differences over the management of the corporation, the Superior Court has jurisdiction in the premises under G. S., 55-114, upon petition properly filed.

3. Corporations § 6a (1)—

Directors of a corporation may confer managerial powers upon its president. G. S., 55-48; G. S., 55-49.

4. Corporations § 5—

In a proceeding under G. S., 55-114, an order continuing corporate officers in their respective offices necessarily carries with it authorization and direction that such officers should continue to exercise the same functions and receive the same emoluments as before the controversy giving rise to the proceeding.

5. Same—

In a proceeding under G. S., 55-114, it is not necessary that the corporation, as such, be joined as a party, since its inability to take corporate action is the very situation which the statute seeks to remedy.

6. Same—

G. S., 55-114, is remedial in character, and the power given the court thereunder to continue corporate officers in their respective offices necessarily empowers the court to direct that such officers continue with the same authority and emoluments enjoyed by them prior to controversy.

7. Same—

G. S., 55-114, empowering the court to continue corporate officers in their respective offices with the same authority and emoluments enjoyed by them prior to controversy, provides an emergency remedy which does not affect the status of the corporation but merely preserves the *status quo* pending determination of controversy in order that the corporation may continue to function, not under the supervision of the court, but by virtue of corporate authority theretofore given, and therefore the remedy violates no constitutional right of stockholders or directors but only

imposes upon them the rules of fair play in the exercise of their property rights.

8. Constitutional Law § 15½—

Liberty of action under the Constitution is not license.

9. Corporations § 5—

G. S., 55-49, provides that officers of a corporation once in office, shall continue in office until their successors are chosen and qualified.

10. Judgments § 17a—

Where a judgment is without error in awarding affirmative relief, a further provision of the judgment dismissing the proceeding will be stricken out or disregarded as an inadvertence.

APPEALS by petitioner and respondents from *Williams, J.*, in chambers at Sanford, 5 September, 1946. From CHATHAM.

Summary proceeding under G. S., 55-114, to continue corporate officers in office pending settlement of dispute over managership of corporation.

The Hadley-Peoples Manufacturing Company is a North Carolina corporation owning and operating a cotton-yarn mill at Siler City, N. C. The following are its officers: Mason P. Thomas, President; Paul W. Baker, Vice-President; J. C. Gregson, Treasurer; Nydia H. Bray, Assistant Treasurer and Secretary.

It is conceded that the president of the company, with the tacit approval of the directors, assumed general management of the mill upon its purchase by the present owners in August, 1944. Then when the directors came to fix the salary of the president on 12 September, 1944, these additional duties were taken into consideration in determining the amount. He was unanimously voted a stipend of $15,000 a year "for serving as President and in all other capacities with the Company." This was a ratification and approval of his managerial functions. For a corporation to authorize its president to be paid for services thereafter to be rendered is to authorize the performance of such services. It thus appears that prior to the annual meeting of the Board of Directors of the corporation, held on 15 January, 1946, the petitioner, Mason P. Thomas, was the duly elected president of the company with general managerial duties; and that his compensation was accordingly fixed to cover his services as president and general manager.

On 10 November, 1945, in a letter addressed to Mason P. Thomas, President of the Company, J. A. Baker, in his capacity as Director, notified him that he and members of his family, owning one-half of the common stock of the Company and represented by one-half in number of the Directors, would be unwilling for him to continue in his "present managerial capacity" after the "next annual meeting of the stockholders in January 1946."

Four days later at a meeting in Charlotte, J. A. Baker suggested, as a means for the settlement of their differences, that the company be offered for sale at public auction. The petitioner countered by asking Baker if he would make him a buy-or-sell offer for their respective shares of stock, and Baker declined to make such an offer. The conference ended without any agreement being reached.

Thereafter, at the annual meeting of the directors on 15 January, 1946, due to the controversy between the petitioner and respondents over "the scope of authority, powers and duties of the President of the Corporation," especially in respect of his managerial activities, the directors, being evenly divided in their sympathies and votes, were unable to elect any officers of the corporation, or to resolve the differences over the management of the mill. Whereupon, this proceeding was started to hold matters *in statu quo* until a new election could be held and to continue the present officers in their respective offices under the effective and operative conditions theretofore obtaining.

The matter was heard before the resident judge of the Fourth Judicial District, Honorable Clawson L. Williams, and on 5 September, 1946, an order was entered continuing the present officers in their respective offices, but for "want of authority" the judge declined "to adjudicate the specific authority and powers of the President of the Corporation," and dismissed the proceeding at the cost of the petitioner.

Both sides appeal, assigning errors.

Brooks, McLendon, Brim & Holderness for petitioner.

Tillett & Campbell for respondents.

STACY, C. J., after stating the case as above: The controversy over the management of the mill produced a situation which gives the court jurisdiction in the premises. G. S., 55-114. The dispute centers around the designation of a manager or the vesting of general managerial powers in the president of the corporation. Obviously, a manufacturing plant in operation needs some direction and management. The court was therefore under the necessity of dealing with the real question in difference between the parties.

The directors of a corporation may confer general managerial duties upon its president, G. S., 55-48; 55-49, as was done by the directors of the instant corporation prior to the stalemate of 15 January, 1946; and the order continuing the present officers in their respective offices until their successors are duly elected, as sanctioned by the statute, necessarily carries with it authorization and direction that they should continue to exercise the same functions and receive the same emoluments which pertained to their respective offices immediately prior to the controversy which resulted in the stalemate. Officers of a corporation, legally in

office, are expected to carry on the business of the corporation. That is what they are there for.

The court's refusal "to adjudicate the specific authority and powers of the President of the Corporation," if at variance with the effect of the order continuing the present officers in their respective offices, may be considered a misapprehension of the court's authority in the premises. The order of continuance merely keeps in force the will of the corporation as unanimously expressed by the directors on 12 September, 1944, and does not change or "affect the status of the corporation" within the meaning of the statute. It simply preserves the *status quo* for the time being. It is the intent of the statute that the corporation shall continue to function pending settlement of the dispute, not under the supervision of the court, but by virtue of corporate authority theretofore bestowed. Hence, this summary proceeding to avoid temporary corporate paralysis. *In re Hotel Raleigh,* 207 N. C., 521, 177 S. E., 648. It is after the similitude of an application for injunctive protection *pendente lite.* The pillars of the business are not to be pulled down while the dispute is raging. The end in view is to enable the officers of the corporation to move from dead center by reverting to the operative conditions theretofore lawfully established and subsisting. The statute was enacted for some purpose; it is remedial in character, and if it mean less than this, it would be useless. Why provide for the matter to be brought before the judge at all, if he can do nothing about it? What the parties want, and need, is to be extricated from their present tug of war.

While intended primarily for the benefit of the corporation, as appears from the text and context of the statute, the corporate entity, as such, is not a party to the proceeding. Nor is it essential that it should be. It could not have joined in the proceeding, when instituted, because of the deadlock over its management, and so the judge of the district is empowered to take cognizance of the situation. This violates no constitutional right. It simply provides for emergency assistance in time of need, and the litigants here are in no position to complain. They are permitted to do as they please with their own, provided they observe the rules of fair play. Liberty of action under the Constitution is not license. *Sic utere tuo,* etc., is still good law and good morals. Having once established satisfactory arrangements for carrying on the business of the corporation, it is but meet that less than a majority should not be permitted to grind the corporate wheels to a permanent stop. Such is the purview of the statute.

True it is, there exists no authority for the court, in this proceeding, to take charge of the business of the corporation, as this would be to "affect its status," but the court is authorized to continue the officers in their respective offices until an election can be held to determine their successors. Moreover, in G. S., 55-49, it is provided that officers of a

corporation, once in office, "shall hold office until others are chosen and qualified in their stead."

It would appear that the provision continuing the present officers in their respective offices, and the dismissal of the proceeding are somewhat inharmonious or wanting in consistency. There was no error in the former, and the latter will be stricken out or disregarded as an inadvertence. Indeed, it may be doubted whether the learned judge intended to do more than dismiss the proceeding from further consideration by him, leaving the operative provisions of his order in effect.

The matter will be remanded for judgment accordant herewith and for such further action as to justice appertains and the exigencies of the situation may require.

The petitioner will be awarded his costs.

Error and remanded.

J. T. FLYTHE, TRUSTEE OF THE ESTATE OF RODERICK DAVENPORT, BANKRUPT, v. S. A. WILSON.

(Filed 19 March, 1947.)

1. Venue § 2c—

Upon motion for change of venue as a matter of right on the ground that the action is to recover a statutory penalty or forfeiture growing out of matters and transactions which occurred in another county, the denial of the motion will not be held for error where the complaint fails to show in what county the alleged cause of action arose and there is no finding or request for finding in respect to this fact. G. S., 1-77.

2. Appeal and Error § 40d—

Where the judgment does not set forth a finding of a material fact, and there is no request for such finding, it will be presumed that the court found facts sufficient to support the judgment.

3. Venue § 2d—

G. S., 1-76 (4), requiring that actions for the recovery of personal property be tried in the county in which the subject of the action, or some part thereof, is situated, applies only to actions for the recovery of specific tangible articles of personal property and not to actions for monetary recovery.

4. Venue § 1b: Bankruptcy § 5—

USCA 11, Sec. 46 (b), relates solely to jurisdiction and does not preclude a trustee in bankruptcy from instituting suit in a county otherwise appropriate.

APPEAL by defendant from *Olive, Special Judge,* at November Special Term, 1946, of WAYNE.

Civil action to recover on two alleged causes of action (1) for usurious payments and penalty therefor, and (2) amount paid by bankrupt as voidable preference, heard upon motion of defendant for change of venue as a matter of right.

These facts are alleged in the complaint filed by plaintiff:

(1) Plaintiff, J. T. Flythe, is the duly elected, appointed, qualified and acting Trustee of the Estate of Roderick Davenport, duly adjudged bankrupt in an involuntary proceeding in bankruptcy in the United States District Court of the Eastern District of North Carolina, New Bern Division, and causes of action exist in his favor as such Trustee against defendant for the recovery (a) of a certain sum of money, as penalty for usury, and (b) of a certain sum of money due the bankrupt's estate by reason of payments of money to defendant constituting unlawful and voidable preference.

(2) Plaintiff, a resident of the County of Wayne, brings this action in said county, against defendant, a resident of the County of Craven, all in the State of North Carolina.

Defendant, before time for answering expired, moved the court for the removal of this action from the Superior Court of Wayne County, to and for trial in the Superior Court of Craven County as a matter of right for that Craven County is the proper venue for the trial of the action in that: (a) Defendant and Roderick Davenport, bankrupt, are residents of Craven County, and the proceeding in bankruptcy is in the United States District Court for the Eastern District of North Carolina of New Bern in the New Bern Division; (b) under the Acts of Congress, especially Title II, Section 46, reading, "Suits by the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this title has not been instituted, unless by consent of the defendant, except as provided in Sections 96, 107 and 110 of this title," the venue of this action by the trustee in bankruptcy is in Craven County in that, if instituted by the bankrupt, the action would properly be brought in said county; and (c) the complaint, on its face, shows that (1) the first cause of action being for "recovery of a penalty or forfeiture, imposed by statute," growing out of matters and transactions alleged to have occurred in Craven County, and under provisions of G. S., 1-77, must be tried there, and (2) the second cause of action being for recovery of personal property, situated in Craven County, and under provisions of G. S., 1-76, must be tried there.

Defendant further set forth as part of his motion that the alleged causes of action, if any, arose in Craven County, North Carolina, and the convenience of witnesses, and the ends of justice would be promoted by such removal.

Upon the hearing of the motion for removal, the Clerk of Superior Court, finding that "plaintiff, J. T. Flythe, Trustee of the Estate of Roderick Davenport, bankrupt, is a resident of Wayne County, North Carolina," and that this action "is properly instituted in Superior Court of Wayne County," entered judgment denying the motion. And, on appeal therefrom, the Judge of Superior Court, upon like findings, entered like judgment. Defendant appeals therefrom to Supreme Court, and assigns error.

J. A. Jones, H. P. Whitehurst, and R. E. Whitehurst for plaintiff, appellee.

L. T. Grantham and W. H. Lee for defendant, appellant.

WINBORNE, J. Defendant, as appellant, assigns as error only the action of the judge below in rendering judgment denying motion of defendant for the removal of the action from the Superior Court of Wayne County to, and for trial in the Superior Court of Craven County. Upon the record, however, as it comes to this Court, it does not appear that there is error in the judgment rendered.

Defendant argues with force and merit (1) that an action for the recovery of a penalty or forfeiture, imposed by statute, must be tried in the county where the cause, or some part thereof, arose, subject to the power of the court to change the place of the trial, G. S., 1-77, and (2) that the forfeiture of interest, and the penalty for usury are imposed by statute. G. S., 24-2. *All v. Mtge. Co.*, 104 S. C., 239, 88 S. E., 529; *Norman v. Campbell* (Okla.), 108 P. (2d), 789.

Even so, the record on this appeal fails to show in what county the cause of action arose. It is true that defendant sets forth in his motion, as a ground for removal, that the complaint shows that the first alleged cause of action, upon which plaintiff seeks to recover, is for the "recovery of a penalty or forfeiture, imposed by statute," growing out of matters and transactions alleged to have occurred in Craven County, where the alleged cause of action, if any, arose. But an inspection of the complaint fails to show in what county the alleged cause of action arose, and neither the Clerk nor the Judge, in passing upon the motion in the court below, makes any finding in that respect. Moreover, the record presents no exception to the failure of the Clerk, or of the Judge to make such finding. Hence, in the absence of any finding in that respect, it will be presumed that the Clerk and the Judge in finding that Wayne County is the proper venue for the action, found facts sufficient to support the judgment.

Defendant also contends that the second cause of action is for the recovery of personal property within the meaning of G. S., 1-76 (4), which provides that actions for the recovery of personal property must

be tried in the county in which the subject of the action, or some part thereof, is situated, subject to power of the court to change the place of trial. It will be noted, however, that the second cause of action is not for the recovery of specific tangible articles of personal property. Hence, the provisions of G. S., 1-76 (4), are inapplicable.

Defendant further contends that under the provisions of USCA 11, Section 46, subsection (b), suits by the trustee shall be brought and prosecuted only in the courts where the bankrupt might have brought or prosecuted them if the proceeding under the statute had not been instituted, and that, hence, the bankrupt not being a resident of Wayne County, the trustee could not have instituted the action there. A reading of the whole section indicates that the above statute relates to matters of jurisdiction, and not venue, and merely authorizes the trustee to sue in the State courts.

Let it be noted that it does not appear that the court passed upon that part of the motion for removal of the action for convenience of witnesses, etc. Hence, decision here is without prejudice thereto.

For causes stated the judgment below is

Affirmed.

GEORGE T. CHANDLER v. H. C. CAMERON AND CARL CAMERON.

(Filed 19 March, 1947.)

1. Injunctions § 8—

Defendants claim under a registered paper writing insufficient to constitute a deed, but effectual in law as a contract to convey the merchantable timber on the tract of land in question. The instrument was executed by only one tenant in common, but defendants contended he was acting for himself and as agent for his cotenants. Plaintiff claims under a subsequently executed timber deed executed by all the tenants in common. *Held:* On the record plaintiff has a *prima facie* title to at least a two-thirds interest in the timber, and he is entitled to have the temporary order restraining defendants from further cutting and removing timber continued to the hearing. G. S., 1-487.

2. Injunctions § 8½—

Under G. S., 1-488, the judge may enter an order permitting the cutting of timber pending final determination of the controversy upon the filing of bond only in the event the court finds that one of the parties is clearly an interloper without a *bona fide* claim of right and that the other party is acting in good faith under a title *prima facie* valid, and it is error for the court to enter such order when the court fails to make such findings but finds to the contrary that the party against whom the order is entered is acting in good faith under a paper writing purporting to convey an interest in the timber.

3. Vendor and Purchaser § 2—

A recorded paper writing executed by one tenant in common which purports to convey the merchantable timber on lands held in common and which provides that the balance of the purchase price should become due upon delivery of timber deed, though ineffectual as conveyance because of the want of a seal, is nevertheless effective as a contract to convey, enforceable in equity, at least against the tenant executing same and those claiming under him by subsequently recorded conveyance.

APPEAL by defendants from *Williams, J.*, in Chambers, 30 December, 1946. From HARNETT. Modified and affirmed.

Civil action to restrain an alleged continuing trespass on real property.

On 14 November, 1946, Eugene, Lewis, and Edward C. McLeod were the owners, as tenants in common, of a certain tract of land in Harnett County on which there was valuable timber. On that date Eugene McLeod executed and delivered to H. C. Cameron a paper writing in words and figures as follows:

"We do hereby sell and convey all the merchantable timber to H. C. Cameron for the sum of $1,500.00, receipt of $1.00 is hereby acknowledged, the balance of $1,499.00 will be due and payable by H. C. Cameron upon delivery of timber deed. The said timber being located on the lands of L. M. McLeod Heirs and adjoining lands of Hoyle Kelly, Gales and Layton, and others, and measuring 8 in. dia. This conveyance is made this Nov. 14, 1946."

This instrument was duly recorded 16 December, 1946. Defendants allege and contend that Eugene McLeod, in executing this paper writing, was acting for himself and as agent of his cotenants.

On 14 December, 1946, the three McLeods, tenants in common, executed a timber deed conveying the merchantable timber on said land to plaintiff. This deed was filed for registration 18 December, 1946, and recorded 19 December, 1946. At the time of the execution and delivery of this deed defendants had entered upon said land and were cutting and removing the timber therefrom.

Plaintiff instituted this action for a permanent injunction. A temporary restraining order was issued. On the return date of the notice to show cause the judge, "being of the opinion and so finding on this showing that the plaintiff has legal title to the timber subject to such rights as the said paper writing may give to the said H. C. Cameron, and that the said H. C. Cameron *bona fide* claims under said paper writing," entered an order continuing the restraining order to the final hearing but providing, however, upon the execution of bond in the sum of $3,000, the plaintiff may "enter upon said lands and begin cutting said timber." Defendant excepted and appealed.

Charles Ross for plaintiff, appellee.

M. O. Lee and K. R. Hoyle for defendants, appellants.

BARNHILL, J. The contention of the defendants that the court below should have dissolved the temporary restraining order cannot be sustained. The plaintiff holds a deed which, on the face of the record, conveys at least a two-thirds interest in the timber. Whether the instrument relied on by defendants in fact creates a prior claim to all the timber is yet to be decided. While we express no opinion in respect thereto, we concur in the conclusion of the court below that plaintiff has a *prima facie* vested interest which should be protected pending the final determination of the issues raised by the pleadings.

Thus the one question presented for decision is this: Did the court below, on the facts found, have authority to permit plaintiff, upon the execution of the required bond, to enter upon the premises and cut the timber thereon pending final determination of the action? We must answer in the negative.

In 1901 the law controlling the right to injunctive relief against a continuing trespass in the form of cutting and removing timber trees was substantially modified. Chap. 666, P. L. 1901. (For a brief review of the law of injunctions in such cases prior to that date see *Lumber Co. v. Cedar Co.*, 142 N. C., 411.)

Section 1 of said Act, now G. S., 1-487, provides that whenever in an action to restrain a continuing trespass in the form of cutting and removing timber trees "the court finds as a fact that there is a *bona fide* contention on both sides based upon evidence constituting a *prima facie* title" the judge shall not permit either party to cut said trees (except by consent) until the title to said trees has been finally determined in such action.

Section 2 thereof, now G. S., 1-488, vests the judge with discretionary power to permit the party who convinces the court of the *bona fides* of his contention and offers evidence "showing a *prima facie* title" to cut the timber in controversy pending the action upon the giving of bond as required by law, provided the court finds as a fact that the contention of the adversary party "is not in good faith and is not based upon evidence constituting a *prima facie* title."

Since the enactment of this statute the cutting of timber which is the subject matter of the action may be permitted only in the event one of the parties is clearly an interloper without a *bona fide* claim of right and the other acts in good faith under a title *prima facie* valid. To support an order to that effect the judge must so find and incorporate such finding in his judgment. *Johnson v. Duvall*, 135 N. C., 642; *Lumber Co. v. Cedar Co., supra; Kelly v. Lumber Co.*, 157 N. C., 175, 72 S. E., 957.

Here the court below made no such finding. On the contrary it found that the defendants are acting in good faith under the paper writing executed by Eugene McLeod. This instrument is not valid as a conveyance for want of a seal. It will, however, operate as a contract to convey, enforceable in equity, at least against Eugene McLeod and those claiming under him by conveyance subsequently recorded. *Willis v. Anderson,* 188 N. C., 479, 124 S. E., 834; *Robinson v. Daughtry,* 171 N. C., 200, 88 S. E., 252; *Vaught v. Williams,* 177 N. C., 77, 97 S. E., 737; *Lumber Co. v. Corey,* 140 N. C., 462. Hence the provisions of G. S., 1-487, are controlling.

It follows that the judgment below must be modified in accordance with this opinion. As so modified it is affirmed.

Modified and affirmed.

MRS. ROELLA HINES OWEN, GEORGE NORWOOD HINES AND MRS. MILDRED HINES STRAUB, v. E. R. HINES AND WIFE, JANIE L. HINES.

(Filed 19 March, 1947.)

1. Pleadings § 2—

If causes of action are not entirely distinct and unconnected, if they arise out of one and the same transaction, or a series of transactions forming one dealing and all tending to one end, and if one connected story can be told of the whole, they may be joined in order that the whole controversy may be determined in one action. G. S., 1-123.

2. Same: Pleadings § 19b—Demurrer for misjoinder of causes held properly overruled.

The complaint alleged that defendant guardian sold lands of plaintiff wards for the sum of $4,000.00, that he thereafter took deed to himself individually for other lands acquired as part of the estate, and that upon plaintiffs' majority, defendant refused to execute deed to them for the land, disaffirmed the trust relationship, and conveyed the land to his wife, his co-defendant, who took with full knowledge of all the facts. Plaintiffs prayed judgment for $4,000.00, that the sum be declared a lien on the land, that defendants be declared to hold title to the land as trustees for plaintiffs, and that the *feme* defendant be adjudged to have no title or interest in the lands. *Held:* Demurrer for misjoinder of causes was properly overruled.

3. Guardian and Ward § 2—

Guardianship is a trust relation in which the guardian acts for the ward as a trustee and subject to the same rules as govern other trustees.

4. Guardian and Ward § 12: Trusts § 5b—

Legal title to guardianship property is in the infant ward rather than the guardian, who is a mere custodian and manager and has no beneficial

title to the property, and therefore where a guardian takes title individually to property of the estate, he holds title as trustee for the ward.

5. Parties § 3—

All persons who have, or claim, any interest in a controversy adverse to plaintiff, or who are necessary parties to a complete determination of the action, may be made defendants, and any person claiming title or right of possession to real estate may be made a party plaintiff or defendant as the case requires. G. S., 1-69.

6. Same—

In an action to establish a trust in lands upon allegations that defendant guardian took title individually to lands belonging to the estate and thereafter repudiated the trust relationship and conveyed the lands to his wife, who took with full knowledge of the facts, the wife is properly joined as a party defendant to the end that the entire controversy be settled in one action and that she be concluded by the judgment in respect to the principal question.

APPEAL by defendants from *Bone, J.*, at September Term, 1946, of JOHNSTON.

Civil action to establish that defendants hold title to certain land as trustees for the use and benefit of plaintiffs, heard upon demurrer of defendants to complaint of plaintiffs.

The record shows that both plaintiffs and defendants are nonresidents of the State of North Carolina, and the parties stipulate as to facts upon which jurisdiction is acquired by virtue of writ of attachment levied on land in controversy situate in Johnston County, North Carolina.

Plaintiffs allege in their complaint, narratively stated in brief, these facts:

Plaintiffs are children of defendant E. R. Hines by his first wife, Nettie V. Hines, who is now deceased. Defendant Janie L. Hines is the wife of E. R. Hines by his second marriage. Nettie V. Hines died seized and possessed of real and personal property situate in Johnston County, North Carolina, including two certain lots of land in the town of Selma, and a tract of land known as the Tom Pittman land, title to which upon her death vested in plaintiffs, who then were minors. Defendant E. R. Hines, their father, qualified as guardian of plaintiffs, as minors, and thereafter as such guardian sold the said lots and said tract of land and received therefor the sum of $4,000.00, which he loaned and invested in his own and individual name, upon securities, such as were not approved by law, and which were not sufficient and adequate to safeguard the guardianship funds. Thereafter, "when it became apparent that the estate had been lost and the same was not presently at hand and in such liquid shape that same could be readily turned over to" his

wards, defendant E. R. Hines received, "as a part of the estate belonging to" his wards, a deed to himself as an individual for a certain tract of land situate in Johnston County, North Carolina, containing 28.2 acres more or less (the land on which writ of attachment as aforesaid was levied), and is now in possession of same. Defendant E. R. Hines has recognized the fiduciary relationship existing between himself and his children in respect to said tract of land, and has within three years next preceding the institution of this action paid to plaintiffs the sum of $50.00 from the income from said land.

Plaintiffs, having each attained the age of twenty-one years, and desiring to acquire title to so much of their estate as then remained intact, caused a deed from defendants to them to be prepared on or about 10 July, 1945, for execution and delivery by defendants. Whereupon, defendant E. R. Hines disaffirmed the trust relationship then existing between him and plaintiffs in respect thereto, and he and his wife, Janie L. Hines, declined to execute and deliver the deed to plaintiffs, and have since remained in possession of said land. Thereafter, on 3 December, 1945, defendant E. R. Hines executed and delivered to his wife, Janie L. Hines, a deed for said land,—she at the time having full knowledge of the matters and things in controversy, and of the equitable rights of the plaintiffs to said land.

Plaintiffs allege further that the disaffirmance of the trust relationship of defendant E. R. Hines as to said land, and the refusal of defendants to execute deed to them as aforesaid, and the execution of deed by defendant E. R. Hines to his wife, defendant Janie L. Hines, as aforesaid, constitute a fraud in law upon their rights as *cestuis que trustent*.

Plaintiffs further allege that by reason of the matters and things above set forth, defendant E. R. Hines is justly indebted to them in the sum of $4,000.00 with interest, and that they, the plaintiffs, are in equity the owners and entitled to possession of lands title to which was taken in the name of E. R. Hines as aforesaid.

Thereupon plaintiffs pray judgment (1) against the defendant E. R. Hines for the principal sum of $4,000.00 with interest, (2) that it be adjudged that defendants hold the title to the land in question as trustee for the use and benefit of plaintiffs, (3) that the indebtedness be declared to be a specific charge and lien upon the said tract of land, and (4) that it be adjudged that defendant Janie L. Hines is not the owner of nor entitled to any right, title, interest or estate in said lands, as the wife of E. R. Hines or otherwise, and that she be barred of any right therein.

Defendants demur to the complaint for misjoinder of both causes of action and of parties to the action in that: (1) Misjoinder of causes for that: One cause of action is on a contract of trusteeship alleged to exist between plaintiffs and defendant, E. R. Hines, and the other in tort for the alleged collusive and fraudulent conveyance of certain lands by

defendant, E. R. Hines, to his co-defendant Janie L. Hines. (2) Misjoinder of parties for that: Defendant Janie L. Hines was not a party to the alleged contract of trusteeship of the defendant, E. R. Hines.

The demurrer was overruled, and from judgment in accordance therewith defendants appeal to Supreme Court and assign error.

Lyon & Lyon for plaintiffs, appellees.
Parker & Lee and James D. Parker for defendants, appellants.

WINBORNE, J. Two questions arise on this appeal: (1) Does the complaint contain a misjoinder of causes of action? (2) Is there a misjoinder of parties to the action? Testing the complaint by well settled principles of law in this State, a negative answer to each question follows.

(1) The general rule, deducible from the decisions of this Court pertaining to the appropriate statute, G. S., 1-123, is that, if the causes of action be not entirely distinct and unconnected, if they arise out of one and the same transaction, or a series of transactions forming one dealing and all tending to one end, if one connected story can be told of the whole, they may be joined in order to determine the whole controversy in one action. See *Bedsole v. Monroe,* 40 N. C., 313; *Fisher v. Trust Co.,* 138 N. C., 224, 50 S. E., 659; *Barkley v. Realty Co.,* 211 N. C., 540, 191 S. E., 3, and numerous other cases.

Applying this rule to the allegations of the complaint in hand, the series of transactions alleged form one dealing, and a connected story of the whole is told,—all tending to one end,—an accounting by the guardian for specific property of his wards.

A guardianship is a trust relation in which the guardian acts for the ward, whom the law regards as incapable of managing his own affairs. And in that relationship a guardian is a trustee and is governed by the same rules that govern other trustees. 25 Am. Jur., pp. 7 and 113. Moreover, the legal title to the property of an infant ward is in the ward, rather than in the guardian. The guardian, being merely the custodian and manager or conservator of the ward's estate, has no beneficial title thereto. Thus when a deed or mortgage is taken by a guardian for his ward, the title is regarded as being in the ward. 25 Am. Jur., 69. *Small v. Small,* 74 N. C., 16; *Wallace v. Wallace,* 210 N. C., 656, 188 S. E., 96. Hence, where a guardian takes title to his ward's property in his own name, the guardian holds the title as trustee for the ward. See *Tire Co. v. Lester,* 190 N. C., 411, 130 S. E., 45.

Moreover, the allegation of fraud in attack upon the conveyance by defendant E. R. Hines to defendant Janie L. Hines is merely one of a series of transactions tending to one end,—the single purpose of the action.

(2) It is provided by statute, G. S., 1-69, that all persons who have, or claim, any interest in the controversy adverse to the plaintiff, or who are necessary parties to a complete determination or settlement of the questions involved, may be made defendants, and any person claiming title or right of possession to real estate may be made a party plaintiff or defendant, as the case requires, in such action.

In this connection, it is said in *Barkley v. Realty Co., supra,* "If the objects of the suit are single, and it happens that different persons have separate interests in distinct questions which arise out of the single object, it necessarily follows that such different persons must be brought before the court in order that the suit may conclude the whole subject."

In the light of the above statute, the *feme* defendant in the present action is a necessary party, and may be joined as party defendant to the end that she may be concluded by the judgment in respect to the principal question.

The judgment below is

Affirmed.

T. P. LEE v. MATTIE E. RHODES AND H. W. RHODES.

(Filed 19 March, 1947.)

1. Judgments § 19—

Ordinarily, where a judgment is rendered in open court and some memorandum or minute of the court appears of record showing what the judgment is, formal judgment based thereon may be later entered, but this rule does not apply to a consent judgment which requires the consent of the parties to subsist at the time it is signed in order to give the court jurisdiction.

2. Judgments § 1—

A consent judgment is the contract of the parties entered upon the records with the approval and sanction of a court of competent jurisdiction, and is not, strictly speaking, a judgment of the court.

3. Judgments § 2—

Pending trial, plaintiff's attorney, plaintiff being present and making no objection, announced that the parties had agreed to a settlement. The court approved the terms of the settlement, directed the withdrawal of a juror and ordered a mistrial. Upon tender of judgment by defendants' attorney in accordance with the settlement, plaintiff appeared *in propria persona*, repudiated the agreement and requested the court not to sign the judgment. *Held:* The court was without jurisdiction to sign the judgment.

APPEAL by defendants from *Burgwyn, Special Judge,* at January Term, 1947, of JOHNSTON.

LEE *v.* RHODES.

Civil action instituted as a summary proceeding in ejectment. The defendants denied they were in possession under a rental contract with the plaintiff, alleging that they were the owners of the property and that the deed executed by them to the plaintiff was in fact intended to be a mortgage to secure certain indebtedness to the plaintiff, etc. After the trial had been in progress for two days, the parties agreed to a settlement by which the defendants were to pay the plaintiff $3,500.00 in cash, for the redemption of their land and in settlement of certain other claims against the defendants.

The terms of the settlement were communicated to the trial judge by plaintiff's counsel in open court, in the presence of the plaintiff, who made no objection thereto. His Honor expressed approval of the settlement, instructed the clerk to withdraw a juror and ordered a mistrial.

Several days later, judgment was tendered by defendants' counsel in accordance with the terms of the compromise agreement, at which time the plaintiff appeared in his own behalf and repudiated the agreement and informed the court that "he did not understand what he was agreeing to at the time he agreed to the settlement," and requested the court not to sign the judgment.

From the refusal of the court to sign the judgment as tendered, the defendants excepted and appealed to the Supreme Court.

Leon G. Stevens and Wellons & Canaday for plaintiff.

A. M. Noble and Lyon & Lyon for defendants.

DENNY, J. The conduct of the plaintiff, if considered in its most favorable light, does not appeal to the conscience of the Court. Even so, the record presents for our consideration and determination a question of law rather than one of ethics.

The appellants are relying upon the decisions of this Court in which it has been held that the requirement that a judgment should be signed by the judge is only directory; and that when a judgment is passed in open court and filed with the papers as a part of the judgment roll, it is a valid judgment, *Range Co. v. Carver,* 118 N. C., 328, 24 S. E., 352. *McDonald v. Howe,* 178 N. C., 257, 100 S. E., 427; *Brown v. Harding,* 170 N. C., 253, 86 S. E., 1010; *Bond v. Wool,* 113 N. C., 20, 18 S. E., 77; *Keener v. Goodson,* 89 N. C., 273; *Matthews v. Joyce,* 85 N. C., 258; *Rollins v. Henry,* 78 N. C., 342.

Ordinarily when a court renders a judgment and there is some memorandum or minute in the records of the court, which discloses what the judgment was, it will be held sufficient and a formal judgment based thereon may be entered *nunc pro tunc* at a succeeding term. *McDonald v. Howe, supra; Brown v. Harding, supra; Ferrell v. Hales,* 119 N. C., 199, 25 S. E., 821; *Grantham v. Kennedy,* 91 N. C., 148; *Logan v.*

Harris, 90 N. C., 8; *Jacobs v. Burgwyn,* 63 N. C., 193; *Davis v. Shaver,* 61 N. C., 18.

The above decisions, however, are not applicable to the facts presented here. There is a distinction between a judgment rendered by a court pursuant to its inherent power to hear and determine a controversy, and a consent judgment.

A consent judgment is not, strictly speaking, a judgment of the court, *Lynch v. Loftin,* 153 N. C., 270, 69 S. E., 143, but is merely the contract of the parties entered upon the records of a court of competent jurisdiction with its approval and sanction, and such contract cannot be modified or set aside without the consent of the parties thereto, except for fraud or mistake, *Keen v. Parker,* 217 N. C., 378, 3 S. E. (2d), 209. *King v. King,* 225 N. C., 639, 35 S. E. (2d), 889; *S. v. Griggs,* 223 N. C., 279, 25 S. E. (2d), 862. Moreover, the power of a court to sign a consent judgment depends upon the unqualified consent of the parties thereto, *King v. King, supra,* and "the consent of the parties must still subsist at the time the court is called upon to exercise its jurisdiction and sign the consent judgment," *Williamson v. Williamson,* 224 N. C., 474, 31 S. E. (2d), 367. *Rodriguez v. Rodriguez,* 224 N. C., 275, 29 S. E. (2d), 901; *Edmundson v. Edmundson,* 222 N. C., 181, 22 S. E. (2d), 576; *Gardiner v. May,* 172 N. C., 192, 89 S. E., 955.

As contended by the appellants, the plaintiff may have acted in bad faith in withdrawing his consent to the settlement of this case. His purpose in so doing may have been to hinder and delay the court in the administration of justice. If so, the court was not without power to deal with such conduct. But, it was without power to sign a judgment, based upon the consent of the parties, after one of the parties repudiated the agreement and had withdrawn his consent thereto.

His Honor was correct in refusing to sign the judgment as tendered. The judgment of the court below is

Affirmed.

W. G. TEMPLE, SR., AND LOUISE TEMPLE, v. R. A. WATSON, JR., ADMINISTRATOR OF W. G. WATSON, DECEASED, AND K. R. HOYLE, SUBSTITUTED TRUSTEE.

(Filed 19 March, 1947.)

1. Injunctions § 8—

Upon the hearing of an order to show cause why a temporary restraining order should not be continued to the hearing, the court sustained defendants' demurrer on the ground of the failure of the complaint to allege facts sufficient to sustain any of the causes of action, with leave to plaintiffs to amend, and overruled defendants' demurrer for misjoinder of parties and causes. Defendants appealed. *Held:* Upon the sustaining

of the demurrer upon the first ground, defendants were entitled to have the temporary restraining order dissolved upon motion.

2. Pleadings § 20½: Appeal and Error § 40j—

The court sustained defendants' demurrer for failure of the complaint to state a cause of action and overruled the demurrer on the ground of misjoinder of parties and causes, and defendants appealed. *Held:* Upon the sustaining of the demurrer on the first ground there was nothing left to which the demurrer on the second ground could be directed, and the ruling of the court thereon presents no question requiring decision on appeal.

APPEAL by defendants from *Williams, J.*, at Chambers, 30 November, 1946. From LEE.

Plaintiffs instituted suit to restrain foreclosure sale, for an accounting, and for the recovery of the balance alleged to be due plaintiffs. Temporary restraining order restraining the sale was issued based on plaintiffs' complaint.

In their complaint the plaintiffs alleged that as heirs at law of Carrie Watson, deceased, they became the owners of certain real property which was subject to an outstanding deed of trust executed by a former owner to secure a debt originally in the sum of $2,400; that in 1940 when Carrie Watson died there was balance due on the debt of $759.18; that this was paid by W. G. Watson, surviving husband of Carrie Watson, and that he had the deed of trust assigned to him; that W. G. Watson, defendants' intestate, occupied the premises until his death in 1946, and that his estate is indebted to plaintiffs for rental value of said premises in the aggregate sum of $3,703.33, together with interest thereon in the sum of $748.25. It was further alleged that plaintiffs executed a deed to W. G. Watson, defendants' intestate, for a lot in Raleigh worth $400, which he sold and for which he did not account, and that his estate is indebted to plaintiffs for money had and received in the sum of $400; that plaintiffs are entitled to an accounting and to credit in the amounts stated, which would discharge the balance of the debt, interest and taxes, and entitle the plaintiffs to recover the difference, $3,514.56; that defendant administrator has procured the appointment of a substitute trustee, and has caused the advertisement by him of the land for sale under the power in the deed of trust. Plaintiffs ask that the sale be enjoined and for the recovery of $3,514.56 from the administrator.

Defendants demurred to the complaint and asked that the action be dismissed and the restraining order dissolved, (1) on the ground of misjoinder of parties and causes of action, and (2) for that the complaint does not state facts sufficient to constitute a cause of action, (a) with respect to rents, or (b) the value of the lot in Raleigh, or (c) allege

that legal payment has been made of an admittedly valid existing indebtedness secured by the deed of trust; and that plaintiffs have not set out sufficient facts to entitle them to the equitable relief prayed for.

The court below sustained the demurrer on the ground that the complaint did not state facts sufficient to constitute a cause of action with leave to plaintiffs to amend, overruled the demurrer as to misjoinder, and continued the restraining order to the hearing.

Defendants excepted and appealed.

D. E. McIver and Gavin, Jackson & Gavin for plaintiffs.

K. R. Hoyle for defendants.

DEVIN, J. On the hearing before the judge below, in answer to the notice to show cause why the temporary restraining order should not be continued, the defendants by demurrer challenged the sufficiency of the complaint to entitle plaintiffs to relief in any of the respects alleged. The court sustained the demurrer on the ground that the complaint did not state facts sufficient to constitute a cause of action for the reasons and in the particulars pointed out by the demurrer. The plaintiffs did not except. The allegations of the complaint upon which the restraining order was issued having been by this ruling held insufficient, the defendants were entitled to have the restraining order dissolved.

The court having struck down as ineffectual plaintiffs' attempted statement of causes of action alleging discharge of the deed of trust, recovery of rents, and the value of the Raleigh lot, nothing was left to which the demurrer for misjoinder of parties and causes of action could be directed, and the ruling of the judge below thereon does not now present a question requiring decision. Defendants were entitled to have the restraining order dissolved, and the order denying plaintiffs' motion therefor must be held for

Error.

JOE R. MOORE, JASPER MOORE, PAUL MOORE, KATIE MOORE DUDLEY, ETHEL MOORE THOMPSON, AND THE FOLLOWING NAMED INFANTS: VELMA MOORE AND DAISY MOORE, APPEARING BY THEIR NEXT FRIEND, JASPER MOORE, v. ERNIE R. MASSENGILL AND WIFE, MADIE MASSENGILL, AND DAVID HERMAN WEBB AND WIFE, MRS. DAVID HERMAN WEBB.

(Filed 19 March, 1947.)

1. Parties § 10a—

G. S., 1-73, provides for the joinder of such parties as are necessary to a complete determination of the controversy between the original

parties, but does not authorize the joinder of a party claiming under an independent cause of action not essential to a full and complete determination of the original cause of action.

2. Parties § 7—

In an action to remove cloud upon title between parties claiming from a common source, it is error to permit a party claiming under a title paramount to and independent of the common source, to intervene.

APPEAL by defendants from *Harris, J.*, at November Term, 1946, of JOHNSTON.

Civil action to remove cloud upon title.

Plaintiff and defendants are claiming title from a common source.

Alice Lee, mother of David H. Webb, one of the defendants, filed a motion and affidavit in this cause, before the Clerk of the Superior Court of Johnston County, praying for an order allowing her to interplead and set up her right and title to the *locus in quo*. Motion allowed and interplea filed. The interplea sets up a claim of title to the premises in the interpleader, who claims title paramount to and independent of the source of title relied upon by the original parties in this action.

The defendants moved before his Honor to strike out the interplea; motion denied, and they appeal to the Supreme Court, assigning error.

Parker & Lee for Alice R. Lee, interpleader.
Wellons, Martin & Wellons for Joe R. Moore.
Leon G. Stevens for defendants.

DENNY, J. The only question presented on this appeal is simply this: May a third party, who claims title to the premises involved in an action to remove cloud upon title, but who is not relying upon any source of title sought to be established in such action, be permitted to interplead and have her independent claim of title adjudicated therein? Our decisions do not so hold.

The pertinent statute, G. S., 1-73, among other things, provides: "When a complete determination of the controversy cannot be made without the presence of other parties, the court must cause them to be brought in. When in an action for the recovery of real or personal property a person not a party to the action but having an interest in its subject matter, applies to the court to be made a party, it may order him to be brought in by the proper amendment."

This statute contemplates only the making of such persons parties as may be necessary to a complete determination of the controversy between the original parties. It is not intended to authorize the engrafting of an independent action upon an existing one which is in no way essential to a full and complete determination of the original cause of action.

Schnepp v. Richardson, 222 N. C., 228, 22 S. E. (2d), 555; *Montgomery v. Blades,* 217 N. C., 654, 9 S. E. (2d), 397; *Coulter v. Wilson,* 171 N. C., 537, 88 S. E., 857; *Asheville Division v. Aston,* 92 N. C., 588; *Bryant v. Kinlaw,* 90 N. C., 337; *McDonald v. Morris,* 89 N. C., 99; *Keathly v. Branch,* 84 N. C., 202; *Colgrove v. Koonce,* 76 N. C., 363; *Wade v. Sanders,* 70 N. C., 277.

It is held in *Colgrove v. Koonce, supra,* that in an action for the recovery of real property, a third person who claims title paramount and adverse both to plaintiff and defendant, should not be permitted under the statute, which is now G. S., 1-73, to make himself a party to the action.

In *Keathly v. Branch, supra,* this Court said: "It is very clear that a claimant for land in dispute between other parties to a suit, and not connected with or interested in that controversy, nor injuriously affected by its result, cannot be allowed to intervene and assert his own independent title. This would be in effect to make a double action and introduce new issues, foreign to the original subject of controversy, and not within the scope of either section 61 or 65 of the Code."

This same question was considered in *McDonald v. Morris, supra,* and the Court, speaking through *Merrimon, J.,* said: "The statute contemplates that all persons necessary to a complete determination of the controversy, the matter in litigation, and affected by the same in some way, as between the original parties to the action, may, in some instances, and must in others, be made parties plaintiff or defendant. But it does not imply that any person who may have cause of action against the plaintiff alone, or cause of action against the defendant alone, unaffected by the cause of action as between the plaintiff and defendant, may or must be made a party. It does not contemplate the determination of two separate and distinct causes of action, as between the plaintiff and a third party, or the defendant and a third party, in the same action. It is only when, as between the original parties litigant, other parties are material or interested, that it is proper to make them parties."

A person has no more right to be made a party to an action in order to set up an independent cause of action therein, than a defendant has to set up a cross-action against a co-defendant which does not arise out of the subject matter in litigation as set out in the plaintiff's complaint. Consequently, an independent cause of action which is unrelated to the claim of the plaintiff and not essential to a full and final determination thereof, may not be litigated by interplea or cross-action. *Schnepp v. Richardson, supra; Coulter v. Wilson, supra; Hulbert v. Douglas,* 94 N. C., 128.

The motion to strike out the interplea of Alice Lee should have been granted, and the order denying such motion is

Reversed.

UNIVERSAL FINANCE COMPANY, INC., A CORPORATION, v. STEVE G. CLARY.

(Filed 19 March, 1947.)

1. Evidence § 35—

Where a party offers in evidence the original chattel mortgage with oral evidence as to its signature by the mortgagor, the instrument is competent notwithstanding the absence of a seal to authenticate the notation on the instrument of its registration. Neither G. S., 8-20, relating to the registration in a county of an instrument taken from the registry of another when evidenced by the certificate and seal of the Register of Deeds, nor USCA, Title 28, Sec. 688, as amended, is applicable.

2. Chattel Mortgages § 13c—In action by mortgagee to recover mortgaged chattel, status of defendant as innocent purchaser is matter of defense.

The introduction in evidence of the original chattel mortgage on an automobile, purporting to have been registered in another state, its registration in such other state in the county where the mortgagor resided not being challenged, with evidence of its execution by the mortgagor, is sufficient to make out a *prima facie* case and overrule defendant's motions to nonsuit in an action by the mortgagee to recover the car against one who bought the car from a purchaser from the mortgagor in this State, the contentions of defendant relating to the integrity of the transaction and his status as an innocent purchaser for value, G. S., 47-20, being matters of defense.

APPEAL by defendant from *Burgwyn, Special Judge,* at September Term, 1946, of MARTIN. No error.

This was an action to recover the possession of an automobile by the mortgagee in a chattel mortgage executed in the State of Maryland where the mortgagor resided.

There was verdict for plaintiff, and from judgment thereon defendant appealed.

Hugh G. Horton for plaintiff, appellee.

Wheeler Martin and Clarence Griffin for defendant, appellant.

DEVIN, J. The defendant assigns error in the admission in evidence of the chattel mortgage under which plaintiff claims possession of the described automobile.

The plaintiff offered the original instrument, which purported to have been executed by Homer R. Jackson, of Baltimore, Maryland, and to have been recorded on the public registry there. This showed due acknowledgment of its execution by the mortgagor before a notary public, and oral testimony was adduced at the trial as to the signature of the mortgagor thereon. Defendant's objection was pointed to the absence of a seal to authenticate the notation on the instrument of its registra-

tion, rather than to the sufficiency of the proof of the execution of the paper for the purposes therein expressed.

The defendant calls attention to G. S., 8-20. This statute permits a copy of an instrument taken from the registry of one county to be registered in another county when evidenced by the certificate and seal of the Register of Deeds. But here the original instrument was offered, sufficiently evidenced as to execution, apparently with notation thereon of the time and date of its recordation in the public registry where the mortgagor resided and where the property was then located. The regulations prescribed by U. S. Code, Title 28, sec. 688, as amended by Federal Rules of Procedure, are inapplicable here.

We note that the transcript of the evidence sent up with the case on appeal does not affirmatively show the recordation of the chattel mortgage. However, in its complaint the plaintiff stated it was duly recorded in Baltimore and gave the book and page of the proper public registry, and the defendant denied this only for lack of information. In his charge to the jury the court stated the chattel mortgage was legally recorded in Baltimore the same day it was given, and no objection or exception to his statement was noted. Furthermore, the defendant in his brief says the mortgage showed "the notation of the time and date of recording and the name of the unidentified person purporting to be recording clerk." Thus we take it that the registration of the mortgage in Baltimore where the mortgagor resided and the property was situated was not challenged by the defendant.

In view of the provisions of G. S., 47-20, which declares that no mortgage of personal property shall be valid as against subsequent purchasers for value from the mortgagor but from the registration of the mortgage where the mortgagor resides, or in case the mortgagor resides out of the State in the county where such property is situated, whether as a general rule a chattel mortgage executed by a nonresident on property then situated at the domicile of the mortgagor and duly recorded there must also be recorded in this State in order to be valid against subsequent purchasers, is not presented in this case. Neither by exception nor in his brief does the appellant raise this question. Furthermore, the evidence does not disclose that the property had come to rest in this State but was transitory at the time the mortgagor disposed of it.

The court below charged the jury that the legal effect of the registration of the automobile in the domicile of the mortgagor was notice to the world that there was a mortgage on the property described, and that he who bought the property did so subject to the mortgage to the extent of the unpaid debt, and gave peremptory instructions to the jury to answer the issues in favor of the plaintiff. The court also pointed out that when the defendant purchased the automobile in Charlotte, North Carolina, it bore a Maryland license plate, and that no sufficient inquiry

was made to ascertain what liens, if any, were recorded against it. No exception was noted to any of the court's instructions.

The only other exception noted by the defendant was to the denial of the motion for judgment of nonsuit. The plaintiff having offered the original mortgage, purporting to have been registered in the locality where the property was situated and the mortgagor resided, together with evidence of the execution of the paper by the mortgagor to secure a valid debt, made out a *prima facie* case, sufficient to withstand motion for judgment of nonsuit. Contentions relating to the integrity of the transaction and the status of the defendant as an innocent purchaser for value were matters of defense.

We discover no error of which the defendant can take advantage on the record before us.

No error.

STATE v. LUCIAN THOMAS AND THOMAS COLE, JR.

(Filed 19 March, 1947.)

APPEAL by defendants from *Burney, J.*, at October Term, 1946, of LEE.

Criminal prosecutions upon separate bills of indictment charging each defendant (1) with the larceny of $850.00 in cash, the property of one John C. Edwards, and (2) with feloniously receiving said sum of money, well knowing it to have been feloniously stolen, taken and carried away, —both contrary to the form of the statute, etc., consolidated for the purpose of trial.

Verdict: As to each defendant: "Guilty of larceny and recommend the mercy of the court."

Judgment: As to each defendant: Confinement in the State's Prison for not less than three years nor more than five years,—"the money in evidence to be returned to J. C. Edwards."

Defendants respectively appeal to Supreme Court and assign error.

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

D. E. McIver, Jeff D. Johnson, Jr., and Gavin, Jackson & Gavin for defendants, appellants.

WINBORNE, J. By means of numerous exceptions directed to the admission of evidence in certain instances, to the rejection of evidence in others, to the refusal to grant motions for judgment as of nonsuit, to various portions of the charge as given by the court, and to the failure

of the court to charge as required by law, the defendants painstakingly direct an extensive and exhaustive search for error. However, after scanning every part of the record of the trial to which the exceptions relate, we are unable to find any prejudicial error. There is evidence, both direct and circumstantial, tending to support the charge of larceny and to connect the defendants with it, either as principals or as aiders and abettors. The case appears to have been tried and presented to the jury in substantial accord with well settled principles of law. And it does not appear that any request was made for more elaborate instruction. Hence, a discussion of the exceptions *seriatim* would serve no useful purpose.

In the judgment below, we find

No error.

STATE v. RICHARD HORTON.

(Filed 19 March, 1947.)

APPEAL by defendant from *Pittman, J.*, at December Term, 1946, of WILKES.

Criminal prosecution on indictment charging the defendant with the murder of one Francis Baker.

Verdict: "Guilty of murder in the first degree."

Judgment: Death by asphyxiation.

The defendant appeals, assigning errors.

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

F. J. McDuffie for the defendant.

STACY, C. J. The deceased was a taxi-driver. On the night of 26 October, 1946, he was engaged by the defendant to drive him from North Wilkesboro to Miller's Creek, a distance of about fifteen miles. While on this trip, the defendant slew the deceased, took his car and drove it to Portsmouth, Ohio, where he was apprehended. The defendant, in a signed confession, admitted that he shot the deceased and took his automobile. He interposed the defense of mental irresponsibility. The jury has resolved this against him.

A careful perusal of the record fails to disclose any valid exceptive assignment of error. The verdict and judgment will be upheld.

No error.

ROSSIE M. MANNING AND GUARANTY BANK & TRUST COMPANY, A CORPORATION, V. COMMERCE INSURANCE COMPANY OF GLENS FALLS, NEW YORK.

(Filed 26 March, 1947.)

1. Appeal and Error § 6c (3)—

Defendant requested the court to make certain findings. The court made other findings as set out in the judgment, and signed and entered the judgment, to which defendant excepted. *Held:* The exception was no more than an exception to the signing of the judgment.

2. Appeal and Error § 40a—

An exception to the signing of the judgment presents for review only whether the judgment is supported by the facts found, and does not present the findings, or the sufficiency of the evidence to support any one of them, for review.

3. Insurance § 44a—Conditions precedent will be interpreted in relation to time of collision causing loss covered by the policy.

This action was instituted under a "single interest collision coverage" rider on an automobile collision policy, insuring the mortgagee from loss on the note secured by the chattel mortgage. The note was payable in one installment six months after purchase. The policy rider provided, as a condition precedent to liability, that the mortgagee should have made all reasonable efforts to collect overdue payments on the note, and failing to do so, should have repossessed the automobile. The car was damaged by collision some four months after purchase. *Held:* At the time of collision when liability under the policy attached, no payment on the note was due, and therefore the mortgagee was not required to demand payment by the endorser on the note as a condition precedent to the institution of action against insurer. Further, it appeared that the endorser demanded that insurance be procured before he endorsed the note, and that insurer did not know that the note had been endorsed until after the collision.

4. Insurance § 13a—

A policy of insurance will be construed most strongly against insurer and all doubt and ambiguity will be resolved in favor of insured.

APPEAL by defendant from *Hamilton, Special Judge,* at November Term, 1946, of PITT.

Civil action to recover on policy of automobile collision insurance.

These facts appear to be uncontroverted:

I. On 14 April, 1945, defendant being engaged in general liability insurance business in the State of North Carolina, and having H. A. White & Sons as its agent in Greenville, North Carolina, authorized to issue in its behalf automobile insurance policies, issued through this agency and delivered to plaintiff Rossie M. Manning a certain policy of insurance on his certain automobile, against loss by collision, within the

life of the policy, with rider providing for "single interest" limit of liability as hereinafter shown:

The policy of insurance in question is captioned "STANDARD AUTOMOBILE POLICY," and sets forth on its face as "DECLARATIONS" in pertinent parts, the following:

"I. NAME OF INSURED—Rossie M. Manning . . . Except with respect to . . . mortgage or other encumbrance is the sole owner of the automobile, except as stated herein: Dickinson Ave. Branch, Guaranty Bank & Trust Co.

"Loss PAYEE: Any loss hereunder is payable as interest may appear to the insured and Dickinson Ave. Branch, Guaranty Bank & Trust Co., Greenville, N. C.

"II. POLICY PERIOD: From April 14, 1945 to April 14, 1946.

"III. IN CONSIDERATION OF THE PAYMENT OF THE PREMIUM and in reliance upon the statements in the declarations and subject to the limits of liability, exclusions, conditions and other terms of this policy, the company agrees to pay for direct and accidental loss of or damage to the automobile, hereinafter called loss, sustained during the policy period, with respect to such and so many of the following coverages as are indicated by specific premium charge or charges:

	"COVERAGES—	LIMITS OF LIABILITY—	PREMIUMS
B-1	COLLISION (or) UPSET	Single Interest	$4.00

"IV. DESCRIPTION OF THE AUTOMOBILE and facts respecting its purchase by the insured: 1939—Oldsmobile, etc. . . . Actual cost when purchased including equipment—$800.00: Purchased April 1945—Used —Encumbrance—$629.90—Installment Payments—One . . . Due Date —10/1/45."

Among the conditions shown on the printed form of the policy are these:

"3. LIMIT OF LIABILITY: . . . The limit of the Company's liability for loss shall not exceed the actual cash value of the automobile, or if the loss is a part thereof the actual cash value of such part, at time of loss nor what it would then cost to repair or replace the automobile or such part thereof with other of like kind and quality, with deduction for depreciation, nor the applicable limit of liability stated in the declarations . . .

"5. PAYMENT OF LOSS: ACTION AGAINST COMPANY: Payment for loss may not be required nor shall action lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy nor until thirty days after proof of loss is filed and the amount of loss is determined as provided in this policy . . .

"9. SUBROGATION: In the event of any payment under this policy, the Company shall be subrogated to all the insured's rights of recovery therefor against any person or organization and the insured execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights.

"11. CHANGES: Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy . . .

"16. DECLARATIONS: By acceptance of this policy the insured agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the Company or any of its agents relating to this insurance."

Attached to and forming a part of the policy, besides another, is "Finance Form 4," entitled "INDIVIDUAL POLICY ENDORSEMENT—SINGLE INTEREST COLLISION COVERAGE," pertinent parts of which are as follows:

"1. Interest insured—Coverage Afforded—In consideration of an additional premium of $4.00, the policy designated above is extended to insure the interest only of Dick. Ave. Branch, Guaranty Bank & Trust Company, who, for the purpose of this coverage, is the Insured, or assignees of the Insured, hereinafter called 'Named Insured,' in the automobile(s) described in such policy against loss or damage, hereinafter called loss, caused by collision of the automobile with another object or by upset of the automobile, while the automobile is in the lawful possession of a retail purchaser or borrower under a bailment lease, conditional sale, mortgage or other encumbrance . . .

"3. Conditions Precedent to Liability: The Named Insured agrees, and it is a condition precedent to the attaching of the Company's liability for any loss under this Endorsement:

"(a) That on April, 1945 . . . the automobile was: 1. Sold by Lewis W. Herring, dealer, to Rossie M. Manning, retail purchaser, or 2. Pledged by....., Borrower, to the Named Insured, under a legally enforceable bailment lease, conditional sale, mortgage or other encumbrance, and the unpaid balance due from the Purchaser or Borrower at the time of execution of such bailment lease, conditional sale, mortgage or other encumbrance was $629.90 . . . due . . . 10/1/45; also

"(b) That, at the date this Endorsement is effective, there are no payments more than thirty (30) days past due under any bailment lease, conditional sale, mortgage or other encumbrance covering the automobile; also

"(c) That the Named Insured shall not make any loss settlement, except at its own cost, which may in any way prejudice the rights of the company without the written consent of the company previously given; also

"(d) That, in case of loss which is covered hereunder and when so requested by the company, the Named Insured . . . shall use all reasonable means for the . . . recovery of the automobile . . .; also

"(e) That the Named Insured shall notify the company promptly of any change in ownership . . .; also

"(f) That the Purchaser or Borrower has defaulted in payment; and

"(g) That the Named Insured has made all reasonable efforts to collect overdue payments, and, failing so to do, has repossessed the automobile; and

"(h) That the interest of the Named Insured, as hereinafter defined, has become impaired . . .

"4. Limits of Liability: The Company's liability for loss of or damage to any automobile insured hereunder shall not exceed the limits specified in such policy nor exceed the lowest of the following limits:

"(a) The cost of repair or replacement of the automobile; or

"(b) The actual cash value of the automobile at time of loss; or

"(c) The amount of any impairment of the Named Insured's interest as represented by the Purchaser's or Borrower's unpaid balance not more than sixty days past due less interest, insurance, finance and other carrying charges computed pro rata as of the date of loss . . .

"The Named Insured's interest shall be impaired when the value of the automobile at the time and because of loss is reduced to an amount less than the Named Insured's interest therein . . .

"This Endorsement is subject to the limits of liability, exclusions, conditions and other terms of such Policy which are not inconsistent herewith."

II. The indebtedness of plaintiff Manning to plaintiff Bank, referred to in the "Individual Policy Endorsement—Single Interest Collision Coverage" as above shown, is evidenced by his certain note payable to the Bank, dated 14 April, 1945, in the amount of $629.90, due 1 October, 1945, which expressly provides that the automobile in question is collateral security for payment thereof. This note bears endorsement of Floyd McGowan. On same date plaintiff Manning also executed to plaintiff Bank a chattel mortgage on the same automobile as security for same indebtedness.

III. The automobile, to which the policy of insurance relates, was damaged by collision with a mule on 4 August, 1945,—at which time no part of the note held by the plaintiff Bank was in arrears and no default thereon had then occurred.

Plaintiffs allege in their complaint in respect to other pertinent matters, that in the collision with the mule the automobile was damaged in excess of its salvage value in the sum of $229.90; that defendant was duly notified of said loss and damage and demand was made upon it for payment of the loss according to the terms and conditions of said policy, and defendant wrongfully denied liability in any amount and refused to pay any part of the loss and damage; that thereupon the plaintiff Manning, owner of the automobile, delivered same to plaintiff Bank, and, in order to reduce its damage as much as possible, it sold said automobile for $400.00 leaving a balance due and owing upon said note in the sum of $229.90, with interest from 1 October, 1945, for which due demand was made upon defendant; that plaintiff, at the time of the collision, had performed all of the conditions required of them in said policy; and that defendant by reason of matters and things therein set forth, is justly indebted to plaintiffs in the sum of $229.90 with interest. Plaintiffs thereupon pray judgment.

Defendant, answering, denies in material aspects the foregoing allegations. And, by way of further answer, and as bar to recovery by either of the plaintiffs, defendant avers, among other things: (1) That the "single interest collision coverage" endorsement insured only the interest of the Bank in the automobile described,—the purpose and effect of the endorsement, on the one hand, being to limit the premium paid by the Bank to $4.00, and, on the other hand, to limit the liability of defendant to the amount of loss and damage, if any, the Bank might sustain, to such amount, resulting from the damage to the automobile, as could not be recovered out of the security of said automobile and the plaintiff Manning, as maker of the note, and Floyd McGowan, the endorser.

(2) That the actual loss and damage to the automobile amounted to only $157.93, the cost of repair following the collision being fairly estimated at $190.43, including $32.50 cost of radiator not covered by the insurance policy.

When the case came on for hearing, the parties waived a jury trial and agreed that the court should find the facts and render judgment accordingly.

Plaintiff offered oral testimony tending to show these facts:

(1) That the automobile immediately before the collision was worth $800; that the dealer's ceiling price on it at that time was $873; that immediately after the collision it was worth from $350 to $400; that after the collision Manning, the owner, turned the automobile over to the Bank and the Bank sold it in September, as result of owner's efforts in procuring a buyer, for $400, and credited Manning's note with that amount.

(2) That when Manning, the owner, went to borrow money from the Bank, the Bank required him to have Mr. McGowan to endorse his note; and that Mr. McGowan called Mr. Wells, the cashier of the Bank, and "said be sure and get insurance on the car, and then he would not mind signing the note."

(3) That J. Roy Martin, admitted to be the adjuster for defendant, and sent by it "to adjust the collision in controversy," told Manning the owner, to turn in the automobile and if it were sold, the Company would then settle the rest of it; (Motion to strike—Denied—Exception) that Martin told Wells, the cashier of the Bank, to see what he could get for the automobile; that the cashier let him know the price of $400 before he accepted it; and that Martin authorized him to sell it.

(4) That Manning, the owner, does not own any real estate, but does own a small amount of personal property, consisting of house furnishings, farm utensils, etc., in aggregate amount of $400 to $450; that he is not worth anything in excess of his personal exemption; that the Bank has made written demand upon him for payment of balance of his note; and that he has not paid it because he could not.

Defendant, on the other hand, offered Adjuster Martin as a witness, and he testified in pertinent part as follows: ". . . I had occasion to investigate the claim involved in this particular lawsuit . . . I advised Mr. Manning that the policy provided no coverage as far as he was concerned, that the policy only provided coverage for the bank. He immediately became disturbed, stating to me that he got the impression from Mr. Wells, when he borrowed the money and when Mr. Wells ordered the insurance, that the insurance did cover his interest as well as the interest of the bank. I advised Mr. Wells and Mr. Manning both that it would be necessary to have estimate prepared as to the cost of repairing of the automobile in order that the insurance company might be advised of the extent of the damage and possible liability . . . I advised Mr. Wells that he should call on Mr. Manning to repair the car at his (Manning's) own expense and that he should exhaust all reasonable efforts to collect from Mr. Manning under the note held in the bank against the car. Later in the discussion of the matter, it developed that Mr. McGowan was endorser on the note held by the bank, and I immediately advised Mr. Wells that it would be necessary to proceed against Mr. McGowan if he was unable to collect from Manning the outstanding balance on the note. I reported the circumstances to the insurance company. There was no coverage under the policy until reasonable efforts had been made by the bank to collect from the purchaser and his endorser. At no time did I instruct Mr. Wells to sell the car for $400 or to accept $400 for it in its damaged condition. And neither did I tell him that the insurance company would pay the difference between the $400 and the amount due on the note, $629.90. I did tell Mr. Wells

that it was necessary to call on the purchaser and the endorser for any loss the bank might sustain on the note and, failing to recover from them, the maximum claim on the insurance company would be $157 and some cents. I arrived at the figures . . . by deducting the $32.50 expended by Mr. Manning in installing the radiator from the estimated cost to repair the car . . ." The witness continued on cross-examination: ". . . I asked Mr. Manning why he did not go ahead and finish the repairs to the car and pay his note on it. He stated that the insurance had been misrepresented to him, that he understood that the car was insured for his protection as well as for the protection of the bank and that it was the bank's loss and that he was not going to pay for it."

The witness further testified in respect of the estimate of cost of repairs.

The court found from the admissions of the parties and from the evidence appearing of record these facts:

"(a) That the defendant Company issued its policy of insurance as appears in the record, and that thereafter a collision was had in which the insured automobile was damaged;

"(b) That notwithstanding the estimated cost ($190.43) to repair the damage to the said insured automobile, the said automobile was sold for the sum of $400.00 and that the full proceeds from the sale were applied on the partial discharge of the note executed by Rossie M. Manning and payable to Guaranty Bank & Trust Company;

"(c) That the sale price of $400.00 as of September 1945, represented a fair and reasonable market value of the automobile at the time;

"(d) That the defendant Insurance Company, through its adjuster, fully authorized and directed to adjust the claim, and through its local agency, not only knew of the proposed sale of the automobile but authorized and approved the sale to be made for the aforesaid sum of $400.00, and thereby and in that respect waived its right to demand liability settlement under sub-section (a) of Section 4, of 'Finance Form No. 4,' constituting a part 'individual policy indorsement—single interest collision coverage;'

"(e) That after the application of $400.00, aforesaid, there remains still due and outstanding on said note a balance of $229.90; and

"(f) That the Bank's interest has been impaired by reason of said collision to the extent of $229.90."

"The court further finds as a fact that although the plaintiff Bank did not procure judgment against co-plaintiff Manning and cause execution to be returned either satisfied or *'Nulla bona,'* the Bank's failure so to do resulted from an investigation disclosing the insolvent condition of the said Rossie M. Manning, and the court finds as a fact that said Manning was insolvent at the time or times in question in the pleadings and still is insolvent, and that no enforcement of judgment then or now

obtained could be had under execution, and that plaintiff Bank made all reasonable effort to collect from the said Rossie M. Manning the balance due on said indebtedness prior to the time of the institution of this action, but failed to collect any part of same, and that there is still outstanding and unpaid on said indebtedness, evidenced by aforesaid note, the sum of $229.90."

"The court further finds that the Bank has not made any demand for payment upon Floyd McGowan, endorser of the Manning note."

Thereupon, the court entered judgment that plaintiff Bank recover of defendant the sum of $229.90 with interest and cost; and that "Upon the payment of this judgment the defendant Insurance Company shall have, and is hereby subrogated to, any right that the plaintiff Bank may have had against Rossie M. Manning, the maker of said note, and Floyd McGowan, indorser, and to any right of action which the said Rossie M. Manning may have against the owner of the mule involved in the collision referred to in the complaint, and shall execute and deliver requisite instruments and papers and do whatever else is necessary to secure such rights."

Defendant excepts to the judgment and appeals to the Supreme Court, and assigns error.

Albion Dunn for plaintiffs, appellees.

Sam B. Underwood, Jr., for defendant, appellant.

WINBORNE, J. While all of the several assignments of error brought forward by appellant on this appeal have been considered, only one of them, the sixth, based upon defendant's tenth exception, merits any discussion.

The record shows that the tenth exception arose in this manner: Defendant requested the court to make certain findings of fact. Then this entry appears: "The court thereafter made the Findings of Fact incorporated in the judgment appearing in the record and thereupon signed and entered the judgment set out in the record, to which the defendant excepted." This constitutes no more than an exception to the signing of the judgment. Such exception challenges only the conclusions of law upon the facts found. *Vestal v. Machine Co.*, 219 N. C., 468, 14 S. E. (2d), 427. It is insufficient to bring up for review the findings of fact or the evidence upon which they are based. If the judgment be supported by the findings of fact, it will be affirmed. *Rader v. Coach Co.*, 225 N. C., 537, 35 S. E. (2d), 609. However, while the exception does not challenge the sufficiency of the evidence to support the findings of fact, the record discloses evidence sufficient to support them. Hence, in the instant case no error is made to appear.

But it is contended by appellant that since the facts found show that the Bank has not made any demand upon the endorser for the payment of the balance due on the Manning note, it follows as a matter of law that it is a violation of the provisions of the conditions precedent to liability,—"that the named insured has made all reasonable efforts to collect overdue payments, and, failing so to do, has re-possessed the automobile." As applied to the case in hand, this contention is untenable.

At the threshold, the uncontradicted evidence tends to show that the endorser required the Bank to obtain insurance on the automobile as a condition upon which he would endorse the note. And defendant's evidence tends to show that defendant through the adjuster discovered that the note was endorsed.

Moreover, the Bank's interest is insured "against . . . loss . . . caused by collision of the automobile with another object." Hence, loss within the meaning of this provision was sustained when the collision occurred. At that time no part of the note had become due, and the Bank re-possessed the automobile. Under these circumstances, it may not be held as a matter of law that the failure of the Bank to demand of the endorser payment of the note was a failure to exercise "reasonable efforts to collect overdue payments." A policy will be construed most strongly against insurer, and all doubt and ambiguity will be resolved in favor of the insured. *Jones v. Casualty Co.*, 140 N. C., 262.

The demurrer *ore tenus* entered in this Court is overruled. The allegations of the complaint are sufficient to state a cause of action.

It is appropriate to say that the extended statement as to provisions of the policy in question as above set forth reveals cause for confusion such as is manifested in this case. For instance, reading the policy, the first declaration is that the NAME OF INSURED is Rossie M. Manning. Next, under heading Loss PAYEE, it is seen that "any loss is payable as interest may appear to insured and" the Bank. Then further on, it appears that "limits of liability" for "Collision or Upset" is "single interest." Then as to single interest, the endorsement reads that "in consideration of an additional premium," "the policy designated above is extended to insure the interest only" of the Bank. Thus the policy, which on its face is for the benefit of the insured, the owner of the automobile, and the Bank, mortgagee, as their interests appear, is so limited by the endorsement that the owner of the automobile is denied any protection whatever, and the insurance company is relieved of liability to him. Moreover, in so far as the Bank, mortgagee, is concerned, a process of elimination must be followed throughout the endorsement to ascertain what liability to it the insurance company ultimately assumed.

The judgment below is

Affirmed.

FRED ENGLISH v. MOODY BRIGMAN, ERNEST SNELSON, FRED E. FREEMAN, E. Y. PONDER, ALVIN DOCKERY, AND J. ROBERT JOHNSON.

(Filed 26 March, 1947.)

Venue § 4c—

The judge of the Superior Court has inherent discretionary power to order a change of venue *ex mero motu* when, because of existing circumstances, a fair and impartial trial cannot be had in the county in which the case is called for trial.

BARNHILL, J., concurring.

APPEAL by defendants from *Alley, J.*, at September Term, 1946, of HAYWOOD.

This is a civil action for damages resulting from the wrongful imprisonment of plaintiff, which he alleges was induced and procured through the conspiratorial acts and conduct of defendants.

The action was instituted in Madison County. Defendants moved to remove the cause to some other county for trial for that they could not obtain a fair and impartial trial in Madison County. When the motion came on to be heard the court, by and with the consent of the parties, entered an order removing the cause to Haywood County.

The case came on for trial at the September Term, 1946, in Haywood County Superior Court. After five days had been consumed in the trial the court found it necessary to withdraw a juror and order a mistrial. The court thereupon found certain facts, concluded that a fair and impartial trial could not be had in Haywood County, and, *ex mero motu*, ordered the cause transferred to Macon County for trial. Defendants excepted and appealed.

Roberts & Baley and Jones & Ward for plaintiff, appellee.

Foy C. Francis, John M. Queen, and J. W. Haynes for defendants, appellants.

SCHENCK, J. This appeal poses but one question, namely: Did the judge of the Superior Court on his own motion, in his own discretion and in the furtherance of justice, have the authority to transfer the case from Haywood to Macon County?

We are of opinion and so hold that the answer is in the affirmative. When the judge of the Superior Court is confronted with a state of facts, as was his Honor, Judge Alley, we think the court had the inherent power *ex mero motu* to order a change of venue.

". . . according to the weight of authority a court in a criminal case has inherent power, even in the absence of express statutory authority,

to order a change in a place of trial from one county to another if and when satisfied that a fair and impartial trial cannot be had within the county where the venue is laid in the indictment. Such power existed at common law, and, therefore, unless specifically denied by statute, still adheres in the courts of the country. . . . The authority to change the venue of civil cases under appropriate circumstances seems also to have existed at common law and to have become a part of our judicial system." 27 R. C. L., sec. 30, p. 810. See also opinion of *Stacy, C. J.,* in concurring opinion in *Miller v. Miller,* 205 N. C., 753, 172 S. E., 493, in which he states: "It is conceded that a court of general jurisdiction such as our Superior Courts may have inherent power, even in the absence of express statutory authority, to order a change of venue," citing *Crocker v. Justices,* 208 Mass., 162, 21 Ann. Cas., 1061, and Note.

The judgment below is

Affirmed.

BARNHILL, J., concurring: While the complaint is filled with "wickedly," "maliciously," "unlawfully," "confederate," "conspire," "conspirators," "conspiracy," and other evil-sounding words, this case comes to this: The judge, in an action in which plaintiff had made a general appearance, issued an order restraining plaintiff from acting as substitute clerk of the Superior Court of Madison County. Plaintiff, considering the order void, ignored it. He was cited for contempt. After hearing he was adjudged in contempt and imprisoned. Thereafter, on motion of defendants here, plaintiffs in that action, a voluntary judgment of nonsuit was entered, and so plaintiff did not prosecute his appeal from the order of Nettles, J. He was released from jail on verbal order of Nettles, J. Now he seeks to hold defendants liable in damages for his incarceration under order of the judge, without any allegation of perjury or fraud or deception practiced upon the judge by means of which he was induced to enter the order of imprisonment.

So then, it is apparent the complaint fails to state a cause of action. The only thing which needs to be heard is a demurrer, *Williams v. McRackan,* 186 N. C., 381, 119 S. E., 746. It makes very little difference which county shall be the scene of that hearing. Hence the order of the judge removing the cause to Macon County, even if erroneous—and it is not—has not materially prejudiced defendants.

J. R. HARRIS v. A. C. CARTER AND D. D. CREECH.

(Filed 26 March, 1947.)

1. Automobiles § 24a—

In order for the negligence of the driver of a vehicle to be imputed to the owner, the driver must be at the time the owner's servant or agent and acting within the scope of his employment.

2. Automobiles § 24e—

Ordinarily, whether the driver of a vehicle is the servant or agent of the owner or an independent contractor is a mixed question of law and fact to be submitted to the jury upon proper instructions, but where the facts are known or established, it becomes a matter of legal inference to be determined by the court.

3. Same—

Plaintiff's evidence tended to show that defendant's employee took defendant's truck to a garage repairman with directions that the repairman "try the car out" to see if he could locate and repair the trouble. *Held:* Under the circumstances disclosed by plaintiff's evidence the repairman was an independent contractor and not an agent or servant of the owner in driving the car for the purpose of examination and therefore in an action against the owner to recover for negligent operation of the car by the repairman, nonsuit was proper.

APPEAL by plaintiff from *Nimocks, J.*, at October Term, 1946, of CRAVEN.

D. L. Ward and W. B. R. Guion for plaintiff, appellant.

R. E. Whitehurst, George B. Riddle, Jr., and D. C. McCotter, Jr., for defendants, appellees.

SEAWELL, J. This is an action to recover damages for injury alleged to have been caused to plaintiffs person and car by the negligent operation of a truck owned by the defendant Carter and driven by his co-defendant Creech.

It is alleged that the truck was driven by Creech "with Carter's consent and within the scope of employment of the defendant D. D. Creech." It is sought to render Carter liable as employer of Creech under the rule *"respondeat superior."*

The answer denies that Creech was the employee or agent of Carter but avers that he was an independent contractor or a repair mechanic, doing a regular repair business, with whom the car had been entrusted or put in bailment for such repairs.

On the trial the plaintiff sought to establish the agency or relation of master and servant between Carter and Creech as growing out of

instructions under which the offending truck was turned over to Creech. The pertinent testimony was as follows:

". . . Mr. Carter said that how his truck came down there was that the truck was running bad and he sent it down there to Mr. Creech's garage by Mr. Brantley and told Mr. Creech to try the car out and see if he could find the trouble, that it was not running right." "Mr. Carter said nothing more than he told me about sending his truck down to the garage and telling the driver to tell Mr. Creech to try the truck out and see if he could locate the trouble with the truck." "Mr. Carter sent the truck to Mr. Creech with a request that he get in and try the truck. He said he wanted Mr. Creech to get in the truck and drive and test the truck out with Stafford Brantley." "Mr. Carter said he was sending a load of wheat to the mill." "Mr. Carter did not say the wheat was on the way to the mill when the accident happened." "To repeat again just what Mr. Carter did say about the mill . . . he was sending it by Mr. Brantley—told him to go and carry the truck to Mr. Creech." "I do not guess Mr. Creech had anything to do with carrying wheat to the mill." "He sent it down for Mr. Creech to fix."

On demurrer to the evidence the trial judge allowed the motion to nonsuit and plaintiff appealed.

The plaintiff's case rests entirely on the significance to be given Carter's words to Creech while putting the truck in his hands for repairs: "To try it out," "drive it," "locate the trouble and fix it." Plaintiff claims it is such an order or direction as would indicate Creech was an employee; or that it was at least evidence that Creech was put in charge of the operation of the truck as Carter's agent. The defendant contends that these facts show Creech to have been an independent contractor, only. Apparently the court took the latter view in ordering the nonsuit.

To make the owner of a motor vehicle liable for its negligent operation in the hands of another, the damnifying act must be done by a servant or agent acting within the scope of his employment. *Templeton v. Kelley,* 216 N. C., 487, 5 S. E. (2d), 555; *Robinson v. McAlhaney,* 214 N. C., 180, 182, 198 S. E., 647; *Tribble v. Swinson,* 213 N. C., 550, 196 S. E., 820. Therefore, as a matter of course, unless the driver to whom the negligence is attributed was agent of the person sought to be fixed with the liability, no negligence can be imputed to the owner under the rule.

Ordinarily, in the course of the trial the question whether the negligent operator is the servant and agent of the defendant or merely an independent contractor for whose acts no negligence can be imputed to him, is a mixed question of law and fact to be submitted to the jury upon proper instructions. McIntosh, Practice and Procedure, p. 605. But where the facts are known or established, it becomes a matter of legal inference, to be determined by the court. *Id.,* p. 605.

In the case at bar the facts are presented in the plaintiff's evidence and are, therefore, not in issue. Taking all the circumstances into consideration we regard the remark of Carter, accompanying the delivery of the truck to Creech for repair, as amounting to no more than the expression of the desire that Creech give it an examination in the method usually employed, locate the trouble and make the necessary repairs. We are of the opinion that the circumstances did not create an agency or the relation of master and servant between the defendants but, on the contrary, left Creech in the relation of independent contractor, having the Carter truck in his hands for repairs on his own judgment, at a price to be fixed by him according to the nature and extent of the repairs. We find no reasonable inference to the contrary from plaintiff's evidence. *Standard Oil Co. v. Hunt,* 187 N. C., 157, 121 S. E., 184; *Brown v. R. R.,* 195 N. C., 699, 701, 143 S. E., 536.

The judgment of nonsuit must, therefore, be

Affirmed.

J. BEVERLY PRIVETTE, STEPHEN B. PRIVETTE AND LUCILLE PRIVETTE HYDE v. LOTTIE A. PRIVETTE MORGAN, IN HER OWN RIGHT AND AS ADMINISTRATRIX OF JOHN H. PRIVETTE, DECEASED, AND AS GUARDIAN OF THE PLAINTIFFS: HER HUSBAND, L. S. MORGAN; O. B. MOSS, COMMISSIONER: MOSES ALLEN AND J. D. DRIVER.

(Filed 26 March, 1947.)

1. Pleadings § 30—

A motion to strike irrelevant and redundant matter from the complaint, if made in apt time, involves a matter of right.

2. Same: Appeal and Error § 40f—

A motion to require an amendment or reformation of the complaint, to make it more certain, is addressed to the sound discretion of the trial court and denial of the motion will not be disturbed on appeal.

3. Pleadings § 31—

Where, in an action attacking the administratrix and guardian in the administration of an estate on the ground of fraud, recitals and denunciations of fraud in matters not necessary to a statement of any cause of action set forth in the pleading, G. S., 1-122, should be stricken as a matter of right upon motion made in apt time.

4. Executors and Administrators § 13g—

Where an administratrix has a dower interest in lands of the estate ordered to be sold to make assets, and the lands are subject to a mortgage, the administratrix is entitled to purchase the lands at her own sale in order to protect her interest therein as an exception to the general rule.

5. Same: Pleadings § 31—Action against administratrix for fraud in connection with decrees entered in administration must sufficiently particularize fraudulent acts relied on.

Plaintiffs attacked the administration of the estate by defendant on the ground that defendant in the management of the estate, in the sale of lands to make assets, in the allotment to defendant of her widow's dower, in the allowance to her of her year's support, fraudulently acquired and converted to her own use personal and real property of the estate in violation of her duties as administratrix and guardian for plaintiffs, and plaintiffs attacked on the ground of fraud each order and decree of the clerk entered within his statutory jurisdiction in the administration. G. S., 28-147. *Held:* General denunciation of the acts of the administratrix as fraudulent without sufficiently particularizing the acts of defendant upon which the charge of fraud is based are insufficient to raise justiciable issues, and defendants' motion, made in apt time, to strike such allegations from the complaint should have been allowed as a matter of right.

APPEAL by Lottie A. Privette Morgan and L. S. Morgan from *Stevens, J.*, at November-December Term, 1946, of NASH.

The plaintiffs brought this action for relief against the *feme* defendant, individually, and as administratrix of the estate of her deceased husband, John H. Privette, and guardian of the plaintiffs, alleging fraud in all three capacities in the conduct of the trust committed to her and in the acquisition and conversion, it is alleged, of funds and property now rightly belonging to the plaintiffs. The plaintiffs are children of Mrs. Morgan and at the times alleged in the complaint, were minors.

Mrs. Privette remarried after the death of her husband, John H. Privette, and her present husband, L. S. Morgan, is joined as party defendant because of that relationship. O. B. Moss was Commissioner under order of court in some of the transactions referred to; and Moses Allen and J. D. Driver were tenants upon a portion of the disputed properties, paying rent to Mrs. Morgan. Hereinafter Mrs. Lottie Privette Morgan will be referred to as the defendant.

Prior to the institution of this action the administratrix and guardian had filed her final account in each capacity, showing a balance due her as administratrix of $841.05, and a balance due her four wards of $147.52, now in the hands of the Clerk.

The complaint contains 30 allegations, 12 demands for relief, and occupies 20 pages of the record. Its full reproduction here is impracticable; a description of the nature of the case, the allegations and demands, will suffice.

The complaint purports to give a connecting story of the transactions of the defendant in her capacity as administratrix, and guardian of the plaintiffs. Its burden is the fraud of defendant in connection with the principal incidents of administration, presented as a continuing scheme

to deprive the plaintiffs of real and personal property rightfully belonging to them as heirs and distributees of the estate. The denunciations of fraud extend to the procurement of the decrees and orders of the probate court and the sale of lands to make assets, the appointment of a commissioner and confirmation of the same; the allotment of the widow's dower; the allowance of her year's support; the order of rental of land belonging to the estate; and other legal steps taken while acting under the orders, authority and supervision of the probate court, or Clerk acting within his statutory jurisdiction.

In a prayer for relief the plaintiffs demand that all the orders and decrees of the Clerk made in these connections, as well as the allowance of the year's support shown to have been made under the proper legal procedure, be vacated on grounds of fraud; that a receiver be appointed for recoverable property, including the real estate claimed by plaintiffs; that the defendants Allen and Driver be required to pay the rents to such receiver; and that an account be taken covering defendant's entire dealing with the estate.

On the hearing of the application for the appointment of a receiver before Stevens, J., the defendant, in lieu of such appointment, was required to file a bond in the sum of $10,000 to protect the rights of the plaintiffs in the litigation. The bond was duly filed.

Before the time to answer had expired the defendant moved to strike out from the complaint certain matter as irrelevant, redundant, and prejudicial; also filed a motion asking the plaintiffs' pleading be stricken from the record and that they be required to replead, for that the objectionable matter was so interspersed and intermingled in the complaint and so affected its allegations, as to render it impossible to eliminate it otherwise.

The motion to strike is directed towards all the allegations of the complaint, from 4 to 30, inclusive. It is predicated upon the irrelevancy of these allegations to any of the demands for relief made by the plaintiffs or to any relief which the court might afford upon the facts presented; to the reiterated charges of fraud made in the complaint without sufficient particularization of the fraudulent acts or conduct constituting the fraud in their relation to the various orders, decrees and administerial acts attacked; and to general denunciations as fraudulent acts and conduct of the defendant, which upon the face of the complaint, were innocent and lawful. Detailed reference to each paragraph of the complaint and the allegations thereof is not considered necessary to the decision.

Upon the hearing the trial judge declined both motions over the objection of the defendant, who excepted and appealed.

Cooley & May, Sharp & Pittman, and Battle, Winslow & Merrell for plaintiffs, appellees.

L. L. Davenport and Hobard Brantley for defendants, appellants.

SEAWELL, J. The appeal poses the question whether there was error in declining either or both of the motions made by the defendant: To strike from the complaint certain objectionable matter specifically pointed out; or to strike the complaint from the files and order the plaintiffs to replead. The first motion, if made in time, as it is here, involves a matter of right. *Parrish v. Atlantic Coast Line R. R. Co.,* 221 N. C., 292, 20 S. E. (2d), 299; *Hill v. Stansbury,* 221 N. C., 339, 20 S. E. (2d), 308; *Patterson v. R. R.,* 214 N. C., 38, 198 S. E., 364. The second, viewed as a motion to require an amendment or reformation of the complaint, to make it more certain, is within the discretion of the lower court. *Womack v. Carter,* 160 N. C., 286, 75 S. E., 1102; *Tickle v. Hobgood,* 212 N. C., 762, 194 S. E., 460. We examine the questions presented in that light.

The gravamen of plaintiffs' case is the alleged fraudulent conduct of the defendant in using the orders and decrees of the Clerk, acting within his statutory jurisdiction, and the offices of various commissioners duly appointed or acting with statutory authority, as devices in furtherance of a scheme to acquire and convert to her own use the personal and real property of the estate committed to her care, in violation of her duties as administratrix and guardian, and to the injury of her wards who now claim the property as heirs and distributees.

In the course of the pleading a direct attack is made on every decree and judgment made by the court in the course of the administration which might affect the present claim. The principal attack is made on the order to sell the lands of decedent to make assets, the sale and order of confirmation, and the acquisition thereof by the defendant out of her own funds; the order permitting the administratrix to rent the lands; the allotment of the widow's dower, with the orders relating thereto, and the assignment of the widow's year's allowance.

In addition to this the complaint contains many recitals and denunciations of fraud in matters not necessary to a statement of any cause of action suggested in the pleading, and which are obviously in disregard of the requirements of G. S., 1-122, with respect to the nature and contents of pleadings, and prejudicial to the defense. The liberality which we are required to give pleadings does not go to the extent of ignoring irrelevant, redundant or unnecessary matter in the face of a motion to strike, asserted as a matter of right.

We return for consideration to the allegations relating to the acts of the defendant under authority of the orders and decrees above mentioned. There is no demurrer to the complaint or exception taken to the jurisdic-

tion of the Superior Court to vacate the orders and decrees of the probate court in its jurisdiction, already acquired, through annulment of its judicial acts, thus providing a *nunc pro tunc* administration in the Superior Court to be accomplished in a matter of hours.

The plaintiffs profess to bring this action under authority of G. S., 28-147, which provides:

"Suits for accounting at term.—In addition to the remedy by special proceeding, actions against executors, administrators, collectors and guardians may be brought originally to the superior court at term time; and in all such cases it is competent for the court in which said actions are pending to order an account to be taken by such person or persons as said court may designate, and to adjudge the application or distribution of the fund ascertained, or to grant other relief, as the nature of the case may require."

After long years of resort to this enabling statute the jurisdiction it confers on the Superior Court has not been clearly defined. It has frequently been declared to be concurrent with that of the Probate Court in matters of special proceedings, where it applies. *Fisher v. Trust Co.*, 138 N. C., 91, 98, 50 S. E., 592; *Shober v. Wheeler*, 144 N. C., 403, 57 S. E., 152; *Leach v. Page*, 211 N. C., 622, 191 S. E., 49; *S. v. McCanless*, 193 N. C., 200, 204, 135 S. E., 71. Many general expressions will be found touching the jurisdiction of the court, of which the following are typical:

"In all these cases it is held that concurrent jurisdiction of the probate court is conferred on the superior court in a civil action to settle estates and to subject real estate to the payment of debts." *Shober v. Wheeler, supra*, p. 282.

Leach v. Page, supra, p. 625, "The distributees of an estate may bring suit originally in the superior court against an administrator for an accounting and for a breach of his bond."

But, in every instance of which we are aware, where the jurisdiction of the Superior Court has been invoked, these general terms are subject to limitations of a practical nature as viewed from their use within the frame of the particular case. We have found no case where the jurisdiction has been extended to a step by step annulment of the judgments and decrees made by the probate court.

It is true that a void judgment may be attacked by motion in the cause, or an independent action, but upon the allegations of the complaint we find but one transaction that might definitely be pursued as of that nature; that is the allegation that the administratrix became the purchaser of the lands of the estate, sold to make assets, and took title in her own name. In this case it appears from the complaint that the lands were under mortgage, that the administratrix had a dower interest therein, and the reasonable inference is that she bought out of her

own funds to protect her interest in the lands, which she had a right to do, under an exception to the rule. *Froneberger v. Lewis,* 79 N. C., 426. As suggested by the Court in *Edney v. Matthews,* 218 N. C., 171, 172, 10 S. E. (2d), 619, perhaps the court is not required to raise the question of jurisdiction *sua sponte,* and, therefore, we reserve consideration of this question until decision is more urgently demanded. But see *Shepard v. Leonard,* 223 N. C., 110, 25 S. E. (2d), 445; *Hopkins v. Barnhardt,* 223 N. C., 617, 27 S. E. (2d), 644; *S. v. Miller,* 225 N. C., 213, 34 S. E. (2d), 143; *S. v. Morgan,* 226 N. C., 414, 38 S. E. (2d), 166.

However this may be, we are of the opinion that the general denunciation of the acts of the administratrix as fraudulent in connection with the orders and decrees above mentioned are fatally defective in not sufficiently particularizing the acts of defendant upon which the charge is based and do not, therefore, raise issues cognizable by the Court. *Development Co. v. Bearden, ante,* 124, 127, 128.

In its factual situation and principles involved, the case before us is so similar to *Development Co. v. Bearden, supra,* that its decision may be controlled by that case.

Without prolonging the discussion or taking up the space required for a restatement of the matters which must be deleted from the complaint, we refer to the defendant's first motion to strike, set out in the record, which we are constrained to hold should have been allowed.

We are advertent to the fact that the body of the plaintiffs' action is thus removed; but they are still at liberty, by repleading, to assert any substantial right they may have under the cited statute. Perhaps, if we were dealing with a question of right under the motion to strike out the complaint, which we are treating as a motion to amend under the statute, our task would be simpler; but as we have stated, action thereupon was within the discretion of the court below, a discretion with which we do not interfere.

The judgment of the court below upon defendant's motion to strike, is reversed. The cause is remanded for judgment in accordance with this opinion.

Reversed and remanded.

FOREMAN-BLADES LUMBER CO., A CORPORATION, C. F. BLADES, EMMA D. BLADES, ESTELLE F., J. V. & L. C. BLADES, CAMILLA F. DANIELS, ANNIE WOODLEY FOREMAN, J. W. FOREMAN, J. W. FOREMAN, JR., J. W. FOREMAN, L. R. FOREMAN, W. B. FOREMAN AND H. C. FOREMAN, TRUSTEES (UNDER THE WILL OF MRS. CLAY FOREMAN) FOR MARGARETTE F. LOVE, AND TRUSTEE ALSO FOR GERTRUDE F. SHEEP, H. C. FOREMAN, L. R. FOREMAN, L. R. FOREMAN, TRUSTEE (UNDER THE WILL OF MRS. CLAY FOREMAN) FOR L. R. FOREMAN, JR., C. B. FOREMAN, R. E. FOREMAN, AND J. G. FOREMAN, MARY C. FOREMAN, W. B. FOREMAN, W. W. FOREMAN, MARGARETTE F. LOVE, GERTRUDE F. SHEEP AND MARION F. SMITH, NOW OR FORMERLY STOCKHOLDERS IN SAID CORPORATION, AND J. W. FOREMAN, INDIVIDUALLY, AND AS ASSIGNEE OF HIS CO-PLAINTIFFS, v. CITY OF ELIZABETH CITY, A MUNICIPAL CORPORATION OF THE STATE OF NORTH CAROLINA,

and

G. H. WINSLOW v. CITY OF ELIZABETH CITY, A MUNICIPAL CORPORATION OF THE STATE OF NORTH CAROLINA.

(Filed 26 March, 1947.)

1. Trial § 23a—

There must be legal evidence of every material fact necessary to support a verdict, and evidence which raises a mere possibility or conjecture in regard thereto is insufficient to be submitted to the jury.

2. Fires § 3—Whether fire on defendant's land was origin of forest fire held speculative upon the evidence, and nonsuit is proper.

Plaintiffs' evidence tended to show: Defendant municipality burned piles of brush in clearing rights-of-way on its land. The evidence was conflicting as to whether the fires were completely extinguished when the workmen quit for the night. Later fires destroyed timber on plaintiffs' lands. Plaintiffs' witness, who was the first to investigate, testified there was an intervening space of two hundred yards between the fire on plaintiffs' lands and the location where the brush was burned on defendant's land, and there was no evidence that the intervening space was burned over until the conflagration became general. There was no unusual weather conditions conducive to the spread of the fire. There was evidence that the *locus* was available to the public by a paved road, and that the public frequented the woods. *Held:* Whether the fire set out on defendant's land was the origin of the fires destroying the timber on plaintiffs' lands is left in speculation and conjecture upon the evidence, and defendant's motion to nonsuit should have been allowed.

APPEAL by defendant from *Burgwyn, Special Judge,* at October Term, 1946, of PASQUOTANK.

Both above actions were brought to recover damages for injury to lands and timber thereon through the alleged negligence of defendant's servants and agents in starting fires upon the adjoining lands of the defendant without notice and carelessly leaving them unextinguished so that fire was communicated to each of the plaintiff's premises, burning

over an extensive area of wooded land with the destruction of timber and damage to the soil. Since the injury to the respective premises was alleged to have been caused by the same fires, and the witnesses were the same, the cases were, by consent, tried together.

The exceptions taken on the trial present a number of subordinate questions which are not discussed in the opinion. That has to do, mainly, with the demurrer to the plaintiffs' evidence and this, in its relation to that question, is summarized.

The defendant City owned a tract of land known as the "Well Field," adjacent to the old Suffolk-Carolina Railroad bed to the north and the Foreman lands to the west and south. The land was low, the soil peaty, and the water level high. The wells sunk here afforded the city's water supply for all purposes. There were a number of wells in the territory and an installation of pumps, pipes, electric power lines, and, in general, equipment for pumping the water into the city for such use as might be necessary.

In this area the city's employees were clearing off "rights-of-way" running north and south, with the northern end up to the aforesaid Suffolk-Carolina road bed, or Jackson road. On one of these rights-of-way, about 30 feet wide, they cleared off grass, reeds and brush and burned some piles at the northern end near the old railroad bed. The debris was described as small piles, making a fire about the size of two tables such as were in the courtroom.

The evidence is contradictory as to whether these fires were completely extinguished when the employees quit work in the evening. Water was hauled and put on them and a trench dug around them, as a matter of precaution; some witnesses said there was some smoke coming up when the workmen left, and there was testimony that an open flame was seen next day. The foreman in charge of the work was used as a witness for the plaintiffs. He stated that the fires were definitely out.

There was much evidence from witnesses who saw fires in the vicinity from a distance, but did not profess to determine the exact location of the fires, until the general area was involved. A witness for the plaintiff, Avery Jones, who was in charge of the work being done on the city property, was notified of a fire as seen by a witness at a distance, and repaired to the scene at once. He testified that at that time there was a distance of 200 yards between the place where the brush piles had been burned and the fire to the west, toward the Foreman land.

There was evidence that the adjacent Jackson road was paved and used by the public generally; and further evidence that the area was frequented by hunters, and that coon, deer and bear were common in the vicinity, and that fires had been started at different times by these hunters. The hunting season, it was said, began later, about the first of October.

There was evidence as to the value of the timber destroyed, both on the Foreman lands and the Winslow lands, and the damage done to the soil in each instance.

At the end of the plaintiffs' evidence, the defendant demurred thereto and moved for judgment as of nonsuit. The motion was overruled. The defendant excepted. The defendant offered no evidence. There was a verdict favorable to the plaintiffs and an award of damages in each case. The defendant, making formal objections and exceptions, appealed from the judgment ensuing, assigning errors.

J. Henry LeRoy and McMullan & Aydlett for plaintiff, appellees.
John H. Hall and Ehringhaus & Ehringhaus for defendant, appellant.

SCHENCK, J. The appeal poses two questions, the answers to either of which might be determinative: Whether, supposing the injury to plaintiffs' lands to have been proximately caused by the negligence of the defendant's employees, the city is nevertheless immune from liability therefor because its employees were acting in furtherance of its governmental powers; and whether the evidence relating to the origin of the fire raises inferences which should have been submitted to the jury. It is thought that in view of the conclusion we have reached on the latter question, discussion of the former is not an immediate necessity.

It has not been possible to set down at length and in much detail all the evidence relating to the fires as the witnesses saw them, including, of course, the brush fires set by the city employees on the northern end of the city property. But the testimony of these witnesses as to the facts observed by each of them leaves much to be desired in the way of direct evidence, still leaves the origin of the fire dependent upon the circumstances they relate. The question, then, is whether these circumstances point so unequivocally to the brush fires set by defendant's employees as the origin of the fires later seen burning over plaintiffs' property as to raise inference of probative value rather than conjectural or mere speculative possibility.

Many cases in our reports reflect the difficulty of decision often present in cases of this kind, but they also furnish rational and applicable rules for guidance in similar situations. A collection of these may be found in *Moore v. Railroad,* 173 N. C., 311, *et seq.,* 92 S. E., 1; and *Lewis v. Steamship Co.,* 132 N. C., 904, 44 S. E., 666. They all come to the same point: When the evidence is "conjectural or speculative" it should not be submitted to the jury. *Lewis v. Steamship Co., supra,* p. 910. More plainly stated in *Cobb v. Fogalman,* 23 N. C., 440, is the rule: "Although the boundary between a defect of evidence and evidence confessedly slight be not easily drawn in practice, yet it cannot be doubted

that what raises but a possibility or conjecture of a fact can never amount to evidence of it."

Since, as we have stated, the facts testified to by the witnesses are such as to compel resort to the circumstances thus brought into the evidence for a more definite conclusion as to the origin of the fire, we might here turn to some of those basic facts upon which plaintiffs must rest. Of all the witnesses who observed the fires in that area, Avery Jones, whose attention was called to the fire by Grant Morris, was nearest in point of time and distance at the critical stage when the relation of the fire to the west and the brush fires on defendant's lands could be adequately known. He testified that there was at that time a space of 200 yards between the two. We find no evidence that the intervening space was burned over (until the conflagration became general), or that the fire had crept underground in the peaty soil from the brush fires in that short time, or that any unusual atmospheric condition made communication through the air more probable. Accessibility of the premises to the public in the vicinity of the fires observed weakens the attempt to confine its origin to the burning of the brush on the city property as the sole possible cause of the fire. *Moore v. Railroad, supra.*

In *Mitchell v. Melts,* 220 N. C., 793, 799, 18 S. E. (2d), 406, *Justice Winborne,* speaking for the Court, laid down the rule which we think is applicable here:

"There must be legal evidence of every material fact necessary to support a verdict, and the verdict 'must be grounded on a reasonable certainty as to probabilities arising from a fair consideration of the evidence, and not a mere guess, or on possibilities.' 23 C. J., 51; *S. v. Johnson,* 199 N. C., 429, 154 S. E., 730; *Denny v. Snow,* 199 N. C., 773, 155 S. E., 874; *Shuford v. Scruggs,* 201 N. C., 685, 161 S. E., 315; *Rountree v. Fountain,* 203 N. C., 381, 166 S. E., 329; *Allman v. R. R.,* 203 N. C., 660, 166 S. E., 891; *Cummings v. R. R.,* 217 N. C., 127, 6 S. E. (2d), 837; *Mercer v. Powell,* 218 N. C., 642, 12 S. E. (2d), 227; *Mills v. Moore,* 219 N. C., 25, 12 S. E. (2d), 661."

Upon these considerations we feel compelled to hold that the court below was in error in declining to sustain the defendant's demurrer to the evidence, and motion for judgment as of nonsuit. The judgment is, therefore, reversed.

Foreman-Blades Lumber Co. et al. v. City of Elizabeth City, Reversed.

G. H. Winslow v. City of Elizabeth City, Reversed.

DOW TRIPLETT AND WIFE, VELMA TRIPLETT, v. ROBERT B. LAIL, W. H. BARKER, R. F. BURRIS, AND GUILFORD REALTY & INSURANCE COMPANY.

(Filed 26 March, 1947.)

Highways § 15: Courts § 4c—

In a proceeding to establish a cartway or way of necessity from lands of petitioners to a State Highway, G. S., 136-68, G. S., 136-69, an order of the clerk adjudging that petitioners are entitled to the relief and appointing a jury of view to "lay off" the cartway, is a final determination of the right to the easement, leaving only the mechanics of execution to the jury of view, and therefore an appeal to the Superior Court by respondents whose lands are affected is not premature, and judgment of the Superior Court dismissing the appeal and remanding the cause to the clerk, is erroneous.

APPEAL by defendant Guilford Realty & Insurance Company from *Hamilton, Special Judge,* at September-October Term, 1946, of CALDWELL.

Special proceeding under G. S., 136-68 and 136-69 to establish a cartway or way of necessity from the lands of the petitioners to State Highway No. 321.

Originally the proceeding was against R. B. Lail only. W. H. Barker accepted service of summons and voluntarily became a party defendant. R. F. Burris, apparently without any notice, service of summons, or voluntary action, was so treated. Thereupon the petitioners filed an amendment to the petition alleging that the Guilford Realty & Insurance Company (which had acquired the land of defendant Burris) is a necessary party defendant. It was so ordered.

The clerk, then, upon a rehearing, adjudged that "petitioners are entitled to and shall have for their use, a cartway or roadway over the lands of the defendants to reach the highway; . . ." and appointed a jury of view to "lay off" said cartway. Defendant Guilford Realty & Insurance Company excepted and appealed to the Superior Court at term.

When the cause came on to be heard in the court below the petitioners moved the court to dismiss the appeal for that it was premature. The motion was allowed by order dismissing the appeal and remanding the cause to the clerk. The defendant Guilford Realty & Insurance Company excepted and appealed to this Court.

Hal B. Adams for plaintiff, appellees.

J. Allen Austin and J. T. Pritchett for defendant Guilford Realty & Insurance Company, appellant.

BARNHILL, J. The ambiguities in the record are such it is impossible for us to form a clear impression of the relative rights of the parties. Apparently the property of petitioners is cut off from the public road by three separate, abutting tracts of land. If so, the order of the clerk left it to the jury of view to fix the location of the cartway, including its termini and the tract to be burdened thereby. *Burden v. Harman,* 52 N. C., 354. In any event, the order authorizes its location on the property of appellant. Appeal therefrom presents the one question posed for decision: Was the appeal from the order of the clerk adjudging the right of petitioners to have a cartway over and across the land of appellant premature? Our decisions answer in the negative. *Burden v. Harman, supra; Warlick v. Lowman,* 101 N. C., 548; *McDowell v. Insane Asylum,* 101 N. C., 656; *Cook v. Vickers,* 141 N. C., 101, 144 N. C., 312; *Dailey v. Bay,* 215 N. C., 652, 3 S. E. (2d), 14.

The order of the clerk, if effective for any purpose, fixes the right of petitioners to a way of ingress and egress. The appointment of a jury of view, to locate, lay off, and mark the bounds of the easement thus established, is the mechanics, in the nature of an execution, provided for the enforcement of the order. It is the province of the clerk, in the first instance, to adjudge the right. It is the duty of the jury of view to execute it.

As said in *Warlick v. Lowman, supra:* "That order was final in its nature, and as the defendant had the right to appeal from it, it would be idle to execute it before the appeal should be taken." "Why complete the matters and things to be done merely incident to and in execution of the principal order before the appeal should lie?" *McDowell v. Insane Asylum, supra.*

"The judgment of the clerk is final and, until reversed or modified, is determinative of the rights of the parties in this controversy. An appeal therefrom is not premature." *Dailey v. Bay, supra.* The court "should have heard the whole matter brought before it by appeal upon the merits." *Warlick v. Lowman, supra.*

The order of remand must be vacated and the cause reinstated on the civil issue docket for trial in the Superior Court in the manner provided by law.

Reversed.

A. A. CREECH ET AL. v. VIVIAN CORBETT ET AL.

(Filed 26 March, 1947.)

Ejectment § 17—Judgment of nonsuit in this trial of issue raised by plea of sole seizin in partition proceeding held error.

Upon the plea of sole seizin in a proceeding for partition, evidence at the trial tended to show: Petitioners' ancestor conveyed the lands by deed of gift not registered within two years of its execution which deed provided that should the grantee die without issue the lands should revert to grantor's heirs. The grantee died without issue and petitioners claim under the reverter clause. Respondents, devisees under the will of the grantee, claim that she was in adverse possession of the land for the statutory period. *Held:* Judgment of nonsuit is erroneous, since if the deed of gift is void, petitioners still claim lands as heirs of the original ancestor, and since the claim of adverse possession, which depends upon whether respondents' testatrix, having recorded the deed, held under the instrument, or adversely, presents a question of fact.

APPEAL by petitioners from *Burgwyn, Special Judge,* at January Term, 1947, of JOHNSTON.

Special proceeding to sell land for partition, instituted before the Clerk, and on plea of sole seizin, transferred to the civil-issue docket for trial.

The land in question is specifically described in paper writing purporting to be deed from J. B. Creech and wife, Polly Creech, to Louisa H. Hales, registered in Book H-13, page 322, Public Registry of Johnston County. This instrument purports to bear date 29 May, 1914, and was filed for registration 3 April, 1917. It contains the following proviso: "Should she die without issue, this tract of land to revert to our heirs."

It is conceded that J. B. Creech died in 1904; Polly Creech in 1908, and Louisa H. Hales in 1945, "without issue," but leaving a will in which she devised all of her property to the respondents.

The claim of the respondents, therefore, rests upon this will and adverse possession on the part of their devisor for more than twenty years.

From judgment of nonsuit entered at the close of all the evidence, the petitioners appeal, assigning errors.

Leon G. Stevens for petitioners, appellants.

Parker & Lee and Wellons & Canaday for respondents, appellees.

STACY, C. J. The question for decision is whether the case as made can survive the demurrer to the evidence. Even if it be conceded that the instrument in evidence purporting to be a deed of gift from J. B.

Creech and wife to Louisa H. Hales is void, as the trial court concluded, this would not perforce dispose of the petitioners' *prima facie* case.

It is true the petitioners claim under the reverter clause in this instrument. Failing in this, however, they claim as heirs of J. B. Creech. So, taking either horn of the dilemma, the matter would seem to be for the twelve.

Then, too, if Louisa H. Hales put this paper writing on record, what effect did it have upon the character of her possession? The respondents rely upon her claim of adverse possession. The petitioners say her claim was under this registered instrument.

The case is involved in too many contradictions to warrant a nonsuit.

Reversed.

STATE v. CHARLIE PHILLIPS.

(Filed 26 March, 1947.)

1. Homicide § 25—

Evidence that defendant shot and killed his wife in culmination of family discord occasioned by his infidelity and bigamous marriage to another woman, together with evidence of the absence of powder burns and location of the fatal wound negating an inference that it was self-inflicted, *held* sufficient to be submitted to the jury on question of defendant's guilt of murder in the first degree.

2. Criminal Law § 52a—

The fact that the State offers in evidence testimony of statements made by defendant, any one of which standing alone might exculpate, does not justify nonsuit when proof of the State's case does not rest solely upon such statements, but to the contrary the fact that the defendant made a multiplicity of inconsistent and contradictory statements is an incriminating circumstance against him.

3. Homicide § 20—

Where the State's case tends to show that defendant husband killed his wife in culmination of family discord, testimony relating to a prior bigamous marriage by defendant is competent as a link in the chain of circumstantial evidence tending to show motive.

4. Criminal Law § 30—

Where testimony of a witness as to her bigamous marriage with defendant is competent, the complaint filed by her in an action to annul the marriage is competent for the purpose of corroborating her testimony. G. S., 1-149.

5. Criminal Law § 81b—

The burden is on appellant to show that alleged error was prejudicial.

STATE *v.* PHILLIPS.

APPEAL by defendant from *Burgwyn, Special Judge,* at September Term, 1946, of HARNETT.

Criminal prosecution on bill of indictment charging the capital felony of murder.

During the early afternoon of Sunday, 18 August, 1946, defendant and his wife, the deceased, were in their home alone. The doors were closed and the radio was going "at a loud blast." A pistol shot was heard by neighbors. About ten or fifteen minutes later defendant came out of his back door, said that his wife had shot herself, and went off to notify others. The body was found on the bed. There was a pistol-shot wound in the anterior part of the right arm about midway between the elbow and shoulder and in the right side at the anterior axillary line above the right breast at the level of the fourth rib. The bullet ranged downward and to the back, the exit wound being 2½ to 3 inches to the left of the backbone, below the scalpus, at the level of the eighth rib. No powder burns were found.

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

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

Charles Ross and Neill McK. Salmon for defendant, appellant.

BARNHILL, J. The defendant offered no testimony. At the conclusion of the evidence of the State his demurrer to the evidence was overruled and he excepted. By this exception he now challenges the sufficiency of the evidence offered.

The record is filled with evidence of family discord, assaults, threats, and infidelity of defendant. Detailed repetition would serve no useful purpose. In addition, the testimony tends to show that several weeks prior to the homicide defendant endeavored to buy a pistol; the week before the homicide he borrowed from a friend the pistol with which the deceased was killed; in 1945 he contracted a bigamous marriage with a woman in Raleigh; his wife learned of this marriage, which became the cause of dissension between them; he stated he had gotten rid of his Raleigh wife and "I'm going to get rid of the other one, I don't need any woman in my business"; and after the shooting he made conflicting statements as to how the homicide occurred. Furthermore, the location of the wound and the absence of powder burns tend to negative the inference the wound was self-inflicted.

Thus it appears there was evidence sufficient to require the submission of the cause to the jury on the capital charge of murder in the first degree. Its probative force was for the jury.

S. v. Watts, 224 N. C., 771, 32 S. E. (2d), 348; *S. v. Todd,* 222 N. C., 346, 23 S. E. (2d), 47, and other decisions to like effect do not compel a contrary conclusion. It is true the State offered evidence of a number of statements made by defendant, either one of which, standing alone, may tend to exculpate. But its case does not rest entirely on such statements. Indeed the multiplicity of inconsistent, contradictory statements made by defendant is an incriminating circumstance to which, no doubt, the jury gave considerable weight.

The testimony of the Raleigh woman, innocent party to the bigamous marriage, was a proper link in the chain of circumstances tending to show motive. The complaint filed by her in an action to annul the bigamous contract of marriage was not offered "against the party as proof of a fact admitted or alleged in it." G. S., 1-149; *S. v. McNair,* 226 N. C., 462. Only that part thereof which tended to corroborate the witness was admitted. The error, if any, was harmless. In any event, its contents are not made to appear. Hence no prejudicial error is disclosed.

A careful examination of the other exceptive assignments of error discussed in defendant's brief fails to disclose cause for disturbing the verdict.

In the trial below we find

No error.

RAYMOND PRESNELL v. E. L. BESHEARS, ED BESHEARS AND WILTON BESHEARS.

(Filed 26 March, 1947.)

1. Judgments § 9—

Failure to plead within the time allowed admits the averments in the complaint entitling plaintiff to recover on the cause of action therein stated, G. S., 1-212, but does not preclude defendants from showing that the averments are insufficient to constitute a cause of action entitling plaintiff to any relief.

2. Judgments § 27a—

Defendants, by motion to set aside a judgment rendered by default and inquiry, are entitled to have the judgment vacated if the complaint is insufficient to allege a cause of action, without a showing of excusable neglect, since in such case there is no basis upon which the default judgment can be predicated.

3. Pleadings § 19c—

Upon demurrer, the complaint will be liberally construed and the demurrer overruled if in any portion of the complaint or to any extent it

presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose fairly can be gathered from it. G. S., 1-151.

4. Automobiles § 24c½—

Allegations that on the date of the accident the truck colliding with plaintiff's vehicle was being operated by named defendants as employees of defendant owner, and that the owner, his agents and employees were negligent in the operation of the truck in respects alleged, *is held* sufficient, as against demurrer, to charge that the employees were acting within the scope of their employment, nor is it fatal that in several instances the allegations of negligence referred to "the driver of defendant's truck" without more definite designation.

APPEAL by plaintiff from *Sink, J.*, at January Term, 1947, of WILKES. Remanded.

Motion to set aside judgment rendered by default and inquiry. Motion allowed and plaintiff appealed.

Trivette, Holshouser & Mitchell for plaintiff.
Burke & Burke for defendants E. L. Beshears and Ed Beshears.
W. H. McElwee for defendant Wilton Beshears.

DEVIN, J. The motion to set aside the default judgment heretofore entered in the cause was based upon the ground that the plaintiff's complaint upon which the judgment was rendered did not state facts sufficient to constitute a cause of action against the defendants. There was no evidence or finding that the failure of the defendants to answer was due to excusable neglect. However, the court below being of opinion that the complaint was demurrable, and that defendants had a meritorious defense to the action, struck out the judgment and permitted the defendants to plead.

The effect of the failure of the defendants to appear in response to the summons and complaint personally served upon them was to establish *pro confesso* in the plaintiff a right of action of the kind properly pleaded in the complaint and thereupon the plaintiff became entitled as a matter of law to recover on the cause of action set out in his complaint. G. S., 1-212; *DeHoff v. Black,* 206 N. C., 687, 175 S. E., 179; *Johnson v. Sidbury,* 225 N. C., 208, 34 S. E. (2d), 67. Defendants' failure to answer, however, admitted only the averments in the complaint and did not preclude them from showing, if they could, on this motion, that such averments were insufficient to warrant recovery. *Beard v. Sovereign Lodge,* 184 N. C., 154, 113 S. E., 661; *Strickland v. Shearon,* 193 N. C., 599 (604), 137 S. E., 803. Hence they were entitled to have the judgment vacated if the facts set out in the complaint should be determined to be insufficient to constitute a cause of action, as there would then be no basis upon which the default judgment could be predi-

cated. McIntosh, 713. And in this Court the defendants demur *ore tenus* on the ground that the complaint does not state facts sufficient to constitute a cause of action.

So that the appeal presents the question of the sufficiency of the complaint to set out an actionable wrong for which these defendants may be held liable. This requires an examination of the allegations of the complaint.

The purpose of plaintiff's suit was to recover damages for a negligent injury to plaintiff's motor truck caused by defendants' truck, consequent upon a collision on the highway. It was alleged that plaintiff's truck was being driven along the highway from North Wilkesboro toward Boone, on the right side of the highway, in a careful manner, and that the Ford truck of the defendants, which had been parked on the left side of the highway, was suddenly driven from the left side of the highway at an unlawful speed and without warning into and against plaintiff's truck, causing injury. As to the responsibility of the defendants for this injury, it was alleged that on said date "the defendant E. L. Beshears was the owner of the old Ford truck which was being operated by the co-defendants Ed Beshears and Wilton Beshears as servants, agents and employees of their co-defendant E. L. Beshears. . . . That at the time of and immediately preceding the collision between the motor vehicles above referred to . . . the defendant E. L. Beshears and his agents and employees were negligent, in that they operated said truck carelessly, heedlessly, and in wilful disregard of the rights and safety of others and at a speed and in a manner so as to endanger person and property in violation of the laws of North Carolina." Particulars of negligent operation of defendants' truck were set out. It was further alleged "that the defendants were operating their truck without proper equipment and brakes."

The defendants criticize the complaint chiefly on the ground that it was not specifically alleged that Ed Beshears and Wilton Beshears, who are designated as agents and employees of E. L. Beshears, the owner of the offending truck, were at the time acting within the scope of their employment, and also that in several instances the allegations of negligence refer to the "driver of defendant's truck" without more definite designation.

However, in the consideration of a pleading, in order to determine its effect, we are required by statute, G. S., 1-151, to give to the allegations a liberal construction, and the rule has been adopted and uniformly followed that if in any portion of the complaint or to any extent it presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose fairly can be gathered from it, the pleading will stand, "however inartificially it may have been drawn or however uncertain, defective and redundant may be its statements, for, contrary to the

common-law rule, every reasonable intendment and presumption must be made in favor of the pleader." *Dixon v. Green,* 178 N. C., 205, 100 S. E., 262; *Leach v. Page,* 211 N. C., 622, 191 S. E., 349; *Pearce v. Privette,* 213 N. C., 501, 196 S. E., 843; *Cotton Mills v. Mfg. Co.,* 218 N. C., 560, 11 S. E. (2d), 550; *Thomas v. R. R.,* 218 N. C., 292, 10 S. E. (2d), 722. "A complaint cannot be overthrown by a demurrer unless it be wholly insufficient." *Blackmore v. Winders,* 144 N. C., 212, 56 S. E., 874.

Applying these rules of construction to the plaintiff's complaint in the case at bar, in the light of defendants' challenge, we are unable to agree with the learned judge below that the pleading upon which the default judgment was predicated was fatally defective.

The judgment by default and inquiry having been rendered by the clerk in accordance with G. S., 1-212, and the case transferred to the civil issue docket for execution of the inquiry, G. S., 1-214, the court was in error in striking out the judgment, and the cause is remanded for further proceedings in accordance with the statute. See *DeHoff v. Black,* 206 N. C., 687, 175 S. E., 179; *Johnson v. Sidbury,* 226 N. C., 345, 38 S. E. (2d), 82.

Remanded.

MOSS-MARLOW BUILDING COMPANY, INC., v. JOHN L. JONES AND HIS WIFE, MRS. JOHN L. JONES.

(Filed 26 March, 1947.)

Pleadings § 27: Appeal and Error § 40g—

An application for a bill of particulars is addressed to the sound discretion of the trial court and the court's ruling thereon is not reviewable, except perhaps in extreme cases. G. S., 1-150.

APPEAL by defendants from *Warlick, J.,* at 15 November, 1946, Term, of CATAWBA.

Civil action to recover on contract.

Plaintiff attaches to its complaint as "Exhibit A" a copy of the contract between it and defendants for the construction of a dwelling house on cost plus basis, and as "Exhibit B" what purports to be an itemized list of materials and labor furnished. Defendants, in apt time, moved for a bill of particulars. The court, finding that plaintiff's complaint, and more particularly "Exhibit B," is sufficiently definite to enable defendants to file answer to complaint, entered order denying the said motion.

Defendants appeal therefrom to Supreme Court and assign error.

Louis A. Whitener for plaintiff, appellee.
Willis & Geitner for defendants, appellants.

PER CURIAM. An application for a bill of particulars under G. S., 1-150, formerly C. S., 534, "is addressed to the sound discretion of the trial court, and his ruling thereon, made in the exercise of such discretion, is not reviewable on appeal, except perhaps in extreme cases." *Tickle v. Hobgood,* 212 N. C., 762, 194 S. E., 461. While appellants concede this principle of law, they contend that this case comes within the exception. However, the argument advanced, in the light of the allegations in the complaint and the exhibit attached thereto, fails in persuasiveness. Hence, the ruling of the court below is

Affirmed.

PEMBROKE NASH, RESIDENT, CITIZEN AND TAXPAYER OF THE TOWN OF TARBORO, SUING FOR HIMSELF AND IN BEHALF OF ALL OTHER CITIZENS AND TAXPAYERS OF SAID TOWN SIMILARLY SITUATED, WHO DESIRE TO COME IN AND MAKE THEMSELVES PARTIES TO THIS ACTION, v. THE TOWN OF TARBORO; RAWLS HOWARD, MAYOR OF THE TOWN OF TARBORO; R. M. COSBY, A. B. BASS, H. I. JOHNSON, FRED HILL, R. M. FOUNTAIN, MILTON KEENE, MEMBERS OF THE BOARD OF COMMISSIONERS OF THE TOWN OF TARBORO.

(Filed 9 April, 1947.)

1. Taxation § 5—

There can be no lawful tax which is not levied for a public purpose. Art. V, Sec. 3.

2. Same—

What is a public purpose in the exercise of the taxing power is, in the final analysis, a question of law for the determination of the courts.

3. Same—

Legislative authority for the imposition of a tax will not be declared unconstitutional on the ground that the purpose of the tax is not a public one unless the violation of this constitutional provision is clear.

4. Same—

What is a public purpose within the exercise of the taxing power must be determined in the light of custom and usage, and what is not considered necessary to the support and proper use of the government at one time may, by reason of changed conditions and circumstances, be classified as a public purpose at a later time.

5. Municipal Corporations § 5—

A municipal corporation has only such powers as are expressly granted it by the Legislature or which are fairly implied or incident thereto, or

which are essential to the accomplishment of its declared objects and purposes.

6. Municipal Corporations § 42—

While a municipality has both governmental and proprietary powers, it may not levy a tax, even in the exercise of a proprietary power, except for a public purpose.

7. Constitutional Law § 10b: Statutes § 6—

While an act of the Legislature will not be declared unconstitutional unless it is clearly so, when a statute is in conflict with a constitutional provision, it is the duty of the Court to so declare.

8. Taxation § 5—

The cost of construction, maintenance and operation of a hotel by a municipal corporation is not a public purpose, Art. V, Sec. 3, and the General Assembly may not authorize a municipality to levy a tax therefor, even with the approval of the voters. Chap. 413, Session Laws 1945.

PLAINTIFF appeals from *Stevens, J.*, at November Term, 1946, of EDGECOMBE.

The plaintiff, a taxpayer in the Town of Tarboro, brought this action on his own behalf and that of the other taxpayers similarly situated to restrain the municipality from issuing bonds and levying taxes for the acquisition or construction of a hotel in the town, which it proposed to own and maintain, and from the levy of taxes to retire said bonds. The plaintiff contends that the proposed action is in contravention of Article V, Section 3, of the Constitution, requiring that taxes be levied and collected only for a public purpose.

The Session Laws of 1945, Chapter 413, purports to authorize the acquisition, or construction of the hotel, the issuance of the bonds, and the levy of the tax, provided the project be approved by a majority of the qualified voters at an election to be called by the Board of Commissioners. Pursuant to the authority thus given the Board passed an ordinance providing for the issue of bonds in the sum of $250,000 and the levy of a tax, if approved as provided in the statute. The election was duly called and held, and the result was favorable to the issuance of the bonds and the levy of the tax.

The case develops no disagreement as to the facts, or claim of procedural defects.

In its further answer the defendant pointed out that the Town of Tarboro has 8,000 inhabitants; that it contains only one hotel, out of repair and with inadequate facilities, and of such a character and reputation that those having occasion to visit the town decline to patronize it, but secure accommodations in neighboring towns. It is pointed out that by reason of this condition the general welfare and convenience of both the residents of the town and those who have business there, and the

economic interests of the town have greatly suffered and will continue to be impaired if the situation is not remedied.

The matter came up for a hearing before Stevens, J., who, after making findings of fact and conclusions of law, entered a judgment sustaining the validity and constitutionality of the statute, the ordinance and the acts pursuant thereto, the proposed bond issue and the tax levy, and denied the injunction and dismissed the action. From this judgment the plaintiff appealed, assigning error.

George M. Fountain for plaintiff, appellant.
Lyn Bond and Philips & Philips for defendants, appellees.

DENNY, J. This appeal presents only one question: Is the cost of construction, maintenance and operation of a hotel by a municipality, a "public purpose," within the meaning of Article V, Section 3, of our Constitution? The cited section provides: "Taxes shall be levied only for public purposes." It must be conceded, therefore, that the defendant is without authority to proceed with the proposed project unless the above question is answered in the affirmative. For it is settled with us beyond question, that there can be no lawful tax which is not levied for a public purpose. *Briggs v. Raleigh*, 195 N. C., 223, 141 S. E., 597; *Commissioners v. State Treasurer*, 174 N. C., 141, 93 S. E., 482; *Jones v. City of Portland*, 245 U. S., 217, 62 L. Ed., 252; *Savings & Loan Asso. v. Topeka*, 87 U. S., 655, 22 L. Ed., 455; *Haesloop v. City Council of Charleston*, 123 S. C., 272, 115 S. E., 596; *Burns v. Essling*, 156 Minn., 171, 194 N. W., 404; *State v. Orear*, 277 Mo., 303, 210 S. W., 392; 44 C. J., 1270; 38 Amer. Jur., 85; McQuillin, Municipal Corporations, Vol. 6 (2d Ed.), p. 337; Cooley on Taxation, Vol. 1 (4th Ed.), Sec. 174. In Amer. Jur., *supra*, it is said: "A state legislature can neither compel nor authorize a municipal corporation to expend any of its funds for a private purpose, and consequently, since practically every undertaking of a municipality does or may require the expenditure of money, a municipal corporation cannot, even with express legislative sanction, embark in any private enterprise, or assume any function which is not in a legal sense public. If there is any restriction implied and inherent in the spirit of American Constitutions, it is that the government and its subdivisions shall confine themselves to the business of government, for which they were created, but if a specific provision prohibiting the expenditure of public funds for private purposes is required, it is found in the clause which forbids the taking of property for other than public uses; for since the funds of a municipality are necessarily directly or indirectly raised by taxation, the expenditure of money by a municipality for private purposes does or may necessarily result in the taking of the property of individuals under the guise of taxation for other than

public uses." The difficulty, however, arises in deciding what is and what is not a public purpose. And, while the initial responsibility for the determination of this question rests with the legislature, its determination is not conclusive. "In its final analysis, it is a question for the Courts," *Briggs v. Raleigh, supra. Yarborough v. Park Commission,* 196 N. C., 284, 145 S. E., 563; *Cobb v. R. R.,* 172 N. C., 58, 89 S. E., 807; *Opinion of Justices,* 118 Me., 503, 106 A., 865; *Kinney v. City of Astoria,* 108 Ore., 514, 217 Pac., 840; *People ex rel. Horton v. Prendergast,* 222 N. Y. S., 29, 162 N. E., 10; Cooley on Taxation, Vol. 1, Sec. 187.

In the case of *Savings & Loan Association v. Topeka, supra,* in considering what is a public purpose, the Court said: "It is undoubtedly the duty of the Legislature which imposes or authorizes municipalities to impose a tax, to see that it is not to be used for purposes of private interest instead of a public use, and the courts can only be justified in interposing when a violation of this principle is clear and the reason for interference cogent. And in deciding whether, in the given case, the object for which the taxes are assessed falls upon the one side or the other of this line, they must be governed mainly by the course and usage of the government, the objects for which taxes have been levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether State or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation. But in the case before us, in which the towns are authorized to contribute aid by way of taxation to any class of manufacturers, there is no difficulty in holding that this is not such a public purpose as we have been considering. If it be said that a benefit results to the local public of a town by establishing manufacturers, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town." 61 C. J., 90.

In determining whether or not a tax is for a public purpose, when considered in the light of custom and usage, as pointed out above, courts should also take into consideration the fact, that a purpose not theretofore considered public, but by reason of changed conditions and circumstances, may be so classified. *Stevenson v. Port of Portland,* 82 Ore., 576, 162 Pac., 509; 61 C. J., 90. This principle has been applied in determining what is a necessary expense within the meaning of Article

VII, Section 7, of our Constitution. Prior to the decision of this Court in the case of *Fawcett v. Mount Airy* (1903), 134 N. C., 125, 45 S. E., 1029, the expense incurred by a municipality for the purpose of building and operating plants to furnish water and lights to its citizens was not considered a necessary expense. The urgent need, however, for the establishment and maintenance of such facilities in our towns and cities, to protect the health of the citizens thereof, fully justified the judicial determination that the cost of construction and maintenance of such plants, is a necessary expense within the meaning of the Constitution.

A municipal corporation is a political subdivision of the State and "can exercise only such powers as are granted in express words, or those necessary or fairly implied or incident to the powers expressly conferred, or those essential to the accomplishment of the declared objects and purposes of the corporation," 37 Amer. Jur., 722. *Brumley v. Baxter,* 225 N. C., 691, 36 S. E. (2d), 281, 162 A. L. R., 930; *Clayton v. Liggett & Myers Tobacco Co.,* 225 N. C., 563, 35 S. E. (2d), 691; *Brown v. Comrs. of Richmond County,* 223 N. C., 744, 28 S. E. (2d), 104; *Kennerly v. Town of Dallas,* 215 N. C., 532, 2 S. E. (2d), 538; *Madry v. Town of Scotland Neck,* 214 N. C., 461, 199 S. E., 617; *Kennedy v. City of Nevada,* 222 Mo. App., 459, 281 S. W., 56. Such a corporation has both governmental and proprietary powers. *Millar v. Wilson,* 222 N. C., 340, 23 S. E. (2d), 42; *Asbury v. Albemarle,* 162 N. C., 247, 78 S. E., 146. A municipal corporation, in the exercise of a proprietary right, just as in the exercise of a governmental power, cannot invoke the power of taxation or the right of eminent domain except for a public purpose.

In the case of *Airport Authority v. Johnson,* 226 N. C., 1, 36 S. E. (2d), 803, *Seawell, J.,* speaking for the Court, said: "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."

We deem it unnecessary to cite or discuss the long list of decisions of this Court, dealing with the many things which have been held to fall within the definition of a "public purpose," such as streets, sidewalks, bridges, water, light and sewerage plants, market houses, abattoirs, municipal buildings, auditoriums, hospitals, playgrounds, parks, railroads, armories, fairs and airports. Those decisions, in our opinion, do not support the contention that the cost of constructing and maintaining a hotel by a municipality is a public purpose within the meaning of our Constitution.

It has been held, however, that a municipal corporation may operate a coal yard and may manufacture and sell ice. *Jones v. Portland, supra; Stevenson v. Port of Portland, supra; City of Tombstone v. Macia,* 30 Ariz., 218, 245 Pac., 677, 46 A. L. R., 828; *Holton v. City of Camilla,* 134 Ga., 560, 68 S. E., 472; *Central Lumber Co. v. Waseca,* 152 Minn., 201, 188 N. W., 275; *Consumers Coal Co. v. Lincoln,* 109 Neb., 51, 189 N. W., 643. It has also been held otherwise. *State v. Orear, supra; Baker v. City of Grand Rapids,* 142 Mich., 687, 106 N. W., 208; *Union Ice & Coal Co. v. Ruston,* 135 La., 898, 66 So., 262, L. R. A., 1915 B, 859. But we have not been able to find any authority, and the appellees have cited none, in which it has been held that the cost of constructing and maintaining a hotel is for a public purpose. On the other hand, it seems that wherever the question has been considered, the Courts and textbook writers have held to the view, that the operation of a hotel is essentially a private business, and therefore the cost of constructing and operating a hotel would not be for a public municipal purpose. *Town of Warrenton v. Warren County,* 215 N. C., 342, 2 S. E. (2d), 463; *Kennedy v. City of Nevada, supra; Lancaster v. Clayton,* 86 Ky., 373, 5 S. W., 864, 116 A. L. R., 898; *Haesloop v. City of Charleston, supra;* 44 C. J., 1271.

In *Kennedy v. City of Nevada, supra,* the Court said: "Of course, a municipality has no implied power to engage in a private business. 19 R. C. L., p. 788, sec. 95. The operation of a tourist camp, whether the city receives any compensation therefrom or not, especially where the inhabitants of the city are excluded, is certainly not a public business. The evidence shows that these grounds were used substantially as an outdoor hotel, and no one would contend that a municipality would have the implied authority to operate a hotel for the benefit of transients." And while the case of *Lancaster v. Clayton, supra,* did not involve the identical question now before us, the opinion clearly shows that the Court deemed the operation of a hotel to be strictly a private business, for it said: "The keeping of a hotel is essentially a private business, conducted for private gain. It is true the innkeeper must have a license, and in the absence of some good excuse, such as lack of room or the like, must entertain all who conduct themselves properly, and are apparently able to pay for it. But the fact that one, in order to conduct some particular business for his own profit, must comply with certain regulations or submit to certain rules of law, does not so far render him the ward of the government that the exercise of the taxing power can be invoked in his behalf. Certainly, a tax could not be constitutionally levied to aid one in building or conducting a hotel; and to exempt the keeper from the payment of the tax thereon is but doing indirectly what cannot be done directly."

In 44 C. J., Munic. Corp., 1271, it is said: "Taxes held to be invalid as not being for a public purpose include a tax for the entertainment

of official visitors; the building or maintenance of a house of entertainment or a hotel and business house . . ." In the case of *Haesloop v. City of Charleston, supra,* the Court did approve the conveyance of certain property owned by the City of Charleston, but not held for governmental purposes, to a private corporation, upon the condition that the corporation would construct on the property a million dollar hotel within ten months from the date of the conveyance. Furthermore, the Court pointed out that the property in question "was neither purchased with money raised by taxation, nor does its proposed disposal involve a resort to the power of taxation." And the Court further concluded that in the disposition of the case it was not necessary to determine whether a hotel is a "public utility within the meaning of the right to tax or to invoke the power of eminent domain."

This Court held in the case of *Town of Warrenton v. Warren County, supra,* where the Town of Warrenton, pursuant to certain legislative authority, had invested a substantial sum in the construction of a local hotel, and thereafter was compelled to purchase the property in order to protect its investment, that the property was not held for a governmental purpose and was therefore subject to taxation by Warren County. *Schenck, J.,* in speaking for the Court, said: "The property is neither for nor used for governmental or necessary public purposes, but merely for business purposes; and in competition with any other hotel that may be established in the Town of Warrenton or vicinity." In a concurring opinion, *Stacy, C. J.,* said: "Counties, cities and towns are created for the benefit of the public and charged with the administration of community affairs. . . . It was never contemplated that they should engage in competitive, private business, . . . Public funds may be expended only for a public purpose. . . . The reason municipal property is granted immunity from taxation is, that it is supposed to be dedicated to a public use."

Therefore, it is clear, that if a municipal corporation could legally tax its citizens to construct and operate a hotel, such hotel would be exempt from taxation. For we know of no authority which gives one political subdivision of a State the authority to levy and collect an *ad valorem* tax on property held for a public purpose, by another political subdivision of the same State. G. S., 105-3 (a); *Board of Financial Control v. Henderson,* 208 N. C., 569, 181 S. E., 636, 101 A. L. R., 783; *Benson v. Johnston County,* 209 N. C., 751, 185 S. E., 6; *Weaverville v. Hobbs, Comr. Vets. Loan Fund,* 212 N. C., 684, 194 S. E., 860; *Warrenton v. Warren County, supra; Winston-Salem v. Forsyth County,* 217 N. C., 704, 9 S. E. (2d), 381.

It may be desirable for the Town of Tarboro to have additional hotel accommodations. Such facilities would, no doubt, serve a useful purpose and tend to enhance the value of property generally, as well as to pro-

mote the commercial life of the community, but ordinarily such benefits will be considered too incidental to justify the expenditure of public funds. *Haesloop v. City of Charleston, supra;* McQuillin, Municipal Corporations, Vol. 6 (2d Ed.), Sec. 2532, p. 343; Cooley on Taxation, Vol. 1 (4th Ed.), Section 175, *et seq.* Every legitimate business in a community promotes the public good. *Savings & Loan Asso. v. Topeka, supra.* But "It may be safely stated that no decision can be found sustaining taxation by a municipality, where its principal object is to promote the trade and business interests of the municipality, and the benefit to the inhabitants is merely indirect and incidental." McQuillin, Municipal Corporations, *supra.* "Many objects may be public in the general sense that their attainment will confer a public benefit or promote the public convenience, but not be public in the sense that the taxing power of the State may be used to accomplish them." Cooley on Taxation, *supra,* p. 383. *Waples v. Marrast,* 108 Tex., 5, 184 S. W., 180, L. R. A., 1917 A, 253.

We are not unmindful of the rule that an Act of the Legislature will not be disturbed by the Courts, unless such Act is clearly unconstitutional. *Brumley v. Baxter, supra; Bridges v. City of Charlotte,* 221 N. C., 472, 20 S. E. (2d), 825; *Freeman v. Comrs. of Madison,* 217 N. C., 209, 7 S. E. (2d), 354; *S. v. Harris,* 216 N. C., 746, 6 S. E. (2d), 854, 128 A. L. R., 658; *Briggs v. Raleigh, supra; Hartsfield v. City of New Bern,* 186 N. C., 136, 119 S. E., 15. But when an Act of the Legislature is in conflict with a constitutional provision, it is the duty of the Court to sustain the Constitution in preference to the Act. *Glenn v. Board of Education,* 210 N. C., 525, 187 S. E., 781; *R. R. v. Cherokee County,* 177 N. C., 86, 97 S. E., 758; *S. v. Knight,* 169 N. C., 333, 85 S. E., 418; 11 Amer. Jur., 714.

We have carefully considered the question before us, in the light of the decisions and other authorities cited herein, and we are of the opinion that the cost of constructing and maintaining a hotel is not a public purpose, within the meaning of Article V, Section 3, of our Constitution. It follows, therefore, that the Legislature is without power to authorize a municipal corporation to issue its bonds and levy a tax for the payment of the principal and interest on such indebtedness, in order to enable it to obtain funds for the construction and maintenance of a municipal hotel.

The judgment of the Court below is

Reversed.

STATE OF NORTH CAROLINA, EX REL. UNEMPLOYMENT COMPENSATION COMMISSION OF NORTH CAROLINA v. L. HARVEY & SON COMPANY, EMPLOYER, No. 53-54-012, AND ALTON PATE, KINSTON, NORTH CAROLINA.

(Filed 9 April, 1947.)

1. Master and Servant § 62—

The findings of the Unemployment Compensation Commission are conclusive when supported by evidence, both in the Superior Court and upon further appeal to the Supreme Court. G. S., 96-4 (m).

2. Same—

Where the findings of the Unemployment Compensation Commission are supported by evidence, the Supreme Court may determine only whether the conclusions of law and orders of the Commission are properly predicated upon the facts found.

3. Master and Servant § 59b—Contract held to constitute defendant contractee and not landlord for purpose of levy of unemployment compensation tax.

The corporate defendant operated a department store. Upon the discontinuance of its shoe department it entered into a contract with the individual defendant under which he occupied space in the store at a rental of a fixed percentage of the gross, and carried on the shoe business under the name of the corporation, with full authority to hire and fire employees and order stock, but under which the corporation required money from sales to be turned over to it immediately as received, controlled the extension of credit and owned all accounts, paid sales tax, advertised in its own name with individual defendant paying for the proportion of advertising devoted to shoes. *Held:* That the corporation was a contractee and not a mere landlord is a legitimate inference from the contract and the course of dealing thereunder, and the conclusion of the Unemployment Compensation Commission to this effect and its determination that the corporate defendant is liable under G. S., 96-8 (e), for unemployment compensation tax on wages paid by the individual to his employees for the period of operation prior to the amendment of Chap. 531, Session Laws 1945, is upheld.

4. Same—

In imposing liability for unemployment compensation taxes, the General Assembly is not limited to the relationship of employer and employee as defined under the common law, but may determine "employing units" subject to the tax either by direct definition or by reasonable administrative procedure.

5. Same—

A person who is a contractor within the meaning of G. S., 96-8 (f) (8), is liable for unemployment compensation taxes for wages paid to his employees for the period subsequent to the effective date of Chap. 531, Session Laws 1945, until March 18, 1947, the effective date of the repeal of this section.

6. Same—

The "contribution" imposed by the Unemployment Compensation Law is a tax, and an amendment which repeals a former provision imposing the tax upon specified persons will be given prospective effect only, and such persons will be held liable for taxes accrued prior to the repeal in the absence of a provision expressly or impliedly releasing them from such liability.

DEFENDANTS' appeal from *Carr, J.*, at September Term, 1946, of LENOIR.

This proceeding was instituted in the Unemployment Compensation Commission for the purpose of determining the liability of the corporate respondent for contributions on wages paid by Pate to his employees down to March 13, 1945, and to determine a similar liability of Pate for contributions on wages paid his employees subsequent to that date. The liability of L. Harvey & Son Company, if any, arose under Section 96-8 (e) of the Unemployment Compensation Act of 1943, which was partly repealed by amendment effective March 13, 1945, which struck out the sentence currently imposing the tax.[1] The proceeding relates to contributions on taxes alleged to have accrued prior to that date. It is sought to hold respondent Alton Pate as a "covered unit" liable for contributions subsequent to the effective date of the repeal. Referring to the cited statute it will appear that the liability or non-liability of the Harvey company depends upon a proper determination of the contractual relation existing between the Company and Pate during the period covered by the then existing law, and the effect of its repeal. The status of Alton Pate subsequent to the repeal is a matter for further consideration.[2]

The inquiry went through its several procedural stages, including hearings before a Deputy Commissioner, the Chairman of the Commission and the Full Commission, until it reached Lenoir Superior Court on appeal from the Full Commission and the final determinations and orders of that Body with respect to the liability of each respondent.

[1]"Sec. 96-8 (e)—Employing unit: (Whenever any employing unit contracts with or has under it any contractor or sub-contractor for any employment which is a part of its usual trade, occupation, profession, or business, unless the employing unit as well as each such contractor or sub-contractor is an employer by reason of sub-section (f) of this Section, or, paragraph Section 96-11 (c), the employing unit shall, for all of the purposes of this Chapter, be deemed to employ each individual in the employ of each such contractor or sub-contractor for each day during which such individual is engaged in performing such employment) . . ." The bracketed portion was stricken out by Chapter 531 of the Session Laws of 1945.

[2]Section 96-8 (f) (8) in a further definition of "employer" applies a tax also to the contractor or sub-contractor who operates under conditions similar to those above quoted. Repeal became effective March 18, 1947. Session Laws, 1947, HB 127.

The procedure is unassailed and its history is not essential to an understanding of the case.[3]

The hearing before the Full Commission resulted in a determination that the respondents, respectively, were liable for the contributions as demanded, and an order was made that they report and pay them as required by law.

The review in the Superior Court involved the consideration of evidence before the Full Commission at the final hearing and respondents' exceptions taken on the hearing. The exceptions were to the findings of fact by the Commission as not being supported by evidence, and to the conclusions of law and determinations and orders predicated thereon, as erroneously made.

The evidence, as certified by the Commission on respondents' appeal, is summarized in its bearing on these exceptions:

The respondent L. Harvey & Son Company operated a department store in which they carried in stock and sold merchandise of a general character, including shoes. They had in all some 8 or 10 departments of classified merchandise. In September, 1942, the Company sold the stock of shoes on hand to a New York concern and contemplated discontinuing the business. However, it entered into a parol agreement with respondent Alton Pate, who had been theretofore engaged in selling shoes, by which he was to occupy a space in the store about 10 feet wide and 100 feet long, exclusively devoted to the sale of shoes. There is evidence from the respondent that this space was rented to Pate for his own use at a rental of 10 per cent of his gross sales. The Company furnished janitor service, heat and lights. In the early days of his occupancy and dealing the stock of goods was bought from the wholesalers in the name and upon the credit of L. Harvey & Son Company. The manager of the Company explained that this was for the reason that wholesalers did not care to take on new accounts and it was in order that Pate might get his quota. The manager of the Company further testified that this was continued for a few months, after which purchases were made by Pate in his own name. Pate testified:

> "I am operating in my name as far as buying is concerned; everything is bought in my name with the exception of this—I'll say two or three. I have my own books, order books. Sometimes I send them in my name, sometimes in his, but it never goes to the office; I pay the bills myself. I am operating under my name. L. Harvey & Son does not have anything to do with the way I operate it."

All the sales tickets are in L. Harvey & Son's name. The tickets go up to the bookkeeping department of L. Harvey & Son Company,

[3]Section 96-4, *et seq.*

through the distributor system, where the record is kept. The cash also goes up to the Harvey Company office, and if there is any change due it is sent back down.

The shoe business carried on by Pate is advertised in the papers in the name of L. Harvey & Son Company and Pate pays to the Harvey Company part of the advertising. L. Harvey & Son Company purchases the credit accounts of goods purchased from Pate without recourse on him. However, when a purchase is made on account a slip is sent up to L. Harvey & Son's office with a notation and if it is not approved the sale is not made. Respondents testify that this is to secure to the Harvey Company the collectibility of the accounts they buy. The Company buys no other accounts and Pate sells accounts to no other person. About 90 per cent of Mr. Pate's business, as testified to by the investigating deputy, is accounts. Whatever interest or carrying charges due upon them go to L. Harvey & Son Company.

Respecting the manner of conducting the business the respondent Pate testified that "as far as the general public is concerned they are dealing with L. Harvey & Son." The tickets and the wrapping paper used in Harvey's business had upon them the name of L. Harvey & Son Company, and not Pate's.

Respondents testify that L. Harvey & Son Company has nothing to do with the operation of Pate's shoe business. Pate hired his help and dismissed employees at his own will. The employees in the sale of shoes did not help in any other department. Pate alone was concerned with the payroll. C. F. Saville, manager of the Harvey store, testified, "Pate keeps his own records and operates in his own name and L. Harvey & Son Company has nothing to do with the manner in which he operates his business."

The findings of fact closely parallel and embody the evidence as above summarized, and as noted in the opinion. Exceptions were filed to six of the eight findings, and in two instances were, in part, sustained—(a) by the Commission upon certification of the appeal, and (b) by the Superior Court.

From finding of fact No. 8, with the parts stricken out enclosed in brackets, is as follows:

> "8. It is further found that (Alton Pate, who operated the shoe department, and contracted with the said L. Harvey & Son Company, is in employment which is a part of the usual trade, occupation, profession or business of the said company); that the said L. Harvey & Son Company is an employing unit within the contemplation of the Unemployment Compensation Law, and also an employer within the terms of such law. It is further found that the said Alton Pate is a subcontractor of the said L. Harvey & Son Company for employment which is a part of the Company's business."

From finding No. 3, the following was stricken out:

> "That the money which was taken in by the said Alton Pate and which goes to the cashier's office of the company, is deposited in the company's bank account as any and all money which the Company itself takes in for sale of merchandise."

The conclusion upon the findings follows:

> "That the Company is responsible for the payment of contributions on the wages paid by Alton Pate to his employees, from the date that the company entered into its contract with Alton Pate, to March 13, 1945, the date that the section of the law was repealed; that subsequent to March 13, 1945, the said Alton Pate continued his contractual relationship with L. Harvey & Son Company and because of this contractual relationship the said Alton Pate, subsequent to March 13, 1945, is an employer within the contemplation of Section 96-8 (f) (8) of the Unemployment Compensation Law as amended."

With the exceptions noted the trial judge affirmed the findings of fact and conclusions of law made by the Full Commission and affirmed its determinations, orders and decrees.

The respondents appealed, assigning errors.

W. D. Holoman, Charles U. Harris, and R. B. Billings for plaintiff, appellee.

J. A. Jones for defendants, appellants.

SEAWELL, J. Upon appeal from the Unemployment Compensation Commission the Superior Court is bound by the findings of fact made by the Commission where there is evidence to support it, and the same rule, of course, applies here.[4] Where there is such supporting evidence our office is to determine whether the conclusions of law and subsequent orders of the Commission may be properly based or predicated upon the facts found.

The pertinent sections of the Compensation Act in force during the period for which the respondent Harvey & Son Company has been held liable for contributions on wages paid by Pate to his employees have been quoted *ante*. The respondent Harvey & Son Company contends that the statute is inapplicable to it for that the facts in evidence only go so far as to show Pate to be a tenant of the Harvey & Son Company and not a contractor in carrying on or aiding any branch of the Harvey

[4]Sec. 96-4 (m)

business. The proponents of the tax liability contend that the existing contract between the parties during the period of alleged liability and their course of dealing between themselves under it, give rise to legitimate inferences of a more intimate business association between them than ordinarily attaches to a rental contract, and point to various customary transactions and dealings between the parties as *indicia* of a contract within the meaning of the statute, rendering the Harvey Company liable for the tax. The status of Pate as an employing unit subsequent to the repeal of the statute will be further considered.[5]

Perhaps no one incident of the contract and dealings between the parties, however unusual between landlord and tenant, might be of sufficient significance to definitely establish the contention that the purpose and effect of the contract was to carry on any business in behalf of the Harvey Company or in connection with the merchandising activities of the latter, such as to be essentially a part thereof and within the coverage of the statute. But taken as a whole and in combination, they are impressive; and seemingly at variance with the explanations and reasons assigned for them in respondents' testimony, or at least engendering contrary inferences.

The relation contended for by respondents is strongly challenged by a *modus vivendi* which would lead the public to believe that they were dealing with the Harvey & Son Company rather than Pate; which advertises the shoe business as still being carried on by L. Harvey & Son Company, not only in the newspapers, but even upon the wrapping paper and sales tickets used every day; which required Pate's money and credits to be turned over to Harvey & Son Company immediately as received; puts Harvey in position to control the extension of credit to each customer; requires all credits to belong to Harvey on the principle of immediate purchase; includes the payment by L. Harvey & Son Company of sales tax on merchandise it claims was sold by Pate independently; and many other circumstances in evidence so at variance with the simple relation of landlord and tenant as to greatly over-burden that conception. On the other hand, these practices could hardly be satisfactorily explained on any theory other than that the business was really that of the Harvey & Son Company and that the limitations and restrictions imposed upon Pate were such as to classify him as a contractor within the meaning of the statute.

Court decisions under statutes which make the tax liability to depend upon the relation of master and servant, as we know it at common law, and which, therefore, make control of the person employed a criterion of the liability to be imputed to the alleged employer, may be found to put more emphasis on the *indicia* of such control than may be warranted in the present case.

---

[5]Sec. 96-8 (f) (8) *ante*.

The statute under review is frankly predicated upon conditions arising out of contract, which in substance make the business carried on virtually that of the superior party to the contract. Since the statute openly deals with the subject of contract its application might be expected to pretermit some of the factors supposed to be *insignia* of the relation of master and servant as distinguished from that of independent contractor. There is, in this jurisdiction at least, no question that in fixing the coverage of the Unemployment Compensation Act the Legislature may go much farther in imposing the contributions than the supposed limitations of master and servant, or employer and employee, as those terms are generally defined and dealt with in the common law; and may, if essential to the imposition of the tax, augment the meaning of the term "employer" beyond the popular definition. In *Unemployment Compensation Commission v. Insurance Co.*, 219 N. C., 576, 14 S. E. (2d), 689, the Court said:

> "The fact that the state has engaged in a cooperative scheme with the Federal Government does not necessarily imply strict uniformity in the incidence of the tax levied by the State and the Federal laws."[6]

and

> "We think it is evident that the Legislature, for the purpose of levying a tax may determine what shall constitute employment subject to taxation without regard to existing definitions or categories . . . it may do this by direct definition, or, perhaps with greater exactness, by providing a reasonable administrational procedure by which such employment may be defined or ascertained."[7]

There are many decisions supporting this view.[8]

The circumstances summarized, *supra,* from the evidence as incidents of the contract and their mutual dealings, are not directed to showing these relations and making available their common law implications, but to the issue whether the contract was of the nature described in the statute. The judicial determination of that question must depend upon inferences fairly drawn from the evidence by those whose office it is to find the facts. We cannot say that the findings of the Commission are unsupported by evidence, or that they are inadequate to sustain the conclusions drawn from them.

---

[6]Loc. cit. p. 586.

[7]Loc. cit. p. 587.

[8]*U. C. C. v. City Ice, etc., Co.*, 216 N. C., 6, 3 S. E. (2d), 290; *U. C. C. v. National Life Ins. Co.*, 219 N. C., 576, 14 S. E. (2d), 689; 139 A. L. R., 895; *U. C. C. v. Jefferson Standard Life Ins. Co.*, 215 N. C., 479, 2 S. E. (2d), 584; See cases cited *U. C. C. v. Ins. Co., supra, p.* 587; c/p citations in respondents' brief; annotation 147 A. L. R., 828; annotation 152 A. L. R., 525; *McGruder v. Yellow Cab Co.* (C. C. A. 4th), 141 Fed. (2d), 324, 152 A. L. R., 516.

The evidence tends to show that the whole business conducted by Pate was absorbed by L. Harvey & Son Company as fast as production occurred, under conditions which secured to that Company exclusive control of both cash and credit, and paid the Company a revenue based on its gross, rising and falling with its volume, without reasonable relation to the rental value of the space occupied by Pate in the store. Under these circumstances the outward forms or devices by which the result was accomplished are relatively immaterial to the purpose of the law. Apparently, the contract makes Pate an *entrepreneur* deriving his compensation from the difference which prudent management may effect between cost of production and a fixed 10 per cent gross on the Company's business.

This contract between L. Harvey & Son Company and Pate continued in force after the amendment of the law concededly releasing L. Harvey & Son Company from further contribution with respect to wages paid Pate's employees. Because of the continued existence of this contract the Commission contends that Pate was himself a "covered unit" and liable for contributions under Section 96-8 (f) (8) of the Act.[9] It is conceded that by amendment to the Act, effective March 18, 1947, Pate is released from further contributions under this subsection. The demand upon him is for contributions with respect to employment subsequent to March 13, 1945, while the law was in force. We are of the opinion the contributions were currently required by the statute as it then stood.

The "contribution" imposed by the law is a tax.[10] While under our decisions accrued taxes are not in all respects regarded as a debt, although sometimes treated similarly in remedial procedure,[11] we have no doubt that the State has a vested interest in accrued taxes which is not destroyed by simple repeal of the statute currently imposing them, without any accompanying provision in the nature of expressed or implied release and where the procedure for their collection is not involved in the repeal.

The Unemployment Compensation Act presents a general scheme to secure current contributions from employers in furtherance of the purposes of the Act, provides for the determination thereof with right of appeal, and procedure for the enforcement of the law and the collection of the contributions, and all of the machinery for that purpose is left intact. We are of the opinion that it was not the purpose of the Legislature in amending the law to make it retroactive in the sense that it released any employer from the obligation of reporting and paying con-

---

[9]See Citation, note 2, *ante*.

[10]*Prudential Ins. Co. of America v. Powell*, 217 N. C., 495, 8 S. E. (2d), 619.

[11]*Gatling v. Carteret County*, 92 N. C., 536, 53 A. L. R., 432; *State v. Georgia Co.*, 112 N. C., 34, 17 S. E., 10, 19 L. R. A., 485.

tributions which had accrued in this connection. We conceive the law in this State to be as stated in Cooley on Taxation:

> "The rule favoring a prospective construction of statutes is applicable to statutes which repeal tax laws. Accordingly it is held that where such a statute is not made retroactive a tax assessed before the repeal is collectible afterwards; and where taxes are levied under a law which is repealed by a subsequent act, unless it appears clearly that the legislature intended the repeal to work retrospectively, it will be assumed that it intended the taxes to be collected according to the law in force when they were levied."[12]

We, therefore, conclude that the judgment of the trial court in affirming the determinations, orders, and decrees of the Unemployment Compensation Commission is free from error, and it is

Affirmed.

MONTROSE BROWN (ADMINISTRATRIX), MRS. JAMES F. BROWN (WIDOW), LILLIE MAY BROWN AND CHARLES BROWN (MINOR CHILDREN) OF JAMES F. BROWN, DECEASED (EMPLOYEE), v. L. H. BOTTOMS TRUCK LINES, INC. (EMPLOYER), AND LUMBER MUTUAL CASUALTY COMPANY (CARRIER).

(Filed 9 April, 1947.)

1. Master and Servant § 55d: Appeal and Error § 40a—

Where the finding of the Industrial Commission that the injured worker was an employee and not an independent contractor is based upon the legal effect of the written contract between the parties, the question is one of law, reviewable on appeal, and is presented by an exception to the judgment of the Superior Court affirming the award of the Industrial Commission.

2. Master and Servant § 4a—

The authority and control retained by the person for whom the work is being done is the criterion for determining whether the workman is an employee or an independent contractor.

3. Master and Servant § 39b—

A written agreement under which a licensed carrier by truck in interstate commerce leases an owner driven vehicle for an interstate trip, with

---

[12]Cooley on Taxation, 4th Ed., Vol. 2, sec. 538; *Higgins Estate v. Hubbs*, 242 Pac., 515; *In re Moseley's Estate*, 164 Pac., 1073; *In re Meinerts Estate*, 213 N. W., 983; *McDonald v. State Tax Commission*, 158 Miss., 331, 130 S., 473; *Moore v. Commonwealth* (Va.), 155 S. E., 635; *Trippett v. State*, 149 Cal., 521, 86 Pac., 1084; *Commonwealth v. Mortgage Trust Co. of Penna.*, 227 Pa., 153, 76 Atl., 5; *Riley, State Comptroller v. Howard, et al.* (Cal.), 226 Pac., 993.

provision that carrier's Interstate Commerce Commission Identification plates be attached for the trip and removed at the destination terminal and that upon discharge of the truck's lading at destination the truck be delivered into the possession of the lessor, *is held* to constitute the owner-driver an employee of the carrier within the purview of the Workmen's Compensation Act while transporting goods in interstate commerce.

4. Carriers § 5—

Where a carrier licensed to transport goods by truck in interstate commerce leases a vehicle from an owner not so licensed and attaches its plates to the vehicle while engaged in transporting goods in interstate commerce, *it is held* the contract of lease will be presumed to have been made in contemplation of the pertinent Federal Statutes and regulations of the Interstate Commerce Commission, requiring retention of control over the vehicle by the franchise owner, and drivers of such vehicle, as a matter of public policy, will be held employees of the carrier and not independent contractors for the purpose of determining liability of the carrier.

5. Master and Servant § 38—

An employer within the purview of the Workmen's Compensation Act may not escape liability thereunder by any provision in his contract with an employee under which the employee agrees to indemnify and save the employer harmless from any claim arising in the performance of the work. G. S., 97-6.

PETITION to rehear decision reported *ante,* 65, 40 S. E. (2d), 476.

Charles W. Taylor and Ehringhaus & Ehringhaus for petitioner, appellant.

Wm. E. Comer for respondent, appellees.

DEVIN, J. The petition to rehear the appeal and to reconsider the decision heretofore rendered on procedural grounds, affirming the judgment below, reported *ante,* 65, 40 S. E. (2d), 476, was allowed for the reason that the defendants' exception to the judgment, under the facts of this case, is regarded as sufficient to bring up for review the single question of law presented by the written contract between claimants' intestate and the defendant Motor Lines, appearing in the record, which was relied on by defendants as establishing the relationship between them of independent contractor, rather than that of employee, as found by the Industrial Commission. In this view the rule laid down in *Rader v. Coach Co.,* 225 N. C., 537, 35 S. E. (2d), 609, 610, and *Fox v. Mills, Inc.,* 225 N. C., 580, 35 S. E. (2d), 869, is not deemed applicable to this case, and consequently the defendants are entitled to have their contention of non-liability on the ground that claimants' intestate was at the time and in respect to the injury complained of an independent contractor, duly considered and decided on its merits.

The plaintiffs' claim for compensation, under the Workmen's Compensation Act for the death of James F. Brown, alleged to have been

due to an injury by accident arising out of and in the course of his employment by the defendant Motor Lines, was allowed by the Industrial Commission, and approved and affirmed by the court below, upon the following findings of fact by the Industrial Commission:

"That L. H. Bottoms (Truck Lines) is engaged in the trucking business with its principal office and place of business in High Point, North Carolina, and holds itself out to the public to haul all kinds of freight, merchandise, supplies and equipment usually and customarily hauled by automotive truck throughout this state and other states; and in said capacity the said L. H. Bottoms Truck Lines has been authorized to do such hauling in interstate commerce by the Interstate Commerce Commission of the United States, and for said purpose has been assigned a certain license plate and number to be used upon its trucks when so engaged in transporting freight for hire in interstate commerce.

"That on or about the 14th day of March 1944, the defendant, L. H. Bottoms Truck Lines, had more freight accumulated in its warehouse than it had trucks of its own to carry; and in order to facilitate the delivery of this freight to its customers, L. H. Bottoms Truck Lines contacted the deceased, James F. Brown, who lived in the vicinity and owned a truck of his own and did local hauling for himself and other people of freight and other commodities. The deceased Brown did not have a license from the Interstate Commerce Commission that would permit him to haul the kind of freight that Bottoms wished to have hauled in interstate commerce; therefore, the said L. H. Bottoms Truck Lines and the said James F. Brown, deceased, entered into an agreement in writing, which is offered in evidence, by the terms of which agreement the said Brown leased his truck to the defendant Bottoms upon the terms and conditions as set out in said lease, and the said Bottoms was to furnish and supply to said truck leased from Brown with an interstate commerce license that would permit said truck to transport merchandise in interstate commerce and especially to carry the load in question from High Point in the State of North Carolina to the City of Norfolk in the State of Virginia. Said agreement was entered into and the truck so owned by J. F. Brown and so leased to L. H. Bottoms Truck Lines was on or about March 13th loaded by the employees of the L. H. Bottoms Truck Lines at its warehouse in High Point, North Carolina, with a load of merchandise in transit and being handled by the defendant Bottoms and consigned to Norfolk, Virginia.

"That the deceased, James F. Brown, operating said truck so leased, left High Point on the morning of March 14, 1944, and was proceeding on the usual and customary route from High Point, North Carolina, to Norfolk, Virginia, to unload said merchandise under the provisions of said lease; and while en route to Norfolk (in Virginia), the truck in which the said Brown was riding and operating for the said L. H. Bot-

toms Truck Lines collided with another truck upon the highway and the said Brown was killed.

"The Commissioner finds as a matter of law that when the deceased, Brown, leased his equipment to L. H. Bottoms Truck Lines that the control of said equipment for the purpose of hauling said load from High Point, North Carolina, to Norfolk, Virginia, passed out of the control of the deceased, J. F. Brown, and that the control of said equipment was solely and exclusively in the possession of the defendant Bottoms; and that any person operating said truck after the execution of said lease was an employee of the defendant, L. H. Bottoms Truck Lines, at the time of his death, and that the injury resulting in his death was due to an accident arising out of and in the course of his employment."

The terms of the lease agreement referred to are as follows:

"1. It is agreed L. H. Bottoms Truck Lines, leases from Jas. F. Brown, Lessor, of Greensboro, the following described Motor Vehicle to be used by said lessee in its interstate service to transport merchandise from High Point, N. C., to Norfolk, Va., and on or about the date of this agreement (Description of Vehicle):

"2. Upon arrival of this vehicle at the destination terminal named in the preceding paragraph the lessee will immediately upon discharge of its lading deliver said vehicle into the possession of the lessor or its agent at the point of discharge of lading.

"3. The lessor agrees to pay all maintenance and all operating expenses of the said motor vehicle while in the use of the lessee. The lessor guarantees said motor vehicle against any defects, latent or otherwise, as of the date hereof, and warrants the said motor vehicle fully meets the requirements of all applicable Federal and state laws, rules or regulations. The lessee shall not be liable for any damage or depreciation that may occur to said motor vehicle while in its possession under this lease.

"4. The lessor further agrees to indemnify and save harmless the lessee against any claim arising from the operation of the vehicle or vehicles named in paragraph (1) thereof, and against any claim for loss or damage to any shipment or shipments being transported in said vehicle or vehicles.

"5. The lessee will pay to the lessor the sum of $40,00, computed at the rate of per load cents per (CWT) (or mile) for a load of..... pounds, less $..... (Driver's wages), for the use of the motor vehicle in the service described in paragraphs one and two hereof.

"6. The lessee assigns and affixes to said vehicle for the duration of this lease, Interstate Commerce Commission identification plates number, as shown in paragraph (1), which must be removed at the aforementioned destination terminal and remain only in the possession of the

lessee, before full payment of the rental sum, as provided for herein, is made."

The facts found are not controverted. The only question now presented is whether, as a matter of law, these facts are sufficient to support the conclusion of the Industrial Commission and the judgment of the Superior Court based thereon. This presents a question appropriate for appellate review. *Wood v. Miller,* 226 N. C., 567, 39 S. E. (2d), 608. If there are facts in evidence or permissible inferences to be drawn therefrom which support the conclusion of the Industrial Commission, the judgment must be upheld, *Edwards v. Pub. Co., ante,* 184, 41 S. E. (2d), 592, "though other inferences may appear equally plausible." *Rewis v. Ins. Co.,* 226 N. C., 325, 38 S. E. (2d), 97.

It is the contention of the defendants that the terms of the contract whereby Brown's truck was leased to the defendants for the transportation of goods for them to Norfolk, Virginia, were sufficient to establish conclusively that the relationship of Brown to the defendants and to the transaction was that of an independent contractor. Defendants urge that there is no other possible interpretation of the contract.

What constitutes one an independent contractor is fully set out in *Hayes v. Elon College,* 224 N. C., 11, 29 S. E. (2d), 137, and the phrase need not be again defined. The right or power of control retained by the person for whom the work is being done is uniformly regarded as the essential criterion for determining whether the workman is an employee or an independent contractor. 71 C. J., 449; *Wood v. Miller, supra; Lassiter v. Cline,* 222 N. C., 271, 22 S. E. (2d), 558.

The defendants cite in support of their contention the case of *Greyvan Lines v. Harrison,* decided in 1944 in the U. S. District Court for the Northern District of Illinois, in which it was held that the relationship of employer and employee did not exist between the Trucking Company and the owners of trucks with whom the company contracted for the transportation of goods or those hired by the truck owners to assist in operating the trucks. The only question presented in that case was the power of the Collector of Internal Revenue to collect taxes and penalties as assessed under Federal Social Security Laws against the company upon payments made to truckers operating under contracts similar to that in the case at bar. The District Court held the Company not liable for the tax on these payments. The decision does not seem to have been reviewed by an appellate court.

However, we are not disposed to hold the conclusion reached by the Judge in the *Greyvan case* as determinative of the question presented in the case at bar.

Here the defendant Bottoms Truck Lines was a motor carrier of goods in interstate commerce, operating under authority of a certificate or license issued by the Interstate Commerce Commission. Transporta-

tion in interstate commerce by an interstate motor carrier is subject to the applicable provisions of the Federal statutes governing such carriage, and the rules, regulations and requirements of the Interstate Commerce Commission. 49 U. S. C. A., secs. 301, *et seq.* Under the Federal statute the defendant was required to attach to each vehicle used in such transportation the identification or license plates prescribed for it by the Commission (49 U. S. C. A., sec. 324). In order to augment its equipment for the transportation of goods, the defendant obtained by contract the use of Brown's owner-driven truck to be added to its own fleet of trucks for the transportation of certain goods from High Point, North Carolina, to Norfolk, Virginia, and in the contract it was stipulated, in accordance with the requirements of the statute and the regulations of the Interstate Commerce Commission, that the license plates issued by the Commission to the defendant Truck Lines for its own trucks must be attached to and used by the Brown truck, thus identifying the truck as being used by the named defendant under its franchise. The Brown truck could not have been driven over the highways to Virginia in interstate commerce without being thus identified. It could not have been used independently or in any other way for this interstate transportation. The truck for the period of transportation was in the possession of defendant Truck Lines, and only at the end of the journey was it to be delivered back to the lessor as provided in section 2 of the contract. The operation of the truck was in law under the supervision and control of the interstate franchise carrier and could be lawfully operated only by those standing in the relationship of employees to the authorized carrier. Brown had no franchise right independent of the defendant. The insurance on the cargo in the Brown truck was carried by the defendant. As a witness for the defendants testified, "He (Brown) had no right to transport anything we had turned over to him," nor was he at liberty to pick up other loads along the route to Norfolk. The defendant Motor Lines could not contract for the use of a truck or employ an independent truck owner not a holder of certificate or permit from the Interstate Commerce Commission (49 U. S. C. A., sec. 311), except under its own license plates, and by virtue of its franchise.

The transportation of goods in interstate commerce by motor vehicles was required to be under the rules and regulations of the Interstate Commerce Commission, and the Brown truck could only have been used in such transportation by the defendant franchise carrier as one of its fleet of trucks under its license plates. Hence it would seem to follow that control of the operation for the period of the lease was given to the licensed carrier, and that the owner-driven truck was in contemplation of law in its employ and the driver for the trip stood on the relationship of its employee, as found by the Industrial Commission.

We think the applicable rule, under the facts here presented, is that the lease or contract by which the equipment of the authorized interstate carrier was augmented, must be interpreted as carrying the necessary implication that possession and control of the added vehicle was, for the trip, vested in the authorized operator.

This conclusion is in accord with well considered decisions in other jurisdictions.

In *Steffens v. Continental Freight Forwarders Co.*, 66 Ohio App., 534, where a truck being operated under license of the defendant, an Ohio corporation, by an independent contractor, negligently injured plaintiff in Pennsylvania, it was held that while under Pennsylvania law ordinarily the defense of independent contractor was available, the Federal statutes relating to motor carriers in interstate commerce, and the regulations of the Interstate Commerce Commission were controlling, and the defendant was held liable, since the operation was under the franchise holder. In support of the conclusion reached the Court cited the ruling of the Interstate Commerce Commission, made 13 August, 1936, to the effect that where the authorized motor carrier added to its equipment by leasing a vehicle and obtained the services of the owner-driver, the lease authorizing it "must be of such a character that the possession and control of the vehicle is, for the period of the lease, entirely vested in the authorized operator in such way as to be good against all the world, including the lessor; that the operation must be conducted under the supervision and control of such carrier; and that the vehicle must be operated by persons who are employees of the authorized operator, that is to say, who stand in the relation of servant to him as master."

The use of the Brown truck in the case at bar was presumed to have been contracted for in contemplation of and subject to the pertinent provisions of the Federal statutes and the regulations of the Interstate Commerce Commission in relation thereto then in force.

A case similar in material respects to the case at bar is *Hodges v. Johnson,* 52 F. Supp., 488. In that case Jocie Motor Lines, the holder of a certificate from the Interstate Commerce Commission authorizing transportation of goods in interstate commerce, entered into contract with Johnson, who was engaged in the trucking business but without certificate as interstate carrier, whereby Johnson leased his truck to transport goods for Jocie from Charlotte, North Carolina, to Roanoke, Virginia, under Jocie's certificate and license from the Interstate Commerce Commission. Jocie did not undertake to direct or supervise the operation of Johnson's truck and Johnson hired and fired his drivers without regard to Jocie. On the return trip from Roanoke, in Virginia, Hodges was killed as result of collision with Johnson's truck. The court held, in an opinion by Judge Barksdale, that while under the general rule Johnson would be regarded as an independent contractor relieving

Jocie of liability for his negligence, under the facts disclosed "public policy requires that the holder of a franchise or certificate from the Interstate Commerce Commission for the operation of freight vehicles in interstate commerce upon the public highways be held responsible for the operation of such vehicle under said franchise or certificate by independent contractors of such certificate holders, their servants and agents. Otherwise, the public might be deprived of the safeguards to the public required by the Interstate Commerce Commission, by means of certificate holders evading their responsibility, by the employment of irresponsible persons as independent contractors." The same ratio *decidendi* was announced in *Venuto v. Robinson,* 118 F. (2d), 679, 28 A. L. R., 122. See also *Stickel v. Erie Motor Freight Co.,* 54 Ohio App., 74; *Emerson v. Park,* 84 S. W. (2d), 1100; *King v. Brenham Auto Co.,* 145 S. W., 278.

In Restatement Law of Torts, the rule is stated as follows: "Sec. 428. Contractor's negligence in doing work which cannot be lawfully done except under a franchise granted to his employer. An individual or a corporation carrying on an activity which can be lawfully carried on only under a franchise granted by public authority and which involves risk of harm to others, is subject to liability for bodily harm caused to such others by the negligence of a contractor employed to do work in carrying on the activity."

In *Kimble v. Wilson,* 352 Pa., 275, where a steel company leased a truck and driver for the delivery of some of the company's products, the truck owner not having authority from the Utilities Commission to be a contract carrier, it was held that the lessor was not an independent contractor as he operated under the rights of another. And in *Brinker v. Koenig Coal Co.,* 312 Mich., 534, where a coal dealer employed an owner driven truck to deliver coal, it was held under the facts of that case the truck owner was not an independent contractor.

The provision in the contract in the case at bar whereby the lessor Brown agreed to indemnify and save harmless the lessee from any claim arising from the operation of the vehicle may not be held to relieve the defendant, if as a matter of law under the facts found liability under the Workmen's Compensation Act accrued, as provided by the statute. G. S., 97-6.

The act of the defendant in accord with the provisions of the lease in placing its own license plates on Brown's truck under the circumstances disclosed, thus giving it the status and holding it out as its own vehicle for the purposes of this trip, a procedure which alone authorized its operation, must be regarded as an assumption of such control as would defeat the plea of non-liability for injury to the driver on the ground of independent contractor. Control of the employer must be completely surrendered to relieve liability. *Leonard v. Transfer Co.,* 218 N. C., 667,

12 S. E. (2d), 729. The defendant corporation having been given a franchise for the operation of motor trucks on the highway as a carrier of goods in interstate commerce, cannot evade its responsibility by delegating its authority to others. *King v. Brenham Auto Co., supra.* Nor may an employer, by leasing the truck of one not authorized to transport goods in interstate commerce and causing its operation under its own franchise and license plates for interstate transportation avoid legal responsibility therefor.

We conclude that the judgment of the Superior Court should be affirmed, and the petition dismissed.

M. A. CAUBLE v. J. C. TREXLER, MORTGAGEE, AND A. R. TREXLER, ASSIGNEE AND OWNER OF NOTE AND MORTGAGE.

(Filed 9 April, 1947.)

1. Contracts § 7—

Agreements against public policy are illegal and void.

2. Contracts § 7g—

A statute on a subject within the province of the lawmaking power is public policy thereon, and an agreement which violates the provision of such statute or which cannot be performed without violating its provisions is illegal and void.

3. Mortgages § 1b—

Where a mortgagee agrees to the scaling down of his debt as required by the Land Bank Commissioner as a condition precedent to making a loan to the debtor with which to satisfy the indebtedness, a mortgage deed thereafter taken by the creditor to secure a note for difference between original indebtedness and the amount received in satisfaction thereof is void as against public policy. 12 USCA, 1016, *et seq.*

4. Actions § 3c: Equity § 1—

The rule that equity will not exercise jurisdiction when the parties are *in pari delicto* is the policy of the law in this State, but the rule is subject to limitations and exceptions, among which are that relief may be given when to do so will advance public policy and that when the parties are not equally blameworthy, relief may be given in furtherance of justice to prevent a party from benefiting from the fruits of his own wrong.

5. Same: Mortgages § 1b—

In an action attacking a mortgage executed at the insistence of the creditor to secure the difference between the original indebtedness and the amount loaned by the Federal Land Bank Commissioner to satisfy the original mortgage indebtedness, equity will not deny relief on the ground that the plaintiff was *in pari delicto*, but will act to prevent the mortgagee from collecting on the instrument.

6. Quieting Title § 2—

An action attacking a mortgage executed at the insistence of the creditor to secure the difference between the original indebtedness and the amount loaned by the Federal Land Bank Commissioner to satisfy the original mortgage indebtedness, plaintiff having been in actual possession of the land from the date of said mortgage, is not barred by the three year statute of limitations, G. S., 1-52 (9), since it is an action to remove cloud on title which is a continuing one to which the statute is not applicable.

APPEAL by plaintiff from *Clement, J.*, at November Term, 1946, of ROWAN.

Civil action instituted 24 December, 1945, for permanent injunction against foreclosure of mortgage deed and for cancellation thereof and to remove same as cloud upon title.

Plaintiff alleges in his complaint, and on the trial in Superior Court offered evidence tending to show in substance these facts:

1. He, the plaintiff, is seized in fee and in possession of a certain tract of land in Rowan County, North Carolina, on which on 29 July, 1931, he and his wife executed to defendant J. C. Trexler a certain mortgage deed as security for a note in the sum of $3,750.

2. In 1936 Cauble, at request of J. C. Trexler, applied to the Federal Land Bank of Columbia, South Carolina, for a loan with which to pay off the said indebtedness to said Trexler. Pursuant thereto upon appraisal of the farm of Cauble, the Land Bank proposed to lend him the sum of $2,600 (1) on the express condition that Trexler, as mortgagee and holder of Cauble's note, would accept same in full of the indebtedness represented by the note, and (2) upon the further condition that said Trexler would not demand or take or accept from Cauble and his wife any additional note or mortgage or obligation of any kind securing the balance due at time of the loan by the Land Bank to Cauble. And in order to induce the Land Bank to lend said amount to Cauble, Trexler signified his willingness to forego any and all amounts due him in excess of the Land Bank loan, and, in connection with the Cauble application for said loan, signed a statement and agreement of creditor (purported copy of which was attached to the complaint, as an exhibit), addressed "To the Federal Land Bank of Columbia, and/or The Land Bank Commissioner, and The Federal Farm Mortgage Corporation, and to the applicant(s) for a loan therefrom to pay the indebtedness herein described," reading in brief as follows: "The undersigned, the owner and holder of that certain note and deed of trust . . . dated 29 July, 1931, . . . executed and owing by M. A. Cauble and wife, Lillie Cauble to J. C. Trexler . . . evidencing and securing an indebtedness in the principal sum of $3750, bearing interest at six per centum per annum . . . upon which the present unpaid balance . . . is $3850, has agreed and

does hereby agree to accept in full settlement of said indebtedness the sum of $2,434.75. Upon receipt of said amount the undersigned will cancel and satisfy the instruments representing, evidencing and securing the said indebtedness, or, at the request of the Federal Land Bank of Columbia, will transfer said instruments to it. The cancelled and satisfied or assigned instruments will be forwarded to the person designated by The Federal Land Bank of Columbia, upon receipt of a check or draft for the amount the undersigned has agreed to accept. The undersigned has no understanding or agreement with the applicant(s) or anyone acting for him or them that the undersigned is to be paid an additional amount upon said indebtedness, directly or indirectly, in cash or otherwise, or that the undersigned will be given any security or evidence of indebtedness therefor; and the undersigned will not demand or accept payment or any evidence of indebtedness or security for the difference, or any part thereof, between the total amount of said indebtedness and the amount herein stated and agreed to be accepted in full settlement thereof. The indebtedness above described is the only indebtedness owed by the applicant(s) to the undersigned. This statement and agreement is made to assist the above named applicant(s) to obtain a loan(s)."

M. A. Cauble and his wife, as applicants, and in writing, acknowledged that the above statement is correct, and that they consent to the provisions thereof. (Here it may be noted that the date of the exhibit as shown in the record on the appeal "25th day of June, 1946," being manifestly erroneous, the original as introduced in evidence on trial below was certified by the Clerk of Superior Court of Rowan County, upon writ of *certiorari* issued *ex mero motu,* and it is seen that the correct date is the "25th day of June, 1936").

3. After the agreement with The Land Bank and with Cauble, and after the said loan had been consummated, J. C. Trexler demanded of Cauble a note for the difference between the amount due on the original note and the amount of the loan from the Land Bank, $2,434.75, and a second mortgage on the same land securing the same,—and "plaintiff, under the circumstances, not knowing what to do, executed a note and mortgage for $1,785.87."

4. Thereafter, during more than nine years demands by J. C. Trexler, and A. R. Trexler as assignee for payment of said note, last signed, were made upon Cauble, and he has consistently refused to pay anything on the principal or interest thereof, claiming at all times that the note and mortgage are null and void and uncollectible. And on 28 November, 1945, J. C. Trexler and A. R. Trexler, acting under the alleged second mortgage, so signed by Cauble, advertised the land for sale, on certain date at the courthouse door in Salisbury.

The plaintiff Cauble testified in detail as to circumstances under which he and his wife, after the Land Bank loan had been consummated and

the checks signed over by them to J. C. Trexler, had signed the note and second mortgage. When Trexler said he had to have a second mortgage, he, Cauble, protested—but, quoting him, "I got to where I couldn't talk any more. I sat down and I said 'Go ahead and make it $2,200 or $22,000.' I told him it wouldn't be worth a cuss after he had signed up what he had with the Bank . . ." And then on cross-examination, this question was asked plaintiff: "I ask you if you don't know that you and Trexler talked this matter over and that it was thoroughly understood that you were to give a mortgage for the balance?", to which plaintiff answered: "I never knowed a thing about the second mortgage, and he never mentioned it until he got me in town at the last pinch. If he had mentioned second mortgage to me, I never would have done it."

Plaintiff further alleges in substance (1) that said note and mortgage deed are without consideration, illegal and unenforceable, and afford defendants no legal right or authority to proceed under the mortgage to advertise and sell at public auction plaintiff's lands, and that the unlawful and wrongful conduct of defendants in the purported advertisement and sale will work irreparable damage to plaintiff, for which there is no adequate remedy at law; and (2) that the note and the mortgage deed purporting to secure the note are a cloud upon plaintiff's title to the land to which it relates.

Thereupon plaintiff prays (1) that defendants be permanently restrained and enjoined from selling said land, under said mortgage deed, (2) that said mortgage deed be removed as a cloud upon plaintiff's title, (3) that said note and mortgage deed be canceled; and (4) that he have such further relief in the action as he may be entitled to in law and equity.

Defendant, answering the complaint, pleads (1) that plaintiff and his wife in signing the note and second mortgage acted voluntarily, and with knowledge of all the facts and circumstances existing at the time, and plaintiff, his wife now being dead, is estopped, and barred of right to maintain this action, (2) that plaintiff ratified the note and second mortgage by part payment of interest accrued on the note, and (3) that plaintiff's right to maintain this action is barred by the three year statute of limitations.

At the close of plaintiff's evidence, motion of defendants for judgment as of nonsuit was allowed. From judgment in accordance therewith, plaintiff appeals to Supreme Court and assigns error.

Woodson & Woodson for plaintiff, appellant.

R. Lee Wright for defendants, appellees.

WINBORNE, J. The evidence shown in the record on this appeal, considered in the light most favorable to plaintiff and under applicable

principles of law, is sufficient, in our opinion, to take the case to the jury. Hence, appellant's exception to the judgment from which this appeal comes to this Court is well founded, and is sustained.

It is a general rule of law that agreements against public policy are illegal and void. *Burbage v. Windley,* 108 N. C., 357, 12 S. E., 839, 12 L. R. A., 409; *Phosphate Co. v. Johnson,* 188 N. C., 419, 124 S. E., 859.

Agreements are against public policy when they tend clearly, among other things, to injure "the public confidence in the purity of the administration of the law." And where the law-making power speaks on a particular subject over which it has power to legislate, public policy in such cases is what the law enacts. 12 Am. Jur., pp. 662, 664, 668. Hence an agreement which violates a provision of a statute or which cannot be performed without a violation of such provision is illegal and void. *Phosphate Co. v. Johnson, supra.*

In connection with the subject of the case in hand, it is seen that the Emergency Farm Mortgage Act of 1933, 48 Stat. at Large, 48, 12 USCA, Subchapter II, Sections 1016, *et seq.,* pertaining to and authorizing loans to farmers by Land Bank Commissioner for "any of the purposes for which Federal Land Banks are authorized by law to make loans," to be secured by first or second mortgages upon farm property, real or personal, provides, among other things: That "the amount of the mortgage given by any farmer, together with all prior mortgages, or other evidence of indebtedness secured by such farm property of the farmer, shall not exceed 75 per cent of the normal value thereof, as determined upon an appraisal made pursuant to the preceding subchapter, as amended"; and that "no loan shall be made . . . unless the holder of any prior mortgage or instrument of indebtedness secured by such farm property arranges to the satisfaction of the Land Bank Commissioner to limit his right to proceed against the farmer and such farm property for default in payment of principal."

The purpose of the statute becomes a public policy. The primary object of the statute is relief to farmers from the load of oppressive debts, and any benefit to the creditors of the farmer is merely incidental. Compare Annotation 125 A. L. R., 809. Hence, if Land Bank Commissioner as condition precedent to making loan to debtor with which to pay existing indebtedness, required the creditor to agree to a scaling down of debt, on terms set forth in purported statement and agreement of creditor introduced in evidence, mortgage deed taken thereafter by creditor to secure a note for difference between original indebtedness and the amount received in satisfaction thereof, would be void as against public policy.

While this particular subject does not seem to have been treated heretofore by this Court, the courts of other jurisdictions have dealt with it

in well considered opinions, and have held almost uniformly, that notes and mortgages, given by a former debtor to his creditor to make up and secure the difference between the amount paid under a scaledown settlement pursuant to the Emergency Farm Mortgage Act of 1933, *supra,* and the amount originally owed, are contrary to public policy and void. See *Federal Land Bank of Columbia v. Blackshear Bank,* 182 Ga., 657, 186 S. E., 724; *Jones v. McFarland,* 178 Miss., 282, 173 So., 296; *Federal Land Bank v. Koslofsky,* 67 N. D., 322, 271 N. W., 907; *Kniefel v. Keller,* 207 Minn., 109, 290 N. W., 218; *Oregon & Western Colonization Co. v. Johnson,* 164 Ore., 517, 102 P. (2d), 928; *Robinson v. Reynolds,* 194 Ga., 324, 21 S. E. (2d), 214. See analogous cases as to such transactions under the Home Owners Loan Act of 1933, 12 USCA, Section 1461, *et seq.,* Annotations 110 A. L. R., 250, 121 A. L. R., 119, 125 A. L. R., 809.

In *Robinson v. Reynolds, supra,* the Supreme Court of Georgia, in an opinion by *Jenkins, J.,* appropriately sums up the principle as applied in above cases in this way: "The beneficent purpose of loans made by Federal agencies under and pursuant to the Emergency Farm Mortgage Act of 1933 . . . was to enable persons in debt and without ability to make payment to constitute such agencies the sole creditors, thereby eliminating by way of compromise all other creditors. Contracts that obviously and directly tend in a marked degree to bring about results that the law seeks to prevent cannot be made the ground of a successful suit. . . . Accordingly, a new obligation assumed by a debtor to a lien creditor, in violation of the expressed terms of the creditor's acceptance, as in full payment of an amount less than his debt, from a Federal agency, making a loan to the debtor, under the farm mortgage act, of an amount insufficient to pay lien indebtedness, is void as against public policy."

However, defendants contend that plaintiff stands *in pari delicto* with them in relation to the execution of the note and second mortgage, and, hence, may not invoke the aid of equity,—that the courts will leave the parties where they found them, and will not lend aid to either of them,—citing *Waggoner v. Publishing Co.,* 190 N. C., 829, 130 S. E., 609; and *Merrell v. Stuart,* 220 N. C., 326, 17 S. E. (2d), 458. The rule there stated is the policy of the law in this State, but it has its limitations and exceptions, and is not necessarily controlling here. See 3 Pomeroy Equity Jurisprudence, 5th Ed., Sections 940, 941, and 942. *Basket v. Moss,* 115 N. C., 448, 20 S. E., 733; *Herring v. Lumber Co.,* 159 N. C., 382, 74 S. E., 1011; *Courtney v. Parker,* 173 N. C., 479, 92 S. E., 324; *Hodges v. Hodges,* opinion handed down this day, *post,* 334.

In this connection we quote from Pomeroy, *supra,* "The rule has sometimes been laid down as though it were equally universal, that where the parties are *in pari delicto,* no affirmative relief of any kind

will be given to one against the other. This doctrine, though true in the main, is subject to limitations and exceptions." Sec. 940. "Even where the contracting parties are *in pari delicto,* the courts may interfere from motives of public policy. Whenever public policy is considered as advanced by allowing either party to sue for relief against the transaction, then relief is given to him. In pursuance of this principle, and in compliance with the demands of a high public policy, equity may aid a party equally guilty with his opponent, not only by canceling and ordering the surrender of an executory agreement, but even by setting aside an executed contract, conveyance or transfer, and decreeing the recovery back of money paid or property delivered in performance of the agreement." Sec. 941. "Lastly, when the contract is illegal, so that the parties are to some extent involved in the illegality,—in some degree affected with the unlawful taint,—but are not *in pari delicto,*—that is, both have not, with the same knowledge, willingness, and wrongful intent engaged in the transaction, or the undertakings of each are not equally blameworthy,—a court of equity may, in furtherance of justice and of a sound public policy, aid the one who is comparatively the more innocent, and may grant him full affirmative relief, by canceling an executory contract, by setting aside an executed contract, conveyance or transfer . . . by means of an appropriate action not directly based upon the contract." Sec. 942.

Applying these principles, this Court in *Basket v. Moss, supra,* pertinently states that Pomeroy "calls attention to the fact that the rule *in pari delicto* is often misunderstood, and its application is properly and correctly that in such cases *'Potior est conditio possidentis'*—that is, that the Court will permit nothing to be done which will enable a party to collect from the other the fruits of his wrong. When he sues to recover, the law will not give him judgment. When he has shrewdly attempted to evade this by taking a mortgage with a power of sale, the court will, by injunction, prevent his collecting on a mortgage denounced as void by reasons of public policy."

In the light of these principles applied to the evidence offered in the trial below, it does not necessarily follow that the plaintiff is *in pari delicto* with defendants in relation to the transaction in question. But even if he be *in pari delicto* with defendants in respect thereto, we are of opinion that if the facts be as plaintiff's evidence tends to show, a court of equity will by injunction prevent defendants from collecting on the mortgage so taken.

Defendants also plead and contend that any cause of action which plaintiff may have rests on the ground of fraud, and that same is barred by the three years statute of limitations. G. S., 1-52 (9). Since plaintiff seeks to remove the second mortgage deed as a cloud upon his title to land, and since the evidence is susceptible of the inference that plain-

tiff has been in actual possession of the land from the date of the said mortgage deed, the statute of limitations so pleaded is inapplicable. The prevailing rule in such case is that the right to maintain an action to remove a cloud from a title is a continuing one to which the statute of limitations is not applicable. 44 Am. Jur., 47—Quieting Title, Sec. 63; 51 C. J., 199—Quieting Title, Sec. 126; Annotations 29 L. R. A. (N.S.), 390, to case of *Cooper v. Rhea,* 82 Kan., 109, 107 P., 799. See also *Cauley v. Sutton,* 150 N. C., 327, 64 S. E., 3, and *Sears v. Braswell,* 197 N. C., 515, 149 S. E., 846.

The demurrer *ore tenus* entered in this Court is overruled. The allegations of the complaint, liberally construed, are sufficient to state a cause of action.

The judgment as of nonsuit entered below is

Reversed.

MRS. MARY GABRIEL, WIDOW, v. TOWN OF NEWTON, EMPLOYER, AND UTICA MUTUAL INSURANCE COMPANY, CARRIER.

(Filed 9 April, 1947.)

1. Master and Servant § 40c—

The evidence tended to show that a policeman suffered acute dilatation of the heart occasioned by unusual exertion in the course of his employment. There was expert opinion evidence that such injury to the heart muscle might be permanent and progressive and there was expert testimony that there was a causal connection between this injury and a fatal heart attack occurring some ten months thereafter. *Held:* The evidence is sufficient to support the finding of the Industrial Commission that the injury to the heart caused by the unusual physical exertion was the cause of death.

2. Master and Servant § 55e—

The findings of fact of the Industrial Commission are conclusive on appeal if the findings are supported by the evidence, considered in the light most favorable for the claimant, notwithstanding that permissible inferences *contra* may be drawn from the evidence.

3. Master and Servant § 40b—

"Accident" within the meaning of the Workmen's Compensation Act is an unlooked for or untoward event which is not expected or designed by the injured employee.

4. Same—Death of policeman from heart attack resulting from injury to heart caused by unusual exertion in course of employment held result of "accident."

The findings of fact were to the effect: A policeman fifty-six years of age who was in good health and without any physical defect or disease,

arrested a young man who, because of intoxication, violently and viciously resisted. After the officer subdued him and transported him to the jail, the officer and another had to carry the prisoner up three flights of stairs because the elevator was out of order. The officer collapsed with acute dilatation of the heart due to the unusual exertion. This injury to the heart muscle was chronic and progressive and the policeman suffered a fatal heart attack some ten months thereafter. *Held:* The evidence warrants the conclusion that the injury to the heart resulted not from inherent weakness or disease but from an unusual and unexpected happening, and that therefore death resulted from an accident within the meaning of the Workmen's Compensation Act, G. S., 97-2 (f). *Slade v. Hosiery Mills*, 209 N. C., 823; *Neely v. Statesville*, 212 N. C., 365, cited and distinguished.

5. Master and Servant § 55d—

A finding of the Industrial Commission based upon sufficient competent evidence will not be disturbed because of the fact that evidence objectionable under technical rules may also have been admitted.

APPEAL by defendants from *Sink, J.*, at November Term, 1946, of CATAWBA. Affirmed.

This was a proceeding under the Workmen's Compensation Act for compensation for the death of Lee Gabriel alleged to have resulted from an injury by accident arising out of and in the course of his employment as a policeman by the Town of Newton.

The Industrial Commission awarded compensation upon the facts found, which may be summed up as follows: Lee Gabriel, 56 years of age, had been a policeman in Newton for two years or more, and was in good health without any physical defect or disease. On the night of 12 February, 1944, he was called to an industrial plant to arrest a young man under the influence of liquor. This man violently and viciously resisted, and it was only by great exertion and after a prolonged struggle that he was subdued sufficiently to be conveyed to jail. There Gabriel had to carry him up three flights of stairs, the elevator being out of order. In doing so Gabriel bore the weight of the head, shoulders and body of the man while an assistant held the prisoner's feet. The man weighed 160 or 170 pounds. On arriving at the top Gabriel collapsed. A physician was called in and diagnosed Gabriel's condition as acute dilatation of the heart due to excessive exertion. Gabriel remained in bed seven weeks. In April in attempting to push a lawn mower he had a similar attack, but later recovered sufficiently to do light work; in September he had another attack, and in December, 1944, he collapsed on the sidewalk and died in a few minutes. In the opinion of medical experts there was a causal connection between the original instance of overexertion, which affected the structure of his heart tissues, and his subsequent death; and that the injury to the heart muscles in February would have been an important contributing factor in the development of later attacks, including the fatal one in December, 1944. It was

testified that his heart was "damaged to some extent in February, and that heart damage went on with him." It was further testified that in case of acute dilatation of the heart due to exertion "the blood more or less piles up, the muscles become weakened or overexercised and overused; and the blood piles up in the left ventricle and stretches, and the heart itself becomes boggy and loose and does not function normally, does not aerate the blood as it should." The damage is muscle damage to the blood vessels. If the heart muscle itself was stretched, "you could have had a progressive involvement."

The Industrial Commission found that the unusual physical exertion required in making and securing the arrest under the circumstances was an unlooked for and untoward event which was not expected or designed by Gabriel, and that his death resulted from an injury by accident arising out of and in the course of his employment by the Town of Newton. Compensation was awarded.

On appeal to the Superior Court, the award of the Industrial Commission was affirmed, and the defendants excepted and appealed to this Court.

Aiken, Patrick, Murphy & Harper for plaintiff, appellee.

Smathers & Meekins and Smathers & Smathers for defendants, appellants.

DEVIN, J. The defendants' appeal presents at the outset the question whether the findings of fact upon which the award of compensation to the claimant was predicated were supported by the evidence. However, upon examination of the record and considering the evidence therein set out in the light most favorable for the claimant, we think the facts found are supported by the testimony offered, and hence must be held conclusive. Permissible inferences *contra,* which might be drawn from the testimony, would not warrant the court in setting aside the findings of the Commission. *Rewis v. Ins. Co.,* 226 N. C., 325, 38 S. E. (2d), 97; *Edwards v. Pub. Co., ante,* 184.

The defendants' chief ground of attack upon the judgment below is that upon the facts found and appearing in evidence the conclusion is not warranted that the death of Lee Gabriel resulted from an injury by accident, and hence was not compensable under the statute, G. S., 97-2 (f).

An accident as the word is used in the Workmen's Compensation Act was defined in *Love v. Lumberton,* 215 N. C., 28, 2 S. E. (2d), 121, as "an unlooked for and untoward event which is not expected or designed by the injured employee"; and in *Slade v. Hosiery Mills,* 209 N. C., 823, 184 S. E., 844, as "a result from a fortuitous cause"; and in *Edwards*

v. Pub. Co., supra, as "an unexpected or unforeseen event; an unexpected, unusual or undesigned occurrence."

In the case at bar it appears from the findings of the Industrial Commission and the evidence in support thereof that prior to the happening upon which the claim is based the deceased was in good health and without any physical defects or disease, and that in attempting to make an arrest he was resisted with unusual vigor, and subjected to overexertion in subduing a young man rendered violent and vicious by drink, and that in consequence of having to carry the heavy weight of his prisoner (170 pounds) up three flights of stairs he suffered physical collapse which the physician diagnosed as acute dilatation of the heart brought on by excessive exertion. There was testimony from medical experts from which the Commission drew the permissible inference that overexertion in the manner described caused a physical injury to the tissues of Gabriel's heart in the stretching of the muscles of the heart, and that this was capable of progressive involvement. The inference is permissible from the medical testimony adduced from those who examined him, as well as from the electro cardiogram that a physical injury resulted from this unusual and unforeseen occurrence, and that there was evidence of a perceptible damage to tissues connected with the functioning of his heart. Due to the rhythmic character of heart action, the injurious effects of a severe strain of the heart muscles may be progressive.

There is authority for the view that a stretching or giving of the heart muscle, caused by unusual exertion, may occur in normal individuals, and that the outcome depends upon pre-existing conditions, age of the person, and the severity of the strain (Goldstein & Shabat on Medical Technique, 369); and that a severe muscular exertion may cause injury to some of the tissues connected with heart action and initiate the development of congestive heart failure, proximately resulting in death at a subsequent period. 24 N. C. Law Review, 152.

It was also testified by medical experts that there was causal connection between the injury sustained in February, 1944, and the death of the deceased in December following, and that the injury described would have been an important contributing factor in the development of later attacks, including the fatal one in December.

It would seem from the facts found that reasonable inferences may be drawn which afford support for the conclusion reached that the deceased suffered an injury by accident within the meaning of the statute, and that death proximately resulted at length from the progressive development of the cardiac symptoms initiated by the severe strain and overexertion in February, 1944. There was evidence warranting the conclusion that the injury resulted not from inherent weakness or disease but from an unusual and unexpected happening. The circumstances, embracing the excessive exertion of subduing a recalcitrant prisoner, and

carrying the weight of his body up the stairs, indicated that the injury sustained was "a result produced by a fortuitous cause." *Slade v. Hosiery Mills, supra.* There was sufficient evidence to bring into the transaction the element of unusualness and unexpectedness from which accident might be inferred. *Moore v. Sales Co.,* 214 N. C., 424, 199 S. E., 605. The injury was not a natural and probable consequence of the work he was engaged in, but was due to an unusual and unexpected occurrence, connected with the employment. *Smith v. Creamery Co.,* 217 N. C., 468, 8 S. E. (2d), 231; *Robbins v. Hosiery Mills,* 220 N. C., 246, 17 S. E. (2d), 20. It was an untoward event without design or expectation. *McNeely v. Asbestos Co.,* 206 N. C., 568, 174 S. E., 509; *Conrad v. Foundry Co.,* 198 N. C., 723, 153 S. E., 266. As was said in *MacRae v. Unemployment Comp. Com.,* 217 N. C., 769, 9 S. E. (2d), 595, "The unusual circumstances and conditions under which said injury was produced constituted an accident arising out of his employment." The general principle underlying claimant's claim is stated in 28 R. C. L., 795, as follows: "It has very generally been held that a strain or rupture resulting from overexertion is an injury for which compensation should be allowed." And in 71 C. J., 618, it is said, "Internal injuries from unusual strain or overexertion under the same circumstances are generally held to be accidental and compensable." But the exertion must be exceptional to constitute an accident within the Act. It was said in *Brown's Case,* 123 Me., 424, "Sudden heart dilatation caused by a strain would, we think, in ordinary parlance be called accidental."

In *Moore v. Sales Co., supra,* the unusual conditions consisted in lifting a pipe of type and weight unaccustomed, causing hernia. Here, the evidence shows unusual strain from lifting a heavy body upstairs after strenuous and excessive exertion. In *Fields v. Plumbing Co.,* 224 N. C., 841, 32 S. E. (2d), 623, the Industrial Commission found that a plumber "was subjected to a greater heat beyond that the public generally who performed manual labor was subjected to at the time and place plaintiff's deceased suffered his heat stroke or in the immediate vicinity thereof," and concluded his death resulted from an injury by accident. The additional hazard created by artificial heat was held to be the super-inducing cause of the death of deceased, and the award of compensation was upheld.

Decisions from other jurisdictions based upon similar facts are in accord with the conclusion reached in the case at bar. *Green v. Bennettsville,* 197 S. C., 313; *Stier v. City of Derby,* 119 Conn., 22; *Farrel v. Ragatz Co.,* 189 Minn., 573; *Sullivan v. Aschenbach,* 33 F. (2d), 1; *Comer's Case,* 130 Me., 373; *Barcalow v. Bd. of Education,* 187 A., 32; *Big Jack Overall Co. v. Bray,* 161 Va., 446; *Indian Creek Coal & Mining Co. v. Calvert,* 68 Ind. App., 474; *Voorhees v. Schoonmaker,* 89 N. J. L., 500; *Carroll v. Industrial Com.,* 69 Col., 473, 19 A. L. R., 110;

Beck Mining Co. v. Industrial Commission, 88 Okl., 347, 28 A. L. R., 209; *Valeri v. Hibbing,* 169 Minn., 241; *Moore v. City of Patterson,* 12 A. (2d), 299; *Griffin's Case,* 315 Mich., 71; *Railway Mail Ass'n. v. Forbes,* 49 S. W. (2d), 880; *Gugon v. Swift Co.,* 229 Iowa, 625; *McCormick Lumber Co. v. Dept. Labor & Industries,* 108 P. (2d), 807, annotated in 9 Neg. & Comp. Cases (N. S.), 335, *et seq.*

The defendants rely upon *Slade v. Hosiery Mills,* 209 N. C., 823, 184 S. E., 844, and *Neely v. Statesville,* 212 N. C., 365, 193 S. E., 664, but we think these cases are distinguishable. In the *Slade case,* where compensation was denied, the Court said: "He was pursuing the general routine of his employment. Nothing unusual or unexpected took place at the mill. The weather was hot, but not excessively so. The case is free from 'injury by accident,' as that phrase is used in the Workmen's Compensation Act." In the *Neely case,* where the deceased, who was chief of the fire department, died from a heart attack brought on by fighting a fire, it appeared that the deceased had been for more than two years a sufferer from chronic cardiac condition and that "the work in which the deceased was engaged was the usual work incident to his employment." In *Buchanan v. Highway Com.,* 217 N. C., 173, 7 S. E. (2d), 382, where it was found that claimant while lifting a scoop "in the usual manner and without anything unusual happening" became sick and unable to work, compensation was denied.

The defendants' assignments of error based on exceptions to the admission in evidence of the answers of medical experts to hypothetical questions do not indicate that any material evidence was improperly considered by the Commission. In *Tindall v. Furniture Co.,* 216 N. C., 306, 4 S. E. (2d), 894, it was said, "The application of the rule of conclusiveness of the findings of the Industrial Commission as to controverted issues of fact, when based on competent evidence, is not defeated by the fact that some of the testimony offered may be objectionable under the technical rules of evidence appertaining to courts of general jurisdiction, as was pointed out in *Maley v. Furniture Co.,* 214 N. C., 589, and *Consolidated Edison Co. v. National Labor Relations Board,* 305 U. S., 197."

The judgment affirming the award of compensation by the Industrial Commission is

Affirmed.

O. E. BELL v. H. S. BROWN AND WIFE, GLADYS B. BROWN.

(Filed 9 April, 1947.)

1. Appeal and Error § 29—

Assignments of error not brought forward in the brief are deemed abandoned. Rules of Practice in the Supreme Court, No. 28.

2. Specific Performance § 4—

Where, in an action for specific performance, defendants admit the execution of the option, the burden is on defendants to prove rescission or abandonment of the agreement when relied on by them as a defense.

3. Appeal and Error § 38—

Where the charge of the court is not brought forward in the record, it will be presumed to be without error.

4. Contracts § 14: Vendor and Purchaser § 13: Frauds, Statute of, § 9—

A written contract, even though involving an interest in land, may be rescinded or abandoned by parol.

5. Same—

The rescission or abandonment of a written contract involving an interest in land must be shown by positive and unequivocal acts and conduct which are clearly inconsistent with the contract.

6. Same—

If an optionee, after the execution of the instrument giving him the right to purchase a residence upon its completion at a stipulated price, requests alterations in the plans which materially increase the cost of construction, he is guilty of conduct inconsistent with the continuance of the option to purchase for the amount stipulated, and such conduct is sufficient to support the optionor's contention that the optionee verbally released him from the option prior to the making of the alterations.

7. Same—

The evidence disclosed that during construction of a residence, alterations materially increasing the cost were made at the request of optionee. The evidence was conflicting as to whether such alterations were made before or after the execution of the option. *Held:* The conflicting evidence was properly submitted to the jury upon the optionor's contention that the optionee verbally released him from the agreement.

APPEAL by plaintiff from *Carr, J.*, at November Term, 1946, of ONSLOW.

This is an action for specific performance. It is admitted that plaintiff and the defendant, H. S. Brown, executed an agreement on 25 September, 1943, whereby the plaintiff agreed to rent from H. S. Brown for a period of three years, certain property in Richlands. The lease was to commence upon the completion of the residence then under construction on the property. On the same day the parties executed an option, under the terms of which, the plaintiff was given the right to purchase the property at any time before the expiration of the lease, for the sum of $6,000.00, less the amount paid as rent, under the terms of the lease.

It is further disclosed by the record that the defendant, H. S. Brown, entered civilian employment in the U. S. Navy, before the residence was completed. He employed J. W. Jones to finish the job. The plaintiff

took possession of the property 1 February, 1944, although the residence was not entirely finished. The total rent for the three years under the terms of the lease, was $2,700.00, and was payable upon completion of the residence. After the plaintiff had paid H. S. Brown $2,500.00, the plaintiff discovered that the property was owned by H. S. Brown and his wife, Gladys B. Brown, as tenants by the entirety and the defendants admit this form of ownership. Whereupon, the plaintiff informed J. W. Jones that Mrs. Brown would be required to sign the lease and option before the final payment of $200.00 would be made. Jones obtained the execution of the original lease and option by the defendant Gladys B. Brown, on 24 August, 1944, and thereafter delivered both instruments to the plaintiff and collected the balance due under the terms of the lease.

It is admitted that plaintiff requested the defendants to execute a conveyance to him for the property, on 25 February, 1946, and that the defendants refused to do so.

The defendants allege as a further answer and defense that subsequent to the execution of the lease and option referred to herein, the plaintiff and the defendant, H. S. Brown, agreed orally to cancel the option, and as a result of the cancellation of the option, the defendant, H. S. Brown, at the request of the plaintiff, changed the plans for the proposed residence and expended between $1,500.00 and $2,000.00 more in the construction thereof than was originally contemplated.

The defendants admit that Gladys B. Brown signed the lease and option, on 24 August, 1944, but they allege her signature was obtained by false and fraudulent representations.

At the close of the evidence the plaintiff made a motion for a directed verdict. Motion denied and plaintiff excepted.

Issues were submitted and answered as follows:

"1. Did the plaintiff release the defendant Horace S. Brown from the option dated 25 September, 1943, as alleged in the Answer. Answer: Yes.

"2. Did the plaintiff procure the execution of the paper writings dated 25 September, 1943, by the defendant, Gladys B. Brown, by false and fraudulent representations, as alleged in the Answer? Answer: ....."

Judgment was entered on the verdict. The plaintiff appeals, assigning error.

Warlick & Ellis for plaintiff.

J. A. Jones for defendants.

DENNY, J. The appellant only presents in his brief, this question: Was the plaintiff entitled to a directed verdict upon the evidence? His

remaining assignments of error will be considered as abandoned. Rule 28, Rules of Practice in the Supreme Court, 221 N. C., 562.

The admissions in the trial below eliminated all matters in controversy between the parties, except whether or not the plaintiff had released the defendant, H. S. Brown, from the option dated 25 September, 1943, and whether or not the signature of the defendant, Gladys B. Brown, to the option and lease, was obtained by false and fraudulent representations.

The execution of the lease and option having been admitted by the defendants, the burden of proof on the issues submitted rested upon them. *Faust v. Rohr,* 167 N. C., 360, 83 S. E., 622. And since the charge of the court is not brought forward in the record, it is presumed to have been given correctly in all respects. *S. v. Hill,* 223 N. C., 753, 28 S. E. (2d), 99; *S. v. Wilson,* 218 N. C., 769, 12 S. E. (2d), 654; *S. v. Hargrove,* 216 N. C., 570, 5 S. E. (2d), 852.

The plaintiff insists the evidence is insufficient to support the verdict and is relying on the cases of *Faw v. Whittington,* 72 N. C., 321, and *Miller v. Pierce,* 104 N. C., 389, 10 S. E., 554. In *Faw v. Whittington, supra,* the question involved was one of abandonment rather than of waiver or rescission by parol. In *Miller v. Pierce, supra,* it is said: "While we are of the opinion that the contract may be discharged by matter *in pais,* there must, however, be something more than the mere oral agreement of the parties." There was evidence in that case that the contract had been rescinded by parol and evidence also of other acts inconsistent with the continuance of the contract.

However, it is said in *May v. Getty,* 140 N. C., 310, 53 S. E., 75: "It is now settled that the parties to a written contract may, by parol, rescind or by matter *in pais* abandon the same. *Faw v. Whittington,* 72 N. C., 321; *Taylor v. Taylor,* 112 N. C., 27; *Holden v. Purefoy,* 108 N. C., 163; *Riley v. Jordan,* 75 N. C., 180; *Gorrell v. Alspaugh,* 120 N. C., 362." *Faust v. Rohr, supra; Public Utilities Co. v. Bessemer City,* 173 N. C., 482, 92 S. E., 331; *Danville Mfg. Co. v. Gallivan Building Co.,* 177 N. C., 103, 97 S. E., 718; *Wells v. Crumpler,* 182 N. C., 350, 109 S. E., 49.

It would seem from an examination of our decisions that while a written contract, involving an interest in land, may be waived or rescinded by parol, but in the absence of a mutual agreement, an abandonment, or waiver of such a contract is to be inferred only from such positive and unequivocal acts and conduct as are clearly inconsistent with the contract. *Aiken v. Atlantic Insurance Co.,* 173 N. C., 400, 92 S. E., 184. "Assuming the law to be that a vendee can abandon by matter *in pais* his contract of purchase, it is clear that the acts and conduct constituting such abandonment must be positive, unequivocal and inconsistent with the contract. The mere lapse of time or other delay in asserting his claim unaccompanied by acts inconsistent with his rights,

will not amount to a waiver or abandonment," *Faw v. Whittington, supra. R. R. v. McGuire,* 171 N. C., 277, 88 S. E., 337; *Wells v. Crumpler, supra; Mfg. Co. v. Lefkowitz,* 204 N. C., 449, 168 S. E., 517; *Furniture Co. v. Cole,* 207 N. C., 840, 178 S. E., 579; *Miller v. Teer,* 220 N. C., 605, 18 S. E. (2d), 173.

Stacy, C. J., in speaking for the Court, in *Stevens v. Turlington,* 186 N. C., 191, 119 S. E., 210, said: "It may be well to note that evidence of a parol discharge of a written contract within the statute of frauds, or of an equitable estoppel matter *in pais,* must be 'positive, unequivocal, and inconsistent with the contract.' *Faw v. Whittington, supra; Miller v. Pierce, supra.* Here the allegations of the verified complaint, and other evidence offered, are of such character; but the credibility of such evidence, of course, on the hearing, will be a matter for the jury."

The evidence of the plaintiff tends to show that substantially all of the changes in the plans for the construction of the residence, were made prior to the execution of the lease and option. While the defendant offered evidence tending to show that plaintiff informed the defendant, H. S. Brown, that he was not interested in buying the property and pursuant to this understanding the defendant, who was a contractor, made changes in the plans at the request of the plaintiff and his wife and expended between $1,500.00 and $2,000.00 more in constructing the residence than would have been required for its completion according to the original plans. If the changes were made after the execution of the lease and option, at the request of the plaintiff and his wife, and such changes involved a substantial increase in the cost of the residence, as contended by the defendants, such request would have been inconsistent with the continuance of the option to purchase for a stipulated amount.

We think the evidence bearing on the waiver or rescission of the option, although sharply conflicting, was sufficient to carry the case to the jury on the first issue. The jury has decided the issue in favor of the defendants, and upon this record the plaintiff is not entitled to his motion for a directed verdict in his favor.

The result will not be disturbed.

No error.

MRS. LORETTA NEWCOMB TOMLINS, BY HER NEXT FRIEND, FRANK M. LEDBETTER, v. ETTA LEE CRANFORD AND HER HUSBAND, FLOYD CRANFORD.

(Filed 9 April, 1947.)

1. Trial § 4—

Nothing else appearing, the trial court has the discretionary power to deny a motion for a continuance for absence of counsel.

2. Appeal and Error § 22—

The Supreme Court can judicially know only what appears of record.

3. Appeal and Error § 7: Trial § 21—

An exception to the refusal of a motion for judgment as of nonsuit which is made for the first time at the conclusion of all the evidence presents no question for review.

4. Deeds § 2a—

Evidence that prior to the execution of the deed, the grantor had been adjudged insane, with other evidence that grantor did not have sufficient mental capacity to know and understand what she was about when she signed the deed, and that defendants had notice of grantor's insanity, *is held* sufficient to be submitted to the jury in grantor's action, brought by her next friend, to set aside the deed on the ground of mental incapacity.

5. Insane Persons § 4½—

Where judication of insanity is shown there is a presumption that insanity continues.

6. Insane Persons § 11—

A deed executed by a person who has been adjudged to be insane, *sans* proof of restoration of sanity, is void.

7. Husband and Wife § 13a: Principal and Agent § 7b—

Where a husband acts for his wife in the negotiations and in procuring the execution of a deed to her, notice to him is notice to her, and she cannot claim under the deed and at the same time deny the fact of agency.

8. Cancellation of Instruments § 15—

Where a deed is set aside for mental incapacity of the grantor, but the decree does not adjudicate defendants' claim for a return of the purchase price and for the cost of improvements, the cause must remain on the docket, at the election of defendants, for determination of defendants' rights in respect thereto.

APPEAL by defendants from *Clement, J.*, at September Term, 1946, of MONTGOMERY.

Civil action to annul a deed for want of mental capacity of the grantor.

In August 1934 plaintiff was committed to the State institution for the insane at Morganton, N. C. In May 1941 the directors of said hospital ordered "that she be discharged from said hospital and delivered to the proper person or authority, and that entry be made that said patient is discharged as Improved . . ."

On 20 February 1946 plaintiff executed a deed to defendant Etta Lee Cranford for two small tracts of land containing a total of twelve acres, for the recited consideration of $500. Defendant Floyd Cranford bargained for the land, procured the preparation and execution of the deed, and otherwise handled the transaction in behalf of his wife, the grantee.

He approached a lawyer about preparing a deed and was informed that plaintiff had been to Morganton and could not give a deed; that a next friend would have to be appointed; and that, to get a good deed, it would have to go through court. He then went to someone else, had a deed prepared, and presented it to plaintiff for her signature. After the deed was executed he made certain improvements on the land of the value, as defendants allege, of $1,500.

The cause was duly calendared for trial at the September Term 1946. Being duly reached and called for trial "the defendant, Floyd Cranford, moved the Court for a continuance of the case for the reasons that his attorney, J. G. Prevette, Asheboro, N. C., was not in Court. Motion denied. Defendants except."

The jury having found for their verdict that plaintiff, on 20 February 1946, did not have sufficient mental capacity to execute a valid conveyance and that defendants, at the time, were aware of her mental incapacity, the court signed judgment vacating and annulling said deed. Defendants excepted and appealed.

Currie & Garriss for plaintiff appellee.

J. G. Prevette for defendant appellant.

BARNHILL, J. The record states that the case was called at a time counsel for defendants was not in court and the court denied a motion to continue for that reason. Nothing further is made to appear. Hence the disposition of the motion was within the discretion of the presiding judge. But see *Moore v. Dickson,* 74 N. C., 423.

The defendants, it is true, set forth in their brief certain facts, controverted in part by plaintiff, leading up to and causing the absence of counsel at the time the case was unexpectedly reached for trial. But the Supreme Court can judicially know only what appears of record. *S. v. DeJournette,* 214 N. C., 575, 199 S. E., 920; *Utilities Com. v. Kinston,* 221 N. C., 359, 20 S. E. (2d), 322; *S. v. Morgan,* 225 N. C., 549.

Perhaps defendants may draw some consolation from the provisions of G. S., 1-220. At least the procedure therein provided is still open to them.

The motion to dismiss as in case of nonsuit was made for the first time at the conclusion of all the evidence. Hence the exception thereto brings up no question for review. Even so, under the circumstances, we have reviewed the testimony and find therein evidence sufficient to require the submission of appropriate issues to the jury.

"When insanity is once shown to exist, there is a presumption that it continues." *Beard v. R. R.,* 143 N. C., 137; *Wood v. Sawyer,* 61 N. C., 251 (277); *In re Craven,* 169 N. C., 561, 86 S. E., 587. Furthermore

there was evidence, other than the adjudication, that plaintiff did not have sufficient mental capacity to know and understand what she was about when she signed the deed.

A deed executed by a person who has been adjudged to be insane, *sans* proof of restoration of sanity, is void. *Wadford v. Gillette,* 193 N. C., 413, 137 S. E., 314. For this reason, perhaps, defendants' knowledge or want of knowledge of plaintiff's mental condition was immaterial. This we need not decide, for the jury found, on competent evidence coming from defendants, that they had notice of plaintiff's insanity.

But defendants contend that this evidence of notice related only to the male defendant, that the *feme* defendant is the grantee, and there is no evidence she had any knowledge thereof. This contention is supported by the record, but it will not avail them. All the evidence tends to show that the male defendant, in procuring the deed, was acting as agent for his wife. Notice to him was notice to her. She now ratifies his acts and claims the fruits of his efforts. She cannot claim the one and escape the other.

Defendants plead the right to a return of the purchase price and to compensation for improvements or betterments in the event the annulment of the deed is decreed, and pray judgment therefor. While the court submitted an issue as to the value of the alleged improvements it gave no charge thereon and the issue was not answered by the jury. The court, after verdict, rendered no decree in respect thereto. Hence the cause must remain on the docket, at the election of the defendants, for the determination of this plea as to which we express no opinion.

The other exceptions entered by the defendants likewise fail to disclose error. Hence, on this record, the judgment must be affirmed.

No error.

STATE v. HOWARD E. MOORE.

(Filed 9 April, 1947.)

1. Rape § 25—Evidence held insufficient to show that assault was made with intent to ravish notwithstanding any resistance prosecutrix might make.

Evidence that defendant, a male, followed prosecutrix along a residential street about ten o'clock at night, passed her, later stepped in front of her, and then stepped in front of her again to prevent her from crossing the street, followed her back to the sidewalk and took her by the arm and threatened to blow her brains out if she tried to run or scream, that prosecutrix did scream and run to the nearest house and that defendant followed her to the embankment by the sidewalk in front of the house, but pursued her no farther, *is held* insufficient to show intent on the part of

defendant to ravish prosecutrix in any event notwithstanding any resistance on her part, and defendant was entitled to nonsuit on the charge of assault with intent to commit rape.

2. Same—

Where in a prosecution under a bill of indictment charging assault with intent to commit rape the evidence discloses an assault but is insufficient to prove intent to ravish prosecutrix notwithstanding any resistance on her part, defendant is entitled to nonsuit on the offense charged, but is not entitled to his discharge, since he may be convicted under the bill of indictment for assault upon a female as though this offense had been separately charged in the bill.

APPEAL by defendant from *Nimocks, J.*, at August Term, 1946, of PITT.

Criminal prosecution tried upon indictment charging the defendant with an assault with intent to commit rape.

The evidence tends to show that on the night of 26 May, 1946, in the City of Greenville, about ten o'clock, the prosecutrix, who was employed as cashier at the Pitt Theatre, left the theatre and started walking home. The defendant followed her, passed her and later stepped out in front of her, she started to cross the street and defendant got in front of her and she ran back to the sidewalk; he followed her and took her by the arm and said if she "tried to run or scream he would blow my . . . brains out." The prosecutrix did scream and got away from the defendant and ran to the nearest house, the home of a Mr. Suggs. The defendant followed her to the edge of the Suggs lot and was last seen by the prosecutrix on the embankment by the sidewalk in front of the Suggs house.

Verdict: Guilty. Judgment: Imprisonment in the State's Prison for not less than 7 nor more than 10 years. The defendant appeals, assigning error.

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

Wm. J. Bundy for defendant.

DENNY, J. The defendant moved for judgment as of nonsuit at the close of the State's evidence, on the ground that the evidence is insufficient to convict the defendant of an assault with intent to commit rape. The motion was overruled, but renewed at the close of all the evidence and again denied. From this ruling, the defendant appeals and assigns error.

The appellant is relying on *S. v. Massey*, 86 N. C., 658; *S. v. Jeffreys*, 117 N. C., 743, 23 S. E., 175; *S. v. Smith*, 136 N. C., 684, 49 S. E., 336;

S. v. Hill, 181 N. C., 558, 107 S. E., 140, and *S. v. Gay,* 224 N. C., 141, 29 S. E. (2d), 458.

In the case of *S. v. Massey, supra,* the defendant pursued the prosecutrix for a considerable distance and threatened to kill her if she did not stop. He continued to pursue her until she arrived in front of a house, where she was met by a colored woman. He then disappeared. This evidence was held insufficient to sustain a verdict of guilty of an assault with intent to commit rape.

The facts in the case of *S. v. Jeffreys, supra,* were substantially as follows: The prosecutrix, while going to her well, a distance of 175 yards, passed the defendant who solicited her to have sexual intercourse with him. She replied that she was not that kind of woman. Whereupon the defendant said "he was going to have it anyway," and exposed his privates. He then followed her until she crossed a fence. He threw his foot upon the fence, but went no further. This evidence was also held insufficient to sustain a conviction of an assault with intent to commit rape. To the same effect was the holding in *S. v. Hill, supra,* where the defendant went to the bedroom of the prosecutrix about eleven o'clock at night, and took hold of her hand and placed his other hand upon her head waking her up. The prosecutrix screamed, ordered him from the room, and he left immediately.

In *S. v. Smith, supra,* the defendant went to the field where the prosecutrix was hoeing cotton. After making inquiry as to where the other members of her family were, he offered to hoe out the row of cotton for her, and did so. He then threw away the hoe and grabbed her by the arm and tried to put his other arm to her neck under the chin. Upon a show of resistance, he released her and left the field. On appeal this evidence was likewise held not sufficient to sustain the verdict of guilty of an assault with intent to commit rape.

This Court said, in *S. v. Massey, supra:* "In order to convict a defendant on the charge of an assault with intent to commit rape, the evidence should show not only an assault, but that the defendant intended to gratify his passion on the person of the woman, and that he intended to do so, at all events, notwithstanding any resistance on her part. . . . The guilt of a person is not to be inferred because the facts are consistent with his guilt, but they must be inconsistent with his innocence."

And in *S. v. Gay, supra, Winborne, J.,* in speaking for the Court, said: "While the evidence shows defendant solicitous to gratify his passion on the person of the woman, it is wholly lacking in the intention 'to do so, at all events, notwithstanding any resistance on her part.' Yet the evidence in the record would warrant the finding of a verdict of guilty of an assault upon a female person, G. S., 15-169; G. S., 14-33; *S. v. Smith, supra* (157 N. C., 578, 72 S. E., 853); *S. v. Williams,* 186 N. C., 627, 120 S. E., 224, and cases cited . . ."

In each of the above cases upon which the defendant is relying, it was pointed out, however, that the evidence was sufficient to support a verdict of guilty of an assault and a new trial was ordered.

The State, on the other hand, is relying on *S. v. Mitchell,* 89 N. C., 521; *S. v. Williams,* 121 N. C., 628, 28 S. E., 405; *S. v. Garner,* 129 N. C., 536, 40 S. E., 6; *S. v. Leak,* 156 N. C., 643, 72 S. E., 567, and similar cases.

The above cases are distinguishable from the one before us and the cases hereinbefore cited, except that of *S. v. Garner, supra,* in which case the verdict below was sustained by a divided Court.

We concede this is a border line case. The prosecutrix was the cashier at a local theatre, and had been engaged in that capacity until immediately before she started home on the evening in question. The intent of the defendant may have been to rob her. The assault took place in a residential section of the City of Greenville. While his conduct was reprehensible and unlawful, we hardly think the evidence sufficient to support a verdict of assault with intent to commit rape. Therefore, the defendant is entitled to a nonsuit upon the charge of assault with intent to commit rape, but he is not entitled to his discharge. He could have been convicted of an assault on a female under the present bill of indictment, the same as if such an offense had been separately charged therein. *S. v. Jones,* 222 N. C., 37, 21 S. E. (2d), 812; *S. v. Hill, supra.* Furthermore, it is admitted by the defendant "that the evidence is sufficient to make out a case of assault on a female."

For the reason herein pointed out, there should be a new trial, and it is so ordered.

New trial.

H. P. BRANDIS ET AL. v. TRUSTEES OF DAVIDSON COLLEGE ET AL.

(Filed 9 April, 1947.)

Declaratory Judgment Act § 2a: Trusts § 20—

While proceedings under the Declaratory Judgment Act, G. S., 1-253, *et seq.*, will be given wide latitude, a proceeding may not be maintained thereunder by trustees under a will to invoke the general equitable powers of the court to authorize them to sell, mortgage or lease a part of the trust property for benefit and preservation of the trust, since such remedy goes far beyond a mere declaration of plaintiffs' rights or a mere obtaining of direction to plaintiffs to do or refrain from doing any act in their fiduciary capacity, and judgment entered in such proceeding will be vacated and the proceeding dismissed.

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

APPEALS by plaintiffs and defendants from *Clement, J.*, at November Term, 1946, of ROWAN.

Proceeding under Declaratory Judgment Act to sell part of trust property for benefit and preservation of trust.

Under the will of Maxwell Chambers, who died in 1855, certain lots in the Town of Salisbury are devised to the Elders of the First Presbyterian Church of Salisbury and their successors in office, "in trust for the use of said Church . . . and to be an appendage to said Church, reserving and withholding from them the right of selling the same or any part of them, but it is my desire that they (the Elders &c) shall so partition said lots off and have them so improved with buildings as will by their rent produce a Rev*inew* for said Church . . . if the Elders fail or neglect to execute the trust and conditions herein required of them, then . . . any . . . property or funds that I have or do hereinafter devise to the said Elders in *trust* for the use and benefit of said Church shall pass over and become vested in the Trustees of Davidson College and their successors *in trust* for the use and benefit of said institution on condition they keep the enclosure or building around and over our family burying ground & the church property in a good state of repair."

Plaintiffs allege that by reason of changed conditions, the lots devised to them in trust by Maxwell Chambers have now become very valuable business property and that plaintiffs "are not financially able to develop and handle the same profitably, and are unable adequately to partition off said lots and have them improved with buildings as will by their rent produce a revenue for said Church . . . and that said lots are, and will continue to be, a burden and not a benefit to said Church for the reason that plaintiffs are not financially able to keep up, develop and maintain the same adequately."

Wherefore, the plaintiffs ask to be authorized "to sell, mortgage, and/or lease the Church Square lots either as a whole or in parts, and, subject to the orders of the court, apply the proceeds to the erection . . . of a new Church and Sunday school building or buildings, and the creation of a reasonable maintenance fund for the same."

The heirs of the testator filed answer and cross-action, asserted failure of the trust and asked that the Trustees of Davidson College be required to assert their rights or disavow any claim to the property, and in the latter event, the heirs claim the property by forfeiture and reverter. Plaintiffs demurred to this cross-action. Overruled; exception.

The Trustees of Davidson College filed answer, renounced none of their rights and asked for protection of same.

The court entered judgment in accordance with the prayer of the complaint, and adjudged that the heirs at law and next of kin of the testator recover nothing by their cross-action.

Plaintiffs appeal from failure to sustain their demurrer to the cross-action.

The heirs at law of Maxwell Chambers appeal from the court's findings and judgment.

Craige & Craige, Clarence Kluttz, and Kerr Craige Ramsay for plaintiffs, appellants-appellees.

J. M. Broughton for heirs-at-law of Maxwell Chambers, defendants, appellants.

John C. Kesler, counsel for guardian ad litem, appellant.

No counsel for Trustees of Davidson College.

STACY, C. J. We think the parties have misconceived their rights and remedies. What the plaintiffs really want is advice and direction of a court of equity in the administration of a testamentary trust. Yet, under a will which specifically withholds from the plaintiffs the right to sell the trust property, authority is sought in a proceeding under the Declaratory Judgment Act, G. S., 1-253-267, "to sell, mortgage, and/or lease" said property subject to the orders of the court; and this in the face of a provision in the will that if the plaintiffs "fail or neglect to execute the trust and conditions herein required of them" the trust property "shall pass over and become vested in the Trustees of Davidson College," in trust and on condition stated.

The problem confronting the plaintiffs is how to invoke the aid of a court of equity without evoking the devise over. This question was not mooted on the hearing. 16 Am. Jur., 282. Nor was it apparently in mind when the pleadings were drawn. The heirs of the testator have no present interest in the matter, and the issues raised by them would seem to belong exclusively to the plaintiffs and the Trustees of Davidson College. The real parties in interest have apparently refrained from joining issue in the matter.

While proceedings under Art. 26 of the General Statutes—Declaratory Judgments—have been given a wide latitude, *Insurance Co. v. Wells,* 225 N. C., 547, 35 S. E. (2d), 631; *Johnson v. Wagner,* 219 N. C., 235, 13 S. E. (2d), 419, nevertheless they are not without limitation, and it can hardly be said the court is expected to lend its general equity jurisdiction to such proceedings. 16 Am. Jur., 291. The purpose of the statutory enactment is to grant "declaratory relief" and remove uncertainties when properly presented. G. S., 1-256; *Light Co. v. Iseley,* 203 N. C., 811, 167 S. E., 56; *Walker v. Phelps,* 202 N. C., 344, 163 S. E., 726. Here, the plaintiffs are seeking to go far beyond the mere declaration of their rights, or obtaining direction "to do or abstain from doing any particular act in their fiduciary capacity." G. S., 1-255.

They frankly concede the necessity of invoking the general equity powers of the court. Their most pressing need just now would seem to be an escape from some of the allegations of the complaint. *Jones v. Habersham,* 107 U. S., 179, 27 L. Ed., 401. This we are disposed to grant by vacating the judgment and dismissing the proceeding as being in excess of the statutory authorization therefor. *Tryon v. Power Co.,* 222 N. C., 200, 22 S. E. (2d), 450; 16 Am. Jur., 302; 87 A. L. R., 1205.

Judgment vacated; proceeding dismissed.

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

F. A. WHITE AND WIFE, INA M. WHITE, v. MARTHA WOODARD AND L. Z. WOODARD.

(Filed 9 April, 1947.)

1. Boundaries § 2b—

A call in a deed to a stake on a ditch and then with the ditch takes the line to the center of the ditch unless a contrary intent appears from the language of the instrument.

2. Same—

Where a call in a deed takes the boundary line to the center of a ditch, subsequent widening of the ditch would alter the center line in the direction in which the widening occurs, which change might be material, particularly in respect to urban property, and conflicting evidence as to subsequent changes in the width of the ditch and the consequent changes in the center line is properly submitted to the jury under proper instructions from the court.

3. Adverse Possession § 19—

In this processioning proceeding to locate the true boundary between the urban lands of the parties, plaintiffs' evidence was to the effect that they had used the strip of land in dispute as a driveway for ingress and egress to their premises for all purposes for the statutory period, that the respective parties had made aprons on the contiguous driveways to their respective properties and that the center between these aprons was the boundary line for which plaintiffs contended. *Held:* Plaintiffs' evidence of adverse user for the purpose for which the land seemed best fitted was sufficient to have been submited to the jury, and nonsuit on the ground that such user was permissive is error.

APPEAL by plaintiffs from *Carr, J.,* at October Term, 1946, of JOHNSTON.

This was a processioning proceeding for the purpose of establishing the line between the property of the plaintiffs on the west and of the

property of the defendants on the east. The plaintiffs claim title to the narrow strip of land involved under a deed from Dr. G. B. Woodard and wife, and by adverse possession. The Clerk heard the matter and from his judgment the plaintiffs appealed, and this cause was heard before the judge presiding and a jury, and from an adverse verdict and judgment thereon, the plaintiffs appealed to the Supreme Court, assigning errors.

Paul D. Grady, Sr., and Lyon & Lyon for plaintiffs, appellants.
Hooks & Mitchiner for defendants, appellees.

SCHENCK, J. There are two critical questions involved in this appeal: First, whether the court is correct in instructing the jury on the question of boundary that "a stake on the ditch" carried the dividing line to the center of the ditch under the facts of the case and, second, whether the court was correct in nonsuiting the plaintiffs on the question of adverse possession of the strip of land in controversy.

The disputed line is between the western boundary of plaintiffs' driveway and eastern boundary of defendants' land along the location of the strip of land above referred to. The location of that line depends upon the western boundary of the strip 7½ feet wide in the deed referred to and located by reference to the calls in senior grants. The determining call is for "a stake on a ditch" and with the ditch.

It is generally accepted that where a line is run to a stream or to "a stake on a stream" and thence with the stream, the intention is to extend the line to the middle of the stream as the true boundary, unless by the language employed the contrary appears. 8 Am. Jur., p. 764, Sec. 27. There is no reason why this should not apply to a ditch, although this is a rather indefinite term: For example, the ditch might be wide or narrow—in this case something like four feet wide—with subsequent changes in width or location. Changes in its width would obviously throw the center line in the direction in which the widening occurred,—and this might make a marked difference in the boundary line between urban property where both by reason of its value and all the necessary uses to which it might be put, would become important.

In the case at bar there is evidence that the ditch had been widened during the time witnesses professed to have known it as a dividing line between the Baptist Church property and the Woodard property. Depending upon its original width the center line may have been moved eastward or westward according to the direction of the change for a sufficient distance to practically cover the main portion of the disputed strip.

The evidence as to changes made in the width of the ditch and the consequent location of the center line was conflicting, but the instructions

to the jury on this point were adequate and the exceptions of the plaintiff cannot be sustained.

The plaintiffs introduced evidence tending to show that they and the persons under whom they claimed had used the strip of land in controversy for various periods—some of the witnesses went back 30 years,—for all the purposes for which it seemed to be fitted, for exclusive ingress and egress to their premises for all purposes, including delivery of wood, farm products, groceries, and for other purposes. See testimony of Gurney Egerton, R., p. 25; L. C. Wilkinson, R., p. 25; L. F. Elmore, R., p. 26; Ruffin Atkinson, R., p. 27; S. V. Morris, R., p. 27; E. L. Etheridge, R., p. 28, and F. A. White, R., p. 28.

The plaintiff testified that he and the defendant had made aprons on the driveways so that White could enter upon his driveway and Woodard might enter upon his driveway, and at the center between these aprons was the line for which he contends.

His Honor, upon defendant's motion, nonsuited the plaintiff on his plea of adverse possession on the ground that the use was, as a matter of law, permissive. This must be held for error since the character of the acts upon the disputed strip was, under the facts of this case, for the jury. The plaintiffs are entitled to a new trial. It is so ordered.

New trial.

A. E. HODGES v. CHARLES M. HODGES.

(Filed 9 April, 1947.)

1. Trusts § 2b—

A complaint alleging an agreement by defendant to purchase plaintiff's residence at foreclosure sale under deed of trust with money borrowed from original lender and to hold same for plaintiff until he could arrange to pay off certain judgments then standing against the property, that plaintiff is now ready to pay off said judgments but that defendant refuses to comply with his part of the agreement *is held* not demurrable on the ground that plaintiff seeks to invoke a contract made for the purpose of hindering, delaying and defrauding creditors.

2. Pleadings § 18—

When fraud does not appear from the allegations of the complaint, fraud cannot be established by demurrer.

3. Actions § 3c—

While the courts will not interfere with the *status quo* where it appears the parties have contrived to defraud creditors, to injure the public or to acquire something by overreaching, such circumstances must appear from the allegations of the complaint in order to justify a demurrer thereto on this ground.

4. Pleadings § 15—

Upon demurrer the facts will be taken as alleged, and in passing on the matter the court is not concerned with how the facts may ultimately turn out to be.

5. Trusts § 2b: Ejectment § 14—

An action to establish a parol trust, with prayer that defendant be directed to execute deed to plaintiff, is not an action for recovery or possession of real property within the meaning of G. S., 1-111, and plaintiff is not entitled to have the answer stricken and judgment by default final rendered for failure of defendant to file bond. G. S., 1-211 (4).

APPEAL by plaintiff from *Sink, J.*, at October Term, 1946, of WATAUGA.

Civil action to impress parol trust on land.

The plaintiff alleges that in February, 1942, the defendant agreed to purchase plaintiff's home place at sale under foreclosure of deed of trust, with money to be borrowed from original lender, and to hold same for the plaintiff until he could arrange to pay off certain judgments, then standing against the property; that plaintiff is now ready to pay off said judgments, but defendant refuses to carry out his part of the agreement. Wherefore, plaintiff asks for declaration and enforcement of trust.

The defendant filed answer, denied the allegations of trust, and asked that he be declared the owner of the property.

There was a motion to strike the answer and for judgment by default final for failure to file bond, both of which were denied. Exception.

The defendant then interposed demurrer to the complaint, for that the contract which the plaintiff seeks to enforce was made for the purpose of "hindering, delaying and defrauding creditors." Demurrer sustained. Exception.

Plaintiff appeals from both judgments, assigning errors.

Trivette, Holshouser & Mitchell and W. H. McElwee for plaintiff, appellant.

Bowie & Bowie for defendant, appellee.

STACY, C. J. The present complaint is strikingly similar to the one in *Taylor v. McMillan,* 123 N. C., 390, 31 S. E., 730, where judgment of dismissal was reversed on appeal. A like result will follow here. There is no allegation of fraud in the complaint, and the demurrer establishes none. *Link v. Link,* 90 N. C., 235. Plaintiff's purpose was not to defraud his creditors, so he alleges, but to retrieve his ability to pay them by saving his rooftree and protecting his means and capacity to earn money. *Hughes v. Pritchard,* 122 N. C., 59, 29 S. E., 93. *Cf. Woodley v. Hassell,* 94 N. C., 157; *Morris v. Allen,* 32 N. C., 203.

It is true, the courts will not interfere with the *status quo* where it appears the parties have contrived to defraud creditors, to injure the public, or to acquire something by overreaching. *Waggoner v. Publishing Co.*, 190 N. C., 829, 130 S. E., 609; *Turner v. Eford*, 58 N. C., 106; *Taylor v. Dawson*, 56 N. C., 87; *Jones v. Gorman*, 42 N. C., 21. In all such cases, the parties are remitted to their own folly, and each is left, as best he can, to paddle his own canoe. *Williams v. McRackan*, 186 N. C., 381, 119 S. E., 746; *York v. Merritt*, 77 N. C., 213; *Dobson v. Erwin*, 18 N. C., 570. Here, we have a different fact situation, in allegation at least, and we are presently concerned only with the facts as alleged, not as they may ultimately turn out to be. See *Cauble v. Trexler*, herewith decided.

There was no error in refusing to strike out the answer and for judgment by default final. G. S., 1-211 (4). This is not an action for the recovery or possession of real property within the meaning of G. S., 1-111, but it is a suit in equity to establish and enforce a parol trust. *Owens v. Williams*, 130 N. C., 165, 41 S. E., 93; *Timber Co. v. Butler*, 134 N. C., 50, 45 S. E., 956. The prayer of the complaint is that the defendant be directed to execute deed to plaintiff and to accept payment for all amounts expended by him.

Reversed and remanded.

STATE v. J. N. CANNON.

(Filed 16 April, 1947.)

Criminal Law § 73d—

Where the death of the trial judge prevents settlement of case on appeal, and thereafter the solicitor offers to withdraw his exceptions to the defendant's statement and the Attorney-General in apt time moves in the Supreme Court that defendant's statement be taken as the case on appeal, the motion of defendant for a new trial will be denied and the motion of the Attorney-General allowed, defendant being in no position to complain of statement of case made out by himself. G. S., 15-180, G. S., 1-282, G. S., 1-283.

MOTION by defendant for new trial for want of statement of case on appeal and inability to secure same.

At the September Term, 1946, Wake Superior Court, before Thompson, J., and a jury, the defendant herein, J. N. Cannon, was prosecuted upon indictment charging him with subornation of perjury, which resulted in a verdict of guilty and sentence of three years in the State's Prison. From the judgment thus pronounced, the defendant gave notice of appeal to the Supreme Court.

Within the time allowed, or subsequently extended by the solicitor, the defendant duly served his statement of case on appeal. This was seasonably returned by the solicitor together with his exceptions and objections. Within fifteen days thereafter, and before the case and exceptions had been mailed to the judge with request to fix time and place for settling case before him, Judge Thompson met an untimely death at his home in Elizabeth City.

Thereupon, counsel for defendant filed with the Clerk of Wake Superior Court the record in the case showing an unsettled statement of the case on appeal, had the same certified to this Court, and moves here for a new trial agreeably to the usual practice in such cases. *S. v. Parks,* 107 N. C., 821, 12 S. E., 572; *Rector v. Mfg. Co.,* 188 N. C., 807, 125 S. E., 629. The motion was filed here on 29 March, 1947.

Thereafter on 1 April, 1947, the solicitor filed notice in the office of the Clerk of the Superior Court of Wake County, offering to withdraw his exceptions to the defendant's statement of case on appeal and to accept the defendant's statement thereof as the case on appeal.

Upon this notice and motion of the solicitor being certified here, the Attorney-General moves that the case be heard on the defendant's statement of case on appeal, disregarding the solicitor's abandoned exceptions and objections.

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

Edward F. Griffin and Yarborough & Yarborough for defendant.

STACY, C. J. It is conceded that the defendant's right of appeal, G. S., 15-180, and his right to have the *case* made up, or a *postea* properly prepared, G. S., 1-282, 1-283, are not to be abridged, except through his own fault or laches. *S. v. Moore,* 210 N. C., 686, 188 S. E., 421. Here, however, the Attorney-General is asking that the exceptions and objections filed by the solicitor (and later abandoned by him) be withdrawn and thus leave the defendant's statement as the case on appeal. This accords with the decisions on the subject. *Drake v. Connelly,* 107 N. C., 463, 12 S. E., 251; *Parker v. Coggins,* 116 N. C., 71, 20 S. E., 962; *Ridley v. R. R.,* 116 N. C., 923, 20 S. E., 962. *Cf. Metcalfe v. Chambers,* 188 N. C., 805, 125 S. E., 630. "We do not see how the appellant can object to the statement made out by himself." *Drake v. Connelly, supra.*

Motion of defendant, Denied.

Motion of Attorney-General, Allowed.

STATE v. J. N. CANNON.

(Filed 16 April, 1947.)

1. Criminal Law § 81c (2)—

In this prosecution for subornation of perjury, the portion of the charge excepted to, though lacking in clarity, *is held* not to contain prejudicial error when the charge is construed contextually.

2. Same—

A charge which fails to repeat in each instance the phrase "beyond a reasonable doubt" in charging upon the *quantum* of proof required to establish defendant's guilt of each of the elements of the offense, but which ends with an admonition that the jury should be satisfied from the evidence beyond a reasonable doubt as to defendant's guilt of each and every essential element of the offense as defined in order to convict, *is held* not prejudicial.

3. Perjury § 4—

The suborner of perjury and the perjurer stand upon an equal footing, especially in respect to turpitude and punishment. G. S., 14-210.

APPEAL by defendant from *Thompson, J.*, at November Term, 1946, of WAKE.

Criminal prosecution on indictment charging the defendant with subornation of perjury.

It is in evidence that on Sunday afternoon, 25 August, 1946, one Wooster King was seen by three police officers of the City of Raleigh to come out of defendant's store at 44 South Blount Street, with a bag in his hand. The officers stopped King and found an unopened bottle of wine in the bag. King said he had bought the wine from the defendant. Whereupon, the defendant was charged with violating the city ordinance against selling wine on Sunday.

When the defendant was tried in the City Court, Wooster King testified that he did not get the wine from the defendant, but that he went into the defendant's store to buy some cigarettes and carried the wine into the store with him. It later developed that King's testimony was false and that the defendant had told him what to say and promised to pay him $25.00 if he would swear falsely in the case.

Verdict: Guilty.

Judgment: Three years in State's Prison.

Defendant appeals, assigning errors.

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

Edward F. Griffin and Yarborough & Yarborough for defendant.

STACY, C. J. The principal exception appearing in the defendant's statement of the case, which was stressed on the hearing with much insistence and apparent confidence, is the one addressed to the following excerpt from the charge:

In order to convict of this crime (subornation of perjury), "the jury must be satisfied from the evidence beyond a reasonable doubt that the testimony of the witness claimed to have been suborned was false and the jury must also be satisfied from the evidence beyond a reasonable doubt that the testimony was given willfully and corruptly knowing it to be false. If the State has satisfied you from the evidence beyond a reasonable doubt that the defendant knew or believed such testimony would be false and you are satisfied from the evidence and believed to have known the witness to have been suborned willfully and corruptly testified and you must also be satisfied from the evidence and beyond a reasonable doubt that the defendant induced or procured the witness to give such false testimony."

Taken with other portions of the charge, *i.e.,* considering it contextually, we think the instruction substantially accords with what was said in *S. v. Chambers,* 180 N. C., 705, 104 S. E., 670. The latter part was not as clear as it might have been, but taken in its setting, no reversible error has been made manifest.

After recapitulating the evidence, and stating the contentions rather fully, the court gave this closing admonition to the jury:

"Remember you cannot render a verdict of guilty against this defendant unless the State has satisfied you from the evidence beyond a reasonable doubt as to the existence of each and every one of the essential elements which go to make up the crime of subornation of perjury as those elements have been enumerated to you in my instructions."

In the eyes of the law, the suborner of perjury and the perjurer stand on an equal footing, especially in respect of turpitude and punishment. G. S., 14-210. The one procures; the other performs. 41 Am. Jur., 40.

There are other exceptions which were pressed with vigor, but on the whole, it would seem that the validity of the trial should be upheld.

No error.

R. W. WINSTON, JR., v. THE WILLIAMS & McKEITHAN LUMBER COMPANY OF VIRGINIA AND J. H. HOLLINGSWORTH.

(Filed 16 April, 1947.)

1. Pleadings § 15—

The office of demurrer is to test the sufficiency of a pleading, admitting for the purpose the allegations of fact contained therein and, ordinarily, relevant inferences of fact necessarily deducible therefrom.

2. Same—

Upon demurrer, the pleading will be liberally construed with every reasonable intendment and presumption in favor of the pleader, and the demurrer will not be sustained unless the pleading is fatally defective.

3. Frauds, Statute of, § 9: Property § 2a: Vendor and Purchaser § 2c—

Standing timber is a part of the realty and a contract to sell and convey timber must be in writing and executed with the same formalities as are required in the transfer of real property, and in order to be enforceable against creditors and purchasers for value, it must be probated and registered as provided by statute.

4. Vendor and Purchaser § 5b—

A duly executed and registered contract to convey timber creates a property right in the parties thereto, and any interference by a third party with the relation and rights created thereby is actionable.

5. Vendor and Purchaser § 25b: Contracts § 26—

A complaint alleging that plaintiff was the purchaser in a duly executed and registered contract to convey timber and that defendants induced the vendors to breach their contract and sell the timber to defendants, states a cause of action.

APPEAL by defendants from *Thompson, J.*, at October Term, 1946, of WAKE.

Civil action to recover damages for procuring the breach of contract to sell timber—heard upon demurrer to complaint.

Plaintiff alleges in his complaint, in brief, these facts:

That Walter P. Stallings and his wife, being the owners of a certain tract of land in Johnston County, North Carolina, executed a written contract, dated 22 March, 1944, and duly registered in Johnston County on 24 March, 1944, by the terms of which they agreed to sell and convey by deed to plaintiff certain timber on said land; that Stallings and his wife failed and refused to deliver deed and to carry out said contract, but instead sold and conveyed said timber to defendants who have cut and removed same from said land, to the damage of plaintiff; that defendants had both constructive and actual notice that plaintiff had contracted to buy said timber; that notwithstanding such notice defendants "did wrongfully, unlawfully and maliciously persuade the said Walter P. Stallings and his wife . . . to breach their contract and to sell the timber to the said defendants"; that "such interference was the direct and proximate cause of the damage suffered by the plaintiff . . ."

Defendants demurred to the complaint for that the facts alleged do not constitute a cause of action against defendants in favor of plaintiff, and for that there is no allegation that defendants made any false or fraudulent representations to plaintiff or breached any contract with plaintiff.

The court, being of opinion that the facts alleged in the complaint are sufficient to constitute a cause of action against defendants, overruled the demurrer.

From judgment in accordance therewith, defendants appeal to Supreme Court and assign error.

Harris & Poe for plaintiff, appellee.

Wellons, Martin & Wellons for defendants, appellants.

WINBORNE, J. The sole question here is as to the correctness of the action of the judge of Superior Court in overruling the demurrer to the complaint. In the light of appropriate procedure and applicable principles of law, we have opinion accordant with the ruling.

"The office of demurrer is to test the sufficiency of a pleading, admitting for the purpose the truth of the allegations of fact contained therein, and ordinarily relevant inferences of fact necessarily deducible therefrom are also admitted . . ." *Ballinger v. Thomas,* 195 N. C., 517, 142 S. E., 761. Both the statute, G. S., 1-151, and the decisions of this Court require that the pleadings be liberally construed and every reasonable intendment and presumption must be in favor of the pleader. The pleading must be fatally defective before it will be wholly rejected. *Blackmore v. Winders,* 144 N. C., 212, 56 S. E., 874; *Ins. Co. v. McCraw,* 215 N. C., 105, 1 S. E. (2d), 369, and numerous others.

The applicable principle of law is appropriately stated in *Elvington v. Shingle Co.,* 191 N. C., 515, 132 S. E., 274, in opinion by *Brogden, J.,* in this manner: "It is a violation of a legal right, recognized by law, to interfere with contractual relations, if there be no sufficient justification for the interference." And the writer quotes from *Angle v. Chicago St. P. M. & O. R. Co.,* 151 U. S., 55, as "a clear and comprehensive statement of the principle," as follows: " 'Wherever a man does an act which in law and in fact is a wrongful act, and such act as may, as a natural and probable consequence of it, produce injury to another, and which in the particular case does produce such an injury, an action on the case will lie.' " 38 L. Ed., 55. Compare *Biggers v. Matthews,* 147 N. C., 299, 61 S. E., 55; *Bell v. Danzer,* 187 N. C., 224, 121 S. E., 448; *Bruton v. Smith,* 225 N. C., 584, 36 S. E. (2d), 9.

In this connection in the present case these principles are pertinent: Standing timber is a part of the realty. *Drake v. Howell,* 133 N. C., 162, 45 S. E., 539. Hence, a contract to sell and convey standing timber is a contract for the sale of an interest in realty, *Williams v. Parsons,* 167 N. C., 529, 83 S. E., 914, and, in order to be valid and enforceable, it must be in writing and executed with the same formalities as are required in the transfer of a like interest in any other part of the land. Tiffany on Real Property, 3rd Ed., Vol. 2, Secs. 596, 598. See also

Davis v. Harris, 178 N. C., 24, 100 S. E., 111. Such a contract to sell and convey timber must be in writing and signed. *Mizell v. Burnett,* 49 N. C., 249; *Green v. R. R.,* 73 N. C., 524; *Drake v. Howell, supra; Davis v. Harris, supra.* And in this State in order for such a contract to be valid to pass any property right as against creditors and purchasers for a valuable consideration, it must be probated and registered as provided by statute. Chapter 47 of General Statutes. When so registered such a contract is valid and binding, and constitutes a property right in the parties thereto. *Coleman v. Whisnant,* 225 N. C., 494, 35 S. E. (2d), 647, and is enforceable even as against a third party,—a purchaser for a valuable consideration. *Combes v. Adams,* 150 N. C., 64, 63 S. E., 186; *Chandler v. Cameron, ante,* 233. Thus, where there is a duly registered contract to sell and convey timber, any interference with the relation and rights created thereby is a violation of a legal right recognized by law, *Elvington v. Shingle Co., supra,* for which an action will lie for recovery of compensatory damages.

Applying these principles to the case in hand, the complaint alleges facts tending to show the existence of a valid duly registered contract between plaintiff and Walter P. Stallings and wife for the sale and conveyance by them to him of certain timber, and that defendants, third parties, with both constructive and actual notice, "did wrongfully, unlawfully and maliciously persuade the said Walter P. Stallings and his wife . . . to breach their contract and to sell the timber to the said defendants," and that "such interference was the direct and proximate cause of damage suffered by the plaintiff." These allegations in the light of the above principles of law are sufficient to state a cause of action.

Furthermore, while the question of the sufficiency of the pleading for the recovery of punitive damages is not debated in this Court, we call attention to these cases: *Richardson v. R. R.,* 126 N. C., 100, 35 S. E., 235; *Worthy v. Knight,* 210 N. C., 498, 187 S. E., 771; *Burris v. Creech,* 220 N. C., 302, 17 S. E. (2d), 123.

The judgment below is

Affirmed.

FLORENCE R. FLANNER v. SAINT JOSEPH HOME FOR THE BLIND SISTERS OF SAINT JOSEPH OF NEWARK, A CORPORATION OF THE STATE OF NEW JERSEY, TRADING IN THE STATE OF NORTH CAROLINA, COUNTY OF CRAVEN, AS ST. LUKE'S HOSPITAL.

(Filed 16 April, 1947.)

1. Bill of Discovery § 7b—

In an action to recover damages for personal injuries, an order for inspection of writings to obtain information to draft the complaint will not

lie to discover whether defendant is protected by liability insurance, since the existence of such policy would not enlarge defendant's liability and could not be pleaded.

2. Same—

An order for inspection of writings relating to financial operations of defendant to obtain facts to enable plaintiff to draw her complaint will not lie for the purpose of enabling plaintiff to determine whether defendant is a commercial rather than an eleemosynary corporation, since this remedy does not lie to forestall an anticipated defense.

3. Bill of Discovery § 7c—

An order for the production of writings to obtain evidence relating to the merits of the controversy is permissible only after issue joined.

4. Bill of Discovery § 8—

The affidavit supporting an order for the inspection of records and documents for the purpose of obtaining evidence must designate the records and documents sought to be inspected and show that they relate to the merits of the controversy.

5. Bill of Discovery § 7a—

Plaintiff may not proceed under G. S., 8-89, for an inspection of writings in defendants' possession for the purpose of obtaining information to form the basis of an action against a third party.

APPEAL by defendant from *Burney, J.*, at February Term, 1947, of CRAVEN.

Civil action heard on motion for order for examination and inspection of insurance policies, books, and records of defendant.

The plaintiff instituted this action by the issuance of summons. She thereupon filed application for an extension of time in which to file complaint, setting forth in the application that the action is to recover damages for personal injuries sustained through the negligence "of defendant, its servants, agents, employees and associates or insurer." The kind or type of transaction out of which the injuries arose is not made to appear.

Thereafter, upon notice duly given, she moved for an order for the examination and inspection of the books and records of the defendant corporation and of insurance policies or contracts in possession of defendant "to the end that she may properly lay her action and prepare her complaint." The court, being of the opinion "that such examination is necessary and proper and reasonable to enable the plaintiff to prepare and file her complaint in the above-entitled cause," ordered and directed the defendant to appear at a designated time and place and there produce for examination and inspection of plaintiff or her counsel "the books and records wherein are recorded the financial operations of the defendant in the operation of said St. Luke's Hospital, the receipt and disposition

of moneys and funds involved in the said operation, together with any and all insurance or assurance contracts relating in any way to the responsibility and liability of the said defendant or said insurance company, to the plaintiff." The defendant excepted and appealed.

R. E. Whitehurst, W. B. R. Guion, and G. B. Riddle, Jr., for plaintiff, appellee.

Barden, Stith & McCotter and W. J. Lansche for defendant, appellant.

BARNHILL, J. Plaintiff, by her motion, seeks information as to whether defendant (1) is protected by liability insurance, and (2) is a commercial rather than an eleemosynary corporation. She asserts that this information is necessary to enable her to prepare her complaint. By its appeal the defendant challenges the right of plaintiff to examine its books and policies for the purpose indicated. Hence, the validity of the order of examination is the one question presented for decision.

Plaintiff concedes she has knowledge of the occurrence, and the attendant facts and circumstances, out of which her injuries arose. That the defendant had the forethought to protect itself against such liability as the law imposes for such injuries does not serve to enlarge or extend that liability. *Borders v. Cline,* 212 N. C., 472, 193 S. E., 826; *Herndon v. Massey,* 217 N. C., 610, 8 S. E. (2d), 914, and cases cited. Hence the existence of liability insurance is not a fact to be pleaded. *Revis v. Asheville,* 207 N. C., 237, 176 S. E., 738; *Duke v. Children's Com.,* 214 N. C., 570, 199 S. E., 918; *Herndon v. Massey, supra.*

Likewise, the financial operations of defendant corporation are not relevant or material to plaintiff's cause of action. She insists, however, that defendant intends to plead in defense that it is an eleemosynary corporation and the information desired is to forestall this defense. But that issue as yet has not been raised, and is a barrier she need not attempt to hurdle until it is first erected by a plea duly made. In any event, she may not do so at this stage of the proceeding in the manner here attempted.

G. S., 8-89, provides a method for obtaining inspection of books, papers, and documents "containing evidence relating to the merits of the action . . ." But procedure thereunder, for the purpose of obtaining evidence, is permissible only after issue joined, and it must be made to appear that the information desired relates to the merits of the controversy in an action pending and at issue. *McGibboney v. Mills,* 35 N. C., 163; *Branson v. Fentress,* 35 N. C., 165; *Sheek v. Sain,* 127 N. C., 266; *Chesson v. Bank,* 190 N. C., 187, 129 S. E., 413; *Ogburn v. Sterchi Brothers Stores, Inc.,* 218 N. C., 507, 11 S. E. (2d), 460.

The affidavit supporting an order for inspection of records or documents in the possession of an adversary party for the purpose of obtain-

ing evidence must designate the records and documents sought to be inspected and show that they are material to the inquiry. *Chesson v. Bank, supra; Dunlap v. Guaranty Co.,* 202 N. C., 651, 163 S. E., 750; *Gudger v. Robinson Brothers Contractors, Inc.,* 219 N. C., 251, 13 S. E. (2d), 414.

So then, it is apparent that plaintiff's motion and supporting affidavit fail to disclose facts sufficient to sustain the order entered, without regard to whether it is to obtain information to enable plaintiff to draft her complaint, as upon its face it purports to be, or is to obtain evidence relating to the merits of the controversy. *Bailey v. Matthews,* 156 N. C., 78, 72 S. E., 92; *Fields v. Coleman,* 160 N. C., 11, 75 S. E., 1005; *Evans v. R. R.,* 167 N. C., 415, 83 S. E., 617; *Chesson v. Bank, supra; Gudger v. Robinson Brothers Contractors, Inc., supra; Mica Co. v. Express Co.,* 182 N. C., 669, 109 S. E., 853; *Patterson v. R. R.,* 219 N. C., 23, 12 S. E. (2d), 652; *Dunlap v. Guaranty Co., supra; Washington v. Bus, Inc.,* 219 N. C., 856, 15 S. E. (2d), 372; *Fox v. Yarborough,* 225 N. C., 606.

Perhaps it is not amiss to add that plaintiff may not proceed under this section of our statutes to examine the defendant's records and documents for the purpose of obtaining information to form the basis of an action against a third party insurance company.

For the reasons stated the judgment below is

Reversed.

W. F. ELLER v. A. L. FLETCHER AND WIFE, MRS. MAY FLETCHER.

(Filed 16 April, 1947.)

1. Brokers § 11—

Under the general rule, a real estate broker is entitled to his stipulated commission, or compensation for his services, when, pursuant to agreement with the owner, he has procured a purchaser ready, able and willing to purchase the property upon the terms offered by the owner.

2. Brokers § 12—

A complaint alleging that plaintiff had procured a purchaser ready, able and willing to purchase the *locus in quo* upon the terms stipulated by defendants when they engaged plaintiff's services to secure a purchaser, and that after plaintiff so advised defendants, defendants began to propose and require other conditions and changes in the terms of sale and finally withdrew the offer of sale, *is held* not subject to demurrer on the ground that the complaint disclosed that sale was not consummated, there being nothing in the complaint disclosing that consummation of sale was a condition precedent to right to commission.

ELLER *v.* FLETCHER.

APPEAL by defendants from *Grady, Emergency Judge,* at September Civil Term, 1946, of WAKE. Affirmed.

Defendants' demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action was overruled, and defendants excepted and appealed.

Wilson & Bickett and John W. Hinsdale for plaintiff, appellee.

A. J. Fletcher and F. T. Dupree, Jr., for defendants, appellants.

DEVIN, J. The plaintiff instituted action to recover commission as real estate broker, alleged to have been earned by procuring a responsible purchaser for defendants' house and lot in accordance with the terms of his agreement with the defendants. By demurrer the defendants raise the question of the sufficiency of the complaint to state a cause of action.

From an examination of the complaint it appears that plaintiff has alleged substantially that the defendants engaged his services to secure a purchaser for their property at the purchase price of $27,500 cash, plaintiff's commission to be $1,000; that pursuant to his agreement with defendants, the plaintiff secured Dr. R. N. Anderson as purchaser for the property at the price stated; that check for $500 of the purchase price was given plaintiff, the balance $27,000 to be paid in cash upon showing of title; that plaintiff so advised the defendants, but defendants began to propose and require other conditions than those contained in defendants' original offer of sale as accepted by the purchaser, and changed and added to the terms, and after two months of endeavoring to meet the changed and varying conditions, the defendant finally withdrew the offer of sale. It was alleged that plaintiff had performed his contract and procured a purchaser ready, able and willing to purchase the property on the terms offered and upon which the services of plaintiff had been engaged.

The view was presented in the argument here that the complaint was fatally defective in that it is alleged that the offer of sale was withdrawn and sale not completed. In support of this position defendants cite *Ins. Co. v. Disher,* 225 N. C., 345, 34 S. E. (2d), 200. In that case it was held that the owner had a right to withdraw the authority of the broker at any time before the broker "has fully earned his commissions." But here it is substantially alleged that the plaintiff had fulfilled his engagement and earned his commission, and that thereafter defendants withdrew the offer of sale and refused to carry the transaction through in accordance with the terms of their offer as made and accepted by the purchaser. It was not alleged that the agreement to pay commission was conditioned upon an actual sale being completed, nor that it should be paid out of the sales price, as was the case in *Jones v. Realty Co.,* 226 N. C., 303, 37 S. E. (2d), 906.

It was said in *White v. Pleasants,* 225 N. C., 760, 36 S. E. (2d), 227, "Where the broker has made a sale of the land or has procured a purchaser who is ready, willing and able to buy on the terms set forth by the principal, the principal, although having the power, has no legal right, without incurring liability for the wrongful termination, to revoke the broker's agency to sell." To the same effect is the holding in *Lindsey v. Speight,* 224 N. C., 453, 31 S. E. (2d), 371.

Under the general rule a real estate broker is entitled to his stipulated commission, or compensation for his services, when, pursuant to agreement with the owner, he has procured a purchaser ready, able and willing to purchase the property upon the terms offered by the owner. *Crowell v. Parker,* 171 N. C., 392, 88 S. E., 497; *House v. Abell,* 182 N. C., 619 (628), 109 S. E., 877; *Harrison v. Brown,* 222 N. C., 610, 24 S. E. (2d), 470; 8 Am. Jur., 1090; 2 Restatement Law of Agency, 1038-1041.

We think the plaintiff has alleged sufficient facts in his complaint to survive a demurrer, and that the judgment should be

Affirmed.

HERBERT SELIGSON v. HARRY KLYMAN.

(Filed 16 April, 1947.)

1. Ejectment § 5½—

G. S., 42-33, applies to actions to recover possession of demised premises "upon a forfeiture for the nonpayment of rent" and not to actions to recover possession of property for one of the causes enumerated in G. S., 42-26.

2. Same: Ejectment § 8—

Plaintiff brought this action to summarily eject his tenant who wrongfully held over, and elected not to claim therein rents or damages for occupation for the period subsequent to the term, G. S., 42-28. Upon defendant's appeal to the Superior Court it appeared that defendant, on the day prior to trial in that court, had surrendered possession, and defendant's motion to dismiss upon his tender of rents and costs was allowed. G. S., 42-33. *Held:* The judgment of dismissal is vacated and the cause remanded for judgment awarding plaintiff his costs, it being error to force plaintiff to accept rents at the rate stipulated in the lease agreement contrary to his election.

3. Ejectment § 8—

Where a tenant wrongfully holds over, the landlord is entitled to obtain possession of his property and also damage for its wrongful detention, which is not necessarily the rent at the rate stipulated in the lease, but indemnity or compensation for the loss, special or otherwise, naturally and proximately resulting, which defendant, in the light of the circumstances, could have reasonably foreseen.

SELIGSON *v.* KLYMAN.

APPEAL by plaintiff from *Grady, Emergency Judge,* at September Term, 1946, of WAKE.

Summary proceeding in ejectment to recover possession of demised premises, plaintiff alleging that defendant was holding over after expiration of term.

In the latter part of 1942, or the early part of 1943, the plaintiff leased to the defendant his store house, 309 Blake Street, Raleigh, N. C., on a month to month basis at a rental of $75.00 per month. On 8 March, 1946, the plaintiff notified the defendant that he would want his building in sixty days. The defendant suggested that he make it June 1st. This was agreed upon, and the parties confirmed their mutual understanding by exchange of letters, the defendant's letter to the plaintiff being dated 12 March, 1946. In the meantime, the plaintiff arranged to take possession on June 1st.

The defendant failed to vacate the premises by the first of June; whereupon this proceeding was instituted before a justice of the peace to obtain immediate possession thereof. The defendant offered no evidence on the hearing, and judgment was entered for the plaintiff. From this judgment, the defendant gave notice of appeal to the Superior Court and posted bond to stay execution.

The case came on for trial *de novo* at the September Term, 1946, Wake Superior Court, which convened on 16 September. On 15 September, the defendant delivered possession of the store to the plaintiff, and thereafter, during the same week, "in open court, tendered the plaintiff all rents due and costs up to and including the trial in the Superior Court, amounting to $262.50 rent to September 15, 1946, and costs in the amount of $18.85," which sums were paid into the clerk's office. The defendant, thereupon moved that the action be dismissed. Motion allowed under G. S., 42-33. Plaintiff appeals, assigning errors.

Howard E. Manning and Ellis Nassif for plaintiff, appellant.
Wilson & Bickett for defendant, appellee.

STACY, C. J. For a number of years the defendant leased a store from plaintiff at a rental of $75.00 per month. In lieu of notice to quit, the defendant agreed to vacate the premises on 1 June, 1946. This he omitted to do, and as plaintiff had arranged to take possession on that date, he immediately instituted this summary proceeding in ejectment before a justice of the peace to obtain possession of his property, not for the nonpayment of rent, as none was then due, but for one of the causes enumerated in G. S., 42-26, the defendant being a "tenant or lessee, who holds over and continues in possession of the demised premises . . . without the permission of the landlord, and after demand made for its surrender." *Vanderford v. Foreman,* 129 N. C., 217, 39 S. E., 839.

Plaintiff elected not to claim "damages for the occupation of the premises since the cessation of the estate of the lessee," G. S., 42-28, as he is authorized to do without prejudice to his right to sue for same in another action, and this no doubt for the reason plaintiff did not wish to limit his claim to an amount within the jurisdiction of a justice of the peace. See G. S., 42-28; 42-30; 42-32; *Simons v. Lebrun,* 219 N. C., 42, 12 S. E. (2d), 644, and cases there cited.

Therefore, when it was made to appear in the Superior Court that defendant had surrendered possession of the store to the plaintiff, in the absence of a request to amend, nothing remained in the case but the costs. *Rental Co. v. Justice,* 212 N. C., 523, 193 S. E., 817.

The provisions of G. S., 42-33, have no application to the facts of the instant record. The plaintiff is not seeking to recover the possession of the demised premises "upon a forfeiture for the nonpayment of rent." There is no allegation of any rent in arrears.

Whether G. S., 42-32, as amended by Ch. 796, Session Laws 1945, can be invoked in favor of the plaintiff is not presented and will not be determined in advance of a ruling on the matter in the court below. See *Stephenson v. Watson,* 226 N. C., 742.

The extent of defendant's liability for withholding possession from and after 1 June, 1946, is yet to be determined, in another action perhaps. The law is well settled that from a lessee who wrongfully holds over, the landlord is not only entitled to obtain possession of his property, but also to recover indemnity for its wrongful detention. *McGuinn v. McLain,* 225 N. C., 750, 36 S. E. (2d), 377; *Allen v. Taylor,* 96 N. C., 37, 1 S. E., 462; Anno. A. L. R., 386. This is not necessarily the stipulated rent in a lease for a time prior thereto. *Martin v. Clegg,* 163 N. C., 528, 79 S. E., 1105; *Credle v. Ayers,* 126 N. C., 11, 35 S. E., 128, 48 L. R. A., 751. "Where possession of leased premises is unlawfully withheld, damages are recoverable against the party unlawfully withholding the same, which may fairly and reasonably be considered as the natural and proximate result thereof, and which damages, special or otherwise, the party in default, in the light of the circumstances, should reasonably have known would result to the party entitled to possession, from his acts in withholding the premises"—Syllabus, *Lewis v. Welch, etc., Feed Co.,* 96 W. Va., 694, 123 S. E., 801, 39 A. L. R., 383.

Indemnity or compensation, rather than rent, would seem to be the proper measure of recovery. *Murtland v. English,* 214 Pa., 325, 63 Atl., 882, 112 Am. St. Rep., 747, 6 Ann. Cas., 339.

The dismissal of the proceeding will be reversed, the judgment vacated and the cause remanded for judgment awarding the plaintiff his costs.

Reversed and remanded.

N. B. BONEY AND JOHN A. YARBOROUGH, CO-ADMINISTRATORS OF THE ESTATE OF LOWELL N. DOUGLAS, DECEASED, v. MRS. MARY B. PARKER, G. B. D. PARKER, JR., SARAH PARKER OLSEN, HARDY ROYALL PARKER, L. R. HAGOOD AND J. C. NORRIS.

(Filed 16 April, 1947.)

Abatement and Revival § 9—Plea in abatement for pendency of prior action held proper only as to parties whose liability is in issue in prior action.

The owner of a truck involved in a collision with an automobile instituted action against the administrators of the owner-driver of the car, who had died as a result of injuries received in the collision. Defendants filed counterclaim alleging that the death of their intestate was a result of negligence of the driver of the truck acting in the course of his employment by plaintiff. Thereafter, administrators instituted suit against the owner and the driver of the truck, and the manager and the owners of a farm upon allegations that the truck was being driven for their benefit in connection with the operation of the farm. *Held:* The plea in abatement of the owner of the truck was properly allowed, since her liability to the administrators was in issue in the prior action, but as to the other defendants in the second action, the plea was properly overruled. G. S., 1-127 (3).

APPEAL by defendants from *Thompson, J.*, at November Term, 1946, of WAKE. Affirmed.

Defendants' demurrer on the ground that there was another action pending between the same parties for the same cause, was sustained as to the defendant Mary B. Parker, and overruled as to the other defendants.

Defendants excepted and appealed.

Smith, Leach & Anderson and Robert C. Wells for plaintiffs, appellees.

Rivers D. Johnson and L. A. Beasley for defendants, appellants.

DEVIN, J. The defendants by answer interposed a plea in abatement, (G. S., 1-133), and sought dismissal of plaintiffs' action on the ground that there was another suit pending between the same parties for the same cause. Defendants' motion, which was based on the pleadings in this case and the record in the case of Mary B. Parker *vs.* N. B. Boney and John A. Yarborough, Administrators of Lowell N. Douglas, pending in the Superior Court of Wayne County, was allowed as to Mary B. Parker, and the action dismissed as to her, and denied as to the other defendants. The defendants' appeal brings the matter here for review.

The pertinent procedural steps leading up to the present controversy and upon which the ruling below was based, may be briefly stated in chronological order as follows: January 12, 1946, a collision on the highway between the automobile owned and driven by Lowell N. Douglas

and the motor truck of Mary B. Parker, driven at the time by J. C. Norris, resulted in damage to both vehicles and a personal injury to Lowell N. Douglas from which shortly thereafter he died in a hospital in Wayne County. March 1, 1946, N. B. Boney was appointed administrator of the estate of Lowell N. Douglas by the clerk of the Superior Court of Wayne County, and subsequently John A. Yarborough, a resident of Wake County, was appointed co-administrator of the estate. July 11, 1946, Mary B. Parker instituted suit in Duplin County, where she resided, against the administrators of the estate of Lowell N. Douglas to recover damages for injury to her motor truck alleged to have been caused by the negligence of their intestate. The administrators filed answer denying the allegations of negligence, and set up a counterclaim for damages against Mary B. Parker for wrongful death of their intestate, alleging this was due to the negligence of the servant and agent of Mary B. Parker who was at the time driving the truck for her. Damages were asked for wrongful death, for suffering endured by Lowell N. Douglas, and for injury to his automobile in the total sum of $78,200. Mary B. Parker replied denying the material allegations of the counterclaim. August 20, 1946, by order, on motion of the administrators, the action was removed from Duplin to Wayne County, where it is still pending.

October 2, 1946, the named administrators instituted this action against the defendants Mary B. Parker, G. B. D. Parker, Jr., Sarah Parker Olsen, Hardy R. Parker, L. R. Hagood, and J. C. Norris for damages for wrongful death of Lowell N. Douglas resulting from collision of his automobile with the negligently driven motor truck of Mary B. Parker, and for damages for suffering endured by their intestate and for injury to his automobile, in the same amounts as set up in the counterclaim in the first action, and alleged that the defendants were severally liable for the injuries complained of, in that Mary B. Parker was the owner of the offending truck which was being driven at the time by her authority; that G. B. D. Parker, Jr., Sarah Parker Olsen, and Hardy B. Parker were the owners of the farm in connection with which and for whose benefit the truck was being operated; that L. R. Hagood was manager and interested in the farm, and the truck was being operated under his supervision and control; and that J. C. Norris negligently drove the truck, and was at the time acting as the servant and agent of the other defendants.

It is apparent that Mary B. Parker was properly dismissed from the action in Wake County as the question of her liability was presented by the counterclaim of the administrators in the already pending action in Wayne County. A complete remedy as against her is available in that action. In her case "there was another action pending between the same parties for the same cause." G. S., 1-127 (3); *Allen v. Salley,* 179

N. C., 147, 101 S. E., 545; *Johnson v. Smith,* 215 N. C., 322, 1 S. E. (2d), 834; *Moore v. Moore,* 224 N. C., 552, 31 S. E. (2d), 690; *Underwood v. Dooley,* 197 N. C., 100, 147 S. E., 686; *Emry v. Chappell,* 148 N. C., 327, 62 S. E., 411.

However, the provisions of the statute as interpreted by the decisions of this Court do not help the other defendants. While the same transaction, to wit, the collision of motor vehicles, is the basis of both suits, the question of the liability of the defendants, other than Mary B. Parker, is in no way presented in the suit in Wayne County, and hence the plea in abatement, or demurrer under the statute, would not be available to these defendants. To justify its dismissal the second action must be determined to be not only for substantially the same cause, but also between the same parties. Unless full relief can be had in the first suit the plaintiffs may not be debarred from seeking remedy against others who are not parties to that action. Whether the administrators, the defendants in the Wayne County suit, could have made these other persons, now sued in Wake County, parties defendant in Wayne County, and by a cross-action brought them into that court on the question of their liability for the injury complained of, is not here presented, as the administrators did not elect to attempt that course. See *Montgomery v. Blades,* 217 N. C., 654, 9 S. E. (2d), 397; *Emry v. Chappell,* 148 N. C., 327, 62 S. E., 411. However, it is open to the parties to ask for a removal of this suit to Wayne County for trial if in the discretion of the judge the convenience of witnesses and the ends of justice would be promoted. G. S., 1-83 (2).

The ruling of the Superior Court in overruling the plea in abatement of the defendants other than Mary B. Parker must be upheld, and the judgment

Affirmed.

STATE v. SAM SILVER.

(Filed 16 April, 1947.)

Rape § 23—

In a prosecution for assault upon a female, evidence tending to show only that defendant asked prosecutrix an improper question, unaccompanied by a show of violence, threats or any display of force, is insufficient to be submitted to the jury, and defendant's motion to nonsuit should have been granted.

APPEAL by defendant from *Thompson, J.,* at October Term, 1946, of FRANKLIN.

Criminal prosecution tried upon a warrant charging defendant with an assault upon a female.

There was a verdict of guilty and from the judgment pronounced thereon, the defendant appealed to the Supreme Court, assigning error.

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

Yarborough & Yarborough for defendant.

PER CURIAM. This appeal is based upon the refusal of the court below to grant the defendant's motion for judgment as of nonsuit. The correctness of the ruling on the motion depends upon whether the defendant committed an assault upon the prosecutrix by asking her an improper question, unaccompanied by a show of violence, threats or any display of force. We think the evidence disclosed on the record is insufficient to sustain the verdict. The defendant's motion should have been granted.

Reversed.

ELLA KLASSETTE v. LIGGETT DRUG COMPANY, INC., BLYTHE & ISENHOUR, CITY OF CHARLOTTE, COMMERCIAL NATIONAL BANK OF CHARLOTTE, EXECUTOR OF THE ESTATE OF E. L. BAXTER DAVIDSON, L. D. CHILDS, RICHARD A. CHILDS, MARGARET M. CHILDS AND JEANIE B. PHIFER.

(Filed 30 April, 1947.)

1. Appeal and Error § 40i—

Upon appeal from judgment as of nonsuit the evidence will be considered in the light most favorable to plaintiff.

2. Negligence § 1—

Negligence is the failure to perform some legal duty owed the injured party under the circumstances, which negligent breach of duty proximately causes injury.

3. Negligence § 5—

Proximate cause is that cause which produces the result in continuous sequence and without which it would not have occurred, under circumstances from which a man of ordinary prudence could have reasonably foreseen that such result was probable.

4. Negligence § 19b (1)—

If plaintiff's evidence fails to establish either negligence or proximate cause, nonsuit is proper.

5. Negligence § 19a—

Whether there is sufficient evidence to support the issue of negligence is a question of law.

6. Municipal Corporations § 12—

The maintenance of the fire department and the extinguishment of fires is a governmental function of a municipality, and, in the absence of statutory provision to the contrary, a municipality incurs no liability either for inadequacy of equipment or for negligence of its firemen.

7. Municipal Corporations § 14a—

A municipality is not an insurer of the safety of its streets and sidewalks but is required only to exercise ordinary care and due diligence to see that they are reasonably safe from dangers or defects which can or ought to be discovered in the exercise of ordinary care and prudence.

8. Same—

A municipality is not under duty to guard against wetness of a sidewalk from water flowing from a building in which its fire department had extinguished a fire, no more than it is under duty to guard against wetness due to rain.

9. Same—

Plaintiff's evidence tended to show that the sidewalk adjacent to a building in which a fire had occurred the previous day was wet from a liquid flowing beneath the door, that plaintiff saw the condition but nevertheless walked through it and slipped and fell to her injury. Plaintiff's evidence also tended to show that there was some colorless oil in the liquid which caused her to fall. *Held:* Plaintiff's evidence discloses that even if there was oil in the water, it was not visible, and therefore the evidence fails to show a hazard or danger which the officers of the city should have discovered in the exercise of due care.

10. Negligence § 4a—

Neither the owner nor lessee may be held liable by a pedestrian for hazardous condition existing upon adjacent sidewalk unless such condition is the result of negligence or nuisance which is the fault of the owner or lessee.

11. Same—

Plaintiff's evidence tended to show that the sidewalk adjacent to a building in which a fire had occurred the previous day was wet from a liquid flowing beneath the door, that plaintiff saw the condition but nevertheless walked through it and slipped and fell to her injury. Plaintiff's evidence also tended to show that there was some colorless oil in the liquid which caused her to fall. *Held:* Neither the owner of the building nor the lessee of the store in which the fire occurred may be held liable, since neither is responsible for a condition created by firemen in fighting the fire, and since if oil from the premises escaped into the water, there was no evidence that it was due to the fault of either of them.

12. Same: Municipal Corporations § 14a—

Plaintiff's evidence tended to show that the sidewalk adjacent to a building in which a fire had occurred the previous day was wet from a liquid flowing beneath the door, that plaintiff saw the condition but nevertheless walked through it because other pedestrians were walking along

the sidewalk at the place, and that she slipped and fell to her injury. Plaintiff's evidence also tended to show that there was some colorless oil in the liquid which caused her to fall. There was evidence that plaintiff had an alternate safe route to her destination. *Held:* Plaintiff is guilty of contributory negligence barring recovery.

APPEAL by plaintiff from *Patton, Special Judge,* at 24 February, 1947, Extra Regular Civil Term, of MECKLENBURG.

Civil action to recover damages for personal injury sustained in a fall on street sidewalk allegedly resulting from actionable negligence of defendants.

Plaintiff took voluntary nonsuit as to defendants Blythe & Isenhour.

These facts in respect to the subject of this action on the dates in question appear to be uncontroverted:

The individual defendants owned the building at the northeast corner of the intersection of Tryon and Trade streets in the city of Charlotte, North Carolina. The owners had leased in writing the ground floor, a part of the basement, and certain space on the second floor of said building to defendants Liggett Drug Company, who then occupied same. On early morning of 17 November, 1943, there was an intense fire in that part of the building so occupied by defendant Drug Company. The fire department of the city of Charlotte extinguished the fire by pumping water on it from three pumps for more than an hour each. The next morning, 18 November, about eleven o'clock, plaintiff slipped and fell as she was walking from the intersection of said streets along East Trade Street, in front of the building, and suffered injury.

Plaintiff alleges in her complaint: That that part of the building covered by the lease to defendant Liggett Drug Company was at the time of her injury in the joint possession and control of the defendants owners and defendant lessee; that "as a result of said fire, and especially as a result of the substance and liquid running out of said building, the sidewalk on East Trade Street adjoining said building became and remained in an oily, greasy and slippery condition," thereby becoming and remaining "in a dangerous and unsafe condition," by reason of which she fell and was injured.

Plaintiff also alleges that the defendants owners and defendant lessee were guilty of negligence in that: "(a) They caused and allowed said greasy and oily substances and liquids to escape from said building and run out to, and spread over, the sidewalk on East Trade Street adjoining said building. (b) Thereafter they allowed said substances and liquids to remain on said sidewalk, although they rendered said sidewalk in an unsafe and dangerous condition. (c) Thereafter they took no measures to remedy the dangerous and unsafe condition of said sidewalk, or to guard against the risks and dangers arising from the risks of said greasy

and oily substances and liquids thereon. (d) They failed to take any precautions, or to notify persons attempting to use said sidewalk of the dangerous and unsafe condition thereof."

Plaintiff further alleges that "defendant city of Charlotte was guilty of negligence in that it allowed said sidewalk to become and remain in said slippery, unsafe and dangerous condition without taking any steps to remedy same, or to give notice of said condition to persons attempting to use said sidewalk.

Plaintiff further alleges that "as a proximate result of the negligence of the defendants hereinbefore alleged, the plaintiff received severe, painful and permanent injuries, etc."

Defendants owners, lessee and city, severally answering, deny in material aspect the foregoing allegations of the complaint, and severally plead the contributory negligence of plaintiff in bar of her recovery in this action.

Plaintiff offered evidence tending to show these facts pertaining to the scene of her fall and injury: The intersection of Tryon Street, which runs generally north and south, and Trade Street, which runs east and west, is known as the Square in the city of Charlotte. The Liggett Drug Company building is on the northeast corner of the Square, with frontage on both Tryon and Trade Streets. The sidewalk on the north side of Trade Street where plaintiff fell "coming from the Square toward Belk's is slanting . . . down hill," and is fairly wide.

Plaintiff, as witness for herself, testified in pertinent part: "On November 18, 1943, I had a fall up there on the sidewalk on Trade Street next to the Liggett Drug Company building. I was up town shopping . . . walking down Trade toward Belk's from Tryon . . . going east on Trade . . . this side of where the Duke Power Company had their offices down stairs, and there is also a flight of steps there. Well, I fell this side of the steps and . . . of the Duke Power Company's office down in the basement of Liggett's . . . my right foot slipped . . . It was a clear sunny day . . . about 11:15 or 11:20 . . . I noticed that the sidewalk was wet because every one was walking along there, and that's the reason I was walking along there because it was wet and I didn't have anywhere else to walk. It was wet all along there. There was something coming out of the building. It was running out from under the doors of the building down the steps on to the hill. Before I fell I did not notice that there was any substance there other than water, because I saw everyone else was walking along there . . . I had gotten past the front door of Liggett's when I fell . . . about to the rear of the store if I remember correctly . . . When I fell I got some of the dampness or wet or moisture on my clothes . . . I was dismissed from the hospital about 3 o'clock, but I had to be taken home in an ambulance . . . My husband . . . got in touch with my mother . . . she got there

between three and three thirty . . . I had on the same clothes that I had on when I fell. She helped me remove them . . . With respect to pedestrian travel at this place where I fell, that is a congested part of the city. It was just a few feet from the Square that I fell . . . I know that the place where I fell was wet. At the time I fell I did not make any examination to see whether there was anything there besides water. Later on I made some examination of my clothes that I had on at the time I fell. That was when I undressed after I was taken home. The clothes were then in the same condition as they were right after I fell. On that examination I found that they were greasy. They had a greasy substance on them, something which made it impossible for me to use them any more."

Then on cross-examination, plaintiff testified: ". . . I got uptown . . . around 10 o'clock. I had been shopping . . . and I was starting down there to Belk's. I wasn't uptown on the 17th of November. On the 18th . . . in going on to the Square I passed right in front of Liggett's on Tryon Street. The sidewalk on Tryon Street was not blocked when I passed there on the morning of the 18th. I observed that there had been a fire there. The glass front on the Tryon Street side of Liggett's was all broken out and the door to Liggett's Drug Store, which door was at the corner of Tryon and Trade, was broken out. I passed that door in turning the corner to go down to Belk's. There was something running under that door. The frame of the door was still there. The glass was gone . . . there were a whole lot of people there. I was sort of outside to the sidewalk and there were a whole lot of people between me and the building . . . looking in . . . themselves. I noticed the wall was blackened from fire and that there had been a bad fire there. I could see that the interior of the building was blackened and burned out. I do not know what was coming under the door, but it was something in liquid form. It was running down the hill. It was going down those steps on to the sidewalk. I had to walk through it. I didn't know how deep it was but all I know is it made the sidewalk wet. There was none of that liquid on Tryon Street. If I had been going that way I could have crossed Trade over to Kress's. There wasn't anything to keep me from crossing Trade. There is a sidewalk on the first block of East Trade between Tryon and College on the south side of Trade, that is, on the opposite side from Belk's. I could have gone across Trade and down to College Street and up to Belk's without walking through the water, but you see I saw everyone else walking along there so I thought it was safe—but I didn't—when I passed the door at the entrance at Liggett's . . . I wasn't walking fast. I did not slow down . . . I just kept walking." To each of these questions, "Now you walked right through the water or liquid or whatever it was, coming out of the drug store? . . . And continued to walk right on down the sidewalk?" she answered, "Yes, sir."

Then, continuing, the plaintiff testified: "I was thoroughly familiar with that corner. I had been by there hundreds of times. I know where the Duke Power Company bus headquarters was in the basement of the Liggett building. That was down toward the rear end of the Liggett building and below the Liggett building, there was a stairway running up between that building and Smith's jewelry store. I had not passed the Duke Power Company when I fell . . . this side of the flight of steps . . ." The witness testified to the effect that the liquid coming out of the front door of Liggett's flowed down the sidewalk as far as the Duke Power Company office. Then she was asked these questions, to which she answered as shown: Q. "In other words, you walked in this liquid all the way from the corner down to where you fell?" A. "That's right, it was slick all the way down that hill." Q. "It was slick all down that hill?" A. "Don't get me wrong. I don't mean it was slick where I was walking, but it was wet all along there, because that's the reason I walked in it." Then in describing her shoes she said "the bottom of the shoe is flat and the heel is above the sole," and that she "walked through this water or liquid all the way from the corner down to where" she fell "with that flat type of shoe on."

The witness E. I. Sinkoe testified that he first saw the stock about a week, probably, or something like that, after the fire . . . At the time . . . there were some broken bottles in the building.

Plaintiff, being recalled, testified further as follows: "The sidewalk there by the side of Liggett's Drug Store stayed the same from the time I fell to the time my husband got there and on up to the time I was taken away." Then, under cross-examination, she continued: "During all that time (from time she fell until she was taken to hospital) there was a constant stream of people walking along that sidewalk. I think buses were loading and unloading there. People were getting on and off buses up there at the corner. Traffic was crowded on the sidewalk. I was looking down at the sidewalk all the time because it was wet, and I was wondering where I could walk to get out of the water . . . I was looking at the sidewalk as I was walking down and fell and also as I was coming down the street before I fell . . ." Then on re-direct examination, she testified: "I would say it was approximately ten minutes from the time I fell to the time my husband got there. No substance had come on to that sidewalk except out of the building during that ten minutes."

James A. Klassette, husband of plaintiff, testified: "I received word about my wife being hurt on November 18, 1943. I found my wife in front of steps leading upstairs, not the steps down to Duke Power . . . sitting in a chair . . . I walked up to Trade Street, on across the Square, and there the whole sidewalk was wet . . . water wasn't just pouring all over the sidewalk . . . there was a stream coming out of the building.

That stream didn't run straight; it ran and spread. Now it didn't cover the whole sidewalk at that time . . . The same substance was coming out of the building. I wouldn't say it was water. I wouldn't say what it was, but ordinarily speaking, I would say it was water, but there was a good stream of liquid coming out of the building . . . as I stepped back up off the street onto the curb my foot slipped. I did not fall. I then made an examination with my fingers of the substance that was there . . . I put my hand on my shoe. Of course you couldn't see oil in the water, because I was looking at it. I had seen enough of it not to see oil . . . Well, I flicked my fingers over my shoe. I got a greasy substance. It was clear, there was nothing discoloring about it." Then, on cross-examination, the witness continued: ". . . I am familiar with the Liggett corner. The sidewalk at the point where my wife fell is a very heavily traveled sidewalk. It and the opposite corner are probably the heaviest traveled points in Charlotte. The Duke Power buses all stop alongside there. At that time the buses . . . stopped there. Passengers are taken on and discharged there . . . there was a continuous stream of people walking along the sidewalk at the time this happened . . . They have spots of grease there where those Duke Power Company buses stop . . . I don't know where the grease on my shoes came from unless it came out of the building . . . It was not a Duke Power Company grease. A Duke Power grease will show black, absolutely. This was just a greasy, colorless substance . . . I said colorless . . . I didn't know until then that there was any oil in the water. I couldn't see it, it was colorless. I couldn't tell by looking at it whether there was grease in the water or not. I did by feeling it. I felt the bottom of my shoe. I had just stepped from the street onto the sidewalk. The place where I crossed that sidewalk and where I stepped was not the point where my wife fell."

The court sustained motion for judgment as of nonsuit made at the close of plaintiff's evidence. From judgment in accordance therewith, plaintiff appeals to the Supreme Court and assigns error.

Arthur Goodman, G. T. Carswell, and Robinson & Jones for plaintiff, appellant.

Goebel Porter and Frank H. Kennedy for Individual Owners, defendants, appellees.

John D. Shaw for City of Charlotte, appellee.

P. W. Garland and Helms & Mulliss for Liggett Drug Company, appellee.

WINBORNE, J. The situation here is not unlike those in the cases of *Houston v. Monroe,* 213 N. C., 788, 197 S. E., 571, and *Watkins v.*

Raleigh, 214 N. C., 644, 200 S. E., 424, wherein this Court held that demurrer to the evidence was sustainable "if not upon the principal question of liability, then upon the ground of contributory negligence."

We are of opinion, however, that the evidence shown in the record on this appeal taken in the light most favorable to plaintiff, as the Court does in passing upon an exception to a judgment as of nonsuit, fails to make out a case of actionable negligence, in accordance with ruling of the learned judge who presided at the trial.

In an action for the recovery of damages for injury allegedly resulting from actionable negligence the plaintiff must show: First, that there has been a failure to exercise proper care in the performance of some legal duty which the defendant owed the plaintiff, under the circumstances in which they were placed; and, second, that such negligent breach of duty was the proximate cause of the injury—a cause that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed. *Whitt v. Rand,* 187 N. C., 805, 123 S. E., 84; *Murray v. R. R.,* 218 N. C., 392, 11 S. E. (2d), 326; *Mitchell v. Melts,* 220 N. C., 793, 18 S. E. (2d), 406, and numerous cases therein cited.

If the evidence fails to establish either one of the essential elements of actionable negligence, the judgment of nonsuit must be affirmed. Whether there is enough evidence to support a material issue, such as negligence, is a matter of law. *Mills v. Moore,* 219 N. C., 25, 12 S. E. (2d), 661.

Guided by these principles, we proceed to consider the factual situation in hand.

I. As the facts relate to the city of Charlotte, these principles of law are applicable:

First: A fire department, maintained by a municipal corporation, belongs to the public or governmental branch of the municipality. And the courts almost uniformly hold, in the absence of statutory provision to the contrary, that the municipal corporation is immune from liability for injury or damage resulting from negligent acts of omission or commission in connection with the maintenance and operation of a fire department. Hence, the extinguishment of fires is a function which a municipal corporation undertakes in its governmental capacity, and in connection with which, in the absence of statutory provision to the contrary, it incurs no liability, either for inadequacy of equipment or for the negligence of its firemen. See 37 Am. Jur., 699, 38 Am. Jur., 322, Annotations; 9 A. L. R., 143, 84 A. L. R., 514; *Peterson v. Wilmington,* 130 N. C., 76, 40 S. E., 853, 56 L. R. A., 959, 11 Am. Neg. Rep., 332; *Howland v. Asheville,* 174 N. C., 749, 94 S. E., 524, L. R. A., 1918 B, 728; *Mabe v. Winston-Salem,* 190 N. C., 486, 130 S. E., 169.

If the law were otherwise, the evidence here reveals nothing unusual in the manner of operation by the fire department in extinguishing the fire in the drug store building, except that a large volume of water was required to do the job, and the fire damage was great.

Second: While plaintiff concedes that the city, in extinguishing the fire, was engaged in a governmental function, and that no negligence is predicated thereon, she contends that the evidence is sufficient for the jury to find that the city breached its duty in respect to the maintenance of its sidewalks in a reasonably safe condition for use in proper manner by pedestrians.

In this connection, a municipality is not held to the liability of an insurer of the safety of its streets, but only to the exercise of ordinary care and due diligence to see that they are reasonably safe for travel. See *Ferguson v. Asheville,* 213 N. C., 569, 197 S. E., 141, where numerous other cases are cited. See also *Houston v. Monroe, supra,* and *Watkins v. Raleigh, supra.* Hence, a municipality is not an insurer of the safety of persons using its sidewalks, and is liable only for negligence. *Gasque v. Asheville,* 207 N. C., 821, 178 S. E., 848.

Moreover, it is only against danger which can or ought to be anticipated in the exercise of ordinary care and prudence, that a municipality is bound to guard. *Watkins v. Raleigh, supra.* The principle, firmly established in our decisions, is clearly stated by *Adams, J.,* in *Markham v. Improvement Co. and City of Durham,* 201 N. C., 117, 158 S. E., 852, in these words: "The law imposes upon the governing authorities of a city or town the duty of exercising ordinary care to maintain its streets and sidewalks in a condition reasonably safe for those who may have occasion to use them in proper manner. Such authorities are liable only for a negligent breach of duty, and for this reason it is necessary for a complaining party to show more than the existence of a defect and the occurrence of an injury; he must show that the officers of the city knew, or by ordinary diligence might have known of the defect. But actual notice is not required. Notice of a dangerous condition in a street may be implied, and indeed will be imputed to the city or town if its officers should have discovered it in the exercise of due care," citing cases. See also *Walker v. Wilson,* 222 N. C., 66, 21 S. E. (2d), 817.

Applying this principle to the case in hand, the evidence fails to show any breach of duty by the city in maintaining its sidewalks in a reasonably safe condition for those who may have had occasion to use them in proper manner. The act of pumping water into the building to extinguish the fire was an integral part of the performance of the functions of the fire department, and any damage done by the water was in the exercise of a governmental function. Moreover, the flowing of water out of the building on to the sidewalk is not evidence of negligence. Sidewalks are exposed to the elements, and, ordinarily, the fact that they

are wet by rain water would not create a danger against which the city would be expected to guard. Hence, in the exercise of ordinary care and prudence, injury from water on a sidewalk may not be anticipated, or reasonably foreseen.

Moreover, in the instant case, it is not contended that oil was in the water as it was pumped into the building or in the chemicals used in extinguishing the fire, and there is no evidence that there were any oils in the Liggett Drug Store building. While there is evidence that a week after the fire there were some broken bottles in the store, there is no evidence, or facts from which a reasonable inference may be had, as to what these bottles contained. Indeed, if oil were in the water as it flowed out of the building, the evidence indicates that it was not visible to the eye. Plaintiff's evidence is that it was colorless. But if the evidence be such that it may be inferred that oil was in the water, as it flowed out of the building, there is no evidence that the city was aware of it, or that the circumstances were such that the officers of the city should have discovered it in the exercise of due care, or that the city had implied notice of it.

II. As the facts relate to defendants owners and lessee of the Liggett Drug Store building: Irrespective of their liabilities *inter sese,* or respectively, and in so far as pedestrians are concerned, any liability of owner, or of occupant of abutting property for hazardous condition existent upon adjacent sidewalk is limited to conditions created or maintained by him, and must be predicated upon his negligence in that respect. Moreover, an owner, or an occupant is liable, if at all, for damage caused by the escape of substances from the premises only where some fault can be attributed to him. The owner, or the occupant, is not liable for injuries caused others in the absence of proof of negligence, unless he is shown to have created a nuisance. See 38 Am. Jur., 800-801. Negligence, Sec. 139.

Applying these principles to present case: There is no evidence that the fire in the building was caused by the negligence of the owners or of the occupant. And the conditions resulting from extinguishing the fire were brought about by the city in the exercise of a governmental function, over which the owners, or the occupant had no control, and for which they, or it, may not be held responsible. If oil from the drug store escaped in the water, the evidence fails to show that it was due to any fault on the part of the owners or of the occupant.

III. As to contributory negligence: It is seen from the evidence that plaintiff saw and knew as much about the condition of the sidewalk as anyone else. If she could not see oil in the water, it is fair to assume that officials of the city in the exercise of ordinary care could not see it. If they in the exercise of ordinary care could have seen it, she should have seen it in the exercise of ordinary care for her own safety. More-

over, the evidence tends to show that there was a safe way for her to travel, but she elected to take the short route and walk on the wet sidewalk. Under these circumstances, her conduct bars her recovery.

However, as we view the entire evidence, plaintiff's fall is just one of those events which sometimes occur without one's foresight or expectation, and therefore not anticipated, the consequences of which must be borne by the unfortunate sufferer. *Simpson v. R. R.*, 154 N. C., 51, 69 S. E., 683.

Other exceptions have been considered, and fail to show prejudicial error.

The judgment below is

Affirmed.

MRS. ELLEN C. ROGERS v. L. S. HALL AND E. D. SWAIN.

(Filed 30 April, 1947.)

1. Landlord and Tenant § 14—

Both a covenant not to assign and a covenant not to sublet are restrictions upon the common law right of alienation, and will be strictly construed to prevent the restraint from going beyond the expressed stipulation.

2. Same—

A covenant not to assign and a covenant not to sublet are not identical in meaning or effect, and a lease which contains a covenant not to sublet but no covenant not to assign, is not breached by an assignment.

3. Ejectment §§ 2, 4—

Averment in the affidavit in summary ejectment that defendants entered into possession as lessees and their term had expired is jurisdictional, G. S., 42-28, and plaintiff must prove her case as alleged.

APPEAL by plaintiff from *Harris, J.*, at November Special Term, 1946, of WAKE.

Action in summary ejectment.

Plaintiff leased premises designated 129 East Martin Street, Raleigh, N. C., to W. G. Weems and Otis M. Banks for a term of years ending 2 March, 1950. The lease contains a condition which prohibits the subletting of the premises without the consent of the owner.

Thereafter the lessees assigned their lease to one Parrish who went into possession. Parrish complied with the terms and conditions of the lease for a period of time and then assigned the contract to D. B. Sherrill and J. Paul Cheek. Sherrill and Cheek remained in possession several

months, paying the rent therefor to plaintiff. On 23 September 1946 they assigned the lease to the defendants herein who took possession and tendered the rent as it became due, but plaintiff refused to accept payment or to recognize the assignment. Instead, on 14 October 1946, she instituted this action in summary ejectment before a magistrate who, on the hearing, rendered judgment for plaintiff. The defendants appealed.

When the case came on to be heard in the Superior Court, the parties waived trial by jury and submitted the cause to the judge on facts agreed as here summarized. The judge, being of the opinion "that the provisions and conditions of the lease have not been violated and that there has not been a forfeiture under the lease," rendered judgment for defendants and plaintiff appealed.

Briggs & West for plaintiff appellant.
Brassfield & Maupin for defendant appellees.

BARNHILL, J. This appeal poses one question for decision: Does the assignment of a lease contract breach a covenant therein not to sublet without the consent of the lessor? We are constrained to answer in the negative.

A covenant not to assign and a covenant not to sublet have the same general objective—the restriction of the common law right of alienation. Even so, they are by no means coextensive. Each has a distinctive meaning. *Springs v. Refining Co.*, 205 N. C., 444, 171 S. E., 635; *Millinery Company v. Little-Long Company*, 197 N. C., 168, 148 S. E., 26; *Hargrave v. King*, 40 N. C., 430; *Oil Co. v. Taylor*, 79 A. L. R., 1374; 32 A. J., 289, 290, 331.

Such provisions in a lease contract are in restraint of alienation. 32 A. J., 296, 333. As such they are not looked upon with favor. 32 A. J., 296. Instead they are so construed as to prevent the restraint from going beyond the express stipulation. *Millinery Company v. Little-Long Company, supra; 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; *Francis v. Ferguson*, 55 A. L. R., 982; *Chapman v. Gypsum Co.*, 85 A. L. R., 917; Anno. 79 A. L. R., 1379; 32 A. J., 297.

On the theory that a sublease and an assignment of a lease are so distinct that the mention of one does not include the other, the general rule is that an assignment of the lease is not a breach of a covenant against subletting. *Millinery Company v. Little-Long Company, supra;* 7 A. L. R., 246; Anno. *ibid.*, 249; *Oil Co. v. Taylor, supra;* Anno. 79 A. L. R., 1379.

The lease contract under which defendants claim the right of possession contains no covenant not to assign. It is agreed they are now the

owners thereof by *mesne* transfers from the original tenants. Therefore, on this record, plaintiff has failed to show cause for ejectment.

Furthermore, plaintiff, in her affidavit filed by way of complaint, G. S., 42-28, alleges that defendants entered into possession of the *locus* as her lessees and their term has expired. The averment is jurisdictional, *Howell v. Branson,* 226 N. C., 264, and she must prove her case as alleged. *Rose v. Patterson,* 220 N. C., 60, 16 S. E. (2d), 458; *Peoples v. Fulk,* 220 N. C., 635, 18 S. E. (2d), 147; *Whichard v. Lipe,* 221 N. C., 53, 19 S. E. (2d), 14; *Coley v. Dalrymple,* 225 N. C., 67. This she has failed to do.

The judgment below is

Affirmed.

T. D. TAYLOR v. SUPERIOR MOTOR COMPANY.

(Filed 30 April, 1947.)

1. Constitutional Law § 8a—

An Act of Congress in exercise of powers conferred by the Constitution is supreme. U. S. Constitution, Art. VI, Sec. 2.

2. Emergency Price Control § 4—

Proper regulations promulgated under the Emergency Price Control Act have the binding effect of law.

3. Courts § 13—

State courts have concurrent jurisdiction for the enforcement of civil remedies under the Emergency Price Control Act.

4. Emergency Price Control § 4—

The Emergency Price Control Act continues in force for the purpose of sustaining any proper suit with respect to rights or liabilities accruing thereunder prior to the cessation of its price fixing provisions.

5. Emergency Price Control § 6—

A complaint alleging violation of regulations duly promulgated under authority of the Emergency Price Control Act, 50 USCA, 901, *held* sufficient as against demurrer.

6. Appeal and Error § 39f—

An exception to the charge will not be sustained when the charge is free from prejudicial error when read contextually.

7. Emergency Price Control § 7—

In an action to recover the penalty for violation of regulations promulgated under the Emergency Price Control Act, the admission in evidence of the regulations set out in Federal Register is permitted by statute. 44 USCA, 307.

8. Emergency Price Control § 9: Courts § 3a—

The Superior Court is a court of general jurisdiction and has the power to award plaintiff reasonable attorney's fees authorized by the Emergency Price Control Act.

APPEAL by defendant from *Olive, Special Judge,* at November Term, 1946, of MECKLENBURG. No error.

Plaintiff instituted this action under the Federal Emergency Price Control Act of 1942, as amended, to recover damages for violation by defendant of the maximum price permitted in the sale of a used automobile.

Plaintiff's evidence tended to show that he purchased of defendant a used automobile in March, 1946, at the sale price of $958.87, to which was added a charge of 25% or $239.72 for warranty that the automobile was "in good operating condition" as defined in Maximum Price Regulations No. 540; that the automobile was not as warranted and not in good operating condition in material respects, and defendant failed to make repairs or replacement in accordance with the warranty, and that consequently the amount charged and paid for the warranty was to that extent in excess of the permitted maximum price; that the automobile was not used for business purposes, nor was plaintiff engaged in selling cars. Plaintiff asked to recover treble damages and for counsel fees.

The defendant offered evidence tending to show that the automobile was as warranted and that plaintiff completed the transaction with knowledge of the condition of the automobile; that plaintiff used it for business purposes; and that if the defendant charged in excess of the maximum price this was not done intentionally or willfully or without taking practical precaution not to violate the regulations, and that plaintiff was in no event entitled to recover more than the amount of the warranty.

Issues were submitted to the jury and answered in favor of plaintiff determining that the defendant sold the plaintiff a used motor vehicle in violation of the Maximum Price Regulations No. 540 as amended. Plaintiff's damages were assessed at $391.85. Judgment was rendered on the verdict for the amount fixed by the jury, and for the further sum of $100 attorney's fees fixed by the court.

Defendant excepted and appealed.

David H. Henderson for plaintiff, appellee.

Basil M. Boyd for defendant, appellant.

DEVIN, J. According to the regulations duly promulgated under authority of the Emergency Price Control Act of 1942, as amended, fixing maximum prices for used passenger automobiles, the seller was

allowed to include in the maximum price an additional amount when the used car was warranted, but this permission was conditioned on the used car being in good operating condition as therein defined. 10 Fed. Register 11558, Part 1360, Art. II, sec. 5(b)(3), sec. 7 (b), (M. P. R. No. 540). Plaintiff's action is bottomed upon the allegation, and the evidence offered in support, that the automobile purchased by him from the defendant was warranted and a specific amount paid therefor, and that the failure of the automobile to be in good operating condition as warranted breached the warranty and constituted the charge therefor an amount in excess of the maximum allowed under the regulations issued by authority of the Price Control Act, and that in consequence he was entitled to recover three times the amount of the overcharge. 50 USCA, sec. 901; Maximum Price Regulations, 540; Emergency Price Control Act, sec. 205(e).

The controversy as to the material facts upon which plaintiff's asserted cause of action was made to depend was resolved below in favor of the plaintiff by the verdict of the jury and the judgment of the court thereon. From this conclusion the defendant has appealed, assigning errors in several particulars.

In the first place defendant questions the jurisdiction of the court, and also demurs *ore tenus* to the complaint as insufficient to state a cause of action. However, it is well settled that an Act of the Congress in exercise of the powers conferred by the Federal Constitution is supreme. Art. VI, sec. 2. And proper regulations authorized under the Act have the binding effect of law. These are the tools used to effectuate the policy and purposes of the Act. Emergency Price Control Act, sec. 2a; *Standard Comp. Scale Co. v. Farrell,* 249 U. S., 571.

Concurrent jurisdiction for the enforcement of the civil remedies under the Emergency Price Control Act is expressly conferred upon state courts, and state courts may not refuse to enforce a claim growing out of a valid Federal law. *Testa v. Katt,* 91 Law. Ed. Adv. Op., 776; *Mondou v. R. R.,* 223 U. S., 1; *McGuinn v. McLain,* 225 N. C., 750, 36 S. E. (2d), 377; *Swink v. Horn,* 226 N. C., 713, 40 S. E. (2d), 353. Notwithstanding the Emergency Price Control Act of 1942, as amended, ceased 30 June, 1946, to be effective as fixing maximum prices for the sale of used automobiles, yet by force of the statute as enacted its authority was continued in force as to rights or liabilities incurred prior to its termination, for the purpose of sustaining any proper suit or action with respect to any such right or liability. 50 USCA, sec. 901(b), *150 E. 47th St. Corp. v. Porter,* 156 F. (2d), 541. We think the court had jurisdiction of the parties and of the cause of action, and that the complaint is sufficient to withstand a demurrer.

Defendant noted exception to certain instructions of the trial judge to the jury, but an examination of the entire charge, in the light of the

criticisms noted, leads us to the conclusion that the court's instructions to the jury were free from error. The form of the issues was agreed to, and thereunder all the controverted questions of fact were fairly submitted to the jury, with correct interpretation of the statutes and effective regulations. Admission in evidence of the regulations set out in Federal Register was permitted by statute. 44 USCA, sec. 307.

The allowance of reasonable attorney's fees, authorized by the Federal statute, must be upheld. As was said by *Justice Denny* in *Hilgreen v. Cleaners & Tailors, Inc.*, 225 N. C., 656, 36 S. E. (2d), 252, "The statute authorizes the court to award reasonable attorney's fees, and the Superior Court, being a court of general jurisdiction, has the power to award such fees." See also *Hopkins v. Barnhardt*, 223 N. C., 617, 27 S. E. (2d), 644.

In the trial we find

No error.

WILLIAM T. STEWART v YELLOW CAB COMPANY, A CORPORATION.

(Filed 30 April, 1947.)

1. Automobiles § 18h (2)—

Conflicting evidence as to the speed of the respective cars in approaching and entering an intersection at right angles, and as to whether the stop lights were green or red as to each vehicle when it entered the intersection, and as to which entered the intersection first, presents determinative questions of fact for the jury and requires overruling of defendant's motion to nonsuit.

2. Automobiles § 18i: Negligence § 20—

An instruction upon the issue of contributory negligence which is predicated upon a finding by the jury that defendant had observed all traffic regulations applicable to him must be held for reversible error, since contributory negligence, *ex vi termini*, is predicated upon negligence on the part of defendant with which the negligence of the plaintiff concurs and contributes in producing the injury.

DEFENDANT'S appeal from *Alley, J.*, at November Term, 1946, of MECKLENBURG.

Helms & Mulliss, Fred B. Helms, and James B. McMillan for defendant, appellant.

Henry L. Strickland and J. Laurence Jones for plaintiff, appellee.

SEAWELL, J. This was an action to recover damages for negligent injury to the person and property of plaintiff incurred in a collision

between the Company's cab and plaintiff's automobile within the intersection of North Tryon and Fifth Streets, in the City of Charlotte.

The trial resulted in an adverse verdict and judgment from which the defendant appealed. The determinative questions on this review involve the propriety of the order overruling defendant's demurrer to the evidence and the soundness of the instruction to the jury on the issue of contributory negligence set out below.

It appears that at the *locus* of the collision North Tryon Street is 65 feet wide from curb to curb, and runs north and south; Fifth Street is 26 feet wide and runs east and west. There was a stop light at each corner of the intersection.

The plaintiff's car was being driven in a southerly direction on Tryon Street and defendant's taxicab in a westerly direction on Fifth. The points of impact on the two vehicles were the left front of plaintiff's car and the right front part of the taxicab, about the front wheel. The taxicab was in a position somewhat turned to the south after the collision and the front left wheel of plaintiff's car had apparently engaged the right front wheel of the taxicab. The collision occurred near the west side of Tryon Street.

The evidence is sharply conflicting with regard to the speed of both taxicab and car in approaching and traversing the intersection; whether the stop lights were green or red when the taxicab entered, and whether green or red when the plaintiff's car entered; and as to which entered the intersection first.

All these factors, and others not catalogued, are important and are relative to each other in their bearing upon the conduct of the parties, whether the plaintiff or the defendant. The differences are such that a factual finding upon any outstanding feature might fix the blame on either party or make it mutual. Such a finding is for the jury. *Cole v. Koonce,* 214 N. C., 188, 191, 198 S. E., 637; *Caldwell v. R. R.,* 218 N. C., 63, 10 S. E. (2d), 680; *Christopher v. Fair Association,* 216 N. C., 795, 4 S. E. (2d), 513; *Manheim v. Taxi Corporation,* 214 N. C., 689, 691, 200 S. E., 382; *Sebastian v. Motor Lines,* 213 N. C., 770, 774, 197 S. E., 539.

The exception to the charge brings under review the following instruction to the jury on the second issue,—presenting the question of contributory negligence:

> "So, with respect to the second issue, the burden of proof on which is on the defendant, if you find by the greater weight of the evidence that on the said 27th day of June, 1944, the defendant through its driver Mr. McGowan, was driving its cab on Fifth Street, going west, that he approached Fifth Street on a green light, and entered the intersection on a green light, until he got about the center or a

little beyond the center thereof, and that at the same time the plaintiff's car, being driven by a Miss Gamble by his direction or by his consent and acquiescence, was approaching said intersection on Tryon Street, going south, and that she was driving said car under a red light, and that she was making a speed of from thirty to thirty-five miles an hour, and at such speed and under said red light entered said intersection, and drove her car, and drove the plaintiff's car in such manner that it crashed into and collided with the defendant's cab, thereby causing the injury to the cab complained of, I charge you that that would be contributory negligence on the part of the plaintiff, his negligence being attributable to the driver who was driving with his consent or direction, and if you find that such negligence concurred and continued up to the time of an injury and contributed to it and without which the injury would not have occurred, then I charge you that it would be contributory negligence and if you so find it would be your duty to answer the second issue Yes. If you fail to so find, it would be your duty to answer the second issue No."

Appellee regards this as merely an adaptation of the law to the facts in evidence. The appellant argues that the instruction is so categorized and contingently stated as to put the burden on defendant to show itself free from fault, at least in the particulars set out, in order to avail itself of the plea of contributory negligence on the part of plaintiff. The exception, we think, is well taken. The instruction is strikingly similar to that reviewed in *Ogle v. Gibson,* 214 N. C., 127, 128, 198 S. E., 598, in which the Court observed:

> "There could be no contributory negligence unless the defendants were also negligent. It is the contribution which a plaintiff makes to the negligence of the defendants as a proximate cause of the injury which bars the right to recover." *Ballew v. R. R.,* 186 N. C., 704, 120 S. E., 334; *Davis v. Jeffreys,* 197 N. C., 712, 150 S. E., 488; *Elder v. R. R.,* 194 N. C., 617, 140 S. E., 298; *Construction Co. v. R. R.,* 185 N. C., 43, 116 S. E., 3.

The instruction violates the principle thus announced and must be held for error, entitling the defendant to a new trial. It is so ordered.

New trial.

STATE v. MOSES ARTIS.

(Filed 30 April, 1947.)

1. Homicide § 20—

The evidence tended to show that defendant, a tenant, killed his landlord. *Held:* Evidence of the contract between the parties, the landlord's repeated refusals to sign lien waivers on the crop and testimony as to the poor condition of the crop is competent to show ill will and motive.

2. Criminal Law § 34a—

Testimony of declarations and admissions made by defendant is competent against him, and objection that defendant was not first cautioned as to his rights by the witness is untenable.

3. Homicide § 19—

Testimony of a witness as to a conversation with defendant relating to where defendant had left his gun after the killing and where witness had found the body of deceased is competent.

4. Homicide § 17—

Description of the wounds found on the deceased is competent.

5. Criminal Law § 48f—

An exception to the admission of evidence cannot be sustained when there is no objection to the question prompting the answer and no motion to strike the answer.

6. Criminal Law § 48d—

Where evidence is withdrawn by the court and the jury instructed not to consider it, any error in its admission is averted.

7. Homicide § 30—

Testimony of the wife of deceased as to the condition of his health just prior to the killing *held* not prejudicial.

8. Homicide § 21—

Premeditation and deliberation may be inferred from evidence that defendant dealt lethal blows after deceased had been felled and rendered helpless.

9. Criminal Law § 39a—

Where defendant testifies as to a communication between him and his attorney, the State may cross-examine him in regard thereto.

APPEAL by defendant from *Leo Carr, J.*, at September Term, 1946, of DUPLIN.

This was a criminal action wherein the defendant was tried and convicted of murder in the first degree upon a bill of indictment which charged murder in the first degree, and from judgment of death predicated on such conviction the defendant appealed to the Supreme Court, assigning errors.

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

Vance B. Gavin for defendant, appellant.

SCHENCK, J. The first exceptive assignments of error brought forward in appellant's brief are Nos. 1, 7, 21, 22, 23, and 28. These exceptions are based upon the fact that the court permitted the witnesses for the State, over objection of defendant, to testify as to the condition of the defendant's crop, which appellant contends served no purpose except to prejudice the jury against him. One witness, C. H. Smith, testified: "Two days after the killing I went over the crop. Looked it all over good. I don't think I have ever been in as sorry worked crop." These objections are all taken to the admission of evidence as to the conditions of the crops which the defendant was working as tenant of the deceased, to the terms of the contract between the deceased and the defendant, and to the refusal of the deceased to sign a lien waiver to enable the defendant to raise money on government mortgage with which to pay for tires and repairs to his automobile. All of this evidence was competent to show ill will of the defendant toward the deceased engendered by continued complaints made to him for the failure to sign lien waivers. We hold that the evidence assailed was competent to show motive. It was difficult to prove important and material facts without the witness giving evidence of them by speaking of them, it was inseparately connected with the evidence of the crime and the prisoner cannot successfully complain that it placed him in a bad light on the trial. *S. v. Moore,* 104 N. C., 743, 10 S. E., 183. There is nothing to indicate that evidence under discussion was introduced or used for the purpose of showing the character of the defendant or prejudice him before the jury.

In *S. v. Wilcox,* 132 N. C., 1120-1144, 44 S. E., 625, this Court said: " 'In the administration of the criminal law any fact shedding light upon the motives of the transaction will not be excluded from the consideration of the jury, whether it goes to the attestation of innocence or points to the perpetrator of the crime.' . . . A man's motive may be gathered from his acts, and so his conduct may be gathered from the motive by which he was known to be influenced. Proof that the party accused was influenced by a strong motive of interest to commit the offense proved to have been committed, although weak and inclusive in itself, yet it is a circumstance to be used in conjunction with others which tend to implicate the accused."

In addition to the assigned reasons for failing to sustain this objection there was practically no denial of the testimony objected to, and for that reason also we cannot hold such evidence as prejudicial.

The defendant objected to the fact that the State's witness was permitted to testify as to a conversation with the defendant immediately

after his arrest without first having cautioned the prisoner of his rights. Declarations and admissions of a defendant are always competent against him in a criminal action. *S. v. Abernethy,* 220 N. C., 226, 17 S. E. (2d), 25; *S. v. Ragland, ante,* 162.

Under proper exceptions the defendant in his brief complains that a witness for the State was permitted to testify, over objection, as to a conversation between himself and a third person in the absence of the defendant. This is not sustained by the record. The witness was relating his conversation with the defendant as to where his gun had been left after the killing and the question as to where the witness had found the body of deceased. These were properly admitted and the exceptions cannot be held for reversible error.

Under Exception 8 the defendant excepts to the admission of testimony as to the description of the wounds found on the deceased. Evidence of this character is competent as showing the violence of the transaction. Exception not sustained.

Exception No. 9 was to testimony given by the State's witness as follows: "The wound that went through his (deceased's) arm into his chest was the worst single wound I have ever seen blowed into a man." The defendant contends that this evidence was not only incompetent but was harmful. While we have some misgivings as to the evidence being harmful, in view of the admission of the killing by the defendant, an examination of the record discloses that while there was no objection to the question which prompted the answer under discussion, no motion to strike the answer was made and no exception taken thereto. It is well settled that assignments of error should be based upon exceptions briefly and clearly stated and numbered in the record. This exception is not tenable.

Exception No. 10 is to the State's witness comparing the wound of the deceased with wounds of others. The court subsequently in its charge withdrew this testimony and told the jury not to consider it, hence error, if any, in admitting the testimony was averted.

Exception No. 25 is taken to the admission of the testimony of the wife of the deceased as to the condition of his health just prior to the killing. In view of the admission of the killing by the defendant it is not seen how this testimony was in any wise prejudicial to the defendant. Hence this evidence is not held for reversible error.

Exception No. 26. Under this assignment of error the defendant in his brief argues his motion for judgment as of nonsuit. It is stated in *S. v. Taylor,* 213 N. C., 521, 196 S. E., 832, "The dealing of lethal blows after the deceased had been felled and rendered helpless was evidence from which the jury could infer the defendant's deliberate and premeditated purpose." This assignment is not sustained.

As to certain assignments of error made to the alleged compulsion of the defendant to testify as to what he contends was a privileged communication between him and his lawyer, Mr. Wilson, it should be noted that this testimony was first brought out by the defendant himself, hence it was opened to the State in cross-examination to pursue the subject. *Jones v. Marble Co.*, 137 N. C., 237, 48 S. E., 94.

We have endeavored to give this case the careful examination it calls for in view of the vital interest of the appellant involved therein and we find no reversible error.

No error.

D. A. S. HOKE, ADMINISTRATOR OF THE ESTATE OF JAMES MURRAY PATE, JR., v. ATLANTIC GREYHOUND CORPORATION, YATES CLYDE FARRIS, AND GEORGE W. SHARPE.

(Filed 30 April, 1947.)

1. Appeal and Error § 14—

After appeal from judgment rendered, the Superior Court has no further jurisdiction of the cause, except that (1) the trial court during the term may modify, amend or set the judgment aside, (2) the judge presiding at a subsequent term may adjudge that the appeal has been abandoned and proceed as though no appeal had been taken, (3) the trial judge has jurisdiction of all matters pertaining to settlement of case on appeal.

2. Judgments § 20a—

During the term a judgment is *in fieri*, and the trial judge, *non constat* notice of appeal, may modify, amend or set it aside at any time during the term.

3. Appeal and Error § 30a—

The judge presiding, after notice and on proper showing, may adjudge that an appeal taken at a prior term had been abandoned, and proceed in the cause as if no appeal had been taken.

4. Appeal and Error § 10e—

The trial judge alone has jurisdiction of matters pertaining to settlement of case on appeal, even though he is out of the district or has retired, and he alone has jurisdiction to modify, amend or strike out entries of appeal or extension of time for service of case on appeal and countercase, or motion to strike out purported case on appeal.

5. Appeal and Error § 31j: Courts § 5—

Plaintiffs, contending that the recitals of notice of appeal and agreement for extension of time of service of case on appeal and countercase, signed by the trial judge, were erroneous, moved before another judge at a subsequent term to strike appeal entries and the case on appeal subsequently

served. Plaintiff appealed from judgment denying these motions. *Held:* The court was without jurisdiction to hear the motions and the appeal therefrom is dismissed.

APPEAL by plaintiff from *Patton, Special Judge,* at February Extra Term, 1947, of MECKLENBURG.

Civil action to recover damages for wrongful death, heard on motion to strike appeal entries in behalf of defendants Atlantic Greyhound Corporation and Yates Clyde Farris, and on motion to strike the case on appeal served by said defendants.

At the January Extra Term judgment was rendered against the defendants. By consent Pittman, J., the trial judge, signed judgment out of term. Thereafter he certified entries of appeal on behalf of appellees herein which recite notice of appeal in open court and agreement of counsel on time within which to serve case on appeal and countercase. Plaintiff, contending that these recitals are erroneous, moved to strike. He also moved to strike case on appeal subsequently served.

Nettles, J., "referred" the matter to Pittman, J., for a "finding of fact." Pursuant thereto Pittman, J., filed his "findings of fact." The court below, upon consideration of the motions and said "findings of fact" entered judgment denying the motions and plaintiff appealed.

McDougle, Ervin, Fairley & Horack for plaintiff, appellant.

Smathers & Smathers and Smathers & Meekins for defendants Atlantic Greyhound Corporation and Yates Clyde Farris, appellees.

BARNHILL, J. An appeal from a judgment rendered in the Superior Court takes the case out of the jurisdiction of the Superior Court. Thereafter, pending the appeal, the judge is *functus officio. Bledsoe v. Nixon,* 69 N. C., 81; *S. v. Casey,* 201 N. C., 185, 159 S. E., 337; *S. v. Lea,* 203 N. C., 316, 166 S. E., 292; *S. v. Edwards,* 205 N. C., 661, 172 S. E., 399; *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; *Lawrence v. Lawrence,* 226 N. C., 221; *Clark v. Cagle,* 226 N. C., 230.

". . . 'the cause' is by the appeal taken out of the Superior Court and carried up to the Supreme Court" although the cost and stay bonds have not been filed and "of course a 'motion in the cause' can only be entertained by the court where the cause is." *Bledsoe v. Nixon, supra.*

To this general rule there are certain exceptions:

(1) A judgment is *in fieri* during the term at which it is rendered and the judge, *non constat* notice of appeal, may modify, amend, or set it aside at any time during the term. *Cook v. Telegraph Co.,* 150 N. C., 428, 64 S. E., 204; *S. v. Godwin,* 210 N. C., 447, 187 S. E., 560.

(2) The judge presiding at a later term, after notice and on proper showing, may adjudge that the appeal has been abandoned and proceed in the cause as if no appeal had been taken. *Avery v. Pritchard,* 93 N. C., 266; *Jordan v. Simmons,* 175 N. C., 537, 95 S. E., 919; *Dunbar v. Tobacco Growers,* 190 N. C., 608, 130 S. E., 505; *Pentuff v. Park,* 195 N. C., 609, 143 S. E., 139; *Pruitt v. Wood,* 199 N. C., 788, 156 S. E., 126.

(3) Jurisdiction of all matters pertaining to the settlement of the case on appeal remains in the trial judge, G. S., 1-282, 283; *S. v. Gooch,* 94 N. C., 982; *Boyer v. Teague,* 106 N. C., 571; *Thompson v. Williams,* 175 N. C., 696, 95 S. E., 100; *Chozen Confections, Inc., v. Johnson,* 220 N. C., 432, 17 S. E. (2d), 505; even though he is out of the district, *Owens v. Phelps,* 92 N. C., 231, *Cameron v. Power Co.,* 137 N. C., 99; or has retired, *Ritter v. Grimm,* 114 N. C., 373; *Simonton v. Simonton,* 80 N. C., 7.

"It is the sole duty of that judge, from whose judgment an appeal is taken, to settle the case on appeal for this Court. The statute so contemplates, and, in the nature of the matter, another judge could not settle it for him. In such case, he alone is supposed to have the information essential to the proper settlement of the case. Hence, he alone can make proper corrections." *Boyer v. Teague, supra.*

"Where there is a controversy as to whether the case on appeal was served within the time fixed or allowed, or service within such time waived, it is the duty of the trial court to find the facts, hear the motions and enter appropriate orders thereon." *Smith v. Smith,* 199 N. C., 463, 154 S. E., 737; *Pike v. Seymour,* 222 N. C., 42, 21 S. E. (2d), 884.

The appeal entries as they appear of record under the signature of Pittman, J., show notice of appeal and extension of time by consent. He and he alone had jurisdiction to modify, amend, or strike these entries. Likewise he alone could hear the motion to strike the purported case on appeal served by the appellees.

There is, perhaps, further reason why the judgment below should not be disturbed. One Superior Court judge has no power to review the findings, orders, and decrees of another Superior Court judge. *Davis v. Land Bank,* 217 N. C., 145, 7 S. E. (2d), 373; *In re Adams,* 218 N. C., 379, 11 S. E. (2d), 163. This we need not now decide for we rest decision squarely on the want of jurisdiction in the court below to enter any order or decree pertaining to the appeal by the defendants in the absence of a showing that the appeal has been abandoned. And certainly here there is no suggestion of an abandonment.

The appeal must be dismissed on authority of the line of decisions represented by *Shepard v. Leonard,* 223 N. C., 110, 25 S. E. (2d), 445; *S. v. Morgan,* 226 N. C., 414; and *S. v. Jones, ante,* 94.

Plaintiff's appeal dismissed.

M. L. PALMER AND H. C. MEADS, TRADING AS PALMER & MEADS, v. W. H. JENNETTE, SR., ET AL., TRADING AS JENNETTE FRUIT & PRODUCE CO.

(Filed 30 April, 1947.)

1. Trial § 45—

Conflicting or contradictory answers to the issues is not ground for judgment *non obstante veredicto*, it being the practice of the court to grant a new trial if the verdict is so contradictory as to invalidate the judgment.

2. Sales § 27—

In this action to recover balance due on the purchase price of potatoes delivered under contract, defendants claimed breach of warranty of merchantability. No issue as to damages for breach of warranty was submitted. *Held:* The instructions of the trial court as to the damages recoverable for breach of warranty and as to the amount recoverable by plaintiff for balance of purchase price, submitted under the one issue as to the amount, if any, defendants are indebted to plaintiffs, *is held* not sufficiently clear to guide the jury in arriving at a proper conclusion, and a new trial is ordered.

DEFENDANT'S appeal from *Frizzelle, J.*, at November Term, 1946, of PASQUOTANK.

The plaintiffs brought this suit to recover the balance alleged to be due on 1107½ bags of field-run Irish potatoes (excepting No. 3s), alleged to have been delivered to defendants at the price of $2.60 per bag, upon which it is admitted the defendants have paid for 370½ bags and are still indebted to plaintiff for 737 bags, or a total of $1,916.20, with interest. Defendants admit that they contracted to buy from the plaintiffs a quantity of field-run potatoes, exclusive of No. 3s, to be dug from a certain field and to pay $2.60 per bag; the defendants allege that it was agreed that the potatoes should be of sound and merchantable quality, which the plaintiffs deny. They further admit that the plaintiffs delivered 1107½ bags of potatoes and that defendants accepted a portion of them, to wit: 370½ bags, but expressly denied that they accepted all of the potatoes which had been delivered. On the contrary, defendants aver that upon the delivery of the last load of the potatoes they discovered that a quantity of them were in a rotting condition and that they so notified the plaintiffs within one hour after delivery. They further set up a claim for expenses for delivering a quantity of the potatoes to another warehouse for re-grading at the request of the plaintiffs.

The plaintiffs deny that the potatoes were removed to another warehouse at their request, averring that they had delivered them to defendants as per contract and had no further interest in them.

On the trial the evidence as to the condition of the potatoes, and the causes thereof, was sharply conflicting. The plaintiffs' evidence tended

to show that the potatoes were in good condition when they left the field for an 11 mile haul to defendants' warehouse. The digging and hauling consumed about four days, and the potatoes were delivered to defendants in lots as harvested. The evidence of defendants tended to show that some of the potatoes were discovered to be in a decaying condition just after the last load was delivered and notice to that effect given the plaintiffs. There was evidence on the part of plaintiffs tending to show that the potatoes were stacked in bags, without ventilation, at defendants' warehouse in a manner that tended to promote rapid deterioration and that this was done at the instance of purchasers. The evidence was indeterminate as to the relative quantity of good and bad potatoes. Defendants paid the plaintiffs for 370½ bags.

Plaintiffs denied the making of an express warranty of merchantability, and on this point the evidence was conflicting. The plaintiffs' evidence tended to show that defendants were afforded an opportunity to inspect the potatoes as they were dug and availed themselves of the opportunity, as far as they thought necessary,—and that care had been exercised to prevent the potatoes from exposure to the sun during the harvesting.

In this condition of the pleading and the evidence, issues were submitted to the jury and answered as follows:

"1. Did plaintiffs contract to sell and deliver to defendant 1107½ bags of field-run Irish potatoes at the price of $2.60 per bag delivered, as alleged in the complaint? Answer: Yes.

"2. If so, did plaintiffs deliver said potatoes to the defendants in accordance with the said contract? Answer: Yes.

"3. Was it a part of said contract that the plaintiffs should deliver said potatoes at the defendants' warehouse in a sound and merchantable condition? Answer: Yes.

"4. If so, did the plaintiffs comply with their said contract by delivering said potatoes at the defendants' warehouse in a sound and merchantable condition? Answer: No.

"5. If so, in what amount, if anything, are defendants indebted to plaintiffs? Answer: $1,708.20."

The first and second issues were answered affirmatively by the jury, without objection by either of the parties, on an instruction from the court that they should do so if they believed "all the evidence in the case."

The third and fourth issues were answered upon instructions to which no objection now applies, the burden being placed on the defendants to show a breach of the warranty upon which they relied. Upon the coming on of the issues the defendants tendered judgment to be signed and rendered that the plaintiffs recover nothing and that they pay the costs of the action. The court declined to sign the judgment and defendants

excepted. Judgment was rendered that the plaintiffs recover of the defendants the sum of $1,708.20 with interest. The defendants appealed, assigning errors.

J. Henry LeRoy for plaintiffs, appellees.
J. W. Jennette for defendants, appellants.

SEAWELL, J. Among other objections to the trial not necessary to discuss at length, the appellants insist that the judgment is not supported by the verdict, because of alleged irreconcilable repugnances in the answers to the several issues. Specifically it is contended that the fifth issue, permitting recovery and determining the amount thereof, is contrary to the findings under the third and fourth issues sustaining defendants' allegation that there was in the sales contract an express warranty of merchantability of the produce sold, and that plaintiffs had breached that warranty. Indeed, it is contended that because of the favorable answers to these two issues defendants were entitled to a judgment, which they tendered, that plaintiffs recover nothing, operating as a judgment *non obstante veredicto* as to the fifth issue.

The motion for judgment was properly overruled. Supposing such irreconcilable repugnance to exist, it is not the practice of the Court to enter a judgment *non obstante veredicto* upon the supposedly favorable issue and ignore the other. Where the answers to the issues are so contradictory as to invalidate the judgment, the practice of the Court is to grant a new trial, or *venire de novo,* because of the evident confusion. *Jernigan v. Neighbors,* 195 N. C., 231, 141 S. E., 586; *Porter v. R. R.,* 97 N. C., 66, 2 S. E., 581.

The Court might have been somewhat relieved in its review of this case if an issue had been submitted directly bearing on the damages sustained by reason of the breach of warranty alleged in defendant's answer, but no objection was made to the absence of such an issue. In its absence and upon the issues submitted, however, the Court is of opinion that the instructions to the jury with respect to damages recoverable by defendants for the alleged breach of warranty or the balance of purchase price claimed by the plaintiff,—both subjects being interrelated,—were not sufficiently clear to guide the jury in arriving at a proper conclusion.

A somewhat anomalous condition was brought about by the manner in which the case was presented in the trial court and we do not ascribe any fault for the indecisive result to the able and experienced judge who tried the case. However, for the reasons stated, we think the defendant is entitled to a new trial. It is so ordered.

New trial.

STATE v. SAM WARREN ET AL.

(Filed 30 April, 1947.)

1. Criminal Law § 42b—

On re-direct examination a witness may explain or refute an inference brought out on cross-examination even though such testimony would otherwise be incompetent.

2. Criminal Law § 81c (3)—

Admission of evidence must be prejudicial in order for exception to its admission to be sustained.

3. Criminal Law § 53k—

An objection to the court's statement of a contention of the State on the ground that it was not supported by the evidence of record cannot be sustained when such contention is a reasonable, logical and fair deduction from the evidence adduced.

4. Criminal Law § 78e (2)—

A misstatement of the contentions of the State should be brought to the trial court's attention in time to afford opportunity for correction.

5. Criminal Law § 12b—

Our courts have jurisdiction of a prosecution for conspiracy executed within the State even though the conspiracy be formed out of the State.

6. Conspiracy § 6—

Evidence in this case *held* amply sufficient to sustain conviction and sentence under charge of conspiracy to steal.

7. Criminal Law § 81c (4)—

Where the sentences upon conviction on three separate counts run concurrently and the sentences on the second and third counts do not exceed that of the first, if there is no error in respect to the first count any errors committed in respect to the second and third counts are harmless, and exceptions relating thereto need not be considered.

8. Criminal Law § 54b—

The failure of the verdict to refer to one of the counts in the bill of indictment amounts to an acquittal on that count.

APPEAL by defendant, Sam Warren, from *Burney, J.*, at Special Criminal Term, January, 1947. From PITT.

Criminal prosecution on indictment charging Sam Warren, and four confederates, in three counts, (1) with conspiracy to steal 10,000 pounds of sugar, valued at $750, the property of Demain Foods, Inc.; (2) with the larceny of 10,000 pounds of sugar, valued at $750, the property of Demain Foods, Inc., and (3) with receiving the said property knowing

it to have been feloniously stolen. In a fourth count the defendant, Sam Warren, is charged with counseling and procuring the larceny of the sugar in question.

The evidence tends to show that in September, 1946, Demain Foods, Inc., had on hand at its Pickle Factory in Ayden, N. C., a number of 100-pound bags of sugar. Needham H. Loftin, one of the defendants, was night watchman in charge of the warehouse. Sometime in September, Sam Warren and three of his confederates went to the warehouse, late at night, and offered the night watchman $20 a bag for the sugar. This was declined at the time. He promised to think it over, however, and on leaving they requested that he let Warren know later what he would do about it. Several nights thereafter, Warren's three companions returned to get his reply. The night watchman then promised to write Warren at his home in Hickory, Va., which he did, agreeing to let him have the sugar and requesting that he come and get it. On October 4th thereafter, the three confederates came to the warehouse, pretended a hold-up with the night watchman, and got the sugar. The night watchman then went to Warren's home in Virginia to collect for the booty. Warren paid him $200 and promised the balance at a later date.

After arrest, the night watchman made a confession which implicated the others. All were then arrested. Warren at first denied any knowledge of the matter; later he broke down and cried and confessed his part in the crimes, and told the sheriff where he could find the sugar. The defendants offered no evidence at the trial. The night watchman was used as a State's witness.

Verdict: The night watchman pleaded guilty; one of the confederates also pleaded guilty to one or more of the charges, and the jury convicted the remaining three defendants on the first three counts in the bill of indictment. There was no verdict on the fourth count.

Judgment as to Warren: Imprisonment in the State's Prison for not less than five nor more than seven years on the charge of conspiracy; a like sentence on the charge of larceny to run concurrently with the first; and a lesser sentence on the charge of receiving, also to run concurrently with the first.

The defendant Warren appeals, assigning errors.

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

J. B. James and W. W. Speight for defendant, appellant.

STACY, C. J. The defendant Loftin, night watchman and one of the conspirators, was called as a witness for the prosecution. On cross-examination he stated that nothing had been offered him to turn State's evidence: "Not a thing was offered to me to make this statement."

In reply, on redirect examination, the record discloses the following:

"Q. Now, Mr. Loftin, have you ever been offered money not to go on the stand in this case? Defendants object. Overruled; exception.

"A. Well, I can't say exactly that I have, but it was talked.

"Court: Well, who talked to you?

"A. It was different ones.

"Q. Any of the defendants?

"A. No, sir."

The appellant contends that this evidence, which was allowed to go to the jury without any qualifying instruction from the court, necessarily created an unfavorable impression against the defendants and prevented a fair and impartial consideration of the evidence by the jury. *S. v. Strickland,* 208 N. C., 770, 182 S. E., 490; *S. v. Page,* 215 N. C., 333, 1 S. E. (2d), 887, and cases there cited. The trial court was quick to sense the situation and drew from the witness the statement that none of the defendants had talked to him about the matter. Thus, the defendants were exculpated from any suggested impropriety. Nevertheless, it is contended, the jury was left to infer that some third person, acting on behalf of the defendants, might have done the talking. Even so, the defendants were responsible for the occurrence. They first asked the witness on cross-examination whether he had been promised anything to make his statement. The further examination by the solicitor was to clear up the inference left by this inquiry. "A witness has the right, upon his redirect examination, to give evidence explanatory of his testimony brought out upon his cross-examination, although such evidence might not have been strictly proper in the first instance"—First Headnote, *S. v. Orrell,* 75 N. C., 317. See, also, *S. v. Sawyer,* 224 N. C., 61, 29 S. E. (2d), 34. Moreover, the whole incident seems to have been no more than "cross-firing with small shot" between the solicitor and counsel for the defendants, and this over an extraneous matter. Anyhow, no harmful result has been shown. With all the evidence one way, including two confessions, and two of the defendants entering pleas of guilty, the appellant's only hope would seem to be to find some error in law or procedure, rather than a suggestion of jury prejudice. The jury had little or no choice. The exception is not sustained.

In giving the State's contentions against the defendant Warren, the court recited in its charge that "Mr. Loftin wrote him and that he sent after the sugar." Appellant says there is no evidence to support the statement "that he sent after the sugar" and the effect was to place before the jury a material circumstance which does not appear on the record. *S. v. Wyont,* 218 N. C., 505, 11 S. E. (2d), 473; *Smith v. Hosiery Mill,* 212 N. C., 661, 194 S. E., 83. It is in evidence, however, that following the night watchman's letter to Warren, his confederates came to get the sugar. The solicitor contended from this circumstance

that Warren sent them. That such was the case seems to have been taken for granted. It was clearly a reasonable, logical and fair deduction. *S. v. Smith,* 225 N. C., 78, 33 S. E. (2d), 472. At any rate, the matter was not called to the court's attention in time to afford an opportunity for correction, and so it is to be regarded as waived or as a harmless inadvertence. *S. v. Smith,* 221 N. C., 400, 20 S. E. (2d), 360.

The appellant's most earnest contentions have been reserved for the rulings on his motions for directed verdicts, and judgments of nonsuits. He stressfully contends there is no evidence of a conspiracy and that what he did was done in the State of Virginia, of which the courts of this State have no jurisdiction. *S. v. Buchanan,* 130 N. C., 660, 41 S. E., 107.

There is plenty of evidence to show a conspiracy and it can make no difference where it was formed. 11 Am. Jur., 559. It was executed in Pitt County, this State. Consequently, the Superior Court of that county had full authority to investigate the matter. *S. v. Lea,* 203 N. C., 13, 164 S. E., 737. The record amply sustains the conviction and sentence on the charge of conspiracy.

Whether the appellant was properly convicted on the charges of larceny and receiving, assuming that at the time of these offenses he was in the State of Virginia, we need not now decide, for his sentences on these counts were made to run concurrently with his sentence on the conspiracy charge, and they add nothing thereto. The one is of equal duration; the other for a lesser time. Hence, any errors committed in respect of these charges can avail the appellant naught. *S. v. Beal,* 199 N. C., 278, 154 S. E., 604; *S. v. Lea, supra.* The verdict makes no reference to the fourth count in the bill. This amounts to an acquittal on that count. *S. v. Hampton,* 210 N. C., 283, 186 S. E., 251.

A careful perusal of the record leaves us with the impression that no exception has been presented which would necessitate a new trial. The verdict and judgment will be upheld.

No error.

STATE v. WOODROW BROWN.

(Filed 30 April, 1947.)

Rape § 26: Criminal Law § 53g—

Where all the evidence tends to show that defendant ravished prosecutrix by force and against her will, defendant's sole defense being insanity, the trial court properly limits the jury to a verdict of guilty of rape or not guilty, and the refusal of defendant's request to submit the question of defendant's guilt of lesser offenses, is without error, there being no

evidence to support conviction of lesser degrees of the offense charged. G. S., 15-169; G. S., 15-170.

APPEAL by defendant from *Thompson, J.*, at November Special Criminal Term, 1946, of WAKE.

Criminal prosecution tried upon an indictment charging the defendant with rape.

The evidence tends to show that the prosecutrix, an unmarried woman, 59 years of age, lived alone in a nine-room house at Leesville. Her home was about a half a mile from her nearest neighbor. On the evening of 11 July, 1946, about 8:15 o'clock, the prosecutrix was alone at her home, and the defendant, a Negro man, broke into the house and tried to have sexual intercourse with her forcibly and against her will. She resisted him vigorously. Fearing that someone might hear her cries, he tried to take her out of the house through a window, failing in that he carried her out of the house through the back door. He then carried her a distance of approximately 100 yards into a pine thicket and kept her there about an hour and a half and raped her two or three times.

An examination of the prosecutrix on 12 July, 1946, by a physician, disclosed that she had bruises on her face, neck, chin and legs. She had a black eye. The examination further revealed that she had previously been a virgin but had within the past 24 or 48 hours suffered a forcible penetration with a laceration of the mouth of the vagina.

The defendant was arrested on 13 July, 1946, and confessed to the crime charged. He thereafter accompanied the officers to the house where the prosecutrix had lived, and pointed out the window where he broke into the house, and the door he broke open to get into the room occupied by the prosecutrix. He showed the officers the different rooms where he struggled with the prosecutrix, took them to the place in the woods where he said he "raped her two or three times," and further stated that she was so weak when he finished he "carried her back to the house and dropped her at the well." The defendant's oral confession, as related by three witnesses for the State, and the testimony of the prosecutrix, coincide in almost every detail as to what took place on the occasion in question. We deem it unnecessary to record the further testimony of the various witnesses.

Verdict: Guilty of rape, as charged in the bill of indictment. Judgment: Death by asphyxiation.

The defendant appeals, assigning error.

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

Harvey Jones and E. D. Flowers for defendant.

DENNY, J. According to the uncontradicted evidence offered by the State, the defendant committed the crime of rape, as charged in the bill of indictment. The attack on the prosecutrix by the defendant was one of pitiless cruelty and brutality.

In the trial below, the defendant did not repudiate his confession or object to its admission in evidence, neither did he offer any evidence in contradiction thereof. He elected not to go upon the stand, but to rest his defense upon a plea of insanity. The defendant offered expert testimony tending to show that he was a person of low mentality. According to this testimony the defendant has the ability to differentiate between right and wrong, but does not have the ability to understand the gravity or the consequences of his acts. The State, on the other hand, offered evidence tending to show that he was a man of normal mentality.

There being no conflict in the evidence bearing on the commission of the crime, the presiding judge announced that he would charge the jury that it might render one of two verdicts, guilty of the crime of rape as charged in the bill of indictment, or not guilty. Whereupon the defendant tendered a prayer for instruction, praying that the jury be instructed that it might render one of four verdicts: Guilty of rape as charged in the bill of indictment; guilty of assault with intent to commit rape; guilty of an assault on a female, or not guilty. The prayer was refused. The defendant excepted and this exception constitutes the principal assignment of error on his appeal. Therefore, we are confronted with this question: Was the defendant entitled to the instruction requested upon the evidence adduced in the trial below? The question must be answered in the negative.

The defendant is relying upon *S. v. McLean,* 224 N. C., 704, 32 S. E. (2d), 227; *S. v. DeGraffenreid,* 223 N. C., 461, 27 S. E. (2d), 130; *S. v. Feyd,* 213 N. C., 617, 197 S. E., 171; *S. v. Ratcliff,* 199 N. C., 9, 153 S. E., 605, and *S. v. Allen,* 186 N. C., 302, 119 S. E., 504. It will be noted, however, in each of the above cited cases, except *S. v. DeGraffenreid,* the appeal was from a conviction of burglary in the first degree. In such cases the statute, G. S., 15-171, provides that when the crime charged in the bill of indictment is burglary in the first degree, it is mandatory upon the judge to instruct the jury that even though the jury may find the facts "sufficient to constitute burglary in the first degree as defined by statute," the jury "may elect to render a verdict of guilty of burglary in the second degree, if they deem it proper to do so." This statute relates to indictments for burglary in the first degree only, and has no bearing on the appeal before us.

The only statutes upon which the defendant may seek relief under his exception, are G. S., 15-169 and 170. The pertinent part of G. S., 15-169, reads as follows: "On the trial of any person for rape, or any felony whatsoever, when the crime charged includes an assault against the

person, it is lawful for the jury to acquit of the felony and to find a verdict of guilty of assault against the person indicted, if the evidence warrants such finding." And G. S., 15-170, reads as follows: "Upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime."

It is pointed out in *S. v. DeGraffenreid, supra,* that "when under the indictment it is permissible to convict the defendant of 'a less degree of the same crime' (C. S., 4640, now G. S., 15-170), and there is evidence tending to support the milder verdict, the defendant is entitled to have the different views presented to the jury, under a proper charge, and an error in respect of the lesser offense is not cured by a verdict convicting the defendant of a higher offense charged in the bill of indictment, for in such case it cannot be known whether the jury would have convicted of a lesser degree of the same crime if the different views, arising on the evidence, had been correctly presented by the trial court. *S. v. Burnette,* 213 N. C., 153, 195 S. E., 356; *S. v. Merrick,* 171 N. C., 788, 88 S. E., 501." *S. v. Jackson,* 199 N. C., 321, 154 S. E., 402. It follows, therefore, that these statutes were not intended to give to the jury the arbitrary right or discretion to convict a defendant of a lesser degree of the crime charged or of a less serious offense than that charged, if the uncontradicted evidence, as here, shows beyond a reasonable doubt that the defendant is guilty of the more serious offense charged in the bill of indictment.

In *S. v. Williams,* 185 N. C., 685, 116 S. E., 736, the appeal was from a conviction of the crime of rape. The State's evidence, if believed, clearly established the commission of the crime. The defendant admitted having sexual intercourse with the prosecuting witness, but testified it was with her consent. The testimony was also conflicting in other respects. Therefore, upon appeal this Court held that the jury should have been instructed that it might return a verdict of guilty of a lesser offense than that charged in the bill of indictment.

In the case before us, there is no conflict in the evidence as to the commission of the acts which constituted the crime charged in the bill of indictment. The defendant's plea of insanity was fully and fairly presented to the jury in a charge free from error. The plea was rejected by the jury.

The exceptions to the charge of the court as a whole, and to the refusal of the court to set aside the verdict and grant a new trial, are without merit. None of the remaining seventeen assignments of error were brought forward in the brief, and will be treated as abandoned. Rule 28, Rules of Practice in the Supreme Court, 221 N. C., 563.

The ruling of the court below in declining the requested instruction must be upheld. Such ruling is in accord with the decisions of this Court when all the evidence tends to show the defendant is guilty of the more serious offense charged in the bill of indictment. *S. v. Ratcliff, supra; S. v. Jackson, supra; S. v. Ferrell,* 205 N. C., 640, 170 S. E., 186; *S. v. Satterfield,* 207 N. C., 118, 176 S. E., 466; *S. v. Hairston,* 222 N. C., 455, 23 S. E. (2d), 885; *S. v. Sawyer,* 224 N. C., 61, 29 S. E. (2d), 34.

In the trial below, we find

No error.

SONOTONE CORPORATION v. CARL J. BALDWIN.

(Filed 30 April, 1947.)

1. Contracts §§ 11½d, 7a—Acts of parties and amendment duly executed and signed after expiration of term of contract held readoption and extension of agreement for subsequent year.

The contract under which defendant was employed as plaintiff's district manager contained a covenant that defendant would not engage in business in competition with plaintiff for a period of one year after the termination of the contract, and stipulated that its term was for one year with provision for automatic renewal for not more than two additional years if defendant sold his quota. The parties continued to operate under this contract for four successive years, and three and one-half years after its execution executed an amendment signed by both parties. At the end of the fourth year defendant tendered his resignation in a letter signed by him as manager. *Held:* The contract was extended and was in force and effect for the fourth consecutive year, and in an action to enforce the covenant not to engage in business in competition with plaintiff during the fifth year, defendant's contention that the covenant was not in writing and signed by him as required by statute, G. S., 75-4, is untenable.

2. Contracts § 7a—

In a contract of employment of a district manager for a specified territory, covenant that he should not engage in business in competition with the employer for a period of twelve months subsequent to the termination of the contract within the territory or a radius of fifty miles thereof is reasonably limited as to time and territory and affords no more than fair protection to the covenantee without injury to the interest of the public, and therefore the covenant is valid and enforceable. Dissimilitude of contracts arising out of the conventional relationship of master and servant is pointed out.

3. Same—

While the law frowns upon unreasonable restrictions, it favors the enforcement of contracts intended to protect legitimate interests.

APPEAL by defendant from *Hamilton, Special Judge,* at January Extra Term, 1947, of MECKLENBURG.

Civil action to enjoin plaintiff's former District Manager from entering competitive employment in violation of his agreement.

The Sonotone Corporation has been selling hearing aids in the Carolinas for approximately 20 years and has built up a large demand for its products in this territory. The defendant, Carl J. Baldwin, is an expert in the audiomatric measurement of hearing loss and the proper fitting of hearing aids to compensate for such loss. He obtained his training in this field while working for the plaintiff.

In 1939 the defendant entered the employ of the plaintiff in the territory of the Carolinas. On 1 January, 1943, he agreed in writing to become Manager or District Manager for the sale of plaintiff's products in 40 counties in North Carolina and 9 contiguous counties in South Carolina. The defendant was given exclusive retail sales rights of plaintiff's products for one year, with provision that the contract should be deemed automatically renewed from year to year for not more than two additional years, if the defendant sold his annual quota. The defendant agreed to devote himself exclusively to the business of selling plaintiff's products and supplies.

It was further stipulated that "Upon the termination of this contract . . . the Manager agrees that he will not engage . . . in the business of manufacturing and/or selling any products or devices . . . in competition with the Manufacturer, or any agents or managers of the Manufacturer, either directly or indirectly as principal, or as agent or employee, in the Territory and within an area extending fifty (50) miles on every side thereof during a period of twelve (12) months from the date of termination."

The parties operated under this agreement for the first year and the two succeeding years. At the end of the third year on 31 December, 1945, the parties continued to operate in the same way without anything being said about a new contract. On 21 June, 1946, the following written stipulation was duly executed by the parties:

"June 21, 1946

"It is hereby mutually agreed that the territory outlined in clause number one of this contract be changed as of this date, to read as follows:

"Effective January 1, 1946, the minimum monthly sales quota outlined in clause number thirty-two, shall be $4,465.00 per mo.

"DEAN BOBBITT, President.
"F. W. BURNS, Assistant Secretary.
"CARL J. BALDWIN, District Manager
Sonotone of Charlotte.

"MRS. CARL J. BALDWIN,
Witness for the District Manager."

In September, 1946, the defendant began negotiations with one of plaintiff's competitors, Telex Corporation, and agreed to become Division Manager for this corporation, effective January 1, 1947, in nine states, including North and South Carolina.

Thereafter, on December 11, 1946, by letter duly signed by the defendant as "Mgr.," he tendered to the plaintiff his resignation as District Manager of the Charlotte territory to take effect at the end of the year, December 31, 1946.

On learning of defendant's contract with the Telex Corporation, the plaintiff instituted this action to enforce the restrictive covenant in its contract with the defendant.

A temporary restraining order was issued and this was continued to the hearing, limited, however, to the 49 counties mentioned in the contract.

From this order, the defendant appeals, assigning errors.

Whitlock, Dockery & Moore for plaintiff, appellee.
Howard B. Arbuckle, Jr., for defendant, appellant.

STACY, C. J. On the hearing, the case was made to turn primarily on whether the restrictive covenant, here sought to be enforced, is in writing and signed by the defendant. The statute provides that no contract or agreement limiting the right of any person to do business anywhere in North Carolina shall be enforceable unless such contract or agreement is in writing and duly signed by the party who agrees not to enter into any such business within the prescribed territory. G. S., 75-4.

I. CHARACTER OF CONTRACT.

That the parties regarded their written contract of January 1, 1943, as being in full force and effect during the year 1946 is evidenced by the following:

1. From and after December 31, 1945, the parties continued their operations under the contract, each rendering the same services and proceeding as theretofore. See, *Styles v. Lyon,* 87 Conn., 23, 86 Atl., 564; 35 Am. Jur., 454 and 460; 17 C. J. S., 318.

2. On June 21, 1946, the parties duly executed and signed an amendment to the contract.

3. On December 11, 1946, the defendant, by letter signed by him as "Mgr.," tendered his resignation as District Manager of defendant's Charlotte territory, effective December 31, 1946.

The effect of the memorandum of June 21, 1946, was to put in writing the mutual understanding of the parties that the written contract between them was still operative and to continue it in force as amended. It was

signed by the defendant in his capacity as District Manager. His letter of resignation, written on December 11, was also signed by him as "Mgr." True, in this letter, the defendant speaks of "the absence of contract," but this would seem to be a contradiction in terms. He resigns as District Manager effective at a later date. He evidently regarded himself as District Manager at that time. Under what contract? Moreover, the defendant was then looking forward to his contemplated work with the Telex Corporation.

The defendant confidently cites, as controlling, the decision in *Jenkins v. King* (Ind., 1946), 65 N. E. (2d), 122, 163 A. L. R., 397, but that case was made to rest on a different principle. There, the extension of the contract by implication alone was all the plaintiff had to rely upon. Here, the parties readopted the contract and amended it by writing duly executed and signed on June 21, 1946.

II. VALIDITY OF COVENANT.

There is no ambiguity in the restrictive covenant. It was inserted for the protection of the plaintiff, and to inhibit the defendant, for a limited time, from doing exactly what he now proposes to do. *Exterminating Co. v. Wilson, ante,* 96. The parties regarded it as reasonable and desirable when incorporated in the contract. Subsequent events, as disclosed by the record, tend to confirm, rather than refute, this belief. Freedom to contract imports risks as well as rights. Such a covenant is lawful if the restriction is no more than necessary to afford a fair protection to the covenantee and is not unduly oppressive on the covenantor and not injurious to the interests of the public. *Beam v. Rutledge,* 217 N. C., 670, 9 S. E. (2d), 471; *Matthews v. Barnes,* 155 Tenn., 110, 293 S. W., 993, 52 A. L. R., 1350; *Granger v. Craven,* 159 Minn., 296, 199 N. W., 10, 52 A. L. R., 1356; Anno. 98 A. L. R., 963.

Many of the authorities in this jurisdiction dealing with restrictive covenants are collected in the case of *Moskin Bros. v. Swartzberg,* 199 N. C., 539, 155 S. E., 154.

Perhaps it should be noted that cases arising out of the conventional relation of master and servant, or employer and employee, are somewhat different in their solution from the one here presented. Anno. 9 A. L. R., 1456. The controlling factors are dissimilar. A workman "who has nothing but his labor to sell and is in urgent need of selling that" may unwittingly accede to an unguarded restriction at the time of his employment, but one who is competent to serve as District Manager of a large corporation is supposed to understand and fully appreciate the significance of his engagements. While the law frowns upon unreasonable restrictions, it favors the enforcement of contracts intended to protect legitimate interests. It is as much a matter of public concern to see that valid engagements are observed as it is to frustrate oppressive ones.

The covenant here seems reasonable in its terms and purposes. It appears to meet the test of validity. *Grand Union Tea Co. v. Walker,* 208 Ind., 245, 195 N. E., 277, 98 A. L. R., 958, and note. It is reasonably limited both in respect of time and territory, which distinguishes it from *Comfort Spring Corp. v. Burroughs,* 217 N. C., 658, 9 S. E. (2d), 473. Likewise, *Kadis v. Britt,* 224 N. C., 154, 29 S. E. (2d), 543, 152 A. L. R., 405, is distinguishable in its factual situation.

In undertaking to change horses for what the defendant regards a better mount, he is reminded of his obligation to the steed which brought him safely to midstream and readied him for the shift. The purpose here is to call his attention to the matter.

No reversible error has been made to appear.

Affirmed.

CITY COACH COMPANY, INC., v. GASTONIA TRANSIT COMPANY.

(Filed 30 April, 1947.)

1. Carriers § 2—

The licensing of public carriers of passengers and freight for hire along the public highways of the State is within the exclusive prerogative of the General Assembly, and it may prescribe the conditions under which and the agency or agencies by which the privilege will be granted.

2. Carriers § 5: Utilities Commission § 2—

The licensing of a carrier of passengers for compensation along a regular route between fixed termini from a point within a city thence along a public highway within the city through several unincorporated towns outside the city to a point on the public highway ⅞ of a mile outside the city, is within the exclusive jurisdiction of the Utilities Commission. G. S., 62-103 (k).

3. Carriers § 5: Municipal Corporations § 26—

A municipality granted an exclusive franchise for the operation of a motor bus transportation service over specified streets within the city and "such other routes, with the consent and approval of the city council" as the public transportation might require. Thereafter the municipality approved request for additional route along a public highway from a point within the city to a point ⅞ of a mile beyond the corporate limits. *Held:* The "approval" of the proposed route does not amount to granting of franchise by the city, and *held further* the city has no authority to grant such franchise either under G. S., 160-203, or by virtue of its implied powers.

4. Carriers § 5: Utilities Commission § 3—

License to a common carrier must be written and granted by the Utilities Commission as such, G. S., 62-105, and an oral permit transmitted by telephone by the Chairman of the Utilities Commission is not a valid authorization.

5. Utilities Commission § 1: Courts § 3a—

The powers vested in the Utilities Commission in respect to the licensing, supervision and control of franchise carriers of passengers and property for compensation and to hear complaints are comprehensive and ordinarily the courts will not exercise original jurisdiction over any question which may arise in respect thereto.

6. Same: Injunctions § 4i—

Injunction will lie to protect the rights and privileges of a duly licensed franchise carrier from infringement by an interloper possessing no franchise or other claim of right.

APPEAL by plaintiff from *Olive, Special Judge,* at October Term, 1946, of GASTON.

Civil action to restrain defendant from operating buses over and along the bus franchise route of plaintiff.

The plaintiff is an interurban carrier of passengers for hire and holds a franchise issued in 1936 which permits it to operate its buses on State Highway 7, from the City of Gastonia over and along East Airline Avenue and Ozark Avenue, which are a part of said highway within said city, to points east.

In 1942 Gastonia granted an exclusive franchise to defendant to operate a motor bus transportation service over and upon the streets of that city along the routes therein specified and "such other routes, with the consent and approval of the City Council of the City of Gastonia, N. C., as the public transportation demands, or the public may require." On 20 November 1945 defendant requested authority to establish an additional bus route to begin at the intersection of West Main Avenue and South Street in said city, extending along Main Avenue thence to Airline Avenue, to Ozark Avenue, to the city limits, and thence along State Highway 7 to a point at or near the overhead bridge at intersection of lower Dallas Road and Highway 7. The route thus outlined is a part of plaintiff's franchise route and serves several unincorporated mill villages outside the corporate limits of Gastonia. The request was approved by resolution adopted by the City Council 20 November 1945.

On 28 November 1945 defendant began the operation of buses over said route which is a part of Highway 7 and extends about seven-eighths of a mile beyond the corporate limits of Gastonia. Thereupon plaintiff instituted this action for injunctive relief and obtained a temporary restraining order.

On the hearing of the rule to show cause the temporary restraining order was dissolved and the cause was continued to the final hearing. When the cause came on to be heard in the court below the court, after hearing, entered judgment denying injunctive relief and dismissing the action. Plaintiff excepted and appealed.

Basil L. Whitener for plaintiff appellant.

L. B. Hollowell for defendant appellee.

BARNHILL, J. This appeal poses this question for decision: Is a municipality vested with authority to grant a franchise for the transportation of passengers for hire over a route extending from a point within the city along streets which form a part of a public highway to a point seven-eighths of a mile beyond the corporate limits of the city?

The business of carrying passengers and freight for hire by motor vehicle over and along the public highways of the State is a privilege the licensing of which is peculiarly and exclusively a legislative prerogative. The General Assembly may prescribe the conditions under which, and the agency or agencies by which, the privilege will be granted. This it has elected to do.

The Utilities Commission is given the power to grant licenses or franchises for the operation of motor buses over and upon the public highways, G. S. 62-105, *Utilities Com. v. Coach Co.*, 224 N. C., 390, 30 S. E. (2d), 328, and to exercise general supervision and control over all public utilities and public service corporations of the State. G. S. 62-27.

"Public utility" as thus used "includes persons and corporations . . . owning or operating in this state equipment or facilities for: (4) Transporting persons or property by motor vehicles for the public for compensation, but not including taxicab, operating on call, or truck transfer service in cities or towns." G. S. 62-65 (e) (4).

And "public highway" as that term is defined in the Motor Bus Law "means every street, road, or highway in this State, whether within or without the corporate limits of any municipality." G. S. 62-103 (o).

The authority vested in the Commission includes the power to supervise the services rendered by carriers of freight or passengers, G. S. 62-30 (1), and to fix the rates to be charged by all public utilities, including those within cities other than railroads using steam as a motor power. G. S., 62-36.

Every person or corporation desiring to operate motor buses over the highways of the State for the transportation of passengers or property for compensation must first apply to and obtain from the Commission a franchise certificate authorizing such operation. G. S. 62-105, *Utilities Com. v. Coach Co., supra.*

This includes every person or corporation "owning, controlling, operating or managing any motor vehicle used in the business of transporting persons or property for compensation between cities, or between towns, or between cities and towns, *or over a regular route,* over the public highways of the State, as public highways are defined" in the Act, G. S. 62-103 (k); and "town" as thus used "means any unincorporated community, point, or collection of people having a geographical name by

which it may be generally known and is so generally designated." G. S. 62-103 (m).

As originally defined "motor vehicle carrier" included only motor carriers operating between cities, or between towns, or between cities and towns, Sec. 1 (k), Chap. 136, P. L. 1927. Interpreting that section as it then existed, this Court held that a franchise was required from the Utilities Commission only when the carrier was operating with cities or towns as fixed termini. *Winborne, Utilities Comr., v. Mackey,* 206 N. C., 554, 174 S. E., 577; *Winborne, Utilities Comr., v. Browning,* 206 N. C., 557, 174 S. E., 579; *Winborne, Utilities Comr., v. Sutton,* 206 N. C., 559, 174 S. E., 580. Thereafter the Legislature amended the section by adding the phrase "or over a regular route." Sec. 2, Chap. 247, P. L. 1937. Thus the Act was broadened and extended so as to include all motor bus carriers operating over a regular route between fixed termini.

This summary of the pertinent law leads to the conclusion that the Utilities Commission and it alone has the power to grant defendant a franchise for the operation of its buses over the route in controversy. The defendant is a carrier of passengers for compensation and it proposes to operate its buses upon a public highway over a regular route between fixed termini. Jurisdiction to license such operation rests exclusively in the Utilities Commission.

The ordinance of the City of Gastonia under which defendant claims the right to operate its buses on the proposed route purports to grant a franchise within the city only and the resolution of 20 November 1945 simply "approves" the proposed route. Hence the city has never undertaken to grant defendant a franchise to operate its buses on Highway 7 beyond the corporate limits of the city. Its claim of authority from this source to exercise the franchise rights now asserted by it is without foundation in fact.

Nor is defendant aided by G. S. 160-203. The application of that Act is expressly limited by its own terms. It does not include the granting of an extraterritorial franchise.

In view of the clear intent of the Legislature to vest in the Utilities Commission control over the issuance of all franchises for the operation of motor buses for the transportation of passengers over regular routes on the streets, roads, and highways of the State within or without cities and towns we cannot hold that the city had authority to grant defendant a franchise to operate over the proposed route either under the terms of G. S. 160-203 or by virtue of its implied powers.

The policy to be followed by the Commission is written in the statute. It contemplates a written license, G. S. 62-105, granted by the Commission as such. G. S. 62-105. An oral permit transmitted by telephone is without force or effect. Hence, what transpired between the secretary-

treasurer of defendant and the Chairman of the Utilities Commission did not constitute a valid authorization for defendant to operate its buses on the proposed route in competition with plaintiff.

It follows that the conclusion of the court below that defendant "has the necessary legal authority from both the governing authorities of the City of Gastonia, North Carolina, and the North Carolina Utilities Commission" to continue the operation of its buses over the franchise route of plaintiff described in the complaint and answer must be held for error. The defendant, although acting in good faith, is an interloper invading the prerogatives, privileges and rights of the plaintiff. G. S. 62-110.

The powers vested in the Utilities Commission in respect to the licensing, supervision and control of franchise carriers of passengers and property for compensation and to hear complaints are comprehensive. Ordinarily the courts will not exercise original jurisdiction over any question which may arise in respect thereto. *Hunsucker v. Winborne*, 223 N. C., 650, 27 S. E. (2d), 817. However, when it is made to appear that the rights and privileges of a duly licensed franchise carrier are being infringed and its property rights invaded by an interloper possessing no franchise or other valid claim of right, a court of equity will intervene and protect the rights of the injured party. It follows that the court below erred in denying plaintiff the injunctive relief prayed.

The right to make application for a franchise in the manner provided by statute is still open to the defendant.

The judgment below is

Reversed.

W. B. COLBERT, INDIVIDUALLY, AND W. B. COLBERT, NEXT FRIEND OF SHIRLEY COLBERT, MINOR, v. MAURICE C. COLLINS AND L. L. COLLINS, AND L. L. COLLINS, GUARDIAN AD LITEM OF MAURICE C. COLLINS, MINOR.

(Filed 30 April, 1947.)

Parties § 10c—

In this action, involving a collision between two automobiles, the Superior Court granted defendants' petition for the joinder of the owner and driver of a third car involved in the collision. *Held:* The order of the Superior Court must be affirmed, since if the additional parties defendant are proper parties, joinder was in the discretion of the court and not subject to review, or if such additional parties are necessary parties to a complete determination of the controversy, the court was required to have them brought in as parties defendant.

APPEAL by plaintiffs from *Thompson, J.*, at September Term, 1946, of FRANKLIN.

The action was commenced by the above named plaintiffs against the above named defendants to recover damages for negligence alleged to have been caused by said defendants, and the defendants filed petition to the Superior Court of Franklin County for an order making Paul Ingram and Raymond Ingram parties defendant. The allegations are to the effect that there was a collision between the cars of W. B. Colbert, driven by Shirley Colbert, minor, and the car of L. L. Collins, driven by Maurice C. Collins, minor, in which collision a third car of Raymond Ingram, driven by Paul Ingram, became involved. The petition was denied by the Clerk of the Superior Court of Franklin County and an appeal was taken by the defendants to the judge holding the courts, and upon such appeal the ruling of the Clerk was reversed by the judge by an order entered making said Paul Ingram and Raymond Ingram parties defendant. To such order the plaintiffs preserved exception and appealed to the Supreme Court, assigning errors.

John F. Matthews for plaintiffs, appellants.
No counsel for defendants, appellees.

PER CURIAM. The only exceptive assignment of error contained in the record is to the signing of the judgment by the judge presiding. This assignment of error is untenable, since if the parties sought to be made parties defendant are proper parties the order was within the discretion of the court and not subject to review, or if, on the other hand, such parties are necessary parties, without whose presence a complete determination of the controversy could not be had, the court was required to have them brought in as parties defendant. McIntosh, Prac. & Proc., Sec. 259, p. 245. The order entered, therefore, should be

Affirmed.

MAGGIE WILSON v. PAUL R. ERVIN, ADMINISTRATOR D. B. N. OF THE ESTATE OF D. G. WILSON, DECEASED.

(Filed 7 May, 1947.)

1. Husband and Wife § 15a—

An estate by entirety in personal property is not recognized in this State.

2. Husband and Wife § 15c—

An estate by entirety may be destroyed or dissolved by the joint acts of the parties, and sale by husband and wife terminates the estate and the proceeds of the sale will be held by them as tenants in common without right of survivorship unless they exercise their right to provide otherwise by contract.

3. Estates § 16—

Since the statutory abolition of survivorship in joint tenancy, G. S., 41-2, the right of survivorship in personalty may be created only by contract.

4. Evidence § 32—

Where, in an action to establish a claim against an estate, plaintiff introduces evidence that prior to his death decedent had received the funds in dispute, testimony by her that she had never received any part of the funds is tantamount to testifying that decedent had not paid her any part thereof, and is incompetent under G. S., 8-51.

5. Evidence § 24—

The witness testified that he had never represented defendant's intestate in any business affairs. *Held:* Testimony that intestate had never told the witness that intestate had paid plaintiff any of the funds in controversy is no evidence that intestate had not made such payments, and is incompetent.

6. Executors and Administrators § 19—

Husband and wife sold land held by them by entireties. After his death she sued his estate to recover the proceeds of sale, part of which was in cash and part in purchase money notes. *Held:* There being no right of survivorship in the proceeds of sale as a matter of law, in the absence of competent evidence that the husband had not paid her any part of the cash proceeds, and the absence of evidence as to whom the notes were made payable, the administrator's motion to nonsuit should have been allowed.

7. Appeal and Error § 31d—

Where appellant does not file a brief his appeal will be dismissed. Rule of Practice in the Supreme Court, No. 28.

APPEAL by plaintiff and defendant from *Olive, Special Judge,* at October Extra Civil Term, 1946, of MECKLENBURG.

The defendant's intestate, D. G. Wilson, and the plaintiff were married in 1925 or 1926. There were no children born of this marriage, but the decedent had five children by a previous marriage.

The plaintiff qualified as administratrix of her husband's estate upon his death on 30 October, 1943. She filed an inventory of the estate 2 February, 1944, showing personal assets in the amount of $34,813.86, and thereafter on 7 August, 1944, filed a supplementary inventory showing the personal assets of the estate as $60,387.78. She subsequently resigned as administratrix and the defendant, the public administrator, took charge of the estate. Thereafter on 19 November, 1945, this action was instituted.

The further facts pertinent to this appeal are substantially as follows:

1. On 5 August, 1926, the Industrial Realty Company, Trustee, conveyed to D. G. Wilson and wife, Maggie Wilson, certain properties in a

suburban development known as Wilson Heights, and on 14 March, 1936, R. L. Price and wife conveyed to the said D. G. Wilson and wife, Maggie Wilson, certain properties in the suburban development known as Beverly Hills.

2. Prior to the death of D. G. Wilson, he had sold approximately fifty lots in the development known as Wilson Heights, to eleven different purchasers. D. G. Wilson and wife, Maggie Wilson, joined in the execution of the respective conveyances. Five sales were made during this period, of property owned by them in the development known as Beverly Hills. Deeds were similarly executed. Several of the purchasers executed notes and deeds of trust to secure the balance of the purchase price, and some of these notes were still unpaid at the time of the death of D. G. Wilson.

3. The plaintiff alleges and offered evidence tending to show that the defendant's intestate received the sum of $7,878.75 from the sale of the aforesaid properties. She further alleges that the above proceeds were received by her deceased husband from the sale of real property held by them as tenants by the entirety, and that no part thereof was paid by him to her, and that she is now entitled as survivor to the entire proceeds from the sale of said properties.

4. The defendant denies that the plaintiff is entitled to recover anything in this action, from the estate of the defendant's intestate, and moved for judgment as of nonsuit at the close of plaintiff's evidence. Motion overruled, whereupon the defendant offered evidence tending to show that D. G. Wilson and wife, Maggie Wilson, executed deeds of trust on certain properties involved herein and that the amount received by the defendant's intestate was less than the amount alleged by the plaintiff. To this evidence the plaintiff excepted.

At the close of all the evidence, the defendant renewed his motion for judgment as of nonsuit, which was again overruled. The jury returned a verdict in favor of the plaintiff for $6,484.92. The plaintiff and defendant appealed from judgment on the verdict to the Supreme Court, assigning error.

John James and J. C. Sedberry for plaintiff.

Tillett & Campbell and James B. Craighill for defendant.

DENNY, J. We shall first consider the defendant's appeal.

The trial below was conducted upon the theory that since the real property had been held by the plaintiff and the defendant's intestate as tenants by the entirety, the proceeds derived from the sale thereof, if such proceeds were held by defendant's intestate at the time of his death, passed to his administrator, as a part of the estate, and are held in trust for the survivor, his wife. In this there was error.

An estate by entirety in personal property is not recognized in this State. *Turlington v. Lucas,* 186 N. C., 283, 199 S. E., 366; *Davis v. Bass,* 188 N. C., 200, 124 S. E., 566; *Winchester v. Cutler,* 194 N. C., 698, 140 S. E., 622; *Dozier v. Leary,* 196 N. C., 12, 144 S. E., 368, 117 A. L. R., 922 n. Just as a divorce *a vinculo* will destroy the unity of husband and wife, and convert an estate by the entirety into a tenancy in common, *McKinnon v. Caulk,* 167 N. C., 411, 83 S. E., 559; *Davis v. Bass, supra,* so may an estate by the entirety be destroyed or dissolved by the joint acts of the parties. *Moore v. Trust Co.,* 178 N. C., 118, 100 S. E., 269. Hence, when property held as tenants by the entirety is sold, the proceeds derived from the sale will not be held as tenants by the entirety with the right of survivorship. Ordinarily, nothing else appearing, the proceeds from the sale of property held by the entireties are held as tenants in common, but the parties would have the right to determine by contract what disposition should be made of the funds or how they should be held. *Moore v. Trust Co., supra.* Moreover, since the abolition of survivorship in joint tenancy, G. S., 41-2, the right of survivorship in personalty, if such right exists, must be pursuant to contract and not by operation of law or statutory provision. *Taylor v. Smith,* 116 N. C., 531, 21 S. E., 202.

It should be borne in mind that a husband has no right to hold real estate as the survivor of an estate purporting to be one by the entireties, as against the heirs of the wife, if the consideration paid for the property came from the separate estate of the wife. *Carter v. Oxendine,* 193 N. C., 478, 137 S. E., 424; *Deese v. Deese,* 176 N. C., 527, 97 S. E., 475. Neither does a conveyance to husband and wife, of land representing a wife's interest in an estate, create an estate by the entireties. *Garris v. Tripp,* 192 N. C., 211, 134 S. E., 461; *Wood v. Wilder,* 222 N. C., 622, 24 S. E. (2d), 474; *Duckett v. Lyda,* 223 N. C., 356, 26 S. E. (2d), 918. Therefore, the holding that there can be no estate by the entireties in personal property, does not endanger or in any way impair the separate estate of the wife.

The appellee is relying upon what is said in *Place v. Place,* 206 N. C., 676, 174 S. E., 747, to sustain the verdict below. She contends the case is directly in point and by reason of the holding therein, she is entitled to all the proceeds received by the defendant's intestate, from the sale of the real property referred to herein, including the proceeds collected or to be collected from deferred payments thereon, since the death of her husband.

It does appear from the evidence that certain notes which represented the balance of the sale price of some of the lots conveyed by D. G. Wilson and wife, Maggie Wilson, were outstanding and unpaid at the time of the death of D. G. Wilson. But it is not disclosed by the evidence, to whom these notes were made payable. Consequently, if the plaintiff is

not entitled to the proceeds derived from the collection of these notes by operation of law, she has not offered sufficient evidence to establish a claim thereto against the estate of the defendant's intestate.

In the case of *Place v. Place, supra,* the question as to whether or not there can be an estate by the entirety in personal property was not before the Court for decision. J. E. Place at the time of his death had deposited the sum of $2,750.00 in a bank, said sum being the entire proceeds from the sale of land held by him and his wife as tenants by the entirety. The widow qualified as administratrix of his estate. She thereafter instituted a special proceeding, in which she claimed all of the aforesaid fund by right of survivorship, and obtained a judgment therefor. Notice of appeal was given to the Supreme Court by the respondents, but the appeal was not perfected. In the meantime, the bank in which the funds were deposited failed. The sum of $812.50 was recovered from the bank and paid on the judgment. Then a proceeding was instituted to determine whether or not the original judgment constituted a general claim against the estate of J. E. Place, or merely a claim against the fund which represented the proceeds from the sale of the land held by entirety. This Court held that the original judgment established the claim as a debt against the estate and that the petitioner was entitled to have the judgment paid in full. What was said in the opinion as to the basis for the original claim upon which the first judgment was obtained was not necessary to a decision on the question presented, and will therefore not be construed as authority for the position taken by the appellee on this appeal.

In view of what we have said above, we must now determine whether or not the plaintiff offered any competent evidence to establish a claim against the estate of the defendant's intestate.

The plaintiff offered competent evidence to show that the proceeds from the sale of certain lots held by her and her husband prior to his death, as tenants by the entireties, were received by him. She alleges in her complaint that no part of these funds were paid to her by her husband prior to his death. She seeks to sustain this allegation by her own testimony and that of her brother-in-law.

The plaintiff was permitted to testify, over the objection of the defendant, that she never received any of the proceeds derived from the sale of the properties referred to herein. Having offered evidence to show that her deceased husband received these funds prior to his death, her testimony to the effect that she had not received any of these funds was tantamount to testifying that the estate of her husband is now indebted to her for whatever interest she may have in the funds. We do not think this testimony was admissible under the provisions of G. S., 8-51. *Angel v. Angel,* 127 N. C., 451, 37 S. E., 479; *Benedict v. Jones,* 129 N. C., 475, 40 S. E., 223; *McGowan v. Davenport,* 134 N. C., 526,

47 S. E., 27; *Sherrill v. Wilhelm,* 182 N. C., 673, 110 S. E., 95; *Boyd v. Williams,* 207 N. C., 30, 175 S. E., 832; *Davis v. Pearson,* 220 N. C., 163, 16 S. E. (2d), 665; Stansbury on Evidence, Sec. 73.

The identical question raised here was decided in *Angel v. Angel, supra.* The witness testifying in his own behalf, in an effort to establish a set-off against the estate of the deceased, was asked, over objection, if anybody had paid him for certain merchandise he had furnished plaintiff's intestate. Thereupon the witness testified that no one had paid him for the goods. The Court said: "We think that this evidence was clearly incompetent, under section 590 of the Code (now G. S., 8-51). It needs no citation of authority to show that the defendant could not have testified that the intestate had never paid for the goods, and yet that was exactly the effect of his testimony when he said that nobody had paid him. Such a palpable evasion of the statute, which would be contrary to its essential meaning and would destroy its beneficial purpose, can not be permitted."

The present *Chief Justice,* speaking for the Court in *Sherrill v. Wilhelm, supra,* said: "We think a fair test in undertaking to ascertain what is a 'personal transaction or communication' with the deceased about which the other party to it cannot testify is to inquire whether, in case the witness testify falsely, the deceased, if living, could contradict it of his own knowledge." Applying the foregoing principles to the evidence under consideration, we think the defendant's exception to the admission of the evidence was well taken and must be sustained.

The remaining evidence offered by the plaintiff to show that she had not received any of the funds involved in this action from her husband prior to his death, was the testimony of J. S. Brown, her brother-in-law. Mr. Brown testified that at no time during the life of the defendant's intestate had he represented him in any of his business affairs. Nevertheless, in an effort to prove that plaintiff is now entitled to the funds in controversy, this witness was permitted to testify, over the objection of the defendant, that D. G. Wilson had never told him he had paid his wife any of the proceeds received from the sale of the lots referred to herein. How could this be competent? The witness, according to his own testimony, knew nothing about the business transactions of D. G. Wilson prior to his death. And the mere fact that D. G. Wilson had never told the witness that he had made a financial settlement with his wife, would not be competent evidence to prove that such a settlement had not been made. It possibly never occurred to Mr. Wilson that it was necessary or proper for him to discuss his private business affairs with his wife's brother-in-law. The exception to the admission of this evidence is sustained.

The burden of proof was on the plaintiff to make out her claim against the estate of the defendant's intestate. This she has not done on this record. The motion for judgment as of nonsuit should have been allowed.

In view of the conclusion reached it becomes unnecessary to discuss the plaintiff's appeal. However, since the plaintiff as an appellant did not file a brief, as required by Rule 28 of the Rules of Practice in the Supreme Court, 221 N. C., 563, the plaintiff's appeal will be dismissed.

Defendant's appeal—Reversed.

Plaintiff's appeal—Dismissed.

STATE v. CLYDE ROSCOE JONES AND CECIL JONES.

(Filed 7 May, 1947.)

1. Assault § 13: Robbery § 3—

Evidence that two persons acted in concert, that one of them assaulted prosecuting witness and both attempted to rob him, with evidence identifying defendants as the perpetrators of the crimes, *held* sufficient to be submitted to the jury and sustain conviction of simple assault and attempt to commit highway robbery.

2. Criminal Law § 78e (1)—

An exception to a specific portion of the charge is insufficient to present the contention that the charge failed to state the evidence and declare and explain the law arising thereon, G. S., 1-180, unless such portion is in itself fatally defective.

3. Criminal Law § 53b—

The failure of the court to add the words "beyond a reasonable doubt" in each instance that it uses the phrase "if the State has satisfied you from the evidence" cannot be held for prejudicial error when the court has used the words "beyond a reasonable doubt" in each portion of the charge excepted to and has theretofore correctly instructed the jury as to the *quantum* of proof required of the State.

4. Robbery § 1a—

The effect of Chap. 187, P. L. 1929 (G. S., 14-87) is merely to provide a more severe punishment for robbery and for attempt to rob when the offenses are committed by the use or threatened use of firearms or other dangerous weapons, without otherwise adding to or subtracting from the common law offense of robbery.

5. Robbery § 3: Criminal Law § 53g—

Defendant was charged with an attempt to commit highway robbery with firearms. The State's evidence was sufficient as to each essential element of attempt to commit robbery but was insufficient to show the use

of firearms in the attempt. *Held:* The court correctly submitted the evidence to the jury on the question of defendant's guilt of the less grave offense of attempt to commit highway robbery. G. S., 15-170.

6. Criminal Law § 53d—

The word "attempt" is self-explanatory, and the failure of the court to define and explain its meaning in the absence of prayer for special instructions is not on this record reversible error.

APPEAL by Clyde Roscoe Jones from *Thompson, J.,* at December Term, 1946, of COLUMBUS. No error.

Criminal prosecution under bill of indictment charging (1) a felonious assault (G. S. 14-2) upon R. S. Britt, and (2) an attempt to commit highway robbery with firearms.

The testimony, considered in the light most favorable to the State, tends to show the following facts. Defendant Roscoe Jones was employed by R. S. Britt to drive a truck to convey strawberries to market places. On 25 April 1946 he did not report for work and someone else was employed in his stead. That night Britt returned to Whiteville about 8:00 p.m. His driver got off the truck and Britt proceeded towards his home about seven miles in the country. A car followed him so closely its lights interfered with his driving. Some distance out of town the driver of the car blew his horn several times and Britt pulled to one side of the road. A young man came to the window of his truck and demanded his pocketbook. He denied having one. Thereupon he was struck on the head with a blackjack or pistol, and the first man and a companion "lit all over" him, felt his clothing, "and went all around under the seat." A car approached and the two men disappeared. Another car came along and carried Britt to the hospital.

When first assaulted, Britt tried to drive off, but his truck crossed the road ditch and hit a tree. At that time he managed to throw his pocketbook in the woods and so his assailants got nothing from him.

Britt recognized Roscoe Jones as one of his assailants but did not identify his companion. However, there was evidence defendants admitted to officers they were the ones who stopped him, claiming they did so to get Roscoe's coat off the truck, and then some argument developed between Britt and Cecil Jones relative to money Britt owed Roscoe, in the course of which Cecil struck Britt with his fist. There was other evidence relative to the conduct of the defendants that afternoon and night which tends to identify them as the parties who stopped Britt on the public highway.

The court, on the first count, submitted the cause to the jury on the lesser offense of assault with a deadly weapon and, on the second count, on the charge of an attempt to commit highway robbery.

By their verdict on the first count, the jury found each defendant guilty of a simple assault, and on the second count, guilty of an attempt to commit highway robbery.

The court pronounced judgment on the verdict on each count, the sentences to run consecutively, and defendant Clyde Roscoe Jones appealed.

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

Frink & Herring for defendant appellant.

BARNHILL, J. It may be conceded that the identification of defendants by the prosecuting witness was by no means convincing. Even so, there was other evidence tending to point to them as the parties who followed Britt and stopped him on the highway. Furthermore, there was uncontroverted evidence that they so admitted. The real controversy involved the conflicting versions of what happened after defendants stopped him. If the statements made by defendants are to be accepted, then Cecil Jones committed a simple assault and Roscoe Jones committed no offense. If Britt's version of the occurrence is true, then the defendants, acting in concert, assaulted Britt and attempted to rob him. They were defeated in this purpose only by the fact Britt had no money on his person when they searched him.

The conflicting contentions in respect thereto were submitted to the jury. It was their prerogative to sift the evidence and find the facts. This they have done. The testimony is amply sufficient to sustain their verdict.

The appellant excepts to that part of the charge in which the court outlined the verdicts the jury might return under the second count as submitted to them. Under this exception he, in his brief, insists that the court failed to comply with the provisions of G. S. 1-180 in that it did not "state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon."

But an exception to a specific portion of the charge is not sufficient to present this question unless such portion is in itself fatally defective. There must be an assignment of error which points out specifically wherein the court failed to charge the law arising on the evidence. *S. v. Dilliard,* 223 N. C., 446, 27 S. E. (2d), 85; *Baird v. Baird,* 223 N. C., 730, 28 S. E. (2d), 225; *S. v. Harrill,* 224 N. C., 477, 31 S. E. (2d). 353; *S. v. Britt,* 225 N. C., 364; *Brown v. Loftis,* 226 N. C., 762. The Court will not make a voyage of discovery to ascertain error. *Cecil v. Lumber Company,* 197 N. C., 81, 147 S. E., 735.

In this and one other excerpt to which exception is entered, the court prefaced its instruction by "If the State of North Carolina has satisfied

you from the evidence . . ." The court had theretofore instructed the jury that the burden was on the State to satisfy them of the defendants' guilt beyond a reasonable doubt, and if it had failed so to do they should return a verdict of not guilty. The instruction was repeated in connection with each statement to which exception is entered. Thus the charge, considered contextually, fails to disclose prejudicial error.

The second count in the bill of indictment charges that defendant, in or near a public highway, with the use or threatened use of firearms, did feloniously attempt to rob one R. S. Britt. G. S. 14-87. The court below submitted the evidence to the jury on the "less degree of the crime charged," to wit, an attempt to commit highway robbery. This is permitted by statute when there is evidence of the "less degree" of the crime charged. G. S., 15-170.

The primary purpose and intent of the Legislature in enacting Chap. 187, P. L. 1929, now G. S. 14-87, was to provide for more severe punishment for the commission of robbery when such offense is committed or attempted with the use or threatened use of firearms or other dangerous weapons. It does not add to or subtract from the common law offense of robbery except to provide that when firearms or other dangerous weapons are used in the commission or attempted commission of the offense sentence shall be imposed as therein directed. *S. v. Keller,* 214 N. C., 447, 199 S. E., 620.

To sustain the charge alleged in the indictment it was necessary for the State to, and it did, offer evidence of every element necessary to be proven in order to convict of an attempt to commit highway robbery. On the other hand, evidence of the use of firearms as charged in the indictment was too vague and uncertain to justify the submission of the graver offense. This is evidenced by the verdict of the jury on the first count. Hence, the court properly followed the procedure authorized by G. S., 15-170. *S. v. Elmore,* 212 N. C., 531, 193 S. E., 713; *S. v. Hall,* 214 N. C., 639, 200 S. E., 375; *S. v. Batson,* 220 N. C., 411, 17 S. E. (2d), 511. As to this the defendant has no just cause to complain.

The court, it is true, did not define and explain the meaning of "attempt." The word "attempt" is one of common usage and means "Act of attempting; an essay, trial, or endeavor; an undertaking; esp., an unsuccessful effort." Webster's New Int. Dic., 2d Ed.; "An endeavor to accomplish a crime carried beyond mere preparation for it, but falling short of the ultimate design. The elements are (1) intent to commit a crime; (2) affirmative action in pursuance of that intent, but falling short of the crime intended." Callaghan, Cyclopedic Law Dic.; *S. v. Parker,* 224 N. C., 524, 31 S. E. (2d), 531. Hence, it was self-explanatory. The absence of amplification cannot be held for reversible error in the absence of special prayer.

We have carefully examined the other exceptive assignments of error and find in them no cause for disturbing the verdict.

No error.

ROBERT OTIS BOYETTE, BY HIS NEXT FRIEND, G. O. BOYETTE, v. ATLANTIC COAST LINE RAILROAD CO.

(Filed 7 May, 1947.)

Negligence § 4b—Timbers piled on railroad platform in ordinary manner in conduct of business held not inherently dangerous within doctrine of attractive nuisance.

The evidence tended to show that defendant railroad company piled used trestle timbers on its platform a short distance from a public road. Some of the timbers were piled with the narrow rather than the wider side down, and some had protruding bolts in them. The pile sloped a little, but there was no evidence that the timbers were piled in an unusual way. Plaintiff, a six-year-old boy, climbed upon the platform and was injured when one of the timbers fell on his foot. Children had been observed to play on piles of timber from time to time placed on the platform. *Held:* The pile of timber was not inherently dangerous, and under the circumstances defendant was not under duty to have anticipated and guarded against injury to children therefrom, nor does the evidence establish actionable negligence in the manner in which the timbers were piled.

APPEAL by plaintiff from *Burney, J.*, at September Term, 1946, of COLUMBUS. Affirmed.

Suit for damages for personal injury alleged to have been caused by the negligence of the defendant. At the close of plaintiff's evidence defendant's motion for judgment of nonsuit was allowed, and plaintiff appealed.

Varser, McIntyre & Henry for plaintiff, appellant.

Poisson, Campbell & Marshall and E. K. Proctor for defendant, appellee.

DEVIN, J. Plaintiff's appeal brings up for review the propriety of the ruling of the trial court in sustaining defendant's motion for judgment of nonsuit, and hence it becomes necessary to consider the evidence offered in order to determine its sufficiency to warrant submission of the case to the jury.

The material facts were these: The defendant operates a line of railroad through the northwest section of the Town of Chadbourn, the general direction being north and south. An unpaved street or road lies to the east of and parallel with defendant's tracks, some 40 or 50 feet

away. On defendant's right of way, between its tracks and the road, it maintains a platform, three feet high, and on this platform is piled from time to time timbers and crossties for use in the conduct of defendant's business. On the occasion complained of a pile of used trestle timbers had been placed on this platform parallel with the track. These timbers were 7 x 12 or 14 inches in size and approximately 16 feet long. Some were worn or decayed at the edges and partially rounded, and contained protruding bolts. Some were piled with the narrow rather than the wider side down. It was testified the pieces were piled up as well as they could be packed with the bolts in some of them, and the pile sloped a little. On the piles of lumber or crossties which from time to time were placed on the platform children had been observed to play.

On the afternoon of 12 February, 1943, the plaintiff, who was at that time 6 years of age, and living with his parents near by, climbed upon this platform and one of the timbers fell on his foot and crushed his toes. The plaintiff testified he was standing on the platform when one of the timbers rolled on his foot. "I was standing on the platform and I had not touched the piece that rolled off and hit my foot. It just bounced up . . . and I jumped off on the ground." He testified he had gotten on the platform and taken a step and started to take another when the timber rolled down and hit him.

Plaintiff's action is not bottomed on the principle of attractive nuisance as elucidated in the *Turntable Case* (*R. R. v. Stout*, 84 U. S., 657), but on negligence, in that the maintenance of a pile of bridge timbers on a platform on defendant's right of way adjoining an open road or street, coupled with defendant's knowledge of the habit of children to play on these piles of material, imposed upon the defendant the duty of exercising due care to guard against injury to such children which it should have foreseen was likely to occur, and that defendant's failure to perform its duty in this respect, and also in respect to the manner in which the timbers were piled, was the proximate cause of plaintiff's injury. In support of this position counsel for plaintiff cite *Kramer v. R. R.*, 127 N. C., 328, 37 S. E., 468. In that case crossties were piled at a street intersection in Marion, North Carolina, in the street, and a child playing on a pile of crossties was injured. One of the questions debated there was the effect of the imputation of negligence from obstructing the street. However, the Court said: "The defendant's negligence would not consist in piling the crossties in the street, but it would consist in its failure to guard against injury to the children, after it had learned of the habit of playing on the ties, and its failing to provide against their injury." This statement, by a divided Court, must be understood in relation to the facts of that case and the questions therein raised. The principle upon which liability for injury to children from the maintenance of inherently dangerous instrumentalities which are

attractive and alluring to them was discussed at length by *Justice Walker* in *Ferrell v. Cotton Mills,* 157 N. C., 528, 73 S. E., 142. In the opinion in that case the conclusion stated in *Brown v. Salt Lake City,* 33 Utah, 222, was quoted with approval as follows: "We are constrained to hold, therefore, that the doctrine of the turntable cases should be applied to all things that are uncommon and are artificially produced, and which are attractive and alluring to children of immature judgment and discretion, and are inherently dangerous, and where it is practical to guard them without serious inconvenience and without great expense to the owner." The legal principles involved in actions of this character have been frequently considered by this Court and rules of liability stated as applicable to varying circumstances. *Campbell v. Laundry Co.,* 190 N. C., 649, 130 S. E., 638; *Boyd v. R. R.,* 207 N. C., 390, 177 S. E., 1; *Brannon v. Sprinkle,* 207 N. C., 398, 177 S. E., 114; *Hedgepath v. Durham,* 223 N. C., 822, 28 S. E. (2d), 503; *Barlow v. Gurney,* 224 N. C., 223, 30 S. E. (2d), 226; 13 N. C. Law Review, 340, and cases cited.

In the case at bar the evidence does not disclose that the pile of bridge timbers was inherently dangerous, or that it was so attractive or alluring to children as to impose upon the defendant the duty to anticipate and guard against their efforts to play on and about it. Nor do we think the evidence is such as to impute actionable negligence to the defendant from the manner in which the timbers were piled. The timbers were on the defendant's right of way, on a platform erected for that purpose, and apparently piled in no unusual way, to be used in the conduct of its business. The immediate cause of the piece of timber rolling over on plaintiff's foot is not clear. We reach the conclusion that the injury complained of, under the circumstances as they are made to appear from the evidence in the record before us, was not one which reasonably should have been anticipated and guarded against by the defendant. "One of the elements of proximate cause essential in the establishment of actionable negligence is foreseeability." *Lee v. Upholstery Co., ante,* 88, 40 S. E. (2d), 688.

This view is supported by the decision in *Harris v. R. R.,* 220 N. C., 698, 18 S. E. (2d), 204. There a child was injured while playing on an empty and open freight car on defendant's track near a children's playground. Demurrer was sustained, as the facts alleged were held insufficient to show negligence. This Court declined to extend the imputation of liability on the part of the owner of premises for injury to a child, on the grounds here alleged, beyond reasonable and proper limits, or to include in the category of attractive nuisances every object of which childish imagination can make a plaything, quoting from *Twist v. R. R.,* 39 Minn., 164, as follows, "To the irrepressible spirit of curiosity and intermeddling of the average boy, there is no limit to the objects which can be made attractive playthings. In the exercise of his youthful

ingenuity, he can make a plaything out of almost anything, and then so use it as to expose himself to danger. If all this is to be charged to natural childish instincts, and the owners of property are to be required to anticipate and guard against it, the result would be that it would be unsafe for a man to own property, and the duty of the protection of children would be charged upon every member of the community except the parents of the children themselves."

Plaintiff's evidence failed to make out a case of actionable negligence so as to impose liability on the defendant for the unfortunate injury to the plaintiff's foot.

We have examined each of the plaintiff's exceptions to the rulings of the trial court in the taking of testimony, and find them insufficient to warrant disturbing the result reached below.

Judgment affirmed.

STATE v. RAYMOND STATON.

(Filed 7 May, 1947.)

1. Criminal Law § 53g—

Where there is evidence of defendant's guilt of a less degree of the crime included in the bill of indictment, defendant is entitled to have the question submitted to the jury.

2. Criminal Law § 81c (4)—

Error in failing to submit the question of defendant's guilt of a lesser degree of the crime is not cured by a verdict of guilty of a higher offense, since it cannot be known whether the jury would have rendered a milder verdict if permitted to do so.

3. Homicide § 16—

Where the intentional killing with a deadly weapon is admitted or established, defendant has the burden of satisfying the jury of the absence of malice in order to escape conviction of murder in the second degree, and that it was justified in order to avoid conviction of manslaughter.

4. Homicide § 27h—

Defendant's evidence tended to show that he secreted himself at night in his barn in order to catch an intruder who had been entering the barn, that on the night in question a person approached defendant's cow stall, that defendant hailed him several times and shot and killed him after he had failed to answer and persisted in undoing the rope on the cow stall. Defendant testified that he apprehended his own life was in danger. *Held:* Upon defendant's testimony tending to show a want of malice, it was error for the court to refuse to submit the question of defendant's guilt of manslaughter.

STATE *v.* STATON.

APPEAL by defendant from *Armstrong, J.*, at October Mixed Term, 1946, of UNION.

Criminal prosecution on indictment charging the defendant with the murder of one Marsh White.

Raymond Staton and Marsh White were neighbors in Union County. They were also brothers-in-law, having married sisters, and were close friends. During the week of 11 August, 1946, they had been going backward and forward to a protracted meeting and had attended church together on the day of the homicide. Somebody had been going into Staton's barn at night. So on Sunday night, 18 August, in an effort to catch the intruder, Staton, armed with a shotgun, secreted himself in his crib shed. The night was dark. Someone came through the corn patch, crawled under the wire, next to the stable door, and was approaching the cow stall when the defendant began hailing him: "Who is that?" He called to him once or twice or six or seven times, and saw him undo the rope on the cow stall. "Then what did you do? A. He wouldn't answer me, and I thought he was going to shoot me, and so I just throwed it up and shot—shot one time."

The defendant then reported to his landlord and to the sheriff that he had shot someone. Not until the sheriff came to make an investigation did the defendant learn that he had shot his brother-in-law.

On the trial, the solicitor announced that he would not ask for a verdict of murder in the first degree, but only for a verdict of murder in the second degree, or manslaughter, as the evidence might warrant.

The court instructed the jury that one of two verdicts might be returned on the evidence, "namely, a verdict of guilty of murder in the second degree, or a verdict of not guilty, depending entirely upon which one of such two verdicts you find to be warranted by the law and the evidence." Exception.

Verdict: Guilty of murder in the second degree.

Judgment: Imprisonment in the State's Prison for a period of not less than 10 years nor more than 20 years.

Defendant appeals, assigning errors.

Attorney-General McMullan and Assistant Attorney-General Tucker for the State.

Coble Funderburk for defendant.

STACY, C. J. The instruction, here assigned as error, took from the jury any consideration of "the less degree" of the crime charged, to wit, manslaughter. In this, we think there was error. *S. v. Robinson,* 188 N. C., 784, 125 S. E., 617. *Cf. S. v. Keaton,* 206 N. C., 682, and *S. v. Capps,* 134 N. C., 622, 40 S. E., 730.

The rule is, that when it is permissible under the bill to convict the defendant of "a less degree of the same crime," and there is evidence to support a milder verdict, the defendant is entitled to have the different views presented to the jury under proper instructions, and an error in this respect is not cured by a verdict finding the defendant guilty of a higher offense, for in such case, it cannot be known whether the jury would have convicted of a less degree of the same crime if the different views, arising on the evidence, had been correctly presented in the court's charge. *S. v. Lee,* 206 N. C., 472, 174 S. E., 288.

It is also established practice that on trial for homicide, upon the admission or establishment of an intentional killing with a deadly weapon, the law casts upon the defendant the burden of satisfying the jury that the killing was without malice, if he would escape a conviction of murder in the second degree, and that it was justified if he would avoid a conviction of manslaughter. *S. v. Burrage,* 223 N. C., 129, 25 S. E. (2d), 393; *S. v. Davis,* 223 N. C., 381, 26 S. E. (2d), 869; *S. v. DeGraffenreid,* 223 N. C., 461, 27 S. E. (2d), 130; *S. v. Beachum,* 220 N. C., 531, 17 S. E. (2d), 674; *S. v. Sheek,* 219 N. C., 811, 15 S. E. (2d), 282; *S. v. Bright,* 215 N. C., 537, 2 S. E. (2d), 541.

Here, the defendant says the killing, if not justified, was at least without malice, and the jury should have been permitted to consider the evidence in this light. *S. v. Sheek, supra.* According to defendant's testimony, the deceased was more than a mere trespasser at the time of the shooting. *S. v. Brittain,* 89 N. C., 481; *S. v. Morgan,* 25 N. C., 186. He was trying to undo the latch to the cow stall, and refused to desist or to answer the defendant's many cries. This caused the defendant to apprehend that his own life was in danger. *S. v. Lipscomb,* 134 N. C., 689, 47 S. E., 44; *S. v. Craton,* 28 N. C., 164.

The fact that the jury deliberated three hours and forty minutes before returning a verdict within the confines of the charge would seem to indicate some hesitancy on their part. We think they should have been allowed to consider the issue of manslaughter.

New trial.

STATE v. BEN FRANK McLEOD.

(Filed 7 May, 1947.)

Criminal Law § 80b (4)—

Where defendant gives notice of appeal but fails to serve case on appeal within the time allowed or take any action toward perfecting the appeal, the motion of the Attorney-General to docket and dismiss will be allowed, but where defendant has been convicted of a capital felony this will be done only after an inspection of the record proper fails to disclose error.

MOTION by State to docket case, affirm the judgment and dismiss the appeal.

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

PER CURIAM. The defendant was tried at November Term, 1946, of Scotland Superior Court on a bill of indictment charging him with the murder of one William Kenneth Lowry, and was convicted of murder in the first degree. Judgment was entered sentencing him to death as the law directs. From this judgment defendant gave notice of appeal to the Supreme Court, but no case on appeal has been made out or served within the time allowed by law, nor docketed in this Court. Nothing has been done toward perfecting the appeal and the time for same has expired.

The motion of the Attorney-General to docket and dismiss the appeal under Rule 17 is supported by the record, and is allowed. We have examined the record and find that no error appears on the face of the record. *S. v. Watson,* 208 N. C., 70, 179 S. E., 455.

Judgment affirmed; appeal dismissed.

D. A. S. HOKE, ADMINISTRATOR OF THE ESTATE OF JAMES MURRAY PATE, JR., v. ATLANTIC GREYHOUND CORPORATION, YATES CLYDE FARRIS AND GEORGE W. SHARPE, SR.

(Filed 21 May, 1947.)

1. Appeal and Error § 20—

Where there are two appeals in one action, only one transcript, with separate statements of cases on appeal, should be filed. Rule of Practice in the Supreme Court No. 19 (2).

2. Negligence § 18: Death § 8—

In an action for wrongful death the army discharge of plaintiff's intestate is incompetent.

3. Same: Trial § 16—

Where the army discharge of plaintiff's intestate has been admitted in evidence but the court thereafter of its own motion withdraws the discharge from the consideration of the jury and instructs the jury not to consider it, the incident will not be held prejudicial.

4. Negligence § 20—

An instruction that if the jury should find certain specific facts from the greater weight of the evidence such conduct "would be negligence"

instead of "would constitute negligence," *held* not an expression of opinion in violation of G. S., 1-180, even when considered with a subsequent instruction applying the rule of the prudent man to the conduct of defendant when confronted by an emergency.

5. Automobiles § 18—

The right of a motorist driving on his right side of the road to assume and act upon the assumption that the driver of a vehicle approaching from the opposite direction will yield one-half the highway or turn to his right in time to avoid collision, as required by law, G. S., 20-148, is not absolute, but is subject to the duty resting upon him to exercise due care under the existing circumstances, and the statutory requirement that he decrease his speed when special hazards exist with respect to traffic, width and condition of the highway or weather conditions, G. S., 20-141.

6. Same: Automobiles § 18i—Rule that driver may assume that driver of approaching car will keep to right held not applicable upon the evidence.

The driver of the car testified that as she approached a long concrete bridge at a speed of about 30 miles an hour over a wet highway she saw a bus traveling 50 or 60 miles an hour approaching from the opposite direction, rounding a curve approximately 150 feet from the other end of the bridge, with its left wheels 3 or 4 feet to the left of the center of the highway, that she took her foot off the accelerator but did not apply her brakes until immediately before the collision. *Held:* It was not error for the court to refuse to give a requested instruction that the driver of the car had the right to assume up to the moment of collision that the driver of the bus would turn to his right in time to avoid collision.

7. Negligence § 2—

A person confronted with a sudden emergency is not held to the same degree of care as in ordinary circumstances, but the rule of the prudent man still applies and he is required to exercise that degree of care which an ordinarily prudent person would exercise under similar circumstances.

8. Same—

The principle of sudden emergency is not applicable to one who by his own negligence has brought about or contributed to the emergency.

9. Automobiles § 8j, 18i—Instruction as to principle of sudden emergency held not applicable upon the evidence.

The driver of the car testified that as she approached a long concrete bridge at a speed of about 30 miles an hour over a wet highway she saw a bus traveling 50 or 60 miles an hour approaching from the opposite direction, rounding a curve approximately 150 feet from the other end of the bridge, with its left wheels 3 or 4 feet to the left of the center of the highway, that she took her foot off the accelerator but did not apply her brakes until immediately before the collision when she saw the bus could not get back on its right side of the road. *Held:* Upon her testimony, either she was not confronted by an emergency, or, if she were so confronted, her acts contributed to it, and therefore the refusal of the court to give a requested instruction relating to the principle of sudden emergency was not error.

10. Automobiles § 8g—

The proof of the skidding of an automobile alone is not such evidence of negligence as to render the owner liable for an injury resulting therefrom, but if the skidding of the car is caused by its negligent operation, the driver is liable for the injury resulting.

11. Automobiles § 18i—

An instruction that the skidding of defendant's car must have been caused by its operation at an excessive speed under the existing circumstances in order for the jury to answer the issue of negligence in the affirmative *is held*, upon the evidence in the case, sufficient upon this aspect, and the refusal of the court to give requested instructions upon the point in the language of the request was not error.

12. Automobiles §§ 8k, 18i—

An instruction to the effect that it would be negligence *per se* for defendant to permit his child under the legal driving age to operate his automobile but that defendant could not be held liable unless the jury found from the preponderance of the evidence that such negligence was the proximate or one of the proximate causes of the injury, *is held* sufficient to cover this aspect of the case and it was not error for the court to refuse to give requested instructions on the point in the language of the request.

13. Automobiles § 18i: Trial § 31e—

An instruction to the effect that if the driver of a car failed to exercise reasonable care in that she approached a bridge "at a high rate of speed of 30 to 35 miles an hour over a highway that was wet . . ." *is held* not an expression of opinion that a speed of 30 to 35 miles an hour was excessive when in other portions of the charge the court fully instructed the jury as to the various statutory speed restrictions and regulations, including those where no hazards exist, G. S., 20-141, and it is apparent that the charge when read contextually could not have been misunderstood.

14. Automobiles § 18g (1)—

Opinion evidence as to the general competency of a driver is inadmissible, the issue being whether the driver was exercising due care in the operation of the vehicle at the time in question and not her competency as a driver.

15. Trial § 48—

Defendants were sued upon the theory of joint and concurrent negligence. An eyewitness of the collision disclosed in her testimony for one of the defendants that she was employed by a casualty company. On cross-examination she was asked if she knew that the casualty company had a direct interest in the outcome of the suit, and replied in the affirmative. The other defendant's objection was sustained and his motion to strike the answer was allowed, but his motion for a mistrial was denied. *Held:* It does not appear that movent was prejudiced by the incident and his exception to the denial of the motion cannot be sustained.

16. Negligence § 18—

While ordinarily the fact that a defendant in an action for negligence is protected by liability insurance is incompetent, where it appears that a witness for one of the defendants was an employee of a casualty company, the fact that the existence of a liability policy is brought out as an incident upon her cross-examination does not necessarily constitute reversible error, particularly where it is apparent from all the pertinent facts that no prejudicial effect resulted.

Two appeals in same action, No. 526 by defendants Atlantic Greyhound Corporation and Yates Clyde Farris, and No. 532 by defendant George W. Sharpe, from *Pittman, J.*, at 6 January, 1947, Extra Civil Term of MECKLENBURG.

Civil action to recover damages for alleged wrongful death, G. S., 28-172, G. S., 28-173.

On former appeal, 226 N. C., 692, 38 S. E. (2d), 105, there is full statement of the case. It was there held that the evidence was sufficient to take the case to the jury. And the evidence on the retrial being in substantial accord with that shown in the record on such former appeal, we refer thereto rather than to restate the evidence here,—reciting in the opinion only such evidence as is pertinent in considering certain exceptions.

Upon the retrial the case was submitted to the jury on the same issues as at former trial. The jury answered the first issue as to joint and concurrent negligence in the affirmative, and the fourth issue as to contributory negligence in the negative, and assessed damages in the sum of $18,000.

From judgment for plaintiff in accordance with the verdict, the defendants appeal to Supreme Court, and assign error.

McDougle, Ervin, Fairley & Horack for plaintiff, appellee.

Smathers & Smathers, Charlotte, N. C., and Smathers & Meekins, Asheville, N. C., for Atlantic Greyhound Corporation, and Yates Clyde Farris, appellants.

Frank H. Kennedy and P. D. Kennedy, Jr., for Geo. W. Sharpe, appellant.

WINBORNE, J. At the outset it is appropriate to call attention to Rule 19 (2) of the Rules of Practice in the Supreme Court, 221 N. C., 544, which provides that when there are two or more appeals in one action it shall not be necessary to have more than one transcript, but the statement of cases on appeal shall appear separately in the transcript. Two separate appeals were taken from the judgment on former trial, and separate records, each of approximately one hundred fifty pages, and

each consisting of the same pleadings, the same issues, the same judgment, and the same charge, but a different narrative of the testimony of the same witnesses, were brought to this Court. Nothing was said about the irregularity at the time. But, since two separate records, of like character, and even larger, are here on this appeal, we deem it expedient to direct attention to the rule to the end that a practice may not be established.

Nevertheless, in view of the fact that both appeals are in the same action and from the same judgment on verdict finding joint and concurrent actionable negligence of all defendants, we consider them together, treating separately the respective assignments of error.

Appeal of defendants Yates Clyde Farris and Atlantic Greyhound Corporation:

These defendants present for consideration several assignments of error, some of which require discussion.

One of the assignments relates to the introduction in evidence of the discharge of James Murray Pate, Jr., intestate of plaintiff, from the U. S. Army. In this connection, it appears that in the course of the introduction of evidence by plaintiff, testimony was elicited on cross-examination of the father of intestate that the intestate entered the National Guard in 1939, and mustered into the regular army in 1940; that he served three years overseas, and returned in May, 1945; and that he had received his discharge at the time of the accident. Then after cross-examination as to the military rating and rank of the intestate, the witness identified and plaintiff offered the army discharge in evidence. The court admitted it, and all defendants objected and excepted. Later in the course of the trial, the court told the jury that the court was worried about the competency of the discharge and instructed the jury that the court was of its own motion withdrawing the discharge from the consideration of the jury, and excluding it as evidence in the trial, and instructed the jury not to take it into consideration in any manner when the jury should come to consider the issues later on in the trial. All defendants object and except for that the discharge having been read to the jury, the harmful effect of it as evidence could not be removed from the minds of the jurors.

We are of opinion that the discharge was incompetent, and should not have been received into evidence. *Stanley v. Lumber Co.*, 184 N. C., 302, 114 S. E., 385. Nevertheless, the court having advised the jury of the error in admitting the discharge, and having withdrawn it from the consideration of the jury, and having instructed the jury not to take it into consideration in its deliberations, our decisions hold that any harm that the introduction of it may have had, was removed. See *Hyatt v. McCoy*, 194 N. C., 760, 140 S. E., 807, where the authorities are assembled.

These defendants also assign as error that portion of the charge in respect to the first issue, with reference to their liabilities, wherein the court instructed the jury that "if you find by the greater weight of the evidence" certain specific facts, "then I charge you that such acts, conduct, and omissions of the defendant Yates Clyde Farris would be negligence . . ." It is contended here that the court in using the words "would be negligence" instead of "would constitute negligence," expressed an opinion in violation of G. S., 1-180. However, counsel in their brief concede that standing alone these assignments may not be sufficient to warrant a new trial.

However, they contend that when this instruction is taken in connection with the charge given by the court in response to questions from the jurors, reversible error appears. One juror asked, "What responsibility is a driver charged with when meeting an automobile in apparent distress? You read if I understand the laws of North Carolina, something with reference to, we'll say, the bus driver supposedly keeping himself under control or being under control, if possible. That is the point that we have at issue here." The other juror asked, "If when approaching a vehicle in distress, you are automatically charged with a certain responsibility. If, in the driver's judgment, the vehicle is not in distress, he thinks the distress of the approaching vehicle has ended, and the approaching vehicle is approaching in a normal manner, does the responsibility placed upon the driver of the first vehicle cease, such as reducing his rate of speed below the law required in North Carolina?"

In response to these questions, the court applied the rule of the prudent man. And while these defendants contend that such instructions do not answer the questions asked by the jurors, they have not brought forward exception to the refusal of the court to give special instructions requested by them in this respect. Nevertheless, the rule of the prudent man is applicable. "The standard of conduct required in an emergency, as elsewhere, is that of the prudent man." *Ingle v. Cassady,* 208 N. C., 497, 181 S. E., 562.

Other assignments of error brought forward by these appellants, upon due consideration, likewise fail to show cause for disturbing the judgment on verdict rendered.

Appeal by defendant George W. Sharpe:

This appellant assigns as error the refusal of the court to give certain requests for specific instruction, to some of which consideration is required which is now given:

(1) That the court erred in refusing to instruct the jury as follows: That if the jury should find that the bus was being operated at a rapid rate of speed around a curve, and that it was on its left side of the highway, and that if the jury should further find that Carol Sharpe was operating the car belonging to defendant, George Sharpe, to her right of

the center line of the highway, then the law would be that Carol Sharpe did not have the duty of stopping or taking other action to avoid an accident up until such time that it appeared that a collision would be unavoidable, for the reason that the said Carol Sharpe had the right to assume, up to the point of collision, that the said bus would assume its proper and rightful position to its right of the center of the highway in passing.

The driver of vehicles proceeding in opposite directions and meeting are required by statute, G. S., 20-148, to 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. In applying this rule, this Court has held in numerous cases that the driver of each vehicle, who is himself observing the rule has right, ordinarily, to assume, and to act upon the assumption that the driver of the other vehicle will also observe the rule and turn to his right so that the two vehicles may pass each other in safety. *Shirley v. Ayers,* 201 N. C., 51, 158 S. E., 840; *Cory v. Cory,* 205 N. C., 205, 170 S. E., 529; *James v. Coach Co.,* 207 N. C., 742, 178 S. E., 607; *Hancock v. Wilson,* 211 N. C., 129, 189 S. E., 631; *Guthrie v. Gocking,* 214 N. C., 513, 199 S. E., 707; *Newbern v. Leary,* 215 N. C., 134, 1 S. E. (2d), 384; *Brown v. Products Co.,* 222 N. C., 626, 24 S. E. (2d), 334.

However, the right of a motorist to assume that a driver of a vehicle coming from the opposite direction will obey the law and yield one-half the highway, or turn out in time to avoid collision, and to act on such assumption in determining his own manner of using the road, is not absolute. It may be qualified by the particular circumstances existing at the time,—such as "the proximity, the position and movement of the other vehicle, and the condition of the road as to usable width, and the like," *Brown v. Products Co., supra.*

Moreover, notwithstanding the right of a motorist to so assume, still this does not lessen his duty to conform to the requirement of exercising due care under the existing circumstances, that is, to conform to the rule of the reasonably prudent man. *Sebastian v. Motor Lines,* 213 N. C., 770, 197 S. E., 539.

Furthermore, the statute on speed restrictions, G. S., 20-141, declares that "no person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing"; and the fact that the speed of a vehicle is lower than the *prima facie* limits, fixed by the statute, "shall not relieve the driver from the duty to decrease speed . . . when traveling upon any narrow . . . roadway, or when special hazard exists with respect to . . . other traffic, or by reason of weather or highway conditions"; and the statute directs that "speed shall be decreased as may be necessary to avoid colliding with any person,

vehicle, or other conveyance on . . . the highway in compliance with legal requirements and the duty of all persons to use due care."

When these principles are applied to the evidence on which this request for instruction is based, the driver of the Sharpe car was confronted, as she says, by a large bus traveling at a high rate of speed, approaching on its left side of a slick road over a long bridge with concrete walls. This would not seem to be an ordinary condition, but rather to present a special hazard. Hence, it would have been inappropriate for the court to have instructed the jury, as a matter of law, that Carol Sharpe had the right to assume, up to the point of collision, that the bus would assume its proper and rightful position to its right of the center line of the highway in passing.

(2) The next request for instruction embodies the principle of law applicable in cases of sudden emergency. In this State a person confronted with a sudden emergency is not held by the law to the same degree of care as in ordinary circumstances, but only to that degree of care which an ordinarily prudent person would use under similar circumstances. *Hinton v. R. R.*, 172 N. C., 587, 90 S. E., 756; *Luttrell v. Hardin*, 193 N. C., 266, 136 S. E., 726; *Ingle v. Cassady, supra; Hewitt v. Urich*, 210 N. C., 835, 187 S. E., 759; *Bullock v. Williams*, 212 N. C., 113, 193 S. E., 170; *Butner v. Spease*, 217 N. C., 82, 6 S. E. (2d), 808; *Beck v. Hooks*, 218 N. C., 105, 10 S. E. (2d), 608; *Etheridge v. Etheridge*, 222 N. C., 616, 24 S. E. (2d), 477.

In *Hinton v. R. R., supra*, it is said, "It is well understood that a person in the presence of an emergency is not usually held to the same deliberation or circumspection as in ordinary conditions." And, in *Ingle v. Cassady, supra*, after quoting the above statement from the *Hinton case*, this pronouncement follows: "In other words, the standard of conduct required in an emergency, as elsewhere, is that of the prudent man." But the principle is not available to one who by his own negligence has brought about, or contributed to the emergency. *Luttrell v. Hardin, supra; Ingle v. Cassady, supra.*

Applying these principles to the evidence in hand, it may well be doubted that, in so far as the driver of the Sharpe car is concerned, a sudden emergency existed. And, if one did exist, it would seem that her operation of the car contributed to it. She states in her testimony that as she approached the bridge at a speed of about 30 miles an hour, and when 30 or 40 feet north of the bridge, she saw the bus coming at about 50 or 60 miles an hour around the curve, approximately 150 feet from the south end of the bridge, and 3 or 4 feet over on her side of the road; that then she took her foot off the accelerator to slow down; that all she did to slow down was to release the accelerator; that she did not apply the brakes until she saw the bus could not get back on its right side of the road; that when she applied the brakes the car did not stop imme-

diately, and about that time the collision came; and that she "could not tell that the car skidded at all . . . If it skidded at all it did not skid at any time prior to the very instant of the collision."

Moreover, the jury has found that the driver of the Sharpe car was negligent, and that that negligence concurred with that of defendants Farris and Greyhound Corporation in bringing about the injury to and death of plaintiff's intestate. Hence, there is no error in the refusal of the instruction requested.

(3) The third request for instruction, refused by the court, is as follows: "That the proof of the mere skidding of an automobile standing alone does not constitute proof of negligence; that if the jury should find from the evidence and by its greater weight merely that the car operated by Carol Sharpe skidded, but does not find that such skidding was caused by any negligence on her part in operating the car, then such skidding standing alone does not constitute negligence, and if the jury should find from the evidence and its greater weight that the Sharpe car merely skidded, but finds no negligence in the way in which said car was operated, then neither Carol Sharpe nor defendant George W. Sharpe, would be guilty of any negligence in this case."

The general rule, as stated in Huddy (7 Ed.), Section 373, is as follows: "The mere fact of skidding of a car is not of itself such evidence of negligence as to render the owner liable for an injury in consequence thereof." *Springs v. Doll,* 197 N. C., 240, 148 S. E., 251; *Butner v. Whitlow,* 201 N. C., 749, 161 S. E., 389; *Waller v. Hipp,* 208 N. C., 117, 179 S. E., 428; *Taylor v. Rierson,* 210 N. C., 185, 185 S. E., 627; *Hewitt v. Urich, supra; Clodfelter v. Wells,* 212 N. C., 823, 195 S. E., 11; *Williams v. Thomas,* 219 N. C., 727, 14 S. E. (2d), 797; *Mitchell v. Melts,* 220 N. C., 793, 18 S. E. (2d), 406; *Etheridge v. Etheridge, supra.* But where the skidding is caused by the negligent operation of the car, the driver is liable for injuries resulting therefrom. *Taylor v. Rierson, supra.*

In the light of these decisions the charge of the court is sufficient to cover the subject of the above request for instruction. The court charged, in substance, that before the first issue could be answered in the affirmative, the jury should find, among other facts, that the skidding of the car was caused by the speed of it, under the existing conditions and circumstances; and that if the jury fail to so find, the issue should be answered in the negative.

(4) The fourth request for special instruction is that if the jury should find that Carol Sharpe were driving the Sharpe car carefully and was not guilty of any negligence, then defendant Sharpe would not be guilty of any negligence and the jury should answer the first and third issues "No."

In this connection, the court apparently in deference to opinion on former appeal in this case, charged the jury that the statute prohibits any person under the age of fifteen years to operate an automobile on the highways of this State, and that it is negligence *per se* for a child under the legal driving age to drive an automobile on the highways of the State, but that it does not necessarily follow that the defendant, in such event, is liable in damages, for the plaintiff must go forward and satisfy the jury by a preponderance of the evidence that such negligence is the proximate or one of the proximate causes of the injury of which complaint is made.

This charge is sufficiently broad to cover the subject of the above request for instruction, and there is no error in refusing to give it.

Appellant Sharpe also excepts to portions of the charge given in respect to the first issue with reference to his liability, as follows: ". . . If you also find that upon approaching said bridge the said Carol Sharpe failed to exercise reasonable care in that she approached said bridge at a high rate of speed of thirty to thirty-five miles per hour over a highway that was wet, slick and slippery, and further failed to exercise reasonable care in that she failed to decrease the speed of said car to such rate of speed as would enable her to avoid colliding with any person, vehicle or conveyance then on said highway and bridge, in compliance with legal requirements and the duty of all persons to use due care . . . then I charge you that such acts, conduct and omissions of the said Carol Sharpe would be negligence . . ."

It is contended that here the court has expressed an opinion as to the sufficiency of the evidence, in violation of the statute, G. S., 1-180, in that the jury is instructed that if the jury should find that Carol Sharpe drove the automobile at a speed of thirty to thirty-five miles an hour that would be a failure to use due care, and is therefore negligence; and that if the car driven by Carol Sharpe collided with any person, vehicle or conveyance on the bridge that would be negligence.

It may be conceded that the instructions, standing alone, and lifted out of the charge as a whole, are liable to attack. But when these instructions are read in connection with other portions of the charge, that is, when the charge is read contextually, they may not fairly be misunderstood. When so read, it is seen that the court fully, clearly and specifically instructed the jury as to the various provisions of the statute, G. S., 20-141, relating to and restricting speed of motor vehicles upon the highways of this State,—particularly in respect to lawful speed where no special hazard exists, and to the duty of drivers to decrease speed. Hence, prejudicial error is not made to appear.

Appellant Sharpe also assigns as error the refusal of the court to receive opinion evidence as to the competency of Carol Sharpe as the

driver of an automobile. The issue here, as it relates to defendant Sharpe, is whether the traffic accident under consideration was contributed to by negligence of Carol Sharpe, the driver of his car. In such case evidence as to the general competency of a driver is inadmissible. 9 Blashfield, p. 630, Part 2, Perm. Ed. Cycl. of Automobile Law and Practice, Section 6187. The question is not as to her competency to drive, but whether she were operating the car at the time in accordance with the duty imposed by law upon operators of automobiles, that is, whether she were exercising that degree of care which an ordinarily prudent person would exercise under similar circumstances.

Appellant Sharpe also assigns as error the denial of his motion for mistrial on account of testimony of Dell Woosley, witness for defendants Greyhound Corporation and Farris, elicited upon cross-examination by counsel for plaintiff. She testified on direct examination that she was employed by the Lumbermen's Mutual Casualty Insurance Company; that there is no connection at all between her employer and the Atlantic Greyhound Corporation; and that she and two others were riding in an automobile following the Sharpe car, about 100 feet behind it, and saw the collision,—describing in detail what she says she saw. Then on cross-examination, after being questioned about discrepancies in her testimony then given and at former trial, and after she had stated that she had for six years, and then worked for the Lumbermen's Mutual Casualty Insurance Company, she was asked the question: "Do you know that Company has a direct interest in the outcome of this lawsuit?" to which she answered: "I do." Counsel for defendant Sharpe objected and moved to strike. The objection was sustained and the motion allowed.

Later, after two witnesses had been examined, the jury was sent out, and counsel for defendant Sharpe, who at the time of the incident had "stepped up to the bench," and told the Judge that he desired to make a motion for mistrial but that he did not desire to do so in the presence of the jury, and would do so at the first intermission, then moved for a mistrial. The motion was denied. Defendant Sharpe excepted.

The following quotation from *Keller v. Furniture Co.*, 199 N. C., 413, 154 S. E., 674, is pertinent to question here raised: "This Court has been insistent in its disapproval of any attempt by plaintiff in an action for personal injury or death, to prove that the defendant had insurance protecting it from the consequences of its own negligence . . . The annotation in 56 A. L. R., 1418, contains an exhaustive review of the cases on this subject. On page 1432, it is said, 'The general rules and principles applicable to the question of the admissibility of evidence, in a negligence action, of the fact that defendant therein carries liability or indemnity insurance protecting him from the consequences of negligence,

are settled beyond dispute, but like most other rules of evidence, they are subject to qualifications and exceptions.' The principle relating to the qualification of the rule is stated by *Hoke, J.*, in *Bryant v. Furniture Co.*, 186 N. C., 441, as follows: 'It has been held in this State that in a trial of this kind the fact that a defendant company charged with negligent injury held a policy of indemnity insurance against such a liability is ordinarily not competent, and when received as an independent circumstance relevant to the issues, it may be held for prejudicial error. And if brought out in the hearing of the jury by general questions asked in bad faith and for purpose of evasion, it may likewise be held for error. On the contrary, if an attorney has reason to believe that a juror, tendered or on the panel, has pecuniary or business connection naturally enlisting his interest in behalf of such company, it is both the right and duty of the attorney in the protection of his client's rights to bring out the facts as the basis for a proper challenge, or if in the course of the trial it reasonably appears that a witness has such an interest that it would legally affect the value of his testimony, this may be properly developed, and where such a fact is brought out merely as an incident, on cross-examination or otherwise, it will not always or necessarily constitute reversible error when it appears from a full consideration of the pertinent facts that no prejudicial effect has been wrought.' "

In the light of these principles, applied to the facts in hand, no prejudicial error is made to appear.

Other assignments of error brought forward by appellant Sharpe, and not considered on the appeal of defendants Greyhound Corporation and Farris, upon due consideration likewise fail to show prejudicial error.

Hence, (1) On appeal of Atlantic Greyhound Corporation and Yates Clyde Farris

No error.

And (2) On appeal of George W. Sharpe

No error.

MAGGIE JONES, JACK JONES AND WIFE, BLANCHE H. JONES, OTIS JONES (UNMARRIED), LYONS JONES AND WIFE, ETTA JONES, LEE JONES AND WIFE, KATTY JONES, CONNER JONES AND WIFE, MADELINE JONES; DUNCAN D. JONES AND WIFE, CHRISTINE JONES, ALICE JONES THOMPSON AND HUSBAND, LEON THOMPSON, BERNICE JONES PAGE AND HUSBAND, L. S. PAGE, R. RALPH JONES AND WIFE, ADDIE JONES, P. FRANK JONES AND WIFE, MADGIE JONES; BESSIE JONES BREITENBACK AND HUSBAND, HUBERT BREITENBACK, V. C. L. JONES AND WIFE, MRS. C. L. JONES, ED LIVINGSTON AND WIFE, FANNIE JONES LIVINGSTON, LELA BOWDEN, CLEATON JONES LINDSEY, MYRTIE JONES TEW, J. A. JONES, NANNIE JONES, LACY McRAE, NED McRAE, MARVIN McRAE, MRS. EARL THOMAS, LAURA JONES, LAWRENCE JONES, LLOYD JONES, MAE JONES, DAN POPLIN, JOHN POPLIN, MAGGIE BLACKMAN, MAUDE PHILLIPS, LILLIE COLE, MRS. GEORGE HART, MRS. AMANDA HART, JOHN BARBEE, CLAUDE BARBEE, GERTRUDE BARBEE, GEO. W. BARBEE, MRS. TURNER McKENZIE, MRS. J. T. HENRY, JOHN W. COLE, FRANK J. COLE, MARY BARBEE, MRS. JAMES G. THREADGILL, LONNIE C. COLE, JR., JIMMIE COLE, VANDER STEWART, LAWRENCE STEWART, MRS. MEMMIE MvINVILLE, NICK STEWART, ALTON STEWART, LEO STEWART, ALICE JONES PATTERSON, LIZZIE JONES SWEATT, MYRTLE JONES SPEARS, ERNEST JONES, LUTHER JONES, IDA T. JONES, WIDOW OF MURDOCK JONES, AND ALL PERSONS WHOSE NAMES AND RESIDENCES ARE UNKNOWN TO PETITIONERS WHO ARE INTERESTED IN THE REAL ESTATE THE SUBJECT OF THIS ACTION, JOHN EARL McKENZIE, TURNER McKENZIE, SR., AND TURNER KENNETH McKENZIE, JR., AND JENNINGS G. KING, GUARDIAN AD LITEM OF JOHN W. COLE AND JIMMY COLE.

(Filed 21 May, 1947.)

1. Descent and Distribution § 2—

"Purchase" as contradistinguished from "descent" means every mode of acquisition of an estate known to law except that by which an heir on the death of his ancestor becomes substituted in his place as owner by operation of law.

2. Descent and Distribution § 10a—

In order for G. S., 29-1 (4), to apply it is necessary that the person dying intestate without lineal descendants should have acquired the land by descent, or if acquired by purchase, that such person be an heir or one of the heirs of the grantor or devisor.

3. Same—

A husband who had acquired real estate by descent, devised same to his wife by will. *Held:* The wife took by purchase, and since she is not an "heir," the provisions of G. S., 29-1 (4), do not apply, and upon her death without lineal descendants the land descends to her collateral heirs rather than to those of her husband.

4. Wills § 33g—

A devise of land to testator's sons "to have the use . . . this use to last through natural life of my said sons" vests in the sons no more than a life estate.

5. Wills § 38—

Where a will conveys a life estate to testator's sons without limitation over of the fee, and contains a residuary clause "the rest and residue of my property I give to my wife one-half and the other one-half to my children," *held* the residuary clause is broad enough to include both real and personal property and will be construed to dispose of the remainder in the real property in order to avoid partial intestacy, there being no intent to the contrary apparent and unequivocally expressed in the will.

6. Wills § 31—

The intent of the testator is the paramount consideration in the construction of his will.

7. Wills § 32—

In seeking the intent of the testator as expressed in the language used by him it will be presumed that he did not intend to die intestate as to any part of his property, and where two constructions are permissible, that construction will be adopted which avoids partial intestacy.

APPEAL by plaintiffs from *Pittman, Resident Judge* of 13th Judicial District, at Chambers at Rockingham, N. C., 8 February, 1947, in proceeding pending in SCOTLAND.

Special proceeding for sale of four certain tracts of land for partition among petitioners as tenants in common and owners in fee thereof, to which respondents are made parties so that the court may determine and adjudicate their claim and interest therein if any—and in which all respondents, other than C. L. Jones and wife, and Fannie Jones Livingston and husband, by answer filed, deny title of petitioners, and specifically plead that the fourth tract is the property of the collateral heirs of Margaret Jones, the wife of John Wesley Jones, and that petitioners have no right, title or interest therein, and assert claim of interest in said lands based upon provisions of Item Four and Item Seven of the last will and testament of John Wesley Jones, deceased, a copy of which is attached to and made a part of their answer for purpose of incorporating same therein.

Counsel, representing the petitioners and the answering respondents, agreed upon facts to be submitted to the court, upon the hearing, as follows: "Two Hundred five acres of the lands, title to which is involved in this action, were devised to John Wesley Jones, by his father, Duncan Jones. The remaining part of the lands involved were acquired by John Wesley Jones from other sources, and constituted, with the 10 acres devised to Turner McKenzie, all of his estate, except a small

amount of personal property. Thereafter, John Wesley Jones died domiciled in Scotland County, leaving a last will and testament duly filed and probated in the office of the Clerk of the Superior Court of Scotland County, a copy of which is hereto attached, marked Exhibit A, and made a part of these agreed facts." Pertinent parts of the will are as follows:

"ITEM TWO. I give to my wife should she survive me, fifty acres to be laid off so as to include my residence and to best advantage to same and rest of farm.

"ITEM THREE. I desire that my wife's sister, Sallie Jones, shall have a home and support along with my wife so long as Sallie shall remain single and desire to live on the said fifty acres of land devised to my wife.

"ITEM FOUR. The residue of my land I dispose of as follows: To John Earle McKenzie and Turner Kenneth McKenzie, sons of Turner McKenzie, (Sr.), I give ten acres of land to be laid off on the public road next to the McEachin land and extending back west to ditch so as to include ten acres for the use of said children. The rest of my land I give to my sons John North Jones, Angus D. Jones and Luther Thomas Jones to have the use of same for their care, the maintenance and support of themselves and their families should they or any of them marry hereafter, this use to last through natural life of my said sons provided that if any one or more of said sons shall pledge their right and interest in said lands by mortgage or other written obligation or submit to any judgment that would otherwise take title or encumber their title to said lands during each his life, his estate shall thereby terminate and shall go over to the children of such son so forfeiting, if he have lawful issue then living, and if he have no lawful issue, then it shall go over to the surviving brothers and their children to be held as they hold their portions herein devised for their support, subject to all the conditions set out in the first instance. The lands devised to my sons may be held in common or partitioned as they may prefer.

"ITEM FIVE. My personal property I give as follows: To my widow all my household and kitchin furniture and furnishings, provisions on hand and family supplies. To my widow one cow and her increase, of her selection; and if there be other cows, North shall have one milk cow.

"ITEM SIX. My livestock otherwise to be kept to complete farming operations for the year, and thereafter they and my farming equipment may be sold or may be allowed to remain on the farm for the use of my family provided my sons prove industrious, attentive to business and of good habits, from year to year for ten years after my death, of which my executor shall be judge, or he may consult neighbors and accept their verdict and act on it, and if he so determines may sell said livestock and outfit at completion of any crop season, he to be the judge at all times as to when to sell.

"ITEM SEVEN. The rest and residue of my property I give to my wife one half, and the other half to my children in equal share."

Further agreed facts are these:

"The widow and children of John Wesley Jones, named in the will, died intestate in the following order:

(a) Angus D. Jones
(b) Margaret Jones
(c) John North Jones
(d) Luther Thomas Jones

"John Wesley Jones and Margaret Jones were first cousins.

"John North Jones, Angus D. Jones and Luther Thomas Jones, devisees under the will of John Wesley Jones, died intestate and without issue. None of the three named devisees married nor pledged their right and interest in the lands described in Paragraph IV of the will, by mortgage or other written obligation, nor submitted to any judgment that would otherwise take title or encumber their title during each his life nor attempted to make any conveyance of any interest in said lands.

"At the time of the execution of the will of John Wesley Jones, John North Jones and Luther Thomas Jones were incompetents.

"The collateral heirs at law of John North Jones, Angus D. Jones and Luther Thomas Jones are parties to this action, either as plaintiffs or defendants.

"The collateral heirs at law of the testator, John Wesley Jones, claim title to the lands devised under Items II and IV of the will of John Wesley Jones.

"The collateral heirs of Margaret Jones claim title to the lands devised under Item II of said will and one-half interest in the lands devised under Item IV of said will, claiming said one-half interest under Item VII of the will."

The counsel thereupon stipulated "that when the court enters judgment in this cause that such judgment shall fix the interest of the parties upon the pleadings and this agreed statement of facts, etc."

When the cause came on for hearing, pursuant to agreement of counsel, the counsel submitted the agreed facts and stipulation, as above set forth, together with an admitted copy of the will of J. Wesley Jones, incorporating the provisions therein hereinabove quoted. The court thereupon concludes as follows:

"1. That J. Wesley Jones on 5 January, 1917, executed his last will and testament, which last will and testament was filed in the office of the Clerk of the Superior Court of Scotland County, probated and recorded as above set out, and the Court makes the agreed facts set forth in said stipulation a part of its findings of fact.

"2. The Court is of opinion, and so holds, that the fifty (50) acres of land described in the will of John Wesley Jones (who is the same person as J. Wesley Jones), in Item 2 thereof, vested in fee simple in Margaret Jones, surviving widow of John Wesley Jones, and the same was thereafter laid off in accordance with said Item 2.

"3. That Margaret Jones, widow of John Wesley Jones, was not an heir of John Wesley Jones, and that in determining the collateral heirs who are entitled to said property a new inheritable quality began with Margaret Jones, as to all land that she took under the will of John Wesley Jones, and the said fifty (50) acres is now vested in the collateral heirs of Luther Thomas Jones, now deceased, who are of the blood of Margaret Jones.

"4. The Court is of opinion, and so holds, that in Item 4 of the will of the said John Wesley Jones, after disposing of ten (10) acres of land to John Earl McKenzie and Turner Kenneth McKenzie, sons of Turner McKenzie, Sr., in the rest of the lands of John Wesley Jones, John North Jones, Angus D. Jones and Luther Thomas Jones took a right to the life use of the same and that, upon the death of Luther Thomas Jones, who survived John North Jones and Angus D. Jones, under Item 7 of said will, the said property vested in the collateral heirs of Margaret Jones to the extent of one-half (½) thereof, and the other remaining half in the collateral heirs of John North Jones, Angus D. Jones and Luther Thomas Jones, who are of the blood of John Wesley Jones and Duncan D. Jones, his father.

"5. That since it appears from the admission of counsel that the collateral heirs of Luther Thomas Jones, deceased, who are of the blood of John Wesley Jones, as well as of the blood of Duncan Jones, father of John Wesley Jones, are the same persons:

"NOW, THEREFORE, it is ORDERED, ADJUDGED AND DECREED that the collateral heirs of Margaret Jones hold title to the lands devised under Item 2 of the will of John Wesley Jones, and a one-half (½) interest in the lands devised under Item 4 of said will, which interest in the lands described in Item 4 of said will passed under Item 7 of the said will, and in accordance therewith."

And thereupon in judgment signed and entered, the court, among other things not here essential, "ordered, adjudged and decreed that the collateral heirs of Margaret Jones hold title to the lands devised under Item 2 of the will of John Wesley Jones, and a one-half (½) interest in the lands devised under Item 4 of said will, which interest in the lands described in Item 4 of said will passed under Item 7 of the said will, and in accordance therewith."

From the judgment so entered, plaintiffs appeal to Supreme Court, and assign error.

Ellis E. Page and McLean & Stacy for plaintiffs, appellants.

Gilbert Medlin and Varser, McIntyre & Henry for defendants, appellees.

WINBORNE, J. The challenge to the judgment below raises for determination this basic question: Does the devise to Margaret Jones, under the will of John Wesley Jones, of whatever land it covers, fall within the purview of the provisions of the fourth rule of descent, G. S., 29-1? If it does, the judgment is in error, and should be reversed. But if it does not, the judgment is correct and should be affirmed, in part certainly, in so far as it relates to land devised to her under Item II of the will, and in whole, if she took any land under Item VII, the residuary clause of the will.

The fourth rule of descent provides, in respect of collateral descent of estate derived from ancestor, that on failure of lineal descendants, and where the inheritance has been transmitted by descent from an ancestor, or has been derived by gift, devise or settlement from an ancestor, to whom the person thus advanced would, in the event of such ancestor's death, have been the heir or one of the heirs, the inheritance shall descend to the next collateral relations, capable of inheriting, of the person last seized, who were of the blood of such ancestor, subject to rules two and three.

It appears from the wording of the rule that it applies where, and only to the extent that, the inheritance (1) has been transmitted by descent from an ancestor, or (2) has been derived by gift, devise or settlement from an ancestor, to whom the person thus advanced would, in the event of such ancestor's death, have been the heir or one of the heirs.

In this connection, it is appropriate to note that real property may be acquired in only two ways, by descent and by purchase. Purchase in that sense is " 'every mode of acquisition of estate known to the law, except that by which an heir on the death of his ancestor becomes substituted in his place as owner by operation of law.' Taking by will is taking by purchase in the most comprehensive meaning of the latter term." 16 Am. Jur., 769.

In the light of this distinction between descent and purchase, for the fourth rule of descent to be applicable, the estate shall have been transmitted by descent from the person last seized by purchase, or shall have been derived by will, devise or settlement from such person so last seized, to one who, upon the death of that person, would have been the heir or one of the heirs of such person.

Thus, when this rule is applied to the facts of the case in hand, it is seen that the estate acquired by Margaret Jones was not transmitted to her by descent, and, though it was derived by devise under the will of

John Wesley Jones, the devise was not from an ancestor, to whom she, the person advanced, would, in the event of the death of such ancestor, have been the heir or one of the heirs. Therefore, the devise to her does not fall within the language or the purview of the provisions of the fourth rule of descent. Hence, the estate does not pass by descent, but by purchase from John Wesley Jones to a stranger to his line, and thereafter descent of the estate would stem from such stranger as a new *propositus*, or person from whom descent is traced. This is in keeping with the holding of this Court in *Burgwyn v. Devereux,* 23 N. C., 583. See also *Ex Parte Barefoot,* 201 N. C., 393, 160 S. E., 365. The case of *Poisson v. Pettaway,* 159 N. C., 650, 95 S. E., 930, differs in factual situation, but is not in conflict with decision here.

The next and final question is whether Margaret Jones took any land under the residuary provisions of item seven of the will of John Wesley Jones.

In this connection it is noted that in item four of the will, after having given to the McKenzies 10 acres of land, about which there is no controversy here, the testator gives "the rest" of his land to his three sons "to have the use of the same for their care, their maintenance and support of themselves and their families should they or any of them marry hereafter, this use to last throughout the natural life of my said sons . . ." This devise vests in these sons no more than a life estate. Moreover, in this item four no disposition is made of the fee in the land, after the life estate of the sons. This gives rise to the question as to the effect of the residuary clause "the rest and residue of my property I give to my wife one-half, and the other one-half to my children in equal share," appearing in item seven of the will. This language is broad enough to cover both real and personal property. Hence, it will be construed to include both unless there is an apparent intent to the contrary, plainly and unequivocally expressed in the writing. *Faison v. Middleton,* 171 N. C., 170, 88 S. E., 141. The intent of the testator is the paramount consideration in the construction of his will. "In searching for the intent of the testator as expressed in the language used by him, we start with the presumption that one who makes a will is of disposing mind and memory, and does not intend to die intestate as to any part of his property," *Ferguson v. Ferguson,* 225 N. C., 375, 35 S. E. (2d), 231, where the subject is fully discussed.

In the *Ferguson case, supra,* it is also stated that: "Even where a will is reasonably susceptible to two constructions, the one favorable to complete testacy, the other consistent with partial testacy, in application of the presumption, the former construction will be adopted, and the latter rejected."

In the light of this presumption, it may not be held as a matter of law that the residuary clause appearing in item seven relates only to personal

property. We, therefore, hold that the court below properly construed this provision of the will as sufficient to pass the real estate undisposed of under item four of the will.

The judgment below is

Affirmed.

GENERAL FINANCE & THRIFT CORPORATION v. J. C. GUTHRIE.

(Filed 21 May, 1947.)

1. Trial § 29—

A peremptory instruction in favor of plaintiff cannot be sustained unless in no aspect of the evidence is it sufficient to support defendant's defense.

2. Chattel Mortgage § 13c—Where an automobile is brought into the State prior to filing or recording of chattel mortgage in another State, the lien of the chattel mortgage does not attach.

A chattel mortgage on an automobile was registered in another state, the laws of which provided that the lien of a chattel mortgage should take effect only from the time it is filed for record. (Ga. Code, 61-2501.) The evidence was conflicting as to whether the automobile was brought into this State by the mortgagor before or after the lien was filed for registration in such other state. The mortgagor sold the car and defendant is the purchaser from his transferee. Defendant conceded that under the general rule the lien of the chattel mortgage is good from the date it was recorded. *Held:* Since there is evidence on the part of defendant that the car was brought to this State prior to the filing of the chattel mortgage for record in such other state, a peremptory instruction in favor of plaintiff mortgagee is error.

3. Appeal and Error § 8—

An appeal will be determined in accordance with the theory of trial in the lower court.

BARNHILL, J., concurring.

APPEAL by defendant from *Grady, Emergency Judge,* at February Term, 1947, of GUILFORD. New trial.

Civil action for the possession of an automobile, claimed under a conditional sale agreement executed in the State of Georgia.

The material facts were these: Charles M. York, then 17 years of age, had been for several months a resident of and employed in the city of Augusta, Georgia. There he purchased an automobile from one McKnight and in part payment executed note and conditional sale agreement in the sum of $709.25, payable in monthly installments, which papers McKnight immediately endorsed and transferred to the plaintiff, a Georgia corporation. These transactions occurred 30 May, 1946. The

conditional sale agreement was filed for record in Richmond County, Georgia, 5 June, 1946, and was duly recorded 8 June, 1946. According to plaintiff's evidence York remained in Augusta some time after this time, but defendant's evidence tends to show that York returned to the home of his parents in Greensboro, North Carolina, with the automobile 3 June, 1946, and on 12 June, following, sold the automobile to W. J. Hodges, who shortly thereafter conveyed it to the defendant Guthrie, though Hodges still retained a "financial interest" in it. The removal of the automobile from Georgia to North Carolina was without the knowledge or consent of the plaintiff. Nothing has been paid on the debt secured by the conditional sale agreement and installments were past due when this suit was instituted 8 August, 1946. After selling the automobile York went to New York, enlisted in U. S. Army, and is now in Germany.

Hodges testified that at the time he purchased the automobile it bore a Georgia license plate, and that York turned over to him his automobile registration card, and executed to him a bill of sale, upon which he obtained from the North Carolina Motor Vehicle Department a certificate of title. Hodges also testified he was told York had been in some trouble, and was advised not to have too much to do with him. He made no inquiry in Georgia as to liens on the automobile.

The court charged the jury if they found the facts to be as shown by all the evidence to answer the issue in favor of the plaintiff. From judgment rendered on the verdict in accord with this instruction, defendant appealed.

Rufus W. Reynolds and Chas. M. Ivey, Jr., for plaintiff, appellee.
S. Bernard Weinstein and Harry Rockwell for defendant, appellant.

DEVIN, J. The peremptory instruction given by the court to the jury, that upon all the evidence they should answer the issue in favor of the plaintiff, presents the question whether in any view of the evidence there was ground for defense to the plaintiff's action.

The defendant appellant, in his brief and in his argument, concedes that under the general rule the execution and recording of a chattel mortgage or other lien on personal property in the county and state where the mortgagor then resided and where the property then was situated would ordinarily constitute notice to subsequent purchasers from the mortgagor in another state to which the property was subsequently removed without the consent of the mortgagee. The case was tried below on that theory, and we will consider the appeal in accord with that view. See G. S., 47-20; *Anderson v. Doak*, 32 N. C., 295; *Hornthal v. Burwell*, 109 N. C., 10; *Sloan Bros. v. Sawyer-Felder Co.*, 175 N. C., 657, 96 S. E., 39; *Whitehurst v. Garrett*, 196 N. C., 154, 144 S. E., 835; *Apple-*

white Co. v. Etheridge, 210 N. C., 433, 187 S. E., 588; *Truck Corp. v. Wilkins,* 219 N. C., 327, 13 S. E. (2d), 529; *Finance Co. v. Clary, ante,* 247, 41 S. E. (2d), 760; 10 Am. Jur., 729; Restatement, Conflict of Laws, sec. 275; 57 A. L. R., 714; 148 A. L. R., 380; Jones on Chattel Mortgages, 301; *Motor Investment Co. v. Breslauer,* 64 Cal. App., 230; *Mercantile Acceptance Co. v. Frank,* 265 P., 190; *Shapard v. Hynes,* 104 Fed., 449.

Without undertaking to controvert plaintiff's position on this phase of the case, the defendant calls attention to the evidence tending to show that before the conditional sale agreement was filed for registration on 5 June, 1946, the automobile had been permanently removed to Guilford County, North Carolina, where the mortgagor resumed his former domicile. It is contended that under the Georgia statute (Code 67-2501) (3320) mortgages and liens of all kinds, as against the interest of third parties acting in good faith and without notice, shall "take effect only from the time they are filed for record in the clerk's office," and that in the case at bar, prior to the time the lien was filed for record in Georgia, the property had been removed to North Carolina and had come to rest in this State in the possession of York; and that hence the lien should not be held, by virtue of its recordation, to attach to or become effective as to property then in North Carolina.

This is the view expressed by the Supreme Court of Wyoming on similar facts in *Yund v. Bank,* 14 Wyoming, 81. In that case movable personal property was mortgaged in Oklahoma and before the instrument was recorded the property was removed to another state, where other liens attached. It was held that the subsequent registration of the paper in Oklahoma did not make it good against subsequent encumbrances in the state to which it was removed. The Court said, "The mortgage was void as against creditors of the mortgagor in Oklahoma unless filed (for record), and not being filed before the property was removed to the Indian Territory, it went there free of any lien as to creditors, and the subsequent filing in Oklahoma could create no lien upon it in a foreign jurisdiction."

In *Truck Corp. v. Wilkins,* 219 N. C., 327, 13 S. E. (2d), 529, relied on by the appellee, it was said, "the general rule of comity, in the absence of a modifying statute, protects the lien of a retention title contract on personal property duly registered and indexed in the state wherein it was executed and the property was then located, after the removal thereof to another state without registration in the latter state." It would seem from the language used that the lien which was made effective by registration and for that reason protected in another state, applied to property "then located" in the state where it was registered; that is, to property there located at the time of the registration of the lien.

We are not inadvertent to the plaintiff's position. It is pointed out that, in addition to the admitted evidence of the registration of the lien in Georgia, there was evidence that Charles M. York, whose parents reside in Greensboro, was only 17 years of age at the time the automobile was purchased from him by Hodges; that the automobile bore a Georgia license plate; that the only evidence of title York exhibited was an automobile registration card; and that the purchaser was advised as to York's record. The plaintiff contends that under the circumstances, the failure to require production of certificate of title, or to make inquiry in Georgia as to encumbrances was evidence of such negligence on the part of Hodges and the defendant as to defeat defendant's claim of acting in good faith and without notice. But, as we think for the reasons hereinbefore set out the case should be remanded for another hearing, we need not discuss the evidence for and against the defendant on this point. Nor need we determine whether the plaintiff's delay in recording its lien on property so mobile delivered into the possession of one whose stay in Georgia was more or less transient, was evidence of negligence on the part of the plaintiff. The record is not clear as to the issuance or custody of the certificate of title in Georgia.

Charles M. York has not been made a party to this action, and as both plaintiff and defendant claim title to the automobile under him, the rights of the parties herein are unaffected by his nonage.

Upon the evidence offered we think the court below was in error in giving the peremptory instruction complained of, and that the case should have been submitted to the jury with appropriate instructions as to the principles of law applicable to the evidence presented. As there must be a new trial we deem it unnecessary to consider the other exceptions noted and brought forward in defendant's appeal.

New trial.

BARNHILL, J., concurring: I concur in the majority opinion. In so doing I deem it well to note that the defendant made no contention in the court below that the property described in the conditional sales contract had come to rest in this State and that therefore the contract, not being recorded in this State, is not valid and enforceable against him, a purchaser for value. Hence the effect of our statute, G. S., 47-20, as a modification of the general rule was not considered.

That we decide the case here on the theory of the trial below without discussing or deciding questions not presented for decision must not be interpreted to mean that we hold that G. S. 47-20 does not materially modify the general rule in respect to property within this State. *Applewhite Co. v. Etheridge*, 210 N. C., 433, 187 S. E., 588. We will decide that question when it is properly presented.

W. B. CARTER, JUNIUS D. GRIMES, JR., AND JOHN A. MAYO, COMMISSIONERS, v. LOUIS H. LILLEY.

(Filed 21 May, 1947.)

1. Guardian and Ward § 1c—

G. S., Art. 9, Chap. 33, relates solely to estates of living persons, and where in a proceeding thereunder the court finds that the missing person is dead under the presumption of death arising from seven years absence, the administration of the estate of such missing person becomes a matter for the probate court and proceedings under the statute are *coram non judice.*

2. Judgments § 45—

Upon the death of a judgment debtor a judgment creditor may not proceed independently to enforce his judgment, but must look to the personal representative whose duty it is to administer the whole estate, and this rule applies to presumptive death of the judgment debtor arising from his absence for seven years without being heard from by those who would be expected to hear from him if living.

3. Executors and Administrators § 2a—

While the death of intestate must be established as a jurisdictional fact to empower the Clerk of the Superior Court to issue letters of administration, G. S., 28-1, G. S., 28-5, the Clerk may upon evidence that a person has been absent from his domicile for seven years without being heard from by those who would be expected to hear from him if living, adjudge that such person is dead and appoint an administrator of his estate.

4. Descent and Distribution § 12: Judgments § 29—

In a suit to subject lands of a missing person to the payment of judgment liens, a guardian for the missing person was appointed, G. S., Art. 9, Chap. 33, and the heirs of the missing person were made parties. Commissioners were appointed to sell the lands but the court further adjudicated that the missing person was dead under the presumption arising from seven years absence. The sale of commissioners was subsequently confirmed. *Held:* The sale of the lands of a decedent in an independent proceeding to satisfy judgment liens is invalid, and the decree of confirmation cannot operate to estop the heirs and in effect validate the title of the purchaser at the sale.

APPEAL by defendant from *Thompson, J.,* February Term, 1947, BEAUFORT. Reversed.

Controversy without action to determine whether a deed tendered by plaintiffs under a contract of purchase and sale conveys a good and sufficient fee simple title to the premises therein described.

On 15 November 1938 W. J. Roberson, a resident of Beaufort County, was the owner of the tract of land in said county which is described in the deed tendered by plaintiffs. On or about that date he disappeared

from his home and in August, 1945, had not been heard from for more than seven years.

On 23 August 1945 Jennings Freeman brought suit to subject said land to the payment of outstanding and existing judgments against Roberson, owned by him, the said Freeman.

A guardian for Roberson was appointed under General Statutes Art. 9, Chap. 33, and made party defendant. Children of Roberson were also made parties defendant and were duly represented. At the October Term 1946 the court found the facts and entered its order appointing commissioners to make sale of said land and, upon confirmation of sale, to pay the costs and the judgments of Freeman in full and then distribute the remainder as therein described. This order contains the following:

"That the said W. J. Roberson disappeared from his home on November 15, 1938, and has not been heard of for more than 7 years, and the Court thereupon adjudges that the said W. J. Roberson is now dead, and that the defendants (naming them) are all of the children of the said W. J. Roberson, deceased, and as such children are sole heirs at law and as such are the owners of the land above described."

Thereafter, pursuant to said order, said land was offered for sale by the commissioners, plaintiffs herein, and after several resales it was finally bid in by defendant. The sale was confirmed and plaintiffs tendered deed sufficient in form to convey title. Defendant declined to accept the deed and pay the purchase price for that "the said commissioners cannot give him a good deed conveying the said lands in fee simple, and if in the future, it should develop that the said W. J. Roberson was not actually dead, he would lose the title to said land."

Thereupon the parties stipulated the facts and submitted them to the court in the form of a controversy without action to determine their respective rights and liabilities.

The court below, upon consideration of the facts agreed, adjudged that the deed of plaintiffs conveys title in fee and that the defendant must accept the same and pay the agreed purchase price therefor. Defendant excepted and appealed.

Junius D. Grimes for plaintiff appellees.
M. C. Paul for defendant, appellant.

BARNHILL, J. The pleadings in the cause in which plaintiffs, as commissioners, were authorized to make sale of the *locus* are not contained in the record before us. Even so, it is apparent the action was instituted under Chap. 49, P.L. 1933, now Art. 9, Chap. 33 of the General Statutes. It is so stated in the brief of appellees. That Act, known as the Missing Persons Statute, was enacted to provide for the

preservation and protection of the estate of a person who has disappeared from the community of his residence and whose whereabouts has been unknown for three months or more and cannot, after diligent inquiry, be ascertained. Historically, its enactment was prompted by the McCoin incident. See *Trust Co. v. McCoin,* 206 N. C., 272, 173 S. E., 345.

Clearly the Act relates solely to the estates of living persons. So soon as the judge found as a fact that W. J. Roberson was dead, the authority of Roberson's guardian to represent him in the action terminated and the administration of his estate became a matter for the probate court. Further proceedings in the original action were *coram non judice.*

After the death of a judgment debtor the judgment creditor may not proceed independently to enforce his judgment. He must look to the personal representative whose duty it is to administer the whole estate. *Moore v. Jones,* 226 N. C., 149, and cited cases.

But here there is no direct proof of the death of Roberson. If the judgment creditor cannot proceed by independent action in the Superior Court is he not denied a forum for the enforcement of a valid claim? The answer is no.

"The absence of a person from his domicile, without being heard from by those who would be expected to hear from him if living, raises a presumption of his death—*i.e.,* that he is dead at the end of seven years." *Beard v. Sovereign Lodge,* 184 N. C., 154, 113 S. E., 661; *Steele v. Insurance Co.,* 196 N. C., 408, 145 S. E., 787; *Chamblee v. Bank,* 211 N. C., 48, 188 S. E., 632; *Deal v. Trust Co.,* 218 N. C., 483, 11 S. E. (2d), 464.

While death is a jurisdictional fact that must be made to appear as the basis for the issuance of letters of administration, this rule provides a method of proof of death when direct proof thereof is not available.

Jurisdiction to appoint an administrator of a deceased person who has died intestate and to issue letters for the administration of his estate rests exclusively in the clerk of the Superior Court. G. S. 28-1, 28-5; *Clark v. Homes, Inc.,* 189 N. C., 703, 128 S. E., 20; *Bank v. Commissioners of Yancey,* 195 N. C., 678, 143 S. E., 252. And when evidence of death under the rule heretofore stated is offered before the clerk having jurisdiction and he finds therefrom that the party is in fact dead, he should so adjudge and appoint an administrator to administer his estate as provided by law. *Chamblee v. Bank, supra; Deal v. Trust Co., supra.*

While there is a division of opinion on this question in other jurisdictions it is accepted procedure with us. What is the purpose of the rule if it is not to constitute the basis of judicial action, and why have a method of proof if the proof, when made, is unavailing?

The judgment below cannot be sustained on the theory that the decree of confirmation entered in an action to which the heirs at law were

parties operates as an estoppel against them and thus, in effect, validates the title to the land purchased by defendant at the sale as therein confirmed. *Springer v. Shavender,* 116 N. C., 12; *Springer v. Shavender,* 118 N. C., 33.

The title tendered by plaintiffs is defective and the contract of purchase and sale is unenforceable. *Trimmer v. Gorman,* 129 N. C., 161. Hence the judgment below must be

Reversed.

D. H. PHILLIPS, EXECUTOR OF THE ESTATE OF MARY VANWORMER SPAHR, v. BEY V. PHILLIPS, MAUDE V. DUNHAM, JEAN W. VANWORMER, AND RUTH VANWORMER JARROTT.

(Filed 21 May, 1947.)

1. Descent and Distribution § 6—

Defendant was adopted prior to 15 March, 1941, the effective date of Public Laws 1941, Chap. 281, Secs. 4, 8 (G. S., 48-6, G. S., 48-15). The adoptive parent was named as devisee and legatee in his mother's will, but predeceased his mother. *Held:* The adopted child takes no interest in the property bequeathed and devised to the adoptive parent.

2. Same: Constitutional Law § 18—

Section 8, Chap. 281, Public Laws 1941, prescribing an effective date for the provisions of the act relating to inheritance by or through adopted children does not create a discrimination.

3. Wills § 42—

Judgment that the widow of a devisee dying prior to the death of testatrix takes nothing under the terms of the will is without error of law.

APPEAL by defendants Jean W. VanWormer and Ruth VanWormer Jarrott from *Rousseau, J.,* in Chambers at High Point, Guilford County, 10 April, 1947.

Civil action for determination of rights of parties in certain real and personal property under will of Mary VanWormer Spahr, deceased.

The parties stipulated upon facts, among others, as follows:

Mary VanWormer Spahr died 29 December, 1945, leaving a last will and testament, dated 1 March, 1943, in which, after directing that all her just debts, if any, and funeral expenses be paid, she gave, devised, and bequeathed "all the rest, residue and remainder" of her estate to her "three children, Frank VanWormer, Bey V. Phillips and Maude Dunham, to be divided equally among them, share and share alike." Her said children were natural born. Frank VanWormer predeceased his

mother,—he having died 17 November, 1943, leaving no natural born children, but leaving defendant Jean W. VanWormer as his widow, and defendant Ruth VanWormer Jarrott as his adopted daughter. Defendants Bey V. Phillips and Maude Dunham are the sole surviving children of testatrix Mary VanWormer Spahr, deceased.

On 2 February, 1924, Frank VanWormer and his wife, Jean W. VanWormer, adopted for life, under the laws of Texas, Ruth VanWormer, now defendant Ruth VanWormer Jarrott,—the letters of adoption expressly providing that "the said child shall share our property as provided by the laws of Texas." At the date of said adoption Frank VanWormer and his wife Jean W. VanWormer, and Ruth VanWormer Jarrott were domiciled in and residents of the State of Texas, and Jean W. VanWormer and Ruth VanWormer Jarrott were at the date of the death of the testatrix Mary VanWormer Spahr, and now are domiciled in and residents of the State of Texas.

The testatrix Mary VanWormer Spahr, though residing in Pennsylvania at the time of her death, was then a resident of and domiciled in Guilford County, N. C., and then owned certain real and personal property in said county, as well as certain real property in the State of Pennsylvania.

The plaintiff, upon allegations of fact substantially as above set forth, requested the court to declare the rights of the parties hereinbefore set out in and to the estate of the testatrix, in order that there be a proper administration of the estate.

The parties thereupon waived jury trial and agreed that the Judge presiding at the trial of the cause, upon the facts agreed and such additional findings of fact, if any, as the court might find from other testimony or evidence, without the intervention of a jury, should render judgment in the cause,—each reserving "every plea set up in the pleadings and every conclusion, position and right based upon or to be inferred from the foregoing facts and any additional facts that may be found by the court in this cause."

When cause came on for hearing the judge of Superior Court found the facts to be as agreed by the parties, and thereon concluded as a matter of law: That defendants Jean W. VanWormer and Ruth VanWormer Jarrott take nothing under the terms of the will of Mary VanWormer Spahr, and that the entire estate of Mary VanWormer Spahr, after the payment of debts, costs of administration and other legal charges, should be equally divided between the defendants Bey V. Phillips and Maude V. Dunham, and entered judgment in accordance therewith.

Defendants Jean W. VanWormer and Ruth VanWormer Jarrott, and each of them, appeals therefrom and assigns error.

Smith, Wharton & Jordan and Arthur O. Cooke for appellants.

D. Newton Farnell, Jr., and Gallup Potter & Gallup, Bradford, Pa., for appellees.

WINBORNE, J. In the matter of the appeal of appellant Ruth VanWormer Jarrott this question is presented: What rights, if any, does Ruth VanWormer Jarrott, who in 1924 was adopted for life by Frank VanWormer and his wife Jean W. VanWormer under the laws of the State of Texas, take in the property in North Carolina bequeathed and devised to Frank VanWormer under the provisions of the will of his mother Mary VanWormer Spahr,—he having predeceased his mother, and having left no natural child? The answer is "None."

Counsel for Ruth VanWormer Jarrott take the position in brief filed (1) that the matters here at issue are controlled by applicable principles of law prevailing in this State,—relying on the case of *Grant v. Reese*, 94 N. C., 729,—and upon general rules stated in Annotation on the subject of "Conflict of laws as to adoption as affecting descent and distribution of decedent's estate," 154 A. L. R., 1179; and (2) that decision on this appeal rests squarely on the construction of two North Carolina statutes, G. S., 48-6, and G. S., 31-44, interpreted in the light of each other and the undisputed facts.

In the light of and upon the basis of this premise, conceded for the purpose of this appeal, it is noted that G. S., 48-6, prescribes in the main the form and contents of adoption order and declares the parent-child relationship established and the rights of inheritance. It was enacted in 1941 (P. L. 1941, Chapter 281, Section 4), as a part of an act to amend Chapter 243 of Public Laws 1935, which amended Chapter 207 of Public Laws 1933, which amended Chapter 2 of the Consolidated Statutes of 1919, all relating to the adoption of minors. The acts of 1933 and 1935 had substantially the same provision in respect to the establishment of relationship of parent and child. These acts provided that "such order granting letters of adoption when made . . . shall have the effect forthwith to establish the relationship of parent and child between the petitioner and the child during the minority or for the life of such child, according to the prayer of the petition, with all the duties, powers and rights belonging to the relationship of parent and child, and in case adoption be for the life of the child, and the petitioner die intestate, such order shall have the further effect to enable such child to inherit the real estate and to entitle it to the personal estate of the petitioner in the same manner and to the same extent such child would have been entitled to if such child had been the actual child of the person adopting it."

Moreover, this Court, in construing and applying the provisions of these statutes as they then existed, stated in *Grimes v. Grimes* (1935),

207 N. C., 778, 178 S. E., 573: "The statute gives no power to the adopted child to inherit through the adoptive parent, or from any source other than the 'estate of the petitioner.' The statute limits the right to inherit to the property of the adoptive parent, and it cannot be construed to give the adopted child the right to inherit from his father's ancestors or other kindred, or to be a representative of them. By the adoption the child is not made issue or heir general, nor is he made the kin of the kindred of the adoptive parent. The effect of the adoption is simply to create a personal status between the adoptive parent and the child adopted, so that the adopted child may inherit from the adoptive parent such estate of the adoptive parent as such parent, during his lifetime, might voluntarily have given to such child."

Appellant concedes this holding in the *Grimes case, supra,* but she invokes and relies upon that part of the amendment of 1941, P. L. 1941, Chapter 281, Section 4, which provides that "where adoptions are for life succession by, through, and from adopted children and their adoptive parents shall be the same as if the adopted children were natural, legitimate children of the adoptive parents."

However, the General Assembly declared in Section 8 of the act of 1941, that "the provisions of Section 4 of this act excluding the last sentence . . . shall apply only to adoptions hereafter made,"—the last sentence not being pertinent here. The act became effective from and after its ratification, and it was ratified on 15 March, 1941. Furthermore, this section was carried forward in the General Statutes of North Carolina of 1943 as G. S., 48-15, entitled "Construction of 1941 Amendment," in these words: "The provision of G. S. 48-6 except for the last sentence, shall apply only to adoptions made after March 15, 1941."

Therefore, since the adoption of Ruth VanWormer Jarrott took place on 2 February, 1924, the provisions of the act of 1941 are inapplicable to her situation, and afford her no relief from the provisions of the statute as it existed prior to the effective date of the 1941 act.

Furthermore, the contention that the part of the 1941 act fixing an effective date creates a discrimination is without merit.

On the appeal of Jean W. VanWormer she merely requests the Court to adjudge what rights, if any, she as the widow of Frank VanWormer, may have in the property of Mary VanWormer Spahr of which he was devisee and legatee under the provisions of the will of Mary VanWormer Spahr,—he having predeceased the testatrix. No argument is advanced and no authority, statutory or otherwise, is cited in support of her exception to the judgment below, and, in the judgment, there is no error in law.

Affirmed.

ETTA W. INGRAM, GUARDIAN OF ROBERT GEROY INGRAM, v. WILLA V. EASLEY, GUARDIAN OF ELSIE CHRISTINE INGRAM.

(Filed 21 May, 1947.)

1. Appeal and Error § 20c—

Where jury trial is waived and the cause submitted to the court by agreement, a deed appearing in the case agreed signed by the parties and which is referred to in the statement of facts agreed, will be considered on appeal notwithstanding objection that the deed was not offered in evidence.

2. Appeal and Error § 22—

Defendant claimed under a deed executed to her ancestor some years prior to the time in question, and introduced the deed in evidence. Plaintiff contended that the evidence failed to show title in the ancestor at the time in question because of want of evidence that the ancestor had not conveyed the property in the interim. *Held:* The Court will not assume the existence of documents about which there is no proof and which plaintiff was under duty to offer in evidence if they exist, but will decide the case upon the facts appearing of record.

3. Husband and Wife §§ 6, 14—

Where the husband is named as grantee with his wife in the introductory recital, but the granting clause, the *habendum* and the warranty of title are to "said party of the second part, her heirs and assigns" the deed conveys nothing to the husband.

4. Deeds § 13a—

In the event of any repugnancy between the granting clause and preceding or succeeding recitals, the granting clause will prevail.

5. Husband and Wife § 14—

Where property constituting the separate estate of the wife is the sole consideration in the exchange of this property for other realty, the wife alone is entitled to such other realty, and deed to such realty, even though it be made to them jointly, does not create an estate by entirety.

6. Husband and Wife § 12c—

A wife may not convey realty constituting her separate estate to her husband, either directly or indirectly, except by testamentary devise, without complying with G. S., 52-12, and therefore when property constituting her separate estate is exchanged for other realty, deed to them jointly for such other realty does not create an estate by entirety.

APPEAL by defendant from *Burney, J.*, November Term, 1946, COLUMBUS. Reversed.

Petition for partition in which the defendant pleads sole seizin.

Upon the filing of defendant's answer denying cotenancy and pleading sole seizin, the cause was transferred to the civil issue docket for trial of the issue thus raised, as is required by law.

When the cause came on for trial in the court below, counsel stipulated the facts, waived trial by jury, and submitted the cause to the court for decision on the pleadings and the facts agreed.

The facts are in substance as follows: In April, 1933, Mildred S. Ingram, wife of Henry W. Ingram, was the owner of two lots in the Town of Whiteville, described in a deed from her mother dated 7 April 1928 and recorded in Book 131, page 469, Columbus County Register. She agreed with G. E. Crutchfield to exchange the first lot or tract described in said deed for the tract described in the complaint then owned by Crutchfield. This agreement was evidenced by a written contract executed by Mildred S. Ingram and husband and G. E. Crutchfield and wife, dated 28 April 1933. Thereafter, on 2 May 1933, in compliance with the agreement, deeds were duly executed.

In 1935 Mildred S. Ingram died intestate leaving surviving her husband, Henry W. Ingram, and one child, Elsie Christine Ingram, the defendant.

Thereafter Ingram remarried and to this union was born one child, Robert Geroy Ingram, the plaintiff. He then died intestate, leaving surviving his widow, Etta W. Ingram, and two children, plaintiff and defendant herein.

After the death of Mildred S. Ingram, Henry W. Ingram remained in possession of the *locus* until the time of his death. Since that time the defendant has been in possession thereof.

The court below, being of the opinion that the deed from Crutchfield and wife to Ingram and wife for the *locus* created an estate by entirety and that upon the death of Mildred S. Ingram her husband, Henry W. Ingram, became the sole owner thereof in fee by survivorship, adjudged that plaintiff and defendant are now the owners thereof by inheritance as tenants in common and remanded the cause to the clerk for further proceedings. Defendant excepted and appealed.

Powell & Powell for plaintiff appellee.
Lyon & Lyon for defendant appellant.

BARNHILL, J. Counsel for the plaintiff earnestly insists that the record fails to disclose that the deed from Crutchfield to Ingram was offered in evidence and therefore it should not be considered by the Court. This deed appears in the case agreed, signed by them. The stipulation of facts makes reference thereto. Furthermore, this deed is the source of the title to which plaintiff makes claim. No reason why it should be disregarded is made to appear.

They further contend that while the record discloses that in 1928 Mildred S. Ingram acquired title to the lot conveyed to Crutchfield in exchange for the *locus,* ownership at the time of the exchange is controlling, and the evidence "in no way denies or disproves that Henry W. Ingram had acquired (it) by purchase or gift" prior to the time it was conveyed to Crutchfield as consideration for the lot in controversy. The answer is simple. The case agreed discloses the title upon which defendant relies. If there is any other deed or document which tends to disprove her title or to strengthen the claim of plaintiff, it was his duty to offer it in evidence. The Court will not assume the existence of documents about which there is no proof but will decide the case upon the facts appearing of record.

Having disposed of these preliminary questions raised by the appellee, we come to the two questions posed by the appeal: (1) Does the deed from the Crutchfields to the Ingrams dated 2 May 1933 on its face purport to convey an estate by entirety to the grantees therein, and (2) If so, did said deed in fact convey any interest or estate to said Henry W. Ingram? We are constrained to answer each question in the negative.

It is apparent the Crutchfield deed conveyed nothing to Henry W. Ingram. His name appears only in the introductory recital giving the names of the parties. In the granting clause the land is conveyed to "said party of the second part, her heirs and assigns." The estate conveyed is so limited in the *habendum* clause and warranty of title is to like effect.

In the event of any repugnancy between the granting clause and preceding or succeeding recitals, the granting clause will prevail. *Williams v. Williams,* 175 N. C., 160, 95 S. E., 157; 16 A. J., 575.

But we are not required to rest decision solely on the clear intent of the deed as expressed by the language used therein. Even if we concede, *arguendo,* the deed discloses an intent to convey the land to the grantees therein as tenants by entirety, the husband took nothing thereunder.

The property given in exchange and as the consideration for this conveyance was a part of the separate estate of the *feme* grantee. She alone was entitled to the conveyance.

To create an estate by entirety the spouses must be jointly entitled as well as jointly named in the deed and so "if the wife alone be entitled to a conveyance, and it is made to her and her husband jointly, the latter will not be allowed to retain the whole by survivorship." *Sprinkle v. Spainhour,* 149 N. C., 223; *Speas v. Woodhouse,* 162 N. C., 66, 77 S. E., 1000.

A married woman cannot convey her real property to her husband directly or by any form of indirection without complying with the provisions of G. S., 52-12. Any manner of conveyance—testamentary de-

vises excepted—otherwise than as therein provided is void. *Sprinkle v. Spainhour, supra; Speas v. Woodhouse, supra; Singleton v. Cherry,* 168 N. C., 402, 84 S. E., 698; *Deese v. Deese,* 176 N. C., 527, 97 S. E., 475; *Davis v. Bass,* 188 N. C., 200, 124 S. E., 566; *Best v. Utley,* 189 N. C., 356, 127 S. E., 337; *Garner v. Horner,* 191 N. C., 539, 132 S. E., 290; *Caldwell v. Blount,* 193 N. C., 560, 137 S. E., 578; *Capps v. Massey,* 199 N. C., 196, 154 S. E., 52; *Fisher v. Fisher,* 218 N. C., 42, 9 S. E. (2d), 493.

This rule applies to a conveyance of land in trust for the husband, *Best v. Utley, supra; Davis v. Bass, supra; Garner v. Horner, supra; Fisher v. Fisher,* 217 N. C., 70, 6 S. E. (2d), 812; notes payable to husband and wife, received in consideration for a conveyance of the wife's land, *Kilpatrick v. Kilpatrick,* 176 N. C., 182, 96 S. E., 988; a conveyance to husband and wife when the land was purchased with the wife's money; *Deese v. Deese, supra;* separation agreements, *Taylor v. Taylor,* 197 N. C., 197, 148 S. E., 171; a consent judgment transferring the wife's property to her husband, *Ellis v. Ellis,* 193 N. C., 216, 136 S. E., 350; and to any other transaction the effect of which is to convey the wife's separate real estate to the husband "for a longer time than three years next ensuing the making of such contract." G. S., 52-12.

Upon the death of Mildred S. Ingram her husband became entitled to possession of the *locus* for life as tenant by curtesy with remainder in the defendant. Henry W. Ingram being now deceased, the defendant is the owner of the property in fee and the plaintiff is possessed of no right thereto or interest therein. Hence the judgment below is

Reversed.

STATE v. ROY KIRKSEY.

(Filed 21 May, 1947.)

1. Jury §§ 1, 3—

Objection that defendant was denied a trial by his peers for the reason that Negroes were excluded from the petit jury must be presented by a challenge to the array and cannot be presented by defendant's challenge to the twelfth juror after he had exhausted his peremptory challenges, the fact that the venireman tendered as the twelfth juror is a white man not being ground for challenge for cause. G. S., 15-163.

2. Constitutional Law § 33—

Upon objection that defendant is denied a trial by his peers for the reason that Negroes were excluded from the petit jury, the trial court's findings of fact when supported by sufficient evidence are conclusive on appeal in the absence of gross abuse.

3. Homicide § 25—

Evidence that defendant went to the home of his mother-in-law about sundown and assaulted his estranged wife, cutting a gash in her arm, and that when his wife returned from the hospital about midnight, defendant was seen in the yard by the light of the car, that his wife got out of the car, and that defendant shot and killed her as she was attempting to run behind it, is sufficient evidence of murder in the first degree to be submitted to the jury.

4. Homicide § 3—

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation.

5. Homicide § 14—

An indictment for murder in the first degree need not allege deliberation and premeditation, an indictment in the form prescribed by statute, G. S., 15-144, being sufficient. G. S., 14-17, G. S., 15-172.

APPEAL by defendant from *Thompson, J.*, at 9 December, 1946, Special Criminal Term of COLUMBUS.

Criminal prosecution upon the following bill of indictment: "The jurors for the State upon their oath present, that Roy Kirksey, late of Columbus County, on the 4th day of July, A.D. 1945, with force and arms, at and in the said county, feloniously, willfully, and of his malice aforethought did kill and murder Eloise W. Kirksey contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State."

Verdict: Guilty of the felony and murder in the manner and form as charged in the bill of indictment.

Judgment: Death by the administration of lethal gas.

Defendant appeals therefrom and assigns error.

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

W. F. Jones and Robert C. Schulken for defendant, appellant.

WINBORNE, J. Defendant in brief filed in this Court presents, as involved on this appeal, three questions, which we consider *seriatim:*

I. The question arises in this manner: After defendant had been arraigned and had pleaded not guilty, and trial had begun, and after eleven jurors had been duly selected, and after defendant had exhausted all peremptory challenges allowed by law, another special venireman, B. J. Mincher, was called and accepted by the State, and tendered to defendant, who challenged the juror peremptorily, upon the ground that defendant, being of the colored race and all of the eleven jurors in the box and all veniremen summoned for jury duty being white men, he

was thereby denied a trial by his peers. After hearing evidence of the defendant in support of his motion and challenge to the proposed juror, the court found facts which appear of record, and thereupon overruled the defendant's motion and challenge as to B. J. Mincher. Exception by defendant.

The exception taken to the refusal of the court to sustain the challenge to the special venireman, B. J. Mincher, under the circumstances set forth, is not well taken, and is not sustained for these reasons: "Unless an objection goes to the whole panel of jurors, it may not be taken advantage of by a challenge to the array." *S. v. Levy,* 187 N. C., 581, 122 S. E., 386, citing *S. v. Hensley,* 94 N. C., 1021; *S. v. Stanton,* 118 N. C., 1182, 24 S. E., 536. *Moore v. Guano Co.,* 130 N. C., 229, 41 S. E., 293; *S. v. Parker,* 132 N. C., 1014, 43 S. E., 830; *S. v. Mallard,* 184 N. C., 667, 114 S. E., 17.

"A challenge to the array," as stated in *S. v. Hensley, supra,* "can only be taken when there is partiality or misconduct in the sheriff, or some irregularity in making out the list." See *S. v. Moore,* 120 N. C., 570, 26 S. E., 697; *S. v. Levy, supra; S. v. Dixon,* 215 N. C., 438, 2 S. E. (2d), 371.

If defendant had wished to take advantage of his objection to the petit jury and special venire, he should have done so by challenging the array. *S. v. Douglass,* 63 N. C., 500, and before entering upon the trial of his case.

Objections to individual jurors are made by challenges to the polls. These challenges are of two kinds—peremptory and for cause. Defendant had exhausted the number of peremptory challenges allowed to him by law, G. S., 15-163, and the fact that the venireman tendered is a white man is not a disqualifying cause. See *S. v. Levy, supra,* for summary of the principal challenges to the polls now recognized by our practice, and of which either side may take advantage at the trial.

Moreover, if the challenge had been timely and appropriately taken, the findings of fact by the presiding judge, which are supported by sufficient evidence, are conclusive on appeal in the absence of gross abuse. *S. v. Cooper,* 205 N. C., 657, 172 S. E., 199; *S. v. Walls,* 211 N. C., 487, 191 S. E., 232, in which appeal is dismissed by U. S. Supreme Court, 302 U. S., 635, 58 S. Ct., 18, 82 L. Ed., 494; *S. v. Henderson,* 216 N. C., 99, 3 S. E. (2d), 357; *S. v. Daniels,* 134 U. S., 641; *Texas v. Thomas,* 212 U. S., 278, 753 L. Ed., 512.

II. The second question pertains to assignment of error challenging the correctness of the action of the trial court in overruling motion of defendant for judgment as of nonsuit, and is also untenable.

The evidence for the State—the defendant having offered none—tends to show substantially these facts: On 4 July, 1945, defendant and deceased were husband and wife—though living in a state of separation—

she with her mother in Columbus County, North Carolina, and he with his father, about a mile away. About sundown on that day defendant went to the home of the mother of his wife and asked for his wife. On being informed that she was in the house dressing, he went in and a fight followed, scuffling in the room, and continued out in the back yard where he was seen with an axe, and then his wife came in the house with gash cut in her arm. He remarked to his wife's mother, "I love her good enough to kill her." His wife was taken by automobile about dark to hospital in Whiteville to get her arm sewed up. Four others went with her. As they returned to the home of her mother, about midnight, defendant was seen by the light of the car, as he was coming from behind a near-by chinaberry tree, toward the car, in direction of his wife, with his hand behind him. His wife got out of the car and ran behind it, and just as she got to the back bumper, a gun in the hand of defendant fired, and she was shot in the back. She exclaimed, "Roy, don't kill me now," and then "Roy has done killed me now." No one had said anything to defendant at that time, and he said nothing before he shot. She died soon after being shot, from result of the gunshot wound. Defendant left and was arrested on 9 September, 1946, in Savannah, Georgia, more than a year thereafter.

This evidence is abundantly sufficient to support a verdict of murder in the first degree. Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. *S. v. Starnes,* 220 N. C., 384, 17 S. E. (2d), 346.

III. The third question relates to assignment of error that the court below erred in refusing to allow his motion in arrest of judgment for that the bill of indictment fails to charge murder in the first degree—contending that since the Act of 1893, Chapters 85 and 281, dividing murder into two degrees, the indictment "should charge deliberation, premeditation and malice, the essential elements of first degree." However, by referring to the 1893 Act, and tracing provisions of it through successive codifications, the contention fails, and the assignment may not be sustained.

In this connection the Act of 1893, Chapter 85, after providing in sections one and two for division of the crime of murder into two degrees and defining the same, provides in section three that "nothing herein contained shall be construed to require any alteration or modification of the existing form of indictment for murder, but the jury before whom the offender is tried shall determine in their verdict whether the crime is murder in the first or second degree." Thereafter, when the statutes were next codified the Act of 1893 was divided—sections one and two of Chapter 85 and Chapter 281 becoming Section 3631 of Revisal of 1905 under chapter entitled "Crimes," and later C. S., 4200, in chapter on "Crimes and Punishment," and now G. S., 14-17, in chapter entitled

"Criminal Law"; and said section three of Chapter 85 becoming Section 3271 of Revisal of 1905 under chapter on "Criminal Procedure," and later as C. S., 4642, and now G. S., 15-172, under similar chapters.

Moreover, as to form of indictment for murder existing at the date of the Act of 1893, Chapter 85 and 281, we find "An act to simplify indictments in certain cases," Laws of 1887, Chapter 58, which provides in pertinent part, as follows: "Section 1. That in bills of indictment for murder and manslaughter it shall not be necessary to allege matters not required to be proved on the trial; but in the body of the indictment, after naming the person or persons accused, and the county of his or their residence, the date of the offense, the averment 'with force and arms,' and the county of the alleged commission of the offense, as is now usual, it shall be sufficient in describing murder to allege that the accused person or persons (as the case may be), feloniously, wilfully, and of his or their malice aforethought, did kill and murder (naming the person killed) and concluding as is now required by law . . .; and any bill of indictment containing the averments and allegations herein shall be good and sufficient in law as an indictment for murder or manslaughter as the case may be."

This statute was later codified and brought forward as Revisal 3245, and later as C. S., 4614, and now as G. S., 15-144.

Applying the provisions of this statute, G. S., 15-144, it is seen that the bill of indictment in the case in hand is drawn in conformity therewith.

After careful consideration of the record and case on appeal, we are unable to find cause to disturb the judgment pronounced, and from which the appeal is taken.

No error.

STATE v. ELLA GODWIN.

(Filed 21 May, 1947.)

1. Criminal Law § 52b—

It is rarely proper to direct a verdict for the State in a criminal prosecution, and where there is no admission or presumption calling for explanation or reply on the part of defendant, an instruction that if the jury should find beyond a reasonable doubt the facts to be as shown by all the evidence, to return a verdict of guilty, must *be held* for reversible error, certainly where the court fails to charge that if the jury has a reasonable doubt of defendant's guilt to acquit her.

2. Intoxicating Liquor § 9e—

In this prosecution for the sale of nontax-paid whiskey the sole witness was an employee of the A. B. C. Board whose testimony disclosed that he

procured the sales by defendant by persistent entreaty and duplicity. *Held:* Under defendant's plea of not guilty, defendant was entitled to the benefit of any reasonable doubt as to the credibility of the State's witness, and therefore an instruction that if the jury should find beyond a reasonable doubt the facts to be as shown by all the evidence to return a verdict of guilty, is erroneous.

3. Criminal Law § 28—

Upon defendant's plea of not guilty the presumption of innocence attaches and goes with him throughout the trial and stands until overcome by proof or an adverse verdict, and casts the burden on the State to prove guilt beyond a reasonable doubt.

4. Criminal Law § 81c (4)—

Defendant was convicted on three counts, sentence on the first two to run concurrently and sentence on the third to begin at the expiration of the first two, suspended on good behavior. *Held:* There being error in the conviction on the first two counts and it being apparent that the conviction on the third count was necessarily influenced by and followed as a matter of course from the convictions on the first two counts, a new trial must be awarded on the third count also.

APPEAL by defendant from *Parker, J.*, at November Term, 1946, of CUMBERLAND.

Criminal prosecutions on three separate warrants charging the defendant in each with the sale of nontax-paid whiskey, consolidated and tried together.

Ralph Lamb, an employee of the State A. B. C. Board, testified that on Sunday morning, 31 March, 1946, he went to the home of the defendant to buy some whiskey. The defendant at first declined to sell him any, she was afraid of him, didn't know him, but said she would give him a drink. The witness replied that he had a drink (he had about an inch of A. B. C. whiskey in a bottle), but wanted some to take along with him. The defendant agreed to swap drinks with him, which she did. The witness took a swallow of the whiskey, and after much importuning, the defendant said: "Give me $2 and go ahead. I think you are all right." The witness gave her $2 and took the whiskey.

Thereafter, on 19 April, the witness and another Mr. Lamb, who was working with him, went to the home of the defendant to buy some whiskey. The defendant first said she was afraid, and the witness replied: "That is exactly what we are going to do, arrest you as soon as you sell us whiskey." She then sold the witness a pint and his comrade paid her $3 for it.

Still, again, on Sunday morning, 5 May, the witness and Mr. Pete Lamb went to the home of the defendant and got a pint of "stump hole nontax-paid liquor," paid for it and left.

On cross-examination, the witness said that on the first occasion there was a swapping of drinks. "I don't consider that selling it. There was no money in exchange. . . . I went there and sat around and argued with that woman a long time and finally left there with a pint of liquor."

Speaking of the second occasion, he says: "We represented ourselves as being A. B. C. officers. . . . I said as soon as you sell us this whiskey we are going to arrest you. . . . I wasn't going to arrest her."

On the second occasion another girl was there and they were mopping the floor. "The third time we only saw Mrs. Godwin."

The defendant offered no evidence.

The following instructions were given to the jury:

1. In respect to the first charge, "The court instructs you that if you find the facts to be true as testified to by the State's witness and beyond a reasonable doubt, it will be your duty to return a verdict of guilty in that case." Exception.

2. In respect to the second charge, "The court instructs you that if you find the facts to be true as shown by all the evidence and beyond a reasonable doubt, it will be your duty to return a verdict of guilty in that case." Exception.

3. In respect to the third charge, "The court instructs you that if you find the facts to be true as shown by all the evidence and beyond a reasonable doubt, it will be your duty to return a verdict of guilty in that case. If you have a reasonable doubt of her guilt you will acquit her." Exception.

Verdict: Guilty as charged in all three cases.

Judgments: In the first case, 12 months in the Woman's Division of the State's Prison; in the second case, 12 months in the Woman's Division of the State's Prison to run concurrently with the sentence in the first case; in the third case, 12 months in the Woman's Division of the State's Prison to begin at the expiration of the sentences in the first and second cases. The sentence in the third case to be suspended for two years on conditions, good behavior, etc.

The defendant appeals, assigning errors.

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

Henry L. Anderson and James R. Nance for defendant.

STACY, C. J. The validity of the trial, and not the guilt or innocence of the accused, is the question presently to be considered.

The peremptory character of the court's instructions, certainly those in the first two cases, would seem to be in excess of approved practice, where, as here, there is no admission or presumption calling for explana-

tion or reply on the part of the defendant. *S. v. Estes,* 185 N. C., 752, 117 S. E., 581; *S. v. Singleton,* 183 N. C., 738, 110 S. E., 846; *S. v. Hill,* 141 N. C., 769, 53 S. E., 311. It is only in rare instances that a verdict may be directed for the State in a criminal prosecution. *S. v. Ellis,* 210 N. C., 166, 185 S. E., 663. "The plea of not guilty disputes the credibility of the evidence, even when uncontradicted, since there is the presumption of innocence, which can only be overcome by the verdict of a jury." *S. v. Riley,* 113 N. C., 648, 18 S. E., 138. See *S. v. Dickens,* 215 N. C., 303, 1 S. E. (2d), 837, and cases there cited.

Where a defendant pleads not guilty to the charge contained in the warrant or bill of indictment to which he is required to answer, there comes to his aid the common-law "presumption of innocence" which goes with him throughout the trial and stands until overcome by proof or an adverse verdict. *S. v. Herring,* 201 N. C., 543, 160 S. E., 891; *S. v. Boswell,* 194 N. C., 260, 139 S. E., 374. His plea of traverse casts upon the State the burden of establishing his guilt, not merely to the satisfaction of the jury, but to a moral certainty or beyond a reasonable doubt. *S. v. Singleton, supra.*

Moreover, it appears from the cross-examination of the witness that the State's case must lean more or less upon a "broken reed," as it were, since it was brought about by persistent entreaty and duplicity. In this respect, it is quite unlike *S. v. Murphrey,* 186 N. C., 113, 118 S. E., 894. The witness admits that, in the first case, he misled the defendant and was able to leave with a pint of liquor only after swapping drinks with her—his own act he imputes to righteousness, hers to unrighteousness; and in the second case he told her a story. Indeed, his testimony in the second case would seem to burden credulity somewhat. At any rate, the jury should have been allowed to give the defendant the benefit of any reasonable doubt. *S. v. Harris,* 223 N. C., 697, 28 S. E. (2d), 232. "Reasonable doubt, in the humanity of our law, is exercised for the prisoner's sake, that he may be acquitted if his case will allow it, but it is never applied for his condemnation." *S. v. Starling,* 51 N. C., 366. No mention is made of any sale in the cross-examination.

Little need be said about the instruction in the third case. Even if standing alone, it could be upheld, which is unconceded, we think the verdict here was necessarily influenced by the results in the first two cases, since it appears to have followed as a matter of course. The judgment in this case was suspended on condition.

Full liberty of consideration on the part of the jury would seem to be the defendant's due in all three cases. *Suum cuique tribuere.*

New trial.

M. D. AKIN v. FIRST NATIONAL BANK OF WINSTON-SALEM ET AL.

(Filed 21 May, 1947.)

1. Appeal and Error § 40b—

Where the trial court sets aside a verdict for error of law and not as a matter of discretion, the ruling is appealable provided the error is specifically designated, and error in failing to have directed a verdict for plaintiff is sufficient for this purpose.

2. Husband and Wife § 14—

Where a husband purchases realty and has the deed made to a trustee of a passive trust for the benefit of himself and wife, nothing else appearing, the instrument creates an estate by entirety. G. S., 41-7.

3. Reformation of Instruments § 10—Evidence held insufficient to show mutual mistake or mistake of draftsman as basis for reformation of deed.

The evidence tended to show that claimant's adoptive father made declarations before and after, but none contemporaneously with, his purchase of the realty in question, to the effect that he was buying, or had bought, it for claimant and her children, but that he usually added that he wanted her to have a place to live as long as she "did right," and that he was not having deed made to her in order to prevent her from losing or disposing of the property. The evidence further tended to show that he instructed the draftsman to make the deed to a bank as trustee for himself and wife, and that the deed was executed according to his instructions. *Held:* The evidence is insufficient to be submitted to the jury on the issue of reformation of the deed to enforce a parol trust in the adopted child's favor, there being no evidence of mutual mistake or error on the part of the draftsman.

APPEAL by intervener from *Pless, J.*, at September Term, 1946, of DAVIDSON.

Civil action by widow to require trustee in deed to execute release to her or to remove cloud on title.

Intervention by adopted daughter to reform deed and to enforce trust alleged to have been declared and intended for her benefit by foster father.

It appears that on 22 January, 1944, plaintiff's husband, A. M. Akin, purchased from C. C. Kiger and wife a house and lot in Davidson County and had the deed made to "The First National Bank of Winston-Salem, Forsyth County, N. C., Trustee for A M and M D Akin," the named *cestuis* being husband and wife. A. M. Akin, the husband of plaintiff, died prior to 5 July, 1945, on which date the plaintiff instituted this action, alleging that the deed in question created a passive or inactive trust, with title and use or right of possession in the *cestuis,* and that upon the death of plaintiff's husband she became the sole owner thereof

by right of survivorship. Wherefore, she asked to be declared the owner in fee simple of the real estate described in the deed and that the defendant Bank be directed to execute to her a deed in clarification of her title.

The defendant Bank filed answer, admitted the passive character of the trust, and disclaimed any interest in the property.

Thereafter, Betty Akin Miller, adopted daughter of A. M. and M. D. Akin, with leave of the court, intervened and alleged that the property was purchased for her and her children by her foster father, so declared by him before and after the purchase, and that his intentions were not properly expressed in the deed because of mutual mistake and error of the draftsman.

In substantiation of her claim, the intervener offered evidence tending to show that her foster father declared on numerous occasions, before and after the purchase, that he was buying and had bought the property in question for his adopted daughter and her children; that a life estate would go to her and the fee to her children. He added, however, that he wanted it put in trust because he was afraid his adopted daughter and her husband would run through with it, or give a mortgage and lose it, and that he had instructed the draftsman to draw the deed accordingly.

The plaintiff in reply, and by cross-examination of intervener's witnesses, produced and elicited evidence tending to show that Mr. Akin told his grantor "he bought this property for his daughter to live in as long as they would do all right; that he didn't make her any deed so she couldn't dispose of it."

The broker, who drafted the deed, testified that Mr. Akin spoke of buying the property for his adopted daughter, but "when we closed the trade he told me he would make the deed to himself and his wife with the First National Bank as Trustee; that he didn't want to make the property to her (adopted daughter) because they might run through with it. . . . He said something about she was to have it to live in if she acted right. . . . Mr. Akin gave me instructions as to how to have the deed prepared. The deed was prepared in accordance with his instructions. . . . I told my stenographer to draw the deed. I put it down like he told me."

The Vice-President of the Bank testified that Mr. Akin "said he wanted to buy a home for his daughter and he wanted it put in trust so she could stay there as long as she paid the insurance and the taxes and behaved herself. He said he wanted the bank as trustee so he could control the property. He said it was made in the name of the bank as trustee; if anything happened to him it would be his wife's and if anything happened to his wife it would be his."

The intervener has lived in the house with her family since its purchase in January, 1944.

The jury returned the following verdict:

"1. Did A. M. Akin create a trust in the real estate, described in the complaint, for Betty Akin Miller, for her life, with the remainder to the heirs of her body, as alleged in the pleadings of Betty Akin Miller? Answer: Yes.

"2. Is the plaintiff, as the widow of A. M. Akin, the owner of and entitled to the possession of the property described in the complaint, and in the deed recorded in Deed Book 156, page 429, in the office of the Register of Deeds of Davidson County, North Carolina? Answer: No."

Upon the coming in of the verdict, the court of its own motion set it aside for error in failing to direct a verdict for the plaintiff on the first issue in accordance with her prayer.

From this action, the intervener appeals, assigning error.

Thomas D. Carter, Ratcliff, Vaughn, Hudson & Ferrell, and P. V. Critcher for plaintiff, appellee.

Elledge & Hayes and H. Bryce Parker for intervener, appellant.

STACY, C. J. When a verdict is set aside for error or errors in law, committed during the trial, and not as a matter of discretion, the party thereby aggrieved may appeal, provided the error or errors are specifically designated. *Powers v. Wilmington*, 177 N. C., 361, 99 S. E., 102; *Rankin v. Oates*, 183 N. C., 517, 112 S. E., 32; *Smith v. Winston-Salem*, 189 N. C., 178, 126 S. E., 514. See, *Likas v. Lackey*, 186 N. C., 398, 119 S. E., 763; *Godfrey v. Queen City Coach Co.*, 200 N. C., 41, 156 S. E., 139. Here, the error which induced the court's action is stated as the failure to direct a verdict for the plaintiff on the first issue in accordance with her request. This suffices for the appeal.

If we look only at the deed it appears to create a passive or naked trust for the benefit of the named *cestuis* who were husband and wife. Hence, under the statute, G. S., 41-7, and the provisions of the instrument, the *cestuis* would seem to take an estate by the entirety. *Security Nat. Bank, Admr., v. Sternberger, Trustee*, 207 N. C., 811, 178 S. E., 595; *Gold Mining Co. v. Lumber Co.*, 170 N. C., 273, 87 S. E., 40; *Davis v. Bass*, 188 N. C., 200, 124 S. E., 566; *Motley v. Whitemore*, 19 N. C., 537. Such was the holding in *Harris v. Distributing Co.*, 172 N. C., 14, 89 S. E., 789.

The evidence offered on behalf of the intervener falls short of establishing a trust in her favor. It is true, her foster father declared on several occasions that he was buying, or had bought, the property for his adopted daughter and her children, but these were usually accompanied by expressions, such as, "to live in as long as they would do all right," and "that he didn't make her any deed so she couldn't dispose of it." He also expressed the fear that she might "run through with it," or

lose it, and that he expected to put it in trust so he could control it. Then, when he finally came to close the transaction, he instructed the broker to have the deed made as it appears of record. There is no evidence of any mutual mistake or error on the part of the draftsman. It is as the purchaser wanted it.

It is to be noted that some of the declarations, upon which the intervener relies to establish a parol trust in her favor, were made before, and some after, but none contemporaneously with the transmutation of the legal title. *Furniture Co. v. Cole,* 207 N. C., 840, 178 S. E., 579; *Lefkowitz v. Silver,* 182 N. C., 339, 109 S. E., 56; *Sykes v. Boone,* 132 N. C., 199, 43 S. E., 645; *Williams v. Honeycutt,* 176 N. C., 102, 96 S. E., 730; *Blackburn v. Blackburn,* 109 N. C., 488, 13 S. E., 937; *Pittman v. Pittman,* 107 N. C., 159, 12 S. E., 61; *Wood v. Cherry,* 73 N. C., 110. And those which were made before the transmission of the legal title were revoked or changed when instructions were given for the preparation of the deed.

All of these considerations distinguish the instant case from those cited and relied upon by the intervener. In fact, we have found no decision, and none has been called to our attention, which would seem to sanction a judgment in her favor on the facts presently appearing of record.

There was no error in setting aside the verdict for the cause assigned. Affirmed.

JOSEPH J. CARROLL AND DAISY C. CARROLL v. CAROLINA CASUALTY INSURANCE COMPANY.

(Filed 21 May, 1947.)

1. Insurance § 41—

In this action on a policy of hospital insurance, plaintiff's evidence tended to show that she incorrectly stated in her application that she did not have hernia but that the statement was not made with intent to deceive, that plaintiff was hospitalized and operated upon for appendicitis, and that during the operation the surgeon incidentally repaired the hernia but there was no evidence that any additional charge therefor was included in the surgical fee. *Held:* Whether the misrepresentation was material was a question for the jury upon the evidence, and defendant's motion to nonsuit was properly denied.

2. Insurance § 31a—

A misrepresentation in an application for a policy will not avoid the policy unless it was made with intent to deceive or unless it materially affected the acceptance of the risk by insurer and contributed to the event on which the policy became payable.

3. Insurance § 41—

The burden is upon insurer to prove that a misrepresentation in an application for insurance was fraudulent, and where insured's evidence negates fraud and insurer offers no evidence, an instruction to the jury that there was no evidence of intent to deceive is without error.

4. Same—

The evidence tended to show that in her application for hospital insurance plaintiff inadvertently misrepresented that she did not have hernia, that subsequent to the issuance of the policy plaintiff was hospitalized for appendicitis, that during this operation the surgeon incidentally repaired the hernia. *Held:* A charge to the effect that the misrepresentation would bar recovery if the hernia in any way contributed to the hospitalization or materially affected the acceptance of the risk by insurer so that insurer would not have written the policy in the form it was issued if the existence of the hernia had been known, *is held* without error, G. S., 58-30, the question of materiality of the misrepresentation being for the jury upon the evidence.

APPEAL by defendant from *Olive, Special Judge,* at February Term, 1947, of GUILFORD. No error.

This was an action on a policy of hospital insurance, to recover $145, the amount expended for hospital and surgical expenses incident to an operation for appendicitis on plaintiff Daisy C. Carroll.

Plaintiffs' claim was contested by defendant on the ground that in the application for insurance to the Pennsylvania Casualty Company (reinsured by defendant Carolina Casualty Insurance Company) the plaintiff Joseph J. Carroll had represented that the *feme* plaintiff had not had hernia, whereas it was shown that she had had hernia for some time, though it was testified she did not complain of it and it had never "bothered" her. It appeared that during the operation for appendicitis the surgeon incidentally repaired the hernia. However, there was no evidence that any charge or additional charge therefor was included in the surgical fee covered by the insurance. Defendant offered no evidence.

Issues were submitted to the jury and answered in favor of the plaintiffs, establishing (1) that the policy was in force at the time of the operation; (2) that, though it was incorrectly stated in the application that *feme* plaintiff did not have hernia, (3) the statement was not made with intent to deceive; (4) that the hernia did not contribute to her hospitalization and did not materially affect acceptance of the risk by the defendant; and (5) that under the terms of the policy plaintiffs were entitled to recover $145.

From judgment on the verdict the defendant appealed.

Smith, Wharton & Jordan and McNeill Smith for plaintiffs.

Gold, McAnally & Gold for defendant.

DEVIN, J. The defendant assigns error in the trial below in two respects: (1) in the court's denial of its motion for judgment of nonsuit, and (2) in the court's instructions to the jury.

The plaintiffs' evidence was sufficient to carry the case to the jury and to support the verdict. Notwithstanding the incorrect answer to the question in the application as to absence of hernia, under the terms of the policy, this would not defeat plaintiffs' action on the policy, otherwise incontestable, unless the answer was made with intent to deceive, or materially affected the acceptance of the risk and contributed to the event on which the policy became payable. There was evidence to sustain plaintiffs on this point, and the motion for judgment of nonsuit was properly denied. The court charged the jury that there was no evidence of an intent to deceive the defendant in the application for the policy of insurance. There was no error in this instruction. The plaintiffs' evidence negatived fraud, and the burden on this issue was upon the defendant. There was no evidence *contra.*

The court charged the jury in substance if they found that the *feme* plaintiff was sent to the hospital for an appendix operation, and that the hernia in any way contributed to her hospitalization; or that it materially affected the acceptance of the risk, or contributed to the contingency; or that but for the answer to the question in the application the Insurance Company would not have written the policy as it did, or not at all, or changed it, they should answer the issue yes, and that before they could answer it no they must find the hernia did not contribute to her hospitalization or materially affect the acceptance of the risk.

This charge presented the determinative question in the language of the policy which provided that falsity in an answer in the application would bar recovery "if such answer is made with intent to deceive or materially affects the acceptance of the risk by the Company and contributes to the contingency or event on which the policy is to become due and payable." The charge is in substantial compliance with the rule laid down in *Wells v. Ins. Co.,* 211 N. C., 427, 190 S. E., 744, and in accord with the provisions of G. S., 58-30, that "a representation, unless material or fraudulent, will not prevent a recovery on the policy." The general rule is that the materiality of the representation depends on whether it was such as would naturally and reasonably have influenced the insurance company with respect to the contract or risk. *Wells v. Ins. Co., supra; Schas v. Ins. Co.,* 166 N. C., 55, 81 S. E., 1014. The question was one for the jury. *Bank v. Ins. Co.,* 223 N. C., 390, 26 S. E. (2d), 862.

It is true the court, in one instance, inadvertently told the jury if they found certain facts to answer the issue "no" when "yes" was indicated

and intended, but in the succeeding paragraph the court corrected the instruction, and properly and fully charged on this point, as was also done in the preceding paragraph. The defendant does not raise the point, or suggest, that there was any misunderstanding of the court's instructions on this issue, and merely finds fault with this portion of the charge for that the court submitted "a question of law to the twelve jurors." The exception to the charge as to the amount of recovery is without merit.

We think the case was fairly and properly submitted to the jury, and the result reached will not be disturbed.

No error.

IN RE WILL OF MRS. W. W. WALLACE.

(Filed 21 May, 1947.)

1. Wills § 25—

A paper-writing probated as a holograph will had the day, date and year printed on its face, with changes in the date and year in script. There was evidence that the changes were in the handwriting of the deceased. *Held:* An instruction that a holograph will is not required to be dated and that if the written words appearing in the handwriting of the deceased were sufficient within themselves to express dispositive intent, the mere presence of the printed words and figures, not essential to the meaning of the words in writing, would not perforce destroy the testamentary character of the script, is without error.

2. Appeal and Error § 39f—

A *lapsus linguae* on an immaterial aspect of the case which could not have affected the result cannot be held for reversible error.

3. Wills § 25—

Where the court has properly submitted to the jury conflicting evidence as to whether the paper-writing probated and every part thereof is in the handwriting of deceased, an inadvertence in directing a verdict on a subsequent issue as to whether the paper-writing was executed according to the formalities of the law, in the light of the jury's affirmative finding to the previous issue, is not held for reversible error.

APPEAL by caveators from *Alley, J.*, at November Term, 1946, of MECKLENBURG.

Issue of *devisavit vel non* raised by a caveat to the holograph will of Mrs. W. W. Wallace.

On 4 December, 1945, the Clerk of the Superior Court of Mecklenburg County admitted to probate in common form the following script:

"1942

(July 1940) 2
(Thursday 4) 3

"My Birthday 66 years old all so glad when I die I no that they want all my money I am hungry now My money is all in land not but one child has helped me that is Allene Wallace she has spent money for me and helped papa Eight hundred dollars to berrie her sister its offul to have such mean children in this world I want Everything I leave given to Allene she sure deserves it in full

MRS W W WALLACE"

Thereafter, ten of Mrs. Wallace's twelve living children filed a caveat alleging: (1) undue influence, and (2) mental incapacity.

The matter was thereupon transferred to the civil issue docket, and upon the hearing the jury sustained the paper-writing as the last will and testament of the deceased.

From judgment on the verdict, the caveators appeal, assigning errors.

Henry L. Strickland and J. C. Sedberry for propounders, appellees.
Morgan B. Gilreath and Ralph V. Kidd for caveators, appellants.

STACY, C. J. The will in question was written in a small notebook or diary. At the top of the page on which it appears are the printed words and figures, "July 1940 Thursday 4." Over the figure "0" in the "1940" the figure "2" is written and across the "4" after the word "Thursday" the figure "3" is written. The evidence tends to show that these written changes of the printed figures were in the handwriting of Mrs. Wallace, as well as the balance of the paper-writing.

On the hearing, the jurors were hesitant to answer that "the paper writing and every part thereof" was the holograph will of Mrs. W. W. Wallace, because of the printed words and figures appearing thereon. The court thereupon instructed the jury that a holograph will was not required to be dated, or to indicate where it was prepared, and that if the written words appearing in the handwriting of the deceased were sufficient within themselves to express her dispositive intent, the mere presence thereon of printed words, not essential to the meaning of the words in writing, would not perforce destroy the testamentary character of the script. To this instruction, the caveators objected and have assigned the same as error.

The principal question presented by the appeal is the correctness of the foregoing instruction. It was taken from the case of *In re Will of*

Lowrance, 199 N. C., 782, 155 S. E., 876, and is supported by what was said therein. The decisions in *Alexander v. Johnston,* 171 N. C., 468, 88 S. E., 785, and *In re Jenkins' Will,* 157 N. C., 429, 72 S. E., 1072, likewise support the position. In accord, also, are the pertinent decisions in other jurisdictions. *In re Yowell's Estate,* 75 Utah, 312, 285 P., 285; *Blankenship v. Blankenship,* 276 Ky., 707, 124 S. W. (2d), 1060.

Nor is the case of *In re Wall's Will,* 216 N. C., 805, 5 S. E. (2d), 937, at variance with the above decisions. There, the jury found that the alteration was significant and not in the handwriting of the alleged testatrix. A similar result would have followed here, had the jury found the presence of the printed words essential to the meaning of the words in writing.

Moreover, the will was not formally challenged on this ground. The basis of the caveat is undue influence and mental incapacity.

In answering a question of one of the jurors in which he stated the will was made in 1943, the court inadvertently replied: "The purported will was made in 1942." This was a *lapsus linguae,* but it is not perceived wherein it was hurtful. We regard it as a harmless inadvertence.

On the issue as to whether the paper-writing was "executed according to the formalities of law," the court directed a verdict for the propounders. This was also an inadvertence in the light of the testimony of Mrs. Marjorie W. Wents that the entire script was not in the handwriting of her mother, the deceased. However, as the jury had already found, under proper instructions and in answer to a prior issue, that the "paper-writing and every part thereof" was in the handwriting of the deceased, it would seem that this latter instruction should not be held for reversible error.

Considering the record in its entirety, we conclude that no prejudicial error has been made to appear.

The verdict and judgment will be upheld.

No error.

STATE v. JAMES HARRY WOLFE AND JOE NATHAN WOLFE

and

STATE v. JAMES H. WOLFE AND JOE NATHAN WOLFE.

(Filed 21 May, 1947.)

1. Criminal Law § 81c—

Two defendants were tried together for the same offense. *Held:* A charge susceptible to the construction that should the jury find beyond a reasonable doubt that either committed the offense charged, they should return a verdict of guilty as to both, must be held for reversible error.

2. Criminal Law § 54b—

Where the verdict is silent on one of the counts contained in the bill of indictment it is tantamount to a verdict of not guilty on that count, and alleged error relating thereto need not be considered on appeal.

3. Criminal Law § 77d—

The Supreme Court is bound by the record as filed.

APPEAL by defendants from *Grady, Emergency Judge,* January Term, 1947, WAYNE. New trial.

Criminal prosecution under two bills of indictment which charge (1) a felonious nonburglarious breaking and entering of the dwelling of Jasper R. Best, and (2) highway robbery.

The evidence favorable to the State tends to show that defendants, conceiving that Best had intermeddled in their personal affairs, went to Best's home, broke in the door, assaulted him, and took $8 in money.

The court below submitted the cause to the jury on the counts of nonburglarious breaking and entering and larceny. Verdict: "Guilty of assault, breaking and entering." The court pronounced judgment on the verdict and defendants appealed.

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

J. Faison Thomson and J. T. Flythe for defendants, appellants.

BARNHILL, J. The record before us discloses that the court in its charge to the jury gave the following instruction to which exception is duly entered, to wit:

"Like every other person who is put upon trial and charged with the commission of a crime, they are both presumed to be innocent, (and before you can return a verdict against them or either one of them, upon either one of these charges, it is necessary for the State to offer evidence which satisfies you beyond a reasonable doubt of the guilt of one or both of them.)"

And later, on the charge of nonburglarious breaking:

"If you find from the evidence and beyond a reasonable doubt that these two defendants, or either one of them, broke the door and went in the house, as contended by the State, that is, that there was a forcible entry of the house with intent at the time to commit an assault upon Jasper Best, it would be your duty to convict them upon that count of house-breaking."

Thus the jury was directed that if they found, beyond a reasonable doubt, that there was a felonious breaking and entering by either defendant they should return a verdict of guilty as to both. Certainly this

conclusion is reasonably implied. Hence the vice in the instructions lies in the fact that the guilt of both was made to depend upon the guilt of either. *S. v. Walsh,* 224 N. C., 218, 29 S. E. (2d), 743.

While the charge might be construed to mean, as was no doubt intended, that a verdict of guilty was to be returned only against the defendant about whose guilt the jury had no reasonable doubt and that they were not to convict both unless they were fully satisfied of the guilt of both, the statements are too ambiguous to go unnoticed. Prejudice to the defendants would seem to be apparent.

The silence of the verdict on the count of larceny constitutes a verdict of not guilty as to that charge. Hence we need not discuss alleged error in the instructions in respect thereto. Neither need we decide whether the verdict is sufficient to support a judgment.

The quoted excerpts from the charge do not reflect the clarity of thought and conciseness of statement usually found in the utterances of the eminent and experienced jurist who presided at the trial below. For that reason it is well to note that the "case on appeal" certified by the Clerk of the Superior Court of Wayne County in response to writ of *certiorari* is the statement filed by defendants, as amended by certain exceptions thereto by the solicitor. The judge has had no opportunity to review it. Even so, it is certified as the case on appeal. We are bound thereby and must decide the question presented upon the record as it comes here, without indulging in assumptions as to what might have occurred.

As there was prejudicial error in the charge there must be a

New trial.

SAM GRAY, ADMR., v. RAEFORD WEINSTEIN.

(Filed 21 May, 1947.)

1. Physicians and Surgeons § 16—

A physician may be held liable for injury resulting either from his failure to use reasonable care and diligence in the practice of his art or his failure to exercise his best judgment in the treatment of the case.

2. Physicians and Surgeons § 20—Facts disclosed by evidence held to raise issue of whether defendant used due care and diligence without proof that treatment was improper or not approved practice in general use.

Evidence that a two-and-one-half-year-old child ate about a dozen aspirin tablets, that his parents immediately took him to defendant's clinic, arriving there about 10:00 p.m., that defendant's nurse phoned him advising him of the situation and that the nurse told the parents the physician said he would come down immediately, which assurance was repeated shortly

after midnight, that the doctor did not arrive until 9:00 a.m. the next morning, that upon his arrival he took the child out of the room saying that he was going to pump out the child's stomach, that he returned in about ten minutes bringing the child back and left the room, and that the child's face looked bloated, he was gasping for breath, and blood was running from the corners of his mouth, and that he died about twenty minutes later from the effects of the aspirin tablets, *is held* sufficient to be submitted to the jury upon the question as to whether the defendant exercised due care and diligence in the treatment of the child under the circumstances.

APPEAL by plaintiff from *Nimocks, J.*, at February-March Term, 1947, of ROBESON.

Civil action to recover damages for alleged malpractice.

The defendant is a physician at Fairmont, N. C., where he operates a hospital known as Weinstein's Clinic.

On the afternoon of 5 October, 1945, Kelly Gray, an infant two and one-half years old, got hold of a bottle of aspirin tablets and ate about a dozen of them. Several hours thereafter, he became quite sick and began vomiting. His parents immediately carried him to the Weinstein Clinic, arriving there about 10:00 p.m. A nurse was on duty. She said: "I will take the child in and call the doctor." She called the defendant and acquainted him with the situation. Following his instructions, the nurse gave the child an enema and put him to bed. She told the parents the doctor said he would come right on down. The same assurance was repeated a little after midnight. The parents remained at the hospital throughout the night. The doctor did not arrive until 9 o'clock the next morning.

By 7 o'clock, approximately two hours before the doctor arrived, the child stopped crying, seemed to be out of pain, got off the bed, moved about unassisted, and took a drink of water.

The defendant, upon his arrival, came to the room where the child was, picked him up from the bed, carried him out, and said he was going to pump out his stomach. While out with the doctor, the child's screams could be heard all over the clinic. In about ten minutes the defendant brought the child back, laid him on the bed, and left the room. The child's face looked bloated, he was gasping for breath, and blood was running from the corners of his mouth. He died in about twenty minutes. Immediately thereafter the defendant came into the room, bent over the child's body, and, turning away, remarked: "Poor little fellow, he couldn't take it."

The plaintiff offered from the defendant's answer the allegation "that the said child died from the effects of the aspirin tablets."

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

McKinnon & Seawell and McLean & Stacy for plaintiff, appellant.

F. Wayland Floyd and Varser, McIntyre & Henry for defendant, appellee.

STACY, C. J. The question for decision is whether the evidence suffices to carry the case to the jury. We think so. *Love v. Zimmerman,* 226 N. C., 389, 38 S. E. (2d), 220.

It is true there is no allegation of incompetency on the part of the defendant to practice his profession. It is alleged, however, that in the plaintiff's case (1) the defendant omitted to use reasonable care and diligence in the practice of his art, and (2) that he failed to exercise his best judgment in the treatment of the case. Either allegation, if supported by competent evidence, would require a jury finding. *Nash v. Royster,* 189 N. C., 408, 127 S. E., 356; *Mullinax v. Hord,* 174 N. C., 607, 94 S. E., 426.

The plaintiff says that, with knowledge of the child's condition, the defendant failed to exercise due care in waiting more than ten hours before seeing the patient; and further that he omitted to exercise an enlightened judgment in pumping out his stomach without first ascertaining whether "he could take it." *Long v. Austin,* 153 N. C., 508, 69 S. E., 500; *McCracken v. Smathers,* 122 N. C., 799, 29 S. E., 354; *S. c.,* 119 N. C., 617, 26 S. E., 157.

The defendant, on the other hand, without presently taking issue with the facts as detailed by plaintiff's witnesses, seeks to uphold the judgment on the ground that there is no evidence of any improper treatment or that what was done departed from the methods of approved practice in general use. *Mitchem v. James,* 213 N. C., 673, 197 S. E., 127; *McLeod v. Hicks,* 203 N. C., 130, 164 S. E., 617; *Smith v. Wharton,* 199 N. C., 246, 154 S. E., 12; *Crooks v. Jonas,* 204 N. C., 797, 169 S. E., 218; *Ferguson v. Glenn,* 201 N. C., 128, 159 S. E., 5; *Smith v. McClung,* 201 N. C., 648, 161 S. E., 91.

We agree with the plaintiff that whether the defendant proceeded with due and ordinary care, under the circumstances and conditions shown by the record, was a question of fact for the jury. *Covington v. James,* 214 N. C., 71, 197 S. E., 701; *Brewer v. Ring and Valk,* 177 N. C., 476, 99 S. E., 358; *Butler v. Lupton,* 216 N. C., 653, 6 S. E. (2d), 523; *Davis v. Wilmerding,* 222 N. C., 639, 24 S. E. (2d), 337.

The absence of expert medical testimony, disapproving the treatment or lack of it, is not perforce fatal to the case. There are many known and obvious facts in the realm of common knowledge which speak for themselves, sometimes even louder than witnesses, expert or otherwise.

The case as made survives the demurrer.

Reversed.

C. W. EDWARDS v. TYRE G. BENBOW.

(Filed 21 May, 1947.)

1. Quieting Title § 2—

In an action to remove cloud from title to lands claimed from a common source, the introduction in evidence by plaintiff of deeds constituting his chain of title containing descriptions sufficient in themselves to refer to the same lands, makes out a *prima facie* case, and defendant having admitted claiming title to the lands described in the deed to plaintiff, and having introduced no evidence, an instruction for the jury to answer the issue in plaintiff's favor if they believe the evidence, is without error.

2. Adverse Possession § 19—

In this action to remove cloud from title, defendant's contention that plaintiff's evidence was sufficient to show adverse possession by defendant, entitling defendant to have the issue as to his adverse possession submitted to the jury, *held* untenable.

DEFENDANT'S appeal from *Rousseau, J.*, at March Term, 1947, of GUILFORD.

This was an action to remove a cloud from the title of plaintiff to the lands described in the complaint.

It is alleged that the lands, as so described, originally belonged to the defendant but that they had been sold under a tax foreclosure suit, conveyed by Commissioner's deed to the City of Greensboro which, in turn, conveyed the lands to the plaintiff. It is further alleged in plaintiff's pleading that defendant claims to be the owner of the "said land" and has frequently asserted the ownership at various times and by various methods, to wit:

> "Said defendant has insisted on listing the land for taxation, and on paying the taxes charged against said property; he has forbidden the plaintiff, his agents, servants and employees, from going upon said property or exercising dominion over it, and he has publicly asserted that he is the owner of said property."

The defendant admits this in his answer, but attacks the validity of the tax title upon the ground that he had tendered to the municipality the taxes due prior to the sale, and that the sale was illegal. He further sets up that he is the owner of the land, alleges present and prior adverse possession, and pleads the statute of limitations.

On the trial the plaintiff introduced a deed which he contends conveyed the lands in controversy to the defendant prior to the tax sale, the judgment roll in the tax proceeding, the commissioner's deed of the latter to Guilford County, and the deed of the latter to plaintiff. For the purpose of the appeal the procedural regularity of the tax foreclosure

suit was admitted. Plaintiff also introduced in evidence his allegation respecting the assertion of claim of the defendant to the land described in the complaint, and rested. Defendant demurred to the evidence and moved for judgment of nonsuit, which was declined. Defendant offered no evidence. Defendant tendered an issue as to his adverse possession, which was declined, and defendant excepted. The court submitted the following issue:

> "Is the plaintiff the sole owner in fee simple of the lands described in the complaint?"

The jury was instructed to answer the issue "yes" if they believed the evidence. The issue was so answered and from an adverse judgment defendant appeals.

Hoyle & Hoyle for plaintiff, appellee.

D. H. Parsons and Walser & Wright for defendant, appellant.

SEAWELL, J. The appellant asks the Court two questions:

Were the descriptions in the various deeds introduced by plaintiff sufficient without other proof to identify the land in dispute and to justify the court in directing the verdict for the plaintiff? Was there sufficient evidence offered by the plaintiff to require the court to submit the issues tendered by defendant as to possession?

1. The appellant insists that to recover it was necessary for the plaintiff, as in ejectment, to show by some evidence *dehors* the deeds that the descriptions therein fitted the lands he claimed, and, failing this, contends that the descriptions in the deeds are too variant and vague to connect him with the common source and show title.

As to the first proposition the defendant failed to allege or offer evidence of any boundaries under which he claimed, whether variant from or identical with those in defendant's description, but in the pleadings joined issue with the plaintiff on claim of title under the latter's description and suffered loss of any vantage ground he may have had by the introduction by plaintiff of the pertinent allegations of the complaint admitted in the answer.

No question was raised requiring the location of boundaries necessitating the intervention of the jury in that respect. *Tatem v. Paine,* 11 N. C., 71; *Brooks v. Woodruff,* 185 N. C., 288, 116 S. E., 724; *Lee v. Barefoot,* 196 N. C., 107, 144 S. E., 547.

We are of opinion that the descriptions in the several deeds are sufficiently identical in character to raise an inference of identity in the land conveyed, running back to defendant's original title, and justify the instruction given to the jury.

The record discloses no evidence of possession by the defendant and the issue tendered by him was properly refused.

We find in the record

No error.

MAGGIE GASKINS ET AL. V. K. C. SIDBURY.

(Filed 21 May, 1947.)

1. Alteration of Instruments § 2—

Where a grantee, prior to registration of a deed, fraudulently alters the description so as to include within its terms a greater quantity of land, grantor may not waive the fraud and recover the value of the additional land and at the same time recover damages for the fraud, but her remedy is an action to remove cloud from the title to that part of the land not covered by her deed and for damages for the consequent injuries.

2. Damages § 7—

Punitive damages may not be awarded where plaintiff is not entitled to recover any actual damages.

3. Actions § 3c—

Fraud gives rise to rights in favor of the defrauded but not in favor of the defrauder, since no one is permitted to found a claim on his own wrong.

4. Appeal and Error § 47—

Where a case has been tried on an erroneous theory of law the verdict will be set aside and the judgment vacated and the cause remanded for proper procedure.

APPEAL by defendant from *Burney, J.*, at October Term, 1946, of NEW HANOVER.

Civil action to recover damages for fraudulent alteration of deed.

The *feme* plaintiff alleges that for a number of years she owned a lot of land in New Hanover County, with a frontage of 70 feet on Highway No. 17; that on 8 April, 1943, she sold one-half of this tract, with a frontage of 35 feet on the highway, to the defendant and duly executed and delivered to him deed therefor; that after delivery of said deed, and before its registration, the defendant fraudulently changed the description therein so as to take in all of her property and more—the call for 35 feet on the highway being changed to 80 feet and a corresponding change being made in the call at the other end of the lot, and that as a consequence, the *feme* plaintiff has lost the balance of her land and otherwise suffered injury. Wherefore, she demands actual and punitive damages.

Upon denial of the allegations of the complaint, and issues joined, the jury awarded the plaintiff $300 actual damages—the value of the balance of her land—and $1,000 punitive damages.

From judgment on the verdict, with provision incorporated therein adjudging the defendant to be the owner of all the land originally owned by the *feme* plaintiff in New Hanover County, the defendant appeals, assigning errors.

Addison Hewlett, Jr., and Solomon B. Sternberger for plaintiffs, appellees.

Clayton C. Holmes for defendant, appellant.

STACY, C. J. It appears that the plaintiffs have misconceived their rights and remedies.

It will not do to say the *feme* plaintiff may waive the fraud and recover the value of the land which the defendant sought by alteration to include in the deed, and at the same time recover damages for the fraud. No deed has been executed by her for the balance of her land and she still has title thereto. *Perry v. Hackney,* 142 N. C., 368, 55 S. E., 289; 16 Am. Jur., 643. Indeed, she may have seizin and legal title to all the land described in the paper-writing. *Respass v. Jones,* 102 N. C., 5, 8 S. E., 770.

What the *feme* plaintiff needs is to reform her complaint with a view of removing the cloud from the title to that part of the land not covered by her deed, and demanding damages for the consequent injuries. *Waldron v. Waller,* 65 W. Va., 605, 64 S. E., 964, 32 L. R. A. (N.S.), 284. The only actual damages awarded by the jury was the value of the balance of her land. She is not entitled to such a recovery on the instant record. Nor can the verdict on the issue of punitive damages presently be sustained. *Worthy v. Knight,* 210 N. C., 498, 187 S. E., 771; *Tripp v. Tobacco Co.,* 193 N. C., 614, 137 S. E., 710; *Webb v. Telegraph Co.,* 167 N. C., 483, 83 S. E., 568; *Burris v. Creech,* 220 N. C., 302, 17 S. E. (2d), 123; 22 Am. Jur., 548.

We are not now concerned with the defendant's executory rights, whatever they may be, under the altered deed. 1 Devlin, Deeds, Sec. 460; *Burgess v. Blake,* 128 Ala., 105, 28 So., 963, 86 Am. St. Rep., 78. Certainly he has no claim thereunder to any land sought to be included by the alteration. Out of frauds arise rights in favor of the defrauded, but not in favor of the defrauder. No one is permitted to found a claim on his own wrong. *Byers v. Byers,* 223 N. C., 85, 25 S. E. (2d), 466.

The case has been tried on an erroneous theory of law. Where this occurs, the practice is to remand it for another hearing. To this end the verdict will be set aside, the judgment vacated, and the cause re-

manded for such further proceedings as to justice appertains and the rights of the parties may require.

New trial.

JOHN CONRAD AND NINA B. CONRAD, PLAINTIFFS, v. JACOB L. GOSS, DEFENDANT; AND MRS. A. L. DISHER, NEE MAGGIE B. GOSS; GROVER C. MYERS, SR., AND W. J. BRYAN.

(Filed 21 May, 1947.)

1. Wills § 31—

A will is to be construed from its four corners and effect be given to every part thereof in order to ascertain and carry out the intention of the testatrix as therein expressed.

2. Wills § 33c—

The will in suit devised the property in controversy to testatrix' son with the added provision that should he die without "heirs" the property should go to testatrix' daughter. *Held:* The word "heirs" means children or issue, and under the devise the testatrix' son takes a fee defeasible upon his dying without issue him surviving, and the roll must be called at the date of his death to determine the effectiveness of the limitation over.

APPEAL by defendant Jacob L. Goss from *Rousseau, J.*, at February Term, 1947, of DAVIDSON. Reversed.

Plaintiffs, judgment creditors, filed exceptions to the report of the appraisers in the allotment of the homestead of Jacob L. Goss, on the ground that the judgment debtor's title to the property was fee simple, rather than a lesser estate as found by the appraisers, and that the value of the property over and above the homestead was sufficient to satisfy plaintiffs' debt.

Jury trial was waived and the court found the facts, and adjudged that Jacob L. Goss was owner of the property in fee simple, and ordered re-appraisement of the property in accord with that ruling.

Defendants excepted and appealed.

Don A. Walser and Charles W. Mauze for plaintiffs.

J. T. Jackson for defendants.

DEVIN, J. The title of defendant Jacob L. Goss, which is here brought in question, was derived under the will of Addie M. Goss, wherein she devised to him all her property, with the added provision, "But should my son Jacob L. Goss die without heirs, I want the property to go to my daughter Maggie B. Goss," with further limitation over,

in case Maggie B. Goss should die without "heirs," to the brothers of the testatrix.

It is obvious that by the use of the word "heirs" in the will the testatrix meant children or issue. The plaintiffs so concede. While in the first part of the will the language is sufficient to convey to defendant Goss a fee simple, we must examine the entire instrument, "taking it by its four corners," and give effect to every part thereof in order to ascertain and carry out the intention of the testatrix as therein expressed. *Heyer v. Bulluck,* 210 N. C., 321, 186 S. E., 356; *Patterson v. McCormick,* 181 N. C., 311, 107 S. E., 12. Applying this rule of construction, it is apparent that the estate devised is made defeasible in the event Jacob L. Goss should die without issue him surviving, with limitation over to Maggie B. Goss. It is provided by statute (G. S., 41-4) that a limitation made to depend upon the dying of any person without heirs or issue shall be interpreted to take effect when such person dies without such issue living at the time of his death. And the decisions of this Court have uniformly given effect to the rule set out in this declaratory statute. *Turpin v. Jarrett,* 226 N. C., 135, 37 S. E. (2d), 124; *Williamson v. Cox,* 218 N. C., 177, 10 S. E. (2d), 662; *Hudson v. Hudson,* 208 N. C., 338, 180 S. E., 597; *Massengill v. Abell,* 192 N. C., 240, 134 S. E., 641; *Pugh v. Allen,* 179 N. C., 307, 102 S. E., 394; *Jones v. Whichard,* 163 N. C., 241, 79 S. E., 503; *Rollins v. Keel,* 115 N. C., 68, 20 S. E., 209; *Smith v. Brisson,* 90 N. C., 284. It was said in *Turpin v. Jarrett, supra,* "To determine the effectiveness of the limitation over the roll must be called as of the date of the death of the first taker."

In the case at bar the identity of the ultimate taker is to be determined at the death of Jacob L. Goss. At that time the roll is to be called. Until then his title is subject to be defeated in the event of his dying without issue. Hence he took only a defeasible fee.

The plaintiffs cite in support of the holding below *Westfeldt v. Reynolds,* 191 N. C., 802, 133 S. E., 168. From an examination of that decision, however, it is apparent that the court's ruling was based upon the peculiar circumstances of that case, in order to effectuate the intention of the testatrix to provide equality in the estates of her two daughters who were the primary objects of her bounty.

For the reasons stated we think there was error in the ruling below, and the judgment is

Reversed.

SOL WILLIAMS, ADMR., v. McCULLERS YOUNG ET AL.

(Filed 21 May, 1947.)

1. Gifts § 1—

Evidence that the owner gave intervener the property in dispute and that the gift was completed by delivery of the property to the donee *held* sufficient to support intervener's claim to the property by gift *inter vivos*.

2. Evidence § 32—

Where, in claim and delivery by an administrator, the replevin bond of defendant is superseded by a replevin bond given by intervener, the surety on the original bond has no pecuniary interest in the outcome of the action and is competent to testify for intervener as to a declaration made by decedent.

3. Evidence § 43b—

In an action in claim and delivery by an administrator, testimony by a disinterested witness as to a declaration made by decedent that the property in suit belonged to intervener, is competent as a declaration against interest.

4. Evidence § 43a—

In an action in claim and delivery by an administrator, testimony as to declaration made by deceased to the effect that she had "loaned" rather than "given" the property to intervener claiming by gift *inter vivos*, *is held* incompetent both on the ground that it is hearsay and on the ground that the declaration is self-serving.

5. Appeal and Error § 6c (4)—

Where the record fails to show what the witness' answer would have been if permitted to testify and the relevancy or materiality of the answer is not made apparent, assignment of error to the exclusion of the testimony cannot be sustained.

APPEAL by plaintiff from *Carr, J.*, at January Civil Term, 1947, of FRANKLIN.

Civil action in claim and delivery instituted by administrator against McCullers Young to recover cow and calf as property of the estate.

Lena Kearney Young, wife of the defendant, with leave of court, intervened, executed replevin bond, and alleged that she was the owner "in fee simple" of the property seized.

From an adverse verdict and judgment, the plaintiff appeals, assigning errors.

G. M. Beam for plaintiff, appellant.
Yarborough & Yarborough for defendants, appellees.

STACY, C. J. The plaintiff, administrator, is a son of Eliza Williams, who died 21 March, 1946. Lena Young is a granddaughter of the de-

ceased. It is admitted that the property in question, a cow and calf, was originally owned by the deceased. The intervener claims the property by gift *inter vivos* from her grandmother some fifteen months before her death.

There was evidence on behalf of the intervener tending to support her claim to the property by gift *inter vivos*. *Gross v. Smith,* 132 N. C., 604, 44 S. E., 111; *Patterson v. Trust Co.,* 157 N. C., 13, 72 S. E., 629. Lenora Foster, a disinterested witness, testified that she was present and heard the deceased say: "Lena you can have my cow." They were then at the home of Sol Williams. "The cow was there too. . . . I didn't hear her say anything about lending the cow to Lena." The gift was completed by delivery of the property to the donee. *Parker v. Mott,* 181 N. C., 435, 107 S. E., 500, and cases there cited.

Another witness for the intervener was her father-in-law, J. C. Young, who was surety on the first replevin bond given by McCullers Young. This bond, however, had been superseded by the later replevin bond given by the intervener. His testimony was to the effect that just prior to the marriage of his son to the intervener, he heard the deceased say "the cow belonged to Lena." The ruling that the interest of the witness did not disqualify him to speak in the case would seem to be correct. *Cf. Mason v. McCormick,* 75 N. C., 263. In no event could McCullers Young and the surety on his bond be held liable for the return of the property or for costs. He had no pecuniary interest in the matter. The evidence is competent as a declaration against interest. *Smith v. Moore,* 142 N. C., 277, 55 S. E., 275. The exception is not sustained.

The plaintiff offered to show by Charlie Spivey that he heard the deceased say, only a few days before her death, "that she loaned the cow to Lena so she could have milk and butter for her two children." On objection this evidence was excluded. The plaintiff excepts and has pressed the exception with vigor. The ruling is supported by a number of decisions. In the first place, it is hearsay, *Chandler v. Marshall,* 189 N. C., 301, 126 S. E., 742; and, secondly, it is self-serving. *Barker v. Ins. Co.,* 163 N. C., 175, 79 S. E., 424. There was no error in its exclusion.

While on the witness stand, the administrator was asked whether any claims had been filed against the estate. An objection to the question was interposed and sustained. The record does not show what the answer would have been. *In re Smith's Will,* 163 N. C., 464, 79 S. E., 977. Nor is its relevancy or materiality apparent. The assignment cannot be sustained.

Perhaps it should be mentioned, as worthy of preservation, that the intervener alleges she is the owner "in fee simple" of the cow and calf in question. The quality of her title, however, was not determined on the hearing as the jury only found the plaintiff was not the owner.

A careful perusal of the entire record leaves us with the impression that no reversible error has been made to appear. Hence, the verdict and judgment will be upheld.

No error.

STATE v. ALBERT SANDERS AND JOSEPH MARVIN FARMER.

(Filed 21 May, 1947.)

Criminal Law § 80b (4)—

Where writ of *certiorari* is allowed, but thereafter appellant fails to file case on appeal in the Superior Court, notwithstanding it had been settled by the trial judge, or docket same in the Supreme Court, and counsel for appellant advises that the appeal will not be perfected, the motion of the Attorney-General to docket the appeal and dismiss the writ of *certiorari* must be allowed, but in a capital case this will be done only after an examination of the record proper fails to disclose error.

MOTION by State to docket and dismiss appeal.

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

PER CURIAM. At the December Term, 1946, Johnston County Superior Court, the defendants herein were tried upon indictment charging them with the murder of one Robert Mitchell. There was verdict of guilty of murder in the first degree as to both defendants. Sentence of death by asphyxiation was pronounced. From the judgment thus entered the defendants appealed. Thereafter they docketed the record proper and applied for a writ of *certiorari*. This Court, for the purpose of preserving defendants' right of appeal and to allow them time in which to have case on appeal settled and the cause docketed here, granted the writ 25 February 1947.

Since the granting of the writ no case on appeal has been docketed in this Court. Instead, counsel have written the clerk as follows: "This is to advise you and the Court that the appeal will not be perfected." Likewise, the Clerk of the Superior Court has certified to this Court that the appeal has not been perfected and no case on appeal has been filed in his office. It further appears that the trial judge officially settled the case on appeal, but counsel, for reasons satisfactory to them, did not file the case so settled in the office of the Clerk of the Superior Court.

The foregoing facts being made to appear to the Attorney-General, he moved to dismiss the appeal for failure to docket the same and that the *certiorari* heretofore issued be dismissed and the judgment below affirmed.

The motion of the Attorney-General must be allowed. Even so, this being a capital case, it is the custom of this Court to examine the record docketed to ascertain whether any error appears on the face thereof. This we have done, and we find no error therein. Therefore the writ of *certiorari* is dismissed and the judgment of the court below is affirmed. *S. v. Watson,* 208 N. C., 70, 179 S. E., 455; *S. v. Moody,* 222 N. C., 763, 24 S. E. (2d), 530.

Judgment affirmed.

Appeal dismissed.

STATE v. RODERICK DAVENPORT, C. T. JONES, JOHNNIE HEATH AND J. R. HUNNING,

and

STATE v. RODERICK DAVENPORT, S. H. POWERS, AL WHORTON AND WILSON BOYLES.

(Filed 5 June, 1947.)

1. Conspiracy § 4—

An indictment for conspiracy need not charge the plan, scheme or contrivance by which the conspiracy is to be executed.

2. False Pretenses § 2—

An indictment for obtaining money by means of false pretenses which charges that defendant made false and fraudulent representations, knowing them to be false, with intent to deceive and defraud named individuals, and others, that such misrepresentations did deceive the named individuals, and others, and that defendant did thereby unlawfully obtain large sums of money with intent then and there to defraud, *is held* sufficient to charge a violation of G. S., 14-100.

3. Indictment § 11—

An indictment will not be quashed for mere informality or refinement or for technical objections which do not affect the merits, and if it contains sufficient matter to enable the court to proceed to judgment, a motion to quash for redundancy or inartificiality is addressed to the sound discretion of the trial court. G. S., 15-153.

4. Jury § 1—

Where a prospective juror states that it would require evidence to remove his impression against defendant, but further states upon interrogation by the court that he could render a fair and impartial verdict upon the evidence despite anything he might have heard or read, the action of the court in overruling defendant's challenge to the juror for cause presents no reviewable question of law. G. S., 9-14.

5. Same—

All questions as to the competency of jurors are for the decision of the trial court, and its rulings thereon are not subject to review unless accompanied by some imputed error of law.

6. Criminal Law § 52a—

Upon motion to nonsuit, the evidence is to be considered in the light most favorable to the State and it is entitled to the benefit of every reasonable inference fairly deducible therefrom, and when so considered, if there be more than a scintilla of competent evidence to support each of the essential elements of the offense charged, the motion should be overruled, without consideration by the court as to the *quantum* of proof required of the State, it being for the jury to say whether they are convinced beyond a reasonable doubt of the fact of guilt upon such evidence. G. S., 15-173.

7. Conspiracy § 3—

A conspiracy is the unlawful concurrence of two or more persons in a combination or agreement to do an unlawful thing or to do a lawful thing in an unlawful way or by unlawful means, and no overt act is necessary to complete the offense.

8. Conspiracy § 6—

It is not required that conspiracy be established by direct proof, but it may be established by circumstantial evidence.

9. Conspiracy § 3—

The fact that one conspirator is the instigator and dominant actor is immaterial, since all who knowingly participate therein are equally guilty.

10. False Pretenses § 1—

The statutory crime of false pretense is the making of a false representation of a subsisting fact calculated to deceive and which does deceive and is intended to deceive, by which one man obtains value from another. G. S., 14-100.

11. Conspiracy §§ 4, 6—

A conspirator may be tried alone provided it appears upon the face of the indictment that there was another with whom he conspired, and therefore where there is plenary evidence that defendant conspired with one who died prior to the institution of the prosecution, defendant's contention that, as he alone was being prosecuted, his motion to nonsuit should have been granted since he could not have conspired with himself, is untenable.

12. False Pretenses § 2—Evidence held sufficient to be submitted to jury on question of defendant's guilt of obtaining property by false pretenses.

The evidence tended to show that defendant borrowed money at 5% per week and reloaned it at a higher rate of interest and that he operated a chain of produce stores as a "front" for his loan business. The evidence further tended to show that he was never able to reloan more than 10% of the money borrowed by him and that both the produce business and the loan business lost money, so that he became hopelessly insolvent but kept operating by increased borrowings. There was further evidence that in borrowing money he gave checks to the lenders and represented that he was solvent and his business legal and that the checks would be paid at any time when presented to the bank, and that he issued such checks after he had notified the bank not to pay any of them except those that came

through the mail and also that he continued to issue such checks upon the same representations even after his account at the bank had been closed. *Held:* The evidence is sufficient to be submitted to the jury in a prosecution for obtaining money by false pretenses.

13. Conspiracy § 3—

A conspiracy to commit a felony is a felony.

14. Indictment § 8½—

A count charging conspiracy to commit a felony is not merged with a count charging commission of the felony.

15. Criminal Law § 39a—

Where an attorney declines proffered employment the relationship of attorney and client is not created, and defendant may not object to testimony by the attorney in corroboration of a State's witness on the ground that the communications were privileged.

16. Criminal Law § 48d—

Defendant may not object to testimony which the court withdraws and instructs the jury not to consider.

17. Conspiracy § 5—

Defendant and his aides operated a loan business on money borrowed upon representations that they would pay interest of 5% per week to lenders, that the business was solvent and legal and that defendant's checks issued to lenders would be paid on demand. Defendant was charged with conspiracy to obtain money by false pretenses. *Held:* The acts and declarations of each conspirator in furtherance of the common design, evidence of the manner in which the business was conducted, representations made to secure money and the destruction and alteration of records is competent as tending to establish the conspiracy.

18. Criminal Law § 50d—

The remarks of the trial court in a lengthy trial involving numerous witnesses that it was unnecessary for the witnesses to go over their testimony again and again, will not be held for error as an expression of opinion, it being clear the remarks were made in an effort to expedite the trial and were proper and necessary.

19. Criminal Law § 53f—

An exception based upon the length of the statement of the State's contentions in comparison with that given those of defendant *held* untenable.

20. Criminal Law § 53d—

In this case the charge of the court in stating the evidence and explaining the law arising thereon *is held* free from prejudicial error.

APPEAL by the defendant, Roderick Davenport, from *Frizzelle, J.*, at February Special Term, 1946, of PITT.

A bill of indictment numbered 2397, charging Roderick Davenport, C. T. Jones, Johnnie Heath and J. R. Hunning, with conspiracy to

obtain money by means of false pretense and of obtaining money under false pretense, was returned at the August Term, 1944, of Pitt County.

A similar bill, numbered 2403, was also returned against the defendants Roderick Davenport, S. H. Powers, Al Whorton and Wilson Boyles at the same term of court, which reads as follows:

"The Grand Jurors Upon Their Oath Present:

"That Roderick Davenport, S. H. Powers, and Al Whorton, and Wilson Boyles, late of the County of Pitt, and on the 24th day of August, A.D., 1944, and prior and subsequent thereto, with force and arms, at and in the County aforesaid, unlawfully, knowingly, designedly, wickedly, deceitfully, and feloniously, with intent to cheat and defraud, did combine, conspire and plan together among themselves each with the other and with each other to obtain large sums of money from the public in general and Mrs. J. R. Hunning, C. L. Brady, Mrs. Alice Proctor, Bobbie Brady and Billy Brady, in particular, by means of false pretense, contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the State;

"And the Grand Jurors for the State Upon Their Oath do Further Present:

"That afterwards, to-wit: On the day and year aforesaid, the aforesaid Roderick Davenport, S. H. Powers, Al Whorton, and Wilson Boyles, late of the County of Pitt, in pursuance and furtherance of said conspiracy planned and designed, unlawfully, knowingly, designedly, wickedly, deceitfully, and feloniously, with intent to cheat and defraud, did unto Mrs. J. R. Hunning, C. L. Brady, Mrs. Alice Proctor, Bobbie Brady, and Billy Brady, and various and sundry others falsely pretend that they could legitimately lend money at 10 per cent interest per week or sufficiently high rate of interest to justify their paying 5 per cent interest per week on all deposits made with them and that they were solvent, and that their business and transactions had been investigated and found to be legal, and if deposits were made with them, they would give their checks for the same, which checks would be payable at any time upon presentation and demand, but that for so long a time as their checks were held by the depositors and not cashed, that they, the depositors, would be paid 5 per cent per week on the amount deposited;

"And in consequence of said false and fraudulent statements and pretenses upon the truth of which said Mrs. J. R. Hunning, C. L. Brady, Mrs. Alice Proctor, Bobbie Brady, and Billy Brady, and various and sundry others relied, the said defendants did then and there obtain from Mrs. J. R. Hunning, the sum of One Thousand ($1,000.00) Dollars; from C. L. Brady the sum of Six Hundred and Fifty ($650.00) Dollars; from Mrs. Alice Proctor the sum of Fifty ($50.00) Dollars; from Bobbie Brady the sum of Sixty ($60) Dollars; and from Billy Brady the sum of Twenty Five ($25.00) Dollars, and from various and sundry others

large sums of money for the defendants' own personal use and for which they gave their checks payable upon presentation and demand;

"Whereas, in truth and in fact, said defendants could not lend out said money in sufficient quantity at a high rate of interest with which to pay said 5 per cent interest per week on said deposits, which fact was well known to said defendants, and at the time said false and fraudulent statements were made, as aforesaid, and in truth and in fact said defendants were not solvent, and their business or transactions were not legal and their checks given to the parties aforesaid, and other depositors, were not good and payable upon presentation and demand as the said defendants did not have sufficient funds on deposit or credit with the banks upon which said checks were drawn with which to pay said checks upon presentation and demand, which facts were well known to the said defendants at the time said false and fraudulent statements were made to the said Mrs. J. R. Hunning, C. L. Brady, Mrs. Alice Proctor, Bobbie Brady and Billy Brady, and other depositors, and said false and fraudulent statements were designedly, falsely and fraudulently made by the said defendants for the purpose of deceiving and defrauding and in fact did deceive and defraud;

"By means of said false pretense, the said Roderick Davenport, S. H. Powers, and Al Whorton, knowingly, designedly, and feloniously did then and there unlawfully obtain from Mrs. J. R. Hunning the sum of One Thousand ($1,000.00) Dollars in lawful money and of the value of $1,000.00, the property of Mrs. J. R. Hunning; and did then and there unlawfully obtain from C. L. Brady the sum of Six Hundred Fifty ($650.00) Dollars in lawful money and of the value of $650.00, the property of C. L. Brady; and did then and there unlawfully obtain from Mrs. Alice Proctor the sum of Fifty ($50.00) Dollars, in lawful money, and of the value of $50.00, the property of Mrs. Alice Proctor; and did then and there unlawfully obtain from Bobbie Brady the sum of Sixty ($60.00) Dollars, in lawful money, and of the value of $60.00, the property of Bobbie Brady; and did then and there unlawfully obtain from Billy Brady the sum of Twenty Five ($25.00) Dollars, in lawful money, and of the value of $25.00, the property of Billy Brady, and did then and there unlawfully obtain from various and sundry others large sums of lawful money, their property, with intent then and there to defraud, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

The two cases were consolidated for trial and tried together with the consent and approval of counsel for the defendants.

Before pleading to the bills of indictment, the defendant Roderick Davenport, through his counsel, moved to quash the bills of indictment and filed separate but similar motions as to each bill. The pertinent parts of the motion in No. 2403 read as follows:

". . . 2. That as to the first count of the bill of indictment, the same is fatally defective for that:

"A. Bill in said count does not set out, or allege any means or plans to be employed by the defendant, or either of them by which any cheat, fraud or fraudulent pretense was to be perpetrated or accomplished against anyone.

"B. The bill in said count does not set out or allege any means, plan, scheme, contrivance, to use, fraud or force, or criminal act or offense, by means of which the defendants or any of them contrived, or conspired against any person, firm or corporation, the public in general, or James R. Worsley, Thad Wooten, J. R. Rouse and W. M. Tripp, in particular, to their damage or otherwise.

"C. That nowhere under any construction alleges any facts which constitute any offense against the criminal law of the State.

"D. As a whole, and in the second count, doesn't aid or strengthen the first count in the matters and things that were complained of.

"3. That as to the second count in the bill of indictment, the same is fatally defective for that:

"(A) Alleges, simply, that the defendants were in the loan business and held themselves out as such, and as being willing to lend such money as they could borrow at 5% per week from Mrs. J. R. Hunning, C. L. Brady, Mrs. Alice Proctor, Bobbie Brady and Billy Brady, and from various and sundry others to someone else at the rate of 10% per week, which allegations, proved, could not subject the defendants, singly or collectively, to criminal prosecution.

"(B) It alleges simply that checks issued in carrying on the loan business by the defendant were in fact and in law mere unsecured evidence of debt and demand promissory note payable by the defendants at some Bank in the amount of $1,000. to the lender, Mrs. J. R. Hunning; $650. to the lender, C. L. Brady'; $50. to the lender Mrs. Alice Proctor; $60. to the lender Bobbie Brady, and $25. to the lender Billy Brady, at any time the aforesaid lenders, Mrs. Hunning, C. L. Brady, Mrs. Alice Proctor, Bobbie Brady and Billy Brady, or any of them, decided that they did not care longer to receive interest from the defendants at the rate of 5% per week, or 260% per annum, which allegations, proven, could not, in law, subject the defendants, singly or collectively, to criminal prosecution or punishment.

"(C) The bill as a whole, and the first count, does not aid or strengthen the second count, in the matters and things complained of in reference to the second count.

"(D) It nowhere under any interpretation or construction alleges any facts which constitute any offense against the criminal laws of the State.

"4. The bill of indictment as a whole, does not allege any offense against the criminal laws of the State.

"Wherefore, The Defendant, Roderick Davenport, respectfully moves the Court:

"1st: That the first count in the bill of indictment be quashed and set aside.

"2nd. That the second count in the bill of indictment be quashed and set aside.

"3rd. That the bill of indictment as a whole be quashed and set aside."

Both motions were denied and the defendant, Davenport, excepted.

All the books and other records pertaining to the business of the defendant Davenport, that could be located by the State, were seized by order of the court, and impounded with the Clerk of the Superior Court of Pitt County, in August, 1944, upon the return of the above bills against the defendants. Such records were made available to the State and the defendant Davenport for use in the trial below.

A summary of the evidence may be stated as follows:

1. The appealing defendant, Roderick Davenport, a college graduate in accounting and business administration, after graduation, practiced as a senior accountant in Winston-Salem for five years. He later went to Florida, where he sold specialty advertising for about five years. He then returned to New Bern, his home town, where he resided for 15 or 16 years prior to the trial of this cause. After his return to New Bern, he engaged in the retail and wholesale grocery business. He went broke during the late depression and according to his testimony he was left with only "two cents." Thereafter for five years he was engaged in the mercantile brokerage business, and then became an agent for the Southern Dixie Life Insurance Company, an industrial insurance company. While engaged in selling industrial life insurance, Davenport developed a small loan business. He charged his borrowers 10% interest per week, and in 1943 had a "few hundred dollars" invested in his loan business.

2. In the early part of 1944, Davenport first began his business in New Bern, which he operated in connection with a "fruit and produce" business. The evidence tends to show that the "fruit and produce" business was used as a "front" for the lending and borrowing operations which became known as the "Davenport System." During the Spring of 1944, stores were opened at Kinston, Goldsboro, Greenville and Rocky Mount. All the stores were owned by Davenport and operated under the name of Dixie Produce Company, except those in Goldsboro, which were operated under the name of Kay Produce Company. One of the New Bern stores was popularly known as the "Big Apple."

THE DAVENPORT SYSTEM.

The evidence tends to show the Davenport Plan or System was to solicit deposits or loans from individuals through paid solicitors and from the public generally through advertisements and otherwise; and to assure the depositors that Davenport was solvent and was able to loan out all moneys loaned to or deposited with him at 10% per week or at a sufficiently high rate of interest to enable him to pay the depositors 5% interest per week on his deposit. The depositor was given a check on the Branch Banking & Trust Company, New Bern, N. C., and advised that it could be cashed any time, but so long as the depositor held the check he would be paid 5% interest per week thereon.

3. According to the testimony of the defendant, Davenport, his deposits or loans possibly did not exceed $1,000.00 in January, 1944. Thereafter the business expanded rapidly.

4. A representative of the State Bureau of Investigation, W. I. Gatling, checked the deposit books and loan records of the Davenport Loan Business at Goldsboro, on 2 August, 1944, and found approximately $60,000.00 had been taken in as deposits and approximately $6,000.00 loaned out. On the following day Mr. Gatling had a conference with Davenport, and advised him to liquidate his business, but Davenport insisted that he was solvent, that he was making money and was loaning out all the money deposited with him at ten per cent per week.

5. During the progress of the trial below, W. R. Boyles, one of the defendants under bill of indictment No. 2403, entered a plea of *nolo contendere* in lieu of his plea of not guilty; and S. H. Powers, another defendant under the same bill, changed her plea from not guilty to guilty. The State took a *nol. pros.* as to Al Whorton, also named as a defendant in this bill of indictment.

The defendants named in bill of indictment No. 2397 were Roderick Davenport, C. T. Jones, Johnnie Heath and J. R. Hunning. C. T. Jones, the manager of the Greenville Store, died prior to the trial. The State took a *nol. pros.* as to Johnnie Heath and J. R. Hunning.

The State used Boyles, Powers, Whorton, Heath and Hunning as witnesses.

6. W. R. Boyles, manager of the Kinston office of the defendant's business and special representative of Davenport, testified that he began working for Mr. Davenport in March, 1944, at Kinston. Prior to that time he worked for him a short time at the Goldsboro store. He tried to check the records and found the store had no system of bookkeeping at all. "You could not tell how many depositors he had or to whom interest had been paid, or how much had been paid." When he went to Kinston no loans were being made there, and after he "saw what the business was" he let it be known he was going to quit. One depositor

drew out $1,700.00, but when the witness informed him he had decided not to quit, the depositor put his money back in the Kinston store. The witness discussed the financial condition of the business with Davenport, and asked him what he was going to do about all the checks he was giving out. Davenport said he "was going to buy them up." Davenport instructed Boyles what to have the employees tell depositors about the checks received for their deposits. The instructions were given to tell the depositors the checks were good and could be cashed any time at the Bank, but if the checks were cashed the interest would stop. Boyles further testified that he bought liquor at $10.00 a quart and gave it away to "help get more deposits." They also gave away fruit and produce for this same purpose.

After W. I. Gatling had checked the books of the Goldsboro Store, he went to Kinston and arranged for a conference with Davenport. Davenport, W. R. Boyles and Hugh Gaskins, manager of the Goldsboro Store, met in a hotel in Kinston, for a conference, before Davenport met with Mr. Gatling. Davenport, according to the testimony of this witness, while in this conference, instructed him to change the depositors' lists. "I said, 'How do you want them changed?' and he says, 'Well, where there is a thousand dollar deposit change it to one hundred dollars, and where there is a $100.00 deposit change it to a ten.'" Boyles further testified he changed some of the records himself and at Davenport's request had the bookkeepers at other stores to make the changes, except in Goldsboro, where the S. B. I. had already checked the books.

7. The evidence tends to show that a fake deposit book was prepared for the Rocky Mount Store. The original book showed deposits made in the store of $24,295.00. When the representative of the S. B. I. called for the books of that store, on 23 August, 1944, for the purpose of checking the deposits, he was given the fake deposit book which contained the names of depositors but showed deposits of only $3,623.50. The evidence further tends to show that the fake books were made up to prevent the S. B. I. from ascertaining the correct amount of deposits held by Davenport. But Davenport instructed Boyles to tell the bookkeepers that the books were being changed to protect the depositors "about interest on the income tax." The records were also changed at the Greenville office by the bookkeeper on instructions from the defendant Boyles.

8. It became known that the S. B. I. was checking the records of the Davenport Loan Business, and withdrawals became heavy. Certain articles were published in newspapers circulated in Eastern North Carolina to the effect that it "appeared that Davenport was violating the usury laws of the State, which was a civil matter but not a criminal offense"; whereupon Davenport, on or about 11 August, 1944, began to run advertisements in the *Wilson Times, Greenville Reflector, Goldsboro*

News-Argus, News and Observer, Raleigh Times, and *Sun Journal.* The advertisements were substantially the same as those which appeared in the *Wilson Times,* 11 August, 1944, as follows:

"Message from owner of Dixie Produce Company.

"I borrow money and legally pay the lender 5 per cent a week. I lend this money at a higher rate—This makes me solvent and responsible to my lenders. An investigation has proven the legality of this business. I invite your loans and your borrowing at Kinston, Goldsboro, Rocky Mount and Greenville, N. C. My managers will accept your loans and pay 5 per cent weekly or extend loans to borrowers.

"We expect to have a store in Wilson as soon as a building can be secured, however, if you would like to do business with us before that time, our nearest store at the present is Dixie Produce Company, 211 S. Main Street, Rocky Mount—or wire or write me at Post Office Box 789, New Bern, N. C.

"Roderick Davenport, Owner, Dixie Produce Company."

And in the *Goldsboro News-Argus,* 12 August, 1944, as follows:

"I borrow money and pay the lender 5 per cent a week.

"I loan this money at a higher rate. This makes me solvent and responsible to my loaners. An investigation has proven the legality of this business. I invite your loans and borrowings at New Bern, Kinston, Goldsboro, Rocky Mount and Greenville, N. C.

"My managers will accept your loans and pay five per cent weekly or extend loans to borrowers.

"Kay Produce Co. Roderick Davenport, owner—Hugh Gaskins, Manager. 1001 Greenleaf St., Goldsboro, N. C. Phone 313."

9. S. H. Powers testified that in an effort to obtain more deposits, decoy or "pretended" deposits were made at the request of Davenport. Money was furnished by him to certain individuals who would make a deposit in the presence of prospective customers. She would write a check and give it to the decoy depositor and the check would be given back. She testified "that was done to make an impression on the people who were there." And she further testified that such deposits were made during the second week in August; and at one time a prospective customer deposited $700.00 or $800.00 immediately after a decoy deposit was made. That she knew after 1 August, 1944, that Davenport was insolvent and could not possibly pay out, but that she "was too deep in it to do anything about it." She and Davenport changed certain records. That Davenport received numerous deposits and made no record of them. No book records were kept of deposits at the New Bern office. Such records as were made consisted of notes, which were kept in the desk drawer. She destroyed the records which contained the names of the employees and solicitors. At Davenport's request she hid the records in

the New Bern office for several days to prevent the S. B. I. from checking them. She called Davenport's attention to the condition of his loans in proportion to his deposits, and he said "He had so many loans that he could not put them on the books and could not tell her about." Loans did not exceed one-tenth of the deposits. Lots of fruit was given away. When a person "would come in and deposit money they were always given oranges or apples or whatever happened to be in the store. . . . Almost every day whiskey was brought in the store and charged to Mr. Davenport, and he would give it to the depositors." Mr. Davenport's activities were directed "to getting deposits."

In response to a question as to whether or not she had an opinion satisfactory to herself as to the total amount of deposits received by Davenport, from the time she began to work for him in March, 1944, until the business was closed, she testified: "From the figures I have here from the daily reports that were received each day and the daily reports that were made that I know about and the money that was paid in deposits that there was no record kept whatsoever, it was $1,940,000.00." This witness further testified that the last time she saw Mr. Davenport before his arrest, was in Goldsboro, and he had between $15,000.00 and $18,000.00 in cash in his possession.

As to the method of making loans, this witness testified that borrowers would give a check payable to bearer. The "check was held at the New Bern office or store; they did not return the checks unless the person that borrowed the money asked for them. They just filed them away and kept the . . . checks." Most of the loans were from $5.00 to $15.00, some of them were for $30.00 or $40.00.

10. C. T. Jones, manager of the Greenville Store, received from Davenport a check, on 22 August, 1944, in the sum of $1,900.00, which had been deposited with Davenport by F. O. Muth, 21 August, 1944. Jones took the check and deposited it in the Guaranty Bank & Trust Company, Greenville, N. C., and on 25 August, 1944, drew out the entire amount and took the money and applied it on indebtedness which he claimed Davenport owed to him. After taking this $1,900.00, he resigned as manager of the Greenville Store. Prior to this time, Jones had admitted to at least one depositor that he was without funds and could not pay a check issued at the Greenville Store, payable to the depositor. He told the depositor he had loaned out her money.

11. Heath and Hunning solicited deposits and told depositors the checks issued for deposits were good. Hunning obtained deposits as late as 21 August, 1944, and as an inducement to obtain the deposits, he said "to put it in there, that he guaranteed our money, said it was good any time." Heath told depositors the checks were good and could be cashed any time at the Banks. He solicited deposits for about seven weeks and was paid a weekly salary of $30.00 and a commission on all deposits

made by persons solicited by him. Davenport furnished him an automobile to use while soliciting business.

12. The evidence tends to show that Davenport told prospective depositors that he was bonded and licensed to do business, that he had money in the bank to take care of every dollar of people's money that he had, that his check was as good as a Government check and that they could get their money any time. That he was loaning out all the money he could get at ten per cent per week and was making money. That he was solvent and had property and could get any help he needed from friends. And when a prospective depositor seemed reluctant to make a deposit, he was told that certain prominent people were doing business with him. Some of those whose names he used had never deposited any money with him.

Statements of similar import were made by his employees and solicitors. The evidence also tends to show that many persons solicited for deposits did not make them until they talked to Davenport and had his assurance that he was solvent and that his deposits were protected by a bond. Deposits were also made in response to the advertisements carried in the papers, to the effect that the business had been investigated and found legal.

13. According to the evidence introduced by the State and the defendant Davenport, some of Davenport's records of loans were missing. Financial statements prepared from the records in evidence, were introduced by the State and tend to show the following:

(a) From 20 July through 28 August, 1944, the defendant's Greenville Store received in deposits $21,961.50; paid to depositors as interest on deposits $2,950.66; loaned to borrowers $1,390.50, and collected on loans, principal and interest $629.25.

(b) From 19 June through 29 August, 1944, the defendant's Goldsboro Stores received in deposits $89,443.70; paid to depositors as interest on deposits $16,257.72; loaned to borrowers $22,214.25, and collected on loans, principal and interest $21,712.62.

(c) From 13 March through 30 August, 1944, the defendant's Kinston Stores received in deposits $157,884.00; paid to depositors as interest $78,600.30; loaned to borrowers $22,692.00, and collected on loans, principal and interest $18,212.54.

(d) From 1 July through 2 September, 1944, the defendant's Rocky Mount Store received in deposits $24,295.00; paid to depositors as interest on deposits $4,835.55; loaned to borrowers $7,261.60, and collected on loans, principal and interest $3,544.35.

(e) The State's exhibit does not show the period during which deposits were received at the New Bern Stores, or in the office of the defendant in the Mohn Building in New Bern, but does show total

deposits received in New Bern as $501,612.06; no record of the amount of interest paid to depositors in New Bern was introduced in evidence, but the exhibit does show the amount loaned to borrowers as $71,641.00, and the amount collected on loans, principal and interest in New Bern as $46,616.64.

(f) These exhibits show deposits received in the sum of $795,196.26; interest paid to depositors on deposits $102,644.23; loaned to borrowers $125,199.85, and collected on loans, principal and interest $90,715.40. The evidence shows that depositors withdrew the sum of $146,691.06. According to these exhibits, Davenport is still due his depositors $648,505.20.

(g) According to the evidence, Davenport admitted his insolvency on 6 September, 1944, in a civil action brought for the purpose of having a Receiver appointed for his loan business. The evidence further shows that all of Davenport's known assets, consisting of fruits, vegetables, merchandise, office fixtures and equipment, motor vehicles, etc., amounted to only $13,164.83 on 31 August, 1944, except certain checks payable to cash which checks Davenport testified represented loans outstanding and due him. The evidence tends to show that many of these checks had been paid and that others were worthless and uncollectible, since the purported makers were insolvent, if indeed such checks had been executed for loans.

14. The defendant Davenport testified he had over one hundred employees and that he owned and operated nine automobiles and one truck in connection with his business. The evidence shows he maintained an office in the Mohn Building in New Bern and operated two stores in New Bern, two in Goldsboro, two in Kinston, one in Rocky Mount and one in Greenville.

The evidence further tends to show that all the stores operated by Davenport lost money continuously in 1944, both in the loan business and in the fruit and produce business as operated under the Davenport System, without taking into consideration any expenses incurred for salaries, commissions, purchase, maintenance and operation of automobiles, rents on store buildings, taxes, insurance, or other expenses.

15. According to the evidence, all checks given for deposits were drawn on the Branch Banking & Trust Company, New Bern, N. C. And, on 5 August, 1944, the defendant had on deposit in said Bank the sum of $11,717.56, when he notified the Bank as follows:

"New Bern, N. C.
August 5, 1944.

"Branch Banking & Trust Company
New Bern, N. C.

"Gentlemen:

"Until further notice please do not pay any of my checks presented at the bank but advise the holders that I desire these items presented at my office for payment.

"These instructions do not refer to any of my checks which you may receive in the mails.

Yours very truly,
(Signed) Roderick Davenport."

The defendant Davenport's account was closed at the above Bank 17 August, 1944.

16. The evidence tends to show that after Davenport instructed the Bank not to pay any checks presented, except those received through the mails, he and his managers and employees continued to accept deposits and give checks on said Bank and to assure depositors the checks were good and payable on presentation. Such checks were issued covering deposits as follows:

(a) At the Rocky Mount Store, deposits in the sum of $11,850.00 were accepted after 5 August, 1944, and of these deposits $6,810.00 were received and checks issued therefor on the above Bank after Davenport's account was closed.

(b) At the Greenville Store, deposits in the sum of $16,181.50 were accepted after 5 August, 1944, and of these deposits $7,495.00 were received and checks issued therefor on the above Bank after the Davenport account was closed.

(c) At the Goldsboro Stores, deposits in the sum of $31,079.20 were accepted after 5 August, 1944, and of these deposits $12,945.50 were received and checks issued therefor on the above Bank after Davenport's account was closed.

(d) At the Kinston Stores, deposits in the sum of $25,933.00 were accepted, after 5 August, 1944, and of these deposits $7,380.00 were received and checks issued therefor on the above Bank after Davenport's account was closed.

(e) The evidence does not disclose what deposits were accepted in the New Bern Stores, and in Davenport's office after 5 August, 1944.

17. According to the testimony of an official of the Branch Banking & Trust Company, New Bern, N. C., Davenport drew out of said Bank on checks drawn payable to cash, the sum of $24,400.00 between 3 July

and 8 August, 1944. It also appears from the testimony of this witness that checks aggregating many thousands of dollars were presented to the Bank for payment after the defendant, Davenport's, account had been closed. A large number of checks presented were issued by Davenport and his managers and employees after the account was closed. Many of these checks were identified and introduced in evidence. There is also evidence tending to show Davenport at one time sent two apple baskets filled with money to an unknown destination.

18. The evidence tends to show that the usual commission paid under the Davenport System, to solicitors for obtaining deposits was $5.00 for $50.00 up to $100.00; $10.00 from $100.00 to $200.00; $15.00 from $200.00 to $300.00, "and right on up until it got to $1,000.00 deposit for which was paid $50.00." Some solicitors were paid a salary and commission. Others were paid 10% commission on deposits secured. There is also evidence tending to show that some depositors were paid 10% per week interest on their deposits. About 15 August, 1944, the interest payments made to depositors in New Bern were reduced to 1% per week. Many depositors were never paid any interest.

19. The defendant Davenport offered many witnesses who testified to his good character. He testified that he was solvent and met all his obligations until his business was closed by the State. That he had never changed any records and had not authorized anyone else to do so. He had never purchased any whiskey or given any whiskey away in connection with his business. He had never stated to anyone that he was bonded or that his loans were insured; and had not authorized Mr. Boyles, Mr. Whorton, or any of the young ladies working for him to do so. That he had books showing the names of those who loaned him money and these books were in his office in New Bern when he was arrested, but "they are not here today." He further testified that he signed thousands of checks in blank and his managers and employees were authorized to fill out the checks when loans were made to him and to deliver a check for each loan. He denied that the checks were intended to be payable at the Bank but he testified they were notes and that he had an understanding with his customers that the checks were not to be presented to the bank for payment but were to be presented at his office or stores. That on 1 August, 1944, he had on deposit in banks approximately $85,000.00 and $30,000.00 in cash in his New Bern store. He tried at all times to keep 80% of what he had borrowed loaned out. On 31 August, 1944, he had notes payable and outstanding in the form of checks totaling only $151,092.62, on which he was paying 5% per week. That he had notes receivable in the form of checks given him by his borrowers totaling $241,479.00, drawing interest at 10% per week. That if all his records were available they would show he was operating

his fruit and produce business and his loan operations at a profit at the time he was arrested and his business closed.

Motions for judgment as of nonsuit on each count in both bills were made at the close of the State's evidence and renewed at the close of all the evidence. Motions overruled and the defendant, Davenport, excepted.

Verdict: "The defendant Roderick Davenport is guilty on both counts in Bill No. 2397 and is guilty on both counts in Bill No. 2403."

Judgment: "In Bill No. 2403, on the conspiracy count, the judgment of the Court is that the defendant, Roderick Davenport, be confined to the State's Prison not less than two years nor more than three years; and on the false pretense count in Bill No. 2403: The defendant is sentenced to State's Prison not less than three nor more than four years, sentence to run consecutively with the sentence in the conspiracy count.

"In Bill No. 2397, the judgment of the Court is that the defendant, Roderick Davenport, is sentenced to State's Prison on the conspiracy count for a term of three years to begin at the expiration of sentence in No. 2403. On the false pretense count in Bill No. 2397, defendant is sentenced to State's Prison for three years, sentence to begin at expiration of sentence in conspiracy count in Bill No. 2397. The Prison sentence in both counts under Bill No. 2397 to be suspended upon condition that the defendant pay the entire cost of this action."

From the foregoing judgment, the defendant, Davenport, appeals to the Supreme Court, assigning error.

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

J. Faison Thomson, Scott B. Berkeley, and W. J. Bundy for defendant.

DENNY, J. We shall first consider the exceptions to the refusal of his Honor to sustain the motions to quash the bills of indictment.

Notwithstanding the various grounds advanced for quashing these bills, the motions in fact point out but two alleged defects in them: (1) That the bills do not set out in the first count the plan, scheme or contrivance by which the conspiracy was to be executed; and (2) that the indictments do not allege any offense against the criminal laws of the State.

A bill of indictment, charging "a conspiracy to cheat and defraud need not charge the means to be used" in the execution of the conspiracy, *S. v. Howard—Gold Brick Case,* 129 N. C., 584, at p. 657, 40 S. E., 71. *S. v. Brady,* 107 N. C., 822, 12 S. E., 325; 11 Am. Jur., 564. And we do not concur in the view that the bills of indictment under consideration do not charge a violation of the criminal laws of the State. In the first count of the bills, the defendants named therein are charged with a con-

spiracy to obtain money from the public in general and certain individuals in particular by means of false pretenses, contrary to the form of the statute in such case made and provided. In the second count of each bill it is charged that the defendants in pursuance and furtherance of said conspiracy made false and fraudulent representations, knowing them to be false, and made such false and fraudulent representations with the intent to cheat and defraud certain individuals, naming them, and various and sundry others, and as a consequence of said false and fraudulent statements, which were intended to deceive and did deceive said individuals and various and sundry others, the defendants did obtain certain sums of money, the property of the named individuals, and did unlawfully obtain from various and sundry others large sums of lawful money, their property, with intent then and there to defraud, contrary to the form of the statute in such case made and provided.

The allegations contained in the second count in these respective bills of indictment are sufficient to charge a violation of the statute, G. S., 14-100. Among other things, it is provided in this statute: "That it shall be sufficient in any indictment for obtaining . . . property by false pretenses to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person, and without alleging any ownership of the chattel, money or valuable security; and, on the trial of any such indictment, it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to defraud."

The action of the court below in overruling the motions to quash must be upheld under our decisions, among which we cite *S. v. Abernethy,* 220 N. C., 226, 17 S. E. (2d), 25; *S. v. Howley,* 220 N. C., 113, 16 S. E. (2d), 705; *S. v. Dale,* 218 N. C., 625, 12 S. E. (2d), 556; and *S. v. Lea,* 203 N. C., 13, 164 S. E., 737. In the last cited case, *Stacy, C. J.,* in speaking for the Court, said: "The statute, C. S., 4623 (G. S., 15-153), provides against quashal for mere informality or refinement, and judgments are no longer stayed or reversed for non-essential or minor defects. C. S., 4625 (G. S., 15-155); *S. v. Beal,* 199 N. C., 278, 154 S. E., 604. The modern tendency is against technical objections which do not affect the merits of the case. *S. v. Hardee,* 192 N. C., 533, 135 S. E., 345; *Rudd v. Casualty Co.,* 202 N. C., 779 (164 S. E., 345). If the bill or proceeding contain sufficient matter to enable the court to proceed to judgment, the motion to quash for redundancy or inartificiality in statement is addressed to the sound discretion of the court. *S. v. Knotts, supra* (168 N. C., 173, 83 S. E., 972). There was no error in refusing to quash the indictments on the grounds of duplicity and indefiniteness. *S. v. Beal, supra.*" Also, in *S. v. Howley, supra, Winborne, J.,* in speaking for the Court, said: "In our criminal procedure it is provided by

statute, C. S., 4623 (G. S., 15-153), that every criminal indictment is sufficient in form if it express the charge against the defendant in a plain, intelligible and explicit manner, and that the indictment shall not be quashed nor the judgment thereon stayed by reason of any informality or refinement, if in the bill sufficient matter appears to enable the court to proceed to judgment," citing numerous authorities.

When these bills of indictment are tested by the principles laid down in the above decisions, we hold them to be sufficient to withstand the motions to quash.

The defendant Davenport assigns as error the refusal of his Honor to allow his challenge for cause, of H. L. Elks, a juror in the trial below. Mr. Elks was called as a juror after the defendant had exhausted all his peremptory challenges. In response to a question by counsel for the defendant, Davenport, Mr. Elks stated that from what he had seen in the papers it would require evidence to remove his opinion or impression against the defendant, Davenport. Upon further questioning by the Solicitor, he stated that he could give Davenport a fair trial "if he pleads not guilty." Whereupon the court propounded the following question: "Are you certain that you can sit there and try the case on the evidence as it shall develop during the trial, and the charge of the Court and the argument of counsel and render a fair and impartial verdict, despite anything you may have heard or read?" Mr. Elks replied, "I'll give him a fair trial; Yes, sir, I could do that." The challenge was thereupon overruled.

It is provided by statute, G. S., 9-14, that the judge "shall decide all questions as to the competency of jurors," and his rulings thereon are final and "not subject to review on appeal unless accompanied by some imputed error of law," *S. v. DeGraffenreid,* 224 N. C., 517, 31 S. E. (2d), 523. The exception to the ruling of the court below in denying the defendant's challenge for cause, in view of the statement of the juror that he could render a fair and impartial verdict despite anything that he might have heard or read, presents no reviewable question of law. *S. v. Lord,* 225 N. C., 354, 34 S. E. (2d), 205; *S. v. Dixon,* 215 N. C., 438, 2 S. E. (2d), 371; *S. v. Bailey,* 179 N. C., 724, 102 S. E., 406; *S. v. Terry,* 173 N. C., 761, 92 S. E., 154; *S. v. Foster,* 172 N. C., 960, 90 S. E., 785; *S. v. Banner,* 149 N. C., 519, 63 S. E., 84; *S. v. Bohanon,* 142 N. C., 695, 55 S. E., 797; *S. v. Potts,* 100 N. C., 457, 6 S. E., 657.

The appealing defendant assigns as error the refusal of his Honor to sustain his motions for judgments as of nonsuit as to each count in both bills, interposed at the close of the State's evidence and renewed at the close of all the evidence.

The defendant devotes 93 pages of his brief to a discussion of these motions. It is well settled with us that in passing upon a motion for judgment as of nonsuit in criminal prosecutions, the evidence must be

considered in the light most favorable to the State; and when so considered, if there is more than a scintilla of competent evidence to support the allegations in the warrant or bill of indictment, it is the duty of the court to overrule the motion and to submit the case to the jury. Moreover, on such motion, the State is entitled to the benefit of every reasonable inference which may be fairly drawn from the evidence. *S. v. Gordon,* 225 N. C., 757, 36 S. E. (2d), 143; *S. v. Scoggins,* 225 N. C., 71, 33 S. E. (2d), 473; *S. v. Herndon,* 223 N. C., 208, 25 S. E. (2d), 611; *S. v. McKinnon,* 223 N. C., 160, 25 S. E. (2d), 606; *S. v. Johnson,* 220 N. C., 773, 18 S. E. (2d), 358; *S. v. Mann,* 219 N. C., 212, 13 S. E. (2d), 247; *S. v. Brown,* 218 N. C., 415, 11 S. E. (2d), 321; *S. v. Landin,* 209 N. C., 20, 182 S. E., 689.

The defendant concedes the correctness of the rule as stated above, but insists that since the State must prove beyond a reasonable doubt the essential elements necessary to constitute the crime of false pretense, a failure of proof as to any one or more of the elements requires the entry of a judgment as of nonsuit. To be sure the court below in passing upon these motions should have sustained them unless there was some competent evidence before him, when considered in the light most favorable to the State, which tended to support the essential allegations in the bills to which the respective motions were directed. A trial judge, however, in passing upon such motions, under the provisions of G. S., 15-173, is not bound by the measure or *quantum* of proof by which the State must prove a defendant's guilt before the jury can convict him. *Stacy, C. J.,* in speaking for the Court in *S. v. Adams,* 213 N. C., 243, 195 S. E., 822, stated the general rule as follows: "If there is any evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury; otherwise not, for, short of this, the judge should direct a nonsuit or an acquittal in a criminal prosecution. S. v. *Vinson,* 63 N. C., 335. But if the evidence warrant a reasonable inferference of the fact in issue, it is for the jury to say whether they are convinced beyond a reasonable doubt of such fact, the fact of guilt. *S. v. McLeod,* 198 N. C., 649 (152 S. E., 895); *S. v. Blackwelder,* 182 N. C., 899, 109 S. E., 644."

The two cases under the separate bills of indictment, were consolidated for the purpose of trial. Hence, we shall treat these bills as one, and the counts contained in the two bills as if separate counts in one bill, for such was the legal effect of the order of consolidation.

The appealing defendant and certain other individuals are charged with conspiring to commit a felony. "A conspiracy is the unlawful concurrence of two or more persons in a wicked scheme—the combination or agreement to do an unlawful thing or to do a lawful thing in an unlawful

way or by unlawful means." *S. v. Whiteside,* 204 N. C., 710, 169 S. E., 711; *S. v. Lea, supra; S. v. Ritter,* 197 N. C., 113, 147 S. E., 733. No overt act is necessary to complete the crime of conspiracy. "The conspiracy is the crime and not its execution," *S. v. Whiteside, supra. S. v. Shipman,* 202 N. C., 518, 163 S. E., 657; *S. v. Wrenn,* 198 N. C., 260, 151 S. E., 261; *S. v. Brady, supra;* 15 C. J. S., 1059.

Furthermore, it is not necessary to join all the known members of a conspiracy in one bill of indictment. Each conspirator may be tried separately, if it appears upon the face of the bill of indictment that there was another with whom the defendant conspired. 11 Am. Jur., 562; 15 C. J. S., 1060. The co-conspirators may be named in the bill or alleged to be unknown. *S. v. Abernethy, supra.*

In proving a conspiracy, it is not necessary to establish the acts charged by direct proof. "It is not necessary to prove that the defendants came together and actually agreed upon the unlawful purpose and its pursuit by common means." 11 Am. Jur., 570. Direct proof of a conspiracy is rarely obtainable. It is said in *S. v. Whiteside, supra:* "It may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy. *S. v. Wrenn, supra.* When resorted to by adroit and crafty persons, the presence of a common design often becomes exceedingly difficult to detect. Indeed, the more skillful and cunning the accused, the less plainly defined are the badges which usually denote their real purpose. Under such conditions, the results accomplished, the divergence of those results from the course which would ordinarily be expected, the situation of the parties and their antecedent relations to each other, together with the surrounding circumstances, and the inferences legitimately deducible therefrom, furnish, in the absence of direct proof, and often in the teeth of positive testimony to the contrary, ample ground for concluding that a conspiracy exists. 5 R. C. L., 1088." *S. v. Lea, supra; S. v. Shipman, supra.*

It may be conceded that one conspirator was the original instigator of the unlawful plan or purpose; and may have more or less dominated his co-conspirators, nevertheless all who knowingly participate in the execution of the unlawful purpose are equally guilty. "When a conspiracy is established, everything said, written, or done by any of the conspirators in execution or furtherance of the common purpose is deemed to have been said, done or written by every one of them, and may be proved against each. It is immaterial when a defendant entered into or became a party to the conspiracy, or how prominent or inconspicuous a part he took in the execution of the unlawful purpose; he is responsible to the fullest extent for everything that is said and done pursuant to the plot." 11 Am. Jur., 571.

The crime charged in the second count of the bills consolidated herein, is that of obtaining property by false pretenses. The crime of false pretense is statutory, G. S., 14-100. The essential elements which the State must prove to the satisfaction of the jury beyond a reasonable doubt, in order to convict one of the crime of false pretense, are set forth in the opinion of *Reade, J.*, in *S. v. Phifer,* 65 N. C., 321, as follows: "We state the rule to be, that a false representation of a subsisting fact, calculated to deceive, and which does deceive, and is intended to deceive, whether the representation be in writing, or in words, or in acts, by which one man obtains value from another, without compensation is a false pretense, indictable under our statute." It is stated in the case of *S. v. Howley, supra:* "The constituent elements of false pretense as defined by the statute, and expressed in the *Phifer case, supra,* have been repeated without variation in numerous decisions of this Court, among which are: *S. v. Dixon,* 101 N. C., 741, 7 S. E., 870; *S. v. Mangum,* 116 N. C., 998, 21 S. E., 189; *S. v. Matthews,* 121 N. C., 604, 28 S. E., 469; *S. v. Whedbee,* 152 N. C., 770, 67 S. E., 60; *S. v. Claudius,* 164 N. C., 521, 80 S. E., 261; *S. v. Carlson,* 171 N. C., 818, 89 S. E., 30; *S. v. Roberts,* 189 N. C., 93, 126 S. E., 161."

The defendant contends that since he was indicted with C. T. Jones, Johnnie Heath and J. R. Hunning, in bill No. 2397; and Jones died after the indictment was returned and before the trial, and the State took a *nol. pros.* as to Heath and Hunning during the progress of the trial; he is entitled to a nonsuit on both counts on the ground that Davenport could not conspire with himself and no one was left in the case with whom he could have conspired. We do not so hold. The identical point raised here was decided in the case of *S. v. Alridge,* 206 N. C., 850, 175, S. E., 191, in which the Court said: "The defendant, Lloyd Alridge, contends that he cannot be convicted of conspiracy because the defendant cannot conspire with himself, and as the State accepted Ed Alridge's plea of guilty of assault, but not guilty of conspiracy, and as the jury acquitted Clarence Alridge, and as Wes Buchanan was dead, there was no one left in the case for him to conspire with. However, the bill charges that Lloyd Alridge conspired with Wes Buchanan. The fact that Buchanan was dead at the time of the trial had no effect upon the unlawful conspiracy if such had been entered into between him and defendant during his lifetime, and before the crime was committed. This point is decided against the contention of defendant in *S. v. Diggs,* 181 N. C., 550, 106 S. E., 834. See, also, *S. v. Turner,* 119 N. C., 841, 25 S. E., 810." 15 C. J. S., 1060.

We deem it unnecessary to discuss the legal status of Heath and Hunning after the State took a *nol. pros.* as to them, since the evidence on this record tends to incriminate Jones and is sufficient to have carried the case to the jury as to Davenport and Jones on the charges contained

in the bill, had Jones been alive at the time of the trial. It is disclosed by the evidence that Jones was the manager of Davenport's Greenville Store. He received deposits and made loans. The store took in over $21,000.00 in deposits prior to his resignation as manager, 25 August, 1944. When demand was made on him for the withdrawal of at least one deposit, he informed the depositor he had loaned out her money and had no funds available for the payment of her check, which had been issued by the Greenville Store 11 August, 1944. The evidence also shows, according to the State's Exhibit No. 269, that between 11 August and 25 August, 1944, this store received in deposits $9,271.50 and during the same period loaned out only $966.50. On 22 August, 1944, according to the evidence of the State and the defendant Davenport, Jones accepted for deposit the check of F. O. Muth in the sum of $1,900.00, which check Davenport had received from Muth and issued therefor a check for $1,900.00 on the Branch Banking & Trust Co., New Bern, N. C., a bank in which he had no account. Jones, as manager of the Greenville Store, deposited the Muth check in the Guaranty Bank & Trust Company, Greenville, N. C., and on 25 August, 1944, he issued a check in the name of Dixie Produce Co., by C. T. Jones, payable to cash for the entire sum of $1,900.00, and applied it on indebtedness to himself which he claimed Davenport owed him. This contention of the defendant cannot be sustained.

The defendant also contends that no one was misled by his statements or his advertisements to the effect that he was solvent, and his business had been investigated and found to be legal. He contends the truth or falsity of those statements is a matter of law, and says in his brief: "The aphorism, 'There are none so blind as those who will not see,' applies here with full force and vigor, and it is argued that this blindness was caused solely by the dazzling light of 260 per centum per annum, and by no other consideration." We concede the Davenport Plan to be one calculated to attract those interested in quick profits. It could also be conceded that a small loan business might be operated in such a manner as to enable its operator to pay 5% interest per week by loaning the money at a higher rate of interest, if the operator could escape the penalty of our usury laws, but such a concession would bring no comfort to this defendant in view of the evidence disclosed on this record. The appealing defendant, his co-defendants, and other associates, knew they were taking in enormous sums of money, that not more than 10% of it was loaned out. They knew the produce stores were being used as a "front" for the loan business and were being operated at a loss. Moreover, according to the evidence disclosed on this record, exclusive of the New Bern Stores, the stores in Greenville, Rocky Mount, Kinston and Goldsboro received in deposits the sum of $85,643.70 and issued checks drawn on the Branch Banking & Trust Co., New Bern, N. C., for those

deposits after Davenport had notified the Bank not to pay any of his checks drawn on that institution except those that came through the mails. Nowithstanding that fact, Davenport, his managers and other employees, in the meantime were making a concerted effort to get deposits and were assuring the depositors the checks issued to them were good and would be paid on presentation at any time. Furthermore, of the above deposits, $37,730.50 were received and Davenport and his managers and employees issued checks therefor on the Branch Banking & Trust Co., New Bern, N. C., after Davenport's account had been closed at that institution.

The defendant further contends that there is no evidence to support the charges against him because he offered evidence to the effect that he paid all withdrawal checks presented to him or to the Branch Banking & Trust Company, New Bern, N. C., prior to the time the representative of the State Bureau of Investigation began an examination of his loan operations. Even so, the evidence on this record tends to show that Davenport at no time during July or August, 1944, was earning sufficient income from his loan business to pay more than a small fractional part of the interest he had obligated himself to pay his depositors, even before taking into consideration the other expenses incurred in connection with the operation of his business. According to the evidence, he was operating on deposits and not earnings, and the records at each store clearly establish this fact. The contention of solvency on the part of Davenport at any time in July or August, 1944, is an absurdity in the light of the evidence as disclosed by the record.

The transcript of the evidence, exclusive of the exhibits, covers 935 pages of the record, which, including exhibits, contains 1,613 pages. Obviously, it is not practical for us to quote all or even a substantial part of the evidence. But when the evidence on this record is tested by the principles laid down in the authorities and decisions cited herein, it is sufficient to sustain the verdict on all the counts in which this defendant is named.

It is also contended by the defendant that the conspiracy counts in the indictment, charge only a misdemeanor and as a matter of law, are merged in the felony counts. A conspiracy to commit a felony is a felony in this jurisdiction. *S. v. Abernethy, supra; S. v. Dale, supra; S. v. Ritter,* 199 N. C., 116, 154 S. E., 62. Hence, the conspiracy counts are not merged in the felony counts as contended by the defendant. *S. v. Dale, supra,* and the cases cited therein.

The rulings of his Honor on the motions for judgment as of nonsuit will be upheld.

The record contains 333 assignments of error to the admission of evidence. We shall not undertake to discuss them at any great length. Most of them are so clearly without merit it is difficult to understand

why they were brought forward. For example, exception after exception is brought forward which challenges the admissibility of evidence admitted as to the co-defendants, after the court had instructed the jury not to consider the testimony against Davenport.

The defendant excepts to the admission of testimony by W. R. Boyles, to the effect that after Davenport was arrested he sent him to employ Mr. Jesse Jones, an Attorney at Law of Kinston, N. C., to represent him. The witness testified he informed Mr. Jones that Davenport was going to "open more stores to get money to pay off down yonder." The proffered employment was declined.

Mr. Jones was called as a witness and his testimony was offered only in corroboration of Boyles' testimony. Mr. Jones testified that Boyles told him Davenport was going to open stores in Wilson and Smithfield to get money to pay off the people he owed in New Bern and Kinston. Whereupon he inquired how Davenport was going to get the money to pay the people in Smithfield and Wilson. Boyles said "he did not know." Then he said "he was to get the money on the representation that he was going to loan it out." The witness testified that he told Boyles, "Under your own statement, if that is what he is going to do he would be guilty of obtaining money under false pretenses." This evidence is attacked on two grounds: (1) That it was a privileged communication arising out of the relationship of attorney and client; and (2) That it was an expert opinion to the effect that Davenport was guilty of conspiracy to defraud by false pretense and invaded the province of the jury.

The rule governing communications between attorney and client is stated in Stansbury on Evidence, Sec. 2, p. 108, *et seq.*, the pertinent parts of which read as follows: "The relation of an attorney and client must have existed at the time of the disclosure. Thus there is no privilege when the relation had not begun, or the attorney had refused employment, or the relation had terminated. . . . Although the attorney need not have been consulted with a view to actual litigation, the communication must have been made in the course of seeking legal advice for a proper purpose; hence, no privilege exists where advice is sought in aid of a contemplated violation of law," citing *S. v. Smith,* 138 N. C., 700, 50 S. E., 859; *Eckhout v. Cole,* 135 N. C., 583, 47 S. E., 655; and *Hughes v. Boone,* 102 N. C., 137, 9 S. E., 286.

The relationship of attorney and client did not exist between the witness and Davenport at the time the conference took place. Consequently, the first ground of objection cannot be sustained.

The second ground upon which the defendant challenges the admissibility of the evidence is likewise untenable, since the court excluded that portion of the evidence as to Davenport which constituted an opinion based on the statement made to Mr. Jones by Boyles.

There are numerous exceptions to the admission of evidence as to confessions made by several of the co-conspirators. These confessions were made in the absence of Davenport, and some of them contained statements purported to have been made by him.

On motion of counsel for Davenport, such confessions were ordered stricken from the record and the jury was instructed not to consider any statements made in the absence of the defendant, Davenport, by the defendants Whorton, Boyles, Powers, Heath, Hunning, or any other person out of court and prior to the time the witnesses were examined and testified in the trial of this cause. The court having ruled with the defendant on his motion to pursue this course, he cannot now complain.

There are exceptions to practically every word of the evidence which tends to show the manner in which the Davenport System was conducted, the advertisements carried in the papers, the books and records introduced in evidence, or as to the statements made by Davenport, his managers and employees to depositors as an inducement to get them to deposit their money.

The acts and declarations of each conspirator are admissible against every other member of the conspiracy. *S. v. Whiteside, supra; S. v. Ritter, supra* (197 N. C., 113, 147 S. E., 733); 11 Am. Jur., 571. Evidence as to the manner in which the business of Davenport was conducted, the statements made as an inducement to secure deposits, the assurance given of the solvency and the legality of the defendant's loan business, the destruction and alteration of records, was competent as tending to establish a conspiracy. *S. v. Whiteside, supra.*

We have carefully examined all the exceptions to the admission of evidence, and they present no prejudicial error.

Exceptions are taken to certain remarks made by the trial judge during the course of the trial below.

We find nothing in the remarks of his Honor made in the course of the trial below, that lends support to the contentions of the defendant. The remarks were no more than were necessary and proper in a trial of this length. The court merely suggested from time to time that witnesses had already testified to certain matters and it was unnecessary for them to go over their testimony again and again. The remarks complained of were clearly made by the court in an effort to expedite the trial. But no one can read this record without being impressed with the fairness and patience of his Honor in the trial of this case.

We have thirty-eight assignments of error challenging the correctness of the charge of the court. A detailed consideration of them would serve no useful purpose. Exceptions are taken to the statement of contentions. An exception is taken to the preponderance of space and time given to the State's contentions, in comparison to that given the contentions of the defendant. Exception is also taken to the court's statement

of the State's evidence, which the defendant contends constitutes, in effect, an opinion on the part of the court adverse to defendant. These exceptions cannot be sustained.

The record shows that the trial judge inquired of counsel for the defendant and of the solicitor, at the close of his statement of the evidence, as to whether or not he should state the evidence more fully than he had already done. Counsel for the State and for the defendant assured his Honor it was not their desire for him to recapitulate the evidence further. Moreover, counsel for defendant requested the court to give a number of additional contentions for the defendant, which were given as requested.

The charge is in substantial accord with our decisions on the questions presented by the exceptions, and is free from prejudicial error.

It has been a laborious and tedious task to review the record on this appeal, which contains 440 assignments of error and over 1,700 exceptions. We have carefully considered all the assignments of error brought forward and argued in the defendant's brief, but we have of necessity discussed only those questions raised by the exceptions that we felt warranted discussion.

The manner in which the able solicitor performed his duties in the preparation and trial of this case, is highly commendable. The excellent judge who presided at the trial below, which lasted for five weeks, was careful and painstaking in the discharge of his duties; and the record supports the conclusion that no prejudicial error was committed in the trial below.

No error.

Z. SMITH REYNOLDS FOUNDATION, INC., v. THE TRUSTEES OF WAKE FOREST COLLEGE ET AL.

(Filed 5 June, 1947.)

1. Declaratory Judgment Act § 2a—

A charitable Foundation and an eleemosynary educational corporation executed a contract under which, in consideration of mutual promises and covenants, the Foundation obligated itself to pay to the education corporation income of the Foundation up to a designated amount each year in perpetuity. This proceeding was instituted under the Declaratory Judgment Act, and the Trustee of the Trust from which the Foundation obtained its principal income was made a party. *Held:* The courts have jurisdiction under the Declaratory Judgment Act to declare the status and authority of the parties and the validity and enforceability of the contract.

2. Charities § 1—

The fact that an educational corporation which is dependent upon endowments and gifts for its maintenance also derives a part of its operating costs from paid students does not affect its status as an eleemosynary institution, and adjudication that such institution is a charitable corporation under the laws of North Carolina is without error.

3. Judgments § 32—

The fact that the existence and validity of a charitable trust and its corporate beneficiary has been declared in an action to establish the validity of their creations does not preclude the courts under the doctrine of *res judicata* from making like declarations in a subsequent action involving the status of the charities and their power to enter into a contract with an eleemosynary educational corporation.

4. Trusts § 3d—

The creation of a charitable trust whose purpose is to be accomplished by the transfer of all its income, not directed to be accumulated, to a corporation created in accordance with directives of the trust indenture solely for the accomplishment of charitable works in this State, is valid.

5. Trusts § 3d—

The rules against perpetuities do not apply to charitable trusts.

6. Trusts § 3d—

A Foundation was created in accordance with a Trust indenture to accomplish charitable works in this State. The Foundation and an educational institution entered into a contract. In this proceeding under the Declaratory Judgment Act to determine the status of the parties and the validity of the contract, it is declared that the Trust is a valid subsisting perpetual trust and that the Foundation and the educational institution are both perpetual charitable corporations.

7. Charities § 2—

The by-laws of the charitable Foundation required that its Trustees designate quarterly the charitable purposes or beneficiaries for which appropriations were to be made. The Foundation entered into a contract obligating it to pay its income in perpetuity up to a stipulated amount yearly to an eleemosynary educational corporation. *Held:* It appearing that the Foundation was not to change its name, that it has express authority to execute the contract, and that it had or might have other funds requiring action by its Trustees for their proper appropriation, its obligation to pay the amount stipulated in perpetuity does not contravene its by-laws and is within its authority.

8. Same—

Where an eleemosynary educational corporation is specifically authorized by amendment to its charter to enter into a contract requiring it to relocate its physical plant and to perform other stipulated conditions and covenants in consideration of an endowment in perpetuity, the grant of power to make the contract carries with it the authority to fulfill its obligations.

9. Charities § 1—

A corporation organized and empowered by charter to operate as an eleemosynary institution must continue to operate as a charity under its charter or surrender the charter, and therefore may make a contractual obligation to maintain its status as a charity.

10. Same—

By the terms of a Trust, the Foundation created as its principal beneficiary was to receive payments from the Trust so long as it did not change its name. The Foundation obligated itself by contract to pay the greater part of its income in perpetuity to an eleemosynary educational institution, which contract stipulated that the Foundation should not change its name in order that it might continue to receive the funds from the Trust, without which it could not perform its obligations under the contract. *Held:* The Foundation is bound by its agreement not to change its name explicit in the contract and also implicit therein as necessary to its ability to perform the contractual obligations.

11. Declaratory Judgment Act § 6—

A charitable Foundation and an educational institution entered into a contract which obligated the Foundation to pay in perpetuity a certain sum yearly, income for the first five years to be held and turned over to the educational institution at the expiration of that period. *Held:* Adjudication that the annual payments subsequent to the five-year period were not cumulative and that if the annual net income of the Foundation in any year should be less than the sum stipulated the Foundation should be under no obligation in any other year to make up the deficiency, *is upheld.*

12. Appeal and Error § 37—

In a proceeding under the Declaratory Judgment Act, the Supreme Court on appeal will not pass on questions relating to the construction of the contract in suit which were not presented for determination in the lower court.

13. Declaratory Judgment Act § 6—

This proceeding was instituted to determine the status of the parties and the validity and enforceability of a contract entered into by a charitable Foundation and an eleemosynary educational institution. *Held:* The adjudication of the validity of the contract, the status of the parties, direction to the parties to perform their obligations, including specific directions in regard to matters necessary to the enforceability of the contract, is authorized by G. S., 1-255.

14. Same—

This action was instituted to determine the validity of a contract between a charitable Foundation and a religious denominational educational institution. The contract required that the State Convention of the denomination should continue in existence and continue its moral and financial support of the educational institution in the same manner as theretofore, and that, by direction of the Convention, the validity of the contract should be established by judicial determination. The convention

approved the contract and assumed its obligations thereunder and was made a party to the proceedings. *Held:* Decree that the Convention has the power and authority to perform the acts stipulated in the contract, though not a party to the contract, is authorized.

APPEAL by defendant, Safe Deposit and Trust Company of Baltimore, Trustee, from *Olive, Special Judge,* at April Term, 1947, of FORSYTH.

Proceeding under Declaratory Judgment Act to determine validity, meaning and construction of written contract, and to declare and announce the rights of the parties thereunder.

The contract follows:

"This Agreement, Made this 16th day of November, 1946, by and between Z. Smith Reynolds Foundation, Incorporated, a charitable corporation, organized and existing under the laws of the State of North Carolina, hereinafter sometimes called the Foundation, and The Trustees of Wake Forest College, an educational corporation, organized and existing under the laws of the State of North Carolina, hereinafter sometimes called Wake Forest College.

"*Witnesseth:* Whereas, Z. Smith Reynolds Foundation, Incorporated, is a charitable corporation, organized and existing under the laws of the State of North Carolina, its certificate of incorporation having been filed in the office of the Secretary of State on August 21, 1936; and

"Whereas, said Z. Smith Reynolds Foundation, Incorporated, is the beneficiary of the Zachary Smith Reynolds Trust created by indenture dated August 21, 1936, between Richard J. Reynolds, Mary Reynolds Babcock, and Nancy Reynolds Bagley, as grantors, R. Edward Lasater and Safe Deposit & Trust Company of Baltimore, Baltimore, Maryland, as Trustees, and Z. Smith Reynolds Foundation, Incorporated. A copy of the said indenture being hereto attached, marked Exhibit A and incorporated in this paragraph as if copied herein; and

"Whereas, in addition to the right to receive income under the provisions of the Zachary Smith Reynolds Trust aforesaid, the Foundation is empowered by its charter to receive property by way of gift, devise or bequest and to dispose of its income and properties for the accomplishment of charitable works in the State of North Carolina; and

"Whereas, The Trustees of the Wake Forest College is an educational corporation originally created by the General Assembly of North Carolina, Laws of 1833, Chapter 59, which original charter has been amended from time to time by Act of the General Assembly of North Carolina; and

"Whereas, the Foundation desires to enter into a contract with Wake Forest College for the purpose of encouraging, promoting and assisting in the financing of the objects and purposes for which Wake Forest College now exists upon the limitations and conditions hereinafter set out;

"Now, Therefore, in consideration of the premises and in further consideration of the mutual promises and covenants hereinafter set out, It Is Hereby Agreed:

"1. The following words and phrases wherever used in this agreement shall have the meanings herein set out as follows:

"(a) 'Baptist State Convention' shall mean the Baptist State Convention of North Carolina, a corporate body acting in its corporate capacity through trustees and its membership being composed of and its control vested in duly elected messengers or delegates of the local Missionary Baptist churches in the State of North Carolina, but shall include any successor organization in any form having substantially the same membership and control.

"(b) 'College' shall mean the Trustees of Wake Forest College, one of the parties to this agreement.

"(c) 'Convention' shall mean the Baptist State Convention as defined in Paragraph (a) preceding.

"(d) 'Endowment funds' shall mean and include all funds owned by or held in trust for Wake Forest College, the income from which is available for the operations of Wake Forest College.

"(e) 'Foundation' shall mean the Z. Smith Reynolds Foundation, Incorporated, one of the parties to this agreement.

"(f) 'Gross income,' when used herein in defining the net income of the Foundation, shall mean and include: (1) all of the income of the Foundation derived from the Zachary Smith Reynolds Trust, (2) all of the income of the Foundation derived from any other trust, where the whole or any part of the income of such trust is payable to the Foundation, and is not earmarked by the donor for other specific uses, (3) the income of the Foundation derived from investments of principal funds owned by it and not earmarked by the donor for other uses, and (4) any gifts made to the Foundation for current expenditure which the Foundation is not authorized to invest for the purpose of producing income, and which have not been earmarked by the donor for other specific uses.

"(g) 'Net income,' when referring to the net income of the Foundation, shall mean the gross income of the Foundation as hereinabove defined, after deducting therefrom all of the necessary and proper expenses of the Foundation, including taxes, determined from time to time in accordance with good business and accounting practice.

"(h) 'Wake Forest College' shall mean The Trustees of Wake Forest College, one of the parties to this agreement.

"(i) 'Zachary Smith Reynolds Trust' shall mean the trust created by the indenture dated August 21, 1936, a copy of which is attached hereto and marked Exhibit A.

"2. Beginning on the 1st day of July, 1947, and ending on the 30th day of June, 1952, the Foundation will accumulate for the benefit of

Wake Forest College all of its annual net income up to the sum of $350,000, and on July 1, 1952, will pay the said accumulated net income to Wake Forest College to aid in the construction of buildings and permanent improvements upon the site selected by it in or near the City of Winston-Salem, Forsyth County, North Carolina. If the Foundation is satisfied that the College has made sufficient progress in procuring the necessary funds, or in commencing or completing buildings and permanent improvements, or in preparing to move or moving the operations of the College to the new site near Winston-Salem, it may pay such accumulated net income or any part thereof to the College prior to July 1, 1952. If, by reason of funds received from sources other than the Foundation, Wake Forest College shall not need the accumulated net income hereinabove referred to for the construction of buildings and permanent improvements, it may use for its operations the whole or that part of the said accumulated net income not needed for the construction of buildings and permanent improvements, or it may add the whole or any part of such accumulated net income to its endowment fund. This paragraph of this agreement is subject to the conditions hereinafter set out.

"3. Beginning on July 1, 1952, the Foundation will pay to Wake Forest College annually in perpetuity the annual net income of the Foundation up to the sum of $350,000. This paragraph of this agreement is subject to the conditions hereinafter set out.

"4. All of the operations of Wake Forest College, its library, Art Gallery, and other movable property now located at the Town of Wake Forest, Wake County, State of North Carolina, and suitable for use in the new location shall be moved to a site in or near the City of Winston-Salem, Forsyth County, State of North Carolina. Wake Forest College will erect or cause to be erected at such new location sufficient buildings for the accommodation of a student body of at least 2,000 persons. If it does not have on hand on or before July 1, 1952, sufficient funds, including the accumulated net income referred to in Paragraph 2 of this agreement, to assure the construction of the required buildings, and has not actually let contracts for any part thereof, the Foundation shall have the right to revoke this agreement. If Wake Forest College does have on hand sufficient funds to assure the construction of buildings as hereinabove provided on or before July 1, 1952, the Foundation shall have the right to revoke this agreement unless construction is actually commenced and completed within a reasonable time.

"5. It is agreed that the payments to be made by the Foundation as prescribed in Paragraphs 2 and 3 of this agreement are subject to the following limitations and conditions, and that the Foundation shall have the obligation to make such payments only so long as each and all of the following conditions and limitations are kept and performed:

"(a) The operations of Wake Forest College shall be conducted at the site fixed as hereinabove provided unless otherwise agreed between Wake Forest College and the Foundation; provided, however, it is understood and agreed that the Bowman Gray School of Medicine of Wake Forest College, which is already located in Winston-Salem, may, in the discretion of The Trustees of Wake Forest College, be either retained at its present location or removed to some other location in Winston-Salem or its environs.

"(b) The name of Wake Forest College shall not be changed and the control of the College shall continue unaltered and undiminished in the Board of Trustees of Wake Forest College, as appointed or elected by the Baptist State Convention.

"(c) The Baptist State Convention shall continue in existence and shall exercise the control which it now has over Wake Forest College and shall continue its moral and financial support of the College. In addition to any special gifts or appropriations, or gifts or appropriations for specific purposes, made by the Convention to the College, the Convention shall pay annually to the College for its support and maintenance a proportion of Convention funds, not less than the proportion that has been paid to the College by the Convention during the current fiscal year of the Convention, which is the calendar year 1946.

"(d) The present endowment fund of the College shall be maintained intact and used for the operation of the College at its new site.

"(e) By the terms of the indenture creating the Zachary Smith Reynolds Trust, the distributable income of said trust may be paid to the Foundation or otherwise used only for charitable purposes within the State of North Carolina. By the terms of the charter of the Foundation it exists only for 'the accomplishment of charitable works in the State of North Carolina.' By the terms of its charter Wake Forest College is an educational corporation under the law of the State of North Carolina. At the time of the execution of this agreement Wake Forest College, the Foundation and the Zachary Smith Reynolds Trust are recognized as charitable objects and trusts under the general laws of the State of North Carolina. At the time of the execution of this agreement Wake Forest College, the Foundation, and the Zachary Smith Reynolds Trust are also recognized as charitable objects and trusts under the revenue laws of the United States and of the State of North Carolina, and, as such, all of their income and a large part of their properties are wholly exempt from taxation. In the event that any future valid law of the State of North Carolina other than a revenue law shall deprive Wake Forest College of its status as a charity so that the Trustee of the Zachary Smith Reynolds Trust cannot pay the income of said Trust to the Foundation or the Foundation cannot pay over such income to Wake Forest College except in violation of the limitations of the said Zachary Smith

Reynolds Trust and the charter of the Foundation, the obligation to make such payments to Wake Forest College shall forthwith cease and determine. In the event that any future valid revenue law of the State of North Carolina or of the United States, or of both of them, shall deprive Wake Forest College of its exempt status thereunder so that the Zachary Smith Reynolds Trust cannot continue to pay the income thereof to the Foundation and the Foundation cannot make the payments hereinabove provided for to Wake Forest College, except with the result that the Zachary Smith Reynolds Trust or the Foundation, or both of them, shall lose such exempt status as would otherwise be enjoyed by a trust organized for charitable purposes or a corporation organized for the accomplishment of charitable works in the State of North Carolina under such valid revenue law or laws then in effect, the obligation to make such payments to Wake Forest College shall forthwith cease and determine. If, however, some, but not all of the objects and purposes of Wake Forest College shall continue to retain their charitable and exempt status under said laws so that the payments herein provided for may be continued if limited to such charitable and exempt objects and purposes and so that the Zachary Smith Reynolds Trust and the Foundation can continue to make said payments without losing their status as a charitable trust and a charitable corporation under the law of North Carolina or without losing their exempt status under such valid revenue act or acts, the payments shall be continued, but shall be limited to the purposes which are recognized by said laws to be charitable and exempt. It is agreed that the Foundation desires to make and will make all of the payments herein provided for as long as it can do so without violating the provisions of the indenture creating the Zachary Smith Reynolds Trust and its charter and so long as such payments can be made without a diminution by taxation of the property or income of the Zachary Smith Reynolds Trust or the property or income of the Foundation, or both of them, solely because of the payments to Wake Forest College herein provided for.

"6. All of the undertakings and obligations of this agreement on the part of the Foundation are and shall be undertakings and obligations of the Foundation and its successors only, and no grantor of the Zachary Smith Reynolds Trust and no Trustee of the Foundation, now or hereafter acting as such, shall be subject to any individual liability of any nature whatsoever, directly or indirectly, to Wake Forest College because of (a) any undertaking or obligation of the Foundation hereunder, (b) the creation of the Zachary Smith Reynolds Trust, (c) having acted as a Trustee of the Foundation, (d) having authorized the execution of this agreement, or (e) having executed this agreement as a Trustee of the Foundation or as an officer of the Foundation.

"7. All prior agreements, whether oral or written, between the Foundation, Wake Forest College and the Baptist State Convention or any of them relating to the subject matter of this agreement are hereby merged in this agreement, and this agreement contains all of the undertakings and obligations of the parties in relation thereto.

"8. This agreement is made subject to the direction of the Baptist State Convention in session assembled on July 30, 1946, that the validity and effectiveness of this agreement, and particularly of Paragraphs 3 and 5 thereof, shall be established by a judgment of the courts of the State of North Carolina.

"In Witness Whereof, Z. Smith Reynolds Foundation, Incorporated, and The Trustees of Wake Forest College have caused this agreement to be executed in their respective names by their respective officers thereunto lawfully authorized, and their corporate seals to be hereunto affixed the day and year first above written.

Z. SMITH REYNOLDS FOUNDATION, INCORPORATED
By /s/ W. N. REYNOLDS
President

"Attest:
/s/ STRATTON COYNER
Secretary
(Corporate Seal)

THE TRUSTEES OF WAKE FOREST COLLEGE
By /s/ JOHN A. OATES
President

"Attest:
/s/ E. B. EARNSHAW
Secretary
(Corporate Seal)"

Pursuant to the concluding paragraph of the agreement, that its validity and effectiveness should be established by judgment of the courts of North Carolina, the Z. Smith Reynolds Foundation, Incorporated (hereinafter sometimes called The Foundation), instituted this proceeding in the Superior Court of Forsyth County, and propounded a number of questions for answers and adjudication, to the end that it might know whether it could safely pay out trust funds.

Upon the hearing, both sides offered evidence, documentary and oral, to show the authority of the contracting parties to enter into the agreement and to remove any uncertainty in connection therewith. Judgment was entered upholding the authority of the parties and sustaining the contract.

The Safe Deposit and Trust Company of Baltimore, Trustee of the Zachary Smith Reynolds Trust, appeals, assigning errors.

Ratcliff, Vaughn, Hudson & Ferrell for plaintiff, Z. Smith Reynolds Foundation, Inc., appellee.

J. W. Bunn; J. M. Broughton; Womble, Carlyle, Martin & Sandridge; Varser, McIntyre & Henry for defendants, The Trustees of Wake Forest College, and the Baptist State Convention of North Carolina, appellees.

Venable, Baetjer & Howard; Hastings & Booe for defendant, Safe Deposit & Trust Company of Baltimore, Trustee of the Zachary Smith Reynolds Trust, appellant.

STACY, C. J. The parties have agreed on what they want to do. The appellant craves final adjudication of the matters before assuming the risk of paying out trust funds. To this end, certain questions were propounded and answered in the court below. We are asked to review the answers and to say whether they are correct. This we proceed to do.

Preliminarily, questions of status, power and authority of the parties were submitted for inquiry and determination.

I. ZACHARY SMITH REYNOLDS TRUST:

This trust is found to be a valid and subsisting, charitable trust under the laws of the State of North Carolina. It was created by indenture of 21 August, 1936, between Richard J. Reynolds, Mary Reynolds Babcock and Nancy Reynolds Bagley, as grantors, R. Edward Lasater, individual trustee (later resigned), Safe Deposit and Trust Company of Baltimore, corporate trustee (now sole trustee), and Z. Smith Reynolds Foundation, Incorporated. The properties held by this trust are the properties allotted for such purposes to the grantors of the trust by judgment of the Superior Court of Forsyth County, rendered at the Special March 11 Term, 1935, in a civil action entitled "Anne Cannon Reynolds, *et al.*, *v.* Zachary Smith Reynolds, *et al.*" (affirmed on appeal, 208 N. C., 578), and also by decree of the Circuit Court of Baltimore City, Maryland, rendered on the 12th day of March, 1936, in a suit entitled "Safe Deposit and Trust Company of Baltimore, *et al.*, *v.* J. Edward Johnston, *et al.*"

II. Z. SMITH REYNOLDS FOUNDATION, INCORPORATED:

It is ascertained that this corporation was duly organized under the laws of the State of North Carolina on August 21, 1936, solely for the accomplishment of charitable works in the State of North Carolina. It was organized as a part of the plan of the Zachary Smith Reynolds Trust, and is its principal beneficiary. It has performed its corporate functions, continuously since its organization, by making grants for

charitable purposes within the State of North Carolina, and will be entitled to receive the income directed to be paid to it by the terms of the Zachary Smith Reynolds Trust so long as it continues to perform its corporate functions and to comply with the terms and conditions set out in the Trust Indenture.

This Indenture creating the Zachary Smith Reynolds Trust provides, *inter alia,* that all questions pertaining to its validity, construction and administration shall be determined under, and in accordance with, the laws of the State of North Carolina. And further, that the trustees shall "hold the Trust Fund in perpetuity," and pay the net income thereof "in quarterly installments, to the Foundation, for charitable purposes in the State of North Carolina." It also expresses the desire of the grantors that "no change shall be made in the name of The Foundation or its successor, after the death of the survivor of the Grantors. If such change is made thereafter, no further payments shall be made to said corporation hereunder."

It is provided in the charter of The Foundation that it "shall have perpetual existence," and it was determined below that it is a valid and subsisting, charitable corporation.

III. THE TRUSTEES OF WAKE FOREST COLLEGE:

As one of the contracting parties, "The Trustees of Wake Forest College" is declared to be a non-profit, educational institution existing and performing its functions with the support of the Baptist denomination in the State, operating through its local churches and the Baptist State Convention of North Carolina, and as such is a charitable corporation under the laws of the State of North Carolina.

It was originally incorporated by Act of Assembly in 1833, "for the purpose of educating youth, and for no other purpose whatever." In 1839 the name of the corporation was changed to "The Trustees of Wake Forest College," and it was then empowered to confer degrees and marks of literary distinction such as are usually conferred in colleges and universities. In 1923 its existence was made perpetual. Its charter was again amended in the Fall of 1946, authorizing the removal and relocation of Wake Forest College in the City of Winston-Salem, or its environs.

Its status as an eleemosynary institution is not affected by the fact that it derives a part of its operating costs from pay students. The balance of these costs—the *sine quo non* to its maintenance—comes from endowments, gifts, and Baptist State Convention appropriations. *City of Raleigh v. Trustees of Rex Hospital,* 206 N. C., 485, 174 S. E., 278.

IV. TRUSTEES OF THE BAPTIST STATE CONVENTION:

It is established that the Trustees of the Baptist State Convention of North Carolina was chartered by Act of Assembly in 1893 and invested "with all the rights, powers, and privileges allowed religious societies by the laws of the State." It is a charitable corporation under the laws of North Carolina. The Convention designates the Trustees of Wake Forest College by election or appointment. It has approved the contract between The Foundation and the Trustees of Wake Forest College and has assumed its obligations thereunder.

V. SAFE DEPOSIT AND TRUST COMPANY OF BALTIMORE, TRUSTEE:

It is made to appear that the Safe Deposit and Trust Company is the corporate, and now sole, trustee of the Zachary Smith Reynolds Trust with power and authority to act as such.

VI. CONTRACT BETWEEN THE FOUNDATION AND WAKE FOREST COLLEGE:

It was revealed on the hearing that the agreement between The Foundation and Wake Forest College, above set out, was duly executed on November 16, 1946, first having been authorized by the Trustees of The Foundation, The Trustees of Wake Forest College, and the Baptist State Convention of North Carolina.

It was further made to appear that the proposal to move Wake Forest College to a site in or near Winston-Salem had been under consideration and negotiation by all the parties hereto for quite awhile; that definite proposal was made by the plaintiff corporation and its Trustees to the Baptist State Convention of North Carolina in a letter dated July 11, 1946, and that thereafter the contract of November 16, 1946, was duly approved, signed, sealed and delivered.

VII. JUDGMENT OF THE SUPERIOR COURT:

We come now to the judgment entered below and the exceptions taken thereto by the Safe Deposit and Trust Company of Baltimore, Trustee. This corporation is the sole trustee of a charitable trust. It is contemplated by the agreement here submitted for consideration that it will pay out large sums of money, yea all of its foreseeable future income, for the purposes therein designated, and it is fully justified in seeking a final determination of the matter. Indeed, the Baptist State Convention, in session duly assembled, directed that the validity and effectiveness of the agreement, and particularly paragraphs 3 and 5 thereof, be established and made certain by a judgment of the courts of the State of North Carolina. This has been done in the judgment below. All of the parties are

keenly interested in the outcome of this adjudication. The issues are large and the considerations are great on both sides.

VIII. EXCEPTIONS TO THE JUDGMENT:

The appellant's first exception is to the determination that "The Trustees of Wake Forest College" is a charitable corporation under the laws of North Carolina. The exception seems not to be pressed on brief. Hence, as the determination is well supported by authority, *West v. Lee,* 224 N. C., 79, 29 S. E. (2d), 31; *Trust Co. v. Ogburn,* 181 N. C., 324, 107 S. E., 238; *Griffin v. Graham,* 8 N. C., 96, the exception will be overruled *pro forma.*

Exception No. 2: The appellant excepts because it is determined herein that the Zachary Smith Reynolds Trust is a valid and subsisting, charitable trust under the laws of this State and that The Foundation is a valid and subsisting, charitable corporation duly organized and existing under the laws of the State of North Carolina, and, as such, is entitled to receive the income from the Zachary Smith Reynolds Trust as therein provided for the accomplishment of charitable works in the State of North Carolina; whereas the same determinations have heretofore been made in prior litigation, and the doctrine of *res judicata* forecloses any further consideration of the matters. Undoubtedly, the prior adjudication settled the matters then before the court, but as the same conclusion is reached herein, it can do no harm to declare it again. If one declaration suffice, two ought to make it doubly sure. Anyhow, the matters may now be regarded as settled. The exception seems feckless.

Exception No. 3: The appellant excepts to the determination that The Foundation has full power and authority under the provisions of the Zachary Smith Reynolds Trust and under its charter and by-laws, and in accordance with the laws of the State of North Carolina, to enter into the contract with The Trustees of Wake Forest College, agreeing to pay its annual net income up to the sum of $350,000 to Wake Forest College in perpetuity as provided in the contract, and subject to each and all of the conditions thereof.

The request for this determination was thought necessary because of certain expressions used by this Court in the cases of *Woodcock v. Wachovia Bank & Trust Co.,* 214 N. C., 224, 199 S. E., 20, and *Gaston County United Dry Forces, Inc., v. Wilkins,* 211 N. C., 560, 191 S. E., 8. It is to be noted, however, that the plan envisioned by the creators of the Smith Reynolds Trust called for (1) the organization of a corporation, under the name of Z. Smith Reynolds Foundation, solely for the accomplishment of charitable works in the State of North Carolina; and (2) the creation of a Trust for charitable purposes in the State of North Carolina, such purposes to be accomplished by the transfer of all

the income of the Trust, not directed to be accumulated, to The Foundation as its chief beneficiary. This arrangement successfully meets the objections pointed out in the *Woodcock* and *United Dry Forces Cases,* and distinguishes it from them. *Williams v. Williams,* 215 N. C., 739, 3 S. E. (2d), 334; *Miller v. Atkinson,* 63 N. C., 537. Moreover, the recent legislation on the subject, G. S., 36-21, and House Bill No. 678, Session 1947, ought to suffice to quiet the matter. But if additional assurance be needed, it may be found in the following cases: *West v. Lee,* 224 N. C., 79, 29 S. E. (2d), 31; *Humphrey v. Board of Trustees,* 203 N. C., 201, 165 S. E., 547; *Whitsett v. Clapp,* 200 N. C., 647, 158 S. E., 183; *Benevolent Society v. Orrell,* 195 N. C., 405, 142 S. E., 493; *Keith v. Scales,* 124 N. C., 497, 32 S. E., 809; *School for D. D. v. Institution for D. D.,* 117 N. C., 164, 23 S. E., 171; *University v. Gatling,* 81 N. C., 508; *S. v. Gerard,* 37 N. C., 210; *Griffin v. Graham,* 8 N. C., 96.

The rules against perpetuities do not apply to charitable trusts. *Penick v. Bank,* 218 N. C., 686, 12 S. E. (2d), 253; *Williams v. Williams, supra; Jones v. Habersham,* 107 U. S., 179, 27 L. Ed., 401. By their very nature they look to perpetuity. The Zachary Smith Reynolds Trust is a perpetual trust. The charter of The Foundation provides that it "shall have perpetual existence," and the corporate life of The Trustees of Wake Forest College, by amendment to its charter, is made perpetual. There is no inherent barrier to the contract here under consideration.

Exception No. 4: The appellant excepts to the determination that paragraphs 2, 3, 4 and 5 of the contract are valid and enforceable. The principal objection urged to this determination is that the net income of The Foundation up to $350,000 per annum is to be accumulated until July 1, 1952, and then paid over to Wake Forest College and that thereafter The Foundation is to pay to the College annually, in perpetuity, its annual net income up to the sum of $350,000.

It is contended that the charter of The Foundation and the Indenture creating the Trust indicate by their terms that the disposition of the income from the Trust to The Foundation is to be made from time to time, and not at any one time in perpetuity. Section 7 of the by-laws of the Foundation further provides that its Trustees shall "at each quarterly meeting . . . designate the charitable purposes or the beneficiaries" for which appropriations are to be made. It is additionally urged as objections that there is no requirement that the College shall continue its operations as a charitable or educational institution, and that it is not clear whether the payments of the annual net income in perpetuity are to be cumulative. The present determination concerns itself primarily with the validity of the contract. Any ambiguity in its terms, short of a fatal indefiniteness, goes to its meaning, rather than to its validity. More about this anon.

The argument of the appellant would seem to overlook the fact that The Foundation is to remain a live corporation and is not to change its name. It has full power and authority to accept gifts from any source, provided they do not conflict with its charitable purposes, and it has express authority to enter into the contract here submitted for consideration. The amendment to the charter of The Trustees of Wake Forest College specifically authorizes it to enter into such a contract in contemplation of the removal of Wake Forest College and its relocation in the City of Winston-Salem, or its environs. The grant of power to make a contract carries with it the authority to fulfill its obligations. *Thomas v. Baker, ante,* 226. It is a contradiction in law to say that one may agree and yet not perform. Performance is the fulfillment of an obligation or a promise kept. *Bank v. Corl,* 225 N. C., 96, 33 S. E. (2d), 613. Here, both parties to the contract have express authority to make it. Both have express power to carry it out. To say there is no requirement that Wake Forest College shall continue its operations as a charitable or educational institution is to disregard the purpose of its creation. It must either operate under its charter or surrender it. Moreover, it is one of the conditions of the contract that Wake Forest College shall maintain its status as a charity to the end that payments may lawfully be made to it by The Foundation. The exception is not well founded.

Exception No. 5: The appellant excepts to the determination that the contract, and each and every provision thereof, is in conformity with the provisions of the Zachary Smith Reynolds Trust, and that The Foundation will be entitled to continue to receive the income from the Trust as provided in the Indenture creating it and to pay such income to The Trustees of Wake Forest College as provided in the contract.

What is said above under Exception No. 4 applies equally to the exception here. Neither is well taken.

Exception No. 6: The appellant excepts to the determination that the contract imposes upon The Foundation the obligation to retain its present name without change, so as to continue to receive the income of the Zachary Smith Reynolds Trust during the existence of the contract with The Trustees of Wake Forest College.

This determination rests upon the familiar principle that "as a man consents to bind himself, so shall he be bound." Elliott on Contracts, Vol. 3, Sec. 1891. It is not only implicit, but also explicit, in the contract that the parties agree to bind themselves to its performance. To carry out its part of the agreement, The Foundation will need the income of the Zachary Smith Reynolds Trust which it is under obligation to receive in its present name, without change, for the accomplishment of charitable works in the State of North Carolina. The Foundation, therefore, is under a double obligation to see that "no change shall be made in the name of The Foundation." It is not to be assumed that a

charitable organization will deliberately hobble itself or to seek, in a disingenuous manner, to avoid its obligations. It has brought this proceeding, not in an effort to get out of its engagements, but as an earnest of its willingness to fulfill them. It is not seeking to ascertain whether it can evade its contracts, but whether it can carry them out. The determination is a counterpart to the prior determination that Wake Forest College agrees to maintain its status as a charitable organization. The covenants are mutual in intent and purpose, and the determinations are complementary. The exception is not sustained.

Exceptions Nos. 7, 8 and 9: These exceptions are addressed to determinations in respect of the authority of the contracting parties to make the contract and its enforceability, which are repetitious of prior determinations, and they seem to have been made out of the abundance of caution. The exceptions are overruled on the basis of former rulings.

Exception No. 10: The appellant excepts to the determination that "neither the contract nor any provision thereof" is in conflict with Section 7 of the by-laws of The Foundation, which is construed as applicable hereafter only to funds not required to be paid to The Trustees of Wake Forest College under the terms of the contract. (Reference is made to Sec. 7 of the by-laws under Exception No. 4 above.)

This determination harmonizes the provisions of the contract with the stipulations and conditions contained in the Indenture creating the Trust and the charter of The Foundation. In matters of this kind, conflicts are not to be sought, but avoided, where it is permissible to do so. The determination accords with approved practice, and the exception to it is not sustained. *Meisenheimer v. Alexander,* 162 N. C., 226, 78 S. E., 161; 13 Am. Jur., 290.

Exception No. 11: The appellant objects to the determination that paragraph 3 of the contract is not a cumulative obligation, and, in the event the annual net income of The Foundation, in any one year, while the contract is in effect, shall be less than the sum of $350,000 per year, only the annual net income of that year shall be payable to The Trustees of Wake Forest College, and The Foundation shall not be under any obligation in any other year to make up any deficiency out of income in any other year.

Arguments have been advanced by the appellant, not only in respect of the annual net income accruing from and after July 1, 1952, but also for the five-year period immediately prior thereto. This seems to be in excess of the objections advanced and argued below. Furthermore, it is difficult to perceive wherein this determination vitally affects the appellant. It is not challenged by either The Foundation or Wake Forest College. Presumably, the objection is based on the assumption that the contract is invalid and unenforceable. Having held otherwise in respect of the validity and enforceability of the contract, it follows that the

exception here on the part of the appellant must be overruled. No doubt other questions will arise in connection with the application and operation of some of the provisions of the contract, which were not presented on the hearing in the court below, and, of course, are not before us. Sufficient unto the day are the problems thereof. "If the trustee should fail to carry into effect the trust, it will be time enough to invoke the supervision of the court." *Trust Co. v. Ogburn*, 181 N. C., 324, 107 S. E., 238.

Exception No. 12: The appellant objects to the determination that the contract is binding on The Foundation and The Trustees of Wake Forest College; the direction to each to perform its obligations thereunder, and the specific direction to The Foundation not to change its name while the contract is in force.

The authority for this part of the judgment is to be found in G. S., 1-255. It follows as a necessary corollary to the determinations previously made herein. The exception is not sustained.

Exception No. 13: The appellant objects to the determination that the net income payable to The Foundation, pursuant to the provisions and conditions of the Indenture creating the Trust, is properly payable to the Foundation and is to be disposed of by The Foundation in accordance with its agreement with The Trustees of Wake Forest College in the amount therein provided.

This conclusional determination is but a shorthand statement in summary of what has gone before. It follows necessarily from the determinations previously made. The exception is not sustained.

Exception No. 14: The appellant objects to the determination that the Baptist State Convention of North Carolina, while not a party to the contract, has the power and authority to perform all the acts described in Paragraph 5 (c) of the agreement.

This determination is warranted by the terms of the contract and particularly the 8th paragraph thereof. The Baptist State Convention has a vital interest in the agreement and is so closely allied with it as to be a bearer of some of its burdens and a sharer of some of its benefits. It has approved the contract and assumed its obligations thereunder. It is a party to this proceeding. The exception is not sustained.

Finally, after all is said and done the case comes to a relatively narrow compass. Is the contract submitted for adjudication valid and enforceable? The trial court thought it was. We approve. Wake Forest College has had a long and honorable career, and whether it nestles in a forest of Wake or stands on a knoll in Forsyth, its mission will remain a quest for truth and a crusade for simple right. We would not deny to this great institution and to those whose faith and good works have made it possible, this vista of a new dawn and this vision of a new hope.

The determinations made and conclusions entered below will be upheld.

Affirmed.

STATE v. WARD M. BLANTON, VIVIAN BAIRD AND W. T. SHORE.

(Filed 5 June, 1947.)

1. Indictment § 4—

While an indictment founded solely upon incompetent evidence may be subject to quashal, witnesses who testified before the grand jury may not be examined in order to show the nature and character of evidence upon which the bill was founded.

2. Indictment § 9—

In this prosecution for conspiracy to suborn of perjury, the first paragraph of the indictment alleged conspiracy to suborn of perjury in general terms, followed by ten separate paragraphs repeating the charge of conspiracy with specific reference to the causes in which the perjuries were alleged to have been committed, each sufficient in itself to charge conspiracy to suborn of perjury in the instance set out. *Held:* The indictment was a one count indictment, and when construed as a whole is sufficient under the statute, G. S., 15-153, notwithstanding that the first paragraph, standing alone, may be insufficient to charge the crime with requisite definiteness.

3. Conspiracy § 4—

An indictment for conspiracy need not describe the subject crime with legal and technical accuracy, the charge being the crime of conspiracy and not a charge of committing the subject crime.

4. Conspiracy § 5—

Evidence of acts and declarations of a co-conspirator in furtherance of the common design is competent provided there is evidence *aliunde* of his participation in the unlawful agreement, regardless of the order of proof.

5. Conspiracy §§ 6, 7—Evidence of attorney's guilt of conspiracy to suborn of perjury held sufficient for jury.

The evidence tended to show that more than thirty fraudulent divorce decrees for nonresidents were secured in the courts of this State upon perjured testimony as to residence, that one of defendants solicited the business, drew the papers, and instructed the litigants in regard to their testimony, that defendant attorney piloted the cases through the courts, having a pre-trial conference with each client, that the attorney over a period of time was frequently in the office where the papers were drawn, that clients were instructed not to inform him of the fact of their nonresidence, but that on at least two occasions they did so inform him and that he acquiesced in the proposed fraud. *Held:* The evidence was sufficient to be submitted to the jury on the question of the attorney's guilt of conspiracy to suborn of perjury, and the State's contention that his spurious appearance of innocence was an element of the fraudulent scheme was properly submitted to the jury together with the attorney's contention that he was the innocent dupe of the other defendants.

6. Attorney and Client § 13—

The disbarment of an attorney follows as a legal consequence upon his conviction of a felony.

STATE *v.* BLANTON.

DEFENDANT Shore's appeal from *Armstrong, J.*, September 16, 1946 Extra Criminal Term, MECKLENBURG Superior Court.

The appealing defendant and his co-defendants, Ward M. Blanton and Vivian Baird, were tried on an indictment charging them with conspiracy to procure persons "to commit wilful and corrupt perjury before the courts of the State of North Carolina" and that "they did combine, conspire and confederate, and plan together amongst themselves each with the other and with each other to suborn of perjury and for corrupt bargaining and contracting with others to commit wilful and corrupt perjury and to procure false testimony to be given wilfully and corruptly knowing the same to be false and they knew and believed that such testimony would be false and knowing that the persons suborned would wilfully and corruptly give false testimony and that they, the said Ward M. Blanton, Vivian Baird and W. T. Shore, induced and procured said persons to give false testimony in actions before the Courts of the State of North Carolina and did, in fact, procure through such unlawful, wilful, wicked, deceitful and felonious conspiracy succeed in having perjury committed in the Courts of the State of North Carolina, to-wit:"

There follow 10 numbered paragraphs in each of which the charge of conspiracy is repeated, with specific references to 2 incidents of overt accomplishment, causes in which the perjuries are alleged to have been committed, the nature of the perjury, particulars of procurement, and concerted action.

The conspiracy alleged was in connection with actions brought in Mecklenburg Superior Court in a wholesale scheme to obtain divorces for persons actually residing out of the State, and principally, or wholly, within the State of South Carolina. The perjury referred to in the indictment relates to false proof of North Carolina residence requisite to procure a divorce here, both as a matter of evidence and pleading.

The defendants moved to quash the indictment on the ground that it was not found on competent testimony; and that it failed to charge the commission of a crime. The motion was overruled in both respects.

The defendant pleaded not guilty and the trial proceeded. During its course a plea of *nolo contendere* was accepted from the defendant Baird. Blanton and Shore were convicted, but only Shore appealed.

In general outline the evidence points to the office of Colonel T. L. Kirkpatrick, a prominent attorney of Charlotte, now deceased, as the headquarters of the defendants Blanton and Baird in organizing and handling the divorce business referred to in the indictment and alleged to be illicit. Colonel Kirkpatrick was entirely disabled, later died, and is not chargeable with participation in the enterprise. Blanton, not a practicing attorney, had occupied the office subsequent to the disablement of Col. Kirkpatrick. Vivian Baird was a secretary in the office, holding

a commission as Notary Public. W. T. Shore, a practicing attorney, handled the court end of the business, receiving the complaints or pleadings prepared in the office, going over them in pretrial conference with clients, presenting the cases and examining the clients and witnesses on the hearing, and performing all the offices of actual attorney and attorney of record as required. The evidence discloses that many cases were tried and disposed of before interference by the S. B. I. brought the activities to a close. The defendant Shore received ten dollars per case, paid usually by Blanton, but not directly received from the clients represented. Blanton received sums varying from $100 to $150 or more per case.

From this office direct solicitation of clients was made in extensive territories in South Carolina, both by Blanton and persons employed by him; and through clients and otherwise the business was advertised, and the fact that divorces could be obtained from the North Carolina Courts through the facilities of the office, regardless of the fact that applicants were not residents of the State.

Oscar E. Sells, testifying for the State, testified that he had gotten in trouble about gasoline coupons and Blanton accompanied him to Washington to see "various Senators and Congressmen." After his conviction and service of a six months term he came to Charlotte to see Blanton who engaged him to ride over the country with one Isadore Groskin to sell oil stock. Vivian Baird was employed in Blanton's office. Witness drove Blanton to South Carolina on several occasions and went down there and solicited business for the office. People from South Carolina would come up and get divorces. Blanton was giving him money to eat on, his car when he wanted it, and a commission on all the business he brought in. At one time he took Blanton and Vivian Baird to Rock Hill and they sent him over to see Evelyn Barr, and her sister, Thelma Chassereau, to see what could be worked out in getting some divorce cases. He did see them and the two sisters rode all over Rock Hill to see their friends who wanted divorces. Witness went down to Rock Hill on two other occasions and called on people, leaving the address and phone number of Blanton's office with a pawn broker who was to advise all those at the Finishing Plant who wanted divorces how they could get "fixed up."

One Pearlie Steedly came up from Fort Mill and got her divorce through the Blanton office. Witness' wife was required to testify as to the residence. Shore represented Pearlie Steedly, "but Mr. Shore was not supposed to know anything about it, only except just like it was legal, and everything. Mr. Shore did not know anything about it but what the lady had lived in North Carolina all her life. Blanton told Mrs. Steedly what to say, where to establish her residence, how to do and what to do. Mrs. Steedly had her legal residence in Fort Mill, South Carolina." She obtained the divorce.

On the trip with Blanton and Baird, Blanton, in the presence of Mrs. Baird, Mrs. Barr and Mrs. Chassereau, said that "there were literally thousands of divorce cases in South Carolina, and all we had to do was to contact the people and get them up there and we would get our commission on each divorce." Soon afterward he saw Mrs. Barr and Mrs. Chassereau in Blanton's office. They were getting a divorce for Mrs. Chassereau "on account of her husband being in the service and she hadn't seen him for three or four years."

Witness stated that Blanton offered Mrs. Sells $10.00 a case for establishing legal residence in North Carolina for non-residents applying for divorces through his office, and on one occasion gave her $10.00—in the Steedly case. He said that since the indictments were filed Blanton had menaced him in various ways to prevent him from testifying in the case.

This witness' wife corroborated her husband as to part of his testimony. She further testified that some of the plaintiffs were cautioned not to let Mr. Shore know anything about residence, that he was just going to try the case. That she was in the courthouse and testified in the Doris Williams case, but did not have to tell a lie.

Evelyn Barr (mentioned in Section 4 of the indictment as having obtained a divorce as the result of the conspiracy) testified that she lived at Rock Hill, South Carolina, had lived at the address for over a year. That she sued for a divorce in Mecklenburg Superior Court. The complaint was prepared by Blanton, who signed Mr. Shore's name to it. Shore was not in the office at the time. The paper was notarized by Mrs. Baird. (It shows Mrs. Barr verified the complaint which alleges her residence to have been in North Carolina for the requisite period.) That she later met Mr. Shore in Blanton's office and asked him if it would be all right to go through with that divorce, knowing that she lived in the State of South Carolina, and he said "yes," and she proceeded to a hearing before Judge Hamilton. She paid Blanton either $135 or $137 for legal services.

The witness stated that after the indictment both defendants Baird and Blanton came to see her and menaced her in an attempt to keep her from court. Blanton tried to frighten her, and she threatened to call the local police. He later gained entrance to her home and told her she wouldn't like to come up missing at work, and threatened violence to her sons; later threatened to have her arrested if she came into the courtroom.

On cross-examination she stated that on the trial she swore that she was a resident of North Carolina upon the advice of her "so-called" attorney; that she did not hire Shore and has never paid him anything. That Blanton told her and her sister what to say in court upon the trial that day and said, "Is that right, Bill?", and Mr. Shore said "Yes." That Shore did not tell them what to go to court and swear, Mr. Blanton

told them what to say. Mr. Shore did ask her how long she had been separated from her husband. That was the first time he had ever asked anything about the subject.

Mrs. Chassereau (mentioned in paragraph 8 of the indictment as having obtained a divorce through Blanton's office and the appearance in court of Shore) testified that she was sent up there through a girl who had gotten a divorce through the Blanton office, and met Blanton and Baird, but did not see Shore at the time. Both Blanton and Baird knew that she was not a resident of North Carolina. She paid Blanton and Baird for getting the divorce. She had before started suit for divorce but that case was thrown out of court and she began anew with Blanton and Baird. The witness stated that she did not tell defendant Shore that she was a resident of South Carolina; that she, with several other applicants for divorce, saw Shore on February 18, the day she got her divorce, and Shore talked to all of the girls present. He asked if they were sure that they had been separated from their husbands for two years and this witness told him, "yes." Shore said that was all he wanted to know. He did not ask her anything about where she lived.

Virginia Herndon Collins (not mentioned in the indictment) was offered as a witness by the State on the question of *scienter* as having obtained a divorce through the Blanton office under similar circumstances and upon similar perjury. After cautioning the jury with respect to this evidence and confining it to the purpose for which it was offered, she was permitted to testify. She stated that she got her divorce on the ground of two years separation and paid Blanton $100 in two payments, and $7.00 at another time. Shore handled the case in court.

Blanton told her beforehand that she would have to have a witness to say that she had lived in North Carolina for six months; that this was the main thing, and gave her instructions about this witness. Fred Collins testified for her that she was a resident of North Carolina, but she was a resident of South Carolina and had been living in South Carolina all her life. Witness stated that she saw Mr. Shore sign the complaint and write in the word "continuously" as to the residence in North Carolina. Prior to the hearing Mr. Shore asked her if she had been separated from her husband for two years and asked her if she had been a resident of the State of North Carolina for six months and she told him she had.

Nell Roach (referred to in Section 6 of the indictment) testified that previously Blanton came to her house with regard to getting a divorce. That she lived in Rock Hill, South Carolina, and had never lived in North Carolina. Subsequently Blanton called her and told her he had the papers ready but witness told him she was not ready to sign. Then he told her it would be absolutely all right, that he had gotten 100 of them and one of them had not come back yet; and she signed in the

presence of Blanton and Baird, paying Blanton at one time $30.00 and at another time $85.00. Mr. Shore represented her as attorney in the courtroom. He asked her questions but did not ask her where she resided.

After she had gotten her divorce Blanton came to see her twice and told her he was expecting some men down there and for her to keep her mouth shut. Shore was in Blanton's office when she paid Blanton $85.00.

Lois Keels testified that she obtained her divorce through Blanton's office and that Shore represented her in the court. In her complaint she swore that she had been for six months a resident of North Carolina, whereas, in fact, she was a resident of South Carolina. She first saw him the morning of the divorce.

Various exhibits were introduced by the State, including the judgment rolls in several of the cases, to which reference is made in the indictment and in the evidence, and several receipts for money paid Blanton in connection with the divorces and particularly receipt for money on which Blanton had signed the name of defendant Shore.

The defendant W. T. Shore, testifying for himself, stated that Colonel Kirkpatrick had been a close friend of his. That he had known Blanton as the Colonel's secretary for several years and that Blanton asked him if he could handle the cases in the office for trial that the Colonel had started; and that he told Blanton he could not let the Colonel down in his sickness. He asked Blanton what trial fee he would pay and that Blanton said that he had been paying Price $10.00 for each divorce. That Colonel Kirkpatrick had to have a living out of it and the minimum fee was $25.00; and that on this basis he undertook to try the cases that Kirkpatrick already had in court.

That Blanton told him he had Kirkpatrick's forms for simple uncontested divorce cases on grounds of two years separation and it was just a matter of filling in the dates; that he did not have to draw any of the papers or come into the case except on the day of the trial. Therefore, whenever Blanton phoned him that he had a divorce case for settlement, which had already been duly verified, and when the cases appeared to be regular, he would sign the papers, take the complaint down and file it. That he never had anything to do with the case or cases in divorce matters till the day of the trial. That he received $10.00 for each case, which fee was paid to him when he took the papers down to file them; that was all he ever received for any of the cases named in the bill of indictment. He stated further that he questioned each client both as to the fact of separation and residence and never had the slightest idea that any one of them was not a resident of the State of North Carolina.

Witness did not remember any conversation with Evelyn Barr when Blanton asked him in her presence, "Isn't that right Bill?" with reference to what Blanton had told them to swear. The witness denied that he had anything to do with rounding up cases or soliciting clients in

divorce cases; said that he had never heard Blanton claim to be a lawyer.

The defendant demurred to the evidence and moved for a judgment of nonsuit as required by the statute.

Objections to the instructions to the jury pertinent to decision will be noted in the opinion.

The jury found the defendant W. T. Shore "guilty as charged in the bill of indictment," recommending mercy. Defendant moved to set aside the verdict for errors committed on the trial, which motion was declined, and defendant excepted. The defendant moved for an arrestment of judgment, which was refused, and defendant excepted. Thereupon he was sentenced to Central Prison for a period of not less than three nor more than seven years, to work as provided by law. The defendant appealed, assigning errors.

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

McRae & McRae and J. F. Flowers for Defendant W. T. Shore, appellant.

SEAWELL, J. The unusual volume of evidence and number of objections to the indictment, admission of evidence, and the charge of the court, render it impossible to take up defendant's exceptions by number, although they have received careful consideration. The discussion here must necessarily be topical, and in summary, if we avoid the creation of a volume equal to that with which we are dealing. The exhaustive and able argument of counsel for the appellant and the equally thorough response of the Attorney-General have raised many questions which we cannot discuss at any length. We confine ourselves to a discussion of those points upon which the appellant seems to rely more strongly for his relief.

In appellant's brief the motion to quash the indictment is succinctly put on two grounds; first, that it was found wholly on hearsay and incompetent evidence; second, that it fails to charge a crime, and is too vague or wanting in substantial averments to give the accused the information necessary for his defense or protect him against subsequent prosecution. In support of the first objection the defendant undertook to put on W. I. Gatling and Edward L. Cannon, claimed to be the only witnesses examined by the grand jury. Their testimony was rejected. No other evidence was tendered. Conceding that an indictment is subject to be quashed when founded solely upon incompetent evidence (*State v. Coates*, 130 N. C., 701, 41 S. E., 760; *State v. Moore*, 204 N. C., 545, 168 S. E., 845; *State v. Deal*, 207 N. C., 448, 177 S. E., 332; *State v. Beard*, 207 N. C., 673, 178 S. E., 242), yet public policy in this State will not permit an examination of the witnesses testifying before the grand jury

in order to show the nature and character of evidence upon which the bill was found. *State v. Levy,* 200 N. C., 586, 158 S. E., 94; *State v. Dixon,* 215 N. C., 161, 1 S. E. (2d), 521; *State v. Dale,* 218 N. C., 625, 12 S. E. (2d), 556.

To fully understand the second objection we must refer to the theory of the case on which it is advanced. The brunt of the attack is made on the "unnumbered" first paragraph of the indictment on the theory that some rule of law, not clearly stated, requires that the indictment shall be analyzed into 11 parts, each of which is to be considered as a count, the main charge of conspiracy being included in the first unnumbered paragraph. If that were true, many of the references in this paragraph would be too vague to survive the attack since, taken alone, not only are many of the essential averments not present, but the trial court and the accused himself might be left in doubt as to the objective of the conspiracy,—what was intended to be accomplished by it. But taken as a whole the objection loses point. While each of the ten numbered paragraphs formally repeat the charge of conspiracy they are sufficiently definite and complete in the particulars claimed to be wanting in the unnumbered paragraph as to contain all the substantial averments necessary to conviction. The trial court construed it as a one-count indictment with the ten numbered paragraphs intended as specifications of particulars omitted from the first and we are of the opinion that his interpretation is not only consistent with the grammatical expression and connection within the bill itself, but is a reasonable and proper legal construction. It certainly was not the intention of the indictment to charge eleven independent conspiracies, and the formal restatement of the fact of conspiracy in each of them does not destroy the continuity. The type of conspiracy to which the indictment is aimed was broader in its purposes than the separate instances in which the overt acts were specified, together with the particular overt instances in which the suborned perjury was used, its character and its purpose. The indictment was, to use the vernacular, intended to charge a conspiracy to run a wholesale divorce mill with perjured testimony as to residence as its mode of operation. The indictment is singularly like a preview of the evidence in the case. The appeal made by the syndicate was to residents of South Carolina, where divorces are not obtainable.

It might have been differently worded and organized, it is true, but we do not find in it any essential defect that is not cured by our statute of jeofailes, G. S. 15-153. Taken as a whole, it fairly charges the crime intended and was sufficient to put the accused to his defense. We do not find wanting any substantial averment of fact or circumstance necessary to support the indictment.

It was not necessary for the indictment for conspiracy to describe the subject crime with legal and technical accuracy. *State v. Dale, supra;*

Williamson v. U. S., 207 U. S., 425, 52 L. Ed., 278; see also 15 C. J. S., "Conspiracy," p. 1112, ss. 80, 85; as to subornation of perjury see G. S. 14-210; and as to the crime itself, see G. S. 14-209. *State v. Ritter,* 197 N. C., 113, 147 S. E., 811; *State v. Lea,* 203 N. C., 13, 164 S. E., 737; *State v. Abernethy,* 220 N. C., 226, 17 S. E. (2d), 25; *State v. Smith,* 221 N. C., 400, 20 S. E. (2d), 360. The crime charged is the conspiracy —not perjury or the subornation thereof.

Most of the exceptions to the evidence relate to the principle that the acts and declarations of an alleged co-conspirator are not admissible in evidence against another charged with participation in the conspiracy unless there is some evidence connecting the latter with the conspiracy; and then only such declarations and acts as are in furtherance of the common purpose, and occur while the conspiracy is still in progress. *State v. Wells,* 219 N. C., 355. Of that character are objections to many exhibits of the State, particularly the receipts given by Blanton for money paid him in connection with the divorces. In one instance such a receipt bears the name of W. T. Shore, signed by Blanton. An examination of the record, however, discloses that when these exhibits were introduced there was other evidence engendering legitimate inferences of Shore's connection with the conspiracy, as will be seen by further reference. The trial judge was careful in protecting the defendant's rights in this respect. It may be observed here that the rules to which we have referred have nothing to do with the order of introduction of evidence. The difficulties of proving conspiracy are notorious but evidence of the declaration or act of a co-defendant in the furtherance of the object of conspiracy will not be excluded if evidence *aliunde* shows the participation. *State v. Dale, supra.*

The several objections to the charge of the court are in many instances so connected with defendant's demurrer to the evidence and motion for judgment as of nonsuit that separate discussion would be repetitious.

The evidence relied upon to convict the appealing defendant was largely, but not wholly, circumstantial. There is in this case "a development and connotation of circumstances" which seem to justify consideration by the jury. *United States v. Glasser,* 315 U. S., 60, 80; *United States v. Manton,* 107 Fed. (2d), 824, 839; *Direct Sales Corp. v. United States,* 319 U. S., 703, 87 L. Ed., 1674. The validity of inferences of his guilty participation in the conspiracy he so much aided and to the success of which he was indispensable, drawn from the long association with Blanton and Baird, and their South Carolina clientele, and daily contacts made in the workshop where the frauds were devised, and the number of appearances made by him as an attorney from day to day in guiding these fraudulent cases to a successful issue in the court,— inferences of participation arising from these facts would scarcely be questioned except from the recurrence in the State's evidence of state-

ments by several of the witnesses that Shore was not told of the falsity of the claim of residence, or that he was not supposed to know, or that witnesses were told not to tell him about it. Thus is uncovered a peculiar but apparently necessary feature of the conspiracy, and upon it the inquiry arises: Whether, as contended by the defendant Shore, a practicing attorney of, we must assume, at least ordinary acumen, piloted through the dangerous channels of the court, upon his own admission, upwards of 30 fraudulent divorce cases—(other evidence suggests 100)—in each of which there was a pre-conference with the client, and to the end he was kept ignorant of the facts, an innocent dupe of the ring; or, upon an alternative view, that a spurious appearance of innocence on the part of Shore had to be maintained in dealing with the court in the critical process of judicial investigation, and was itself conspiratorial.

The trial judge gave it as a contention of the State that the latter view prevailed in the alleged prosecution of the aims of the conspiracy, and that the State relied upon it as one of the constituent factors of the scheme. In the exception to the bracketed portion of the charge dealing with this feature we find the brunt of the objection to the judge's instructions, and we forego discussion of others offering less serious challenge to the result.

The circumstance pointed out,—consistent recurrence in the office of Blanton of the understanding that the falsity of the claim of residence should not be made known to Shore,—had its fitting counterpart in the behavior of Shore,—not perfect perhaps in role, but nevertheless so present as to betray a sensitivity on that point,—when he sometimes examined the applicants as to the truth of the allegations as to two years separation and seemingly avoided the equally important question of residence, upon which the whole conspiracy depended.

Shore was not merely a "front," an apple-peeling colonel of plausible appearance, sitting in the front office to give an air of respectability to the operations of Gentle Grafters in an O. Henry story. He was literally the mouthpiece of the setup—the one means of entrance the Blanton office had to the courts of justice, with their traditional standards of respectability and canons of rectitude. A mishap in that department, which might easily occur, would put an end to the fraudulent scheme, destroy both the conspiracy and the conspirators.

Whether the inferences may be strong or weak, it is not our office to say. The whole circumstances surrounding the actors and bearing upon their alleged conspiracy, the acts and declarations of those engaged in it and their interdependence are legitimate subjects for consideration by the jury. And we do not find that the pertinent passages in the charge are to be held for error. It is to be noted here, however, that in two instances the rule apparently imposed upon the witnesses not to speak to Shore of the fact of their South Carolina residence broke down. Mrs.

Barr testified that in the presence of Blanton and Baird and others in the office just prior to the hearing of her case in court, she asked Shore whether it would be all right to proceed with the trial knowing that she lived in South Carolina. He answered, "Yes." At another time Blanton was telling them "what to swear,"—turned to Shore with the question, "Isn't that right, Bill?", and Shore replied, "Yes." These expressions must be taken in the light of the circumstances under which they were made. We cannot say that they are free from inferences tending to show a knowledge on the part of Shore of the unlawful nature of the acts in which he was engaged, and his guilty participation in the conspiracy. We do not mean by this reference to evidence specifically challenged, to suggest that it stands alone. The evidence which we find no necessity of analyzing, *arguendo,* is ample to support conviction. The disbarment of the defendant followed as a legal consequence of his conviction.

We do not find in the record or in the exceptions of the appellant, which we have carefully considered, any sound reason for disturbing the result of the trial. We find

No error.

STATE v. RALPH VERNON LITTERAL AND MARVIN CLAUDE BELL.

(Filed 5 June, 1947.)

1. Criminal Law § 12d—

Where persons held by Federal officers on a Federal charge are released by order of the District Judge to the sheriff for trial in the State Court, *held,* upon obtaining custody through the comity and courtesy existing between the courts of the two jurisdictions, the State Court acquired jurisdiction.

2. Jury § 8—

When the jury is drawn and summoned and the grand jury selected and impaneled before the effective date of the Amendment of 1946, the absence of women on the jury panel is not a defect, even though the bill of indictment is returned after the Amendment's effective date, since the Amendment merely makes women eligible for jury service and time must be allowed to implement the constitutional provision.

3. Jury §§ 2, 3: Indictment § 13—

A motion to quash the indictment on the ground that no women were summoned to serve on the jury is untenable when it appears that defendants did not exhaust their peremptory challenges and thus that they obtained a jury acceptable to them.

4. Constitutional Law § 33—

Male defendants are not prejudiced by the absence of women from the jury panel.

5. Criminal Law § 42d—

Where the credibility of prosecutrix' testimony is put in issue by the plea of not guilty and by cross-examining her, testimony tending to support her version of the occurrences attendant the crime is competent for the purpose of corroboration.

6. Criminal Law § 35—

Where prosecutrix testifies that she was assaulted and left in distress in a field, testimony of her exclamatory cry for help is competent.

7. Criminal Law § 42d—

Prosecutrix' statement to officers, giving her version of the crime, reduced to writing and signed by her, is competent for the purpose of corroborating her testimony.

8. Criminal Law § 48f—

Where prosecutrix' written statement is competent for the purpose of corroborating her testimony and is admitted for this purpose, if some parts of the statement do not tend to corroborate her testimony, it is incumbent on defendants to move to strike or exclude such parts, and a general objection to the statement as a whole is ineffective.

9. Criminal Law § 42d—

A witness testified he saw defendants in an automobile on the afternoon and evening before the crime was committed, and made a memorandum describing the car and the number of its license plate. Officers testified that they found the license plate in a stove pipe in the loft of a barn at the home of one of defendants, and made a memorandum thereof. *Held:* The memoranda were competent for the purpose of corroborating the witnesses.

10. Criminal Law § 33—

The absence of a finding of record that the confession of a defendant was voluntary, is not fatal, since the court's ruling admitting the confession in evidence must, of necessity, have been predicated upon such finding.

11. Same—

Nothing else appearing, a confession will be presumed voluntary, and the fact that it is made in the presence of armed officers after defendant's arrest does not render it incompetent.

12. Criminal Law § 39b—

The relationship of patient and physician within the purview of G. S., 8-53, does not exist between a defendant and an alienist examining him in regard to his sanity.

13. Same—

Where a defendant offers testimony of an alienist in support of his plea of mental irresponsibility, he waives any confidential relationship and the State may cross-examine such witness concerning all matters covered in the examination-in-chief.

14. Criminal Law § 29b—

Where an alienist has testified as to the mental irresponsibility of defendant based upon his examination of defendant, the fact that the cross-examination of the witness in regard to the basis of his opinion incidentally discloses defendant's past criminal record does not render the cross-examination incompetent, since the matter is within the proper scope of the cross-examination.

15. Criminal Law § 53k—

The court is not required to give all the contentions, but only to state them as fairly for one side as for the other.

16. Criminal Law § 53d—

An instruction that the jury should be governed by their recollection of the evidence in arriving at a verdict, is without error.

17. Criminal Law § 54g—

The relationship of patient and physician within the purview of G. S., proper for the court to refuse to accept it and to instruct the jury again as to the form of the permissible verdicts, and such defendant cannot complain that the jury shortly thereafter rendered a verdict in proper form adverse to him.

APPEAL by defendants from *Sink, J.*, at January Special Term, 1947, WILKES. No error.

Criminal prosecution under bill of indictment which charges the capital felony of rape.

The evidence for the State tends to establish the following facts:

Prosecutrix lives at Pleasant Hill, a settlement on the Traphill road about four miles from the center of Elkin. On the evening of 23 August 1946 she and two girl friends, accompanied by three boys, went to a watermelon feast in or near Elkin, arriving about 7:00 p.m. They returned to the cab station at Elkin, a bus stop, too late to "catch" a bus. They then went to a movie. They returned to the bus stop and the three girls boarded a bus about 11:05 p.m. to go home. Prosecutrix lived about 100 yards beyond the end of the run of this bus where it turned around and returned to town. The girls noticed a car with its lights off trailing the bus. Prosecutrix's two girl companions left the bus sometime before it reached the end of its run. The bus, having reached its terminus, drove into a side road to turn around. The trailing car turned on its lights and passed, went up the road, and turned around between the bus and the home of the prosecutrix. It drove up beside prosecutrix who had left the bus and started home. One of the two occupants got out. She started to run into a neighbor's yard. The driver called to the other, "Grab her." He chased her, grabbed her, put his hands over her mouth and pulled her into the car. During this time she screamed and attempted to get free but was thrown down to the floor

of the car and the one holding her sat upon her and held his hand over her mouth. The car drove off and she was blindfolded. She asked them what they were going to do to her, and one replied that they were going to assault her. They tried to make her drink liquor. Some distance away she was taken out of the car and the driver left for a while. During this time she attempted to get away. The car returned and she was again placed therein. Thereafter she was criminally assaulted several times by each of the occupants and was subjected to other treatment too vile and repulsive to repeat. She was likewise beaten and one of the occupants said that he was going to cut his initials on her leg and made a mark several inches long. Finally they drove into Tennessee, put the prosecutrix off in a corn field, threatened to kill her if she looked around, and drove away. She went to a home nearby about 7:00 a.m. where she was treated, given food, and later carried to town and placed on a bus for home. There was evidence of other occurrences on the trip it is unnecessary to repeat. There is likewise evidence in the record amply sufficient to identify the two defendants as the occupants of the car and the assailants of the prosecutrix.

Thereafter the defendants were apprehended by Federal and State officials and were first held by the Federal authorities on a charge of kidnapping. The judge of the Middle District entered an order 6 November 1946 releasing the defendants to the sheriff of Wilkes County for trial in the State court on the charge of rape.

While the defendants were in the custody of the officers they made statements in the nature of confessions. The statements were in the main in substantial accord with the testimony of the prosecutrix.

When the case came on for trial in the court below the defendants moved to quash the bill of indictment (1) for that the Federal court had no right to release the defendants to the State court, and therefore the State court had no jurisdiction to try the defendants on the capital felony charged; and (2) for that no women were summoned to serve at the term of court at which they were placed on trial. The motion was overruled.

The defendant Bell offered no testimony. The defendant Litteral offered testimony tending to show that he is of such low mentality that he is incapable of distinguishing right from wrong. This evidence was sharply controverted by testimony offered by the State. There was a verdict of guilty of rape as charged in the bill of indictment as to each defendant. Judgment of death was pronounced as to each and defendants appealed.

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

Trivette, Holshouser & Mitchell and Hayes & Hayes for defendant Bell.

Fred S. Hutchins for defendant Litteral.

BARNHILL, J. The defendants advance no argument and cite no authority to sustain their contention that the court below was without jurisdiction. The defendants, it is true, were first held by the Federal authorities on the charge of kidnapping. It may be that so long as they were in the custody of Federal officials the State was powerless to proceed. Even so, there is no provision of law, so far as we can ascertain, which denied the district judge the right to surrender the custody of the defendants to the State authorities for trial in the State court. It was a matter of comity and courtesy existing between the courts of the two jurisdictions and rested in the sound discretion of the district judge.

The State court, having obtained custody, of course had jurisdiction to proceed. *S. v. Harrison,* 184 N. C., 762, 114 S. E., 830; *S. v. Davis,* 223 N. C., 54, 25 S. E. (2d), 164; *S. v. Inman,* 224 N. C., 531, 31 S. E. (2d), 641; 14 A. J., 435.

Likewise the contention that the absence of women on the jury panel constitutes a fatal defect in the proceeding is without merit. The constitutional amendment adopted in 1946 merely makes women eligible for jury service. Before it becomes of practical application it needs must be implemented by legislation prescribing qualifications and manner of selection of women for jury service. See Chap. 1007, Session Laws, 1947. The panel was drawn and summoned and the grand jury was selected and impaneled before the effective date of the amendment and the bill was returned the day thereafter. Furthermore, so far as the record discloses the petit jury was selected without the use of any of the twenty-eight peremptory challenges available to defendants. Thus they obtained a jury acceptable to them. *S. v. Koritz, post,* 552.

The exception is without merit for the further reason the defendants are not of the same class or sex as those claimed to have been wrongfully excluded. Hence no discrimination is made to appear. *S. v. Sims,* 213 N. C., 590, 197 S. E., 176; *McKinney v. Wyoming,* 30 Pac., 293, 16 L. R. A., 710; *U. S. v. Chaplin,* 54 Fed. Supp., 682.

Ballard v. U. S., 67 S. Ct., 261 (dec. Dec. 9, 1946), cited and relied on by defendants, discusses the method of selecting Federal petit and grand juries in States in which women are eligible for jury service. It is not controlling here.

Prosecutrix testified that she was kept from her home all night, maltreated, misused, criminally assaulted, left alone and in distress in the nighttime in a corn field in Tennessee. Her testimony was challenged and its credibility put at issue by the pleas of not guilty and by extended cross-examination. Hence the testimony of her mother that prosecutrix

did not return home that night and she, the witness, so reported to the officers and the radio station was competent in support of her testimony. *S. v. Brabham,* 108 N. C., 793; *S. v. Bethea,* 186 N. C., 22, 118 S. E., 800; *S. v. Brodie,* 190 N. C., 554, 130 S. E., 205; *S. v. Scoggins,* 225 N. C., 71; *S. v. Walker,* 226 N. C., 458.

To like effect was the testimony of the witnesses from Tennessee who rendered her assistance, fed her, and helped her return home. Her call for help and exclamation, "Oh, God, will somebody help me," was a spontaneous utterance prompted by and tending to show her need of help which was a result of the wicked acts of those who had kidnapped her. This testimony tends to complete the picture of what happened that night. Exception thereto cannot be sustained. *S. v. Hawkins,* 214 N. C., 326, 199 S. E., 284, and cases cited; *S. v. Draughon,* 151 N. C., 667, 65 S. E., 913.

The prosecutrix also made a statement to the officers which was reduced to writing and signed by her. Although she, while on the stand, did not refer to this writing, there was other evidence tending to identify it as her written statement. The court admitted it as corroboratory testimony and was careful to instruct the jury fully as to the nature of the testimony and the manner in which it should be considered. It was competent for the purpose for which it was offered and was properly admitted.

It may be that there are some parts of this written statement which do not tend to corroborate the witness. Even so, the defendants made no motion to strike or to exclude such parts of the statement as might not be competent for that purpose. They were content to enter a general objection to the statement as a whole. This did not require the presiding judge to sift the writing and eliminate therefrom any part thereof which in his opinion might not tend to corroborate. If the defendants objected to the statement in part and not as a whole they should have so indicated by proper motion or exception. *S. v. English,* 164 N. C., 497, 80 S. E., 72; *S. v. Wilson,* 176 N. C., 751, 97 S. E., 496; *S. v. Shepherd,* 220 N. C., 377, 17 S. E. (2d), 469; *S. v. Britt,* 225 N. C., 364.

One Reavis, witness for the State, noticed the two defendants about 5:00 or 5:30 of the afternoon preceding the assault, near the cab station. They were on a 1940 Ford coach. He saw them again about 10:30 that night. He noted on his cab book a description of the automobile and the number of its license plate. On the stand he testified concerning the facts disclosed by this memorandum. Next day the officers investigating the crime found the license plate in a stove pipe in the loft of a barn at defendant Bell's home. They made a memorandum thereof. That these memoranda were competent as tending to corroborate these witnesses would seem to be too clear to require discussion. Stansbury, N. C. Evidence, Sec. 51, p. 81; *S. v. Scoggins, supra; S. v. Bethea, supra.*

The defendant Litteral was first apprehended. On 30 August he signed a statement in the nature of a confession. This statement was offered and admitted in evidence as against him only without objection.

Thereafter, about midnight, 2 September, officers apprehended and arrested Bell at his home. He made a statement which was reduced to writing and signed by him. When this writing was identified by one of the witnesses and offered in evidence Bell objected. Thereupon, the court, of its own motion, had the jury retire and offered this defendant an opportunity to challenge the voluntariness on *voir dire*. Upon the close of the *voir dire* the court overruled the objection, had the jury return, and admitted the statement in evidence. Exception thereto cannot be sustained.

While it is the better practice for a judge on a *voir dire* respecting an alleged confession to make his finding as to the voluntariness thereof and enter it in the record, a failure so to do is not fatal. Voluntariness is the test of admissibility, and this is for the judge to decide. His ruling that the evidence was competent of necessity was bottomed on the conclusion the confession was voluntary. *S. v. Hawkins, supra.*

There is nothing in this record upon which a contrary conclusion could be based. Confessions, nothing else appearing, are presumed to be voluntary. *S. v. Bennett,* 226 N. C., 82; *S. v. Wise,* 225 N. C., 746; *S. v. Mays,* 225 N. C., 486; *S. v. Grass,* 223 N. C., 31, 25 S. E. (2d), 193; *S. v. Wagstaff,* 219 N. C., 15, 12 S. E. (2d), 657; *S. v. Hudson,* 218 N. C., 219, 10 S. E. (2d), 730; *S. v. Murray,* 216 N. C., 681, 6 S. E. (2d), 513. They are not rendered incompetent by reason of the fact the defendant was at the time under arrest or in jail or in the presence of armed officers. *S. v. Thompson,* 224 N. C., 661, 32 S. E. (2d), 24; *S. v. Wagstaff, supra; S. v. Richardson,* 216 N. C., 304, 4 S. E. (2d), 852; *S. v. Murray, supra; S. v. Smith,* 213 N. C., 299, 195 S. E., 819; *S. v. Exum,* 213 N. C., 16, 195 S. E., 7; *S. v. Caldwell,* 212 N. C., 484, 193 S. E., 716; *S. v. Stefanoff,* 206 N. C., 443, 174 S. E., 411; *S. v. Rodman,* 188 N. C., 720, 125 S. E., 486; *S. v. Newsome,* 195 N. C., 552, 143 S. E., 187.

The defendant Litteral tendered Dr. Kelly, an alienist and teacher of neuropsychiatry, as a witness in his behalf. This witness testified that the defendant, in his opinion, is mentally incapable of distinguishing right from wrong. He based that opinion in part on information received from Litteral during a two-hour conference with him. The court permitted the solicitor to cross-examine in respect to statements made by Litteral for the purpose of testing the soundness of and impeaching the conclusion made by the witness. This evidence was not incompetent by reason of the physician-patient relationship. G. S., 8-53; *Smith v. Lumber Co.,* 147 N. C., 62; *S. v. Newsome, supra;* Stansbury, N. C. Evidence, Sec. 63, p. 110. Furthermore, when the defendant offered the

doctor as a witness he waived the confidential relationship, if any existed, and opened the door for cross-examination concerning all matters about which the witness had testified. *Jones v. Marble Co.*, 137 N. C., 237.

Neither was it incompetent for the reason it involved former conduct of the defendant and tended to show a criminal record. The doctor gave his opinion as to the mental capacity of the defendant. The solicitor had a right to inquire into the basis of that opinion. The cross-examination was confined to that question. That it incidentally developed facts concerning the defendant's bad record is a risk he took when he tendered the witness for examination-in-chief. *Milling Co. v. Highway Comm.*, 190 N. C., 692, 130 S. E., 724; *S. v. Beal*, 199 N. C., 278 (298), 154 S. E., 604; *S. v. Cox*, 201 N. C., 357, 160 S. E., 358; *S. v. Nelson*, 200 N. C., 69, 156 S. E., 154; *S. v. Ray*, 212 N. C., 725, 194 S. E., 482; *Bank v. Motor Co.*, 216 N. C., 432, 5 S. E. (2d), 318; *Foxman v. Hanes*, 218 N. C., 722, 12 S. E. (2d), 258; *S. v. Shepherd, supra.*

It is not amiss to note in this connection that the intelligent manner in which this defendant answered the questions of the witness and detailed occurrences in his life from childhood gives reason to understand why the jury accepted the testimony of the State's witnesses as to his sanity rather than that of the alienist and demonstrates the justice of the rule which permits the line of cross-examination conducted by the solicitor.

There are a number of exceptions to the charge of the court. We have examined each one of them with care without regard to whether they were brought forward and discussed in the brief. No one of them points to cause for disturbing the verdict.

The court correctly charged the law of the case. It was not required to give all the contentions. It was under the duty only to state them as fairly for the one side as for the other. *S. v. Colson*, 222 N. C., 28, 21 S. E. (2d), 808; *Trust Co. v. Ins. Co.*, 204 N. C., 282, 167 S. E., 854; *Cab Co. v. Sanders*, 223 N. C., 626, 27 S. E. (2d), 631; *S. v. Friddle*, 223 N. C., 258, 25 S. E. (2d), 751.

Its statement that the jury in arriving at a verdict must be governed by their recollection of the testimony is in accord with the authorities. *S. v. Cameron*, 223 N. C., 464, 27 S. E. (2d), 84; *S. v. Harris*, 213 N. C., 648, 197 S. E., 156.

The jury came into court to report agreement and returned a verdict as to defendant Litteral of guilty as charged in the bill of indictment. As they were about to return their verdict as to defendant Bell the court interrupted them, informed them that it could not accept the verdicts tendered and instructed them that they should spell out the verdicts which should be: guilty of rape as charged in the bill of indictment, or, guilty of assault with intent to commit rape, or, not guilty. The jury shortly thereafter returned the verdicts which appear of record. The defendant Bell excepts. The assignment of error bottomed on this excep-

tion is untenable. *S. v. Wilson,* 218 N. C., 556, 11 S. E. (2d), 567; *S. v. Perry,* 225 N. C., 174; *S. v. Bishop,* 73 N. C., 44; *S. v. Brown,* 204 N. C., 392, 168 S. E., 532; *S. v. Noland,* 204 N. C., 329, 168 S. E., 412; *S. v. Godwin,* 138 N. C., 582.

After a careful examination of all the exceptions in the record we are persuaded the defendants were accorded a fair trial, free of prejudicial error. Hence the judgments must be affirmed as to both defendants.

No error.

STATE v. WALL C. EWING.

(Filed 5 June, 1947.)

1. Criminal Law § 52a—

On motion to nonsuit only the evidence favorable to the State will be considered.

2. Criminal Law § 28—

In order to sustain conviction, circumstantial evidence, in the same manner as direct proof, must be sufficient to convince the jury of the fact of guilt beyond a reasonable doubt, and statements that circumstantial evidence must "exclude a rational doubt" or "exclude every rational hypothesis of innocence" are merely converse statements of the general rule as to the *quantum* of proof required, and do not impose upon the State, when relying upon circumstantial evidence, any greater intensity of proof.

3. Criminal Law § 52a—

Circumstantial evidence which raises a reasonable inference of defendant's guilt is sufficient to be submitted to the jury, it being for the jury to say whether it convinces them of the fact of guilt beyond a reasonable doubt.

4. Homicide § 25—Evidence held sufficient to be submitted to the jury and to sustain conviction of manslaughter.

The evidence tended to show that over a period of years defendant habitually and repeatedly threatened, cursed and brutally assaulted his wife, and on occasions threw her bodily to the ground, and that defendant was alone with her when she was found on the floor of her bedroom in an unconscious condition suffering from many contusions and bruises. There was expert opinion evidence that she died as a result of hemorrhage from a blow on the head. There was testimony that this injury might have resulted from a fall. *Held:* The evidence was sufficient to overrule defendant's motion to nonsuit and to sustain his conviction of manslaughter.

DEFENDANT'S appeal from *Parker, J.,* at August-September Term, 1946, of CUMBERLAND.

The defendant was tried upon an indictment charging him with the murder of his wife, Douglas Southerland Ewing. The verdict was, "Guilty of manslaughter," and the judgment imprisonment in the State's Prison for not less than 18 nor more than 20 years, to be worked upon the public roads.

Since the only question presented on appeal is whether any reasonable inferences of defendant's guilt could be drawn from the facts in evidence, these are summarized as testified to by the witnesses. About 60 witnesses testified for the State and an equal number for the defendant. Only the more pertinent facts are here related.

Evidence for the defendant was mainly directed toward his condition of confirmed inebriety as bearing on his responsibility for crime, or the degrees thereof. Evidence for the State was directed toward the facts tending to establish the crime and defendant's connection with it.

A large number of the State's witnesses were close neighbors of Wall Ewing and his wife, Douglas Southerland Ewing, in the City of Fayetteville and gave eyewitness testimony about occurrences in and about the Ewing home for a period from two and one-half to three years prior to the death of Mrs. Ewing. The defendant is described as a man of from 235 to 250 pounds weight and his wife as a woman of 97 to 103 pounds. The evidence discloses that during all this time the defendant maltreated his wife, with mental torture, obscene revilings, and continual beatings and threats to kill. These increased in severity and brutality until near the time of her death, which occurred Wednesday, 13 March, 1946, about one o'clock a.m., in a hospital to which she had been carried after being found lying unconscious on the floor of her bedroom alone with the defendant, and covered with bruises.

On the preceding evening a call came to Miss Kate Southerland, a sister of Mrs. Ewing, to come to the latter's home. The evidence does not disclose the nature of the call or who made it. Miss Southerland, accompanied by a maid, went to the home of defendant's mother, living in Fayetteville, and with her, repaired to the house. The situation there was described by the maid.

Mrs. Douglas Ewing was lying upon the floor of the bedroom unconscious. There was a large bruise behind her left ear, a cut across her forehead, and other bruises upon her arms, shoulders and body. The defendant, the only other occupant of the room, was sleeping in a chair. Miss Southerland and the maid picked up Mrs. Douglas Ewing and placed her on the bed, then left. Ewing awoke before they left.

Soon, Dr. Gainey arrived, who stated on the trial he had been called by Ewing. He stated that he found Mrs. Ewing in an unconscious condition, saw many bruises,—a dozen or more separate bruises—on her shoulders and arms, legs and thighs, one across the forehead and another behind her left ear. She was carried to the hospital.

The nurse in charge testified that Mrs. Ewing had many bruises on her body besides those on the head, some old and some comparatively new. Both thighs were burned in places six to eight inches long. "Part of the burn was in a clear blister which was about two and one-half inches, the wide part of it, in a clear blister and part where the skin was burned off of either thigh."

The defendant came to the hospital, "under the influence of something"; was very boisterous. He spent most of the time in the room with Mrs. Ewing and was occasionally profane. Several times he went to the bed where the unconscious woman lay, slapped her roughly on the side of the face, exclaimed, "Snap out of it, you have been like this before. Snap out of it." This was accompanied with profanity.

While there the defendant told one of the nurses that Mrs. Ewing could have been hurt in an automobile accident "and scrambled through her hair." This was about ten minutes after her death. The nurse replied, "If she was in an automobile accident and got hurt like that it is a wonder you did not get killed," and defendant replied, "Hell, I did get hurt on my legs." But the nurse saw no sign of injury.

Defendant also told another nurse his wife had been hurt in an auto accident which bruised him "just as bad as she was," but during the time defendant was in the hospital he removed his pants and there were no bruises.

Before Mrs. Ewing died the defendant said to another nurse, "Ray, I like to have got her this time," or "I am afraid I got her this time."

The autopsy was performed by Dr. Richard H. Follis. He found that death had been caused by external force, applied behind the left ear, which disrupted the brain tissue and produced an extensive hemorrhage and blood clot, with consequent pressure and deformation of the lobes of the brain. On cross-examination he said it was the same type of force that came from a fall. Dr. Follis stated there were at least thirty bruises upon the woman's body, inflicted while she was alive.

The evidence leading up to this final stage is from testimony of near neighbors who were witnesses to occurrences in and about the Ewing home indicating the continual cruelty of the defendant to his wife, and amorous scenes between defendant and Miss Southerland, the wife's sister, some of the evidence indicating immoral relations between the two.

One witness testified that he had seen Mrs. Ewing creeping around the bushes at their home, hiding from her husband; had heard her screaming, "Wall, don't hit me any more. You are killing me," not once, but a number of times, daytime and nighttime.

Another testified that Mrs. Ewing took refuge in her house, her hair "messed up," had a black eye, was bruised and nervous. Once again she came but was not admitted—was "battered up" again.

Another testified to seeing Ewing striking his wife. Another time they were standing on the porch, and he called her "you God damn s.o.b.," and knocked her off the steps. This witness testified she could hear Mrs. Ewing screaming at night and begging defendant not to hit her any more.

A witness testified he had seen Ewing and Miss Southerland "sliding" in the backyard, and when Mrs. Ewing came out defendant told her to go back in the house. Some time afterward she saw Miss Southerland in Ewing's lap. Defendant had his arm around her and they were kissing. Mrs. Ewing came out and defendant told her to "get the hell back into the house." Another witness heard Mrs. Ewing begging Miss Southerland to leave, saying that she was lying in bed with Wall and breaking up her home.

Another witness, a member of an orchestra playing at the radio station owned or managed by defendant, gave testimony tending to show immoral relations between Ewing and Miss Southerland in the Ewing office.

At one time, testified another witness, she heard Mrs. Ewing begging defendant not to beat her, not to kill her. Mrs. Ewing came to witness' home several times. On one occasion she looked like she had been strapped with something. Witness heard her "hollering" night and day, at intervals of two or three days.

A witness testified that he had seen Mrs. Ewing running from her husband any number of times. At times defendant came out looking for her, using such expressions as "if you don't come back here you G—d— s.o.b., I am going to kill you." He had seen Ewing knock her out of the door and "run her through the neighborhood." He had seen defendant take his wife's head and beat it against the wall, with severe force.

Other witnesses testified to similar occurrences. The evidence disclosed that he had chased her with a shotgun, making continual threats to kill her, that she'd been seen disheveled and bloody after his assaults, and that on one occasion she was so bloody that the blood dripped down to the sidewalk.

A witness testified that he saw Ewing pick up his wife "like a sack" and throw her bodily out of the back door some five feet to the ground, saying, "You stay out there, you s.o.b., I've got no use for you anyway." He had seen the defendant assaulting her, slapping her, pulling her hair, "stomping" her.

On the Sunday preceding the death a witness living near heard Mrs. Ewing pleading with her husband, "Wall, please leave me alone, don't hit me any more, you have about beat me to death now." The defendant said, "You G—d— s.o.b." This same witness heard Mr. Ewing say, on Tuesday evening, about an hour before the ambulance came to take Mrs. Ewing to the hospital, "Get up off this floor, you G—d— s.o.b."

The State introduced evidence of blood on chairs and on the doors of the closet to the bedroom.

Miss Southerland was not present at the trial and her maid testified that she did not know where Miss Southerland was.

This brings the evidence for the State up to the immediate situation at the time of the death, above outlined, in the order of its introduction.

The defendant introduced evidence tending to show that, on account of continued inebriety, a mental condition had supervened, rendering defendant irresponsible for crime, especially with respect to deliberation. The State offered evidence to the contrary.

The defendant, in the manner directed by statute, demurred to the evidence and moved for judgment as of nonsuit. The motion was declined. The jury returned as its verdict, "Guilty of manslaughter." From the ensuing judgment defendant appealed, assigning as error the refusal to grant his motion of nonsuit.

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

James R. Nance and McLean & Stacy for defendant, appellant.

SEAWELL, J. Probably not wishing to risk the result of a new trial, the appellant contents himself with a demurrer to the evidence. A successful issue on that question would be equivalent to acquittal.

In the argument and in the brief, counsel for the appellant point out that the evidence is circumstantial, present the usual arguments against the conclusiveness of evidence of that character, with new angles, it is thought, applicable to the facts of the case. It is contended that the facts presented in evidence do not unerringly point to the *corpus delicti,* nor to the defendant as the guilty person, but leave it to surmise whether the deceased woman came to her death by foul means or by accident, without any criminal contribution by the husband. Stress is put on the statement of Dr. Follis, a State's witness, made on cross-examination, that the external force which inflicted the death injury was "the same type of force that comes from a fall"; and the testimony of Dr. Turner, a witness for the defendant, in answer to a hypothetical question, that the *contre coup* which disrupted the brain tissue on the opposite side of the blow and caused the hemorrhage, in his opinion indicated that deceased was moving at the time she sustained the injury. It is a rule, based upon the nature of demurrer, that in considering its sufficiency we regard only that evidence which is favorable to the State. Passing that, however, we are of opinion that the injection of this theory into the evidence did not leave the question of the cause of the injury as nicely balanced as the defense might desire.

We do not look on the case at bar as affording an occasion for an extended review of cases here, or elsewhere, involving the use of circumstantial evidence as an instrument in the proof of crime.

While, from the very nature of the evidence, no two cases can be found identical in fact pattern, we suggest reference to *S. v. Wilcox,* 132 N. C., 1120, 44 S. E., 625; *S. v. Harrison,* 145 N. C., 408, 59 S. E., 867; *S. v. Lawrence,* 196 N. C., 562, 146 S. E., 395,—each a *cause celebre* in our legal history,—in which may be found, we think, an answer to the challenge of uncertainty now made and usually made against this type of evidence, and an explanation of expressions intended to be helpful in its analysis and consideration. To these may be added *S. v. Brackville,* 106 N. C., 701, 11 S. E., 517; *S. v. Melton,* 187 N. C., 481, 483, 122 S. E., 17; and many other cases of similar import. It was not the purpose of these cases in any of their expressions to alter or affect the existing rule as to the intensity of proof required to convict. *S. v. Shook,* 224 N. C., 728, 32 S. E. (2d), 329; *S. v. Crane,* 110 N. C., 530, 15 S. E., 231; *S. v. Flemming,* 130 N. C., 688, 41 S. E., 549; *S. v. Wilcox, supra; S. v. Adams,* 138 N. C., 688, 50 S. E., 765; *S. v. Willoughby,* 180 N. C., 676, 103 S. E., 903. That rule is, and has been from time almost immemorial, that to justify the conviction the jury must be convinced beyond a reasonable doubt of the guilt of the accused, and it applies no matter what mode of proof is involved. The angle of approach and review of circumstantial evidence is necessarily somewhat different. Nevertheless, statements to the effect that the evidence should "exclude a rational doubt as to the prisoner's guilt" (*S. v. Wilcox, supra*), or "exclude every rational hypothesis of innocence" (*S. v. Melton, supra; S. v. Matthews,* 162 N. C., 542, 548, 77 S. E., 302; *S. v. Newton,* 207 N. C., 323, 327, 177 N. C., 184; *S. v. Stiwinter,* 211 N. C., 278, 279, 189 S. E., 868) are simply converse statements of the rule of reasonable doubt, universally applied, and do not handicap circumstantial evidence as an instrument of proof with the necessity of doing more. When reasonable inferences may be drawn from them, pointing to defendant's guilt, it is a matter for the jury to decide whether the facts taken singly or in combination produce in their minds the requisite moral conviction beyond a reasonable doubt. *S. v. Matthews, supra; S. v. Gardner,* 226 N. C., 310, 311.

The same evidence that pointed to the guilt of the defendant was ample to establish the *corpus delicti.* It disclosed motive, often expressed intent, a hatred and brutality hardly equaled in the annals of this Court, and as far as the evidence goes, exclusive opportunity. Defendant's statement at the hospital in the presence of the dying woman, "Ray, I am afraid I got her this time," is a *multum in parvo* expression significant as to past occurrences and the present authorship of her lethal injury.

It is the duty of the Court to analyze and apply the evidence in the cold light of reason and logic untouched by any resentment to which our common humanity is subject. Looking at the evidence as impersonally and objectively as the duty demands, we find it ample to sustain the conviction. Appellant no doubt has cause to thank the able defense of his counsel and the mercy of the jury that his present plight is no worse. The demurrer to the evidence was properly overruled. We find

No error.

BEN R. LOWE AND WIFE, MARNIE LOWE, v. COOPER A. HALL.

(Filed 5 June, 1947.)

1. Specific Performance § 3—

In an action for specific performance by vendor, the vendee may not ask for rescission on the ground of fraud and at the same time claim damages for breach of warranty.

2. Same—

The purchaser contended that he accepted deed upon fraudulent representations of good title whereas conveyance included a particular strip of land to which vendor did not have good title. Vendor contended that the conveyance did not include said strip. There was evidence that the purchaser, an attorney, had theretofore investigated the title and had accepted fees for such services and had had opportunity to re-examine title prior to delivery of deed which he accepted. *Held:* The issue of fraud was properly submitted to the jury, and the purchaser's motion to nonsuit in the vendor's action for specific performance was properly overruled.

3. Damages § 11—

A witness may not give an opinion as to the amount of damages suffered by plaintiff, the ascertainment of damages being the province of the jury, and an instruction upon such testimony upon the issue of damages is perforce erroneous.

DEFENDANT'S appeal from *Olive, Special Judge,* at January Civil Term, 1947, of ALAMANCE.

Plaintiff brought this action for specific performance of a contract for the sale of real estate and the performance by the purchaser of certain obligations to cancel mortgage liens upon the property of plaintiffs, and for damages caused by the nonperformance of the contract.

The complaint alleges that the real estate, subject of the contract, was a part of a development in or near the City of Burlington, and consisted of a house, workshop, and a number of lots in a subdivision referring to the map. It was sold at public auction and defendant became the highest bidder at the price of $14,775, causing his name to be signed to a "sales

ticket," or memorandum of the agreement, and the purchase was confirmed by the plaintiff.

Plaintiff then had a warranty deed to the property prepared somewhere about 4 June, 1946, and delivered it to defendant. The defendant accepted the deed, made a cash payment of $925. The defendant took possession of the property, collected the rents therefrom, made changes in the dwelling house, had the insurance transferred to him, and generally exercised dominion and ownership over the property.

It is further alleged that there were encumbrances on the property, which also covered other property of plaintiff, consisting of three deeds of trust, listed in the complaint, securing a total of $13,000 which defendant agreed to pay out of the purchase price and cancel of record. The complaint alleges that when plaintiff delivered the deed the defendant told him he had acquired all indebtedness secured by these mortgages.

The complaint sets up an itemized statement of a settlement alleged to have been made between plaintiff and defendant, in debit and credit form, which defendant tendered to plaintiff and plaintiff accepted.

The statement credits the purchase price of the property, $14,775, charging against it the three notes and deeds of trust mentioned, rent of house for one month after Hall took over, $420 rent of apartment for Lowe's mother, and two per cent discount on purchase price for cash settlement, $30 rent of shop by Lowe, $40 legal fees to Hall, $925 cash payment, which, adjusted by some other small items, left due to Lowe $163, which was paid on the settlement.

It is alleged that Hall kept the deed until 22 July, 1946, when he mailed it to plaintiff, and plaintiff has been unable to redeliver the deed because of Hall's refusal to receive it. That Hall demanded a reduction of $2,500 in the purchase price. Hall has refused to cancel the deeds of trust as agreed. The plaintiff alleges that he has been damaged thereby in the sum of $5,000.

The defendant, in his answer, admits the purchase of the property at the auction at the purchase price named, the signing of the contract, the acceptance of the deed, the purported settlement leaving a balance due Lowe of $163, and that the encumbrances mentioned in the complaint were not canceled. He sets up as a defense that the sale was conditioned by the auctioneer upon the ability of Lowe to give a good title; that the title was not good, in that included in the property sold to him there was some to which Lowe had no title, and that there were upon the property laborers' and materialmen's liens in a substantial amount. He further alleges that the purchase of the property, the signing of the deed, the purported settlement, were all brought about through the false and fraudulent representation of the plaintiff that he had a clear and unencumbered title to the property conveyed, whereas, there was included in it

certain property known as the Scott Cates lot to which plaintiff had no title.

On the trial the plaintiff introduced the allegations of the complaint and admissions in the answer, and proceeded with testimony.

The plaintiff testified in support of the allegation in his complaint in the same tenor as above set out.

Plaintiff testified that after the sale was confirmed by him he had a deed prepared, signed by himself and wife, acknowledged before a notary, and, on 5 June, 1946, delivered it to Mr. Hall. They settled up for everything owed by either party to the other, leaving a balance due plaintiff of $163 which defendant paid him in cash, and out of which he paid defendant $150 for straightening up the title. That Hall knew the condition of the title to the land because he had paid him theretofore $300 to look it up.

Plaintiff paid Hall $150 to get a deed for a "little undeveloped piece of property" next to the house, the Scott Cates lot. Hall had the deed at the time with about 30 names on it—all but one of the heirs. He was to draw the papers so that Lowe might go to New Jersey to get the last heir to sign. This was six months before the sale. Plaintiff testified that he paid Hall $300 to look up the title—to protect himself—at the time of the loans, and Hall reported to him it was good.

Witness stated that he had had some work done on the apartment house, shop building and garage, all of which had not been paid for at the time of the delivery of the deed, but all had been paid for some time after the sale. One bill, Mr. Harris' bill, had not yet been paid. That material did not go into the house Cooper Hall bought, "but he put a lien on everything I had." No liens had been filed when the deed was delivered.

"I told Mr. Hall the Scott Cates property came to a point of one foot on Queen Street and spanned out to 25 feet to the back of the property he bought. It was not across the Cooper Hall lot, it was on one side. The Scott Cates line was the Hall line."

"Mr. Hall knew the location of the Scott Cates lot when he bought the property—all about it, when he lent the money on the property—he had the deed in his hand, looking and reading it off and looking at the piece of property."

Mr. Hall now has the deed from the heirs to the Scott Cates lot. Mr. Hall prepared the deed for him to take to New Jersey for the last heir to sign and reported the title was all right.

Geddie Fields, the auctioneer who sold the Lowe property, testified for plaintiff that the property sold to Hall consisted of an apartment house, woodworking shop and several lots. Prior to the sale he announced that the sale was subject to passing the title by "the most exacting attorney." There was other property of Lowe sold at the auction—in all over

$42,000. Some time in July, 1946, Mr. Lowe brought witness a deed Mr. Hall had sent back and said Hall had decided not to take the property, showing a letter to that effect. Witness loaned Lowe money, disbursing it in payment of bills for labor and material on Lowe's property—because Hall said he would not take the property because of outstanding bills. Fields carried the paid bills to Hall, along with the deed. The paid bills represented every dime as far as witness knew which might be against the property. He told Hall that Lowe was looking to him to deliver the deed and he was doing it now. Hall said he was not going to take the property unless Lowe knocked off $2,500. He raised no objection as to the title. At this time there were no liens filed against the property.

On the question of damages this witness testified that he was familiar with the real estate market in the area, and had an opinion satisfactory to himself as to the damage caused Lowe by the failure to cancel the mortgages and accept the title. It was placed at $15,000. It was explained that he was unable, because of the situation in which it left the remaining land sold at the auction, also included in the uncanceled deeds of trust, to deliver deeds to any of the purchasers. That a second sale always affects the price of property. He attempted such a sale—not including that purchased by Hall—and could get no bids.

Plaintiff introduced documents as exhibits, including the deed of himself and wife to Hall, the statement of settlement prepared by Hall, and the instruments securing indebtedness which it was alleged Hall promised to pay and cancel, showing them to be still outstanding. The deeds in trust covered the Hall purchases as well as additional property of plaintiff.

The defendant testified that after the purchase of the property he wrote to Mr. Phipps, Lowe's attorney, that he wanted the deed delivered 3 June as he would pay cash, and it would be necessary to cancel a mortgage on the remaining property before he left. Mr. Lowe came in the office on 7 June. He told Lowe that when he went over to cancel the bank mortgage a man told him he expected he'd "get messed up" about the title because the Cates property was included in what he bought. Lowe assured him it was not, and on the strength of that "we proceeded to settlement of our matters as indicated here on that slip which has been introduced." Defendant denied paying the $163 balance.

Defendant denied representing Lowe in the Scott Cates matter except to get "the minor's interest." He testified that Geddie Fields came to see him about the matter and he asked Fields, "Well, have you paid all of these labor and material claims?" And Fields told him he had, and wanted to show him the papers, and defendant said, "No, I am not interested any longer. I have been completely worn out trying to get a title, and I'm through with it." Defendant denied saying anything to Fields about knocking off $2,500 from the price.

Defendant said the deed containing the names of all the heirs to the Scott Cates property was received by him the latter part of June and is now in his office. It was not put on record because, "This man, Mr. Black, came into my office and told me about these liens and when he did, why, I stopped and folded my hands and called for Mr. Lowe." Defendant filed the lien for Harris and "filed it on everything Ben Lowe had out there," because it was impossible to work out a description.

Defendant testified that he had taken over the property when Lowe gave him the deed, and collected the rents. That he collected the rents, and credited them on the mortgages. They have not been actually credited on the papers but a record has been kept in his office. Defendant stated that he was in possession of the premises, not as owner, but under the mortgages.

Mrs. Hall corroborated defendant in saying that Mr. Hall said nothing to plaintiff in the conversation which she heard about reducing the purchase price by $2,500. She thinks she was present every time when a conversation of that sort could have occurred. Defendant introduced copy of the lien of Harris Lumber Company for materials furnished Lowe, on Lowe's property, including that purchased by Hall.

In rebuttal plaintiff introduced various deeds purporting to convey the Scott Cates property, as to all heirs.

The defendant demurred to the evidence in the manner directed by the statute and moved for judgment of nonsuit, which motion was denied, and defendant excepted.

The following issues were submitted and answered as indicated:

"1. Was a warranty deed for the property, described in the complaint as bid off by the defendant, signed, sealed, acknowledged, and delivered by the plaintiff B. R. Lowe and his wife to the defendant as alleged in the complaint?

"Answer: Yes.

"2. Was the delivery of the deed to the defendant procured by false and fraudulent representations of the plaintiff B. R. Lowe as alleged in the Answer?

"Answer: No.

"3. What damages, if any, is the plaintiff B. R. Lowe entitled to recover of the defendant?

"Answer: $2,000.00.

"4. What amount, if any, is the defendant entitled to recover of the plaintiff B. R. Lowe on his counterclaim?

"Answer: ....."

Defendant moved to set aside the verdict for errors committed on the trial, which motion was overruled, and defendant excepted. To the ensuing judgment defendant objected and excepted; and thereupon appealed, assigning errors.

L. J. Phipps and Bonner D. Sawyer for plaintiff, appellee.
Louis C. Allen and Barnie P. Jones for defendant, appellant.

SEAWELL, J. Numerous objections were made to the instructions given by the court to the jury, all of which have been given careful attention. We do not find in them prejudicial error and do not feel that extended discussion is demanded. Reference to the theory on which the case was tried—and perhaps the only possible theory on which it could be tried under the pleadings—will clear up some of these objections.

The defendant's defense is practically one of confession and avoidance. He accepted plaintiff's deed and effected a settlement with him, went into possession of the property as owner, and collected rents—rents from Lowe himself and his mother, and assumed complete dominion. All this, he alleges, was done under the fraudulent representations of the plaintiff with respect to the title of the property, particularly with regard to the Scott Cates strip or wedge, which plaintiff represented as located outside the purchased property, whereas, the defendant contends, it is located within it. On this he asked for a rescission of the whole transaction and his money back. The plea and demand for rescission was inconsistent with assertion of a claim for breach of warranty, *Troitino v. Goodman*, 225 N. C., 406, 415, 35 S. E. (2d), 277. Counsel stakes the issue on fraud.

The matter in the most favorable light for the defendant, was a jury question, and the jury declined to accept the imputation of fraud. Considering the admissions of the defendant as to his acquaintance with the Scott Cates situation, and his acceptance of fees on several occasions to investigate the title to the property, and the opportunity afforded him to re-examine it, it is a question whether his defense might not be as weak in law as the jury found it to be in fact.

However, the verdict on the *quantum* of damages cannot be sustained on the evidence and instructions in the record. There was error in the admission of the evidence of Fields giving his opinion of the amount of damages, since that was the province of the jury. The instructions based upon it were, therefore, affected with the same objection.

There must be a new trial on the issue as to damages; and to that end the case is remanded. In other respects we find no error, and the judgment is affirmed.

Partial new trial.

JOHN M. COBLE, JR., AND EDNA GLENN COBLE, HIS WIFE, AND MARTHA COBLE ATWATER AND LUTHER E. ATWATER, JR., HER HUSBAND, PETITIONERS, v. SARAH GLENN COBLE, WIDOW OF C. W. COBLE, DECEASED, AND THE PEOPLE'S NATIONAL BANK OF CHESTER, SOUTH CAROLINA, EXECUTOR OF HIS ESTATE, AND RICHARD COBLE, HIS INFANT SON, AND SARAH GLENN COBLE, HIS GENERAL GUARDIAN, AND BETTY BACON McKOY AND JAMES H. McKOY, JR., MINORS, AND THE WILMINGTON SAVINGS & TRUST COMPANY, THEIR GENERAL GUARDIAN, RESPONDENTS.

(Filed 5 June, 1947.)

1. Dower § 7—

Where a widow dissents and renounces provision made for her expressly in lieu of dower in her husband's will, she is entitled to dower in the same manner as though her husband had died intestate.

2. Courts § 14—

The laws of the state of the *situs* determine what estate a widow who has dissented from her husband's will has in his property; and the laws of the state in which the husband died domiciled and in which the will was probated govern her dissent.

3. Same—

Where a widow accepts provision made for her expressly in lieu of dower in her husband's will, she loses dower; but if she validly dissents in the state in which the will is probated, she renounces the will *in toto* and cannot take testamentary benefits under it anywhere.

4. Wills § 40—

Testator died in South Carolina and his will was duly probated there. His widow filed a dissent valid under the laws of that State. *Held:* She is entitled to her dower rights in lands owned by testator within North Carolina upon the filing of an authenticated copy of the will as proven and probated, without also dissenting here.

5. Wills § 15b—

The will of a nonresident recorded here, G. S., 31-27, should include as a muniment of title, the proceedings in dissent as same appear of record in the probate court in the county in which the will was probated, and when such dissent proceedings have not been included in the papers recorded they may be filed and recorded *nunc pro tunc* when the rights of third parties have not intervened.

APPEAL by C. C. Cates, Jr., as guardian *ad litem* of minor defendant, Richard Coble, from *Olive, Special Judge,* at January Civil Term, 1947, of ALAMANCE.

Special proceeding to sell land for partition in which right of dower in an undivided one-fourth interest is called into question by guardian *ad litem* of a minor heir.

The parties agree that Clarence W. Coble, who owned one-fourth undivided interest of, in and to the lands in question, died on 2 November, 1943, resident of the State of South Carolina, survived by his wife, Sarah Glenn Coble, and one child, Richard Lyles Coble, and leaving a last will and testament in which he willed and bequeathed (1) four thousand dollars to his wife "to be hers absolutely and forever . . . in lieu of dower," it not being his "intention that she is to receive any other portion" of his said estate whatsoever, and (2) the rest and residue of his property, of any and every kind, to Peoples National Bank of Chester, Chester, South Carolina, for and during the minority of his son Richard Lyles Coble, in trust solely for the uses and purposes set forth. The bank was named also as executor of his will. The will of Clarence W. Coble was dated 24 October, 1942, and signed, sealed, published and declared by him as and for his last will and testament in the presence of three witnesses who at his request and in his presence and in the presence of each other affixed their names thereto as subscribing witnesses. It was duly probated upon the oath of one subscribing witness according to the laws of South Carolina in court of probate of Richland County, South Carolina, on 23 November, 1943, and letters testamentary were issued to Peoples National Bank of Chester, the named executor.

Thereafter, on 20 March, 1944, and within the time prescribed by the State of South Carolina, Sarah Glenn Coble, the widow of Clarence W. Coble, duly filed her dissent to the said will in said Richland County, State of South Carolina, pursuant to and in compliance and in accordance with the laws of the State of South Carolina, rejecting and renouncing the said legacy of four thousand dollars, and electing to take such interest in the estate of her late husband as she would have taken had there been no will. A dissent so filed is valid under the laws of the State of South Carolina.

A transcript of the will of Clarence W. Coble, together with its probate, as authenticated and certified from the Probate Court of Richland County, South Carolina, was under date 11 September, 1946, duly filed in the office of the Clerk of Superior Court of Alamance County, North Carolina, on 13 September, 1946, and recorded in the Will Records. But the transcript of the will and probate, so filed and recorded in Alamance County, North Carolina, did not contain a copy of the dissent and renunciation of Sarah Glenn Coble.

However, on 28 January, 1947, a copy of the said dissent and renunciation as filed with the said bank as executor and in the Probate Court of Richland County, South Carolina, proven before a notary public upon oath of the subscribing witness thereto was filed in the Superior Court of Alamance County, North Carolina. Also on same date, and within six months from the date of filing the authenticated copy of the will in Alamance County, North Carolina, the attorney for the widow filed a

paper writing styled "Widow's Dissent" in manner prescribed by the North Carolina statute, G. S., 30-1, except that no written authority to him from her was filed.

When the cause came on for hearing in regular term of Superior Court of Alamance County, North Carolina, on 28 January, 1947, upon the agreed statement of facts, the court concluded as pertinent matters of law: That the said dissent of Sarah Glenn Coble "has been duly filed both in South Carolina and North Carolina, as required by the laws of the said respective States, and that she thereupon became entitled to take, hold and receive a dower estate in and to the lands and real properties and interest in land and real properties owned by her husband, C. W. Coble, and located in North Carolina at the time of his death," etc. And, thereupon, and in accordance therewith the court entered judgment.

The respondent, C. C. Cates, Jr., as guardian *ad litem* of Richard Lyles Coble, minor, respondent, appeals therefrom to Supreme Court, and assigns error.

C. C. Cates, Jr., for Richard Lyles Coble, appellant.

Belser & Belser and John W. Crews for Sarah Glenn Coble Sullivan, appellee.

WINBORNE, J. Decision on the challenge to the judgment from which this appeal is taken may fairly turn upon the answer to this question: Where the testator, domiciled in Richland County in the State of South Carolina, makes provision in his will for his wife, expressly in lieu of dower, and, upon the will being duly proven and probated in the probate court of said county and recorded therein, the widow files in the probate court of said county a valid dissent to said will,—thereby rejecting and renouncing the provision so made for her, and electing to take such interest in the estate of the testator as she would take had there been no will, may the widow claim dower in real estate in Alamance County in the State of North Carolina, of which testator died seized, without also dissenting there, upon the filing of an authenticated copy of the will as proven and probated in Richland County, South Carolina? The answer is "Yes."

In this connection, it is the law in the State of South Carolina that the legal right of the wife to dower in the lands of her husband cannot be defeated by his last will and testament, but if, by his will, he makes a provision for his widow, and declares it to be in lieu of dower, she must elect between the two, the provision made in the will and the dower, and cannot take both. See *Bannister v. Bannister,* 37 S. C., 529, 16 S. E., 612; *Gordon v. Stevens,* 11 S. C. Eq. (2 Hill Eq.), 46; 27 Am. Dec., 445; *Bailey v. Boyce,* 23 S. C. Eq. (4 Strobh.), 84; *Hair v. Goldsmith,* 22 S. C., 566; *Callahan v. Robinson,* 30 S. C., 249; 3 L. R. A., 497; *Mat-*

thews v. Clark, 105 S. C., 13, 89 S. E., 471; *Bomar v. Wilkins,* 154 S. C., 64, 151 S. E., 110, 68 A. L. R., 501. See also Anno. 22 A. L. R., 444.

If the widow accepts provision made for her by her husband in his will, declaring that such provision is made in lieu of dower, she by her voluntary act loses dower. *Bomar v. Wilkins, supra.*

But where a widow dissents and renounces the provision made for her by her husband in his will, declaring that such provision is made in lieu of dower, the whole estate is open in so far as she is concerned, and she is let into the enjoyment of all her rights thereto in as ample manner as if her husband had died wholly intestate. 17 Am. Jur., 746, Dower, Sec. 92.

Moreover, while there is conflict of law in this respect, the better reasoned authorities it seems hold that the widow's renunciation in the State of the decedent's domicile of the provisions of his will in her favor is a total renunciation of the will everywhere, and, having renounced it there, she cannot take testamentary benefits under it elsewhere. See Anno. 105 A. L. R., 271, at p. 283, where the cases *Colvin v. Hutchinson* (Mo.), 92 S. W. (2d), 667, 105 A. L. R., 266, and *Jones v. Gerock,* 59 N. C., 190, among other citations, are cited in support.

In the *Colvin case, supra,* it was held that a renunciation in Illinois by the widow of the testator resident in that State, of the provisions of the will in her favor, was effective in Missouri as to land in that State without further renunciation there, and that the widow did not, by her failure to make a new renunciation in Missouri, lose her right to claim her dower interest in the lands in Missouri against the will. *Hyde, C.,* writing in that case for the Supreme Court of Missouri, pertinently states: "Surely it is a poor rule that will not work both ways. We think that the reason of the matter is that, when a man dies owning real estate in several states, leaving a will providing for his wife benefits which under the law she would take in place of dower if she accepted it, his widow's situation is as follows: The will offers her testamentary benefits; each state offers her instead certain estates in the land located therein; but the law of each state governs the kind of an estate she may have there if she renounces the will . . . If she renounces the will, in order to make the choice between different estates any state offers for renunciation, she must do what that state requires or get only what she would receive there upon her failure to make such a choice in the required way. But, when she renounces the will in the state of her residence, where its validity is established by probate, she renounces it *in toto* everywhere, and cannot take testamentary benefits under it anywhere. At least, in the absence of a statute with specific requirements, no filing of the renunciation elsewhere is necessary. Likewise, if she accepts it in the state of her residence and its probate, she is bound by it everywhere and cannot renounce it in some other state. This view is supported by

well-considered authority, and gives effect both to the principle that title to real estate is governed by the laws of the state where it is located and to the principles upon which the doctrine of election is based," citing among other cases *Jones v. Gerock, supra.*

In the case of *Jones v. Gerock, supra,* the will of a decedent, domiciled in Alabama was probated there, and his widow filed dissent there, according to the laws of that State, and afterwards when the will was admitted to probate in Onslow County in this State, the widow also dissented there. This Court held that there can be no question that the widow of one domiciled in another state is entitled to dower in the lands situate in this State, of which he was seized and possessed at time of his death. Moreover, *Pearson, C. J.,* in writing the opinion, had this to say: "If the plaintiff had not entered her dissent in the State of Alabama, but had *taken under the will* the lands devised to her in that State, and had then come here and entered her dissent and claimed dower, we are inclined to the opinion that she would not have been entitled to it, because, having taken *under* the will, she would not be allowed to take against the will here, according to the doctrine established by *Mendenhall v. Mendenhall,* 53 N. C., 287. But, as she dissented there, and has also dissented here, and claims against the will in both States, her acts harmonize, and her right seems to be a very clear one."

Moreover, "in accordance with the general rule that an election once made in one jurisdiction, particularly where made at the domicil, is binding and estops the person so electing from inconsistent conduct in other jurisdictions, the necessity for election under the law of the *situs,* as well as other matters pertaining to election, may be obviated by a previous election or renunciation at the domicil." 11 Amer. Jur., 348, Conflict of Laws, Sec. 58. This principle is in keeping with what is said in the case of *Jones v. Gerock, supra,* and is applicable to factual situation now in hand.

Furthermore, the dissent filed by the widow in the probate court of Richland County in the State of South Carolina, the domicile of the testator, wherein the will is proven and probated, establishes the extent of the effectiveness of the provisions of the will, in so far as the widow is concerned. The dissent became a part of the proceedings in respect to the will. An authenticated copy of the will to be allowed, filed and recorded in Alamance County, North Carolina, under the provisions of G. S., 31-27, pertaining to recording of certified copies of will of non-residents, should include as a muniment of title, the proceedings in dissent as same appear of record in the probate court of Richland County, South Carolina. Such copy duly authenticated may be now made and allowed, filed and recorded in said Alamance County, *nunc pro tunc,* and will relate back to date of filing the authenticated copy of the will in said county, provided no rights of third parties have intervened. *Scott*

v. Lumber Co., 144 N. C., 44, 56 S. E., 548; *Vaught v. Williams*, 177 N. C., 77, 97 S. E., 737.

In the light of the foregoing principles applied to facts in hand in relation to point raised by the appeal, the judgment below is

Affirmed.

STATE v. PHILIP MILTON KORITZ, CAL ROBERSON JONES AND MARGARET DEGRAFFENREID.

(Filed 5 June, 1947.)

1. Jury §§ 2, 3—

In respect of special veniremen summoned to serve as petit jurors, upon the overruling of defendants' challenge to the array on the ground of discrimination against members of the Negro race, defendants still have available challenges to the polls, and where they fail to exhaust their peremptory challenges they may not object to the composition of the jury, their right being not to select but to reject jurors, and it being necessary that the court's action in the matter be hurtful and its effect unavoidable before it will be held to vitiate the trial.

2. Grand Jury § 1—

Where on appeal to the Superior Court defendants are tried on warrants sworn out in a municipal court and not on bills of indictment, the composition of the grand jury could in no way affect them and their objection to the method of selecting grand jurors is irrelevant.

3. Jury §§ 3, 8—

Mere irregularity on the part of the jury commissioners in preparing the jury list, unless obviously, designedly, or intentionally discriminatory, does not vitiate the list or afford a challenge to the array.

4. Jury § 8: Criminal Law § 67c—

The finding of the trial court, when supported by evidence, that no discrimination was intended or resulted from the manner in which the jury list was prepared, is sufficient to support its action overruling a challenge to the array on the ground that the jury list contained a disproportionately small number of Negroes, and such ruling will not be disturbed on appeal in the absence of some pronounced ill consideration.

5. Constitutional Law § 33—

A member of the white race cannot object to the jury list on the ground that it contained a disproportionately small number of Negroes, since he could not be affected by any alleged discrimination against the Negro race.

6. Same—

In the composition of jury lists an absolute numerical ratio between the races is not required, the objective being to get a fair cross-section of community judgment and the action of the jury commissioners in applying

the standard of qualifications prescribed by law will be upheld unless there is evidence of fundamental unfairness which contravenes due process of law.

7. Same—

Our statutory requirements that the jury lists be taken from the names of the taxpayers of the county who are of good moral character and of sufficient intelligence are constitutional and valid.

8. Same—

A defendant does not have the right to be tried by a jury of his own race or to have the representatives of any particular race on the jury, but he is entitled to be tried by a competent jury from which the members of his race have not been excluded intentionally, arbitrarily or systematically.

9. Same—

Our statutes relating to the selection of jurors prescribed limitations applicable equally to all races without discrimination in respect to race, creed or color.

APPEALS by defendants from *Rousseau, J.*, at October Term, 1946, of FORSYTH.

Criminal prosecutions on four separate warrants charging the defendants, Philip Milton Koritz, Cal Roberson Jones, Margaret DeGraffenreid and Betty Keels Williams, severally, with resisting, delaying or obstructing a police officer of the City of Winston-Salem in discharging or attempting to discharge a duty of his office in violation of G. S., 14-223, consolidated and tried together as all of the alleged offenses arise out of the same transaction or the same series of transactions.

The cases were tried originally in the Municipal Court of the City of Winston-Salem and again *de novo* on appeal to the Superior Court of Forsyth County.

When the cases were called and consolidated for trial in the Superior Court, the defendants first interposed a motion to quash the warrants and to discharge the panel of petit jurors because of discrimination against the Negro race in making up the jury list from which the jurors were summoned for the term. Three of the defendants are Negroes; one is a white man. Several days were consumed in hearing this motion, with both sides offering evidence in respect of the matter.

The defendants offered evidence tending to show, according to their contention, that the number of Negroes selected for jury service out of the total number of eligible Negroes in the county was disproportionately small to the number of whites selected in the same manner, and that the use of separate tax lists for whites and Negroes was discriminatory against both races. Out of 23,450 possible eligible white jurors, only 10,367 names appear in the box; and out of 4,900 possible Negro jurors

only 255 names are in the box. The result is discrimination against both races, so the defendants say.

The State, on the other hand, offered evidence tending to show, so it contends, that there was no studied or deliberate discrimination against either race on the part of the jury commissioners, and that the large number of whites as compared with the number of Negroes who were actually selected for jury service was not the result of any prejudice or intentional discrimination against the latter race. Walter A. Mickle, the County-City Tax Collector, and former deputy sheriff who assisted in the actual drawing of juries from 1936 to 1946, says: "I never heard any commissioner discuss whether a man was black or white, that I remember, during the time I was in the office as Chief Deputy, at the drawing of the jury."

After hearing the evidence, the trial court made the following findings:

1. That as the defendants are being tried upon warrants, and not upon bills of indictment, the method of selecting grand juries in Forsyth County is not germane to the present motion.

2. That a fair representation of Negroes was placed in the jury box by the commissioners; and that there was no intentional discrimination in preparing the jury list either in respect of color or religion.

The court thereupon overruled the motion to quash the warrants and the jury panel. Defendants excepted to the findings and rulings. Exceptions Nos. 1 and 2.

Announcement was then made that each defendant would have 6 peremptory challenges, making a total of 24, and that there were only 20 regularly drawn and summoned jurors. The court ordered that 25 talesmen be summoned, not less than 10 of whom should be Negroes. On inquiring of counsel for defendants whether they wished the talesmen drawn from the box or summoned by the sheriff from among the persons qualified to act as jurors in the county, counsel for the defendants, Mr. Avnet, replied: "In the light of our motion, I would not care to indicate; just leave that matter for your Honor." It was agreed that a venire of 25 would be sufficient, but defendants excepted to the order. Exception No. 3.

The jury as finally selected was composed of seven whites and five Negroes. Six were taken from those regularly drawn and summoned for the term, and six from the special venire. The defendants used 23 of their 24 peremptory challenges, one being in respect of a Negro on the special venire. They still had one peremptory challenge left when the jury was completed. The court found that the proportion of Negroes on the jury, as finally selected, was generous to that race. Exception by the defendants. Exception No. 4.

Verdicts: Guilty as to Philip Milton Koritz, Cal Roberson Jones and Margaret DeGraffenreid. Not guilty as to Betty Keels Williams.

Judgments: 12 months on the roads as to Philip Milton Koritz; 10 months on the roads as to Cal Roberson Jones, and 8 months in prison as to Margaret DeGraffenreid.

The defendants appeal, assigning errors.

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

William Reid Dalton, I. Duke Avnet, and Harold Buchman for defendants.

STACY, C. J. The defendants have abandoned all their exceptions, save the first four, which go to the competency of the petit jurors selected to try the consolidated cases. When all is said and done in respect of these exceptions, we are met with the paramount fact that the jury as finally selected was satisfactory to the defendants, and they were not required to take any juror over objection. They announced their contentment with the jury without exhausting all their peremptory challenges. It was composed of 7 white men and 5 Negroes.

In respect of special veniremen summoned to serve as petit jurors, a challenge to the array may be interposed for cause; and, if this be overruled, challenges to the polls are still available. *S. v. Kirksey, ante,* 445; *S. v. Levy,* 187 N. C., 581, 122 S. E., 386. To present an exception on rulings to challenges to the polls, the appellant is required to exhaust his peremptory challenges and then undertake to challenge another juror. *Oliphant v. R. R.,* 171 N. C., 303, 88 S. E., 425. The court's action in the matter must be hurtful and its effect unavoidable before it will be held to vitiate the trial. *S. v. Cockman,* 60 N. C., 484; *S. v. Benton,* 19 N. C., 196.

The trial court was at pains to see that every opportunity was afforded for the selection of a fair and impartial jury. The defendants would be entitled to no more on a new trial, and this they have already had. *S. v. Levy,* 187 N. C., 581, 122 S. E., 386; *S. v. Sultan,* 142 N. C., 569, 54 S. E., 841; *S. v. English,* 164 N. C., 497, 80 S. E., 72; *S. v. Bohanon,* 142 N. C., 695, 55 S. E., 797. Their right is not to select but to reject jurors. Having been tried by twelve jurors who were unobjectionable to them, the defendants have no valid ground to urge that they have been prejudiced by the composition of the jury. *S. v. Pritchett,* 106 N. C., 667, 11 S. E., 357; *S. v. Hensley,* 94 N. C., 1021. "The defendant did not exhaust his peremptory challenges. . . . When such is the case, the objection to a juror who could have been rejected peremptorily is not available." *S. v. Bohanon, supra; Oliphant v. R. R.,* 171 N. C., 303, 88 S. E., 425.

The trial court was obviously correct in holding that the composition of the grand jury could in no way affect the defendants. They were

tried on warrants sworn out in the Municipal Court, and not on bills of indictment returned by the grand jury, as was the case in *S. v. Peoples,* 131 N. C., 784, 42 S. E., 814. No rights of theirs were passed upon by the grand jury. The question is put aside as irrelevant. The case of *Smith v. Texas,* 311 U. S., 128, 85 L. Ed., 84, strongly relied upon by the defendants, dealt with the composition of a grand jury. It is inapplicable here.

The principal point, argued by the defendants, is the manner in which the petit jurors were selected. Six regular jurors who were summoned for the term did serve on the jury, and it is these jurors of which the defendants now complain, albeit they might have been excused with or without cause. It has been held in a number of cases that mere irregularity on the part of the jury commissioners in preparing the jury list, unless obviously, designedly, or intentionally discriminatory, would not vitiate the list or afford a basis for a challenge to the array. *S. v. Daniels,* 134 N. C., 641, 46 S. E., 743; *S. v. Kirksey, ante,* 445. There is a finding on the present record, which is supported by the evidence, that no discrimination was intended or resulted from the manner in which the jury list was prepared. This suffices to sustain the ruling below, in the absence of some pronounced ill consideration. *S. v. Lord,* 225 N. C., 354, 34 S. E. (2d), 205; *S. v. Henderson,* 216 N. C., 99, 3 S. E. (2d), 357; *S. v. Bell,* 212 N. C., 20, 192 S. E., 852; *S. v. Walls,* 211 N. C., 487, 191 S. E., 232; *S. v. Cooper,* 205 N. C., 657, 172 S. E., 199; *Akins v. Texas,* 325 U. S., 398, 89 L. Ed., 1692; *Thomas v. Texas,* 212 U. S., 278, 53 L. Ed., 512.

In no event could the defendant Koritz profit from, or be hurt by, the alleged discrimination against the Negro race, as he is a member of the White race. *S. v. Sims,* 213 N. C., 590, 197 S. E., 176.

Moreover, an absolute numerical ratio or balance between the races is not required, nor even possible perhaps. "Some play must be allowed for the joints of the machine." *M. T. & K. Ry. Co. v. May,* 194 U. S., 267. The problem involves more than mere mathematics or simple arithmetic. Equality can result from disparity in numbers, just as discrimination can result from equality among unequals. Character and intelligence are common to members of both races, with varying degrees of quality, dependent upon the individual, regardless of race. Nor can they be determined or measured by statute. The standard of qualification is prescribed by law. Its application is the place of the rub. The rules of fair play are not difficult to understand. They are only difficult to practice. The end in view is to get a fair cross-section of community judgment. Hence, as local officials are in better position than outsiders to weigh the imponderables, their determination of the matter will be upheld unless too wide of the mark or "unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfair-

ness which is at war with due process." *Akins v. Texas,* 325 U. S., 398, 89 L. Ed., 1692; *Louisville Gas Co. v. Coleman,* 277 U. S., 32.

It is the contention of the defendants, however, that our statutes on the subject contain inherent, constitutional infirmities, in that, the jury list is taken from the names of taxpayers of the county who are of good moral character and of sufficient intelligence. For this position they rely chiefly upon the recent case of *Thiel v. Southern Pacific Co.,* 328 U. S., 217, 90 L. Ed., 1181. The cited case is hardly an authority for the position taken. There, the Supreme Court of the United States was exercising a supervisory power over the administration of justice in the Federal Courts, and was not concerned with any constitutional question. To like effect is the decision in *McNabb v. United States,* 318 U. S., 332, 87 L. Ed., 819.

Nor are the cases of *Norris v. Alabama,* 294 U. S., 587, 79 L. Ed., 1074; *Smith v. Texas,* 311 U. S., 128, 85 L. Ed., 84; *Glasser v. United States,* 315 U. S., 60, 86 L. Ed., 680, and others cited by the defendants, controlling on the instant record. The present case, in its factual situation, is strikingly similar to the one presented in the case of *S. v. Walls, supra,* where a like ruling was upheld, and, on appeal to the Supreme Court of the United States, the decision was left undisturbed, the appeal being dismissed, 302 U. S., 635.

Of course, it is understood that the intentional, arbitrary and systematic exclusion of any portion of the population from jury service, grand or petit, on account of race, color or creed, is at variance with the Constitution and cannot stand. *Akins v. Texas,* 325 U. S., 398, 89 L. Ed., 1692. It is not the right of any party, however, to be tried by a jury of his own race, or to have a representative of any particular race on the jury. It is his right to be tried by a competent jury from which members of his race have not been unlawfully excluded. *Ballard v. United States,* 67 S. C. Rep., 261, 91 L. Ed. (Adv. Op.), 195. "The law not only guarantees the right of trial by jury, but also the right of trial by a proper jury; that is to say, a jury possessing the qualifications contemplated by law." *Hinton v. Hinton,* 196 N. C., 341, 145 S. E., 615.

The broadside challenge to the State's whole method of selecting jurors, regular, special and talesmen, calls for only a passing word. There is no mention of race, color or creed in any of the statutes on the subject, and whatever limitations are to be found therein apply equally to all races. It was said as early as *Strauder v. West Virginia,* 100 U. S., 303, 25 L. Ed., 664, that within constitutional bounds a state may confine the selection of its jurors "to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications." 31 Am. Jur., 594. The defendants boldly assert that they are immune from trial in Forsyth County so long as the present method of selecting

juries obtains therein. The conclusion is a *non sequitur* on the facts as revealed by the record. The challenge is not sustained.

A careful perusal of the record leaves us with the impression that no reversible error has been made to appear in respect of the matters of which the defendants now complain. Hence, the verdict and judgments will be upheld.

No error.

STATE v. LOUISE JAMES (ALIAS MOORE), AND EVELYN CHILDS.

(Filed 5 June, 1947.)

APPEAL by defendants from *Rousseau, J.*, at November Term, 1946, of FORSYTH.

Criminal prosecutions on warrants charging the defendants with malicious injury to property, tried originally in the Municipal Court of the City of Winston-Salem and again *de novo* on appeal to the Superior Court of Forsyth County.

Verdict: Guilty as to both defendants.

Judgment: 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.

William Reid Dalton for defendant.

PER CURIAM. The exceptions relied on here are the same as those presented in the case of *S. v. Koritz, et al., ante,* 552, herewith decided, and are controlled by the rulings in that case.

No error.

STATE v. JOHN HENRY BRUNSON.

(Filed 5 June, 1947.)

APPEAL by defendant from *Rousseau, J.*, at November Term, 1946, of FORSYTH.

Criminal prosecution on warrant charging the defendant, a man over eighteen years of age, with assault upon a female, tried originally in the Municipal Court of the City of Winston-Salem and again *de novo* on appeal to the Superior Court of Forsyth County.

Verdict: Guilty.

Judgment: Fifteen months on the roads.

The defendant appeals, assigning errors.

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

William Reid Dalton for defendant.

PER CURIAM. The exceptions relied on here are the same as those presented in the case of *S. v. Koritz, et al., ante,* 552, herewith decided, and are controlled by the rulings in that case.

No error.

STATE v. ESSIE KING.

(Filed 5 June, 1947.)

APPEAL by defendant from *Rousseau, J.,* at November Term, 1946, of FORSYTH.

Criminal prosecution on warrant charging the defendant with disorderly conduct and disturbing the peace, tried originally in the Municipal Court of the City of Winston-Salem and again *de novo* on appeal to the Superior Court of Forsyth County.

Verdict: Guilty.

Judgment: Thirty days in jail.

The defendant appeals, assigning errors.

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

William Reid Dalton for defendant.

PER CURIAM. The exceptions relied on here are the same as those presented in the case of *S. v. Koritz, et al., ante,* 552, herewith decided.

This record contains an additional circumstance which does not appear in the record of the *Koritz Case,* to wit, in addition to the Negro jurors who served on the jury in the *Koritz Case,* there was another Negro juror regularly drawn and summoned for petit jury service, and who was then serving.

The exceptions here presented are controlled by the rulings in the *Koritz Case.*

No error.

STATE v. LIDA MAE WATKINS, CELIA ANN PURCELL, JAMES EDWARD STURDIVANT AND LOUVENIA WALLACE.

(Filed 5 June, 1947.)

APPEAL by defendants from *Rousseau, J.*, at November Term, 1946, of FORSYTH.

Criminal prosecutions on warrants charging (1) the defendant, Lida Mae Watkins, in three warrants with assaults and in another with resisting an officer; (2) the defendant, Celia Ann Purcell, with assault; (3) the defendant, James Edward Sturdivant, he being a man over eighteen years of age, with assault on a female; and (4) the defendant, Louvenia Wallace, with assault, all tried originally in the Municipal Court of the City of Winston-Salem and again *de novo* on appeal to the Superior Court of Forsyth County. In the Superior Court the seven cases were consolidated and tried together.

Verdict: Guilty as to each of the defendants.

Judgments: Lida Mae Watkins, 12 months imprisonment in three cases, 15 months in the other, and to be assigned to work—all sentences to run concurrently; Celia Ann Purcell, 12 months imprisonment and to be assigned to work; James Edward Sturdivant, 12 months on the roads and suspended sentence in a prior case ordered into effect; Louvenia Wallace, 30 days in jail.

From these judgments, the defendants appeal, assigning errors.

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

William Reid Dalton for defendants.

PER CURIAM. The facts of this record, in so far as they relate to alleged jury defect and bias, are practically identical with those appearing in *S. v. Essie King, ante,* 559, herewith decided. The conclusions there are controlling here. That case and this one are based on the rulings in the *Koritz Case, ante,* 552, herewith decided.

No error.

STATE v. MARTHA JONES.

(Filed 5 June, 1947.)

APPEAL by defendant from *Rousseau, J.*, at November Term, 1946, of FORSYTH.

Criminal prosecution on warrant charging the defendant with disorderly conduct and disturbing the peace, tried originally in the Municipal Court of the City of Winston-Salem and again *de novo* on appeal to the Superior Court of Forsyth County.

Verdict: Guilty.

Judgment: Thirty days in jail.

The defendant appeals, assigning errors.

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

William Reid Dalton for defendant.

PER CURIAM. The facts of this record, in so far as they relate to alleged jury defect and bias, are practically identical with those appearing in *S. v. Essie King, ante,* 559, herewith decided. The conclusion there is controlling here. Both cases are based on the rulings in the *Koritz Case, ante,* 552, herewith decided.

No error.

ERNEST P. DAVIS v. ATLANTIC COAST LINE RAILROAD COMPANY, A CORPORATION, AND NORTH CAROLINA SHIPBUILDING COMPANY, A CORPORATION.

(Filed 5 June, 1947.)

1. Waters and Watercourses § 4—

Where a lower tract of land naturally receives the flow of surface waters from higher lands, the owners of the higher lands are not liable for damages from the drainage even though the flow is increased or accelerated by the removal of obstructions from, or the leveling or resurfacing of the higher lands, or the laying of pipes so as to drain the water under instead of over railroad tracks on the higher lands, provided they do not alter the natural drainage and provided there is no difference in the manner of its discharge which augments the damage from the natural flow, and an instruction to this effect is without error.

2. Damages § 11—

Where plaintiff introduces evidence as to loss of income upon the issue of damages, plaintiff's Federal income tax report is competent for the purpose of contradicting plaintiff's testimony on this aspect.

3. Evidence § 27—

Where evidence is material and competent, objection on the ground that it would tend to discredit the party in the eyes of the jury is untenable.

4. Evidence § 32½—

Where the Federal income tax report of a party is competent for the purpose of contradicting his testimony as to loss of income upon the issue of damages, objection thereto on the ground that the report was improperly secured and not used for any purpose permitted under Federal Law, is unavailing, there being no objection on the ground that the report was not properly exemplified.

PLAINTIFF'S appeal from *Bone, J.*, at December Term, 1946, of NEW HANOVER.

W. F. Jones, W. L. Farmer, and Varser, McIntyre & Henry for plaintiff, appellant.

John H. Manning, Chauncey H. Leggett, and Howard H. Hubbard for defendant North Carolina Shipbuilding Company, appellee.

M. V. Barnhill, Jr., and McLean & Stacy for defendant Atlantic Coast Line Railroad Company, appellee.

SEAWELL, J. The plaintiff's action is for recovery of damages to his property allegedly caused by the wrongful accumulation, acceleration, and diversion of surface water by defendants upon and from their own respective premises, onto and over plaintiff's premises lying upon a lower level. In this tortious act, it is alleged, the defendants acted conjointly.

The premises of plaintiff, alleged to have been damaged, consisted of a parking lot, on which several buildings were located, in the Sunset Park section of the City of Wilmington, east of the river. A spur track of the defendant Atlantic Coast Line Railroad Company adjoins and borders the plaintiff's property on the easterly side, running about northeast and southwest between plaintiff's property and that of the defendant Shipbuilding Company, which latter property it borders on the northwest. Plaintiff's property is nearer the river at a somewhat lower level than the property of either defendant. That of the Shipbuilding Company is on the highest level. At the time referred to in the pleadings and evidence the Shipbuilding Company carried on a wartime shipbuilding industry at its plant along the river in the immediate vicinity, in which a very large number of workmen were employed. The plaintiff prepared his property, consisting of about an acre, as a parking lot for automobiles, and built upon it a small storehouse and other buildings. Some time afterwards the Shipbuilding Company put the area across the railroad, opposite plaintiff's property, in shape to be used as a parking lot for its employees, and possibly others. The terrain theretofore

was somewhat irregular in topography; this was leveled off, and the lot was covered with cinders and other material furnishing a hard surface suitable for parking. The surface theretofore had been sandy.

Generally, the whole area was described as inclined so that the drainage, in the natural condition of the area, was in an northwesterly direction toward the river, and from the defendant Shipbuilding Company's higher lot across the railroad and plaintiff's property, although the evidence is conflicting as to whether all the water from the Shipbuilding Company's parking lot, in its natural condition, would have drained that way. The plaintiff's property has been described as low and swampy.

In order to protect the railroad bed from injury by flooding and washing, the defendant Company installed three drain pipes, the effect of which was to carry the drainage under the rails rather than over them, which drains discharged water on plaintiff's parking lot.

The plaintiff bases his claim of damages upon the wrongful acts of the defendants in the following particulars:

That by leveling and hard surfacing its property across the railroad and above plaintiff's property, which had theretofore been highly absorbent, and in its natural state "absorbed the surface water that fell or ordinarily accumulated thereon from all sources," the defendant Shipbuilding Company thereby accelerated the flow of water across its co-defendant's right of way and upon plaintiff's land, to the latter's damage; and that the leveling and excavation of certain dunes or hills on defendant's property had the effect of diverting over plaintiff's lot surface water which would have gone elsewhere. Further, that by the installation of the drain pipes under the railroad track the surface water was diverted, dammed up, accelerated and discharged on plaintiff's land to his injury and damage.

The defendants deny that plaintiff suffered any damage by reason of the improvements put upon their own property or the manner of its use; and especially the installation of the drain pipes designated as one source of plaintiff's injury. They contend that plaintiff's injury by flooding and passing of water upon or over his premises was by reason of the natural drainage across the properties and the rainfall experienced, and not to any act of theirs; and that they did no more to their own property than they might lawfully do in its ordinary use to accomplish the legitimate purpose to which it was put.

There was much evidence taken on the hearing, contradictory in many of its aspects.

Plaintiff's evidence tended to show that as a consequence of directing the waters through the drainage pipes mentioned, his parking lot was cut in channels. That the foundations of the buildings were weakened and they were greatly damaged; and that sand, garbage, and tin cans were left upon the property by the subsiding waters; that the area had been

seen flooded up to the running boards of the cars and that the owners had to wade in after them. Experts testified for the plaintiff as to the effect of the change of topography on the flow of water and the effect of the drainage pipes installed under the Atlantic Coast Line Railroad Company's tracks in collecting and discharging water on the plaintiff's premises.

Evidence of the defense was of a contradictory nature, indicating that much of the flooding was the natural effect of the flow of water across the railroad track and on to plaintiff's property; and that at times after rains the flood was so great as to spout up when it hit the railroad tracks and dam up until it overflowed the area now occupied as a parking lot by the plaintiff.

The rationale of decision does not require detailed statement and analysis of this evidence. The verdict of the jury was against the plaintiff upon the fact of damage and is, we think, unassailable unless it was rendered under an erroneous view of the law found in the judge's instructions.

Since almost the whole charge is bracketed with exceptions it is possible only to discuss those lying closer to the gravamen of the case, the theory on which plaintiff seeks recovery. The following bear critically on the liabilities and duties of adjoining or contiguous owners with respect to the disposition of surface waters, and are under exception by appellant:

> "I charge you, Gentlemen of the Jury, that under the law when one owns or occupies lower lands, he must receive waters from higher lands when they flow naturally therefrom. There is a principle of law to the effect that where two tracts of land join each other, one being lower than the other, that the lower tract is burdened with an easement to receive waters from the upper tract, which naturally flow therefrom.
>
> "I charge you further that the owner, or one in charge of the higher lands or premises, may increase the natural flow of water, and may accelerate it, but cannot divert the water and cause it to flow upon the lands of the lower proprietor in a different manner, or in a different place from which it would naturally go. If the defendant Shipbuilding Company in this case did no more than increase or accelerate the natural flow of water upon the lands leased by the plaintiff, then the Shipbuilding Company would not be liable, but if the Shipbuilding Company dealt with the property which it had in possession in such manner as to divert water which otherwise would not have naturally flowed upon plaintiff's land, and diverted that water so that it did flow upon his land, thereby causing him damages, then the Shipbuilding Company would be liable.

"If there were no natural flow of water from the Shipbuilding Company's parking lot premises prior to the time when it was prepared by them for a parking lot, and by their action in excavating, or leveling and grading it down, they created an artificial flow of water, that theretofore had not existed, and caused it to flow in an artificial state upon the plaintiff's land, and thereby damaged him, the Shipbuilding Company would be liable, but if a natural flow of water already existed, that is, if the water naturally drained from that area, from the premises occupied by them, and later used as a parking lot, if before they did anything to it, there was a natural drain of it onto the plaintiff's land, then even though their action in leveling it down and grading may have increased and accelerated that water, they would not be liable."

"Now, Gentlemen of the Jury, as concerns the defendant railroad company, if the water came down in its natural state, as it would naturally have flowed, and the railroad company did nothing to accelerate its flow, under its tracks, then the railroad company would not be liable for damages, but if it was not a natural flow of water, but if it was a flow of water created by the wrongful diversion of the defendant Shipbuilding Company, and when the water was wrongfully diverted and discharged in that direction to the railroad company's tracks it gathered the water in pipes and discharged it upon the plaintiff's property in a manner different, it would have naturally gone, and in a way so as to damage the plaintiff's property, then the defendant Railroad Company would be liable in damages to the plaintiff. If the water, however, was wrongfully diverted by the Shipbuilding Company, and started in its flow towards the railroad company, and the railroad company put in pipes enabling the water to go under its tracks instead of over them, and you find from the evidence that the plaintiff's property was not damaged by the water being cast upon his property in this manner through the pipes any greater than if it had flowed over the railroad tracks, and eventually gone on the property, then the railroad company would not be liable in damages to the plaintiff."

"In other words, if the stream of water which came down to the railroad company's tracks was wrongfully diverted there by the Shipbuilding Company, yet if the action of the railroad in putting the pipes under there did not cause the damage, the railroad company would not be liable."

These instructions are supported by numerous authorities. *Roberts v. Baldwin,* 151 N. C., 407, 66 S. E., 346; *Sykes v. Sykes,* 197 N. C., 37, 147 S. E., 621; *Jennings v. Bohner,* 134 N. Y. Supp., 943.

". . . As long as the drainage results in carrying the water along the natural course the servient proprietor may not complain, even

> though natural barriers on the higher land have been cut down and the flow of water both accelerated and increased. Were the rule otherwise, there would be no method by which any one owner could improve his land by the construction of ditches and drains which would carry the drainage upon another's property, because the purpose of such improvement in every instance is to hasten and increase the flow of water, and this object is only attained by the removal of natural barriers." *Fenton & Thompson R. Co. v. Adams,* 211 Ill., 201, 77 N. E., 531, 535.

If the owner of adjacent property on a high level were not permitted to prepare his property for any legitimate purpose to which it might be put by leveling it or clearing it or other improvement, on the theory that he had no right to accelerate the flow of water therefrom but must leave it as an absorbent to retard its flow, it would deprive such owner of the use of his property. "If it be the law of California that an owner cannot level it, the result would be to condemn to sterility vast acreages of agricultural land situated in this state." *Combes v. Reynolds,* 43 Cal. App., 656, 185 Pac., 877, 879; *Parker v. Railway,* 123 N. C., 71, 31 S. E., 381; *Rice v. Railroad,* 130 N. C., 375, 41 S. E., 1031; *Launstein v. Launstein,* 150 Mich., 425, 114 N. W., 383; *Kaufman v. Greisemer,* 26 Pa. St., 407, 67 Am. Dec., 437; Waters & Watercourses, Franham, Sec. 895, p. 2622.

We do not find in the exceptive portions of the judge's charge error which might have prejudiced the jury against plaintiff's cause; and they were triers of the facts.

Since the verdict of the jury was against the plaintiff on the question of injury and damage, ordinarily evidence directed to the *quantum* of damages and not considered on the other issues becomes immaterial. In the present case, however, the defendants sought to contradict the witness in the estimate of the damages he had suffered by the introduction of his Internal Revenue income tax report for the period during which he complains his income from the property was diminished through the alleged wrongful acts of the defendants. The income tax report showed that his income was far less than that claimed by him in the present case. The plaintiff contends that the effect of the introduction of the income tax report was to discredit the plaintiff in the eyes of the jury as criminally evading the Federal Income Tax Laws. The income tax report, however, was certainly competent for the purpose introduced since it is in plain contradiction as to his testimony about his income. If competent at all, plaintiff could not complain of its effect upon any other issue before the jury. Plaintiff, however, claims that it was incompetent because improperly secured and not used for any purpose permitted under the Federal law. There is no objection on the ground that the

report is not properly exemplified. We do not think that the objection is tenable.

As stated, we have not thought it practicable to list all the exceptions brought forward by counsel within the space and time afforded. They have all been carefully examined and considered, and the investigation leads us to the conclusion that the record discloses

No error.

J. B. DIXON v. S. B. BROCKWELL AND STERLING M. BROCKWELL, T/A TAR HEEL GAS & OIL COMPANY,

and

CARL M. MARTIN v. STERLING M. BROCKWELL,

and

GEORGE WAKEFIELD, JR., v. S. B. BROCKWELL AND STERLING M. BROCKWELL, T/A TAR HEEL GAS & OIL COMPANY, AND S. M. BROCKWELL, INDIVIDUALLY,

and

FRANK N. MARTIN v. STERLING M. BROCKWELL.

(Filed 5 June, 1947.)

1. Automobiles § 22—

Plaintiffs, guests in an automobile, brought this action against the owner of a truck involved in a collision with the car. On the issue of whether plaintiffs were injured by the negligence of defendant, the court in response to a question from a juror as to whether it would be possible to find "both parties" negligent, replied in the negative, and then correctly instructed the jury that if the jury found that the driver of the car and the driver of the truck were guilty of concurrent negligence, to answer the issue in the affirmative. *Held:* The conflicting instructions must be held for reversible error.

2. Appeal and Error § 39f—

Conflicting instructions upon a material aspect of the case must be held for reversible error.

3. Automobiles § 22—

Where guests in a car, having no control over its operation, and the driver of the car bring actions against the owner of a truck involved in a collision with the car, it is the better practice to try the actions by the guests separate from the action by the driver of the car, since in the guests' actions the issue of concurring negligence of the drivers is not germane, while in the action by the driver of the car the issues of negligence and contributory negligence arise.

4. Appeal and Error § 47—

Where a new trial is awarded certain appellants for error of law committed in the trial of one of the issues, and judgment against another

appellant is based upon that verdict, a new trial as to such other appellant will be necessarily awarded on his appeal.

APPEAL by plaintiffs in the four actions from *Rousseau, J.*, at November Term, 1946, of FORSYTH.

Four civil actions to recover for personal injuries allegedly sustained in a motor vehicle collision resulting from actionable negligence of defendant.

On the early morning of 15 August, 1943, a passenger car, owned and operated by Frank N. Martin, in which J. B. Dixon, Carl M. Martin, George Wakefield, Jr., A. B. Davis and Bob Wycoff were riding as guests of Frank N. Martin, but having no control of the operation of his car, traveling from Durham, N. C., toward Winston-Salem, N. C., on the Hillsboro highway, and a tractor-trailer truck, or tractor-tanker unit owned by defendant and operated by his agent in the business of transporting petroleum products, and loaded with gasoline, traveling toward Durham on said highway, collided on a curve at a point 7, 8 or 10 miles from Durham, in edge of Orange County, North Carolina, a short distance west of Eno station, resulting in injury to the driver and passengers in the car.

Four separate actions were instituted by J. B. Dixon, Carl M. Martin, George Wakefield, Jr., and A. B. Davis, respectively, passengers in the car of Frank N. Martin, and another action was instituted by Frank N. Martin, all against the defendant, or defendants named in captions. By consent of counsel for all the parties all the cases so instituted were consolidated for trial. During the course of the trial the plaintiffs in the five actions submitted to voluntary nonsuits as to all defendants except Sterling M. Brockwell.

The several plaintiffs allege in their respective complaints, as acts of negligence proximately causing the collision in question, and on the trial offered evidence tending to show that as the tractor-trailer or tractor-tank unit of defendant approached the bridge over Stony Creek, and the point of impact, it was traveling at a speed of 50 to 60 miles per hour, and to its left side of the center line of the highway in the path of the car of Frank N. Martin, until too late to get back on its side of the highway.

On the other hand, defendant answering each of the several complaints, denies the allegations of negligence in each of the actions instituted by the passengers in the Martin car, and avers that, in so far as the plaintiffs, who were passengers in the Martin car are concerned, the sole and proximate cause of the collision, and, in so far as Frank N. Martin is concerned, that the proximate cause or one of the proximate causes of the collision was the negligent and unlawful manner in which the Martin car was being operated, in respects specifically set forth, and as to each plaintiff pleads contributory negligence, and on trial offered evidence in reference to these averments.

The case was submitted to the jury upon one set of eight issues. The first three issues were as follows:

"1. Were the plaintiffs, Carl M. Martin, J. B. Dixon, George Wakefield, Jr., and A. B. Davis, injured by the negligence of the defendant, S. M. Brockwell, as alleged in the complaints?

"2. Was the plaintiff, Frank N. Martin, injured and his property damaged by the negligence of the defendant, S. M. Brockwell, as alleged in the complaint?

"3. Did the plaintiff, Frank N. Martin, by his own negligence contribute to the injuries and damage sustained by him, as alleged in the answer?"

The last five were with respect to what damages, if any, is each plaintiff entitled to recover of the defendant.

When the charge of the court was concluded on Wednesday, before Thanksgiving, after hearing an expression of the jurors' wishes as to whether they preferred to commence their deliberations upon the issues on Friday morning, the court instructed the jury to return and commence deliberation on the issues on Friday morning.

The jury answered the first issue "No," but did not answer any other issue. Thereupon, the court signed judgment in favor of defendant in each of the several actions—and the several plaintiffs gave notice of appeal to Supreme Court. Plaintiff A. B. Davis abandoned his appeal. Plaintiffs J. B. Dixon, Carl M. Martin and George Wakefield, Jr., bring up one appeal and assign error, and plaintiff Frank N. Martin, a separate appeal, and assigns error.

Elledge & Hayes for J. B. Dixon, appellant.
Hastings & Booe and W. S. Mitchell for Carl M. Martin, appellant.
Robert A. Merritt for George Wakefield, Jr., appellant.
Deal & Hutchins for Frank N. Martin, appellant.
Womble, Carlyle, Martin & Sandridge and Hudgins & Adams for Sterling M. Brockwell, appellee.

WINBORNE, J. As to appeal by plaintiffs J. B. Dixon, Carl M. Martin and George Wakefield, Jr.:

These appellants assign as error, among others, the response of the court to a question from the jury.

In this connection it appears from the record that in charging the jury on Wednesday the court instructed the jury in respect to the first issue that if they, the defendant and Martin, "both were guilty of negligence, and their negligence proximately contributed to this event and brought this about and became one of the proximate causes, concurring and cooperating with one another's negligence, then it would be your duty to

answer this Yes." It also appears that after some deliberation on Friday morning, the jury returned into open court, and requested that the charge on the first issue be repeated,—saying that "there seems to be a little bit of misunderstanding on the charge" about what the law is as to negligence. Thereupon, the court proceeded to charge extensively in that respect,—including among many others an instruction in substance that if the jury should find by the greater weight of the evidence that defendant were guilty of negligence, that became one of the proximate causes of the injuries to plaintiffs Dixon, Carl Martin, Davis and Wakefield and that Frank N. Martin were guilty of negligence, that became one of the proximate causes, concurring with the negligence of defendant, then the jury answer the first issue Yes.

Then the court inquired of the jury if there were "any other matters." Whereupon, a juror asked this question: "Your Honor, in an issue of this kind would it be possible to find both parties negligent?", to which the court replied: "No, sir, you could not." Exception 19. "Do you mean find both parties guilty of negligence and answer the issue?" Juror: "On issue No. 1?" The court: "On issue No. 1 is it possible to find both parties guilty of negligence on issue No. 1? Let me read this issue." Then the court proceeded to give instruction on the first issue in respect to concurrent negligence of defendant and plaintiff Martin, and then on the second and third issues and on the eighth issue as to damage, if any, Frank N. Martin is entitled to recover. And then the court concluded with the following: "You cannot find Carl M. Martin, J. B. Dixon, George Wakefield, Jr., and A. B. Davis guilty of any negligence. They had no control over either car, the truck or the passenger car. (As the court instructed you, if you answer this issue Yes, you would have to find it was the negligence of the defendant, his sole negligence, that became the proximate cause, or the defendant's negligence concurring with the negligence of Frank Martin, Frank Martin's negligence being one of the proximate causes. You would have to find that it was the defendant's sole negligence, or that it was the defendant's negligence and Frank Martin's negligence, concurring, proximately bringing about this injury to these plaintiffs to answer this issue Yes. If you find that it was the sole negligence of Frank Martin and not any negligence of the defendant, of course, you would answer issue No. 1, No, if the defendant did not proximately . . . did not and was not guilty of negligence, proximately bringing about this event)." That portion in parentheses constitutes Exception 23.

These plaintiffs contend that the charge, in the respects indicated, among others, is conflicting and calculated to confuse the jury,—particularly when, in answer to the question of the juror as to whether it would be possible to find both parties negligent, in considering the first issue, the court replied: "No, sir, you could not." After careful con-

sideration, this Court is of opinion that the charge so given is vulnerable to the attack made upon it. Was the jury to understand that if the jury should find that both the defendant and Frank N. Martin were negligent, and that the negligence of each concurred with that of the other as a proximate cause of the collision, the first issue could not be answered in the affirmative? The meaning is not clear and is susceptible of an interpretation inconsistent with other portions of the charge which are correct statements of the law. Defendant contends, on the other hand, that the charge taken as a whole may not be held for error. However, in this connection, the decisions of this Court uniformly hold that 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 as the jury, which must take the law from the court, is not supposed to know which is the correct instruction. Hence, we must assume in such cases, in passing upon appropriate exception, that the jury, in coming to a verdict, was influenced by that portion of the charge which is incorrect. *S. v. Starnes,* 220 N. C., 384, 17 S. E. (2d), 346; *Templeton v. Kelley,* 217 N. C., 164, 7 S. E. (2d), 380, and numerous other cases cited therein.

It is appropriate to say that consideration of this appeal leads to the conclusion that it would be better to try the actions brought by these plaintiffs, passengers in the Frank N. Martin car, separately from the action brought by Frank N. Martin. This is so even though these plaintiffs make no allegation of negligence against Frank N. Martin. They elect to allege a cause of action for actionable negligence only against the defendant, and may recover only if they make good on these allegations, even if Frank N. Martin were negligent also, and that his negligence were a proximate cause of, and concurred in bringing about the collision in question. Hence the issue in their actions is one of negligence of defendant, and proximate cause, and concurring negligence of Frank N. Martin has no place in the trial of their causes. While, on the other hand, in the Frank N. Martin case, there are issues of negligence and contributory negligence which require appropriate instructions.

For error pointed out, there must be a new trial on this appeal.

As to appeal by plaintiff Frank N. Martin:

The judgment from which Frank N. Martin appeals is based upon the verdict on the first issue. Since there is error in respect to that verdict, and there is to be a new trial in the action to which the first issue relates, a new trial in the action brought by him necessarily follows.

On appeal by J. B. Dixon, Carl M. Martin and George Wakefield, Jr.,
New trial.

On appeal by Frank N. Martin,
New trial.

BEATRICE SMITH v. CAMEL CITY CAB COMPANY.

(Filed 5 June, 1947.)

1. Carriers § 1—

The operator of taxicabs for hire under franchise or license is under duty of a common carrier in regard to the safety of passengers in transit in so far as this rule of liability can be applied to this mode of transportation.

2. Carriers § 21a (2)—

A common carrier is under duty to protect its passengers from assault by intruders when by the exercise of due care the acts of violence might have been foreseen or anticipated and the carrier could have avoided injury to the passenger by the exercise of proper care, and the carrier is liable in damages proximately resulting from negligent breach of duty in this respect.

3. Same—

While the driver of a taxicab is not under duty to interfere in a fight on the sidewalk between third parties and one who is desirous of becoming a passenger but who has not entered the vehicle, after such person has been accepted as a passenger and entered the conveyance, the duty of a common carrier in regard to the safety of its passengers in transit attaches, and it may be held liable for personal injuries or loss of packages accepted with the passenger for transportation, proximately resulting from negligent breach of this duty.

4. Same—

Evidence tending to show that a person who had called a cab was assaulted as she left her place of business to enter the cab, that she finally managed to get into the cab and that the driver drove half a block with passenger's assailants surrounding, that the driver then stopped the cab and left the scene, and that the passenger received serious injury in the fight and lost her goods she had taken with her in the cab, *is held* sufficient to overrule defendant cab company's motion to nonsuit.

5. Negligence § 16—

In this action by a passenger in a cab to recover for injuries resulting from an assault by intruders, the complaint *is held* not to establish contributory negligence as a matter of law, and defendant cab company's demurrer *ore tenus* was properly overruled.

APPEAL by defendant from *Clement, J.*, at February Term, 1947, of FORSYTH. No error.

This was an action for damages for personal injuries received and property lost while plaintiff was a passenger in one of defendant's taxicabs. It was alleged that defendant's driver negligently failed to protect plaintiff from an assault being made upon her.

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

William H. Boyer and H. Bryce Parker for plaintiff.
W. Avery Jones and Hosea V. Price for defendant.

DEVIN, J. The only assignment of error presented by the defendant in this Court is the denial of its motion for judgment of nonsuit. All other exceptions noted in the trial below have been abandoned.

This raises the question of the sufficiency of the evidence offered, considered in the light most favorable for the plaintiff, to warrant submission of the case to the jury. The material facts were these: The plaintiff operates a cafe on North Cherry Street in Winston-Salem. On the evening of 31 December, 1944, plaintiff caused a woman by the name of Fostena Phillips to be arrested for disorderly conduct. Fostena subsequently secured bail, and with her sister Mavin and some other friends, went to a place near plaintiff's cafe and waited for her to come out. Plaintiff closed up about 2:00 a.m. and called one of defendant's cabs to take her home as she had frequently done. The defendant's cab, driven by a regular employee who knew plaintiff and where she lived, came in response and drew up in front of the cafe. Plaintiff had one of her employees put in the cab several packages containing shoes, cigarettes, and some currency amounting to about $80. When plaintiff started across the sidewalk to the cab, Fostena and her friends appeared and attacked plaintiff and a fight ensued. Plaintiff succeeded in getting on the front seat of the cab, was pulled out, and the fight renewed. Plaintiff succeeded in getting back in the cab and the driver was urged to drive off. This he failed to do, saying, "I am going to see this well done." He did, however, let the cab roll down to a dark spot about half a block away, with plaintiff's assailants still holding on to the cab and trying to fight her. Here the driver stopped the cab, got out, opened the back door and departed. The plaintiff testified "the girls" were fighting her, but she could not start the car as the driver had taken the switch keys. She then managed to get out on the other side, and was rescued by a man named Smith who drove up in his car at this time, her assailants fighting her all the way across to Smith's car. . . . She said, "All during the fighting the girls had been hitting me with a stick, a blackjack, one of the shoes off one of my feet." Plaintiff was carried to the hospital where three or four stitches were taken to close a gash in her head. During the melee plaintiff's money and goods were thrown out of the cab, scattered and lost.

Conceding that the driver of defendant's cab was under no obligation to protect plaintiff while she was on the sidewalk, or to defend her or champion her cause outside of his cab, still it would seem that the plaintiff's testimony, that after she had gotten in the cab and the cab had proceeded half a block the driver stopped the cab, with plaintiff's assailants surrounding, and left the scene, would afford some evidence of fail-

ure to exercise due care for the protection of one whom he had accepted as a passenger in his cab, and tend to sustain an action for damages for injuries received and property lost proximately resulting therefrom.

It was admitted that the defendant in this case was engaged in the business of operating taxicabs for hire on the streets of Winston-Salem, under franchise from the city. Hence it would seem that the duty uniformly held obligatory upon common carriers, with respect to the safety of passengers being transported by them in the course of their business, should also be held to be imposed upon those who operate taxicabs on the public streets under franchise or license issued in accord with statutory provisions and regulations, in so far as applicable to that type of carriage. *Durfey v. Milligan,* 265 Mich., 97; *Shelton Taxi Co. v. Bowling,* 244 Ky., 817; *Duplaise v. Yellow Taxicab Co.,* 204 Wis., 419; *Yellow Cab Co. v. Carmichael,* 33 Ga. App., 364; *Sanchez v. Pacific Auto Stages,* 116 Cal. App., 392; 69 A. L. R., 992; 96 A. L. R., 753.

The duty owed by common carriers to passengers being transported by them has been frequently stated by this Court to be to provide for the safe conveyance of their passengers "as far as human care and foresight" can go, consistent with practical operation of the business. *Perry v. Sykes,* 215 N. C., 39, 200 S. E., 923; *Horton v. Coach Co.,* 216 N. C., 567, 5 S. E. (2d), 828; *Hollingsworth v. Skelding,* 142 N. C., 246, 55 S. E., 212. And in the performance of its duty it is obligatory upon the carrier to protect a passenger from assault, not only by the carrier's employees, but also by intruders, when by the exercise of due care the acts of violence might have been foreseen and avoided. *Seawell v. R. R.,* 132 N. C., 856, 44 S. E., 610; *Wilson v. Bus Lines,* 217 N. C., 586, 9 S. E. (2d), 1. This obligation on the part of the carrier with respect to the safety of passengers continues until the journey expressly or impliedly contracted for is concluded. *White v. Chappell,* 219 N. C., 652, 14 S. E. (2d), 843. But before liability may be predicated for the injury to the passenger, it must have proximately resulted from the negligent failure of the carrier to perform its duty. *Chancey v. R. R.,* 174 N. C., 351, 93 S. E., 834. And the carrier must have known of, or had reasonable grounds to anticipate the assault by intruders, with present ability to avoid injury to the passenger by the exercise of proper care. *Pride v. R. R.,* 176 N. C., 594, 97 S. E., 418; *Wilson v. Bus Lines,* 217 N. C., 586, 9 S. E. (2d), 1; *Batten v. R. R.,* 77 Ala., 91; *Lake Erie & W. R. R. v. Arnold,* 26 Ind. App., 190; *Connell v. R. R.,* 93 Va., 44.

We do not conceive it to be the legal duty of the driver of a taxicab to interfere in a fight on the street or sidewalk between third parties and one who is desirous of becoming a passenger but who has not entered the vehicle, but after the person has been accepted as a passenger and has entered the conveyance, the duty is imposed upon the carrier to exercise due care and vigilance to protect the passenger in transit from

violence threatened by third parties when the circumstances are such as to indicate that injury to the passenger might reasonably be anticipated and avoided by the exercise of proper care. *Yellow Cab Co. v. Carmichael,* 33 Ga. App., 364, 126 S. E., 269. However, the carrier is not an insurer of the safety of its passenger, and can only be held liable in damages for negligent breach of its duty, proximately resulting in injury to the passenger, *Chancey v. R. R., supra; Mills v. R. R.,* 172 N. C., 266, 90 S. E., 221, or causing loss of packages accepted with the passenger for transportation. *National F. Ins. Co. v. Yellow Cab Co.,* 205 Ark., 953.

There was no error in denying defendant's motion for judgment of nonsuit, and for the same reason defendant's demurrer *ore tenus* to the complaint as insufficient to state a cause of action was properly overruled. The allegations of the complaint were in substantial accord with the evidence offered. Contributory negligence was not alleged, nor may the complaint be held to establish contributory negligence as a matter of law. *Ramsey v. Furniture Co.,* 209 N. C., 165, 183 S. E., 536.

As there was sufficient evidence to carry the case to the jury, and no other exception is brought forward, the result will not be disturbed.

No error.

MAXINE J. RIERSON v. MRS. C. Y. YORK.

(Filed 5 June, 1947.)

1. Judgments § 27a—

Upon a motion to set aside a default judgment, whether the neglect is excusable or not is to be determined with reference to the litigant's neglect and not that of the attorney.

2. Same—

Under G. S., 1-220, a judgment may be set aside for excusable neglect irrespective of whether the neglect is induced by mistake of fact.

3. Same—

Findings that the neglect of the defendant was due to the incapacity of her lawyer induced by serious illness, that she had used due diligence and that the attorney's neglect should not be imputed to her, and that defendant has a meritorious defense, is sufficient to support the court's order setting aside a default judgment under G. S., 1-220.

4. Appeal and Error § 40m—

The discretionary power of the trial court to set aside a default judgment for mistake, inadvertence, surprise or excusable neglect, G. S., 1-220, is a legal discretion and reviewable.

5. Same—

Where, on a motion to set aside a default judgment under G. S., 1-220, the trial court finds facts sufficient to support the conclusion that the litigant's neglect was excusable, objection to the order setting aside the default judgment on the ground that the facts were insufficient to show a mistake of fact, is untenable, the finding of excusable neglect and meritorious defense being sufficient to support the judgment, and the Supreme Court being bound by the findings when supported by evidence.

STACY, C. J., dissents.

PLAINTIFF'S appeal from *Clement, J.*, at February Term, 1947, of FORSYTH Superior Court.

H. Bryce Parker for plaintiff, appellant.

P. W. Glidewell, Sr., and H. M. Ratcliff for defendant, appellee.

SEAWELL, J. The case comes here by appeal of the plaintiff from an order made by Judge Clement setting aside a default judgment in her favor in the above entitled action for the recovery of an automobile from the defendant. The motion to set aside the judgment was made under G. S., 1-220, for excusable neglect.

The plaintiff unsuccessfully resisted the motion before the Clerk of the Court, and appealed. In the Superior Court the trial judge adopted the findings of fact made by the Clerk, and added other pertinent findings.

The court had before it substantially the following situation:

The plaintiff had summons served on the defendant, which was not accompanied by the complaint. The summons contained the usual notice when and where the complaint would be filed.

The defendant immediately employed Mr. Glidewell, a reputable lawyer in good standing, practicing in the court from which the summons issued, to represent her and do whatever was necessary in her defense, giving him the copy of the summons served upon her. Mr. Gildewell undertook the defense, advising her that he would take all necessary steps and would advise her when it became necessary for her to answer. The attorney advised her that the plaintiff could not proceed further until additional papers were served on her and that he would write to the clerk of the Superior Court of Forsyth County and requests the clerk to notify him when the complaint was filed and served on petitioner.

The attorney was taken suddenly and seriously ill shortly thereafter and was unable to attend to the duties of his office, and did not advise his client, the defendant, of the filing of the complaint, or any other step taken in the case until after the judgment by default was taken. Defendant was taken by surprise, learning of the situation first through an execution issued against her upon the default judgment.

The clerk found these facts substantially as stated and further found that defendant, a saleswoman in a Winston-Salem store, was unacquainted with rules of court and court proceedings, and relied implicitly on her attorney to take such steps as might be necessary to protect her in any and all claims of the plaintiff; that she used due diligence, and that the neglect which led to the judgment by default was due to the failure of her counsel to take the necessary steps in her defense. He further found, upon the evidence presented, that the defendant had a meritorious defense.

The same evidence was presented and reviewed in the Superior Court, and the findings of fact made by the clerk were adopted. Additional findings were made, one paragraph bearing on the controversy between the parties as to the fact of ownership.

Briefly, the plaintiff claims that she purchased and owned the car in controversy and that defendant's husband persuaded her to let him have the car in order that he might borrow on it the sum of $200.00 which he badly needed, and that she surrendered the car to him, along with the certificate of title which she signed in blank, for that purpose. The defendant, in her motion and affidavit, says that she was the owner of a Pontiac sedanette in her own right; that her husband represented to her that he had repurchased the car in controversy from the plaintiff under the necessity of providing for the support of his illegitimate children, to which plaintiff had given birth, and that he exchanged the car with defendant for her own, with exchange of title certificate; and that he subsequently informed her that the proceeds of the sale of the sedanette had been delivered to plaintiff.

As to these contentions, Judge Clement further found that the defendant did not know that any fraud had been practiced on plaintiff, if any there had been, and that she, in good faith, surrendered her Pontiac sedanette to her husband "in exchange therefor" and accepted the title certificate, properly endorsed, to the car involved in the litigation.

The court thereupon found that this failure of the defendant to file answer resulted from no negligence on her part but was to the negligence of her attorney, and that his negligence should not be imputed to her. And further, that the defendant had a meritorious defense against the claim asserted by plaintiff. The judgment was set aside.

In considering the propriety of the order entered on the hearing of defendant's motion, we must remember that the excusability of the neglect on which relief is granted is that of the litigant, not that of the attorney. The neglect of the attorney, although inexcusable, may still be cause for relief. *Meece v. Commercial Credit Co.*, 201 N. C., 139, 159 S. E., 17; *Abbitt v. Gregory*, 195 N. C., 203, 141 S. E., 587; *Ice Co. v. R. R.*, 125 N. C., 17, 24, 34 S. E., 100; *Stallings v. Spruill*, 176 N. C., 121, 96 S. E., 890.

The case at bar is distinguishable from the case of *Crissman v. Palmer*, 225 N. C., 472, 35 S. E. (2d), 422; and *Lerch v. McKinne*, 187 N. C., 419, 122 S. E., 9, cited in plaintiff's brief, which in effect hold that the relief given under G. S., 1-220, on the ground of "mistake, inadvertence, surprise or excusable neglect" refers to mistake of fact and not of law, in that it does not appear that defendant's neglect to file answer was wholly due to the impression her attorney was under that further papers were to be served on her before plaintiff could proceed further. There was evidence from which the judge might find, and did find, that the neglect was due to the incapacity of the attorney induced by serious illness. The larger part of the court's jurisdiction under this statute is invoked under "excusable neglect" where there is neither mistake of law nor fact.

In fact, *Crissman v. Palmer, supra*, dealt with a mistake occurring during the course of the trial against which relief could be had only upon appeal or motion for new trial. (Pp. 474, 475.)

The exact conditions on which review may be made of an order granting or denying a motion of this sort under G. S., 1-220, identical with preceding statutes construed in the cited opinions, have never been consistently determined. *Depriest v. Patterson*, 85 N. C., 376. The general principle is that the court having jurisdiction has also discretion. *Bank v. Foote*, 77 N. C., 131, 132. The discretion, however, is held to be a legal discretion and, therefore, reviewable. *Norton v. McLaurin*, 125 N. C., 187, 34 S. E., 269; *Hudgins v. White*, 65 N. C., 393; *Dunn v. Jones*, 195 N. C., 354, 142 S. E., 320.

How far within the bounds of such a discretion the court must keep in order that his judgment may be firmly established is often a question. It is said in *Norton v. McLaurin, supra*, that although the discretion is a legal discretion, it will not be reviewed unless in case of gross abuse. *Cowles v. Cowles*, 121 N. C., 272, 273, 28 S. E., 476. At least we are bound by the findings of fact when they are supported by evidence. *Carter v. Anderson*, 208 N. C., 529, 181 S. E., 750. Recognizing that principle, it would be necessary to narrow the factual basis of the Judge's conclusions to meet the view of the appellant and take the case out of the statute. This we are not privileged to do. See *Seawell v. Lumber Co.*, 172 N. C., 320; *English v. English*, 87 N. C., 497.

The order setting the judgment aside must be

Affirmed.

STACY, C. J., dissents.

STATE v. MAYFORD JORDON.

(Filed 5 June, 1947.)

1. Abortion § 1—

G. S., 14-44, and G. S., 14-45, creates separate and distinct offenses, the first statute being designed to protect the life of a child *in ventre sa mere*, and the second being primarily for the protection of the woman.

2. Same—

A prosecution under an indictment charging that defendant prescribed certain drugs for a pregnant woman with intent to destroy the child, without allegation that the drug was prescribed with intent to procure a miscarriage or to injure or destroy the woman, is a prosecution under G. S., 14-44.

3. Statutes § 11—

Penal statutes must be strictly construed.

4. Abortion § 2—

The words "either pregnant or quick with child" contained in G. S., 14-44, mean "pregnant with child that is quick," since otherwise the words "or quick with child" would be merely confusing surplusage, and since the *sine qua non* of the offense is the intent to destroy the child *in ventre sa mere*, which must be quick before it has independent life.

5. Abortion § 10—

Evidence that defendant, with intent to produce a miscarriage, gave a certain drug to a woman within thirty days after she had conceived, is insufficient to be submitted to the jury in a prosecution under G. S., 14-44, since in such instance the child could not be quick.

APPEAL by defendant from *Rousseau, J.*, at December Term, 1946, of FORSYTH. Reversed.

Criminal prosecution under bill of indictment which charges that defendant did "unlawfully, wilfully and feloniously prescribe for one Mildred Bennett, she being pregnant, to the knowledge of the said Mayford Jordon, certain medicines, drugs or instrument, with intent thereby to destroy said child, . . ."

There were intimate relations between defendant and the prosecutrix on the first and third Sundays in July, 1946. Sometime shortly after 15 August she discovered she was pregnant and so informed the defendant. Thereupon he procured twelve 5-grain capsules of quinine, gave them to her, and told her to take them "and it would destroy the baby." Later he gave her twelve more capsules. She took four and threw the others away. The medicine did not have the desired effect.

During the progress of the trial the defendant inquired whether the State was proceeding under G. S., 14-44, or 14-45. The court replied it was proceeding under G. S., 14-44. There was a verdict of guilty.

The court pronounced judgment and defendant appealed.

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

Roy L. Deal and Fred S. Hutchins for defendant, appellant.

BARNHILL, J. By the enactment of Chap. 351, P. L. 1881, the Legislature created two separate criminal offenses. The first, Sec. 1, now G. S. 14-44, is designed to protect the life of a child *in ventre sa mere* and makes it unlawful to prescribe or administer drugs to or perform an operation upon a "woman, either pregnant or quick with child," with intent thereby to destroy said child. The second, Sec. 2, now G. S. 14-45, condemns the administration of drugs to or performance of an operation upon a "pregnant woman . . . with intent thereby to procure a miscarriage of such woman, or to injure or destroy such woman," and is primarily for the protection of the woman.

Here the bill of indictment contains no allegation that the drug was prescribed with intent to procure a miscarriage or to injure or destroy the prosecutrix. Hence the court below correctly ruled that the prosecution is under G. S. 14-44.

So then the one question posed for decision is this: Is the evidence offered sufficient to sustain a conviction under G. S. 14-44? The answer depends upon the meaning of the term "either pregnant or quick with child" used in the statute and in the bill of indictment.

Broadly speaking, a woman is "pregnant" from the moment of conception until the time the impregnated ovum, embryo, fetus, or child is discharged from the uterus. This, the attorney-general contends, is the meaning of the word as used in the statute. On the other hand, the defendant insists that "pregnant or quick" is used as one term or expression to qualify, limit, or define "with child" and thus confines the period of pregnancy to which the statute relates to the latter half of the term of pregnancy during which the child is quick.

Concede, *arguendo,* that either construction may be permissible. Even so, the rule of strict construction applicable to penal statutes requires the adoption of the latter. Furthermore, this is the more reasonable conclusion. If "pregnant" is used in its broadest sense, then "quick with child" adds nothing to the statute. Instead, it constitutes the injection of superfluous and meaningless language in the law which tends only to confuse. It would likewise compel us to conclude that the Legislature made it a crime to administer drugs, etc., with the intent to destroy a child which had not yet come into being within the "intent" provision of the statute.

The very purpose of the statute is to protect the child *in ventre sa mere* after it has reached the stage of development at which it gives evidence

of independent life. And the *sine qua non* of the offense is the intent to destroy this child. We so held in *S. v. Forte,* 222 N. C., 537, 23 S. E. (2d), 842, where *Winborne, J.,* speaking for the Court, says:

". . . there is no evidence of a quickening of the child, proof of which is required when the State proceeds under the provisions of C. S. 4226 (now G. S. 14-44), as it does in the bill of indictment under which defendant stands charged."

Therefore, we conclude that "either pregnant or quick with child" as used in G. S., 14-44, means "pregnant, *i.e.,* quick with child" or "pregnant with child that is quick."

The evidence offered tends to show that the medicine was prescribed or administered, if at all, within 30 days after conception. There is no evidence prosecutrix was then "quick with child." Indeed, in the course of nature, she could not have been. Hence, *S. v. Forte, supra,* is controlling.

The judgment below is

Reversed.

THOMAS HOLMES v. BLUE BIRD CAB, INC., AND S. H. BLACK.

(Filed 5 June, 1947.)

1. Negligence § 20: Appeal and Error § 39f—

This action was submitted to the jury on the issues of negligence, contributory negligence and damages. The court charged to the effect that if defendant was guilty of negligence and that if such negligence was the proximate cause of injury, then "liability" would follow. *Held:* The use of the term "liability" cannot be held for prejudicial error.

2. Same—

A charge that if defendant was guilty of contributory negligence which proximately caused injury, "liability" would follow, cannot be held for prejudicial error as implying that legal liability would attach regardless of contributory negligence when it appears that the court thereafter defined contributory negligence and charged that it would bar recovery if it constituted a proximate cause of the injury.

3. Same—

The use of the phrase "the proximate cause" of injury instead of "a proximate cause" of injury in defining contributory negligence that would bar recovery, cannot be held for prejudicial error when it appears that the court repeatedly charged that contributory negligence need not be the sole proximate cause of the injury in order to bar recovery by plaintiff.

4. Automobiles §§ 15, 18i—

Plaintiff's evidence was to the effect that at nighttime he was carrying a child's bicycle, too small for him to ride, across a street intersection to

a repair shop, and that he was hit by a vehicle entering the intersection against the stop light at a high rate of speed. *Held:* The refusal to give defendants' requested instruction that the failure to have a light on the bicycle was a violation of G. S., 20-129 (f), was not error, since under the circumstances plaintiff was a pedestrian rather than a cyclist.

DEFENDANT'S appeal from *Clement, J.*, at January Term, 1947, of FORSYTH.

Hoyle C. Ripple and Hosea V. Price for plaintiff, appellee.
Womble, Carlyle, Martin & Sandridge for defendants, appellants.

SEAWELL, J. The plaintiff brought this action to recover damages for a personal injury sustained by collision with a cab owned by the Blue Bird Cab, Inc., and driven by its employee, S. H. Black. Both are defendants and the agency is admitted. Issue was joined as to the negligence, contributory negligence and damages, resulting in a verdict favorable to the plaintiff. From the judgment ensuing defendants appealed.

There was sharp contradiction between the evidence of plaintiff and that of the defendants on vital questions of negligence. The statement of the occurrence by the plaintiff prevailed. The only exceptions argued are to the instructions to the jury and the refusal to give an instruction asked for by the defendants.

The only evidence necessary to bring forward relates to the instruction which was refused.

At the time of the injury, according to plaintiff's statement, he was crossing the street under the protection of the green light when the defendant Black, driving the taxicab through the intersection, and against the red light at a high rate of speed, ran into him, causing severe injury. At the time plaintiff was pushing a small bicycle, belonging to a niece, across the intersection, carrying it to a repair shop. One pedal was off, and was strapped to the handle bars. The bicycle was too small for plaintiff to ride. It was unlighted.

The defendants requested an instruction that failure to have the bicycle lighted was a violation of the statute, G. S., 20-129, subsection (f), and evidence of negligence to be considered on the issue of contributory negligence. The instruction was refused.

Instructing the jury upon the issue as to negligence of the defendants, the court said:

> "But if a person is driving the automobile and is doing it negligently, that is, if he is doing it differently from what a reasonably prudent man would have done it at the time and place in question, when the injury occurred, then he is negligent, and if his negligence is the proximate cause of damage or injury to another, then liability follows."

The objection is that the court erred in using the term "liability" in this connection since, it is pointed out, "liability" is fixed by law on the finding of negligence and proximate cause and the jury is not permitted to deal with it. Argued with this in defendant's brief is a further instruction on the same issue relative to the principle of *respondeat superior* in which the term "liability" was again used. The objection would have more point if the issues had been such as to submit the question of liability to the jury; the issues, however, submitted only the question of negligence and proximate cause. The only question here is whether the jury was prejudiced against the defendant by a plain statement of the law, the correctness of which is not questioned. Neither *Braswell v. Johnston,* 108 N. C., 150, 12 S. E., 911, nor *Farrell v. Railroad,* 102 N. C., 390, 9 S. E., 302, support the objection made by appellant. In the former case the one issue submitted was, "How much, if any, is the plaintiff entitled to recover?"—thus ignoring the issues of fact and substituting a question of law. In the latter case the defendant asked for an instruction which would have had the same effect. Other cases cited in the brief are distinguishable on the same principle.

In none of the cases cited by defendants is the word "liable" used at all. The question posed by these cases in different form is, whether it was proper to charge the jury that the plaintiff *could or could not recover,* rather than, under our present practice, submit the issues of fact upon which recovery is determined. *Braswell v. Johnston, supra.*

"Liable" is defined as "responsible for"—derived from the same Latin root we find in *"respondeat superior"*—the principle on which the employer is held for the tortious act of the employee. To use that term in the connection we find it, even though some other word might have been as fitting, cannot be held as prejudicial. There is the further objection that the language employed here implies legal liability without regard to contributory negligence inasmuch as it does not mention negligence of the plaintiff. That subject was fully treated in instructions on that issue.

The court charged the jury on contributory negligence as follows:

> "'Contributory negligence,' gentlemen, is the want of ordinary care on the part of the person injured by the actionable negligence of another, combining and concurring with that negligence, and contributing to the injury as a proximate cause thereof, that is, concurring and continuing to the time of the injury, without which the injury would not have occurred.
>
> "'Contributory negligence' is such an act or omission on the part of the plaintiff, amounting to a want of ordinary care, concurring and cooperating with some negligent act or the omission of the defendant, as makes the act or omission of the plaintiff the proximate cause or occasion of the injury complained of."

The defendants insist that the use of the word "the" instead of "a" in this instruction is sufficient to mislead the jury into the conclusion that contribuory negligence, to be a defense, must be the sole proximate cause of the injury.

But in almost the very last instruction given to the jury was the following:

> "Under the law of this State and under the decisions of our Supreme Court, the term 'contributory negligence' implies that it need not be the sole cause of the injury sustained by the plaintiff."

This was several times repeated with respect to conduct of the plaintiff from which it was contended inferences of negligence might be drawn. It is likewise substantially stated in the same paragraph from which the exceptive sentence is taken.

The tendered instructions directed toward the duty of having a lighted lamp on the bicycle is based on G. S., 20-129, subsection (f), reading in part:

> "'Lamps on Bicycles': Every bicycle shall be equipped with a lighted lamp on the front thereof, visible under normal atmospheric conditions from a distance of at least three hundred feet in front of such bicycle, and shall also be equipped with a reflex mirror or lamp on the rear, exhibiting a red light visible under like conditions from a distance of at least two hundred feet to the rear of such bicycle, when used at night."

In support of this exception defendants cite *Benson v. Anderson* (Washington, 1924), 223 Pac., 1063, and Blashfield, pp. 384, 385, which seem to be in point, and other authorities which do not tally with the factual situation. However, *Benson v. Anderson, supra,* upon which the Blashfield text is predicated, refers to a pedestrian who was injured while pushing an unlighted bicycle along the right side of the road, across a bridge. The opinion refers to him as a pedestrian but the injured man claimed that he had a right to be on that side of the road as a bicyclist. The opinion merely says that if a bicyclist, he should have had a light upon his bicycle as required by the statute and the substance of the opinion is that he had not bettered himself. If the cited opinion has the connotation attributed to it, it is not persuasive in its rationale.

Under its wording, as well as upon reason, we are unable to assent to the proposition that the cited statute has any application to the facts of this case. It refers to a bicycle "used at night" and clearly implies "used" in the ordinary manner as a vehicle. Plaintiff was as much a pedestrian as if the bicycle had been strapped to his back or carried on his shoulder. He would have been as much, and no more, entitled to the protection of

the law of the road if his burden had been a sack of unlighted potatoes.

We see no reason to disturb the result of the case. We find

No error.

STATE v. W. P. YOW, JR.

(Filed 5 June, 1947.)

1. Receiving Stolen Goods § 8—

A verdict of "guilty of receiving stolen goods" is insufficient to support a judgment imposing sentence for receiving stolen goods knowing them to have been stolen.

2. Receiving Stolen Goods § 6—

Evidence that the witness had had a pistol stolen from his car in front of defendant's sandwich shop, that defendant was advised of the theft and promised if he found out anything about it he would let the witness know and try to get the pistol back for him, and that some two months thereafter the pistol was found upon search in defendant's absence in a dresser drawer in the bedroom of defendant's wife, *is held* insufficient to be submitted to the jury in a prosecution for receiving stolen goods knowing them to have been stolen, since the evidence fails to show defendant received the property, or, if he did, that he had felonious intent.

3. Receiving Stolen Goods § 4—

The inference arising from the recent possession of stolen property has no application to a charge of receiving.

4. Receiving Stolen Goods § 2—

The offense pronounced by G. S., 14-71, consists of receiving with guilty knowledge and felonious intent goods which previously had been stolen, and sufficient evidence of all the essential elements of the offense must be made to appear in order to sustain a conviction.

BARNHILL, J., dissents.

APPEAL by defendant from *Clement, J.*, at January Term, 1947, of FORSYTH. Reversed.

The defendant was indicted for the larceny of a pistol, the property of J. H. Hemrick, Jr. There was a second count in the bill charging defendant with receiving the stolen pistol knowing it to have been stolen.

From the evidence offered by the State it appeared that Hemrick's pistol was stolen from the glove compartment of his automobile while it was in front of defendant's sandwich shop, and that defendant, whom Hemrick had known for 25 years, had seen him place it there, and was later advised of the theft. However, others had been, at the time, about the shop and the automobile. The evidence was not clear whether de-

fendant had opportunity to take it or not. Hemrick expressed opinion that he did not think defendant had stolen his pistol, and defendant said if he found out anything about it he would let Hemrick know and try to get the pistol for him.

The State offered evidence that two months later officers with search warrant went to defendant's place. Defendant was away from home. The officers saw Mrs. Yow in the bedroom, sick in bed, and asked her where the automatic Colt pistol was, and she said in the dresser drawer. The officers found the pistol lying in the top drawer not concealed. Hemrick identified the pistol as his.

The jury returned verdict "guilty of receiving stolen goods." Upon that verdict judgment was rendered imposing sentence. Defendant appealed.

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

William H. Boyer and H. Bryce Parker for defendant.

DEVIN, J. The failure of the jury to find the defendant guilty of larceny amounted to an acquittal on that charge, and the verdict "guilty of receiving stolen goods" was insufficient to support the judgment on the second count in the bill, entitling the defendant to a *venire de novo* on that count. *S. v. Shew,* 194 N. C., 690, 140 S. E., 621; *S. v. Cannon,* 218 N. C., 466, 11 S. E. (2d), 301.

However, the defendant insists the evidence offered was insufficient to show that with felonious intent he received the stolen article knowing at the time that it was stolen, and that having been acquitted of the charge of larceny he was entitled to nonsuit on the second count.

Conceding that there was evidence that the pistol was stolen, and that the defendant was made aware of that fact shortly after the theft, the only remaining question for decision was whether there was sufficient evidence to go to the jury that the defendant with felonious intent received the pistol with knowledge at the time that it had been stolen. *S. v. Morrison,* 207 N. C., 804, 178 S. E., 562; *S. v. Oxendine,* 223 N. C., 659, 27 S. E. (2d), 814. On this point the only evidence is that two months after the theft the pistol was found in a dresser drawer in the bedroom of defendant's wife (presumably the room also ordinarily occupied by the defendant when at home). The defendant was not present. There was no suggestion as to how the pistol came to be there. The defendant was acquitted of the larceny. Presumably the pistol, if stolen, was stolen by someone else, and to make defendant guilty on the second count he must have received the stolen pistol with felonious intent. Evidence merely that it was found in a drawer in defendant's wife's bedroom would seem to be lacking in sufficient probative value to war-

rant conviction on the charge of receiving stolen goods knowing them to have been stolen. The evidence fails to show that the defendant received the stolen article, or, if so, to negative the reasonable inference that it was for the purpose of returning it, as he had promised to do. The inference arising from the recent possession of stolen property has no application to the charge of receiving. *S. v. Best,* 202 N. C., 9, 161 S. E., 535; *S. v. Lowe,* 204 N. C., 572, 169 S. E., 180.

Receiving stolen goods knowing them to have been stolen is a statutory offense. G. S., 14-71. The criminality of the action denounced by the statute consists in receiving with guilty knowledge and felonious intent goods which previously had been stolen. Sufficient evidence of all the essential elements of the offense must be made to appear in order to sustain a conviction. *S. v. Minton,* 61 N. C., 196; *S. v. Adams,* 133 N. C., 667, 45 S. E., 553; *S. v. Oxendine, supra; S. v. Fowler,* 117 W. Va., 761, 188 S. E., 137; 68 A. L. R., 187; 45 A. J., 386.

In view of defendant's acquittal on the charge of larceny and the insufficiency of the evidence on the second count, we think the defendant is entitled to the allowance of his motion for judgment of nonsuit, and that the judgment must be

Reversed.

BARNHILL, J., dissents.

STATE v. GEORGE W. JOHNSON.

(Filed 5 June, 1947.)

1. Rape § 27—

Where, in a prosecution for assault with intent to commit rape, there is sufficient evidence to support at least a verdict of guilty of an assault upon a female, defendant's motion to dismiss under G. S., 15-173, is properly denied.

2. Criminal Law § 53b, 53k, 78e (2)—

An instruction defining the *quantum* of proof required of the State as "by the greater weight of the evidence" must be held for reversible error even though the inadvertence is in the statement of contentions and not brought to the trial court's attention at the time.

3. Criminal Law § 53b—

Where, in giving additional instructions in response to a juror's request, the court charges that the jury "must be satisfied" from the evidence rather than "satisfied beyond a reasonable doubt," the charge must be held for prejudicial error even though in other portions of the instructions the court had correctly stated the intensity of proof required of the State.

4. Criminal Law § 81c (2)—

Where the court in different portions of the charge gives correct and incorrect instructions as to the *quantum* of proof required of the State, the charge must be held for prejudicial error, since the jury may have acted upon that portion which was incorrect.

5. Criminal Law § 77d—

The Supreme Court is bound by the record as filed.

APPEAL by defendant from *Clement, J.*, at January Term, 1947, of FORSYTH.

Criminal prosecution upon indictment charging defendant with crime of assault upon a certain named female with felonious intent, by force and against her will, to ravish and carnally know.

Verdict: Guilty.

Judgment: Imprisonment pronounced.

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

Phin Horton, J. Erle McMichael, and H. Bryce Parker for defendant, appellant.

WINBORNE, J. On this appeal defendant presses for error the refusal of the court to grant his motion for judgment as of nonsuit entered at close of State's evidence, and renewed at the close of all the evidence, pursuant to provisions of G. S., 15-173. These motions, being general, may not be sustained. Since the prosecution is upon an indictment charging an assault with intent to commit rape, which is a felony, G. S., 14-1, and G. S., 14-22, it is lawful for the jury to acquit of the felony and to find a verdict of guilty of an assault upon a female if the evidence warrants such a finding. G. S., 15-169. Therefore, there being sufficient evidence to support at least a verdict of guilty of an assault upon a female, the motion to dismiss under G. S., 15-173 was properly denied. See *S. v. Jones*, 222 N. C., 37, 21 S. E. (2d), 812. Compare *S. v. Gay*, 224 N. C., 141, 29 S. E. (2d), 458.

However, defendant's exceptions to portions of the charge of the court to the jury are well taken.

One exception has this setting, and is as follows: Opening the charge by saying that the bill of indictment charges defendant with an assault with intent to commit rape, and after enumerating various kinds of assaults, including that with which defendant is charged, and instructing the jury that the gravamen of an assault is an intentional attempt, by violence, to do injury to the person of another, the court continued as follows: "There has been evidence offered in this case by both the State

and the defendant. The defendant contends that he is not guilty; the State contends that you should be satisfied, by the greater weight of the evidence, that he is guilty." The exception is directed to the foregoing quotation.

The rule of law as to the degree of proof, "greater weight of the evidence," as there set forth, is manifestly erroneous. Ordinarily a misstatement of contentions must be called to the attention of the court at the time, or else it will be deemed to be waived. But not so as to statements of a contention with respect to applicable law. See *S. v. Gause, ante,* 26, 40 S. E. (2d), 463, citing *McGill v. Lumberton,* 215 N. C., 752, 3 S. E. (2d), 324; *S. v. Calcutt,* 219 N. C., 545, 15 S. E. (2d), 9; *Stanley v. Hyman-Michaels Co.,* 222 N. C., 257, 22 S. E. (2d), 570.

Another exception to the charge has this setting: After the jury had retired and later returned to the courtroom, and asked and received further instruction, and again retired and later returned to the courtroom, and asked further instruction on one certain point, on which the jury was "tied up on," the court gave further instruction, concluding with the following: "The mere fact that he might try to persuade her to submit herself to him, wouldn't make him guilty of the offense. (Q) To make him guilty of an assault, you must be satisfied that he had made an intentional attempt to do violence to her. (R) Well, now, the other part of it, you haven't asked for my explanation. I think you understand that. (S) To be guilty of an assault with intent to commit rape, there must not only be an assault, but there must be an intent to have intercourse with her, against her will, by force, and in spite of all resistance that she might make." (T) The exceptions relate to the portions between the letters "Q" and "R" and "S" and "T." Here also the vice pointed out is the degree of proof, that the jury "must be satisfied," instead of according to the correct degree "satisfied beyond a reasonable doubt."

In this connection it is true that in other portions of the charge the correct rule is given. Nevertheless, where the court charges correctly in one part of the charge, and incorrectly in another, it will be held for error, since the jury may have acted upon that which is incorrect. This holding is in accordance with uniform decisions of this Court. *Templeton v. Kelley,* 217 N. C., 164, 7 S. E. (2d), 380, and numerous cases cited. See also *In re Will of West, ante,* 204, 41 S. E. (2d), 838.

In fine, it may be and doubtless is that the words "greater weight of evidence" instead of "beyond a reasonable doubt" and the word "satisfied" instead of "satisfied beyond a reasonable doubt" were slips of the tongue or errors in transcribing. Yet they appear in the record, and we must accept it as it comes to us. *S. v. Gause, supra.*

Since the case must go back for a new trial, it is deemed unnecessary to consider other assignments, and we do not pass upon them.

For errors shown, there will be a

New trial.

LILLIE COOKE PEARCE ET AL. v. N. C. ROWLAND, JR.

(Filed 5 June, 1947.)

Taxation § 42: Tenants in Common § 7—

Respondent, a tenant in common in expectancy in possession of the land, redeemed it from the county after tax foreclosure. There was conflict in the evidence as to whether respondent had promised petitioner, his cotenant, to pay the taxes. Petitioner had knowledge of the tax foreclosure proceedings. This proceeding for partition was instituted some thirteen years after the redemption from tax foreclosure. *Held:* Whether respondent's redemption of the land was for the benefit of petitioner depends upon whether respondent was under any legal or moral obligation to pay the taxes, and this question together with the plea of laches should have been submitted to the jury, and a directed verdict for petitioner must be held for error.

APPEAL by respondent from *Thompson, J.*, at September Term, 1946, of FRANKLIN.

Petition for partition. Plea of sole seizin and laches by respondent.

The *locus in quo* is the Nannie Cooke 34-acre tract of land in Franklin County which her mother devised to her subject to her father's life estate. In 1929 the life tenant, W. A. Parrish, conveyed his interest in the property to his son, who kept it for two years, or until the spring of 1931, and "turned it loose" or surrendered it to all who had an interest in it.

Nannie Cooke died intestate leaving her surviving four children, the *feme* petitioner herein and three others. The three conveyed their interests to the respondent during August and September of 1930 for very nominal amounts. Many efforts were made by the respondent to purchase the *feme* petitioner's share, but without avail. After the grantee of the life estate had surrendered his interest, the respondent told the petitioner that a foreclosure proceeding had been brought to sell the land for taxes. Whereupon, the petitioner said to the respondent that as "he was using the land, to go ahead and pay the taxes and use it, and if anything remains, see me." This was the last conversation the *feme* petitioner had with the defendant.

The *feme* petitioner further testified that she received summons "concerning the sale of the land for taxes; that she did not file any answer, because Mr. Rowland promised to pay the taxes."

There was a sale of the land to the county in the tax foreclosure suit. Opportunity was then extended to those interested to redeem the land upon payment of the taxes. This was accepted by respondent on the first Monday in April, 1933, being April 3rd. At that time, "he made a $10.00 deposit on the taxes, thinking Mrs. Pearce would come and pay her part." He did not remember whether he went to see the *feme* peti-

tioner after making the deposit, but he says, "I gave her a good showing in my estimation to come and protect her land if she wanted to."

The respondent finally paid the taxes in full on 4 November, 1933, and received a deed from the county. The deed bears date 19 April. It was registered 4 November.

From directed verdict for petitioners, the respondent appeals, assigning errors.

G. M. Beam and Yarborough & Yarborough for petitioners, appellees.
John F. Matthews for respondent, appellant.

STACY, C. J. It is admitted that prior to the sale of the land for taxes in 1933, the *feme* petitioner and respondent were vested remaindermen (tenants in common in expectancy) deriving their title and interests —one-fourth and three-fourths respectively—from a common source. *Priddy & Co. v. Sanderford,* 221 N. C., 422, 20 S. E. (2d), 341; 14 Am. Jur., 124. There is some evidence that respondent was in possession of the land when the tax lien was foreclosed.

After sale to Franklin County in the tax foreclosure proceeding, the county extended to the parties in interest an opportunity to redeem the land upon payment of the taxes then due and in arrears. This offer was accepted by the respondent on the first Monday in April, 1933, at which time he "made a $10.00 deposit on the taxes, thinking Mrs. Pearce would come and pay her part." He is not certain whether he went to see her after making the deposit, but he says, "I gave her a good showing in my estimation to come and protect her land if she wanted to." The respondent finally paid the taxes in full on 4 November, 1933, and received a deed from the county, which had theretofore been prepared on 19 April. It is this deed which he says forecloses the *feme* petitioner's interest in the land and gives him sole seizin and exclusive title thereto.

There is a dispute as to whether the respondent was under promise to pay *feme* petitioner's part of the taxes and account to her in rents (*Bailey v. Howell,* 209 N. C., 712, 184 S. E., 476) before the institution of the tax foreclosure proceeding. She testifies that she did not file answer in the proceeding, "because Mr. Rowland promised to pay the taxes."

The respondent felt under some obligation to the *feme* petitioner even after his agreement with the county to redeem the land upon payment of the taxes. *Stell v. Trust Co.,* 223 N. C., 550, 27 S. E. (2d), 524, and cases there cited. He was very grateful to the County Attorney, "thanked him six or seven times, for getting him straightened out so he could get title to it."

The respondent says he has owned the whole of the land in question since 1933, "having purchased three-fourths from the heirs of W. A.

Parrish, and one-fourth from the county." Was the purchase of the one-fourth from the county made for the benefit of the *feme* petitioner? The answer depends upon whether the respondent was under any legal or moral obligation to pay the taxes. *Smith v. Smith,* 150 N. C., 81, 63 S. E., 177. The *feme* petitioner says he was. The respondent says he was not, or that, if he were, he discharged his duty in this respect. The evidence is such as to require the aid of a jury, free to render a verdict in keeping with the facts as it may find them to be under proper instructions from the court.

The plea of laches is also a matter to be considered on the further hearing. *Stell v. Trust Co., supra.*

There was error in directing a verdict for the petitioners.

New trial.

W. C. ELDER v. S. T. JOHNSTON.

(Filed 5 June, 1947.)

1. Wills § 33a—

An unrestricted devise of realty, nothing else appearing, constitutes a devise in fee, G. S., 31-38.

2. Same—

Testatrix devised her real and personal property to be equally divided among her children with provision that it be sold and proceeds equally divided among them if they could not agree upon a physical division. By subsequent item she provided that realty devised to any of her children who should die before their children became of age, should not be sold until the youngest child of such deceased child became of age, unless a like amount of money were invested in real estate of equal value. *Held:* The subsequent item contained no limitation over and imposed no condition upon the estate devised, and upon the voluntary partition between devisees, a devisee can convey the lands allotted to him in fee simple.

APPEAL by defendant from *Carr, Resident Judge,* in Chambers, 24 April 1947, ALAMANCE.

Lora Perry Elder died in the year 1942, seized and possessed of certain land in Alamance County, including the tract described in the complaint. She left a will in which she devised all her property to her two daughters and four sons. The material part thereof is as follows:

"*SECOND:* I give and devise to my own children, all of my real and personal property, to be equally divided among them and if they cannot agree then all of my real and personal property is to be sold and the proceeds thereof, equally divided among all my children.

"*THIRD:* My further will and desire is that in the event of the death of either of my two daughters or four sons before all of their children become of age (of all who have issue) that the real property devised by me to said son or daughter, shall not be sold or disposed of, until the youngest child of the respective sons and daughters becomes of age, unless a like amount of money is invested in real estate of equal value."

Plaintiff and his brothers and sisters made a voluntary partition of the lands devised in said will and plaintiff was allotted as his share the tract described in the complaint. A partition deed therefor was delivered to him. Thereafter he contracted to sell and convey said land in fee simple to defendant for the sum of $14,000 and pursuant thereto tendered to defendant a deed conveying same in fee with full covenants of warranty. Defendant declined to accept said deed and to pay the agreed purchase price for that under the terms of the will of Lora Perry Elder the estate of plaintiff is contingent and so limited that he cannot now convey a fee simple title. Thereupon, plaintiff instituted this action to compel specific performance of said contract.

The cause was submitted to the resident judge in chambers upon the record. Being heard, the court adjudged that the deed tendered by plaintiff conveys a good and sufficient title in fee simple and decreed specific performance. Defendant excepted and appealed.

Long & Long for plaintiff appellee.
C. C. Cates, Jr. for defendant appellant.

BARNHILL, J. The testatrix, in the second paragraph of her will heretofore quoted, made an unrestricted devise of her land to her six children to be equally divided among them, with the provision that if they could not agree upon a division then the land should be sold and the proceeds divided. Nothing else appearing, this constitutes a devise in fee. G. S. 31-38; *Holt v. Holt,* 114 N. C., 241; *Fellowes v. Durfey,* 163 N. C., 305, 79 S. E., 621; *Roane v. Robinson,* 189 N. C., 628, 127 S. E., 626; *Barbee v. Thompson,* 194 N. C., 411, 139 S. E., 838; *Lineberger v. Phillips,* 198 N. C., 661, 153 S. E., 118; *Jolley v. Humphries,* 204 N. C., 672, 169 S. E., 417; *Hambright v. Carroll,* 204 N. C., 496, 168 S. E., 817; *Barco v. Owens,* 212 N. C., 30, 192 S. E., 862; *Heefner v. Thornton,* 216 N. C., 702, 6 S. E. (2d), 506; *Early v. Tayloe,* 219 N. C., 363, 13 S. E. (2d), 609; *Croom v. Cornelius,* 219 N. C., 761, 14 S. E. (2d), 799.

So then the question here is this: Does the provision contained in paragraph three so restrict or limit the estate thus devised that plaintiff cannot now convey a fee simple title to the share allotted to him in the division? The court below answered in the negative. In that conclusion we concur.

In this provision there is no limitation over. Nor is there any condition imposed upon the estate conveyed. The testatrix merely expresses a desire as to the course that shall be pursued in respect to a sale of the property in the event a devisee dies before his or her children become 21 years of age. "If this be regarded as a restraint on alienation it is void, *Williams v. McPherson*, 216 N. C., 565, 5 S. E. (2d), 830, and if merely the expression of a desire on the part of the testator, it is likewise ineffectual. *Brooks v. Griffin*, 177 N. C., 7, 97 S. E., 730." *Early v. Tayloe, supra.* See also *Lineberger v. Phillips, supra; Hambright v. Carroll, supra; Barco v. Owens, supra; Heefner v. Thornton, supra;* in each of which the language used by the testator was much stronger than here and yet we held that it was not sufficient to delimit the fee theretofore devised.

On this record the deed tendered by plaintiff conveys an indefeasible fee and defendant is under legal obligation to accept the same and to pay the agreed purchase price. Hence the judgment below is

Affirmed.

STATE v. MATTIE BOLDIN.

(Filed 5 June, 1947.)

Homicide § 7—

The evidence tended to show that after an altercation with her husband, defendant got a loaded rifle from another room, went back in the kitchen and shot and killed her unarmed husband as he started back in the house. Defendant testified she pointed the rifle at him and "reckoned" she pulled the trigger, and that she did not know why she shot him. *Held:* An instruction that if the jury should find the facts to be as all the evidence tended to show to return a verdict of guilty of manslaughter, otherwise to acquit defendant, is without error. G. S., 14-34.

APPEAL by defendant from *Williams, J.*, at December Term, 1946, of ORANGE. No error.

The defendant was indicted for the murder of her husband, Willie Boldin. The solicitor announced he would not ask for conviction of murder in the first degree, but of murder in second degree or manslaughter.

The evidence offered by the State tended to show that on Sunday, 17 February, 1946, the deceased returned home from Burlington "about drunk." A quarrel ensued between him and his wife, in the course of which she struck at him with a knife. Deceased took the knife away from her and went out and threw the knife away. The defendant then went in another room and came back into the kitchen with a loaded rifle

and as deceased started back in the house and was in the door she shot him, the bullet entering his body just over the heart and inflicting a wound from which he died shortly thereafter.

The defendant testified that after the deceased took the knife away from her and went out, she went in another room and got the rifle and came back into the kitchen. As he started back in she threw up the rifle and he ran in and took hold of it. She said: "I threw up the rifle and he ran in and grabbed it. I pointed it at him. I reckon I pulled the trigger." When asked why she shot him, she replied, "I don't know." She admitted she was "mad because he was drunk."

The court in his charge to the jury, after reviewing the testimony and stating the contentions of the State and defendant thereon, instructed the jury that there was sufficient evidence to rebut the presumption of malice arising from an intentional killing with a deadly weapon, and that they should not consider verdict of murder in the second degree. Thereupon, after defining manslaughter and pointing out the effect of the unlawful act of pointing a gun at another, the court charged as follows: "There is no evidence that the defendant shot under any reasonable apprehension of receiving death or great bodily harm at the time; there is no evidence that the deceased was armed at the time, and I instruct you that if you find beyond a reasonable doubt the facts to be as all the evidence in this case tends to show, that it would be your duty to return a verdict of guilty of manslaughter; otherwise you would acquit her."

The jury returned verdict of guilty of manslaughter, and from judgment imposing prison sentence the defendant appealed.

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

Horton & Bell and B. D. Sawyer for defendant.

DEVIN, J. The defendant assigns error in the instructions given by the court to the jury as to manslaughter, on the ground that it eliminated the question of self-defense, but, upon a careful examination of the testimony offered in the trial as shown by the record before us, we agree with the learned judge below that there was no evidence that the fatal shooting was done in self-defense, or that it resulted from accident or misadventure. We think the defendant is unable to escape the implication from her own testimony that she was guilty of manslaughter. She testified that she pointed the rifle at him and "reckoned" she pulled the trigger; and in response to the question why she shot him she replied, "I don't know." *S. v. Stitt,* 146 N. C., 643, 61 S. E., 566; *S. v. Limerick,* 146 N. C., 649, 61 S. E., 568; *S. v. Parker,* 198 N. C., 629, 153 S. E., 260; *S. v. Wall,* 218 N. C., 566, 11 S. E. (2d), 880; G. S., 14-34. "At common law and by Rev., 3632 (now G. S., 14-34), one who points a

loaded gun at another, though without intention of discharging it, if the gun goes off accidentally and kills, it is manslaughter." *S. v. Coble,* 177 N. C., 588, 99 S. E., 339.

None of the exceptions noted by defendant to the ruling of the court as to the admission of testimony can be sustained.

No error.

STATE v. MITCHELL A. HOUGH.

(Filed 5 June, 1947.)

1. Criminal Law § 52a—

Upon a motion to nonsuit, the evidence is to be considered in the light most favorable for the State and defendant's evidence in conflict with that of the State will not be considered.

2. Automobiles § 28e—Evidence of culpable negligence in driving of automobile held sufficient for the jury.

The evidence tended to show that the car driven by defendant struck the rear of a parked wrecker at nighttime, swerved by the wrecker, ran off to the left side of the highway, ran up and down an embankment, careened back across the highway and turned over about 130 feet from the point of collision. There was evidence tending to show that defendant had been drinking. There was conflict in the evidence as to whether the lights were burning on the wrecker and as to whether it was parked entirely off the pavement and as to whether there was other traffic on the road at the time. *Held:* There was sufficient evidence to support the jury's finding that defendant was guilty of culpable negligence.

3. Criminal Law § 81c (2)—

The charge of the court will be considered contextually.

APPEAL by defendant from *Rousseau, J.,* at September Term, 1946, of FORSYTH.

Criminal prosecution on indictment charging the defendant with the slaying of one Cleona Suber, with a deadly weapon, to wit, an automobile.

The State's evidence tends to show that on the night of 17 March, 1946, Clarence Counts was returning in his automobile from a roadhouse near Winston-Salem when he had a puncture. He went to town, secured a wrecker and returned with Albert V. Brown driving. They passed the Counts car, turned the wrecker around and stopped it off the pavement about 10 feet behind the Counts car, with its lights burning, brakes set and the motor running. Before Counts and Brown could get out of the wrecker, it was struck from the rear by a LaSalle car driven by the de-

fendant, and pushed forward about six feet. After striking the wrecker the defendant's car swerved by the wrecker, ran off to the left side of the highway, ran up and down an embankment, careened back across the highway and turned over about 130 feet from the point of collision. The defendant's car was demolished and one of its occupants, Cleona Suber, was killed. Soon after the defendant's car came to rest, someone threw a bottle out of it into the field near-by. It was found to be a pint bottle with a small amount of whiskey in it. The defendant had a strong odor of listerine on his breath. The time of the collision was about 1:30 a.m., and the moon was shining brightly. There was no other traffic in sight at the time.

According to the defendant's evidence he was also returning from a roadhouse, and just before the impact he met a truck-trailer with its lights on, going in the opposite direction. Because of this he did not see the parked wrecker in time to avoid sideswiping it. The wrecker was not entirely off the pavement, and it was unlighted. The defendant says: "I dimmed my lights when I met the trailer, and it was just hazy foggy just a little bit, and just as the trailer part of the truck passed me, I switched my lights back on bright, and there stood this wrecker. . . . I wasn't making over 40 miles per hour. . . . There wasn't a drop of liquor in my car."

At the close of the evidence, the court sustained the motion to nonsuit as to Albert V. Brown and overruled it as to Mitchell A. Hough.

Verdict: Guilty.

Judgment: Six months on the roads.

The defendant appeals, assigning errors.

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

Deal & Hutchins for defendant.

STACY, C. J. Viewing the evidence in its most favorable light for the prosecution, the accepted position on motion to nonsuit, it seems sufficient to carry the case to the jury. It is true, the defendant's evidence, if accepted in its entirety, would tend to leave the question of culpable negligence in doubt. *S. v. Lowery,* 223 N. C., 598, 27 S. E. (2d), 638. However, the jury has accepted the State's version of the matter, and rejected the defendant's theory of the case. *S. v. Sudderth,* 184 N. C., 753, 114 S. E., 828. No doubt the force of the impact, the destruction and death which followed the collision, and the circumstances surrounding the incident, led the jury to believe that the defendant's car was being driven faster than he thought or else he was unable to control it. Physical facts speak their own language and are often heard above the

voices of witnesses. *Atkins v. Transportation Co.,* 224 N. C., 688, 32 S. E. (2d), 209; *Powers v. Sternberg,* 213 N. C., 41, 195 S. E., 88.

The jury found that the defendant was culpably negligent. There is evidence to support the finding. *S. v. Cope,* 204 N. C., 28, 167 S. E., 456; *S. v. Stansell,* 203 N. C., 69, 164 S. E., 580; *S. v. Satterfield,* 198 N. C., 682, 153 S. E., 155. The facts here are quite different from those appearing in the case of *S. v. Lowery, supra,* upon which the defendant strongly relies.

The exceptions to the charge are also untenable. While somewhat meager in its application of proximate cause, it will do when considered contextually. *S. v. Davis,* 225 N. C., 117, 33 S. E. (2d), 623.

A careful perusal of the record leaves us with the impression that no reversible error has been made to appear. Hence, the verdict and judgment will be upheld.

No error.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1947

BOARD OF EDUCATION OF THE STATE OF NORTH CAROLINA AND STATE OF NORTH CAROLINA, PLAINTIFFS, v. MARTHA W. GALLOP AND HUSBAND, EMANUEL GALLOP, JOSEPH WOODHOUSE AND WIFE, GLADYS WOODHOUSE, HELEN A. NORMAN AND HUSBAND, H. W. NORMAN, GEORGE J. SPENCE, TRUSTEE, AND S. T. COOPER, DEFENDANTS.

(Filed 17 September, 1947.)

1. Execution § 22—

Where sheriff's deed is attacked on the ground that it was not supported by a live execution in the sheriff's hands, such attack goes to the complete invalidity of the deed, and it is incumbent upon the party relying upon such deed as a link in his chain of title to prove, *dehors* the recitals in the deed, that it was executed pursuant to a sale under a live execution.

2. Same—

Sheriff's deed constituting a link in plaintiff's title was attacked on the ground that it was not supported by a live execution. Plaintiff introduced a purported "execution" signed by the clerk, but which did not have notation as to date of issue, G. S., 1-310, nor notation by the sheriff of the date received and the date of execution, G. S., 2-41, nor entry of any return on the judgment docket, G. S., 1-321. *Held:* The purported "execution" is insufficient as an original and is ineffectual if relied upon as a replica of an original execution which had been lost.

3. Same—

Recitals in sheriff's deed that it was executed pursuant to sale under live execution in his hands are only secondary evidence of such fact and cannot be admitted for that purpose until the loss or destruction of the original records is clearly proven to the satisfaction of the court.

4. Same: Execution § 6—

Where sale is had after the maximum period allowed for return of the original execution, there can be no presumption that successive executions were issued in the absence of showing that the requisite fees were tendered the clerk, since the clerk is not bound to issue any execution unless the proper fees are tendered to him. G. S., 1-305.

5. Same—

Under C. S., 672, an execution sale had more than sixty days (now ninety days, G. S., 1-310) from date of issuance of execution is void.

PLAINTIFF'S appeal from *Burgwyn, Special Judge,* at May Term, 1947, of PASQUOTANK.

The plaintiffs brought this action in ejectment against the defendants in possession, claiming title to the land in the State Board of Education and asking damages for its wrongful retention; and joined therein allegations that certain described deeds of trust were invalid, constituted a cloud on the title, and asked that they be removed from the county registry.

The defendants answered, admitting possession, denying plaintiffs' title, and claiming title in themselves; and in a further defense and counterclaim pleaded adverse possession under color of title for seven years, adverse possession for more than 21 years and more than 20 years, and for more than 30 years, prior to the commencement of the action, pleading the several statutes. They further attacked plaintiffs' source of title, alleging the same to be through a deed of Charles Carmine, Sheriff of Pasquotank County, to M. B. Simpson, and from Simpson and others through *mesne* conveyance to the plaintiff Board of Education. The invalidity of the sheriff's deed is alleged to rest in the fact that the sale was made without authority of law or valid execution in the hands of the sheriff. They demand that plaintiff's deeds be removed from the registry as constituting a cloud on defendants' title. Defendants further set up a claim based upon equitable estoppel, alleging that plaintiffs, having once attempted to exercise some dominion over the property, desisted because of defendants' notice of their ownership, and thereafter permitted several homes to be erected on the land without objection or protest, leading defendants to believe that their title or right of possession was fully recognized.

On the trial the plaintiffs introduced as part of its chain of title the aforesaid deed of Charles Carmine, Sheriff of Pasquotank County, to M. B. Simpson, dated 14 March, 1941, containing the following recitals:

"NORTH CAROLINA
PASQUOTANK COUNTY

"THIS DEED made and entered into this 14th day of March, 1931, by and between Charles Carmine, Sheriff of Pasquotank County,

of the first part, and M. B. Simpson of said County, of the second part, WITNESSETH:

"THAT WHEREAS, a certain writ of execution issued out of the Superior Court of said County in favor of M. B. Simpson, plaintiff, and against Joseph Woodhouse, defendant, commanding said Sheriff out of the personal property of the said Woodhouse within said County found, to satisfy the same, or in default thereof out of the real property of the said Judgment debtor, as by reference to said execution will more fully appear; and

"WHEREAS, because sufficient personal property of said judgment debtor to satisfy said execution in said County could not be found the said Sheriff did levy on, take and seize all the estate, right, title and interest of said judgment debtor of, in and to the real estate hereinafter described with the appurtenances, and did on the 2nd day of March, 1931, sell the said premises at auction at the Courthouse door in Elizabeth City, North Carolina, at 12 o'clock noon, after having advertised and given the notices according to law, at which sale the said Simpson became the last and highest bidder, therefor, at the price of FIVE HUNDRED DOLLARS."

The deed then conveys the land in controversy to Simpson, under whom the plaintiff Board of Education claims.

In support of the deed of Sheriff Carmine to Simpson the plaintiff offered F. D. Horner, Clerk of the Superior Court, who identified certain papers from the files of his office, containing the judgment roll, which plaintiff offered in evidence. Amongst them is the summons in the action of *Simpson v. Woodhouse,* verified complaint therein, and judgment; execution dated 18 December, 1930, and attached thereto memorandum of the Sheriff relating to the persons summoned to lay off homestead and levy made on the excess; appraisers' return showing the land included in the homestead and the adjacent land of defendant in execution, the latter being the same now in controversy. (The execution above listed is not the paper in controversy hereinafter mentioned, called during the trial "the second execution," dated 5 February, 1931.)

There follows a copy of notice of the March 2nd sale, dated 31 January, 1931, with notation on the back thereof by the Sheriff, "Sold to M. B. Simpson for $500"; and a newspaper clipping showing advertisement in an Elizabeth City newspaper.

The plaintiff then offered in evidence a paper writing from the same jacket, containing the judgment roll in the case of *Simpson v. Woodhouse,* together with the photostatic copies of the face and reverse thereof. The paper purports to be an execution, is dated 5 February, 1931, and requires execution and return on or before 2 April, 1931. The paper,

in form of an execution, bears no statement or endorsement that it had ever been issued, or received by the sheriff, and no return indicating it had been acted upon or of sale made thereunder.

Defendants objected on the ground that the paper had been previously stricken from the files by final court order upon motion of these defendants in the case of *Simpson v. Woodhouse* and no longer constituted a part of the judgment roll; and further because the affidavits and, especially, two orders relating to the purported execution, one by the Clerk, and one upon appeal by the trial judge now sitting at this hearing, striking the paper from the files, were not offered along with it as inseparably relevant matters of record. Pending argument the jury was excluded from the room and the defendants offered these affidavits and orders from the same jacket containing the judgment roll. The affidavits were those of the movents in the proceeding before the Clerk, including some of the present defendants, and supporting affidavits from other witnesses. In addition to that, further affidavits were read, and testimony was taken (in the absence of the jury) respecting the character of the paper offered as an execution, its former absence from the judgment roll, for the purpose of showing that it had made a recent appearance there. All of the affidavits made in the previous hearing except the item below mentioned, the affidavit of Robert L. Sessoms, were excluded, as well as the two orders striking the paper from the file. In excluding them His Honor made an order that they should be a part of the case on appeal, and they are a part of the record. However, they are not essential to the decision of the case and are omitted from this statement.

The judge did admit an affidavit of Robert L. Sessoms, Jr., manager of the Mitchell Printing Company of Raleigh, to the effect that he was familiar with the various legal forms printed and for sale by his company and that the paper in controversy was a form printed by that company. He further testified that this form was printed on or about 1 September, 1932. That this particular form of execution as printed bears the following on the inside of the paper at the fold: "Form 12—Execution Against Property—New Form—60282—Mitchell Printing Co."; that on the outside of such printed form as printed there appeared the following: "Form 12—60282—1M—9-1-32"; the latter date indicating when it was printed and put on sale; that the form bearing the aforesaid number was not in existence during the year 1931 and particularly during February, March and April. Prior forms carried a lower number.

Reference to the purported execution as offered shows that the date above referred to was pinched or torn off the paper but the publisher's number remained. The judge, having once declined to admit the paper, reconsidered and admitted it on the ground that the present plaintiff was

not a party to the motion which resulted in striking the paper from the files and was not bound thereby, admitting the paper in evidence, over the defendants' exception.

The following issues were submitted to the jury:

1. Are the plaintiffs the owners of the lands described in the complaint?
   Answer: No.
2. Have the defendants, and their predecessors in title, been in the adverse possession of the lands described in the complaint, under color of title, under known and visible lines and boundaries, continuously, for more than 7 years prior to the institution of this proceeding?
   Answer: Yes.
3. What amount, if anything, are the plaintiffs entitled to recover of the defendants?
   Answer: Nothing.

As to the first issue, the court charged the jury that if they believed the facts to be as testified to by the witnesses and as the record evidence in the case tended to show, they should answer the first issue "No"; and that if they believed the facts to be as the record evidence tended to show and as testified to by the witnesses, they would answer the second issue "Yes"; and that if the jury believed the facts to be as testified to by the witnesses and as the record tended to show, they would answer the third issue "Nothing." Similar directional instructions were given upon the issues relating to defendants' cross-action.

To these instructions the plaintiffs in apt time objected and excepted. The jury rendered a verdict in accordance with the instructions given them. The plaintiff moved to set aside the verdict and for a new trial for errors assigned or to be assigned in case on appeal. The motion was overruled and plaintiff excepted. Upon the signing of the ensuing judgment the plaintiff objected, excepted and appealed, assigning errors.

Attorney-General McMullan for the State.

R. Clarence Dozier and Wilson & Wilson for plaintiff, appellant.

J. Henry LeRoy and Geo. J. Spence for defendants, appellees.

SEAWELL, J. The deed of Sheriff Carmine to M. B. Simpson is a vital and necessary link in the plaintiff's title and its validity depends on a sale under a live execution in the hands of the sheriff as provided by law. It is incumbent upon the plaintiff offering such a deed when challenged in an action involving the title, to support it by evidence of these

facts. *Byrd v. Collins,* 159 N. C., 641, 75 S. E., 1073; *Avery v. Stewart,* 134 N. C., 287, 46 S. E., 519; *Isley v. Boon,* 109 N. C., 555, 13 S. E., 795; *Person v. Roberts,* 159 N. C., 168, 74 S. E., 322; *Sinclair v. Worthy,* 60 N. C., 114, 115; *Thompson v. Lumber Co.,* 168 N. C., 226, 84 S. E., 289. The continuous history of variations in early decisions will be found in 36 A. L. R., Anno., p. 1007 (*seq.*); however, the important case of *Thompson v. Lumber Co., supra,* is not listed.

The attack on plaintiff's proffered muniment of title, based on the want of such an execution, does not go to its irregularity but to its complete invalidity.

This case, then, hinges upon the legal effect of the so-called "second execution," the paper admitted after very extensive controversy, and virtually deprived of effect by the instructions given to the jury upon the issues determining the plaintiff's title to the lands.

The plaintiffs do not contend that this paper writing was in existence at all until after the sale of the land. They do contend that the court, and the jury, may draw from it the inference that it was written and signed by Aydlett, Clerk of the Superior Court, *ex mero motu,* to supply a formerly existing execution which had become lost, and that this was within his official power and discretion.

It seems to be agreed that the "second execution," as it has been called, was filled in in the handwriting of Mr. Aydlett and bears his proper signature. There is no evidence *dehors* the document itself as to whether he wrote it up *ex mero motu* or at the insistence of some other person; and there is no evidence *dehors* the paper that there was ever any such execution issued or lost which might be supplied either *ex mero motu* or otherwise by the clerk. In fact, the evidence, as far as it goes, is *contra.*

The evidence tends to show that there was no entry upon the records of the clerk as to its issue (G. S., 1-310), nor endorsement of the clerk on the day of its issue, none by the sheriff of the day he received it and the day of execution (G. S., 2-41), nor entry of any return on the judgment docket (G. S., 1-321), all of which were statutory requirements in force at the time of its alleged issue and return.

The paper which it is suggested is a substitute for a lost original, which original should have been thus charted through its course by the records, is not supported by any return upon it or accompanying it, or any of the notations which we have mentioned. It rivals the Flying Dutchman, sailing without a log—just coming out of the nowhere into the here. The evidence seems to disclose that it made its first appearance amongst the papers in the judgment roll very recently, and some 16 years after the sale.

If indeed the so-called "second execution" could be an exact replica of an original which was lost and which the clerk sought to replace, it falls far short of being a serviceable substitute. If we might conceive of this paper lying in the clerk's office in the judgment roll all this while as an original, none of the presumptions which the appellants desire to attach to it can be indulged. An execution is of no effect until its issue and delivery to the sheriff. *McKeithen v. Blue,* 149 N. C., 95, 62 S. E., 769, 128 Am. S. R., 654.

The law, as we have seen, has provided a method by which this important fact may be evidenced; there is no evidence *dehors* the record of the issue of the execution; and there is nothing in the challenged paper itself, supposing it to be a substitute, which would raise a presumption or inference of such issue. In other words, the document at last appearing raises no presumption that it was ever issued or acted upon.

It is now the settled law in this State that the recitals in a sheriff's deed other than those which pertain to some of his own acts, are only secondary evidence in so far as establishment of the existence of the judgment and the execution are concerned. *Thompson v. Lumber Co., supra:*

> "The deed was introduced in evidence but the judicial proceedings were not produced, the sheriff relying upon the recitals in the deed to prove their existence and contents. It is well established that the recitals in a deed executed pursuant to a judicial decree, or by a sheriff upon an execution sale are evidence of the facts recited, but they are only secondary evidence and before being admitted for that purpose the loss or destruction of the original record must be clearly proven. *Isley v. Boon, supra; Person v. Roberts, supra.*"

In *Byrd v. Collins, supra,* the Court quoted with approval *Avery v. Stewart, supra;*

> "If the instrument is lost, the party is required to give some evidence that such a paper once existed, though slight evidence is sufficient for this purpose; and that a *bona fide* and diligent search has been unsuccessfully made for it in the place where it was most likely to be found . . . the question whether the loss of the instrument is sufficiently proved to admit secondary evidence of its contents is to be determined by the court and not by the jury."

From *Person v. Roberts,* 159 N. C., 168, 74 S. E., 322, we quote:

> "The act of issuing an execution is not that of the sheriff but of the clerk and can easily be proved by the execution itself, or in its absence, if lost, by the record. . . ."

Certainly, the recitals are neither conclusive nor effective against the record itself. *Powell v. Turpin,* 224 N. C., 67, 69, 70, 29 S. E. (2d), 26.

Appellants urge that a presumption of the issue of a prior execution was raised by G. S., 1-305, making it the duty of the clerk to issue successive executions within six weeks of the return date of the first, this on the principle that officers are supposed to have performed their duties. The force of this suggestion is somewhat blunted by the fact that the clerk is not bound to issue any execution at all unless the fees are tendered to him. *Bank v. Bobbitt,* 111 N. C., 194, 16 S. E., 169. There is no evidence that any such fees were paid or tendered.

The original execution issued in this case on 18 December, 1930, and now in the judgment roll, was no authority for the sheriff in making the sale and executing the deed. Under the law as it then existed, requiring return not less than 40 nor more than 60 days from the date of issue (C. S., 672) this execution was "dead in law." More than 70 days had expired when the sale was made. *Gardner v. McDonald, Sheriff,* 223 N. C., 555, 27 S. E. (2d), 522; *Jeffreys v. Hocutt,* 193 N. C., 332, 137 S. E., 177. A sale made under it would, therefore, be void.

We do not find it necessary to consider objections and exceptions to the instructions given by the court upon the issues relating to the defendants' title since the plaintiff must fail in the assertion of his own title. Error in the latter respect, if there is such, cannot be material to the result. In the record we find

No error.

ELIJAH PLUM SHEPPARD v. VANDALIA I. SYKES, LACY O. WARNER, JOHNNIE GRAY WARNER, JOSHUA O. WARNER, WILLIAM J. WARNER AND NELDA GRAY SYKES, DALIA SYKES, MINORS, AND ALL OTHER CHILDREN OF VANDALIA I. SYKES NOT IN ESSE BY THEIR GUARDIAN AD LITEM, DAVID J. SYKES.

(Filed 17 September, 1947.)

1. Dower § 7—

The widow is not a tenant in common with the heirs at law, but her estate is superimposed upon the estate of the heirs and is superior thereto.

2. Adverse Possession § 4f—

When a widow remains in possession of the whole estate under an unallotted dower right her possession is an extension of the possession of her deceased husband and is not deemed to be adverse to her children.

3. Same—

A mortgagor died leaving a minor widow and a child *in ventre sa mere.* The mortgage was foreclosed. The widow's father purchased at the foreclosure sale and conveyed to the widow when she attained her ma-

jority. *Held:* The widow entered into possession not as surviving widow but in her own right as purchaser, and therefore the principle that her possession is an extension of the possession of her deceased husband, is not applicable, since the continuity of possession was broken.

4. Limitation of Actions § 9—

Where a fiduciary, either by operation of law or by agreement, enters into possession, time will not run during the existence of the relationship so as to bar an action to establish a resulting or constructive trust until there has been an unqualified disavowal by clear and unequivocal acts or words.

5. Same—

Where a widow enters into possession of the estate of her husband, not under her unallotted dower right, but as purchaser from the purchaser at the foreclosure sale of a mortgage on the land executed by the husband, she holds same adverse to the heirs, and the principle of law that time will not begin to run against an action to have her declared trustee of a resulting or constructive trust in favor of the minor heirs until the termination of the relationship by clear and unequivocal acts or words, is not applicable.

6. Trusts § 5b—Evidence held insufficient to establish constructive trust in favor of heir against widow.

A mortgagor died leaving a minor widow and a child *in ventre sa mere.* The mortgage was foreclosed and the land was purchased by the widow's father at the foreclosure sale and reconveyed to the widow upon her majority. This action was instituted by the child twenty-five years after attaining her majority to have the widow declared the trustee of a resulting or constructive trust in her favor upon allegations that the widow procured the foreclosure of the mortgage and that her father bid in the land for her as her agent. There was no evidence that the widow procured the foreclosure of the mortgage, but it appeared to the contrary that foreclosure was dictated by common prudence, since the estate was insufficient to pay secured claims and there was no one legally capable of negotiating an extension of the debt, nor evidence that the widow's father acted as her agent rather than in her interest as her father. *Held:* The evidence is insufficient to impress a trust upon the widow's title for benefit of plaintiff.

APPEAL by plaintiff from *Morris, J.,* at May Term, 1947, of BEAUFORT. Affirmed.

Civil action to remove cloud on title of real property and quiet title thereto. G. S. 41-10.

On 26 October 1897 Elijah Woolard died intestate, seized and possessed of five small tracts of land in Beaufort County. He had executed two mortgages thereon: one, 1 November 1893 to Thomas H. Blount, and another 18 January 1895 to E. Peterson. He left surviving him his widow, Julia V. Woolard, and a child *in ventre sa mere.* Said child, plaintiff herein, was born shortly thereafter. In January 1899 both

mortgages were foreclosed and the land was purchased at the sale by Richard Johnson, father of the widow. It was announced at the sale that Johnson desired to purchase for his daughter, widow of the mortgagor, and others present entered no bids, but permitted the land to be sold to said Johnson. Foreclosure deeds were executed and delivered to Johnson 28 January 1899. On the same day Johnson executed and delivered to Blount trust deed reconveying said property to secure unpaid purchase money.

After the death of her husband the widow moved to the home of her father and she and her child lived with him until the date of her remarriage in 1902. Johnson qualified as her guardian. She became 21 years of age 12 December 1900. On 22 December 1900 she acknowledged full settlement by her guardian and in consideration of one dollar "and in further consideration of the conveyance to me by my said Guardian of a certain tract of land in Beaufort County," released and forever discharged him and his bond from further liability. Johnson delivered to her deed dated 4 February 1899, conveying the land purchased at the Woolard foreclosure, subject to existing mortgage to Blount.

She went in possession of the *locus* and remained in possession thereof until the date of her death. During her life she sold or otherwise disposed of all land conveyed to her by Johnson except the one tract described in the complaint. While in possession she paid the amount due on the mortgage and the same was canceled of record in 1907. While she lived with her father, before her second marriage, the net proceeds of the crops raised on the land were applied to the payment of the Blount mortgage.

Plaintiff became 21 years of age in 1919. In 1929 Julia B. Warner (Woolard) executed a will in which she devised the *locus* to plaintiff. Thereafter she executed another will in which she devised the same to Vandalia I. Sykes, her daughter by her second husband, for life with remainder to her surviving children, subject to a charge in the sum of $800 in favor of plaintiff.

Plaintiff disavowed any right under the will and instituted this action claiming the land as her own. At the conclusion of the evidence for the plaintiff the court, on motion of defendants, entered judgment dismissing the action as in case of nonsuit and plaintiff appealed.

Rodman & Rodman for plaintiff appellant.

Carter & Carter and Grimes & Grimes for defendant appellees.

BARNHILL, J. The principles of law relied upon by plaintiff are so well established we need not discuss them. Whether the facts appearing

on this record are such as to invoke the application of those principles is the question presented for decision.

Where a confidential relation is established between parties, either by act of law or agreement, the rights incident to that relation continue until the relation is put an end to, and time will begin to operate as a bar during the existence of such relation only in the event there has been an unqualified disavowal by clear and unequivocal acts or words. *Blount v. Robeson,* 56 N. C., 73; *Hospital v. Nicholson,* 190 N. C., 119, 129 S. E., 149; *Sorrell v. Sorrell,* 198 N. C., 460, 152 S. E., 157; *Teachey v. Gurley,* 214 N. C., 288, 199 S. E., 83.

Relying on this principle of law the plaintiff bottoms her cause of action upon the theory that Julia V. Woolard (later Warner), the widow, held possession of the *locus* after the death of her husband in trust for the use and benefit of herself and her daughter, the plaintiff herein. She alleges that the widow "caused and procured the land . . . to be advertised and sold under the powers of sale therein contained, and said lands were so sold and bid in for her by Richard Johnson, her father . . ." and that Johnson was acting as her agent in purchasing and later reconveying to her. In her brief she takes the additional position that the widow went into possession of the inheritance under her unallotted right of dower and that her possession was merely a continuation of the possession of the deceased husband and was not adverse to her daughter, the plaintiff. *Page v. Branch,* 97 N. C., 97. We are constrained to hold that neither position is sustained by the record.

The widow is not a tenant in common with heirs at law. Her estate is superimposed upon the estate of the heirs and is superior thereto. Even so, when the widow remains in possession of the whole estate under an unallocated dower right, her possession is an extension of the possession of her deceased husband and is not deemed to be adverse to her children.

But here the whole record negates the suggestion that the widow remained in possession as such. The property was under mortgage. The mortgages were foreclosed and the land was purchased by Richard Johnson. In the meantime the widow, herself an infant, had moved to the home of her father and become a member of his family.

Thus the continuity of possession under the same right was broken. The title of the deceased husband and his heirs was divested by the mortgage sales and a new title in a new line was created. When the widow entered into possession she went in, not as surviving widow but in her own right as purchaser.

There is no evidence that the widow "caused and procured" the foreclosure of the mortgages. The mortgagor was dead. The widow was under legal disability due to her nonage. The estate which was being

administered was without sufficient assets to pay the secured debts. There was neither widow nor heir legally capable of negotiating or contracting for an extension of the debt. Common prudence and foresight dictated foreclosure. The record discloses this and nothing more.

Even so, the plaintiff insists that the circumstances under which the widow acquired title were such as to impress it with a trust in favor of plaintiff. The record, we think, fails to sustain this position.

She was without means and incapable of contracting. Her father purchased the land so as to protect the home of his infant daughter who was again his dependent and a member of his household. There is not a particle of evidence tending to show that in so doing he acted as her agent rather than as her father, interested in providing a home for her. Under the circumstances here appearing, the statement that he desired to purchase "for her" cannot be construed to mean that he purchased as agent for her. *Akin v. Bank, ante,* 455.

It follows that there is no evidence tending to show that she purchased at the sale property in which she and her child were jointly interested so as to impress her title with a trust for the benefit of plaintiff.

Under the view we take of the case the widow held under a record title superior to any claim of plaintiff, and so she and those claiming under her need not resort to the defense of adverse possession. We note, however, that over a period of 25 years after plaintiff became 21 years of age the widow remained in exclusive possession of the land, appropriated the income therefrom to her own use and sold four of the five tracts formerly owned by plaintiff's father (one of which was sold to plaintiff's husband) without protest from or action by plaintiff. We cannot say that she, in equity and good conscience, has any good or valid claim thereto.

The judgment below is

Affirmed.

GEORGE SUMNER v. MAGGIE SUMNER.

(Filed 17 September, 1947.)

1. Divorce § 9a—

Where, in the husband's action for divorce on the ground of two years separation, the wife files a cross action for divorce *a mensa*, an instruction which inadvertently places the burden of proof upon the plaintiff as to the issues submitted upon the defendant's cross action must be held for reversible error.

2. Appeal and Error § 39h—

An erroneous placing of the burden of proof must be held for reversible error notwithstanding that in other portions of the charge the court may

have given correct instructions in regard thereto, since it must be assumed that the jury was influenced by an erroneous instruction upon a material point, especially when the error is made in the closing admonition of the court.

3. Appeal and Error § 39f—

The fact that the court, in giving concluding instructions which contained an erroneous placing of the burden of proof upon certain of the issues, states that such instruction was given at the prompting of appellant, will not render the instruction harmless under the doctrine of invited error when the nature of the "prompting" by appellant's counsel is not disclosed and it is not made to appear that appellant at any time assumed the burden of proof upon the issues or requested the court to so charge.

APPEAL by plaintiff from *Frizzelle, J.*, at April Term, 1947, of NASH. New trial.

Civil action for divorce.

Plaintiff instituted this action for divorce on the grounds of two years' separation. The defendant filed answer in which she (1) pleads recrimination, (2) alleges a cross action for divorce *a mensa* under G. S. 50-7, subsections 3 and 4, and (3) prays alimony and attorneys' fees.

Issues were submitted to and answered by the jury as follows:

"1. Were the plaintiff and the defendant legally married, as alleged in the complaint?

"Answer: Yes.

"2. Have the plaintiff and the defendant lived separately and apart from each other for two years next preceding the institution of this action?

"Answer: Yes.

"3. Has the plaintiff been a resident of the State of North Carolina immediately preceding the institution of this action for six months?

"Answer: Yes.

"4. Was the separation between the plaintiff and the defendant caused by the unlawful and wrongful conduct and treatment by the plaintiff of the defendant?

"Answer: Yes.

"5. Did the plaintiff endanger the life of the defendant by his cruel and barbarous treatment of her, as alleged in the answer and cross-action?

"Answer: Yes.

"6. Did the plaintiff offer such indignities to the person of the defendant as to render her condition intolerable and life burdensome?

"Answer: Yes.

"7. Did the plaintiff abandon the defendant, as alleged in the answer and cross-action?

"Answer: .....

"8. Has the defendant been a resident of the State of North Carolina more than six months prior to the beginning of this action?

"Answer: Yes."

Thereupon the court entered judgment (1) granting defendant a divorce *a mensa* and (2) requiring the plaintiff to make payments of alimony as therein set out. Plaintiff excepted and appealed.

P. H. Bell for plaintiff appellant.

Fountain & Fountain for defendant appellee.

BARNHILL, J. The record discloses the following as the concluding instruction of the court:

"Upon prompting by counsel for the plaintiff, I have this to say further: (I have already called your attention to the fact that this divorce sought by the plaintiff is upon the ground of two years' separation and not upon the ground of adultery. Now, with respect to the fourth issue and with respect to all of the issues submitted, the fourth, the fifth, and the sixth, if the plaintiff has satisfied you under his plea of being innocent of any wrongful or unlawful conduct toward the defendant, and if he has satisfied you that he is innocent of any indulging or perpetrating any cruel or barbarous treatment so as to endanger the life of the defendant, and if he has not offered any indignities to the person of the defendant as to render her condition intolerable and life burdensome, or if he has satisfied you upon the evidence and by its greater weight with respect to the fourth issue, that the defendant committed adultery, as he contends he has offered evidence tending to show, why of course that would defeat the action of the defendant for a divorce from bed and board.)

"Plaintiff excepts to foregoing portion of charge in parentheses.

"EXCEPTION No. 17.

"COURT: Is that what you asked for, Attorney Bell?

"ATTORNEY BELL: Yes, sir, and would entitle him to a divorce, your Honor.

"COURT: (No, you are not suing for a divorce on the ground of adultery. It would find him blameless, of course, and find that she has been guilty of wrongful conduct, if such was found by the jury, then they would in answering the fourth issue take those facts into consideration.)

"Plaintiff excepts to foregoing portion of charge in parentheses.

"EXCEPTION No. 18."

It is apparent the court below inadvertently, for a moment, got the relation of the parties to the action reversed and spoke under the impression the husband was the defendant. The burden of proof on the fourth, fifth, and sixth issues is on the defendant. The quoted charge places it upon the plaintiff. This must be held for error.

As the plaintiff does not bring forward any exception to the prior instruction of the court as to the burden of proof we may assume that it had correctly charged on this question. Even so this does not temper the prejudicial nature of the error. *S. v. Absher,* 226 N. C., 656.

As was said in *S. v. Overcash,* 226 N. C., 632: "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 possess 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." See also *Dixon v. Brockwell, ante,* 567.

This is particularly true when the erroneous instruction is the closing admonition of the court—the last word before the jury retired to make up their verdict. *S. v. Benton,* 226 N. C., 745; *S. v. Rhinehart,* 209 N. C., 150, 183 S. E., 388.

While, under the doctrine of invited error, a party cannot complain of a charge given at his request, *Thompson v. Telegraph Co.,* 107 N. C., 449; *Bell v. Harrison,* 179 N. C., 190, 102 S. E., 200; *Exchange Co. v. Bonner,* 180 N. C., 20, 103 S. E., 907; *Blum v. R. R.,* 187 N. C., 640, 122 S. E., 562, or which is in substance the same as one asked by him, *Kelly v. Traction Co.,* 132 N. C., 369, rehearing denied, 133 N. C., 418; *Griffin v. R. R.,* 138 N. C., 55; *Smathers v. Hotel Co.,* 162 N. C., 346, 78 S. E., 224, we are of the opinion this doctrine has no application here. The nature of the "prompting" by plaintiff's counsel is not disclosed. Neither is it made to appear that plaintiff at any time assumed the burden on these issues or requested the court to so charge. *Exchange Co. v. Bonner, supra.* What was said thereafter could not have invited the error already committed. Indeed it discloses that the thoughts of the court and counsel were not even then in complete accord.

To avoid any possible prejudice to either party on a rehearing we have purposely refrained from discussing any of the evidence offered.

The error in the charge necessitates a new trial. It is so ordered.

The costs in this Court will be taxed against plaintiff.

New trial.

MRS. JOSIE McCULLERS WELLS v. WILLIAM M. WELLS.

(Filed 17 September, 1947.)

1. Parent and Child § 5—

The father is under moral and legal duty to provide for the support of his child, which duty ordinarily terminates when the child reaches his majority.

2. Same—

Where a child, who prior to and after reaching the age of twenty-one years, is and continues to be insolvent, unmarried and incapable, mentally and physically, of earning a livelihood, the father continues to be under legal duty to provide for the support of such child.

3. Pleadings § 15—

A demurrer admits the allegations of the complaint for the purpose of testing its sufficiency.

4. Same—

The complaint will be liberally construed upon demurrer.

5. Parent and Child § 5—

This action was instituted by the wife against her husband to recover for moneys expended in the support of their son after he had attained his majority upon allegations that the son because of mental and physical disability was unable to support himself, that the husband had abandoned the child and failed to provide adequate support, and that by reason of the husband's misconduct the wife had been compelled to supply the child with the necessities of life. *Held:* The inference is reasonably deducible from the facts alleged that the expenditures by the wife were compelled by necessity, and the husband's demurrer to the complaint should have been overruled.

APPEAL by plaintiff from *Frizzelle, J.*, at February Term, 1947, of WILSON.

Civil action to recover for and on account of expenses incurred by plaintiff in the necessary maintenance of the son of plaintiff and defendant, who prior to and since his twenty-first birthday was and has been mentally and physically incapable of earning a livelihood,—heard upon demurrer to complaint filed by plaintiff.

Plaintiff alleges in material aspects: That she and defendant were married to each other on 7 April, 1917, and to them R. S. Wells, their oldest child, was born on 28 October, 1919;

"3. That since on or about the ..... day of February, 1938, when defendant left the residence which was then being occupied by plaintiff, defendant and their children, the defendant has been living separate and apart from said plaintiff;

"4. That prior to and at the time defendant separated himself from plaintiff, they and their children, including said R. S. Wells, were living in Elm City in the above named State and County and in the residence which had been theretofore occupied by plaintiff, defendant and their children; . . .

"6. That said R. S. Wells, prior to, at the time of, and since he reached the age of 21, has, except when away at school, resided and still resides with and been under the care of his mother:

"7. That said R. S. Wells, prior to, at the time of and at all times since, his 21st birthday, has been and still is unmarried, insolvent and so handicapped, both mentally and physically, as to be absolutely incapable of earning a livelihood and is absolutely dependent upon the plaintiff, his mother, in whose care and custody he was left, for sustenance, care and support, and for the necessities of life and in fact, has been, and still is in such condition mentally and physically as to require more or less constant supervision, care, attendance and attention, and to such an extent as to take up the larger portion of plaintiff's time, both by day and night, and greatly handicap the plaintiff in her normal life, activities and opportunities:

"8. That for several years past and particularly since said R. S. Wells has passed his 21st birthday, the defendant has wrongfully abandoned said R. S. Wells, his son, and the supervision, support and maintenance of said R. S. Wells to this plaintiff, his mother, and, except in small, insignificant and wholly inadequate occasional contributions, has abandoned said child, his son, and his necessary maintenance, nursing, care and support to the plaintiff who has, at her personal expense, burden, trouble and sacrifice and by and through her personal efforts, been compelled, through defendant's misconduct, to supply and has in fact, during said period of time, supplied said R. S. Wells, with the necessities of life, including food, clothing, heat, medical attention, nursing and necessary personal attendance, attention and supervision, and, except for the home and its furniture, each and every comfort, care and attention, as well as the constant supervision required by his mental and physical handicaps:

"9. That the value of the necessities and necessary services and attentions as above outlined and so furnished by plaintiff to said R. S. Wells have been well worth the sum of $250.00 per month for each and every month since said R. S. Wells reached his 21st birthday, and the plaintiff, who has furnished the same is entitled to recover from defendant their value and particularly up to the 28th day of October 1946, in the total sum of $18,000 or some other large sum:

"10. That defendant is in fact, in law, and in morals wholly responsible for said necessities, the burden of which he has wrongfully attempted

to shift to plaintiff and he is a man of considerable means and property and amply able to provide and pay for the same."

Upon these allegations plaintiff prays judgment, etc.

Defendant demurred to the complaint filed in the above entitled action "for that it appears upon the face thereof that it does not state facts sufficient to constitute a cause of action, in that the plaintiff is suing upon an implied contract for necessaries, and for her own personal services furnished to her son, who is also the son of the defendant, who was, during the period covered by the suit, more than 21 years of age," and moved "that the action be dismissed."

The court sustained the demurrer, and ordered the action dismissed at cost of plaintiff and her surety. She appeals to Supreme Court and assigns error.

Lucas & Rand and Ehringhaus & Ehringhaus for plaintiff, appellant.

Larry I. Moore, Battle, Winslow & Merrill, and Varser, McIntyre & Henry for defendant, appellee.

WINBORNE, J. The question presented on this appeal is one of first impression in this jurisdiction. While the duty of the father to support his children during minority has been the subject of decision in opinions of this Court, it is conceded on this appeal that the duty of the father to support his child, who is defective mentally or physically, and who after reaching the age of twenty-one years continues in such condition, has not been the subject of decision in this State. The fact that the latter is true may be due to the fact that the defective children are relatively few when compared with all children in the State, who by nature must pass through the period of minority when they are held, in law, to be incapable of managing their own affairs, and to be under the jealous protection of the law. Or it may be, as Kent says: "The obligation of parental duty is so well secured by the strength of natural affection, that it seldom requires to be enforced by human laws." 2 Kent in American Law, 190.

Be that as it may, this question is now presented: Is a father under legal obligation to continue to provide necessary support to his son, who prior to, and after reaching the age of twenty-one years is and continues to be insolvent, unmarried and incapable, mentally and physically of earning a livelihood? We hold that he is under such obligation.

"The duty of parents to provide for the maintenance of their children is a principle of natural law." It is "an obligation laid on them not only by nature herself, but by their own proper act, in bringing them into the world . . . By begetting them, therefore, they have entered into a volun-

tary obligation to endeavor, as far as in them lies, that the life which they have bestowed shall be supported and preserved." 1 Blackstone's Commentaries (Lewis' Edition), 419.

Basically, the duty of parents, primarily the father, to provide necessary support, care and maintenance for their children may be said to rest on the inability of children to care for themselves. "The wants and weaknesses of children render it necessary that some person maintains them, and the voice of nature has pointed out the parents as the most fit and proper persons. The laws and customs of all nations have enforced this plain precept of universal law . . . The obligation on the part of the parent to maintain the child continues until the latter is in a condition to provide for its own maintenance." 2 Kent on American Law, 190.

Ordinarily a child, in the eyes of the law, is in a condition to provide for his own maintenance when he has reached the age of twenty-one years, that is, has attained the status of majority. That age was arbitrarily fixed at common law for the termination of the child's minority, and the attainment of his majority, and the rule has remained in force throughout the United States. 27 Am. Jur., 748, Infants, 5. However, as stated by *Fullerton, J.*, in *Springstun v. Springstun,* 131 Wash., 109, 229 P., 14, 40 A. L. R., 595, "Majority or minority is a status, rather than a fixed or vested right . . . the rule was arbitrary in the sense that it was one of convenience and necessity, as distinguished from a substantive rule of law."

Therefore, if a child be so defective in mind or in body as to be incapable of providing his own maintenance when he reaches the age of twenty-one years, the rule does not remove the disability and has no application to the status of the child.

Moreover, the child may have the same need of support, care and maintenance after reaching that age as before. If so, does the obligation of the father to provide necessary support to such child terminate at that time? The dictates of humanity, which the law follows, answer "No."

In this connection we find in decisions of this Court in reference to the duties and obligations of the husband or father to his wife and to his children expressions which are indicative of the public policy of the State, such as these: In *Ritchie v. White,* 225 N. C., 450, 35 S. E. (2d), 414: "It is the public policy of the State that a husband shall provide support for himself and his family . . . This duty he may not shirk, contract away, or transfer to another."

In re the Custody of TenHoopen, a minor, 202 N. C., 223, 162 S. E., 619: "It is the moral and legal duty of the father to provide for the protection, maintenance and education of his children," citing cases.

In *Sanders v. Sanders,* 167 N. C., 319, 83 S. E., 490: "There can be no controversy that the father is under a legal as well as a moral duty to

support his infant children, . . . and, if he has the ability to do so, whether they have property or not," quoted with approval in *Green v. Green,* 210 N. C., 147, 185 S. E., 651.

And in *Howell v. Solomon,* 167 N. C., 588, 83 S. E., 609, *Walker, J.,* speaking of the right of the father to the custody of his minor child, uses these words: "This right of the father continues to exist until the child is enfranchised by arriving at years of discretion, 'when the empire of the father gives place to the empire of reason,' 1 Blackstone, 453." To the same effect are *Newsome v. Bunch,* 144 N. C., 15, 56 S. E., 509, and *Little v. Holmes,* 181 N. C., 413, 107 S. E., 57.

Moreover, the law applicable to the case in hand as gleaned from decisions of the courts of the land is aptly summarized in the American Jurisprudence as follows: "A duty to support and maintain minor children is universally recognized as resting upon the parents of such children, usually upon the father primarily . . . This parental duty is said to be a principle of natural law, and is everywhere acknowledged as at least a moral obligation of parents toward their children. One view, sustained principally by early cases in England and in some of the American States, is that such duty is only a moral obligation and that there is no legal obligation on the parent to maintain his child, unless by force of some statute. But this doctrine, admitted to seem startling and opposed to the innate sense of justice by the court which gave to it its first American support, has been repudiated by the great majority of American courts. The prevailing view is that parents are, regardless of any statute, under a legal as well as a moral duty to support, maintain, and care for their minor children. This obligation is sometimes spoken of as one under the common law and sometimes as a matter of natural right and justice, and is often accepted as a matter of course without the assignment of any reason." 39 Am. Jur., 630, Parent and Child, 35. The author further states: "Generally, when a child arrives at the age of majority the parent is no longer under legal obligation to support him, but where a child is of weak body or mind, unable to care for itself after coming of age, and remains unmarried and in the parents' home, it has been held that the parental rights and duties remain practically unchanged, and that the parent's duty to support the child continues as before. The obligation to support such a child ceases only when the necessity for the support ceases." 39 C. J., 710, Parent and Child, Sec. 69, citing *Breuer v. Dowden,* 207 Ky., 12, 268 S. W., 541, 42 A. L. R., 146; *Crain v. Mallone,* 130 Ky., 125, 113 S. W., 67, 22 L. R. A. (N. S.), 1165, 132 Am. St. Rep., 355; *Rowell v. Vershire,* 62 Vt., 405, 19 A., 990, 8 L. R. A., 708; *Schultz v. Western Farm Tractor Co.,* 111 Wash., 351, 190 P., 1007, 14 A. L. R., 514. Also Anno. 42 A. L. R., 154; 7 L. R. A., 177.

In *Crain v. Mallone, supra, Carroll, J.,* writing for the Supreme Court of Kentucky, says: "The duty and obligation of a parent to care for his offspring does not necessarily terminate when the child arrives at age or becomes an adult; nor is it limited to infants and children of tender years. An adult may by accident or disease be as helpless and incapable of making his support as an infant, and we see no difference in principle between the duty imposed upon the parent to support the infant and the obligation to care for the adult, who is equally, if not more, dependent upon the parent. In either case the natural as well as the legal obligation is the same, if the parent is financially able to furnish the necessary assistance."

In *Breuer v. Dowden, supra,* the Supreme Court of Kentucky, through *Sampson, J.,* further says: "From the texts and cases cited by the parties, we deduce the rule to be that a parent is not liable for the debts of his adult child, in the absence of a statute to the contrary, unless the child is in such a feeble and dependent condition physically or mentally as to be incapable of supporting himself; that if at the time the child becomes of age he is reasonably physically and mentally sound and fairly able, if willing, to make and earn his own support, the parent is not liable for his debts or obligations thereafter contracted, even though he should later become sick or mentally unbalanced and therefore incapacitated to earn a livelihood. If, however, the child at the time of his arrival at the age of twenty-one years is sick or otherwise incapacitated to earn a living for himself, and is, at the time, living in the home of the parent as a member of the household, the parent is liable for necessaries furnished him."

In *Schultz v. Western Farm Tractor Co., supra,* the Supreme Court of the State of Washington, through *Fullerton, J.,* expresses this view: "Doubtless the legal duty of a parent to support his normal child ceases at the age of majority, but the rule is not the same with respect to his defective children, whether the defect be mental or physical. To these he owes a continuing obligation of support, which ceases only when the necessity for support ceases."

To like effect are the holdings of the New York courts. See *Cromwell v. Benjamin,* 41 Barbour's Supreme Court Reports, New York, 558, and *In Re: Van Denburgh,* 164 N. Y. S., 966.

In the light of the public policy of this State, and in keeping with the dictates of humanity, the principles of law enunciated in these authorities are persuasive and convincing. Hence, we hold that ordinarily the law presumes that when a child reaches the age of twenty-one years he will be capable of maintaining himself, and in such case the obligation of the father to provide support terminates. But where this presumption

is rebutted by the fact of mental or physical incapacity, it no longer obtains, and the obligation of the father continues.

Applying this holding to the allegations of the complaint in the present case, admitted as true for the purpose of testing the sufficiency of complaint to state a cause of action, when challenged by demurrer, we are of opinion and hold that the allegations of the complaint do state a cause of action, and plaintiff is entitled to an opportunity to be heard in court. Under a liberal interpretation of the complaint, which the plaintiff is entitled to have us make, the inference is reasonably deduced from the facts alleged, that the expenditures made by the plaintiff since the son reached the age of twenty-one years were impelled by necessity. See *Ritchie v. White, supra.*

The judgment below is

Reversed.

STATE v. JETHRO LAMPKIN AND RICHARD McCAIN.

(Filed 17 September, 1947.)

1. Criminal Law § 73a, 73b, 74—

The rules governing appeals are mandatory and not directory and the time for settling a case on appeal cannot be extended beyond the term of the Supreme Court to which the appeal is required to be brought, whether by consent of counsel or by order of court or by consent of counsel with approval of the court, and an extension which runs counter to the rules governing appeals does not preserve or regain the right of appeal.

2. Criminal Law § 80b (4)—

Where defendants failed to make out and serve statement of case on appeal within the time available under the rules governing appeals, the motion of the Attorney-General to docket and dismiss must be allowed, but where defendants had been convicted of a capital felony and one of them files a purported statement of case on appeal under an extension of time by consent beyond the time available under the rules governing appeals, the motion to docket and dismiss will be allowed only after an inspection of the record proper as to the one and of the purported statement of case on appeal as to the other, fails to disclose error.

MOTION by State to docket case, affirm judgments, and dismiss appeals.

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

STACY, C. J. At the January (20th) Extra Term, 1947, Mecklenburg Superior Court, called for the trial of criminal cases exclusively, and

presided over by Burgwyn, Special Judge, the defendants herein, Richard McCain and Jethro Lampkin, were tried upon indictment charging them with the murder of one Thomas F. McClure, which resulted in convictions of murder in the first degree and sentences of death as the law commands in such cases. G. S., 14-17.

From the judgments thus entered, the defendants gave notice of appeal to the Supreme Court, and were granted the privilege of appealing *in forma pauperis,* without giving security for costs. G. S., 15-181. By consent, the defendants were allowed 60 days from 31 January, 1947, to make up and serve statement of case on appeal, and the solicitor was allowed 20 days thereafter to prepare and serve exceptions or countercase. Apparently these time limits were later extended, 30 and 40 days respectively, as appears from petition for *certiorari* filed in this Court on 31 March, 1947. The petition for *certiorari* was denied 6 May, 1947, "for failure to show merit and to negative laches." Nothing further seems to have been done in the case of Jethro Lampkin.

The motion of the Attorney-General to docket the case, affirm the judgments, and dismiss the appeals was filed 19 August, 1947. Thereafter, on 15 September, the Clerk of this Court received by Railway Express from counsel for Richard McCain what purports to be his statement of case on appeal. The statement appears to have been "accepted" by the solicitor of the Fourteenth Judicial District—date not given. It is stated therein that, by consent, the defendant was allowed 90 days from the rising of the court (31 January, 1947) to make up and serve his statement of cases on appeal, the solicitor was allowed 40 days thereafter to prepare and serve exceptions or countercase. As these stipulations run counter to the rules governing appeals, they are insufficient to preserve or to regain the right of appeal. *S. v. Farmer,* 188 N. C., 243, 124 S. E., 562.

The motion of the Attorney-General is well interposed, and must be allowed. *S. v. Nash,* 226 N. C., 608, 39 S. E. (2d), 596; *S. v. Watson,* 208 N. C., 70, 179 S. E., 455. However, as is customary in capital cases, the entire record has been examined. No reversible error appears on the face of the record proper, or in the McCain purported statement of case on appeal. *S. v. Brooks,* 224 N. C., 627, 31 S. E. (2d), 754.

Perhaps it should be noted that when the time for settling a case on appeal is extended beyond the term of the Supreme Court to which the appeal is required to be brought, the right to bring up the case on appeal is thereby lost and it no longer exists *ex lege* or as a matter of right. *S. v. Moore,* 210 N. C., 459, 187 S. E., 586; *Pruitt v. Wood,* 199 N. C., 788, 156 S. E., 126. The manner of such extension, whether by consent of counsel or by order of court or by consent of counsel with approval of the court, can make no difference. *S. v. Moore, supra.* The rules

governing appeals are mandatory and not directory. *Calvert v. Carstarphen,* 133 N. C., 25, 45 S. E., 353. Neither the parties, nor their counsel, nor the Superior Court may disregard them or set them at naught. *Waller v. Dudley,* 193 N. C., 354, 137 S. E., 149; *S. v. Farmer, supra.*

Judgments affirmed; appeals dismissed.

T. T. HYLTON, R. A. BLIZZARD AND J. J. BROWN v. THE TOWN OF MOUNT AIRY, N. C., W. F CARTER, MAYOR; D. C. BEAMER, WILLIAM MERRITT, WALTER POORE, JOHN FRANK, THOMAS JONES, COMMISSIONERS.

(Filed 17 September, 1947.)

1. Appeal and Error § 40a—

An exception to the signing of the judgment presents only the question whether the judgment is supported by the facts found by the court or those set out in the agreed statement of facts or admitted in the pleadings.

2. Municipal Corporations § 25b—

Where the facts agreed show that a street was received and accepted by a municipality upon its incorporation, without reference to the width of such street, and that the municipality had kept up and maintained same as a public street at a width of less than thirty feet, the facts are sufficient to support the conclusion of law by the court that the town had acquired the street, at least by prescription, and that therefore such street does not come within the provision of a subsequent amendment to the town's charter stipulating that streets thereafter opened and constructed within the town should not be less than thirty feet in width, and judgment of the court that plaintiffs are not entitled to restrain the municipality from improving said street by hard surfacing for a width of less than thirty feet, in accordance with the discretionary power given the municipal authorities as to streets acquired and established prior to the amendment, is affirmed.

3. Pleadings § 22b—

A motion to amend the complaint so as to substantially change the character of the cause at issue, especially in the Supreme Court on appeal, will not be allowed. G. S., 1-163.

APPEAL by plaintiffs from *Bobbitt, J.,* at July 1947 Term, of SURRY.

Civil action to restrain defendants from constructing "Mitchell Street less than thirty feet in width and with 5-foot sidewalks."

The pleadings, complaint and answer, present in substance admission of these facts:

1. That the defendants, mayor and commissioners of the town of Mount Airy, on 26 November, 1946, by resolution duly passed, caused

an election to be held in said town for the purpose of ascertaining the will of the qualified voters therein on the question of a proposed bond issue to raise funds with which, among other things, to grade and construct streets in said town,—at which election the bond issue was "voted by a large majority."

2. That Mitchell Street is one of the streets to be constructed from the funds derived from the sale of said bonds; that plaintiffs and others, a majority of the property owners representing a majority of the lineal feet on said street, presented a petition to the mayor and Board of Commissioners of the town requesting the construction of a hard surface on said street, without specifying the width of the street; and that the petition was accepted and a street of the width of 27 feet was ordered.

3. That the charter of the town of Mount Airy was amended in 1925, Private Laws 1925, Chapter 160, Section 50, providing "that all streets hereafter opened or constructed for the use of the public within the limits of the town . . . shall not be less than thirty (30) feet in width, and shall conform in location to the streets of the town already constructed . . . etc."

Plaintiffs allege and contend that their petition requested the construction of Mitchell Street "as is by law provided," and that a width of less than 30 feet for said street is violative of the said private act of 1925, and is illegal and will cause plaintiffs irreparable injury, and thereupon they pray injunctive relief.

Defendants, answering and denying relief sought by plaintiffs, aver: That Mitchell Street, then known as North South Street, was opened and constructed prior to 1910, and on 10 August, 1910, was accepted by the town of Mount Airy as a public street and so dedicated; that, hence, the said private act of 1925 above referred to has no application; and that from all records and information available the street is only 27 feet wide.

The parties, plaintiffs and defendants, through their respective attorneys, agreed upon statement of facts of the case, and agreed that same with the complaint and answer be submitted to the Honorable Wm. H. Bobbitt, Judge holding courts of the 21st Judicial District, to be heard and passed upon out of the district and out of term, and that judgment be rendered in the same manner. The facts agreed upon are substantially these:

(1) That the index of streets of the town of Mount Airy shows that on 2 August, 1910, the extension of South Street to Lebanon Street was received and in the acceptance of it by the town no reference was made to the width so far as can be ascertained from the records of said town.

(2) That the above North South Street is the same street that is now designated Mitchell Street.

(3) That since the opening of that street in August, 1910, the town has kept up and maintained same as a public street as it is now laid out, and of the widths hereinafter set forth, and it has been so used by the public.

(4) That the entrances of said street (a) from Orchard Street is 27.1 feet between the curbs, and (b) from Lebanon Street is 22.3 feet between the curbs, and these widths probably vary between Orchard and Lebanon Streets.

(5) That the following sections appear in the charter of the town of Mount Airy: (See Private Laws 1925, Chapter 160, Sections 49 and 50.)

"Section II. The Board of Commissioners . . . shall cause to be kept clean and in good repair the streets, sidewalks and alleys; may establish the width and ascertain the location of those already established, and lay out and open others and may widen or reduce the width of streets now established, or change any grades, the Board of Commissioners may deem it advisable, and without liability on the part of the Town to any abutting owner . . .

"Section III. That all streets hereafter opened or constructed for the use of the public within the limits of the town or within one mile of the corporate limits as then existing shall be not less than 30 feet in width and shall conform in location to the streets of the Town already constructed, or as may be platted and mapped under the direction of the Board of Commissioners."

Thereafter, upon consideration of these facts and of the admissions in the pleadings, the judge being of opinion "that Mitchell Street in Mount Airy, North Carolina, at the location pertaining to this cause has been a public street since 1910, and as such is not affected by the provisions of Section III of the charter of the town of Mount Airy . . . and that the determination of the width of Mitchell Street is within the discretion and judgment of the Board of Commissioners of the town of Mount Airy, and that plaintiffs are not entitled to restrain the defendants from fixing the width of Mitchell Street at less than 30 feet, or from paving Mitchell at a width of less than 30 feet," adjudged that the temporary restraining order be dissolved, and dismissed the action.

Plaintiffs appeal therefrom and assign error.

E. C. Bivens for plaintiffs, appellants.

A. B. Carter and Fred Folger for defendants, appellees.

WINBORNE, J. The only exception presented in the assignment of error in the record on this appeal is to the signing of the judgment from which appeal is taken. Such an exception challenges only the conclusions of law upon the facts found by the court or upon which the parties

agree,—as in this case, the facts set out in the agreed statement and those admitted in the pleadings in accordance with the stipulations of the parties. *Vestal v. Machine Co.*, 219 N. C., 468, 14 S. E. (2d), 427; *Manning v. Ins. Co., ante,* 251. If the judgment be supported by the facts it will be affirmed. *Rader v. Coach Co.*, 225 N. C., 537, 35 S. E. (2d), 609. In the light of these principles, appellant fails to show error. It would seem that the conclusions of law reached by the court logically follow the facts to which the parties agree. Upon these facts the court could properly conclude as a matter of law that the town had acquired the street, at least by prescription. See *Boyden v. Achenbach,* 79 N. C., 539; *Wright v. Lake Waccamaw,* 200 N. C., 616, 158 S. E., 99, and cases cited.

Plaintiffs, the appellants, concede in their brief that the facts are as shown in the agreed statement of facts, but they say that the facts fail to show that the town of Mount Airy has acquired title to any part of Mitchell Street, or, if so, what part. This appears to be the basis of their contention that there is error in the judgment signed. However, they allege in their complaint that one of the streets to be constructed from the funds derived from the sale of the bonds is Mitchell Street. And the thing complained of is not that Mitchell Street is not a street, but that the Board of Commissioners propose to pave it of the width of 27 feet, and not of the width of 30 feet, in violation of law. Hence, they pray that the Mayor and Board of Commissioners of the town shall be restrained from constructing Mitchell Street "less than 30 feet in width, and with 5-foot sidewalks." This is the purpose of the action. And they have agreed in the statement of facts (1) that Mitchell Street is the same as North South Street, which was received by the town of Mount Airy on 2 August, 1910; (2) that in the acceptance of it by the town no reference was made to the width; (3) that since the opening of the street by the town in 1910, the town has kept up and maintained it as a public street and it has been so used by the public; and (4) that the width of the street is as stated in the agreed statement. Furthermore, plaintiffs themselves petitioned the town to pave the street. Summing up plaintiffs' position, it would seem that Mitchell Street is a street if it is to be paved 30 feet in width, but is not a street if it is to be paved 27 feet in width.

The provisions of the town's charter, Private Laws 1925, Chapter 160, Section 50, that streets "shall be not less than 30 feet in width" relate to streets thereafter opened and constructed for the use of the public within the town of Mount Airy and not to those then in use. Hence it is inapplicable here. Therefore, the court properly held that the determination of the width of Mitchell Street is within the discretion of the Board of Commissioners of the town. Indeed, the parties agree that the charter

of the Town of Mount Airy (Private Laws 1925, Chapter 160, Section 49) expressly authorizes the Board of Commissioners to establish the width and ascertain the location of those streets already established, and to widen or reduce the width of streets "now established," that is, established at time of enactment of the charter—1910.

Nevertheless, plaintiffs move in this Court to be permitted to amend their complaint so as to allege that the town of Mount Airy has no title to Mitchell Street, either by deed or otherwise, and that the defendants have no legal authority to expend thereon moneys belonging to the town of Mount Airy, and that the question of title to the property is a fact to be found by the jury. The motion is denied. The introduction of such amendment would substantially change the character of the cause at issue, and will not be permitted. G. S., 1-163. "It is well understood that except in proper instances a party to a suit should not be allowed to change his position with respect to a material matter in the course of litigation. . . . Especially is this so where the change of front is sought to be made between the trial and appellate courts." *Stacy, C. J.,* in *Ingram v. Power Co.,* 181 N. C., 359, 107 S. E., 209. See also *Roberts v. Grogan,* 222 N. C., 30, 21 S. E. (2d), 829.

The judgment below is

Affirmed.

BRUCE J. DUPREE, ANNIE WILLIAMS, LEONA VINES, JAMES T. DUPREE, JACOB DUPREE, ELIZABETH DUPREE, TOM AUSTIN DUPREE, AND JOSHUA DUPREE v. WILLIAM ARTHUR MOORE.

(Filed 17 September, 1947.)

1. Betterments § 2—

A person who is let into possession of land under a parol contract and who, in good faith and in reliance on the promise to convey, puts valuable improvements on the land, cannot be ejected at the instance of the promissor under a plea of the statute of frauds without compensation for the improvements.

2. Same: Betterments § 7—Plaintiffs' evidence held insufficient to establish contract to convey as predicate for his claim for improvements.

Plaintiffs, eight heirs at law, claiming the *locus in quo* by descent, instituted this action in ejectment. Defendant claimed compensation for improvements, alleging that he entered upon the land under a parol agreement to convey made between himself and one of the heirs acting for and in behalf of herself and all the other heirs, and that he made improvements upon the land in good faith in reliance upon the contract to convey. Defendant's evidence failed to show an agreement between himself and all the heirs, and further disclosed that defendant had knowledge that two of the heirs were minors. *Held:* Defendant having alleged and prose-

cuted his claim for improvements upon the theory of an integral contract to convey, and having failed to show such contract on the part of all of the heirs, his evidence is insufficient to establish a contract to convey necessary to support his claim for improvements.

3. Estoppel § 10—

Minors, since they do not have the capacity to contract, cannot create an estoppel *in pais* against themselves.

4. Trial § 45—

Motion for judgment *non obstante veredicto* may not be granted if the pleadings raise issuable matter.

PLAINTIFFS' appeal from *Morris, J.*, at May Term, 1947, of BEAUFORT.

The plaintiffs sued the defendant in ejectment for possession of the land described in the complaint which they claimed by descent from the father, J. T. Dupree. The defendant answered, admitting the devolution of title upon the plaintiffs by the death of Dupree, but set up a parol purchase contract between himself and Annie Dupree Williams, one of the heirs, for and in behalf of all the plaintiffs, by virtue of which he went into possession of the lands sometime in 1941 and built thereupon, in good faith, buildings and improvements claimed to be worth $1,400, for which he demands compensation in case of his ejectment, and reimbursement for his expenditures in paying taxes.

The contract alleged was an agreement, made by the said Annie Williams, that if the present defendant Moore would pay the taxes due on the place and give the heirs the difference between the taxes and $200 she would have all the heirs sign a deed.

The defendant testified that at the time this agreement was made, in addition to Annie Williams there was present Bruce Dupree, who said he "did not have nothing to do about it. Whatever Miss Annie said was all right with him." Defendant did not talk with James Dupree nor Jacob nor Elizabeth Vines; talked to Tom and Joshua but they were under age. The defendant further testified that the taxes due amounted to $165; that he paid this and gave Annie Williams $24 for the heirs.

Annie Williams and Bruce Dupree both testified that they did not enter into any agreement to sell the land; and Annie Williams denied receiving any money for distribution to the heirs.

E. A. Daniel, who was county attorney at the time, testified that some of the heirs and Moore came to his office and his recollection was that they wished to deed the land to William Arthur Moore, who was to pay the taxes. But witness on investigation found that there were two minor heirs and it would take a special proceeding to convey the title to the land and that the heirs were not willing to incur the expense and said they would wait until the minors got grown.

No deed was ever made. There was evidence relating to the value of the improvements and the rental value of the land during defendant's occupancy.

Upon the pleading and testimony, somewhat confusing and distinctly contradictory, the following issues were submitted to the jury and answered as indicated:

1. Are plaintiffs the owners and entitled to possession of the land described in the complaint?
   Answer: Yes.
2. Did the plaintiffs enter into a verbal contract with defendant that if he would pay the taxes on the lands they would execute to him a deed therefor?
   Answer: Yes.
3. Did the defendant under terms of the contract and in good faith enter into possession of said lands?
   Answer: Yes.
4. If so, did the defendant, while in possession of the land erect improvements thereon?
   Answer: Yes.
5. What was the value of said improvements?
   Answer: $1,200.00.
6. Did the plaintiffs have actual knowledge that the defendant was in possession of said lands under a verbal contract to purchase the same and did they have actual knowledge that he was making improvements thereto?
   Answer: Yes.
7. What is the fair reasonable rental value of the lands in controversy?
   Answer: $2.50 per week and $2.00 a year for lot.
8. What is the fair, reasonable rental value of the lands in controversy exclusive of improvements made thereon by the defendant?
   Answer: $4.00.

The plaintiffs moved for judgment *non obstante veredicto,* which motion was denied, and exception made. Plaintiffs then moved to set aside the verdict and for a new trial, which motion was declined, and plaintiffs excepted. Judgment followed according to the tenor of the issues and answers thereto, to which the plaintiffs objected and excepted and appealed.

H. S. Ward for plaintiffs, appellants.
Carter & Carter for defendant, appellee.

SEAWELL, J. The defendant appellee depends partly on existence of a parol contract to convey the lands in controversy and partly on the principle of estoppel *in pais* to support recovery under his cross action. But the alleged parol contract to convey is not supported by the evidence against all the plaintiffs; estoppel *in pais* is not pleadable against the admitted minors nor is there supporting evidence as to all of the adult plaintiffs.

1. Where there has been a parol contract to convey lands and the statute of frauds is invoked by the promissor, we say, in shorthand, that the contract is void. It cannot be specifically enforced; but the clutch of circumstance and incident comprising the whole transaction may engender important legal consequences.

A person let into possession of land under a parol contract and who has, in good faith and reliance on the promise to convey put valuable improvements on the land, cannot be ejected at the instance of the promissor under a plea of the statute of frauds (G. S., 22-2), without compensation for the improvement. *Union Central Life Insurance Co. v. Cordon,* 208 N. C., 723, 182 S. E., 496, 497; *Eaton v. Doub,* 190 N. C., 14, 22, 128 S. E., 494, 498, 40 A. L. R., 273.

First, however, there must be the contract. Whatever the allegations in defendant's cross action, the evidence falls short of inferences tending to establish such a contract as to the heirs or cotenants as a whole, or the authority and legal capacity of Annie Williams to act for them. According to the defendant's testimony, when the alleged contract was originally made with Annie, Bruce Dupree was present and remarked that "whatever Miss Annie says is all right with me." But, testified the defendant, he did not talk with James nor Jacob nor Elizabeth Vines. He did talk with Tom and Joshua, but they were minors.

E. A. Daniel testified that according to his recollection the "whole group" (meaning the heirs) came to his office and that the "conversation was" that they wanted to make a deed to Moore and he was to pay the taxes. They were informed that since there were minors concerned this could not be done without a special proceeding and the cotenants were not willing to pay the cost of such proceeding. "It was my understanding," said the witness, "that they said they would wait until the minors were grown."

The defendant, therefore, entered upon the premises with the knowledge that he had no contract with the minors, Tom and Joshua, and none apparently with certain others of the cotenants, if the evidence indicates a contract with any of them.

This Court has no power to split up what was alleged by defendant as an integral contract and so treated on the trial and in the judgment, so as to give the defendant relief if he is entitled to any, against the

cotenants who may have attempted to convey the land; and we do not suggest that this is feasible on a retrial.

2. The theory of estoppel rests upon the evidence tending to show that certain of the plaintiffs, according to defendant's evidence, saw him building on the land and made no protest. It equally appears from the evidence that certain others did not. As to two of the cotenants, admittedly minors, since they did not have the capacity to contract they could not create an estoppel against themselves.

"Want of legal capacity cannot be supplied by estoppel and a person cannot be estopped *in pais* when he cannot bind himself by contract." 19 Am. Jur., "Estoppel," p. 644.

The plaintiffs moved for judgment *non obstante veredicto*. Ordinarily the plaintiffs are not entitled to such judgment unless it may be properly rendered upon the pleadings. *Palmer v. Jennette, ante,* 377; *Jernigan v. Neighbors,* 195 N. C., 231, 141 S. E., 586; *Winder v. Martin,* 183 N. C., 410, 111 S. E., 708; *Fowler v. Murdock,* 172 N. C., 349, 90 S. E., 301; *Baxter v. Irvin,* 158 N. C., 277, 73 S. E., 882; *Doster v. English,* 152 N. C., 339, 67 S. E., 754; *Shives v. Cotton Mills,* 151 N. C., 290, 66 S. E., 414. We are unable to conclude that there remains no issuable matter under the pleadings.

However, the verdict and judgment are not supported by the evidence, and upon their objections and exceptions thereto the plaintiffs are entitled to a new trial, and it is so ordered.

New trial.

JAMES E. TEMPLE v. J. A. STAFFORD.

(Filed 17 September, 1947.)

Automobiles § 24e—Evidence held insufficient to be submitted to jury upon doctrine of respondeat superior.

In this action to recover against the owner of a truck upon the doctrine of *respondeat superior*, plaintiff's evidence showed defendant's ownership of the truck and negligence of the driver causing the injury. The uncontradicted evidence tended to show that defendant maintained the truck for farm use and permitted his day to day laborer to use the truck for his own purposes when not engaged in farm work, that defendant had told him to have fluid put in the brake system the next time he went to town for groceries or any other purpose, that on the occasion in question, the laborer, without defendant's knowledge, took the truck to town to get his shoes repaired, that while there he had fluid put in the brake system, that on his return trip he stopped at a piccolo "joint," and that the accident in suit occurred as he was leaving the piccolo "joint" to return to the farm. *Held:* The evidence fails to show that the driver was the

agent or employee of defendant at the time of and in respect to the transaction out of which the injury arose, and defendant's motion to nonsuit should have been allowed.

APPEAL by defendant from *Burgwyn, Special Judge,* at May Term, 1947, of PASQUOTANK. Reversed.

Civil action to recover compensation for property damage and personal injury resulting from an automobile-truck collision.

Defendant operates a farm in Pasquotank County and maintains thereon a truck for farm use. One George Proctor lives on the farm and works for defendant as needed on a day-to-day basis. Defendant permitted Proctor to use the truck for his own purposes when not engaged in farm work. Proctor complained about the condition of the brakes and defendant told him the next time he went to South Mills after groceries, or for any other purpose, to take the truck to Mullen's Esso Station and have them put in brake fluid.

"Mr. Stafford told me to grease the truck and put the brake fluid in. He didn't tell me no special day. He told me that the next time I was up there to have this done and I had it done."

On 14 December, 1944, the weather was bad and Proctor was not working that afternoon. He, without the knowledge of the defendant, decided to go to South Mills on the truck to get his shoes fixed and "while I was over there I decided to have the truck fixed up, greased and brake fluid put in. They were my shoes, and I thought I'd have this other done while I was over there."

On his way home after dark Proctor stopped at a piccolo "joint" to get something to eat and drink. As he left the "joint" and drove out onto the highway the truck and plaintiff's automobile collided. There was evidence tending to show that Proctor drove or backed into the highway without lights and immediately in front of plaintiff's oncoming automobile.

As a result of the collision, plaintiff's automobile was badly damaged and he suffered certain personal injuries.

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

J. W. Jennette for plaintiff, appellee.

W. A. Worth for defendant, appellant.

BARNHILL, J. The one assignment of error relied on by defendant is bottomed on the refusal of the court below to grant his motion to dismiss as in case of nonsuit, entered at the end of the evidence for plaintiff and duly renewed at the conclusion of all the testimony. This assignment presents the one question: Is there any evidence in the record tending

to show that Proctor was the agent or employee of the defendant at the time of and in respect to the transaction out of which plaintiff's injury and damage arose? We are constrained to answer in the negative.

The plaintiff insists that Proctor was about his master's business from the time he left home with the truck to go to South Mills "for the purpose of having the truck greased and brake fluid put in it" until his return to his home. If this were true, plaintiff's right to recover could not be successfully challenged. But such is not the case.

Plaintiff's testimony other than that elicited through the adverse examination of the defendant discloses nothing more than negligence of the driver and ownership of the truck by defendant. *Carter v. Motor Lines, ante,* 193.

On the other hand, the evidence as to the nature of Proctor's trip to South Mills and the purpose for which he went is positive and uncontradicted. He went while off duty, for his own convenience, without the knowledge of defendant, to have his shoes repaired. Theretofore he had complained about the condition of the brakes and defendant told him to have brake fluid put in the first time he went for groceries or any other purpose. While in South Mills he recalled these instructions, drove by the filling station and had the truck greased and brake fluid put in. This was merely incidental and when the work was done the mission, if it may be so termed, was complete. He did not go to South Mills to get brake fluid and he was not on his way home from the performance of that duty when the accident occurred.

As he was not about his master's business at the time of the collision his negligence may not be imputed to defendant. *Reich v. Cone,* 180 N. C., 267, 104 S. E., 530; *Tyson v. Frutchey,* 194 N. C., 750, 140 S. E., 718; *Van Landingham v. Sewing Machine Co.,* 207 N. C., 355, 177 S. E., 126; *Tribble v. Swinson,* 213 N. C., 550, 196 S. E., 820; *Parrott v. Kantor,* 216 N. C., 584, 6 S. E. (2d), 40; *McLamb v. Beasley,* 218 N. C., 308, 11 S. E. (2d), 283; *Hawes v. Haynes,* 219 N. C., 535, 14 S. E. (2d), 503; *Riddle v. Whisnant,* 220 N. C., 131, 16 S. E. (2d), 698; *Smith v. Moore,* 220 N. C., 165, 16 S. E. (2d), 701.

The relationship of master and servant should be pleasant and harmonious. To this end it is not unusual for the master to permit his servant to use, for his own convenience, the master's means of conveyance. Perhaps this custom prevails on our farms more than elsewhere. In any event, this effort of the master to accommodate and assist his servant and make his life more pleasant does not bring within the scope of the master's employment acts of the servant otherwise outside such scope. The master is not so penalized for his kindness.

The judgment below is

Reversed.

STATE v. WILLIAM HOOPER.

(Filed 17 September, 1947.)

1. Burglary § 2—

The commission of the intended felony is not necessary to constitute the crime of burglary, it being sufficient if defendant intended to commit a felony at the time of breaking and entering.

2. Burglary § 11—

Evidence tending to show that defendant broke and entered a dwelling house at nighttime, which was then occupied, with intent to commit rape, but that he abandoned his intent and fled when his intended victim turned on the light and screamed, *is held* sufficient to overrule defendant's motion to nonsuit on the charge of first degree burglary, the crime having been consummated with the breaking and entry with felonious intent notwithstanding the later abandonment of the intent.

3. Burglary § 12b—

Where, in a prosecution for burglary, all the evidence tends to show burglary in the first degree, an instruction which predicates the right of the jury to return a verdict of guilty of burglary in the second degree upon findings by the jury from the State's evidence of the elements of second degree burglary, is error.

4. Same: Burglary § 13b—

In a prosecution for burglary, the jury, even though it finds from the evidence all the elements of burglary in the first degree, may render a verdict of guilty of burglary in the second degree if it deems it proper to do so. G. S., 15-171. An instruction to this effect is mandatory, and a charge that the jury might render the milder verdict even though the evidence "tends" to show the elements of first degree burglary, does not fully comply with the statute.

APPEAL by defendant from *Nettles, J.*, at April Term, 1947, of BUNCOMBE.

Criminal prosecution tried upon indictment charging defendant with the crime of burglary in the first degree.

It is disclosed by the evidence that on the night of 14 March, 1947, the prosecuting witness returned from visiting her husband, who was ill in a hospital. She locked and checked the doors and windows in the apartment, which was located on the ground floor of a two-family apartment house. The apartment was occupied by the prosecuting witness and her son, who was nine years of age, and her daughter, who was three years of age. Her brother and his wife occupied the upstairs apartment. About 12:30 a.m., the defendant broke open a window and entered the apartment. The prosecuting witness was awakened by someone pressing against her legs. She snapped on the light and saw the defendant leaning over the edge of the bed. She screamed and he ran out of her room.

According to the signed statement of the defendant, he entered the apartment through a dining room window, went down the hall and cut off a light that was burning in the bathroom, and then went to the room of the prosecuting witness. He used a flashlight to find his way around in the house. After the defendant was arrested, he told Sheriff Lawrence Brown that he did not enter the apartment of the prosecuting witness to rob her or to murder her. Whereupon the Sheriff asked him the question: "What did you go there for?" and he said, "You know what I went in there for."

Verdict: Guilty of burglary in the first degree. Judgment: Death by asphyxiation. Defendant appeals, assigning error.

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

Philip C. Cocke, Jr., and Geo. A. Shuford for defendant.

DENNY, J. The exceptions to the refusal of his Honor to grant the defendant's motion for judgment as of nonsuit, on the ground that the evidence is insufficient to support a verdict of guilty of burglary in the first degree, cannot be sustained.

It is not necessary that the intended felony be committed in order to establish the crime of burglary. The question is: What was the intent of the defendant at the time of the breaking and entry?

Evidence as to the conduct of the defendant after the breaking and entry may be considered by the jury in ascertaining the intent of the accused at the time of the breaking and entry. But where there is a breaking and entry into the dwelling house of another, in the nighttime, with the intent to commit a felony therein, the crime of burglary is consummated, even though the accused by reason of unexpected resistance or the outcry of his intended victim, may abandon his intent to commit the felony. *S. v. Allen,* 186 N. C., 302, 119 S. E., 504; *S. v. McDaniel,* 60 N. C., 245; *S. v. Boon,* 35 N. C., 244.

The defendant assigns as error the following portion of his Honor's charge: "If you return a verdict of not guilty as to burglary in the first degree and not guilty of attempt to commit burglary in the first degree, you will then consider whether or not the defendant is guilty of burglary in the second degree, the burden being on the State to so satisfy you, that the defendant broke and entered the dwelling house of the prosecuting witness, Mrs. Julia Phillips, with a felonious intent to commit rape, and that it was not then and there occupied by her as a dwelling house, and in the nighttime, and you so find beyond a reasonable doubt, the burden being on the State to so establish, then the Court charges you that you may in such event render a verdict of guilty of burglary in the second

degree even though you find facts sufficient to constitute burglary in the first degree; therefore, in this case the defendant is entitled as a matter of right to have you gentlemen consider whether he is guilty of burglary in the second degree, if you deem it proper to do so, or not guilty." Later in the charge his Honor said: "You have a right, gentlemen of the jury, to render a verdict of guilty of burglary in the second degree in this case although the evidence may tend to show that the building was actually occupied as sleeping quarters by the prosecuting witness and it was in the nighttime, and that the breaking and entering was for a felonious purpose and intent and that it was in the nighttime." We think the above instructions may have been confusing to the jury. All the evidence on this record tends to show that the apartment of the prosecuting witness was actually occupied at the time of the alleged burglarious entry. And, there is no evidence to support a verdict of burglary in the second degree as defined by the statute, G. S., 14-51.

Ordinarily when the evidence tends to show the defendant is guilty of the more serious offense charged in the bill of indictment, a charge on the lesser degrees of the crime will not be held for error. *S. v. Wise,* 225 N. C., 746, 36 S. E. (2d), 230. But here we think his Honor may have misled the jury into believing that their right to bring in a verdict of guilty of burglary in the second degree, as authorized by statute, G. S., 15-171, was dependent upon the finding of certain facts as set forth in the charge on burglary in the second degree. Moreover, the later instruction, as set forth above, relative to the right of the jury to bring in a verdict of guilty of burglary in the second degree, notwithstanding the evidence tended to show that the building was occupied, etc., does not comply fully with the provisions of the statute, G. S., 15-171. The statute gives the jury the right to render a verdict of guilty of burglary in the second degree, not only where the evidence tends to show certain facts, but, "upon the finding of facts sufficient to constitute burglary in the first degree as defined by the statute—if they deem it proper so to do." This instruction is mandatory. *S. v. McLean,* 224 N. C., 704, 32 S. E. (2d), 227.

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

New trial.

S. M. ETHERIDGE ET AL. v. L. S. LEARY ET AL.

(Filed 17 September, 1947.)

1. Declaratory Judgment Act § 2b—

Where, in a proceeding under the Declaratory Judgment Act to establish the validity of the appointment by the Clerk of the Superior Court of a justice of the peace for an unexpired term, G. S., 7-114, the answers admit the allegations of the petition to the effect that the appointment of petitioner was valid, the admission dehearts the proceeding and renders it moot, and the proceeding will be dismissed for want of real controversy.

2. Declaratory Judgment Act § 1: Courts § 2—

In a proceeding under the Declaratory Judgment Act involving the validity of the appointment of a justice of the peace, a declaration of the court of the marital status of persons who had been married by the justice of the peace but who were not before the court, is clearly beyond its jurisdiction.

APPEAL by defendants from *Morris, J.*, in Chambers at Camden, 23 July, 1947. From CAMDEN.

Proceeding under Declaratory Judgment Act to establish validity of appointment of S. M. Etheridge as a justice of the peace in South Mills Township, Camden County, for an unexpired term from 19 March, 1945, to 1 April, 1947, and to declare valid all marriages performed by him during his term of office, including that of *feme* petitioner, who was married by him on 22 October, 1945.

The justice of the peace and one of the persons married by him are the petitioners herein. The former Clerk of the Superior Court, the present Clerk, and the husband of the *feme* petitioner are the respondents.

In summary, the petition alleges that on 19 March, 1945, J. G. Etheridge resigned as justice of the peace in South Mills Township, Camden County, and his son, S. M. Etheridge, was duly appointed in his stead to fill the unexpired term of two years and fourteen days; that L. S. Leary, the then Clerk of the Superior Court, entered upon the margin of the "Record of Magistrates" in his office the notation "two years" instead of "two years and fourteen days"; that the notation is no part of the official record, albeit the former Clerk offers to correct the record, if need be and if permitted to do so.

Paragraph four of the petition follows:

"4. That on March 19, 1945, immediately subsequent to the resignation of the said J. G. Etheridge, S. M. Etheridge was duly appointed by the Clerk of the Superior Court of Camden County, acting under the authority of General Statutes 7-114, and other statutes and decisions relative thereto, as Justice of the Peace for South Mills Township, Camden County, North Carolina, for the unexpired term of the said

J. G. Etheridge, which said term lasted until the first day of April, 1947. That the said S. M. Etheridge on March 19, 1945, duly took and subscribed the regular oath for Justice of the Peace before the Clerk of the Superior Court of Camden County, as indicated on page 78, 'Record of Magistrates,' of the records in said office."

In the answers filed by the respondents the allegations of paragraph four of the petition are admitted.

It is further alleged, however, that during his term of office, the said S. M. Etheridge performed 2,608 marriages; that one Roscoe S. Ange of Norfolk County, Va., was among the number and that he has brought suit in the Circuit Court of Norfolk County, Va., to annul his marriage, alleging that S. M. Etheridge was not a duly qualified justice of the peace at the time of performing the ceremony.

Thereafter, on or about 1 April, 1947, S. M. Etheridge was appointed to a new term as justice of the peace in South Mills Township, Camden County, by the Clerk of the Superior Court, but this was later revoked and no acts of his under this appointment are here in question.

The *feme* petitioner and respondent, Oscar Riddick, were married by S. M. Etheridge on 22 October, 1945. It is alleged that due to the publicity given the matter of S. M. Etheridge's appointments, the *feme* petitioner has been embarrassed and wishes to have her marital status declared by the court. The respondent, Oscar Riddick, "avers that he sincerely hopes the said S. M. Etheridge was a then qualified justice of the peace, but he has his doubts about the same and, therefore, denies the allegation" of a valid marriage.

Judgment was entered, agreeably to the prayer of the petition, declaring the due appointment of S. M. Etheridge as a justice of the peace in South Mills Township, Camden County, from 19 March, 1945, to 1 April, 1947, with all the powers and authority accorded to such officer by law; that the 2,608 marriages performed by him, during his term of office, are valid and binding, so far as his authority to perform them is concerned; and that the *feme* petitioner and respondent, Oscar Riddick, were duly married on 22 October, 1945. The Clerk of the Superior Court was also authorized to change the notation on the margin of the "Record of Magistrates" opposite the oath of S. M. Etheridge, to read: "For the unexpired term of J. G. Etheridge—until April 1, 1947."

From this judgment, the respondents appeal, assigning errors.

J. Henry LeRoy for plaintiffs, appellees.

W. W. Cohoon and John H. Hall for defendants, appellants.

STACY, C. J. It is apparent from the uncontroverted allegations of the fourth paragraph of the petition that there is no real controversy

here. Everybody wants the same kind of judgment. Only one result is desired or contemplated. *Tryon v. Power Co.*, 222 N. C., 200, 22 S. E. (2d), 450. Moreover, to undertake to declare the marital status of persons not before the court, and in the case of Roscoe S. Ange doubtless undesired by him, is clearly in excess of the court's jurisdiction.

The feeble denial by the respondent, Oscar Riddick, of the validity of his marriage, if, indeed, he really denies it, was perhaps made in an effort to save the case of the *feme* petitioner. 16 Am. Jur., 315; Anderson, Declaratory Judgments, 805; Borchard, Declaratory Judgments, 478-482. Nevertheless, we think the whole proceeding must go out on the admitted allegations of paragraph four of the petition. The effect of these undenied averments is to deheart the proceeding and render it moot. No question is raised in respect of the attempted appointment of S. M. Etheridge to a new term, which was later revoked. It is conceded that the clerk's authority to appoint justices of the peace is confined to vacancies occurring during a term. G. S., 7-114; *Gilmer v. Holton*, 98 N. C., 26, 3 S. E., 812.

Whether the facts here alleged bring the matters within the purview of the Declaratory Judgment Act is not decided.

Proceeding dismissed.

A. M. AUSTIN AND WIFE, VIRGINIA ODEN AUSTIN, v. F. B. HOPKINS.

(Filed 17 September, 1947.)

Boundaries §§ 11, 12—

In a processioning proceeding between parties claiming from a common source to establish the boundary line as called for in their respective deeds, defendant also pleaded title to the disputed strip by adverse possession, but prior to trial it was agreed and stipulated of record that the only question in controversy was the location of the true boundary line between the parties. *Held:* Defendant cannot assert title to the disputed area by adverse possession in the face of the stipulation of record, and it was not error for the trial court to fail to charge the jury on the question of adverse possession.

APPEAL by defendant from *Williams, J.*, at June Term, 1947, of PASQUOTANK.

Processioning proceeding instituted 29 March, 1946, to establish the true boundary line between adjacent lands of the petitioners and the defendant.

The petitioners claimed the true boundary line between the lands of the parties was a line, as later shown on the court map, from an undis-

puted common corner of the lands of the parties hereto, designated as D, to a point in the Southern margin of Burgess Street, 295 feet and 10 inches west of the property line of the southwest corner of Poindexter and Burgess Streets, designated on the map as B.

The defendant contended that the true boundary line was from point D to a point in the Southern margin of Burgess Street designated as C, the point C being 9.8 inches west of the point designated as B. The land in dispute being a triangle 9.8 inches wide on Burgess Street in Elizabeth City, North Carolina.

The defendant in answering the petition pleaded title to the disputed area by adverse possession. But prior to the trial it was agreed between the parties that the title to the property was not in issue, and the following stipulation was dictated into the record: "It is stipulated and agreed between the parties that the only question in this controversy is the location of the true boundary line between the parties."

The petitioners and the defendant introduced certain duly recorded deeds, containing descriptions of the respective lots. The defendant also introduced evidence of his possession, cultivation and use of the area in dispute since 1913. There was no dispute as to the location of any other line or corner of the lots involved herein.

Upon the evidence submitted, the jury found the true boundary line between the adjacent lands of the parties to be the line represented on the court map from D to B, as contended for by the petitioners. Judgment was entered on the verdict, and the defendant appealed, assigning error.

J. Henry LeRoy and Killian Barwick for petitioners.

W. W. Cohoon and R. Clarence Dozier for defendant.

DENNY, J. The sole question presented on this appeal is: Did his Honor commit error in failing to charge the jury on the question of adverse possession? The answer is No.

The defendant cannot assert title to the disputed area by adverse possession in the face of the stipulation entered into by him. *Matthews v. Myatt,* 172 N. C., 230, 90 S. E., 150, the case upon which the appellant is relying, is not applicable to the facts herein. In that case the plaintiff claimed the disputed area upon two grounds: (1) That it was covered by his record title; and (2) that if the disputed area was not covered by the deeds in his chain of title, he had acquired title thereto by the adverse possession of himself and those under whom he claimed. In the instant case, in view of the stipulation entered into by the parties, evidence of adverse possession could be considered by the jury only as tending to show the location of the true boundary line, and not for the

purpose of establishing title to the disputed area by reason of such adverse possession. The defendant's evidence as to his possession, cultivation and use of the area to the line contended for by him was submitted to the jury. This was all the charge he was entitled to on the question of adverse possession. See *Thomas v. Hipp,* 223 N. C., 515, 27 S. E. (2d), 528, and *Clark v. Dill,* 208 N. C., 421, 181 S. E., 281.

In the trial below, we find

No error.

E. E. BOYCE v. JOHN F. WHITE AND FERMOR WARD.

(Filed 17 September, 1947.)

Adverse Possession § 7—

A grantee claiming by adverse possession a strip of land lying outside of the boundaries called for in the deed may not tack his grantor's possession of such strip, the deed alone being insufficient to create privity between the grantor and the grantee as to such strip.

APPEAL by plaintiff from *Frizzelle, J.,* at November Term, 1946, of CHOWAN. Error and remanded.

This was an action to determine the location of the boundary line between the adjoining lands of plaintiff and defendants.

By consent the case was heard by a referee, who reported findings of fact and conclusions of law locating the line substantially as contended by the defendants. Plaintiff's exceptions thereto were overruled and the referee's report confirmed by the trial judge. Plaintiff appealed.

W. A. Worth for plaintiff, appellant.

Marvin Wilson and J. A. Pritchett for defendants, appellees.

DEVIN, J. Both parties claim title from the same source. J. M. Forehand owned two adjoining tracts of land, the dividing line between them extending generally northwest and southeast. In 1920 he conveyed the tract lying northeast of the dividing line to his son J. Lester Forehand, and on same date conveyed the land lying southwest of the line to his daughter Corinne Forehand Bell. In 1943 J. Lester Forehand conveyed his land so acquired to the defendants, and in same year Corinne Forehand Bell conveyed her tract of land to the plaintiff. A controversy arose between the plaintiff and defendants as to the location of the dividing line between these tracts of land. The trial was by referee.

It was found by the referee that the dividing line described in the deeds from J. M. Forehand, as well as in the deeds from his predecessors in title, was that designated on the court map by the numerals 2 to 15, which is the line claimed by the plaintiff. However, the referee found that the title to two parcels of land, aggregating 7.62 acres, lying on the southwest side of this dividing line, had been acquired by the defendants and their predecessors in title by adverse possession for more than twenty years, and concluded that in consequence the true dividing line should be located in accordance with the defendants' contentions so as to include the area referred to, and to require the establishment of the line designated on the map by the letters ABD. Plaintiff's exception to this finding and conclusion was overruled by the trial judge, and in this we think there was error.

All the deeds appearing in the record, as found by the referee, show the southwest boundary of the defendants' land (the J. Lester Forehand tract) to be that indicated on the map by the numerals 2 to 15. Neither defendants' deed, dated 1943, nor those of their predecessors in title cover the disputed parcels of land, or any land southwest of the line 2 to 15. Defendants' actual possession could not have been of longer duration than three years, nor could they extend the time of their adverse possession for the statutory period by adding to it that of J. Lester Forehand, for there was no privity between them as to land not embraced in J. Lester Forehand's deed to the defendants. The first deed offered, being deed from Brinkley to Baker, dated 1873, under which defendants claim, describes the line as now contended by the plaintiff in this action, and the referee so found. The same description in legal effect was brought forward in deeds from Baker to Deans (1880), Deans to J. M. Forehand (1891), J. M. Forehand to J. Lester Forehand, 1920, and from J. Lester Forehand to the defendants in 1943.

The general rule is stated in 1 Am. Jur., 880-882, as follows: "Several successive possessions cannot be tacked for the purpose of showing a continuous adverse possession where there is no privity of estate or connection of title between the several occupants . . . Privity, therefore, is essential. . . . A deed does not of itself create privity between the grantor and the grantee as to land not described in the deed but occupied by the grantor in connection therewith, although the grantee enters into possession of the land not described and uses it in connection with that conveyed."

In the language of *Justice Connor* in *Jennings v. White,* 139 N. C., 23, 51 S. E., 799: "It cannot be that several disseizins having no privity can be tacked so as to vest title." The principle seems to have been well settled that in order to sustain titles claimed by the adverse possession of several occupants there must be shown connected possession and a privity

of grant or descent. *Barrett v. Brewer,* 153 N. C., 547, 69 S. E., 614; *May v. Mfg. Co.,* 164 N. C., 262, 80 S. E., 380; *Johnston v. Case,* 131 N. C., 491, 42 S. E., 957.

It is apparent that the finding and conclusion of the referee as to the location of the dividing line, based upon adverse possession of the area in dispute by the defendants and those under whom they claim for twenty years, is not supported by the evidence, and that the court below was in error in overruling plaintiff's exceptions on this point, and in confirming the report of the referee. The cause is remanded to the Superior Court for further proceedings not inconsistent herewith.

Error and remanded.

STATE OF NORTH CAROLINA Ex Rel. W. K. McLEAN, SOLICITOR FOR THE NINETEENTH JUDICIAL DISTRICT, v. MRS. ANNIE TOWNSEND.

(Filed 17 September, 1947.)

1. Nuisance § 7—

In the absence of statutory provision, a suit to abate a public nuisance, except at the instance of an individual who suffers special damage, may be maintained only by the State on relation of its Attorney-General and not on the relation of the Solicitor of the District.

2. Same—

A suit to abate a public nuisance as defined by G. S., 90-103, cannot be maintained under G. S., 19-2 to 19-8.

PLAINTIFF'S appeal from *Gwyn, J.,* at May Term, 1947, of BUNCOMBE.

Cecil C. Jackson for plaintiff, appellant.

No counsel contra.

SEAWELL, J. This suit was brought to abate what is charged to be a public nuisance in the City of Asheville, being maintained by defendant in the unlawful keeping and sale of narcotics, and vending the same to addicts, and to others for redistribution, and administering narcotic drugs to them by hypodermic subcutaneous injection on the premises. The place was frequented by a large number of persons, all during the day and until 12 o'clock or afterward at night, many of them narcotic drug addicts, and at times the habitues and proprietress were boisterous and profane.

Instruments and equipment for drug injections were found when the premises were raided by the officers and many evidences of their exten-

sive use were found. The evidence was clearly sufficient to classify the place as a nuisance under G. S., 90-103 (see Narcotic Drug Act) and to convict the defendant for its maintenance and the unlawful keeping and dealing in narcotics and the syringes *et cetera* used in their injection.

The action is brought, however, as a civil suit for the abatement of a public nuisance, by the State on relation of the Solicitor of the 19th Judicial District, and appears to have been based on G. S., 19-2 to 19-8, a statute confined to abating nuisance created by prostitution, gambling or illegal sale of whiskey, and the method of abatement sought follows that pattern.

It is to be noted that the Narcotic Drug Act, G. S., Article 5, 90-86 to 90-113, while it declares and defines a public nuisance—Sec. 90-103—does not provide specifically for its abatement; and by declaring the building, boat, aircraft, or whatnot to be the nuisance, and not providing for its confiscation or effectual means to secure discontinuance of its nefarious use, rather embarrasses the common law, which modern conceptions of nuisance have somewhat outrun, with respect to the remedy.

Be that as it may, in the absence of statutory authority we are of the opinion that although the nuisance complained of, and its abatement, is of special concern to the City of Asheville, the instant case is subject to two serious defects: First, it is a public nuisance. In the absence of statute and barring those instances where an individual may take action because of his special damage over and above that suffered by other members of the general public, "The State is the proper party to complain of wrongs done to its citizens by a public nuisance"; *Pedrick v. R. R.*, 143 N. C., 485, 498, 55 S. E., 877. And we are of the opinion that this must be done, as heretofore, on the relation of its Attorney-General. 39 Am. Jur., p. 376, Sec. 123, n. 22. Second, we do not find G. S., 19-2 to 19-8, under which this proceeding appears to have been brought and prosecuted, applicable. *S. v. Alverson,* 225 N. C., 29, 33 S. E. (2d), 135.

If there is any reason why those who are responsible for this heinous offense against society and open violation of the narcotic laws may not be adequately punished in a criminal case, we fail to perceive it. But as for the present proceedings, for the reasons stated, we are unable to sustain it.

The judgment of nonsuit is

Affirmed.

ULYSSES S. WESCOTT v. THE FIRST AND CITIZENS NATIONAL BANK OF ELIZABETH CITY ET AL.

(Filed 17 September, 1947.)

Appeal and Error §§ 50, 52—

A soldier, overseas, remitted by letter certain funds to a bank for deposit. After the soldier's death, action was instituted to impress the funds with a trust in favor of the soldier's grandfather, based upon certain expressions in the letters. On appeal it was held that the evidence was insufficient to create a trust, that the letters had not been probated as required to constitute a will, and it was stated that the letters failed to show intent to make a testamentary disposition of the funds. After certification of the opinion, the letters were probated in common form and judgment was entered in the action ordering the funds to be paid over to the soldier's grandfather who had been appointed administrator *c. t. a., d. b. n.* No caveat was filed. The Supreme Court in its supervisory power remands the case with direction that the funds remain in the hands of the Clerk to the end that appropriate proceedings be undertaken.

APPEAL by defendant R. C. Lowry, Administrator, from *Morris, J.*, at May Term, 1947, of PASQUOTANK. Remanded.

Robert B. Lowry, J. Henry LeRoy, and Geo. J. Spence for plaintiff, appellee.

W. C. Morse, Jr., and R. Clarence Dozier for defendant, appellant.

DEVIN, J. This case was here at Fall Term, 1946, and is reported *ante*, 39, where the facts are fully set out. The action was instituted to impress a trust in favor of the plaintiff as to funds which had been deposited in defendant Bank to the credit of Ulysses C. Robbins, who died overseas while in the armed forces of the United States, in 1945. On the former appeal this Court held that the evidence was insufficient to show the creation of a trust, and that the fund should be turned over to the administrator for distribution according to law. The next of kin are the infant brother and sister of the decedent. It was noted in the opinion that the letters of the deceased soldier, which were relied on by the plaintiff as constituting a trust, had not been offered or proven in the manner prescribed by the statutes so as to constitute a will. In further reference thereto it was stated in the opinion of this Court, "The letters of Robbins evidence a desire only to secure for his own use the money he was sending back from overseas, and do not seem to contain definite expression of purpose or intention thereby to make a testamentary disposition of the fund."

However, after the opinion on the former appeal was certified down, the plaintiff Wescott offered the letters referred to for probate as the last

will and testament of Robbins, and the papers thus propounded were admitted to probate in common form. No caveat has yet been filed. The plaintiff, the sole beneficiary, was thereafter appointed administrator *c. t. a., d. b. n.* R. C. Lowry, administrator, offered to resign, but his resignation was not accepted by the Clerk, and he was allowed to withdraw his resignation and was directed to "continue with his duty as such administrator."

The judge who heard the matter below after setting out the facts, denied the motions of R. C. Lowry, administrator, and of Howard S. Whaley, guardian *ad litem* of the infant next of kin, and ordered that the funds be paid over to the plaintiff, administrator *c. t. a.*, and that R. C. Lowry file his final account. From this judgment R. C. Lowry, administrator, and Howard S. Whaley, guardian, gave notice of appeal. But subsequently Whaley, guardian *ad litem,* notified the Clerk and his counsel that he would not appeal from the judgment, and instructed counsel to withdraw his notice of appeal. R. C. Lowry, administrator, perfected his appeal and appeared with counsel in this Court in opposition to the judgment below.

In view of the judicial dictum of this Court that the letters of Robbins "evidenced a desire only to secure for his own use the money he was sending back from overseas, and do not seem to contain definite expression of purpose or intention thereby to make a testamentary disposition of the fund," we deem it proper in the exercise of the supervisory powers of this Court to remand the cause to the end that appropriate proceedings be undertaken on behalf of the infant next of kin to see that their rights are adequately protected. The fund will remain in the hands of the Clerk until final disposition thereof by the Court. The costs of this appeal will be taxed against the estate.

Remanded.

STATE v. ELMER RAY WOOLARD.

(Filed 17 September, 1947.)

Criminal Law § 50d—

In a prosecution for carnal knowledge of a female child over twelve and under sixteen years of age, the repeated remark of the court in directing the sheriff to quiet the spectators, made immediately after cross-examination of prosecutrix to impeach her testimony, that "you people cannot laugh at the predicament of this poor little girl; the only difference between you and she is that you haven't been caught," *is held* to violate G. S., 1-180, as tending to invoke sympathy for prosecutrix and thereby bolster her testimony and as tending to impair the effect of defendant's plea of not guilty.

STATE *v.* WOOLARD.

APPEAL by defendant from *Hamilton, Special Judge,* at June Term, 1947, of BEAUFORT.

Criminal prosecution upon bill of indictment charging that the defendant did unlawfully, willfully, and feloniously carnally know and abuse a certain named female child over twelve and under sixteen years of age, etc.

Defendant pleaded not guilty.

The record discloses that on the trial below after the prosecutrix as witness for the State had testified to facts tending to support the charge against defendant, he, through cross-examination by his counsel, sought to impeach the truthfulness of her testimony; that at the conclusion of her examination as a witness, the court made the following remark: "Mr. Sheriff, you'll have to keep that crowd quiet—you people cannot laugh at the predicament of this poor little girl; the only difference between you and she is that you haven't been caught"; and that this remark was made three times during the course of the trial. Exception by defendant.

The defendant did not offer himself as a witness.

There was a verdict of guilty. And from judgment, sentencing defendant to two years on the roads, he appeals to Supreme Court and assigns error.

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

LeRoy Scott and John A. Mayo for defendant, appellant.

WINBORNE, J. Among the errors assigned by defendant on this appeal the one directed to the remarks made by the presiding judge in the course of the trial and in the presence of the jury as above recited, is well taken and must be held to be prejudicial error. The apparent effect of these remarks is twofold: (1) They tend to invoke sympathy for the prosecuting witness, and thereby bolster her testimony; and (2) they tend to impair the effect of defendant's plea of not guilty. Thus they constitute a violation of the provisions of G. S., 1-180, forbidding a judge to express to the jury his opinion on facts of the case being tried.

Decisions of this Court, uniformly, are to the effect that "the slightest intimation from a judge as to the strength of the evidence, or as to the credibility of the witness, will always have great weight with the jury, and, therefore, we must be careful to see that neither party is unduly prejudiced by any 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. See also *S. v. Owenby,* 226 N. C., 521, 39 S. E. (2d), 378.

And, "the judge may indicate to the jury what impression the evidence has made on his mind, or what deductions he thinks should be drawn therefrom, 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 from an expression calculated to impair the credit which might not otherwise and under normal conditions be given by the jury to the testimony of one of the parties." *Stacy, C. J.*, in *S. v. Benton*, 226 N. C., 745, 40 S. E. (2d), 617.

"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 properly instructed jury. This right can neither be denied or abridged." *Walker, J.*, in *Withers v. Lane*, 144 N. C., 184, 56 S. E., 855.

Applying these principles to the exception indicated, there must be a new trial. Hence, other assignments need not be considered as they may not then recur.

New trial.

ISAAC RIDDICK v. RICHMOND CEDAR WORKS.

(Filed 17 September, 1947.)

1. Master and Servant § 40d—

Claimant was employed as a lumber-piler and was instructed to stay away from the saws, but there was evidence that on the day of his injury he was instructed to leave his regular job and to perform some work in the vicinity of one of the saws, and that while waiting at the place designated he started to assist another employee, in the absence of the regular sawyer, in cutting off a board, and suffered an injury when his hand came in contact with the saw. Two men were usually required to operate the saw. *Held:* The evidence was sufficient to sustain the finding of the Industrial Commission that the injury arose out of and in the course of his employment.

2. Master and Servant § 55d—

A finding of fact of the Industrial Commission is conclusive on appeal if supported by evidence notwithstanding that the evidence upon the entire record might also support a contrary finding.

APPEAL by defendant from *Frizzelle, J.*, at November Term, 1946, of GATES.

Proceeding under Workmen's Compensation Act to determine liability of defendant, employer and self-insurer, to plaintiff, injured employee.

After making the jurisdictional determinations the Industrial Commission found that claimant, a Negro boy 18 years of age, was employed

by the defendant at its lumber plant in Gates County. He was not employed to do any sawing, and in fact had been warned to stay away from the saws. Nevertheless, on 2 May, 1945, "he was directed to leave his regular job and to perform some work in the vicinity of one of the saws," and while waiting around the place in the absence of the regular sawyer, he started to assist another employee in cutting off a board and suffered an injury when his hand came in contact with the saw. Two men were usually required to operate the saw, and claimant undertook to help in the absence of the regular operator.

There was an award by the Industrial Commission which was affirmed on appeal to the Superior Court. From this latter ruling, the defendant appeals, assigning errors.

Walter G. Edwards for plaintiff, appellee.
John H. Hall for defendant, appellant.

STACY, C. J. The correctness of the award is challenged on the ground that claimant had departed from the work he was employed to do at the time of his injury. *Davis v. Veneer Corp.*, 200 N. C., 263, 156 S. E., 859; *Parrish v. Armour*, 200 N. C., 654, 158 S. E., 188. Even so, he was instructed on the day of the accident to leave his regular job and to do some work in the vicinity of one of the saws. "Whatsoever thy hand findeth to do," was apparently within the purview of this instruction. In compliance, the claimant, in the absence of the regular sawyer, undertook to assist another employee in cutting off a board. The fact that he was not actually engaged in the performance of his duties as lumber-piler at the time of the injury would not perforce defeat his claim for compensation. *Brown v. Aluminum Co.*, 224 N. C., 766, 32 S. E. (2d), 320. He was doing "some work" in the vicinity of one of the saws, pursuant to instructions from his superior. This suffices to repel the motion to dismiss. *Rewis v. Ins. Co.*, 226 N. C., 325, 38 S. E. (2d), 97; *Pickard v. Plaid Mills*, 213 N. C., 28, 195 S. E., 28; *Gordon v. Chair Co.*, 205 N. C., 739, 172 S. E., 485; *Bellamy v. Mfg. Co.*, 200 N. C., 676, 158 S. E., 246.

As a dernier resort, the defendant says that notwithstanding the determination of the Industrial Commission, the record as a whole impels the conclusion of a noncompensable injury. To accept this view would be to reject the inferences which support the fact-finding body. *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. *Hegler v. Mills Co.*, 224 N. C.,

669, 31 S. E. (2d), 918; *Fields v. Plumbing Co.*, 224 N. C., 841, 32 S. E. (2d), 623.

The result is an affirmance of the judgment below.

Affirmed.

STATE v. EARL O'DEAR AND ROBERT MESSER.

(Filed 17 September, 1947.)

Criminal Law § 80b (4)—

Where defendant gives notice of appeal but fails to make out or serve case on appeal within the time allowed or take any action toward perfecting the appeal, the motion of the Attorney-General to docket and dismiss will be allowed, but where defendant has been convicted of a capital felony this will be done only after an inspection of the record fails to disclose error.

MOTION by State to docket case, affirm the judgment and dismiss the appeal.

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

PER CURIAM. The defendants were tried at May Term, 1947, of Jackson Superior Court on two bills of indictment charging them with the murder of Jack Hall and Margie Maples Hall. It was alleged that the defendants were at the time engaged in the perpetration of a robbery. Both defendants were convicted of murder in the first degree, and judgment was entered by Bobbitt, Judge Presiding, sentencing them to death as the law directs. From this judgment the defendants gave notice of appeal to the Supreme Court, but no case on appeal has been made out or served within the time allowed by law, nor docketed in this Court. Nothing has been done towards perfecting the appeal, and the time therefor has expired. Counsel who appeared for the defendants below have notified the Solicitor for the State that they can find no reversible error in the trial, either in the evidence or the charge of the court, and authorize withdrawal of appeal.

The motion of the Attorney-General to docket and dismiss the appeal under Rule 17 is supported by the record and is allowed. We have examined the record and find that no error appears on the face of the record. *S. v. Watson*, 208 N. C., 70, 179 S. E., 455; *S. v. McLeod, ante*, 411, 42 S. E. (2d), 464. The evidence shown by the record sent up was sufficient to support the verdict and judgment.

Judgment affirmed; appeal dismissed.

STATE v. WILLIE CHERRY.

(Filed 17 September, 1947.)

Criminal Law § 80b (4)—

Where defendant gives notice of appeal but fails to make out or serve case on appeal within the time allowed or take any action toward perfecting the appeal, the motion of the Attorney-General to docket and dismiss will be allowed, but where defendant has been convicted of a capital felony this will be done only after an inspection of the record proper fails to disclose error.

APPEAL from *Burgwyn, Special Judge,* at Special Term, June, 1947, of NORTHAMPTON.

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

E. N. Riddle for defendant.

PER CURIAM. The defendant was convicted of burglary in the first degree. Sentence of death by asphyxiation was imposed. Defendant gave notice of appeal. No case on appeal was served within the time allowed by the court below, and the attorney for the defendant has notified this Court that the appeal will not be perfected.

The Attorney-General moves to docket and dismiss the appeal. This motion must be allowed, but, according to the usual rule of the Court in capital cases, we have examined the record to see if any error appears. We find no error therein. *S. v. Watson,* 208 N. C., 70, 179 S. E., 455.

Judgment affirmed; appeal dismissed.

STATE v. LESTER STANLEY.

(Filed 24 September, 1947.)

1. Homicide § 25—

The evidence tended to show that defendant killed his wife by making two separate slashes of a razor across her throat, which overlapped and cut her throat from ear to ear to a depth which almost decapitated her. *Held:* The brutal and vicious manner of the slaying is sufficient to support an inference of premeditation and deliberation, and defendant's motion to nonsuit on the capital felony was properly overruled.

2. Constitutional Law §§ 32, 34—

A person accused of crime is entitled to information as to the nature of the crime of which he is accused and has the right to confront his

accusers; the first of these is satisfied by his arraignment, and the second by his confrontation and examination of the witnesses upon the trial.

3. Same: Indictment § 6—

In capital cases the indictment must be returned in open court by the grand jury in a body or by a majority of them, G. S., 15-141, but the indictment and its return are no part of the trial and therefore defendant's constitutional right of confrontation is not infringed by his absence when the indictment is returned.

4. Criminal Law § 38d—

Where a witness testifies that photographs accurately represented the scene, the use of the photographs to illustrate the witness' testimony is competent, and objection thereto on the ground that the witness did not make the photographs is untenable.

5. Criminal Law § 31a—

A physician, qualified as an expert, testified from his examination of the body that deceased was in a prone position when the fatal injuries were inflicted because, if the deceased had been standing, the quantity and pressure of the blood which would have gushed forth from the severed arteries of the neck would have sprayed a larger area with blood. *Held:* The reasons assigned by the witness for his conclusion bring the conclusion well within the rule of expert opinion testimony.

6. Same—

Testimony of an embalmer describing the wounds he found on the body in the course of preparing the body for burial is testimony as to an observed fact not requiring expert testimony.

7. Constitutional Law § 33: Jury § 5b—

Upon emergency arising after afternoon adjournment of the court and after defendant's counsel had left and was too far away to be available, the judge called the court back in session and in open court, and in defendant's presence, substituted the 13th juror in the exercise of his discretion, G. S., 9-21. *Held:* There being no suggestion of any unusual reason demanding the presence of defendant's counsel, it cannot be held that defendant was prejudiced or deprived of any fundamental right by the action of the court.

DEFENDANT'S appeal from *Burgwyn, Special Judge,* at April Special Criminal Term, 1947, of EDGECOMBE.

This defendant, Lester Stanley, was tried upon an indictment charging him with the murder of his wife, Shirley Stanley; was convicted of murder in the first degree, sentenced to death, and appealed. Parts of the record and evidence sufficient to an understanding of the points discussed in the opinion are summarized in this statement.

At the opening of the trial the defendant moved to quash the bill of indictment because he was not present in court when it was returned and read. The motion was overruled and defendant excepted.

The defendant, Lester Stanley, and Shirley Ruffin were married in June, 1944, lived together about three weeks, when defendant was drafted for service in the war. While he was gone a daughter was born to them. Stanley returned in September, 1946, and thereafter lived with his wife and child in the home of Robert Ruffin, his father-in-law, occupying a bedroom next to that of Ruffin and his wife. Ruffin was a brick mason, and Stanley was employed by him and working with him on 10 March, 1947, the day on which the death of Shirley Stanley occurred, on a job four or five blocks from the home, and about five minutes walk. On that morning, when Ruffin got ready to go on the job, Stanley insisted that William Rollins, another worker who ordinarily pushed the wheelbarrow containing the bricks, should go in the car with Ruffin and that he should come along with the wheelbarrow after them. As his wife's mother had left earlier for the laundry where she was working he was thus left alone with his wife and infant at the home. A neighbor woman came in and engaged Shirley in conversation for a short time and left.

Stanley arrived on the job at the Babcock house about 45 minutes after Ruffin and Rollins had gone to work, began mixing the cement, and remained until they were called to the Ruffin home by the police, reaching there about 11:30 o'clock.

Meantime two women had come to the Ruffin house, found the front door locked from the inside, and after repeated knocks and calls, went to the back door where they effected an entrance. Terrified at what they saw through the door of a bedroom, one of them took the baby outdoors and the other called Shirley's mother and the police. The latter, on arrival, as stated, called Ruffin.

Shirley Stanley was found in the bedroom of Ruffin and his wife, lying on the floor beside the bed, in a grotesque position, one pajama leg torn off and lying on the bed, with her throat cut from ear to ear, the blood in a pool around her head. Her clothing was up around her waist and toward her neck, her legs drawn up and spread open. No one was allowed to enter, but the body could be seen from the door. Stanley said, "Somebody has killed my wife. I hope I don't find them before you all do!"

Spots observed on defendant's overalls which had the appearance of blood led to his arrest and imprisonment. After many denials and conflicting statements he finally made a statement, which in the main, he later confirmed by his own testimony on the trial, in which he gave his version of the circumstances leading to and accompanying the death of his wife and his own conduct and part in the final scene and afterward, substantially as follows:

With much repetition he told the officers that he had trouble with his wife the night before and became angry with her because she declined to

have marital relations with him, and sat up awhile, smoking. He chose the next morning, said he, to "make up" with her. She repulsed his advances, told him to get out of the house, that she no longer cared for him, and didn't want to see him again. During the course of the argument she left the room and returned with the razor. In pulling the razor away from her, said he, her hand was cut. During the struggle he had his arms around his wife, her back to him, with the razor in his hands, and as he shoved her away from him her throat was accidentally cut. That he was scared, went out the back way, threw the razor under the house, washed the blood off his hands in a bucket of water, and got some on a handkerchief. He buried the handkerchief, he said, near the place where he was working; later he voluntarily went with the officers, showed them the place, and it was unearthed.

The blood on several garments worn by defendant at the time of the death was analyzed by experts and proved to be the same type as that of deceased.

Photographs of the rooms, and the body as found, which the witness testified were accurate representations, were, over defendant's objection, permitted to be shown the jury, with the caution that they were not substantive evidence, but could be considered only as illustrating the testimony. Defendant excepted.

Dr. Norfleet, qualified as an expert, testified that deceased had two cuts upon the neck on both sides, lapping from both sides, which severed major arteries. Based upon his examination of the body and its surroundings he gave it as his opinion that the deceased was lying on the floor when she received these wounds. To this defendant objected and excepted. The witness gave as his reasons that if she had been standing the severance of the major blood vessel in the neck would have caused the blood to gush or spurt out in quantities under the pressure and spray a greater area than he found to be the case, and particularly the bed and furniture immediately near, and he found no such evidence of that condition. There was blood on the floor, for quite a distance, but none on the upper part of the furniture, and none on the bed, which was right next to the body, except at a low level. A major blood vessel, however, was cut to produce the amount of blood he saw on the floor. If a person's throat was cut, and a major blood vessel severed, the blood would gush out before he could fall to the floor, and in this instance would have shown on the furniture or bedspread.

William Parker, who owns a funeral home in Tarboro and embalmed the body, after qualifying as an expert embalmer, especially as to the human circulatory system, testified that in the course of preparing the body for burial he examined the wounds inflicted upon the neck and throat. The neck was cut practically all the way from the lobe of one

ear to that of the other, in two incisions, severing both jugular veins. The esophagus was cut in two, and a "nick" was made in the neckbone. To this evidence defendant excepted.

Upon the conclusion of evidence, defendant demurred to the evidence and moved for judgment as of nonsuit, which was denied, and defendant excepted. Defendant also moved to nonsuit on the charge of first degree murder, which was refused, and defendant excepted.

At the conclusion of the evidence and before argument began the court excused one of the jurors for cause, and substituted for him the "thirteenth" juror, who had been qualified as the statute requires, and had sat with the jury throughout the trial. The prisoner was present in court but his counsel had left the court after adjournment and was not present or available. Counsel was permitted to file objection and exception.

The verdict was murder in the first degree. Defendant moved to set aside the verdict for errors committed on the trial, which was denied, and defendant excepted. From the ensuing sentence of death, defendant, having objected and excepted, appealed, assigning errors.

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

Cooley & May for defendant, appellant.

SEAWELL, J. In view of the voluminous record and the number of exceptions taken upon the trial it is necessary to confine discussion to those objections which counsel for appellant have urged upon us as being of a more serious nature. However, it must be understood that those exceptions not discussed here or noted in the foregoing statement have received careful attention and have not been considered of sufficient merit to affect the result of the trial. *In limine* it is proper to say that the demurrers to the evidence, including the motion to nonsuit the graver charge of first degree murder, were properly overruled. The evidence of the guilt of defendant is plenary; and there are several phases of the evidence sufficient to give rise to the inference of deliberation and premeditation. If we pass over the inference that the defendant nursed his grievance of the night before and vengefully renewed it the morning after, and also inference that he deliberately planned the opportunity and set the stage for the tragedy, all of which point to deliberation and premeditation, the vicious, ferocious, and brutal manner of the slaying,—by two slashes of the razor which almost decapitated the victim,—engenders an inference of premeditation and deliberation distinct from the presumption of second degree murder by the intentional use of a deadly weapon in the killing and not merged therein. *S. v. Artis, ante,* 371;

S. v. Taylor, 213 N. C., 521, 523, 196 S. E., 832; *S. v. Hunt,* 134 N. C., 684, 689, 47 S. E., 49; *S. v. Bynum,* 175 N. C., 777, 783, 95 S. E., 101. From *S. v. Bynum, supra,* we quote:

> "If this evidence satisfied the jury that the prisoner committed the homicide, the attendant circumstances of the killing by cutting her throat from ear to ear, beating up her head, and breaking her nose with a club, the wiping of the knife-blade in the grass and the hands with buds and leaves, if believed, was evidence from which the jury could infer that the killing was deliberate and purposeful, and not a sudden access of rage and such premeditation, if only for a moment, is sufficient to make it murder in the first degree."

The defendant moved to quash the indictment because of the fact that he was not present when it was returned by the grand jury in a body and read in open court.

Relative to indictment and trial there are two things guaranteed by the Constitution to one accused of crime; information as to the nature of the crime of which he is accused, and confrontation of his accusers. One of these requirements is satisfied by his arraignment, and if by plea of not guilty he puts himself upon his country the ensuing trial by jury in which he may confront and examine the witnesses, satisfies the other. The exception seems to point to one or the other of these rights, neither of which was denied him. In a capital case the indictment is still required to be returned into open court by the grand jury in a body, or a majority of them. G. S., 15-141. In other cases it may be returned by the foreman. It may be assumed that the practice has been preserved in the case of capital felonies as an additional guaranty that the requisites to its validity have been duly observed.

The indictment and its return are no part of the trial. The fallacy of the argument that it was in any way necessary that the defendant be present at once appears when we understand that the indictment is often found before the accused is even apprehended. It is not the practice to have defendant present although he may be in custody.

Other challenges to the validity of the trial which merit further discussion are: Objection to the use of photographs of the body and the scene of the tragedy; expert opinion evidence as to whether the woman was standing or recumbent when the wounds were inflicted upon her; testimony of the embalmer as to the nature and extent of the wounds found upon the body; and exception to the order substituting the 13th juror as one of the original twelve in the absence of counsel. We discuss these in that order.

The witness testifying said that the photographs accurately represented the position and condition of the body when found and its environment.

They were then permitted to be used to illustrate the testimony, with the caution that they were not substantive evidence. The objection here is based on the fact that the photographs were not made by the person testifying.

In this, as in most other jurisdictions, it is not necessary that a photograph used only to illustrate the evidence be made by the witness testifying "providing he can testify to its adequacy as a representation of the subject it purports to illustrate." Stansbury, North Carolina Evidence, Sec. 34; *Bane v. R. R.,* 171 N. C., 328, 88 S. E., 477; *Roane v. McCoy,* 182 N. C., 727, 109 S. E., 842; *Gates v. McCormick,* 176 N. C., 640, 97 S. E., 626; *Hagaman v. Bernhardt,* 162 N. C., 381, 78 S. E., 209.

Reference to the reasons given by Dr. Norfleet (see statement, *supra*) for his conclusion that Shirley Stanley was lying down when the wounds were inflicted upon her convincingly bring the subject within the rule of expert opinion, based upon professional knowledge of the behavior of the human body, its organs and functions, particularly the blood circulatory system under invasion by wounds such as were found. Similar expert testimony has been approved in *George v. R. R.,* 215 N. C., 773, 3 S. E. (2d), 286. Expert medical opinion has been often resorted to, to show the position of the body when it received a lethal wound. Admission of the evidence of the embalmer presents no prejudicial error. The statement of the embalmer was to an observed fact which did not require expert testimony.

The objection to the substitution of the alternate or 13th juror as a member of the panel is confined to the fact that it was done in the absence of defendant's counsel. The substitution was made in open court; but it had recessed for the afternoon and was called back in session. The defendant was present.

The record shows that the emergency, or condition requiring the substitution, arose after defendant's counsel had left the court upon the afternoon adjournment and was too far away to be available. No fault is attached to the attorney because of his absence; the question is whether any constitutional right of the defendant was invaded by the action of the court in the absence of counsel; or that it was attended with prejudicial error.

Rule 27 of Superior Court Practice relieves the court from sending for counsel when the case is called in a regular session. The corollary is that the court violates no duty by proceeding without counsel when it does not appear that the particular matter, because of some *unusual reason,* demands his presence. *S. v. Denton,* 154 N. C., 641, 70 S. E., 839. Perhaps an "unusual reason" might be afterward discovered in some prejudicial action by the judge which might have been resisted by counsel if present. In the instant case, however, there is no such sug-

gestion. In fact the 13th juror had been passed by both the solicitor and the counsel for defendant and was qualified to take his seat when the trial judge, in the exercise of his discretion conferred by the statute, G. S., 9-21, found it to be necessary. Under these circumstances we are unable to see that the defendant suffered deprivation of any fundamental right by action in the absence of counsel or that he was prejudiced in any way in the trial of his cause. *S. v. Dalton,* 206 N. C., 507, 174 S. E., 422; *S. v. Broom,* 222 N. C., 324, 22 S. E. (2d), 926.

As stated, we have carefully examined the record, considering all of the exceptions to the trial, and we find

No error.

STATE v. N. DEMAI.

(Filed 24 September, 1947.)

1. Homicide § 18: Criminal Law §§ 34a, 81c (3)—

While testimony of a declaration of a deceased made prior to the fatal encounter as to his reason for going to a place near the scene where the altercation took place is incompetent because not a part of the *res gestæ*, the admission of testimony of such declaration cannot be held prejudicial when there is no evidence that deceased knew of the proximity of defendant and no evidence that deceased went to the scene for other than some lawful purpose.

2. Homicide § 17—

The evidence tended to show that deceased's three sons and a nephew were with him at the time of the fatal encounter with the defendant. *Held:* Testimony of one of the sons that he went to the scene to keep deceased from getting into trouble with defendant is competent to negative the suggestion, arising on defendant's evidence, that the witness went to the scene to attack defendant.

3. Criminal Law § 31h—

A witness who has seen foreign service in the U. S. Army and who has been an Army instructor in small arms is competent to testify as to the caliber and range of the rifle used in the perpetration of the killing.

4. Same—

Where, after testimony qualifying a witness as an expert, the court admits expert testimony of the witness, it will be presumed that the court found the witness to be an expert notwithstanding the absence of a specific announcement of the preliminary ruling.

5. Homicide § 25—

Where the State's evidence tends to show an intentional killing by defendant with a deadly weapon, and defendant relies upon evidence of self-defense, defendant's motion to nonsuit is properly overruled.

6. Criminal Law § 81c (5): Homicide § 30—

Where defendant is convicted of murder in the second degree, any error in the instructions of the court relating to murder in the first degree cannot be held prejudicial in the absence of a showing that the verdict of second degree murder was thereby affected.

7. Criminal Law § 53k—

The language used by the court in stating the respective contentions of defendant and the State will not be held for prejudicial error when the expressions used by the court are based on the evidence and legitimate deductions therefrom.

8. Same: Criminal Law § 53f—

Defendant's assignment of error on the ground that the court consumed more time in stating the contentions of the State than those of defendant cannot be sustained when defendant does not complain that any of his contentions were omitted or incorrectly stated.

9. Criminal Law § 53k—

Defendant testified he was born in the United States but on cross-examination admitted that he had registered as an alien in 1940 under the Alien Registration Act, and stated without objection that his reason for so doing was some doubt as to which side of the international boundary line he was born on, and that he did not want to risk deportation. *Held:* The court's statement of the State's contention to the effect that the registration under the Alien Registration Act was not in good faith but to obtain advantages which might accrue from registering thereunder, with a further instruction that the whole matter was irrelevant but that the jury might consider it only upon the question of the credibility of the witness, is without prejudicial error.

10. Homicide § 27f—

While an instruction upon the perfect right of self-defense which is predicated upon a felonious assault being made on defendant, must be held for prejudicial error, nothing else appearing, where the court proceeds further and explains the principle of law applicable to non-felonious assault under the evidence presented in the case by instructing the jury that if the jury were satisfied that deceased and others with guns threatened defendant and approached close enough to inflict serious injury, even though a gun was not pointed at defendant, that would constitute an assault, the charge will not be held for reversible error.

11. Same—

Where the State's evidence, though contradicted by that of defendant, tends to show that defendant was at fault in bringing on the controversy in that he was armed with a high-powered automatic rifle, asserted his intention of immediately killing deceased, which caused deceased to desist from going where he had a right to go and to send for his gun to withstand defendant's present menace of violence, and that thereafter defendant opened the engagement and shot and killed his unarmed adversary, *is held* to warrant an instruction upon the duty of defendant to withdraw

from the difficulty before he could avail himself of plea of self-defense. Defendant's evidence to the contrary and his contention that he had made out complete self-defense were called to the attention of the jury.

APPEAL by defendant from *Hamilton, Special Judge,* at June Term, 1947, of NASH. No error.

The defendant was indicted for the murder of Charlie A. Johnson. On the trial the State's evidence tended to show that the defendant intentionally shot the deceased with a rifle, killing him instantly. It was contended on behalf of the defendant that the evidence warranted the conclusion that the killing was done in self-defense.

The circumstances of the homicide, according to the evidence offered by the State, were these: Both defendant and the deceased lived south of the highway between Rocky Mount and Nashville, the defendant's land fronting on the highway and the land of deceased lying south and west of the defendant's. The home of the deceased was some three-quarters of a mile from the highway, and reached by a road therefrom known as the Winstead Road. His family consisted of his wife, three sons aged 19, 17, and 16 years, and a nephew, Jimmie Johnson, aged 26. As the result of a dispute over the location of the dividing line between the lands of defendant and those of the deceased ill-feeling had arisen between them, and defendant had threatened the life of deceased.

Late in the afternoon of 26 April, 1947, the defendant appears to have taken possession of the disputed land and had his servant plowing thereon while he kept guard, armed with an automatic magazine rifle, 25-20 caliber. The deceased who seems to have been unaware of the action of the defendant had driven in his car to a store on the highway to get an afternoon paper. While he was gone one of his sons looking across the open space from his home (about a quarter of a mile) saw the defendant with his rifle, and he and his two brothers got in another car, and drove out to warn their father of the defendant's proximity. But before they met their father, they saw him turn to his left off the Winstead Road and into a farm path which led to his tenant house 250 yards from the road, and in the direction of the field where the defendant was. The deceased was unarmed, and could not have seen the defendant on account of woods and houses when he turned into the farm path to the tenant house, nor until he walked out beyond the tenant house into an open field. When the three sons, all unarmed, arrived on the scene the deceased was talking to the defendant who was standing some 50 yards away with the rifle in his hand. They heard defendant say he would kill the deceased if he came out there, and then declared he was going to kill him anyway. The defendant appeared to be excited and angry. The deceased seemed to have been in a good humor, as he laughed, waved his hand, and said he was unarmed, but if defendant was going to kill him

anyway he might as well get his gun, and told one of his sons to go to the house and get his gun. The son got in one of the cars, drove to the house where Jimmie Johnson, his nephew, joined him, and returned with a pistol, a shotgun and a .22 caliber rifle. When these reached the scene the defendant was still in the field with his rifle, and the deceased was standing in the open space near the tenant house smoking a cigarette. The other boys came to the car and took or were handed the .22 rifle and shotgun, Jimmie Johnson keeping the pistol. At that time the deceased exclaimed, "Lookout, he is going to shoot," and the boys dropped to the ground. Defendant opened fire and fired several shots. Apparently one of the first struck the deceased in the forehead and he fell to the ground on his face. Defendant continued to fire, and the Johnson boys then began firing and advancing through the woods on their left. The defendant fired on them, slightly wounding Jimmie Johnson, and then turned and ran toward his house. The Johnson boys came back and found their father dead. The still burning cigarette lay near his outstretched fingers on the ground.

The defendant's evidence, on the other hand, tended to show that when his servant began plowing earlier that afternoon, someone shot at him from the woods, the bullet passing through his clothes. The servant left his mule in the field and ran to the house and told defendant who thereupon had warrant sworn out against the deceased and one of his sons. The defendant then took his rifle and went to the field to protect his premises and his property from further attack. Shortly thereafter the deceased and his sons and nephew appeared near the tenant house, all armed with guns and rifles, and defendant retreated. The attackers deployed their forces on his right and left as if to surround him, and began firing at him from all sides. He fired several shots in return, and having used up the few cartridges he had, ran. He stoutly maintained he did not shoot at the deceased, and declared it could not have been a bullet from his rifle that killed him.

However, the State offered the bullet taken from the skull of the deceased and a ballistics expert from the F. B. I. who testified the fatal bullet was 25-20 caliber, and that from his examination of bullet and rifle in his opinion the bullet came from the defendant's rifle. Another witness, a former lieutenant of Marines who had served overseas during the war and had been for some time an instructor in firearms, testified the 25-20 rifle had greater range than the .22 rifle; that the shotgun would not be effective beyond 50 yards, and that the pistol had a maximum range of 75 yards. There was evidence from a number of witnesses that the defendant was a man of good character, and *contra* from State's witnesses that his character was bad.

There was 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.

O. B. Moss, Thorp & Thorp, and J. A. Jones for defendant.

DEVIN, J. The trial of this case necessarily consumed considerable time. Seventy-five witnesses were examined, forty-five for the State and thirty for defendant. The transcript of their testimony fills 180 pages of the record, and the judge's charge to the jury covered 56 pages. The industry and zeal of defendant's counsel are reflected in the 187 exceptions noted at the trial, 108 of them relating to the judge's charge. Certainly no stone has been left unturned which might disclose error. Under the ordinary limits of an opinion it will be inexpedient to discuss all of the exceptions brought up in defendant's appeal, but each has been examined and none overlooked.

The defendant assigns error in the admission over objection of testimony from witness John Johnson to the effect that he knew deceased went to the tenant house on the afternoon of the homicide to check fertilizer as witness had heard him speak of it, and that witness had himself gone there to keep deceased from getting into trouble with the defendant. While the declaration of a deceased person not part of the *res gestæ* would ordinarily be regarded as incompetent, here the admission of the testimony objected to was harmless, as there was no evidence that deceased knew of the proximity of the defendant when he went to the tenant house or that he went for other than some lawful purpose. Likewise, it was competent for this witness to negative the suggestion that he himself went there to attack the defendant. He testified both he and the deceased were unarmed.

The evidence of witness Jimmie Johnson as to the caliber and range of the weapons exhibited was competent, as the witness was shown to have had peculiar knowledge and experience as to such matters from service in the late war in the U. S. Marine Corps, where he was for some time instructor in the use of firearms. While the court did not specifically announce preliminary ruling that he was an expert, by admitting his testimony the court presumably so found. *S. v. Coal Co.*, 210 N. C., 742 (752), 188 S. E., 412. The exception to the testimony of the ballistics expert from the F. B. I. is without merit. Nor can the exception to the testimony of a character witness be sustained. It was for the jury to determine how much weight should be given the testimony.

Defendant's motion for nonsuit was properly overruled. *S. v. Johnson*, 184 N. C., 637, 113 S. E., 617.

The defendant noted exception to the court's instructions to the jury as to murder in the first degree. However, as the jury acquitted the defendant of the capital felony and found him guilty only of a lesser offense, any errors committed by the court in his charge on this phase of the case were cured by the verdict, and would not afford ground for a new trial in the absence of showing that the verdict of second degree murder was thereby affected.

The defendant has also brought forward in his assignment of error numerous exceptions taken by him to the court's instructions to the jury as to murder in the second degree, manslaughter, and the defendant's right of self-defense, but an examination of the entire charge in the light of the criticisms thus presented leaves us unconvinced that any prejudicial error was committed by the trial judge in the respects called to our attention. The established principles of law applicable thereto seem to have been stated in substantial accord with the decisions of this Court. While the court in charging the jury used at times somewhat colorful expressions in stating the contentions of the State and defendant, these expressions seem to have been based on evidence and legitimate deductions therefrom, and we cannot see that consequent harm resulted to the defendant.

The defendant assigns error in that the court's statement of the State's contentions consumed more space than that given the defendant's contentions. We perceive no prejudicial error on that score. He does not complain that any of his contentions were omitted or incorrectly stated. It had been agreed that the court need not recite the evidence in detail otherwise than in stating the contentions of the parties on the evidence.

The defendant excepted to the court's reference to a matter brought out on cross-examination of the defendant for the purpose of impeachment (*S. v. Wilson,* 217 N. C., 123 (127), 7 S. E. (2d), 11.) The defendant testified he was born in North Dakota, but later on cross-examination admitted that in October, 1940, he registered under the Alien Registration Act as an alien. He stated as his reason for so doing that he was born near the line between North Dakota and Canada, and was not sure on which side of the line he was born, and that he reasoned if it should be shown he was born north of the line without having so registered he might be deported. He testified he left his birthplace at the age of eleven, moved to Ohio, and came to Rocky Mount in 1909. No exception to this evidence was noted. In charging the jury the court stated at some length the defendant's contention on this point and recapitulated his testimony as to why he had registered as an alien in 1940. The court then in a single sentence stated the State's contention that one who knew that his birthright was that of the United States would not seek to appear as an alien, and that as certain advantages might accrue

from registering under the Alien Registration Act, the State contended the registration was not in good faith on the part of the defendant. The court then instructed the jury as follows: "The court instructs you that whether he registered or didn't register, whether he was born in Canada, North Dakota, North Carolina, or some island in the far seas, would have nothing at all to do with what happened on that field the late afternoon of 26 April, but you are allowed to consider those facts in respect to the registration only as you may relate the whole thing to the credibility of the witness as the witness has testified from the stand, and nothing else." We see no valid ground of complaint as to the court's action. The defendant's exception to the court's definition of malice and reference to how it may be shown is without merit.

The defendant excepted to the court's instructions to the jury on the defendant's right of self-defense under the various phases of the evidence. While the court's manner of statement might not be altogether unobjectionable, we think in the main he stated the law correctly, and we perceive no sufficient basis for awarding a new trial on that ground. The court laid down the rule in substance that if the jury should find the defendant was threatened with violence by the deceased and his sons, with present ability to inflict serious harm or death, while the defendant was at a place where he had a right to be and without fault in provoking the assault, and they found under these circumstances that he intentionally shot and killed the deceased, and they should further find that at the time he was acting under the reasonable apprehension that it was necessary or apparently necessary for him to do so in order to save himself from death or great bodily harm, and he used no more force than was reasonably necessary for that purpose, the law would excuse his act as having been done in self-defense and the jury should acquit. And the court further instructed the jury that they were to judge of the reasonableness of the apprehension under which he acted, but they must do so in the light of the circumstances as they appeared to the defendant at the time. True the court in stating the principle that one who was where he had a right to be and was without fault in bringing on the difficulty had a right to stand his ground and give back blow for blow, apparently predicated that right upon showing that a felonious assault was being made upon him. Standing alone this would have been error, as pointed out in *S. v. Bryant,* 213 N. C., 752, 197 S. E., 530; *S. v. Moore,* 214 N. C., 658, 200 S. E., 427; *S. v. Ellerbe,* 223 N. C., 770, 28 S. E. (2d), 519, on the ground that this instruction was calculated to give the jury the impression that before one could successfully plead self-defense he must show that a felonious assault was being made upon him, and that it was the duty of the court to go further and state the principle of law applicable to non-felonious assault, or draw the distinction between them.

S. v. Hough, 138 N. C., 663, 50 S. E., 709; *S. v. Blevins,* 138 N. C., 668, 50 S. E., 763. But here the court proceeded further to explain to the jury what would constitute an assault, under the evidence presented in this case, which would be sufficient to give rise to this right, and justify the defendant in standing his ground and shooting it out if apparently necessary to save himself from death or great bodily harm; and the court instructed the jury if they were satisfied the deceased and others approached with guns threatening him and close enough to inflict serious injury, even though a gun was not pointed at him, that would constitute an assault. We do not think the defendant can justly complain of the court's instruction on this phase of the evidence. *S. v. Glenn,* 198 N. C., 79, 150 S. E., 663; *S. v. Pennell,* 224 N. C., 622, 31 S. E. (2d), 857.

The defendant excepted to the court's instructions as to the imperfect right of self-defense as applicable to this case. The court charged the jury in substance that where one was without fault in provoking the difficulty he had a right to stand his ground on his own land and return blow for blow without withdrawing and slay his assailant if necessary or apparently necessary to save himself from death or great bodily harm, but that if the jury found the defendant was at fault in bringing on the difficulty by using language calculated and intended to bring on the difficulty which ensued, and provoked an assault by threats and menace of violence with present ability to inflict it, causing the deceased to do something he otherwise would not have done, and that the defendant thus became the aggressor, then the defendant would not be entitled to avail himself of plea of self-defense in a situation he had wrongfully brought about until he first tried to withdraw from the difficulty and gave his adversary notice of his intention so to do, and then through mere necessity and to avoid death or great bodily harm fired the fatal shot. *S. v. Garland,* 138 N. C., 675, 50 S. E., 853; *S. v. Kennedy,* 169 N. C., 326, 85 S. E., 42; *S. v. Crisp,* 170 N. C., 785, 87 S. E., 511; *S. v. Glenn, supra; S. v. Robinson,* 213 N. C., 273, 195 S. E., 824. However, we think, taking the testimony offered by the State in its most favorable light, there was some evidence upon which to base the instruction complained of. According to the State's witnesses, the defendant, with a high-powered automatic rifle in his hand and within range, asserted his intention of immediately killing the deceased, which caused the latter to desist from going where he had the right to go, and to send for his gun to withstand this present menace of violence. The State's evidence further tended to show that the defendant opened the engagement, began firing and shot and killed his unarmed adversary. The defendant's contention that these were not the facts and his version of the circumstance and cause of the shooting, making out a case of complete self-defense, were fully called to the attention of the jury.

The testimony in the case offered by the State and that by defendant were sharply contradictory at every material point. While the defendant earnestly contended the evidence warranted a verdict of acquittal on the ground of self-defense, the jury has accepted the State's version of what happened on this fatal field, and found the defendant guilty of murder in the second degree. There was evidence to support this finding. No prejudicial error appears on the record, and the result will be upheld.

No error.

E. G. GENTRY, ADMR. ESTATE OF ARNOLD GENTRY, v. TOWN OF HOT SPRINGS, NORTH CAROLINA.

(Filed 24 September, 1947.)

1. Pleadings § 15—

A demurrer tests the sufficiency of the complaint to state a cause of action, admitting for the purpose the allegations of fact and inferences of fact reasonably deducible therefrom, but it does not admit the conclusions of law asserted by the pleader thereon.

2. Municipal Corporations § 12—

This action was instituted solely against a municipal corporation to recover for wrongful death upon allegations of gross neglect and culpable negligence on the part of the chief of police and jailer and the mayor and board of aldermen resulting in the death of plaintiff's intestate when he was suffocated in a fire originating in a room adjacent to the cell in which the police chief and jailer had incarcerated intestate. *Held:* Defendant's demurrer to the complaint was properly sustained upon the ground of governmental immunity since a municipality may not be held liable upon the theory of *respondeat superior* for gross neglect or culpable negligence of its officers in the discharge of their governmental duties. G. S., 153-179, is not applicable.

SEAWELL, J., dissents.

APPEAL by plaintiff from *Nettles, J.*, at March Term, 1947, of MADISON.

Civil action to recover damages for death of plaintiff's intestate, alleged to have been caused by the wrongful act, neglect or default of the defendant.

In substance, the complaint alleges that during the early morning hours of 27 April, 1946, plaintiff's intestate, a boy fifteen years of age, was wrongfully incarcerated in the lockup or jail of the Town of Hot Springs, N. C., by the chief of police and jailer, Milt Landers, after having been brutally and inhumanly treated by said officers; that the vicious and criminal propensities and general unfitness of said officer

were well known to both Mayor and Board of Aldermen of the town; likewise, the jail, with its surroundings, was known to be a potential fire trap, unsafe and unfit for such use, with faulty electric-lighting equipment, etc.; that soon after the incarceration of plaintiff's intestate, his brother, Frank Gentry, aged 22, came to the jail and was himself brutally assaulted by the Chief of Police and placed in the lockup; that the Chief of Police then left for his home, taking with him the only available key to the jail, and in a short time, about 3:30 a.m., a fire broke out among the shavings, sawdust and other inflammable materials in the workshop adjacent to the lockup, which quickly spread to the jail and suffocated plaintiff's intestate and his brother. Wherefore plaintiff seeks recovery for the wrongful death of his intestate.

Demurrer was interposed on the ground that the complaint does not state facts sufficient to constitute a cause of action for wrongful death against the defendant municipality.

From judgment sustaining the demurrer, the plaintiff appeals, assigning error.

Calvin R. Edney for plaintiff, appellant.

George M. Pritchard and George L. Greene for defendant, appellee.

STACY, C. J. The complaint paints a lurid picture. However, if we look beyond the paint and examine the foundation of the alleged cause of action for wrongful death, as the demurrer invites us to do (*Andrews v. R. R.*, 200 N. C., 483, 157 S. E., 431), we perceive no distinguishable difference between this case and the case of *Dixon v. Town of Wake Forest*, 224 N. C., 624, 31 S. E. (2d), 853. The *Dixon case* was itself predicated on *Parks v. Town of Princeton*, 217 N. C., 361, 8 S. E. (2d), 217, and *Nichols v. Town of Fountain*, 165 N. C., 166, 80 S. E., 1059, 52 L. R. A. (N. S.), 942, Ann. Cas. 1915-D, 152. The demurrer, which challenges the complaint on the ground of governmental immunity, was properly sustained on authority of these cases. See Anno. 46 A. L. R., at p. 98; s. 61, A. L. R., 569; 41 Am. Jur., 899.

This doctrine which shields a municipality and its innocent taxpayers from liability for the negligent acts of its officers, done in the exercise of a purely governmental function, is recognized in all the decisions on the subject. True, many fine distinctions may be found in some of them, but the doctrine itself is regarded as essential, else it would be impossible to say where the liability of a municipal corporation would end, or how heavy a burden might be imposed on those who sustain its existence. *Nichols v. Town of Fountain, supra.* In the absence of statute, the doctrine of *respondeat superior* is not applicable to a State, or to its subdivisions when discharging a governmental duty (save perhaps in ad-

miralty matters). *Clodfelter v. State,* 86 N. C., 51, 41 Am. Rep., 440; *Brown's Admr. v. Town of Guyandotte,* 34 W. Va., 299, 12 S. E., 707; 41 Am. Jur., 896. See discussion in *Hunt v. High Point,* 226 N. C., 74, 36 S. E. (2d), 694.

Shearman and Redfield, in their work on the Law of Negligence, Fourth Edition, Sec. 253, state the rule as follows: "The governmental powers of the state are further exercised by a great number of municipal and *quasi*-municipal organizations, such as cities, towns, counties and boards, to which, for purposes of government and for the benefit and service of the public, the state delegates portions of its sovereignty, to be exercised within particular portions of its territory, or for certain well-defined public purposes. To the extent that such local or special organizations possess and exercise governmental powers, they are, as it were, departments of state; as such, in the absence of any statute to the contrary, they have the privilege and immunity of the state: they partake of the state's prerogative of sovereignty, in that they are exempt from private prosecution for the consequence of their exercising or neglecting to exercise the governmental powers they possess. To the extent that they exercise such powers, their duties are regarded as due to the public, not to individuals; their officers are not agents of the corporation, but of 'the greater public'—the state. No relation of agency existing between the corporation and its officers, with respect to the discharge of these public, governmental duties, the corporation is not responsible for the acts or omissions of its officers therein. This is nothing more than an application and proper extension of the rule that the state is not liable for the misfeasance of its officers."

Speaking generally to the subject in *Mendel v. Wheeling,* 28 W. Va., 233, it was said: "It has often been decided, that, where the powers created and duly enjoined are given and laid upon officers or agents to be named by the municipal corporation for the public benefit and as a convenient method of exercising the general government of the corporation, such corporation is not liable for the negligent omission or action of such officers or agents. . . . It seems therefore to be well settled, that, when a municipal corporation through its officers as agents is merely carrying out or exercising its purely governmental powers, it is not liable for any negligence of its officers or agents. This is so held from the wisest public policy; because, should a different rule obtain, municipal corporations could not exist."

In the case at bar, the Chief of Police and Jailer, the Mayor and the Board of Aldermen are all charged with gross neglect and culpable negligence in connection with the death of plaintiff's intestate. But these charges are leveled at them in their respective governmental offices. The municipality alone is sued, and this upon the theory of *respondeat*

superior. Hobbs v. Washington, 168 N. C., 293, 83 S. E., 391. Unless and until the General Assembly shall declare otherwise, a municipality is not liable in damages for the tortious acts of its officers committed in the discharge of their governmental duties. The provisions of G. S., 153-179, are not applicable to the allegations of wrongful death here made. *Moffitt v. Asheville,* 103 N. C., 237, 9 S. E., 695, 14 Am. St. Rep., 810.

Whether Arnold Gentry had a cause of action for personal injuries, which survived his death and became an asset of his estate, is not presented and is not decided. See *Hoke v. Greyhound Corp.,* 226 N. C., 332, 38 S. E. (2d), 105; *Hobbs v. Washington, supra; Moffitt v. Asheville, supra; Manuel v. Comrs.,* 98 N. C., 9, 3 S. E., 829; Anno. 46 A. L. R., 111, s. 61, A. L. R., 571; also *White v. Comrs. of Johnston,* 217 N. C., 329, 7 S. E. (2d), 825.

Affirmed.

SEAWELL, J., dissents.

E. G. GENTRY, ADMR. ESTATE OF FRANK GENTRY, v. TOWN OF HOT SPRINGS, NORTH CAROLINA.

(Filed 24 September, 1947.)

APPEAL by plaintiff from *Nettles, J.,* at March Term, 1947, of MADISON.

Civil action to recover damages for death of plaintiff's intestate, alleged to have been caused by the wrongful act, neglect or default of the defendant.

The complaint alleges substantially the same facts as those appearing in the companion case, *Gentry, Administrator, v. Town of Hot Springs, N. C., ante,* 665.

Demurrer interposed on the ground that the complaint fails to state facts sufficient to constitute a cause for wrongful death against the defendant municipality.

From judgment sustaining the demurrer, the plaintiff appeals, assigning error.

Calvin R. Edney for plaintiff, appellant.

George M. Pritchard and George L. Greene for defendant, appellee.

PER CURIAM. The decision of this case is controlled by the decision in the companion case, *Gentry, Administrator, v. Town of Hot Springs, N. C., ante,* 665.

Affirmed.

SEAWELL, J., dissents.

EVERETT JOHNSON v. JAMES (JIM) WALLIN.

(Filed 24 September, 1947.)

1. Frauds, Statute of, § 9—

Growing trees are a part of the land, and a contract for the sale thereof comes within the meaning and intent of the statute of frauds. G. S., 22-2.

2. Same—

A contract under which plaintiff was to cut certain trees on defendant's land, haul them and saw them into lumber, deliver 6,000 feet of the lumber to defendant and keep the remainder as payment for cutting the trees, hauling the logs and manufacturing the lumber, is not a contract for the sale of growing timber, but is a contract of employment for the conversion of trees growing on defendant's land into logs and the manufacture of the logs into lumber for the primary benefit of defendant, for which plaintiff was to be compensated in logs, and the exclusion of parol evidence of such contract is erroneous.

APPEAL by plaintiff from *Nettles, J.,* at March Term, 1946, of MADISON.

Civil action to recover by claim and delivery certain logs claimed by plaintiff under an alleged contract between him and defendant.

Plaintiff alleges in his complaint, liberally interpreted:

I. That he and defendant entered into an agreement concerning a certain boundary of timber owned by the defendant in which it was agreed (1) that plaintiff should cut down certain trees, and saw them into logs; (2) that defendant would haul the logs to a point where plaintiff could reach them with his truck; (3) that plaintiff would then haul the logs to his sawmill and manufacture same into lumber, six thousand feet of which was to be manufactured according to specifications given by defendant, and delivered to defendant; and (4) that plaintiff should have the remainder as pay for cutting the trees, hauling the logs and manufacturing the lumber.

II. That he, the plaintiff, immediately entered upon the premises of defendant and began the performance of his part of the agreement, and

after all the trees had been cut down and cut into log lengths, and the logs hauled, and six thousand feet of the lumber was manufactured and delivered to defendant, there were seventy-five logs remaining in the woods and on premises of defendant, which defendant forbade plaintiff to remove and denied to him the right to take the logs according to the agreement and refuses to plaintiff the right to enter and remove same.

III. That he, the plaintiff, has fully complied with the terms of the contract; and is entitled to possession of the logs remaining in the woods as pay for his work and labor, and "insists that defendant be made to comply with his part of the same and . . . to deliver to the plaintiff the logs which plaintiff purchased and paid for according to the terms of the contract," and if for any reason defendant is not able to deliver the specific logs, plaintiff is entitled to damages therefor.

Thereupon, and in accordance with these allegations, plaintiff prays judgment against defendant.

On the other hand, defendant, answering, denies the material allegations of the complaint, and as further defense, and by way of counterclaims, avers:

I. That since the contract attempted to be set up by plaintiff is for the sale and purchase of standing timber, it is required by law to be in writing, and he pleads the statute of frauds in bar of plaintiff's right to maintain the action.

II. That if the court should determine that the contract upon which plaintiff seeks to recover is not within the prohibition of the statute of frauds, and plaintiff is entitled to sue upon same, then defendant avers that about the middle of January, 1945, he selected 110 trees growing upon his premises and agreed with plaintiff that plaintiff might cut same for lumber, and at his own expense cut, log and saw same, and deliver to defendant the first 6,000 feet, cut according to defendant's specifications, from which defendant intended to construct a house upon his lands; that plaintiff neglected and refused to start operations when he agreed, and defendant started cutting the timber, for the cost of which, $25.00, plaintiff agreed to pay defendant and still owes, and refuses to pay same; that plaintiff refused and neglected to cut and deliver to defendant this 6,000 feet of lumber as agreed upon, and only delivered 4,642 feet to the damage of defendant in sum of $80 which plaintiff justly owes defendant; that although defendant had selected, pointed out and agreed that 110 trees should be cut and manufactured by plaintiff, an additional 30 trees, not in the agreement, worth as logs at least $400, were wrongfully cut by plaintiff, and since same were not mature and ripe for cutting, their cutting by plaintiff has damaged defendant in sum of $500, which he is entitled to recover of plaintiff; and, by reason of the matters and things so averred, defendant is entitled to have and

recover of the plaintiff the sum of $605. Upon these averments defendant prays that plaintiff take nothing by his alleged cause of action, and that he have and recover of the plaintiff the sum of $605 and the costs of the action.

Plaintiff, in reply, denies in substance the averments of defendant in conflict with the allegations of his complaint, and prays that defendant take nothing by his counterclaim, and for judgment as prayed in his complaint.

Upon the trial in Superior Court, plaintiff offered evidence tending to support the allegations of his complaint, but the court sustained objections thereto, apparently upon the ground that the alleged contract was oral and not in writing, and plaintiff took numerous exceptions.

At the close of plaintiff's evidence motion of defendant for judgment as of nonsuit was allowed, and the action dismissed at cost of plaintiff.

From judgment in accordance therewith plaintiff appeals to Supreme Court and assigns error.

Carl R. Stuart for plaintiff, appellant.

John H. McElroy and J. M. Baley, Jr., for defendant, appellee.

WINBORNE, J. Plaintiff's exception to the refusal of the court to admit parol evidence tending to support the allegations of his complaint as to the alleged agreement upon which this action is based is well taken.

While in this State it is provided by statute, G. S., 22-2, that "all contracts to sell and convey lands . . . or any interest in or concerning them . . . shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, etc.," and while it may be taken as settled that growing trees are a part of the land, and that a contract for the sale thereof is considered as within the meaning and intent of the statute, the alleged contract between the parties to the present action is not one for the sale of growing timber. It is a contract of employment for the conversion of trees growing on defendant's land into logs and for manufacture of the logs into lumber for the primary benefit of defendant to the extent of 6,000 feet of lumber, for which plaintiff was to be compensated in logs. It does not contemplate that there should be a transfer of any title to or interest in the trees as they stood upon the land, which is essential to bring the agreement within the purview of the statute. The case of *Ives v. R. R.*, 142 N. C., 131, 55 S. E., 74, is on all-fours with the case in hand. The opinion of this Court by *Walker, J.*, fully discusses the subject. See also *Sumner v. Lumber Co.*, 175 N. C., 654, 96 S. E., 97, and *Walston v. Lowry*, 212 N. C., 23, 192 S. E., 877.

Hence, we hold that plaintiff is entitled to an opportunity to make out his case on parol evidence, and for error in refusing to admit such evidence, the judgment as of nonsuit is

Reversed.

IN THE MATTER OF: LENA VICK BATTLE AND WANDA SUE BATTLE, MINORS, APPEARING HEREIN BY THEIR GENERAL GUARDIAN, PEOPLES BANK & TRUST COMPANY; LARUE BATTLE BETTS; THOMAS ALEXANDER BETTS; PEOPLES BANK & TRUST COMPANY, ADMINISTRATOR OF THE ESTATE OF ALEXANDER PARKER BATTLE, JR., DECEASED; THOMAS A. BETTS, JR., AND ROBERT B. BETTS, MINORS, APPEARING HEREIN BY THEIR NEXT FRIEND, K. D. BATTLE.

(Filed 24 September, 1947.)

1. Wills § 34—

Testator devised the tract of land in question to his son for life, remainder to his son's children, with provision that if the son should die without issue him surviving the land should go to such of testator's children and grandchildren as survived the son. *Held:* Upon the death of the life tenant without issue him surviving, the surviving children and grandchildren of testator take *per capita* and not *per stirpes*.

2. Same—

As a general rule, where a devise is to a class, the devisees take share and share alike unless it clearly appears that testator intended a different division.

3. Wills § 31—

Where the language of a will is clear there is no occasion for interpretation.

APPEAL by general guardian of Lena Vick Battle and Wanda Sue Battle, minors, and by LaRue Battle Betts from *Bone, J.*, of 2nd Judicial District in Chambers, 13 August, 1947.

Civil action on petition under Uniform Declaratory Judgment Act, G. S., 1-253, *et seq.*, filed in Nash County to obtain interpretation of the meaning of certain provisions of the last will of Alexander Parker Battle.

The facts in so far as pertinent to the single question raised on this appeal are these:

Alexander Parker Battle died 17 June, 1943, leaving a last will and testament in which the concluding sentence in Item Six relating to his home farm, consisting of one hundred and eighty acres, reads as follows: "If my said son, Alexander Parker Battle, Jr., survives my said wife and dies without leaving children or issue surviving him then I devise this

said tract in fee to such of my children and grandchildren as may survive him, the said Alexander Parker Battle, Jr."

The wife of the testator survived him and died on 3 July, 1944, and his son Alexander Parker Battle, Jr., died 1 December, 1946, without issue surviving him.

Upon these facts the parties interested are in controversy as to whether under the provisions of Item Six, as aforesaid, the children and grandchildren of Alexander Parker Battle upon the death of Alexander Parker Battle, Jr., without issue surviving him, took the said home farm *per stirpes* or *per capita*.

The parties interested are LaRue Battle Betts, who is daughter and the only child of Alexander Parker Battle who survived Alexander Parker Battle, Jr., and Lena Vick Battle, age 5 years, and Wanda Sue Battle, age 3 years, children of Asail Vick Battle, another son of Alexander Parker Battle who died 7 April, 1944, and Thomas A. Betts, Jr., age 6 years, and Robert B. Betts, age 3 years, children of LaRue Battle Betts, who are the only grandchildren of Alexander Parker Battle who survived Alexander Parker Battle, Jr.

The court below was of opinion and held as a matter of law that the children and grandchildren of Alexander Parker Battle took on a *per capita* basis as tenants in common, share and share alike, and entered judgment declaring that LaRue Battle Betts, Lena Vick Battle, Wanda Sue Battle, Thomas A. Betts, Jr., and Robert D. Betts own the said home farm as tenants in common.

From the judgment so entered LaRue Battle Betts and Lena Vick Battle and Wanda Sue Battle, minors, through their general guardian appeal to Supreme Court and assign error.

Battle, Winslow & Merrell for K. D. Battle, Next Friend of Thomas A. Betts, Jr., and Robert B. Betts, appellee.

S. L. Arrington for LaRue Battle Betts, appellant.

F. S. Spruill for Peoples Bank & Trust Company, General Guardian for Lena Vick Battle and Wanda Sue Battle, appellant.

WINBORNE, J. This is the sole question on this appeal: Do such of "the children and grandchildren" of the testator as survived the devisee named take the home farm *per capita* and not *per stirpes?* The decisions of this Court furnish an affirmative answer. See *Shull v. Johnson,* 55 N. C., 202; *Leggett v. Simpson,* 176 N. C., 3, 96 S. E., 63; *Ex Parte Brogden,* 180 N. C., 157, 104 S. E., 177; *Mitchell v. Parks,* 180 N. C., 634, 105 S. E., 398; *Burton v. Cahill,* 192 N. C., 505, 135 S. E., 332; *Lamm v. Mayo,* 217 N. C., 261, 7 S. E. (2d), 501; *Tillman v. O'Briant,*

220 N. C., 714, 18 S. E. (2d), 131; *Wooten v. Outland,* 226 N. C., 245, 37 S. E. (2d), 682. Further elaboration is necessarily repetitious.

However, the general rule is that where the devise is to a class, the devisees take share and share alike unless it clearly appears that the testator intended a different division. *Shull v. Johnson, supra; Tillman v. O'Briant, supra,* and cases cited.

In the present case, as said by *Clark, C. J.,* in *Leggett v. Simpson, supra,* "There is nothing in the will which impairs the usual rule of construction that where a devise is to a class collectively, and not by name to various devisees in the class, all the members of the class take *per capita* and not *per stirpes.*"

In the devise here the words, "such of my children and grandchildren as may survive him," are merely descriptive of the group of devisees designated by the testator. The language is clear and affords no occasion for interpretation. *Cannon v. Cannon,* 225 N. C., 611, 36 S. E. (2d), 17. Therefore, the only inquiry to be made is who of his children, and who of his grandchildren survived the named devisee. They collectively constitute the devisees to whom the property is devised,—without preference one over the other.

The present case in factual situation is not unlike the case of *Tillman v. O'Briant, supra.* There the devisees were "Maggie Rhew's children" and two others. There were seven of the children. *Stacy, C. J.,* writing for the Court, says: "The bequest here is to Maggie Rhew's seven children and two others, the words 'Maggie Rhew's children' being descriptive of the first seven of the nine named legatees. *Ex Parte Brogden, supra.* This is the meaning usually ascribed to such language." And the Court held that the nine as members of the class took *per capita.*

The judgment below is

Affirmed.

JAMES A. MARZELLE, MINOR, BY HIS NEXT FRIEND, PEARL MARZELLE, v. SKI-LAND MANUFACTURING COMPANY, CONDUCTED AND REGISTERED UNDER THAT NAME BY CHESTER BROWN, SR., C. E. MORGAN, JAMES S. HOWELL, EARLE F. MORGAN AND CHESTER BROWN, JR., AS PARTNERS.

(Filed 24 September, 1947.)

1. Negligence § 4a—

Evidence that plaintiff slipped and fell to his injury on the sidewalk when he stepped into a mixture of syrup and water which flowed from the doors of defendants' building across the entire sidewalk, and that men were seen working on the inside of the building with brooms, *is held* sufficient to be submitted to the jury on the issue of defendants' negligence and to withstand motion for judgment of nonsuit.

2. Same—

Plaintiff's evidence was to the effect that he slipped and fell on the sidewalk when he stepped into a mixture of syrup and water which flowed across the entire sidewalk from the doors of defendants' building, that cars were parked at the curb adjacent to the sidewalk, and traffic in the street prevented a person from walking in the street outside the parked cars, and that the substance had the appearance of dirty water with nothing in its appearance or odor to import danger therefrom. *Held:* Whether defendant was guilty of contributory negligence was a question for the jury.

3. Negligence § 19c—

Judgment of involuntary nonsuit on the ground of contributory negligence cannot be upheld unless the evidence is so clear on that issue that reasonable minds could draw no other inference.

APPEAL by plaintiff from *Patton, Special Judge,* at March Term, 1947, of BUNCOMBE. Reversed.

This was an action to recover damages for a personal injury due to a fall on the sidewalk in front of defendants' building. It was alleged that plaintiff's fall was caused by the defendants' negligence in sweeping syrup or other slippery substance from their building on to the sidewalk.

At the conclusion of plaintiff's evidence, motion for judgment of nonsuit was allowed, and plaintiff appealed.

Lamar Gudger for plaintiff, appellant.

Harkins, Van Winkle & Walton for defendant, appellee.

DEVIN, J. Considering the evidence in the light most favorable for the plaintiff, we think it was of sufficient probative value to require submission to the jury, and that the motion for nonsuit was improperly allowed.

Plaintiff testified in substance that on the occasion alleged he was walking on the sidewalk on Southside Avenue, in Asheville, in front of the building occupied and used by the defendants in the manufacture of candy and other confections. Double doors opened out of this building on to the sidewalk. Plaintiff observed flowing entirely across the sidewalk from the open doors to the curb a liquid which looked like dirty water. Pursuing his way he stepped on it, his feet slipped from under him, and he fell on his head and back and sustained injury. He found that the substance was syrup. He testified he didn't know there was any danger and had no idea it was slippery. The substance came out of defendants' building and plaintiff saw men working on the inside with brooms. There were three cars parked in front of the building where he fell and there was so much traffic one couldn't walk in the street out-

side those cars. There was no sign or other warning of the slippery condition of the sidewalk. Another witness testified he was walking on the sidewalk just behind the plaintiff and saw him fall. This witness said the substance on the sidewalk looked like dirty water, off a dirty cement or wood floor. It proved to be syrup and water which had been swept out of the building on to the sidewalk. He said he saw John McAdams, who worked for the defendants, and another, inside the doors and saw McAdams sweep the stuff on to the sidewalk. Cars were parked in front, but it was possible for people to walk in the street beyond those parked cars. This witness testified he could see the substance on the sidewalk and thought it was water, that he went through it and didn't slip, but, said he, "I like to have."

We think the testimony offered by the plaintiff, tending to show that the syrup or slippery substance on the sidewalk was thrown or swept thereon from defendants' building by the defendants' servants in the course of their employment, without notice or warning to pedestrians, was sufficient to afford some evidence of negligence on the part of the defendants, and to withstand a motion for judgment of nonsuit. *Conway v. Ice Co.,* 169 N. C., 577, 86 S. E., 524; *Cole v. R. R.,* 211 N. C., 591, 191 S. E., 353. In this respect this case is distinguishable from the recent case of *Klassette v. Drug Co., ante,* 353, 42 S. E. (2d), 411. Nor was the appearance of the liquid—which looked like dirty water—such as to carry the necessary implication of contributory negligence to one who stepped on it in passing along the street. According to plaintiff's evidence there was nothing in the appearance or odor of the substance on the sidewalk, as he approached, to indicate it was syrup or to import danger therefrom. Whether he used due care under the circumstances was a question for the jury. *Bell v. Raleigh,* 212 N. C., 518, 193 S. E., 712; *Doyle v. Charlotte,* 210 N. C., 709, 188 S. E., 322; *Ferguson v. Asheville,* 213 N. C., 569, 197 S. E., 146; *Watkins v. Raleigh,* 214 N. C., 644, 200 S. E., 424; 13 A. L. R., 79 (note). "It is a familiar rule that a judgment of involuntary nonsuit on the ground of contributory negligence of the plaintiff cannot be rendered unless the evidence is so clear on that issue that reasonable minds could draw no other inference." *Cole v. Koonce,* 214 N. C., 188, 198 S. E., 637.

We conclude from an examination of the evidence in the record before us, that the judgment of nonsuit must be

Reversed.

STATE v. HAL GIBBS.

(Filed 24 September, 1947.)

1. Automobiles § 30d—

The unlawful operation of a motor vehicle upon a public highway while under the influence of intoxicating liquor is a misdemeanor.

2. Criminal Law § 8—

All who participate in the commission of a misdemeanor, as aiders and abettors or otherwise, are guilty as principals.

3. Automobiles §§ 30d, 33—

Evidence tending to show that the owner of a truck rode therein for a distance of 30 or 40 miles on the highway while both he and the driver were under the influence of intoxicating liquor, without evidence that the owner was too drunk to be conscious of what was going on, or that he had relinquished his right of control, *is held* sufficient to show, as against demurrer, that defendant aided and abetted the driver in the commission of the offense of unlawfully operating a motor vehicle upon a public highway while under the influence of intoxicating liquor, and to sustain the owner's conviction as a principal.

4. Criminal Law § 81c (2)—

Where the charge is free from error when considered contextually, exceptions thereto cannot be sustained.

APPEAL by defendant from *Sink, J.*, at August Term, 1947, of YANCEY. No error.

Criminal prosecution under bill of indictment charging the unlawful operation of a motor vehicle upon a public highway while under the influence of intoxicating liquor.

On 12 July, 1947, one Blake Styles was apprehended by patrolmen while operating a truck on a public highway. He was at the time "highly intoxicated." Defendant, the owner of the truck, was present, riding with Styles at the time. He also was in a "drunk condition." The truck had been driven from some point in Burke County, and the Burke County line was 30 or 40 miles from the point where defendant and Styles were stopped by officers. A one-half gallon container not quite full of white liquor was found in the truck.

There was a verdict of guilty. The court pronounced judgment and defendant appealed.

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

J. Frank Huskins for defendant, appellant.

BARNHILL, J. Under our statute the unlawful operation of a motor vehicle upon a public highway while under the influence of intoxicating liquor is a misdemeanor and all who participate in the commission of a misdemeanor, as aiders and abettors or otherwise, are guilty as principals. *S. v. Cheek,* 35 N. C., 114; *S. v. Lumber Co.,* 153 N. C., 610, 69 S. E., 58; *S. v. Parris,* 181 N. C., 585, 107 S. E., 306; *S. v. Grier,* 184 N. C., 723, 114 S. E., 622; *S. v. Graham,* 224 N. C., 351, 30 S. E. (2d), 154.

So then the primary question posed by this appeal is this: Is there any testimony in the record, sufficient to repel a demurrer to the evidence, tending to show that defendant aided and abetted Blake Styles in the commission of the offense charged?

Defendant owned the truck and was present, riding thereon as a passenger, while it was being operated by Styles, who was then in an intoxicated condition. He, as owner, nothing else appearing, had the right of control and could, at will, permit or forbid the use of the truck by another. He and his companion had traveled more than 30 or 40 miles and at the time had liquor on the truck. Sufficient time had elapsed for him to discover Styles' condition and forbid his operation of the vehicle.

While there is testimony tending to show the defendant was intoxicated there is no evidence to the effect he was too drunk to be conscious of what was going on, *S. v. Creech,* 210 N. C., 700, 188 S. E., 316; or that the driver was on a mission of his own, *S. v. Spruill,* 214 N. C., 123, 198 S. E., 611; or that defendant had surrendered or relinquished his right of control. *S. v. Spruill, supra.*

Hence the testimony concerning the facts and circumstances surrounding the parties at the time gives rise to permissible inferences of fact sufficient to require its submission to the jury and to sustain the verdict. *S. v. Trott,* 190 N. C., 674, 130 S. E., 627; *S. v. Adams,* 213 N. C., 243, 195 S. E., 822. Under the circumstances defendant's silence was consent. At least it warrants that inference.

"Where the owner of a vehicle permits an intoxicated person to drive it, while he is therein, he is liable as an accessory." 9-10 Huddy Auto Law 51. See also *ibid,* sec. 4, p. 29.

When an owner places his motor vehicle in the hands of an intoxicated driver, sits by his side, and permits him, without protest, to operate the vehicle on a public highway, while in a state of intoxication, he is as guilty as the man at the wheel. *Story v. U. S.,* 16 F. 2d., 342, cert. denied, 274 U. S., 739, 71 L. Ed., 1318; 5 Blash. Cyc. Auto L. & P., 67; 9-10 Huddy Auto Law, 30, 51; 5 A. J., 912.

If, under such conditions he is criminally liable for a resulting homicide, Anno. 99 A. L. R., 771, *S. v. Trott, supra, a fortiori,* he is guilty of the unlawful operation of the motor vehicle.

The *Creech* and *Spruill cases, supra,* cited and relied on by defendant, are distinguishable. In the *Creech case* all the testimony tended to show that Creech, the owner, was too drunk to be conscious of the driver's condition or of the fact he was operating the vehicle. In the *Spruill case* it appeared that the driver was on a mission of his own and had been acquitted. *S. v. Trott, supra,* is in point.

The charge of the court, considered contextually, is free from error. So considered, it appears the court clearly instructed the jury that defendant's guilt depended upon whether he, being the owner of the truck, consciously permitted Styles to operate the vehicle on a highway, knowing at the time he, the driver, was under the influence of intoxicating liquor as theretofore properly defined. Exceptions thereto cannot be sustained.

In the trial below we find

No error.

STATE OF NORTH CAROLINA EX REL. NORTH CAROLINA UTILITIES COMMISSION v. H. D. McLEAN—HENDERSON BUS LINE.

(Filed 24 September, 1947.)

Utilities Commission § 5—

An applicant for a franchise to operate motor vehicles upon designated public highways of the State for commercial purposes, who at the time has no prior or subsisting right to be affected thereby, is not entitled to appeal to the courts from the determination of the Utilities Commission denying the application and awarding the franchise to an opposing applicant.

APPEAL by respondent from *Parker, J.,* at Chambers in Durham, 30 April, 1947 (by consent). From VANCE.

On 18 February, 1946, H. D. McLean, d/b/a Henderson Bus Line, filed with the North Carolina Utilities Commission application for franchise to transport passengers over certain routes in Vance County. Docket No. 3522. He was a mere applicant at the time without prior franchise right.

On 22 March, 1946, S. M. Reams and Herbert Yancey, d/b/a Reams Bus Line, made application for similar franchise over the same highways and between substantially the same points. Docket No. 3554. Thereafter they intervened in No. 3522 and entered protest to allowing the petition filed therein.

By consent, the two applications were heard together, and resulted in a denial of the McLean application and the granting of a franchise to Reams and Yancey.

McLean filed objections and exceptions to the findings and conclusions of the Commission, and appealed from its decision to the Superior Court of Vance County. On motion of Reams and Yancey this was dismissed for want of any legal right to maintain the appeal.

From this ruling, the respondent, H. D. McLean, d/b/a Henderson Bus Line, appeals, assigning error.

John H. Zollicoffer for Reams and Yancey, petitioners, appellees.

A. A. Bunn, L. H. Wall, and S. J. Ervin, Jr., for H. D. McLean, respondent, appellant.

STACY, C. J. The question for decision is whether an applicant for a franchise to operate motor vehicles upon designated public highways of the State for commercial purposes, who at the time has no prior or subsisting right to be affected thereby, is entitled to appeal to the courts from the determination of the Utilities Commission denying the application and awarding the franchise to an opposing applicant.

The trial court thought that a negative answer was adumbrated, if not actually given, in the case of *Utilities Commission v. Trucking Co.*, 223 N. C., 687, 28 S. E. (2d), 201. The impression is correct. We now adopt the concurring opinion in that case as the opinion here. The position is also supported by what was said in *Utilities Com. v. Kinston*, 221 N. C., 359, 20 S. E. (2d), 322.

The case of *Utilities Com. v. Coach Co.*, 216 N. C., 325, 4 S. E. (2d), 897; *S. c.*, 218 N. C., 233, 10 S. E. (2d), 824, is distinguishable as was pointed out in the above cited, controlling cases. Likewise, the case of *Utilities Com. v. Coach Co.*, 224 N. C., 390, 30 S. E. (2d), 328, appears beside the point.

The attempted appeal was properly dismissed.

Affirmed.

STATE v. CLAUDE SULLIVAN.

(Filed 24 September, 1947.)

1. Criminal Law § 62f—Evidence held insufficient to support finding that defendant had violated conditions of judgment.

Execution of the sentence of a minor was suspended upon condition that he be committed to a State training school, obey its rules and regulations, and remain of good behavior without attempting to escape from the institution. The minor twice returned home, having been taken back to the school once by his father. There was evidence that each time he returned to his home he was sick mentally and physically. There was no evidence

of any representation or statement or action of any kind on the part of the officials of the school other than a letter describing his mental and physical condition as showing apathy. *Held:* The evidence is insufficient to support the findings of the court that defendant had violated the conditions of the judgment, and upon defendant's appeal from the order of the court committing him to the State's Prison, the case is remanded.

2. Same—

Upon motion by the solicitor for execution of a suspended sentence, the burden is on the State to offer affirmative evidence of violation of the conditions of the judgment.

APPEAL by defendant from *Gwyn, J.*, at February Term, 1947, of BUNCOMBE. Error and remanded.

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

Don C. Young for defendant.

DEVIN, J. Claude Sullivan, aged sixteen years, was charged with breaking and entering a store in Asheville, and at December Term, 1945, pleaded *nolo contendere*. The presiding judge sentenced him to State's Prison for not less than one nor more than two years, with the following added provision: "Capias and commitment to the foregoing sentence shall not issue for term of 3 years if the defendant is committed to the Eastern Carolina Training School for Boys, and shall remain of good behavior without attempt to escape therefrom and obedient to the rules and regulations of said institution until such time as he shall be discharged according to law. Upon violation of the rules and regulations of the institution or escape from the institution, capias to issue immediately for the defendant and the above sentence to go into effect."

The defendant thereafter was arrested by the police in Asheville 11 December, 1946, and at February Term, 1947, the presiding judge, on the solicitor's motion for commitment, found that after defendant entered the Training School pursuant to the original judgment he escaped and left without permission; that he was returned to the Training School and remained six weeks, and again escaped without permission. Thereupon the court found that defendant had violated the conditions of the judgment, allowed the solicitor's motion, and ordered defendant committed to State's Prison. The defendant excepted and appealed.

Passing the questions raised by the defendant's objections to the form and legal effect of the original judgment, we think the evidence presented to the judge below, on the solicitor's motion, was insufficient to support the finding and judgment appealed from. It appeared that after the original judgment was entered at December Term, 1945, the defend-

ant remained in jail until 13 February, 1946, before he was taken to the Training School; that after about a month and a half he returned to his father's home in Asheville complaining of being sick and lack of medicine with which he had previously been treated. Subsequently his father took him back to the Training School where he remained about six weeks and again returned to his home. He was then sick and was put under care of a physician but was well enough to attend West Buncombe High School for the remainder of the Spring Term and the Fall Term, 1946. In December, 1946, he was taken into custody by the police and held to bail until the February Term, 1947, of the Superior Court, and then ordered committed to State's Prison.

The physician under whose care he had been for the past two years wrote that he was suffering from chronic gall bladder infection and a very serious "nervous disorder," that he had been diagnosed as "mentally sick," and that he was "suffering from vitamin deficiency which has caused severe case of neuritis." A letter from his teacher at the Training School written in April, 1946, described his mental and physical condition as showing apathy, but that he indicated no improper attitude toward the institution. There was no evidence of any representation or statement or action of any kind from the officials of the Training School other than the letter above referred to. The only witness offered by the State was the defendant's father.

The record seems to be lacking in evidence of the material facts found by the judge below, that he had left the Training School without permission, or had escaped, or that he had not been obedient to the rules and regulations of the institution, or that he had not been of good behavior. The burden was on the State to offer affirmative evidence of violation of the conditions of the judgment.

There was error in ordering the defendant committed to State's Prison on the evidence presented, and the case is remanded for such disposition by the court as the facts may warrant.

Error and remanded.

MRS. FRANCES C. KNIGHTEN v. MRS. VIOLA McCLAIN.

(Filed 24 September, 1947.)

1. Husband and Wife §§ 26, 33—

The wife may maintain an action for criminal conversation with her husband and alienation of his affections.

KNIGHTEN *v.* MCCLAIN.

2. Husband and Wife §§ 28, 35—

In the wife's action for criminal conversation with her husband and the alienation of his affections, testimony by the wife relative to statements made to her by her husband tending to show his illicit relationship with defendant are incompetent. G. S., 8-56.

APPEAL by defendant from *Nettles, J.*, at January Term, 1947, of BUNCOMBE.

Civil action to recover damages for criminal conversation with plaintiff's husband and the alienation of his affections. There was a verdict for the plaintiff, and from judgment entered thereon, the defendant appealed, assigning error.

Don C. Young for plaintiff.

John C. Cheesborough, S. J. Pegram, and J. W. Haynes for defendant.

DENNY, J. The defendant demurred *ore tenus* in this Court on the ground that a wife cannot maintain an action against another for criminal conversation with her husband and the alienation of his affections. The demurrer cannot be sustained.

We concur in what was said in *Hinnant v. Power Co.*, 189 N. C., 120, 126 S. E., 307, with respect to the right of a wife to maintain an action of this character, as follows: "Whatever her former status may have been, the doctrine of marital equality now clothes her substantially with similar relative rights, from which it follows that for a direct and intentional invasion of the right of *consortium* such as criminal conversation, alienation of affection, or the inhibited sale of narcotic drugs, an action now lies in favor of the husband or the wife."

The defendant assigns as error the admission of testimony by the plaintiff, over defendant's objection, relative to statements made to the plaintiff by her husband, which statements tended to show his illicit relationship with the defendant. The admission of this evidence was error. The statute, G. S., 8-56, among other things, provides: "Nothing herein shall render any husband or wife competent or compellable to give evidence for or against the other in any action or proceeding in consequence of adultery, or in any action or proceeding for divorce on account of adultery (except to prove the fact of marriage); or in any action or proceeding for or on account of criminal conversation, except that in actions of criminal conversation brought by the husband in which the character of the wife is assailed she shall be a competent witness to testify in refutation of such charges."

Declarations of plaintiff's husband as to his improper relationship with the defendant are incompetent as evidence for plaintiff in this

action. *Grant v. Mitchell,* 156 N. C., 15, 71 S. E., 1087; *McCall v. Galloway,* 162 N. C., 353, 78 S. E., 429, and what is said in *Hyatt v. McCoy,* 194 N. C., 762, 140 S. E., 807, as to the admission of such evidence for some purposes, will not be held to modify this rule.

The defendant is entitled to a new trial, and it is so ordered.

New trial.

MARTHA H. DEVINE ET AL. v. DAVE STEEL CO. ET AL.

(Filed 24 September, 1947.)

1. Master and Servant § 40c—

The evidence tended to show: Deceased was subject to mild epileptic seizures which usually lasted only a few seconds. He was required in the course of his employment to stand on a cement platform to lower a flag from the flag pole each day. He was found unconscious at the bottom of the flag pole with ropes of the flag pole tangled with his body, under circumstances tending to show that while engaged in the performance of his duties, he had fallen and hit the back of his head on the cement platform, which injury caused death. The cause of his fall was not definitely determined by the Industrial Commission. *Held:* The evidence is sufficient to sustain the findings of the Industrial Commission that death resulted from an accident arising out of and in the course of his employment.

2. Master and Servant § 55d—

Where the evidence before the Industrial Commission is such as to permit either one of two contrary findings, the finding of the Industrial Commission is conclusive on appeal to the courts.

APPEAL by defendants from *Nettles, J.,* at July Term, 1947, of BUNCOMBE.

Proceeding under Workmen's Compensation Act to determine liability of Dave Steel Company, Inc. (employer) and Hartford Accident & Indemnity Company (carrier) to Martha H. DeVine, mother and next of kin of Hugh Patrick DeVine, deceased employee.

Following the jurisdictional determinations, the Industrial Commission found that the deceased employee, Hugh Patrick DeVine, met his death as the result of a fall which he sustained on 6 March, 1946, while lowering a flag from a flag pole when he fell and hit the back of his head on the cement platform on which he was standing. His duties required him to stand on this platform and to lower a flag from the flag pole each day. He was engaged in this work at the time of his injury. On the day in question, he was discovered in "an unconscious condition at the

bottom of the sign and flag pole . . . and the ropes from the flag pole were tangled with the deceased's body."

The Commission found that the deceased was subject to mild epileptic seizures which usually lasted only a few seconds, and further that his work exposed him to some peculiar hazards. "The Commission is of opinion that . . . the fall caused the death of plaintiffs' deceased and that he was subject to a peculiar hazard on account of being required to stand on the cement platform and lower the flag."

Whether the deceased ascended a ladder, standing near-by, and became entangled in the flag rope, or was seized with an epileptic fit, which caused him to fall, was not definitely determined by the Commission. The conclusion was reached, however, that the fall was the proximate cause of his death, and that this resulted from an accident arising out of and in the course of his employment. Whereupon, compensation was awarded to the mother as next of kin of the deceased.

On appeal to the Superior Court the award of the Commission was upheld. From this latter ruling, the defendants appeal, assigning errors.

Irwin Monk and Guy Weaver for plaintiffs, appellees.

Williams, Cocke & Williams for defendants, appellants.

STACY, C. J. Without adopting all the reasons assigned by the hearing Commissioner, and approved by the Full Commission, in support of the conclusions reached, we think the record discloses facts sufficient to sustain the award.

The deceased was engaged in his regular work. He accidentally fell and suffered a fatal blow when the back of his head came in contact with the concrete platform on which he was standing. The exact cause of the fall is not determined, although it is found that it was an accident arising out of the employment. *Robbins v. Hosiery Mills,* 220 N. C., 246, 17 S. E. (2d), 20. It occurred while the employee was in the discharge of his duties, and it resulted in his death. This permits the inference, which the Commission has drawn, that it was a compensable injury. *Rewis v. Ins. Co.,* 226 N. C., 325, 38 S. E. (2d), 97; *Brown v. Aluminum Co.,* 224 N. C., 766, 32 S. E. (2d), 320. To say the death was due to physical seizure, unrelated to the employment, even if regarded the more plausible view, would be to reject the opposing inferences which support the fact-finding body. *Hegler v. Cannon Mills,* 224 N. C., 669, 31 S. E. (2d), 918. Moreover, where the record is such as to permit either finding, the factual determinations of the Industrial Commission are conclusive on appeal to the Superior Court and in this Court. *Kearns v. Furniture Co.,* 222 N. C., 438, 23 S. E. (2d), 310.

The cases of *Rewis* and *Brown,* above cited, are in full support of the conclusion here reached. We are content to rest our decision on what was said in these two cases.

Affirmed.

C. N. DAVENPORT, JR., ADMINISTRATOR OF THE ESTATE OF BETTY GERTRUDE PATRICK, DECEASED, v. AUGUSTUS R. PATRICK, JR.

(Filed 24 September, 1947.)

1. Death § 3—

An administrator instituted this action for wrongful death against intestate's husband upon allegations that the husband's negligence caused the death of his intestate. Intestate left no children her surviving. *Held:* The husband being the sole beneficiary of any recovery, G. S., 28-149 (9), the courts will look beyond the nominal party plaintiff, and recovery will not be allowed under the principle that a wrongdoer will not be permitted to enrich himself as a result of his own misconduct.

2. Death §§ 3, 9—

The right of action for wrongful death is purely statutory, and provisions of the statute authorizing the institution and maintenance of such action are no more binding on the courts than the provisions of the same statute directing the distribution of recovery, and the persons entitled to distribution of such recovery are to be determined as of the time of intestate's death.

3. Actions § 3c—

Public policy will not permit a wrongdoer to enrich himself as a result of his own misconduct.

4. Death § 3: Husband and Wife § 7—

An administrator instituted this action for wrongful death against intestate's husband alleging that intestate's death resulted from the husband's negligence. Recovery was allowed to the extent of expenses for burial of intestate. G. S., 28-173. *Held:* The husband is primarily liable for the burial expenses of his wife, and he would be the beneficiary of such recovery, and therefore recovery for burial expenses by the administrator will not be allowed.

APPEAL by plaintiff and defendant from *Frizzelle, J.,* at April Term, 1947, of WASHINGTON.

Civil action instituted 18 October, 1944, by the plaintiff, administrator of the estate of Betty Gertrude Patrick, deceased, for the wrongful death of his intestate. The parties hereto entered into certain stipulations in the trial below, the pertinent part of which reads as follows:

"The defendant in this action, having renounced his right to administer upon the estate of his deceased wife, the plaintiff, C. N. Davenport, Jr.,

thereafter was duly appointed as administrator of the estate of Mrs. Betty Gertrude Patrick, deceased, and is now the duly qualified and acting administrator of the said estate. It is stipulated that plaintiff's intestate died as a proximate result of the negligent operation of an automobile owned by the defendant and in which he and his deceased wife and four other persons were riding and that this action was duly instituted within twelve months after the death of the said deceased; that the deceased in no wise contributed to the injuries alleged to have been suffered by her resulting in her death, and that she was riding in said automobile on said occasion as a guest of the defendant. It is stipulated that the said Mrs. Betty Gertrude Patrick died leaving no child nor representative of any child, leaving the defendant, her surviving husband, and that she also left her surviving her father and her mother. It is stipulated that the deceased was a young woman 16 years of age and that she was in good health mentally and physically and that for sometime prior to her death was earning as much as $45 per week and that her cost of living did not exceed $20 per week. It is stipulated that bills relating to and embracing funeral expenses in the aggregate sum of $889.47 have been filed with the plaintiff administrator; that the administrator is the undertaker who buried the deceased."

Whereupon the court entered the following judgment: "It was agreed that the Court should render judgment upon the admissions of the parties contained in the foregoing stipulations and the principles of law applicable to and controlling the same without the intervention of a jury. Upon a careful consideration of the admissions contained in the stipulations hereinbefore set out in this action which was brought and is an action for actionable negligence against the defendant to recover damages for the death of plaintiff's intestate, who was the wife of the defendant, the Court is of the opinion that under the applicable principles of law the only recovery that can be had in this action is the actual amount of the burial expenses and the costs of the action. It is, therefore, Considered, Ordered, Adjudged and Decreed that the plaintiff have and recover of the defendant the actual amount of the burial expenses incurred in the burial of the plaintiff's intestate and the cost of this action, the amount of said burial expenses to be ascertained and determined in the due course of the administration of said estate by and before the Clerk in the exercise of his probate jurisdiction."

The plaintiff and the defendant appealed, and assign error.

W. L. Whitley and W. L. Whitley, Jr., for plaintiff.

Norman & Rodman for defendant.

PLAINTIFF'S APPEAL.

DENNY, J. The plaintiff excepts to an order of the court below, allowing the defendant to amend his answer to show the relationship of the parties and to plead the wrongful conduct of the defendant as alleged by the plaintiff, as a bar to any recovery in this action.

In view of the stipulations entered into by the parties, the exception is rendered feckless.

The real question posed on plaintiff's appeal is simply this: Where the death of a wife was caused by the negligence of her husband, there being no issue of the marriage, can the administrator of the deceased wife recover from the husband for her wrongful death?

The plaintiff contends that what disposition may be made of the recovery in this action, has no bearing or limitation on the right of the plaintiff to maintain the action, as provided in G. S., 28-173, and cites *Warner v. R. R.*, 94 N. C., 250. In that case a nonsuit was entered because the complaint did not allege that the intestate had next of kin. The Court said, in discussing this statute: "It seems that its purpose is to give the action for the recovery of damages in the case provided, without reference to who may become the beneficiaries, excluding creditors and legatees. . . . Nothing appearing to the contrary, the presumption was that the intestate left next-of-kin surviving him, and whoever insisted upon the contrary was bound to aver and prove the fact. *University v. Harrison,* 90 N. C., 385; *Harvey v. Thornton,* 14 Ill., 217; Lawson on Presumptive Ev., 198. And as the next-of-kin generally, in the order prescribed, would take the damages recoverable, it was for this reason not necessary to allege that the intestate had next-of-kin. If he had not, and this fact could avail the defendant, it should have pleaded and proven it as matter of defense."

We concede that ordinarily the courts are not concerned as to how or to what particular person or persons a recovery in an action for wrongful death will be distributed,—that is, the courts have no favorites among distributees. But where it is made to appear that the beneficiary of the action was responsible for the death of plaintiff's intestate, another principle of law intervenes.

The courts will look beyond the nominal party whose name appears on the record as plaintiff and consider the legal questions raised as they may affect the real party or parties in interest. The real party in interest in this action is not the administrator, but the beneficiary under the statute for whom the recovery is sought. *Harrison v. Carter,* 226 N. C., 36, 36 S. E. (2d), 700; *Pearson v. Stores Corp.,* 219 N. C., 717, 14 S. E. (2d), 811; *Brown v. R. R.,* 202 N. C., 256, 162 S. E., 613; *Holmes v. Wharton,* 194 N. C., 470, 140 S. E., 93; *Avery v. Brantley,* 191 N. C.,

396, 131 S. E., 721; *Vaughan's Admr. v. Lawrence & N. R. Co.*, 297 Ky., 309, 179 S. W. (2d), 441; *Robinson's Adm'r v. Robinson*, 188 Ky., 49, 220 S. W., 1074; *Dishon's Adm'r v. Dishon's Adm'r*, 187 Ky., 497, 219 S. W., 794. The beneficiary here is the defendant. For all practical purposes he is the plaintiff and the defendant.

The right to maintain an action for wrongful death is purely statutory. No such right existed at common law, and the provisions of the statute authorizing the institution and maintenance of such an action are no more binding upon the courts than the provisions of the same statute which direct how the recovery in such action, shall be distributed. The rights of claimants to the proceeds recovered in an action for wrongful death, are determined as of the time of intestate's death. *Neil v. Wilson*, 146 N. C., 242, 59 S. E., 674. And we know of no statutory provision or decision of this Court that would permit a recovery for wrongful death, and then direct the distribution of such recovery in a manner other than as directed by the statute of distribution. At the time of the death of plaintiff's intestate, the defendant was and still remains the sole beneficiary under the law, of her personal estate and of any recovery that might be obtained for her wrongful death. G. S., 28-149 (9).

Public policy in this jurisdiction, buttressed by the uniform decisions of this Court, will not permit a wrongdoer to enrich himself as a result of his own misconduct. *Pearson v. Stores Corp., supra; Reid v. Coach Co.*, 215 N. C., 469, 2 S. E. (2d), 578; *Brown v. R. R.*, 204 N. C., 668, 169 S. E., 419; *Goldsmith v. Samet*, 201 N. C., 574, 160 S. E., 835; *Parker v. Potter*, 200 N. C., 348, 157 S. E., 68; *Davis v. R. R.*, 136 N. C., 115, 48 S. E., 591.

In the case of *Dishon's Adm'r v. Dishon's Adm'r, supra*, the facts were similar to those in the instant case, except the husband died before the institution of the action. Therefore we quote the opinion at some length. The Court said: "In this case the petition discloses the fact that Mrs. Dishon left no children, and therefore under the letter of section 241 of the Constitution and section 6 of the statutes an action is provided, if applicable under such circumstances as we have here, by which the administrator of the wife can sue the husband or his estate, not for the benefit of the plaintiff, but for the benefit of the defendant. That is, the wrongdoer is both the defendant and the real plaintiff, the net result of which would be, of course, that the real parties are not beneficially interested, and the only persons who could be benefited by the action would be the attorneys and other court officials to the extent of the fees to which they might be entitled for services rendered. Does not this unavoidably and necessarily render the whole proceeding a moot case? Certainly the time and processes of the court are employed only in

determining an abstract question of law and fact in which the parties to the action have no beneficial interest. Surely no one would suggest the possibility that the framers of the Constitution or the members of the Legislature had any such purpose in view when they gave their time and attention to the preparation and adoption of these sections; and we cannot give to them any such effect. So despite the comprehensive language in which the abstract right of action for negligent or wrongful death is established by both the Constitution and the statute, its concrete application is necessarily limited to real controversies between parties adversely interested. Hence the right is not conferred upon the personal representative of the decedent to sue the wrongdoer for the latter's benefit. It is insisted, however, by counsel for plaintiff that the question of the disposition of any recovery that might be obtained in this action is not here, and it is intimated that when, in a suit to settle the estate of plaintiff's intestate, that question arises, her collateral kin may contest the right of the husband's estate to receive the proceeds of the recovery upon the ground that it is against the public policy of the state to permit one to benefit by his own wrong. The Legislature, however, has plenary power to declare the public policy of the state except in so far as it is defined by the Constitution, and, under express constitutional authority, so to do, has provided that the husband in the absence of children shall be the beneficiary of any recovery for the wrongful death of his wife. The terms so providing are as broad as those which provide that a recovery may be had. If we cannot limit the plain, unambiguous terms by which the right to sue is created, neither can we limit the equally plain and unambiguous terms by which the public policy of the state as to who shall be the beneficiary of the suit is declared. We must take both as we find them, and the fact that the public policy as declared destroys the right of action as conferred in so far as this particular plaintiff and this character of action are concerned does not confer upon us the power to declare that the right exists in the absence of a person entitled under the law to exercise same and to confer that right upon someone else."

In *Pearson v. Stores Corp., supra, Winborne, J.*, in speaking for the Court, said: "The weight of authority and the better view is that the contributory negligence of one parent, even though it bar recovery for his or her benefit, or to the extent of his or her interest in an action by the administrator for the death of a child, will not defeat recovery by or for the benefit of the other parent who is not negligent, but that the amount of the verdict will merely be reduced to the extent of the negligent parent's share." Hence, if the plaintiff's intestate had left a child or children, this action could be maintained for the benefit of such child or children. The recovery, however, would be limited to the pro rata part to which such child or children would be entitled to take under the

statute of distribution. *Pearson v. Stores Corp., supra; Robinson's Adm'r v. Robinson, supra.*

DEFENDANT'S APPEAL.

The defendant is primarily liable under the common law and our decisions for the burial expenses of his wife. *Bowen v. Daugherty,* 168 N. C., 242, 84 S. E., 265. We do not think a cause of action exists for the recovery of burial expenses in an action for wrongful death separate and apart from the right to recover for the wrongful death. The statute provides for the payment of burial expenses out of "the amount recovered in such action." G. S., 28-173. We think it was error to enter judgment against the defendant for burial expenses.

Plaintiff's appeal—Affirmed.

Defendant's appeal—Reversed.

WACHOVIA BANK & TRUST COMPANY, AS TRUSTEE FOR CLAUDE F. DEAL, AND OTHERS UNDER THE WILL OF C. J. DEAL, v. CLAUDE F. DEAL AND WIFE, WINIFRED DEAL, AND ANY ISSUE BORN OR UNBORN OF CLAUDE F. DEAL, JAMES F. DEAL AND WIFE, NINA WHITE DEAL, MABEL DEAL AULL AND HUSBAND, W. B. AULL, ARTHUR L. DEAL (WIDOWER), CARLOTTA R. DEAL, AS EXECUTRIX AND SOLE DEVISEE UNDER THE WILL OF CLARENCE R. DEAL, TELLIE I. DEAL (WIDOW), WALTER A. DEAL AND WIFE, MARGARET B. DEAL, SILAS ARNOLD DEAL AND WIFE, KATHRYN DEAL, LOUISE DEAL MONROE AND HUSBAND, JAMES M. MONROE, ROY C. DEAL, AND LOUISE DEAL MONROE, AS SUCCESSOR TRUSTEE UNDER THE WILL OF SILAS A. DEAL, AND W. C. COUGHENOUR, JR., GUARDIAN AD LITEM FOR CLAUDE F. DEAL AND WIFE WINIFRED DEAL, AND ANY CHILD OR CHILDREN OF CLAUDE F. DEAL.

(Filed 24 September, 1947.)

1. Wills § 39—

A petition by a trustee for advice and instruction of the court in the administration of a trust created by will is not strictly speaking an adversary action but is in the nature of a proceeding *in rem,* and plaintiff is entitled to the relief prayed, and therefore motion to nonsuit by any of defendant beneficiaries is not appropriate.

2. Death § 1—

The presumption of death from seven years absence arises only upon proof that the absent person left his own place of residence without intelligence from or concerning him for the required period, and mere absence from a place where his relatives reside but which is not his own place of residence is insufficient to raise the presumption.

3. Same—

The presumption of death from seven years absence is rebuttable, and the jury should consider all facts and circumstances surrounding the absent person's disappearance which has any direct bearing upon his reason for leaving or the probability or improbability that there would have been a communication from him.

4. Infants § 2—

Where the property rights of minors are involved, the protection of these interests by the court is of more importance than the rigid enforcement of the rules relating to the preservation of objections and exceptions to the admission or exclusion of evidence.

5. Wills § 39: Death § 1—

Where, in an action for the advice and instruction of the courts in the administration of a trust created by will, the question for determination is the death of one of the beneficiaries under the presumption of death arising from seven years absence, the burden of proof upon the issue is upon the other beneficiaries who would benefit rather than upon the plaintiff trustee.

6. Death § 1—

The presumption of death arising from seven years absence raises no presumption that the absent person died without issue him surviving.

APPEAL by defendant W. C. Coughenour, guardian *ad litem*, from *Alley, J.*, at February Term, 1947, of ROWAN. New trial.

Petition by plaintiff trustee for advice and instruction in the administration of a trust estate created by will in which various defendants assert conflicting claims.

C. J. Deal died in December, 1921, leaving a last will and testament in which he devised his estate to plaintiff bank in trust for the use and benefit of his wife and children as therein set out, subject, however, to certain specific bequests.

The will in part provided that at the death of testator's wife the residue should be divided into six equal parts, and "One-sixth to be held in trust upon the following conditions: All income to be paid to my son, Claude F., during the term of his natural life, and at his death, if he leaves children alive and surviving him, the income to be paid to them, share and share alike, until each reaches the age of 21 years. As each reaches the age of 21 years, its part shall be paid to it in fee simple. If either shall die before reaching the age of 21 years, its part shall go to the others. If neither reaches the age of 21 years, said one-sixth shall revert to my estate. If my son, Claude F., dies leaving no children alive and surviving him, said one-sixth shall revert to my estate, and be divided as herein provided among my other children hereinbefore mentioned, or their heirs or representatives."

In 1923 Claude F. Deal and his wife left the community and he has not been heard from since by any of his collateral kin.

As other children of the testator were contending that he is dead and his estate held in trust by plaintiff should be distributed, the plaintiff instituted this action for advice and instructions. All interested parties were made parties defendant. The appellant was appointed guardian *ad litem* for Claude F. Deal and wife, Winifred Deal, and any child or children of Claude F. Deal. He filed answer denying the death of Claude F. Deal asserted by other defendants and praying that the plaintiff be instructed to continue the administration of said trust for the benefit of C. J. Deal during his life and then his children as set out in said will.

Issues were submitted to and answered by the jury as follows:

"1. Was the defendant, Claude F. Deal, dead at the time of the institution of this action on the 5th day of December 1946?

"Answer: Yes.

"2. If so, did the defendant die without child or children surviving him, or the issue of any deceased child?

"Answer: Yes.

"3. Did the said Claude F. Deal die without leaving child or children or the issue of any deceased child prior to the 23rd day of August 1945?

"Answer: Yes."

Thereupon the court entered judgment directing the plaintiff to make settlement of said trust estate under the limitation over contained in said devise. The defendant guardian *ad litem* excepted and appealed.

Clarence Kluttz for defendant appellant, guardian ad litem.

Woodson & Woodson for defendant appellees James F. Deal and wife, Mabel Deal Aull and husband, and Arthur L. Deal.

Dwyer & Hennes and Hayden Clement for defendant appellee Carlotta R. Deal as Executrix and Sole Devisee.

D. A. Randleman for defendant appellees Tellie I. Deal, Walter A. Deal and Wife, Margaret B. Deal, Silas Arnold Deal and Wife, Kathryn Deal, Louise Deal Monroe and Husband, James M. Monroe, Roy C. Deal, and Louise Deal Monroe, as successor trustee under the will of Silas A. Deal.

BARNHILL, J. It is to be noted in the beginning that while the jury found as a fact that Claude F. Deal is dead and that he left no child or children surviving, it is not so adjudged by the court below.

Strictly speaking, this is not an adversary action. It is a petition for advice and instruction in the administration of an estate in the nature

of an *in rem* proceeding. The plaintiff is entitled to the relief prayed whether Claude F. Deal is living or dead. Hence the motion of the guardian to dismiss as in case of nonsuit was properly overruled.

When in a judicial proceeding it is necessary to ascertain as a material fact whether a person is living or dead, the fact of death may be established by circumstantial evidence.

"The absence of a person from his domicile, without being heard from by those who would be expected to hear from him if living, raises a presumption of his death—*i.e.*, that he is dead at the end of seven years." *Carter v. Lilley, ante,* 435, and cited cases.

The mere absence of a person from a place where his relatives reside but which is not his own place of residence, without being heard from by them for a period of seven years, is not sufficient to create a presumption. 25 C. J. S., 1058-9. It is the proof of the continued and unexplained absence of a person from his home or place of residence without any intelligence from or concerning him for the required period which gives rise to the application of the rule. 16 A. J., 19; 25 C. J. S., 1057.

This rule of evidence is a procedural expedient sired by necessity and is based on the generally accepted fact that a normal person will not, if alive, remain from his home for seven years without communicating with family or friends. 16 A. J., 19.

The strength of this presumption varies with the circumstances; its force depends on the character of the person, his attachment to his home, and the circumstances under which he left. 25 C. J. S., 1056, 1061; 16 A. J., 21.

It follows that the presumption is rebuttable. *Chamblee v. Bank,* 211 N. C., 48, 188 S. E., 632; *Clark v. Homes,* 189 N. C., 703, 128 S. E., 20; *Trimmer v. Gorman,* 129 N. C., 161; 16 A. J., 21; 25 C. J. S., 1061.

Evidence tending to show the desire of the absent person to conceal his identity, the probability or improbability that there would have been a communication from him, that he was a fugitive from justice, or any other fact or circumstance surrounding his disappearance tending to support or rebut the presumption is admissible. 25 C. J. S., 1057; 16 A. J., 22; Anno. 44 A. L. R., 1488; 64 A. L. R., 1288.

When Deal left the community his wife left with him. Did he disappear or merely change his place of residence and establish a home elsewhere? Why did he leave? Under all the circumstances it is probable that he, if alive, would have communicated with his brothers and sisters or the trustee of the estate? These and like questions are to be considered by the jury in arriving at an answer to the first issue.

While it may be the appellant has not fully preserved his exceptions to the exclusion of tendered testimony respecting the circumstances under which Claude F. Deal left the community in which he had theretofore

lived, the interests of minors are involved and the proper administration of a trust estate is at stake. Protection of these interests is of more importance than the rigid enforcement of the rule.

The effect of the charge of the court on the second and third issues, to which exception is entered, was to place the burden of proof as to those issues on the plaintiff. In this there was error.

The appellees assert the death of Claude F. Deal and make claim to the trust estate. But they have no interest in the estate unless he died "leaving no children alive and surviving him." Only in that event are they the rightful claimants, and so the burden of proof rests upon them.

Furthermore, the proof of the death of Claude F. Deal raises no presumption that he died without lineal descendants. *University v. Harrison,* 90 N. C., 385; *Warner v. R. R.,* 94 N. C., 250. There must be evidence of that fact to support affirmative answers to the second and third issues.

For the reasons stated there must be a

New trial.

D. D. COBURN v. ATLANTIC COAST LINE RAILROAD COMPANY, A CORPORATION.

(Filed 24 September, 1947.)

Railroads § 11—

The provisions of G. S., 60-81, making the killing of livestock by the engine or cars running upon any railroad *prima facie* evidence of negligence in an action against the railroad company for damages, do not apply unless the action is brought within six months after the cause of action accrues, and in this case evidence of negligence without the benefit of such presumption *is held* insufficient.

APPEAL by plaintiff from *Burgwyn, Special Judge,* at April Term, 1947, of MARTIN.

Civil action instituted 1 November, 1946, to recover damages for hogs killed, two on 31 December, 1945, and two on 17 January, 1946, by trains of defendant as result of alleged actionable negligence of defendant, which allegations of negligence are denied by defendant.

In the trial court plaintiff offered evidence in an effort to make out a case of actionable negligence. Defendant also offered evidence. The court sustained motion for judgment as in case of nonsuit at close of all the evidence.

Plaintiff appeals to Supreme Court and assigns error.

R. L. Coburn for plaintiff appellant.

Rodman & Rodman for defendant appellee.

PER CURIAM. The benefit of the provisions of the statute, G. S., 60-81, making the killing of cattle and other livestock by the engine or cars running upon any railroad *prima facie* evidence of negligence on the part of the railroad company in any action for damages against such company is unavailable to plaintiff, since the statute further provides that no person shall be allowed the benefit of its provisions unless he shall bring his action within six months after his cause of action shall have accrued. Plaintiff concedes this. This being so, the evidence offered on the trial of this action taken in light most favorable to plaintiff fails to make out a case of actionable negligence. Hence, the judgment below is

Affirmed.

STATE v. OSCAR DOUGLAS (ALIAS JACK PEE).

(Filed 24 September, 1947.)

Criminal Law § 80b (4)—

Where defendant fails to serve case on appeal within the time allowed, the motion of the Attorney-General to docket and dismiss will be granted, but where defendant has been convicted of a capital offense this will be done only after examination of the record proper fails to disclose error.

APPEAL by defendant from *Sink, J.*, at March Term, 1947, of DAVIE.

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

No counsel for defendant.

PER CURIAM. The defendant was convicted of rape. Sentence of death by asphyxiation was imposed. Defendant gave notice of appeal. No case on appeal has been served. The time for serving case on appeal has expired and no extension of the time for serving such case has been granted.

The Attorney-General moves to docket and dismiss the appeal. The motion must be allowed, but, according to the rule of the Court in capital cases, we have examined the record to see if any error appears. No error is disclosed by the record. *S. v. Watson,* 208 N. C., 70, 179 S. E., 455.

Judgment affirmed.

Appeal dismissed.

SOUTHERN RAILWAY COMPANY v. POLK COUNTY: G. C. FEAGAN, E. G. THOMPSON AND W. J. SCREVEN, THE BOARD OF COUNTY COMMISSIONERS OF POLK COUNTY, NORTH CAROLINA, AND MAX H. FEAGAN, TREASURER AND TAX COLLECTOR OF POLK COUNTY, NORTH CAROLINA.

(Filed 24 September, 1947.)

Taxation § 38c—

Where the tax collector is also treasurer of the county, a written demand for the return of taxes paid to him under protest addressed to him in his capacity as tax collector without the appellation "treasurer" is a reasonable compliance with the statute, G. S., 105-267, and will support an action for the recovery of the taxes.

DEFENDANT'S appeal from *Pless, J.*, at January Term, 1947, of POLK.

W. T. Joyner and Jones & Ward for plaintiff, appellee.

J. T. Arledge and S. G. Bernard for defendant, appellant.

PER CURIAM. The plaintiff paid to Max H. Feagan, who is both Tax Collector and Treasurer of Polk County, certain taxes under protest, and later demanded their return. G. S., 105-267. The written demand was addressed to "Max H. Feagan, Tax Collector," without the appellation, "Treasurer." It is clear that the tax was illegal and if the demand had been made on Feagan as Treasurer its return would have been proper, and required by law. The only question in the case is whether the demand addressed as stated, is a valid compliance with the statute.

Looking at the reality of the situation the Court is of the opinion that the demand actually brought to the attention of Feagan as Treasurer the demand and the information required by the statute in reasonable compliance with its purpose; and that neither law nor equity is satisfied by withholding the funds.

The judgment of the lower court is

Affirmed.

MRS. MATTIE BOYAN v. DUKE POWER COMPANY.

(Filed 11 December, 1946.)

APPEAL by plaintiff from *Burgwyn, Special Judge,* at March Term, 1946, of GUILFORD (High Point Division).

Civil action to recover damages, alleged to have been sustained by reason of the negligence of the defendant, a common carrier of passen-

gers, when plaintiff was invited to alight from one of defendant's buses at a dangerous and unsafe place.

The issue of negligence was answered in favor of the defendant and judgment entered accordingly.

The plaintiff appeals, assigning error.

Gold, McAnally & Gold for plaintiff.

W. S. O'B. Robinson, Jr., Horace S. Haworth, Owen Reese, and Carter Dalton for defendant.

PER CURIAM. The exceptions have been carefully considered. They present no new questions of law. The case was one for the jury and it has spoken in a trial free from prejudicial error. Hence, in the trial below we find

No error.

ARNOLD PROCTOR BY HIS NEXT FRIEND, MRS. C. D. PROCTOR, v. CARTER FABRICS CORPORATION AND LAFAYETTE G. HAYWOOD.

(Filed 11 December, 1946.)

PLAINTIFF'S appeal from *Burgwyn, Special Judge,* at March, 1946, Civil Term, of GUILFORD (High Point Division).

Gold, McAnally & Gold for plaintiff, appellant.

James B. Lovelace for defendants, appellees.

PER CURIAM. The plaintiff, a minor, sued by his next friend to recover for serious injuries sustained through the alleged negligence of the defendants in the operation of a truck which struck and ran upon said plaintiff. Judgment of nonsuit was entered upon defendants' demurrer to the evidence, and plaintiff appealed. The Court is of the opinion that the demurrer was properly sustained, and the judgment is

Affirmed.

NAOMI McM. LEDFORD, ADMX., v. CITY OF WINSTON-SALEM, ET AL.

(Filed 31 January, 1947.)

APPEAL by plaintiff from *Carr, J.,* at October Term, 1946, of FORSYTH.

Civil action to recover damages for death of plaintiff's intestate, alleged to have been caused by the wrongful act, neglect or default of the defendants.

From judgment of nonsuit entered at the close of plaintiff's evidence, she appeals, assigning errors.

Elledge & Hayes and H. Bryce Parker for plaintiff, appellant.

Womble, Carlyle, Martin & Sandridge for defendant, City of Winston-Salem, appellee.

Craige & Craige and Kerr Craige Ramsay for defendant, Winston-Salem Railway Co., appellee.

PER CURIAM. The scene of the present accident is the same as that appearing in the case of *Dillon v. Winston-Salem, et al.*, reported in 221 N. C., 512, 20 S. E. (2d), 845, with full description of the location, to which reference may be had to avoid repetition. The essential and operative facts of the two cases are strikingly similar, except that in the *Dillon Case* plaintiff's intestate was a passenger directing the operation of the automobile in which he was riding, while here plaintiff's intestate was the driver of the death car. Both cases are controlled by the same principles of law, and both were dismissed on demurrer to the evidence in the Superior Court. The judgment in the *Dillon Case* was affirmed on appeal, and a like result must follow here. No useful purpose would be served by detailing again a parallel state of facts. *Alberty v. Greensboro,* 219 N. C., 649, 14 S. E. (2d), 635.

Recognizing the pertinency of the Dillon decision, the plaintiff seeks to distinguish the subject case from that one, but the controlling facts are too nearly alike to warrant a different conclusion. Of course, there are differences in detail. These, however, are unimportant. This was the result reached in the Superior Court, and we are unable to say there is reversible error in the judgment.

Affirmed.

RHEA PENLAND, TRADING AS BURNSVILLE CONSTRUCTION CO., 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 19 March, 1947.)

APPEAL by plaintiff from *Phillips, J.*, at September Term, 1946, of MITCHELL. Affirmed.

Civil action to recover balance alleged to be due on contract to erect a church building for defendants in which the defendants plead a counterclaim for damages for breach of contract, heard on report of referee.

McBee & McBee and Watson, Fouts & Watson for plaintiff, appellant.
W. C. Berry and Charles Hutchins for defendants, appellees.

PER CURIAM. The contract is admitted. Defendants plead breach thereof and resulting damages for which they pray judgment. Hence the issues as raised by the pleadings are those raised by the further answer and counterclaim. Plaintiff failed to tender the issues thus raised and to demand jury trial thereon. *Booker v. Highlands,* 198 N. C., 282, 151 S. E., 635; *Brown v. Clement Co.,* 217 N. C., 47, 6 S. E. (2d), 842. Hence trial by jury was waived.

The court below found that the evidence sustained the findings made by the referee, adopted them as its own, and rendered judgment for defendants on their counterclaim in the amount found to be due. A careful examination of the record fails to disclose error therein.

Affirmed.

A. C. GODWIN v. HENRY E. COOPER.

(Filed 19 March, 1947.)

APPEAL by defendant from *Grady, Emergency Judge,* at October Term, 1946, of HARNETT. Affirmed.

J. A. West and J. R. Young for plaintiff.
Mack M. Jernigan and H. Paul Strickland for defendant.

PER CURIAM. Plaintiff declared on two checks issued by defendant and delivered to plaintiff in payment for a stock of goods and the assignment of a written lease on the store building in which the goods were housed. Defendant admitted giving the checks, but alleged as an affirmative defense that the lease was invalid, and that consequently there was a failure of consideration. However, no defects appear on the face of the lease, nor are any facts alleged in the answer which would render the lease invalid. The court below entered judgment in favor of the plaintiff on the pleadings, and on the record before us that ruling must be upheld and the judgment

Affirmed.

STATE v. WILLIE LITTLE, ALIAS JAMES HARRINGTON, ALIAS CHICKEN.

(Filed 9 April, 1947.)

Criminal Law § 80b (4)—

Where defendant gives notice of appeal but takes no action to perfect the appeal, the motion of the Attorney-General to docket and dismiss, made after expiration of time for perfecting the appeal and any extensions thereof, will be allowed, but in a capital case this will be done only after an inspection of the record proper fails to disclose error.

APPEAL by defendant from *Grady, Emergency Judge,* at December Criminal Term, 1946, of WAKE.

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

No counsel contra.

PER CURIAM. The defendant was convicted at December Criminal Term, 1946, of the Superior Court of Wake County of the crime of rape upon Mrs. Fletcher Rook, and sentence of death was pronounced upon him in accordance with the law. The defendant gave notice of appeal to the Supreme Court but no case on appeal has been docketed in this Court and the Assistant Clerk of the Court of Wake County has certified that no case on appeal has been filed at the office of said Clerk. The time agreed upon by counsel for perfecting the appeal, and fixed by the Court, and any extension of time which may have been granted, has expired; and the Assistant Clerk aforesaid certifies that counsel for the defendant has informed her that he does not intend to perfect the appeal.

Whereupon, the Attorney-General has caused the record proper to be filed in this Court and moves that the case and record be docketed and the appeal dismissed under Rule 17 of the Rules of Practice of the 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. WILL JOHNSON.

(Filed 16 April, 1947.)

APPEAL by defendant from *Stevens, J.*, at October Term, 1946, of EDGECOMBE.

This action was tried upon appeal to the *Superior Court* and defendant was found guilty, and from judgment pronounced upon such verdict the defendant appealed, assigning error.

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

Cameron S. Weeks and Cooley & May for defendant, appellant.

PER CURIAM. There appears in the record the following: "In a charge that was free from error, the Court instructed the jury that they could convict the defendant only of an unlawful sale of liquor or find the defendant not guilty," and "To the foregoing statement the Solicitor and Counsel for the defendant agree, and that it shall be a part of this case on appeal."

At the close of all the evidence the defendant renewed a motion he had theretofore made when the State had rested its case for a dismissal and for a judgment as of nonsuit which was denied, and exception taken. There was a verdict of guilty, whereupon the defendant moved that said verdict be set aside, which was denied. The defendant then moved to set aside the judgment signed, which was overruled, and exception noted.

This case presents but one assignment of error for the consideration of this Court upon appeal, namely, was the evidence introduced sufficient to carry to the jury the issue as to a sale of liquor by the appellant, Will Johnson? The court below held that there was such evidence and submitted such issue to the jury. In this holding we think there was no error.

We have read carefully the record of the evidence and we are constrained to hold that there was sufficient evidence, and since the Solicitor and counsel for the defendant agreed in the outset that the only verdicts that could be rendered in this case were those of guilty of the defendant in making sale of liquor or not guilty, we hold that there was no error in submitting the issue.

In the judgment below we find

No error.

GEORGE METROS v. GEORGE N. LIKAS.

(Filed 5 June, 1947.)

PLAINTIFF'S appeal from *Rousseau, J.*, at 18 November, 1946, Term, of FORSYTH.

Eugene H. Phillips and Dallace McLennan for plaintiff, appellant.

No counsel contra.

PER CURIAM. The plaintiff sued on a promissory note in the sum of $500.00, which he alleges was executed by the defendant, of which he is now owner and holder in due course, and which is due and remains unpaid. The defendant admits the execution of the note but alleges it was obtained from him by the plaintiff upon a fraudulent representation, the particulars of which are stated. Plaintiff demanded judgment on the pleadings, which was refused, and he appealed.

It is not incumbent on the Court at this time to go into the merits of the controversy. Defendant has made a sufficient showing to repel the present assault, and the order declining the motion for judgment on the pleadings is

Affirmed.

STATE v. CLARENCE JONES AND IDA HAITHCOCK.

(Filed 5 June, 1947.)

APPEAL by defendants from *Grady, Emergency Judge,* at September Criminal Term, 1946, of DURHAM.

Criminal prosecution upon bill of indictment charging defendants with unlawful possession of intoxicating liquors for the purpose of sale.

Verdict: As to each defendant guilty as charged in the bill of indictment.

Judgment: Pronounced.

Defendants appeal to Supreme Court and assign error.

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

W. T. Hatch and J. M. Templeton for defendants, appellants.

PER CURIAM. Due consideration has been given to all assignments of error presented by appellants on this appeal, and cause for disturbing the judgment below is not made to appear.

Hence, we find

No error.

R. L. BRIGHT v. NOAH BRIGHT.

(Filed 24 September, 1947.)

APPEAL by plaintiff from *Burgwyn, Special Judge,* at May Term, 1947, of PASQUOTANK. Affirmed.

Civil action to recover damages resulting from a fire alleged to have been caused by the negligence of the defendant, in which the defendant denies negligence and pleads a judgment of nonsuit entered in a former action on the same cause of action as *res judicata* and in bar.

There was a judgment of nonsuit to which plaintiff excepted and appealed.

J. W. Jennette and R. Clarenze Dozier for plaintiff appellant.

John H. Hall for defendant appellee.

PER CURIAM. It may be that, on this record, defendant's plea of *res judicata* is sufficient to sustain the judgment below. This we need not decide, for a careful examination of the record fails to disclose any evidence tending to show that plaintiff suffered his loss as a proximate result of actionable negligence of the defendant. For that reason the judgment below is

Affirmed.

APPENDIX

IN RE ADVISORY OPINION TOUCHING PROPOSED LEGISLATION TO PROVIDE SUBSISTENCE AND TRAVEL ALLOWANCE FOR MEMBERS OF THE GENERAL ASSEMBLY.

(Filed 31 March, 1947.)

1. Constitutional Law § 5—

The voice of the people is the voice of finality, and therefore where a proposal has been submitted to a vote and rejected, governmental officials ordinarily may not take action to effectuate such proposal.

2. Constitutional Law § 8a: Public Officers § 11—

The General Assembly is authorized to fix the compensation of other officials but the people have reserved to themselves the right to determine the amount which the members of the General Assembly shall be paid, Art. II, Sec. 28, and the General Assembly is without authority to provide subsistence and travel allowance for its members in addition to the compensation fixed by the Constitution.

3. Public Officers § 5b—

Self-interest disqualifies one from action in a public capacity where unbiased judgment is required.

On 28 March, 1947, the following Joint Resolution No. 979 was received from the General Assembly of North Carolina:

A JOINT RESOLUTION REQUESTING AN ADVISORY OPINION OF THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF NORTH CAROLINA UPON HOUSE BILL NO. 276.

Whereas, House Bill No. 276, providing that each member of the General Assembly shall be entitled to the same subsistence and same allowance for transportation as provided by law for State officials and employees, has been reported favorably by the Committee on Appropriations and is now pending on the Calendar of the House of Representatives; and

Whereas, it now appears that a majority of the House of Representatives and of the Senate favor and will vote for the passage of said bill or similar bill unless advised by the Chief Justice and Associate Justices of the Supreme Court, in an Advisory Opinion, that their contemplated action is in contravention of the Constitution: Now, Therefore,

Be it resolved by the House of Representatives, the Senate concurring:

Section 1. That the Chief Justice and Associate Justices of the Supreme Court of North Carolina be, and they hereby are, respectfully requested to furnish to the House of Representatives and the Senate an

Advisory Opinion as to the constitutionality of House Bill No. 276, providing that each member of the General Assembly shall be entitled to the same subsistence and the same allowance for transportation as provided by law for State officials and employees.

Sec. 2. Inasmuch as the session of the General Assembly is now approaching its end, it is respectfully requested that this Advisory Opinion be furnished at the earliest possible time.

Sec. 3. That this Resolution shall be in full force and effect from and after its ratification.

The substance of the accompanying House Bill No. 276 is set out in the first paragraph of the above resolution.

The following responses were made by the Chief Justice and Associate Justices of the Supreme Court on 31 March, 1947:

Raleigh, N. C., 31 March, 1947

To the Honorable L. Y. Ballentine, Lieutenant Governor,
ex officio President of the Senate, and the Honorable
Thomas J. Pearsall, Speaker of the House of Representatives:

In re Constitutionality of House Bill No. 276

Joint Resolution No. 979, requesting the Chief Justice and the Associate Justices of the Supreme Court to indicate whether in their opinions House Bill No. 276, if duly approved by both Houses of the General Assembly, would be a valid exercise of the legislative power, has been received and carefully considered. This bill would provide subsistence and travel allowance for members of the General Assembly in addition to the compensation fixed for their services by constitutional provision.

The people of North Carolina, speaking through their Constitution, have fixed the salaries of members of the General Assembly for the term of their office at six hundred dollars each, with additional compensation in case of an extra session. Art. II, Sec. 28. A proposed amendment which would have augmented this amount with an expense allowance was defeated in the general election of 1946. Ch. 1042, Session Laws 1945. It is understood that another amendment involving the same matter is to be voted on at the next general election.

The rule is well established in this jurisdiction that the voice of the people is the voice of finality. This principle was recently approved in the case of *Purser v. Ledbetter,* 227 N. C., 1, where the Commissioners of the City of Charlotte were denied the right to proceed with a matter following its rejection at the polls. Similarly, the Commissioners of Guilford County were held to be without authority to augment the salary of one of their officers which had been fixed by the General

Assembly, albeit the duties of the officer had been greatly increased. *Hill v. Stansbury,* 223 N. C., 193, 25 S. E. (2d), 604.

While the General Assembly is authorized to fix the compensation of other officials, the people have reserved to themselves the right to determine the amount which the members of the General Assembly shall be paid. The object of the reservation is to relieve those in high public office from the necessity of passing upon a matter in which they have a direct pecuniary interest. It has long been a rule of general observance that self-interest disqualifies one from acting in a public capacity where unbiased judgment is required. Anno. 133 A. L. R., 1258. Such was the direct holding in *Kendall v. Stafford,* 178 N. C., 461, 101 S. E., 15, where the Commissioners of the City of Greensboro were denied the right to vote themselves additional compensation, notwithstanding the letter of the law seemed broad enough to include the power. See, also, *In re Steele,* 220 N. C., 685, 18 S. E. (2d), 132, and *S. v. Hartley,* 193 N. C., 304, 136 S. E., 868.

Substantially the same question here submitted has been the subject of debate in a number of states. It is generally held that a legislative body has no power to provide subsistence and travel allowance for its members in excess of or in addition to the compensation fixed by constitutional provision. The authorities on the subject are collected in 50 A. L. R., 1239, and 60 A. L. R., 416, where the arguments in support of the different contentions are fully stated. See, also, supplemental decisions thereunder. In line with the majority view is our own decision in *Bank v. Worth,* 117 N. C., 146, 23 S. E., 160.

Accordingly you are advised that the General Assembly would seem to be without authority to accomplish the purpose declared in House Bill No. 276.

Respectfully,

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.

APPENDIX

IN RE ADVISORY OPINION IN RE HOUSE BILL NO. 65, DESIGNATED AS CHAPTER 885 OF THE SESSION LAWS OF 1947.

(Filed 9 June, 1947.)

1. Constitutional Law § 4—

The Constitution within its compass is supreme and its directives must be regarded as mandatory and binding upon all, and none may be considered nonessential or unimportant details which may be dispensed with.

2. Statutes § 1—

The omission of the enacting clause prescribed by Art. II, Sec. 21, of the Constitution of North Carolina, renders a purported Act of the General Assembly inoperative and void.

3. Same—

Expressions in a purported Act of the General Assembly which merely declare the legislative policy may not be held a "substitute" for the enacting clause if, indeed, there may be any substitute for the language of the constitutional formula.

4. Same—

The enacting clause must be incorporated in a bill at the time it is passed by both houses of the General Assembly, and the fact that the bill is a committee substitute for the original bill which may have contained an enacting clause is immaterial.

On June 5, 1947, the following communication was received from His Excellency, R. Gregg Cherry, Governor of North Carolina:

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:

I am handing you herewith a letter directed to me from Honorable Harry McMullan, Attorney-General of North Carolina, attached to which is the letter to him from Dr. Ellen Winston, Commissioner of Public Welfare of North Carolina, in which the question is raised as to

whether or not the Committee Substitute for House Bill No. 65 became a part of the laws of the State of North Carolina enacted by the General Assembly in 1947.

A certified copy of the Committee Substitute for House Bill No. 65, which is designated as Chapter 885 of the Session Laws of 1947, is hereto attached.

For the reason set forth in the letter to me from the Attorney-General and from the Commissioner of Public Welfare, I am constrained to request in the public interest that you render to me your advisory opinion as to whether or not the Committee Substitute for House Bill No. 65 was duly enacted by the General Assembly of 1947 and became a part of the public laws of this State.

An opinion from the members of the Court will set at rest the many and perplexing problems of grave concern which will arise throughout the State by reason of the uncertainty which will exist from and after July 1, 1947, as to what is the law of North Carolina respecting adoptions. In all probability no case could arise from which, in due course, this question could reach the Court in time to avoid the unfortunate results which would follow from reliance upon this statute in the event it should later be held not to be the law of North Carolina.

If considered as consistent with what the members of the Court may think to be a proper course in this matter, I respectfully request that an advisory opinion be rendered to me concerning this important question.

Respectfully,
R. GREGG CHERRY,
Governor.

RGC:mw.

4 June 1947.

HONORABLE R. GREGG CHERRY
Governor of North Carolina
Raleigh, North Carolina.

DEAR GOVERNOR CHERRY:

I have received from Dr. Ellen Winston, Commissioner of Public Welfare of the State of North Carolina, a letter under this date, which is enclosed, requesting my opinion as to the sufficiency of the enactment of the Committee Substitute for House Bill No. 65 of the General Assembly of 1947 entitled "A BILL TO BE ENTITLED AN ACT TO REWRITE CHAPTER 48 OF THE GENERAL STATUTES RELATING TO ADOPTIONS."

The important question which she has submitted has been given a careful consideration by me; but in view of the fact that there is no decision of the Supreme Court of North Carolina to which I can point which will conclusively determine the question which she has presented,

I believe that it is of a high degree of importance that you should request the *Chief Justice* and the *Associate Justices* of the Supreme Court of North Carolina to render an advisory opinion as to the enactment of this law which is to go into effect on the first day of July, 1947.

This House Bill No. 65, purporting to rewrite adoption laws of the State, was regularly introduced in the General Assembly and referred to committee. This original bill, as introduced, contained the usual enacting clause as prescribed by Art. II, Sec. 21, of the North Carolina Constitution: The amendments proposed by the committee were of such an extensive nature that, in accordance with approved legislative practice, a substitute bill was prepared by the committee. The committee then reported the original bill with a recommendation that such bill "do not pass," and reported the substitute bill with a recommendation that such substitute "do pass." In accordance with usual legislative practice, the original bill was then placed on the unfavorable calendar where it remained without any further action with respect to it. The substitute bill was adopted, passed by both Houses and ratified. The substitute bill had the same title as the original bill, and contained all the sections which the committee wishes the bill to include. The substitute bill as recommended by the committee, passed by both Houses of the General Assembly, enrolled and ratified, did not contain an enacting clause.

In the case of *State v. Patterson,* 98 N. C., 660, the Supreme Court of this State held invalid Chapter 113 of the Private Laws of 1887 incorporating a municipality in Cabarrus County because the Act failed to contain the enacting clause, "The General Assembly of North Carolina do enact," as required by Article II, Section 21, of the State Constitution which provides as follows:

"The style of the acts shall be: 'The General Assembly of North Carolina do enact.'"

The Court said:

"In the case before us, what purports to be the statute in question has no enacting clause, and nothing appears as a substitute for it."

If the use of the enacting phrase "The General Assembly of North Carolina do enact" *in ipsissimis verbis* is required by the Constitution, the result would be that the Committee Substitute for House Bill No. 65 was not enacted by both branches of the General Assembly. The *Patterson Case,* however, does suggest that in lieu of the constitutional language, other language might be used in the Act as a substitute for it.

Section I of the Act provides as follows:

"Chapter 48 of the General Statutes of North Carolina is hereby rewritten to read as follows:

"48-I. *Legislative intent; construction of chapter.* . . . The General Assembly hereby declares as a matter of legislative policy with respect to adoption that . . ."

There is other language in the Committee Substitute for House Bill No. 65 which may be considered by the Court as sufficient to identify it as an enactment by the General Assembly.

Sec. 2 of the Act provides as follows:

"All laws and clauses of laws in conflict with this Act are hereby repealed."

Sec. 3 of the Act provides:

"This Act shall become effective July 1, 1947."

I find no other case recited by our Court which would solve the problem posed by these differences between the Committee Substitute for House Bill No. 65 and the Act of the General Assembly considered in the case of *State v. Patterson,* and the differences are obvious and important.

As the Committee Substitute for House Bill No. 65 makes many important changes in substance and procedure in the provisions of Chapter 48 of the General Statutes relating to adoption, it is a matter of wide public concern to timely ascertain whether or not House Bill No. 65 was enacted by the General Assembly. This bill purporting to be an Act was read three times in each House of the General Assembly and signed by the presiding officers of both Houses as required by the Constitution, Article II, Section 23. The journals kept by the House and Senate, as required by Article II, Section 16, of the Constitution, disclose that the Committee Substitute for House Bill No. 65 was duly passed upon the several readings in the House and the Senate.

I am informed that the Act which was duly ratified and enrolled in the office of the Secretary of State has been designated as Chapter 885 of the Session Laws of 1947 and is now in process of being printed under the direction of the Secretary of State and shortly will appear as part of the Session Laws of 1947.

Under an Act of the Legislature the duty is imposed upon this office to codify and make as a part of the General Statutes the public laws enacted by the General Assembly of North Carolina which when, so codified, are *prima facie* the law of the State. On account of the uncertainty as to whether or not the Committee Substitute for House Bill No. 65 has become a part of the law of the State, I, as Attorney-General, am unable to determine whether or not Chapter 48 of the General Statutes should be treated as repealed to the extent in conflict with the Committee Substitute for House Bill No. 65 and whether or not the Committee Substitute for House Bill No. 65 should be included as a part of the codification of the laws of North Carolina.

In view of these important considerations, I am constrained to suggest to you that public interest would justify you in requesting the *Chief Justice* and the *Associate Justices* of the Supreme Court of North Carolina to render to you, and other officers of the State and the several

counties of the State directly concerned in the administration of this law, an advisory opinion as to whether or not the Committee Substitute for House Bill No. 65 has become a part of the statutory law of North Carolina. The numerous adoption proceedings which are now pending and which in due course would be brought in the Courts of North Carolina prior to the next session of the General Assembly may be seriously imperiled and validity brought into question unless the answer to this problem is given by such authority as may be provided in an advisory opinion of the *Chief Justice* and the *Associate Justices* of the Supreme Court. Any opinion expressed by me would be inconclusive and not in anywise binding upon the Courts.

I, therefore, recommend to you that such opinion be requested from the *Chief Justice* and the *Associate Justices* of the Supreme Court of North Carolina.

Respectfully yours,
HARRY MCMULLAN,
Attorney-General.

HM:f.

The following response was made by the *Chief Justice* and *Associate Justices* of the Supreme Court of North Carolina:

Raleigh, N. C.,
9 June, 1947.

To His Excellency, R. GREGG CHERRY,
Governor of North Carolina.

ADVISORY OPINION IN RE HOUSE BILL NO. 65, DESIGNATED AS CHAPTER 885 OF THE SESSION LAWS OF 1947.

Your request for an advisory opinion as to whether or not the Committee Substitute for House Bill No. 65 was duly enacted by the General Assembly of 1947, and became a part of the public laws of the State, presents the question whether the purported Act of the General Assembly, designated as Chap. 885, Session Laws of 1947, from which was omitted the enacting clause prescribed by sec. 21, Art. II, of the Constitution of North Carolina, may be regarded as a valid Act of the General Assembly.

Since the Bill referred to undertook to rewrite Chap. 48 of the General Statutes of North Carolina, relating to the adoption of minors, and to repeal the laws on this subject now in force, it becomes important to determine now whether the laws in relation thereto have been repealed and other provisions enacted in lieu thereof, or whether Chap. 48 continues in force as now written. The interest of the public is involved, as human and property rights may be materially affected before the question by orderly procedure could reach this Court. Certainty as to the

proper administration of the law is essential, and the question of incorporation of the Act as part of the General Statutes requires answer before the effective date of the Act. Hence, compliance with your Excellency's request is deemed appropriate.

By the Constitution of North Carolina the legislative power of the people of the State is by them vested in the two branches composing the General Assembly, and certain limitations are placed upon the exercise of this power. Among these is that contained in sec. 21, Art. II, of the Constitution: "The style of the acts shall be: 'The General Assembly of North Carolina do enact.' "

It is axiomatic under our system of government that the Constitution within its compass is supreme as the established expression of the will and purpose of the people. Its provisions must be observed by all. The form set out in the quoted section prescribes that the legislative power shall be exercised in a specific manner. A due observance of it is essential. It is not in accord with the nature of written constitutions to incorporate nonessential or unimportant details which may be dispensed with. Those who framed the Constitution, which the people have ratified, placed this requirement in a distinct and separate section. It must be treated as a command. Its observance is essential to the effectiveness of the act. To interpret the Constitution otherwise would permit it to be ignored by the General Assembly, its creature. To be valid and effective the Acts of the General Assembly must be enacted in conformity with the Constitution. Under the quoted section the manner of enactment must be regarded as of its substance. The provision is mandatory. I Cooley Cons. Lim., pg. 81.

This is in accord with the view heretofore expressed by this Court in *State v. Patterson,* 98 N. C., 660, where the identical section of the Constitution now being considered was interpreted. It was there held that the omission of the enacting clause rendered the purported Act of the General Assembly inoperative and void. And in *Scarborough v. Robinson,* 81 N. C., 409, by the same reasoning, it was held that the failure of the presiding officers of the two branches of the General Assembly to affix their signatures to an act during the session, as required by sec. 23, Art. II, of the Constitution rendered the act ineffective, and that the judicial power could not be exercised "in aid of an unfinished and inoperative act." In I Sutherland Statutory Construction, sec. 1802, it is said: "In a majority of jurisdictions the constitutional form of enacting clause must be set forth *in ipsissimis verbis* in every Act."

In the *Patterson Cases* the Court based its decision that the statute was invalid on the absence of an enacting clause, and added "and nothing appears as a substitute for it." It is suggested that there may be in this Act other words of like import which may be treated as a substitute for

the constitutional form. But from an examination of the statute in question here we do not find a "substitute" for the enacting clause. At most there are expressions in the Act which purport to declare a legislative policy but which fall short of supplying words which may be interpreted as equivalent to the constitutional formula, "the General Assembly of North Carolina do enact." Moreover, it may be doubted whether any substitute for this form should be deemed a compliance with the unequivocal requirement of the Constitution.

Nor may the fact that the bill which passed both branches of the General Assembly was a committee substitute for the original bill be regarded as material. Whatever may have been the form of the bill originally introduced, the bill in the form now presented for consideration was the only bill ever passed and it admittedly contained no enacting clause. The enacting clause must be incorporated in the bill at the time it is passed by both houses of the General Assembly. 59 C. J., 597, sec. 151.

Accordingly, in response to the question propounded in your letter, you are advised that in the opinion of the *Chief Justice* and *Associate Justices* of the Supreme Court, the bill passed by the General Assembly, and now designated as Chapter 885 of the Session Laws of 1947, was not enacted in conformity with the Constitution, and must be regarded as inoperative and void.

Respectfully submitted,

WALTER P. STACY,
Chief Justice.
MICHAEL SCHENCK,
W. A. DEVIN,
M. V. BARNHILL,
J. WALLACE WINBORNE,
A. A. F. SEAWELL,
EMERY B. DENNY,
Associate Justices.

APPENDIX

The following Advisory Opinions, given by Justices of the Supreme Court of North Carolina from 1869 through 1925, have not been printed heretofore in the Supreme Court Reports. They were collected and arranged by Dr. Preston W. Edsall of the Department of History and Political Science of North Carolina State College of Agriculture and Engineering of the University of North Carolina. It is through the scholarly research of Dr. Edsall that they are now available.

IN RE HOMESTEADS AND EXEMPTIONS
1869

RESOLUTION ASKING INFORMATION OF THE SUPREME COURT.

Resolved, by the General Assembly of North Carolina, That the Supreme Court be respectfully requested to advise the Legislature at its present session upon the following points of law:

1. Does Article Ten of the State Constitution, entitled "Homesteads and Exemptions," exempt from sale under Court executions obtained on a contract complete before the adoption of the State Constitution, a realty or homestead of the value of one thousand dollars.

2. Is personal property of the value of five hundred dollars exempt from sale under execution of a like character.

Ratified the 27th day of January, A.D. 1869.

—Public Laws, 1868-69, p. 703.

The following communication was received from the Hon. R. M. Pearson, Chief Justice of the Supreme Court, which was read and transmitted to the House of Representatives:

Raleigh, February 1st, 1869.

To the Hon. Tod R. Caldwell, *Lieutenant Governor, and* Joseph W. Holden, *Speaker, &c.*

I have the honor to acknowledge the receipt of your letter with the accompanying resolutions of the General Assembly, requesting the Supreme Court to give its opinion in regard to the validity of the homestead exemption, against debts contracted prior to the ratification of the Constitution.

With every disposition to comply with any request of the honorable bodies over which you preside, the view which the Justices of the Court take of their constitutional duties forbids them from doing so in this instance.

The functions of the Court are restricted to cases constituted before it. We are not at liberty to prejudice questions of law.

In the contested election between Waddell and Berry, the Judge of the Court, on the request of the Senate, after much hesitation, expressed an opinion in regard to the qualification of voters. That, however, is the only instance in which it was ever done, and it was put on the ground that the questions could not come before the Court in a judicial form. The questions set out in the resolutions under consideration, not only may, but in all probability will, come before us for decision.

Respectfully yours, &c.,

R. M. PEARSON,
Chief Justice.

—Feb. 1, 1869, *Sen. Journal*, 219-220.

IN RE MUNICIPAL ANNEXATIONS 1917

RESOLUTION No. 23

RESOLUTION REQUESTING THE OPINION OF THE SUPREME COURT OF NORTH CAROLINA.

Resolved by the Senate, the House of Representatives concurring:

That the Supreme Court of North Carolina be requested, if it can conveniently and properly do so, to advise the General Assembly as to the court's interpretation of the recent amendments to the Constitution with especial reference to the question as to whether or not there is any provision of the amendments to the Constitution recently adopted which would require the General Assembly to provide by general law the machinery for annexation by cities and towns of outlying and adjacent territory; or whether or not the General Assembly could make these annexations by special act, as the circumstances of each city or town might, in the judgment of the General Assembly, require.

Ratified this the 26th day of February, A.D. 1917.

—Public Laws, 1917, p. 627.

Under S. R. 1241, H. R. 1493, a joint resolution requesting the opinion of the Supreme Court of North Carolina, the following opinion is received from the Chief Justice:

To the General Assembly:

Owing to the public importance of the matter the Supreme Court has decided to respond to the annexed resolution as requested. After due

consideration the Court is unanimously of opinion that the amendments to the Constitution do not take from the General Assembly jurisdiction and power to exact special laws relating to annexation by a city or town of adjacent territory.

For the Court:

WALTER CLARK,
Chief Justice.

—February 26, 1917, *Sen. Journal*, 1917, p. 427.

IN RE OMNIBUS JUSTICE OF THE PEACE BILL 1919

RESOLUTION No. 34

RESOLUTION REQUESTING THE OPINION OF THE SUPREME COURT OF NORTH CAROLINA.

Resolved by the Senate, the House of Representatives concurring:

That the Supreme Court of North Carolina be requested, if it can conveniently and properly do so, to advise the General Assembly as to the Court's interpretation of the recent amendments to the Constitution with especial reference to the question as to whether or not there is any provision in Article II, section 29, which would prohibit the General Assembly from enacting an omnibus justice of the peace bill.

Ratified this 26th day of February, A.D. 1919.

—Public Laws, 1919, p. 576.

MESSAGE FROM THE SUPREME COURT

To the Honorable, the General Assembly of North Carolina.

Pursuant to S. R. 812, H. R. 1005, the Court has conferred together as to the constitutionality of the proposed "Omnibus Bill" for the appointment of justices of the peace in the counties throughout the State, and are of the opinion that the bill is constitutional and not in contravention of the recent amendment, Article II, section 29, which prohibits the enactment of any local, private or special act relating to the appointment of justices of the peace, etc., but authorizes general laws regulating this and other matters contained in the section referred to.

February 27th, 1919.

By the Court:

WALTER CLARK,
Chief Justice.

—*Senate Journal*, 1919, p. 327.

IN RE MUNICIPAL FINANCE BILL 1921

The following resolution (S. R. 548) was adopted on December 15, 1921 (Sen. Journal, extra session, 1921, p. 152):

A SENATE RESOLUTION REQUESTING AN EXPRESSION FROM THE SUPREME COURT OF NORTH CAROLINA AS TO THE VALIDITY OF HOUSE BILL 59, SENATE BILL 395, KNOWN AS THE MUNICIPAL FINANCE ACT, IF PROPERLY PASSED BY THE SENATE IN THE FORM IN WHICH IT HAS PASSED THE HOUSE OF REPRESENTATIVES.

Be it Resolved by the Senate:

SECTION 1. WHEREAS, The Municipal Finance Act has been passed by the House of Representatives in the form as appears in the copy hereto annexed by which the incorporated towns in the county of Madison were exempted from the operation of sections 2947 and 2948 of the act; and

WHEREAS, There is a division of opinion in the Senate with respect to the constitutionality of the act in the form in which it passed the House of Representatives in the light of Article II, section 29, and Article VIII, section 4, of the Constitution of North Carolina.

SEC. 2. Now, therefore the Senate of North Carolina does most respectfully request an expression of opinion from the Supreme Court of North Carolina with respect to the validity of this act in the light of Article II, section 29, and Article VIII, section 4, of the Constitution of North Carolina, if it is passed by the Senate properly in the form in which it has passed the House of Representatives.

SEC. 3. The Principal Clerk of the Senate is hereby directed to transmit a copy of this resolution to the Supreme Court of North Carolina, together with a copy of the bill as passed by the House of Representatives.

—*Ibid.*, p. 252.

The following communication from the Chief Justice of the Supreme Court and his Associates, relative to the constitutionality of S. B. 395, H. B. 59, A bill to amend and re-enact the Municipal Finance Act, being section 2918 to 2969, Consolidated Statutes of North Carolina, is sent forward by Senator Long of Halifax, and upon motion of Senator Long of Alamance, is ordered spread upon the Senate Journal in full.

ADVISORY OPINIONS.

The Honorable, The Senate of North Carolina:

In response to the inquiry of your honorable body as to the opinion of the several members of this Court as to the constitutionality of a bill now pending before you to authorize the issue of bonds by the municipalities of the State, it appeared to us in conference with the committee of the Senate that said bill was materially amended on its passage through the House, especially by increasing the life of the bonds proposed to be issued from fifteen to thirty years.

In *Glenn v. Wray,* 126 N. C., at p. 733, it is said: "If the amendment were in a material matter, it would be necessary that the amended bill should be read over again three times in each House, with a yea and nay vote on the second and third readings entered on the Journal. *It is the bill in its final shape, not in another and different form,* which requires these preliminaries to its validity," *i.e.,* the three readings on three several days in each House, and the entry of the ayes and noes on the second and third reading in each House.

This matter is not specifically referred to in your written communication, but I take it that the object of your resolution was to ascertain the constitutionality of the pending bill should it pass, in its present shape, the second and third readings in your body. Candor compels me to say that under the ruling in *Glenn v. Wray,* which has been more than a dozen times affirmed by this Court, the bill as passed by you under the present circumstances, would be unconstitutional, and the bonds issued thereunder void, unless all previous decisions on the subject are to be overruled and set aside. This renders it unnecessary for me to express any opinion on any mere detail in the bill.

Most respectfully,
(Signed) WALTER CLARK,
Chief Justice.

Raleigh, North Carolina, December 15, 1921.

To the Honorable, the Senate of North Carolina:

Responding to the inquiry presented at the instance of your honorable body, we are of opinion that the mere omission of Madison County from certain provisions will not of itself invalidate the act, if properly passed by both Houses, as required by the Constitution.

P. D. WALKER,
Associate Justice.
W. A. HOKE,
Associate Justice.
W. P. STACY,
Associate Justice.
W. J. ADAMS,
Associate Justice.
—*Ibid.*, p. 173.

IN RE EMERGENCY JUDGES
1925

A SENATE RESOLUTION REQUESTING AN OPINION FROM THE SUPREME COURT OF NORTH CAROLINA AS TO THE VALIDITY OF SENATE BILL No. 482, BEING A BILL ENTITLED "AN ACT TO PROVIDE EMERGENCY JUDGES IN NORTH CAROLINA."

Be it Resolved by the Senate of North Carolina:

SECTION 1. THAT WHEREAS, there has arisen in North Carolina a demand for the relief for the congestion of the dockets of the Superior Court in various Counties in said State, and WHEREAS, there has arisen in said State the question of whether or not the General Assembly of North Carolina has the constitutional power to enact legislation looking towards the appointment of Emergency Judges to relieve the condition aforesaid, and

WHEREAS, there has arisen among Judges, lawyers and citizens of the State of North Carolina, the question as to whether said conditions are temporary or permanent, and

WHEREAS, it is to be seriously considered whether or not there is a necessity to create additional offices of Solicitors within the State, which will greatly increase the expense of the State, which at the present time should be economically expended, and

WHEREAS, there has arisen a confusion as to the meaning of the verbal opinion of the Honorable The Supreme Court of North Carolina recently given upon a questionnaire presented to it, and

WHEREAS, a certain bill, being Senate Bill No. 482, has been properly introduced in the Senate of North Carolina in form as appears in a copy hereto attached.

SEC. 2. *Now, therefore, the Senate of North Carolina* does most respectfully request an expression of opinion from the Honorable The Supreme Court of North Carolina with respect to the validity of and powers of performance contained in said bill in the light of Article IV, section 11, of the Constitution of North Carolina and such other articles and sections as may be pertinent thereto.

SEC. 3. The Principal Clerk of the Senate is hereby directed to transmit a copy of this resolution to the Honorable The Supreme Court of North Carolina, together with a copy of the bill introduced in the Senate of North Carolina, being Senate Bill No. 482, herein above referred to.

Adopted 14 February, 1925.

The following message is received from the honorable, the Supreme Court of North Carolina, and referred to the Committee on Courts and Judicial Districts:

Raleigh, N. C., February 17, 1925.

To the HONORABLE J. ELMER LONG, *Lieutenant-Governor, ex officio President of the Senate, and Members of the North Carolina Senate:*

In response to the resolution of your honorable body, requesting an opinion from the members of the Supreme Court as to the constitutionality of Senate Bill No. 482, being a bill entitled "An act to provide emergency judges in North Carolina," beg to say that after due consideration, and as now advised, we are unable to discover any constitutional inhibition to the provisions of said bill. We, therefore, give it as our opinion that if said bill should become a law, it would be constitutional.

Respectfully submitted,

W. A. HOKE, *Chief Justice.*
W. P. STACY, *Associate Justice.*
W. J. ADAMS, *Associate Justice.*
HERIOT CLARKSON, *Associate Justice.*
GEO. W. CONNOR, *Associate Justice.*
—February 17, 1921, *ibid.*, 205-206.

REQUEST FOR ANSWERS TO QUESTIONS CONCERNING THE JUDICIAL SYSTEM 1925

RESOLUTION No. 20

A JOINT RESOLUTION OF THE GENERAL ASSEMBLY ASKING FOR A CONSTRUCTION BY THE HONORABLE, THE SUPREME COURT OF NORTH CAROLINA, OF SECTION 11, ARTICLE IV, OF THE CONSTITUTION OF NORTH CAROLINA RELATIVE TO SPECIAL JUDGES, AND OF SENATE BILL No. 12, SENATE BILL No. 165, SENATE BILL No. 183, AND OF HOUSE BILL No. 104.

WHEREAS, an increase in the business of the Superior Courts of North Carolina has brought about a condition of congestion both in the civil and criminal courts of said Superior Courts; and

WHEREAS, it is the desire of the General Assembly to provide increased court facilities, and that said facilities shall be provided in a manner consistent with the Constitution of North Carolina; and

WHEREAS, article four, section eleven, of the Constitution of North Carolina was amended in one thousand nine hundred and fifteen to read as follows: "and the General Assembly may by general laws provide for the selection of special or emergency judges to hold the Superior Courts of any county or district when the judge assigned thereby, by reason of sickness, disability or other cause, is unable to attend and hold said court, and when no other judge is available to hold the same. Such special or emergency judges shall have the power and authority of regular judges of the Superior Courts, in the courts which they are so appointed to hold; and the General Assembly shall provide for their reasonable compensation"; and

WHEREAS, there have been introduced in the Senate and in the House certain bills designed to relieve the congestion of the civil and criminal dockets: Therefore, be it

Resolved by the House of Representatives, the Senate concurring:

SECTION 1. That the General Assembly respectfully asks a construction by the honorable, the Supreme Court of North Carolina, of that part of section eleven, and section ten, article four of the Constitution of North Carolina, hereinbefore set as to the following points:

(a) Whether weeks of court in excess of fifty-two, the maximum number to be held by the regular judge, can be provided and special judges designated to hold such additional terms of courts.

(b) Whether or not when necessity demands concurrent terms of two or more divisions of the Superior Court can be held in any one county by a special judge provided for in section eleven, article four, of the Constitution.

(c) If special judges under the Constitution can be designated to hold regular terms of court in any of the districts or counties, how far would such special judges be controlled by section eleven, article four of the Constitution, which provides that no judge shall hold courts in the same district oftener than once in four years.

(d) Whether or not article four, section twenty-three, of the Constitution requires the selection of a solicitor in each district, circuit or other subdivisions of the State.

(e) Whether additional districts may be created under article four, section ten, of the Constitution by further divisions of the State and grouping therein the counties of the State without interference with the judicial districts now existing, the said new districts not being identical with any of the old.

(f) Can the General Assembly fix and set terms of court in a judicial district in conflict with other terms, or direct the Governor to fix and

set them of at least forty weeks, and direct the Governor to appoint a special or emergency judge to hold them.

SEC. 2. Whether or not Senate bill number twelve, Senate bill number one hundred and sixty-five, Senate bill number one hundred and eighty-three, and House bill number one hundred and four, or any part of them, are in violation of the Constitution of North Carolina.

SEC. 3. This act shall be in force from and after its ratification.

Ratified this the 31st day of January, A.D. 1925.

—Public Laws, 1925, pp. 607-609.

This Joint Resolution was not the subject of formal response, as the Resolution was later withdrawn. See opinion of STACY, C. J., 196 N. C., 829.

IN RE TERMS OF SUPREME COURT

ROBERT R. KING
OSCAR L. SAPP
R. R. KING, JR.

KING, SAPP & KING
ATTORNEYS AND COUNSELLORS AT LAW
102 N. ELM STREET
GREENSBORO, N. C.

August 29, 1923.

MR. EDWARD C. SEAWELL,
Clerk Supreme Court,
Raleigh, N. C.

DEAR SIR:

Referring to rule five of the Supreme Court, we would thank you to advise us what interpretation the Court puts upon the words, "commencement of a term"; that is to say, when did the fall term of the Supreme Court commence within the meaning of this rule? Our Court commenced on the 27th instant. Are we bound to carry up to the present term appeals from our current term, or may they go over till the spring term? Your prompt answer will be greatly appreciated.

Yours truly,
KING, SAPP & KING,
By R. R. KING.

Letter was presented from R. R. King, of the firm of King, Sapp & King, asking what interpretation the Court puts upon the words "commencement of term." The Court interprets the statute, C. S., 1408, as it reads: "There shall be held at the seat of the Government of the State

in each year two terms of the Supreme Court, commencing on the first Monday in February and the last Monday in August." Court opens on Monday, in accordance with the statute, and not on Tuesday, although the argument of cases is heard on Tuesday.

2 Sept., 1923.

REPORTS OF THE SUPREME COURT OF NORTH CAROLINA IN WHICH ADVISORY OPINIONS OF THE JUSTICES ARE PRINTED

227 N. C., 705. In re Subsistence and Travel Allowance for Members of the General Assembly.

227 N. C., 708. In re House Bill No. 65.

227 N. C., 715. In re Homestead and Exemptions (1869).

227 N. C., 716. In re Municipal Annexations (1917).

227 N. C., 717. In re Omnibus Justice of the Peace Bill (1919).

227 N. C., 718. In re Municipal Finance Bill (1921).

227 N. C., 720. In re Emergency Judges (1925).

227 N. C., 721. In re Proposed Changes in Judicial System (1925). No formal response, as the Resolution of the General Assembly requesting advice was later withdrawn.

227 N. C., 723. In re Terms of the Supreme Court.

226 N. C., 772. In re Phillips.

223 N. C., 845. In re Yelton.

207 N. C., 879. In re General Election.

204 N. C., 806. In re Proposed Constitutional Convention.

196 N. C., 828. In re Advisory Opinions.

120 N. C., 623. In re Leasing of the North Carolina Railroad.

114 N. C., 923. In re Term of Office of Judges and Justices.

66 N. C., 652. In re Power of Supreme Court to Declare Act of General Assembly Unconstitutional.

64 N. C., 785. In re Legislative Term of Office.

61 N. C., 64. In re Extradition.

60 N. C., 153. In re Martin.

40 N. C., 440.
31 N. C., 516. } Waddell v. Berry.

ADVISORY OPINIONS OF THE JUSTICES OF THE SUPREME COURT OF NORTH CAROLINA ACCORDING TO SUBJECT MATTER

Advisory Opinions. Advisory opinions not forbidden by the Constitution. *In re Legislative Term of Office,* 64 N. C., 785.

Advisory Opinions. Justices will not give advisory opinions on matters which may come before the Court in judicial form, since Court may not prejudge questions of law. *In re Homestead and Exemptions,* 227 N. C., 715.

Advisory Opinions. Justices will give advisory opinions as matter of courtesy. *In re Leasing of the North Carolina Railroad,* 120 N. C., 623; *Waddell v. Berry,* 40 N. C., 440, and 31 N. C., 516.

Advisory Opinions. Advisory opinion not given, as Joint Resolution requesting advice was later withdrawn. *In re Proposed Changes in Judicial System,* 227 N. C., 721.

Advisory Opinions. Justices will not give advisory opinions when General Assembly has not decided with reasonable certainty upon course of action. *In re Advisory Opinions,* 196 N. C., 828.

Constitutional Law. Power of Court to declare Act of the General Assembly unconstitutional, opinion of *Mr. Justice Rodman,* 66 N. C., 652. See note, 66 N. C., 432.

Constitutional Law. Constitutionality of proposed legislation validating lease of North Carolina Railroad to the Southern Railway Co. *In re Leasing of the North Carolina Railroad,* 120 N. C., 623.

Constitutional Law. Amendments to Constitution do not take from General Assembly power to enact special laws relating to annexation by a city or town of adjacent territory. *In re Municipal Annexations,* 227 N. C., 716.

Constitutional Law. Amendment Art. II, sec. 29, does not prohibit General Assembly from passing general laws regulating Justices of the Peace. *In re Omnibus Justice of the Peace Bill,* 227 N. C., 717.

Constitutional Law. Mere omission of Madison County from certain provisions of the Municipal Finance Bill would not of itself invalidate the Act. *In re Municipal Finance Bill,* 227 N. C., 718.

Constitutional Law. General Assembly has power to pass act to provide for Emergency Judges. *In re Emergency Judges,* 227 N. C., 720.

Constitutional Law. Omission of enacting clause from purported Act of General Assembly renders it void. *In re House Bill No. 65,* 227 N. C., 708.

Elections. Qualification of bargainor, trustee and *cestui que trust* in deed of trust to vote for members of the Senate. *Waddell v. Berry,* 31 N. C., 516; 40 N. C., 440.

Elections. Constitutionality of proposed legislation providing for convention to pass upon repeal of XVIII Amendment to the Constitution of the United States. *In re Proposed Constitutional Convention,* 204 N. C., 806.

Elections. Time of holding "General Election" to vote on whether convention should be called to vote on repeal of XVIII Amendment to Constitution of United States. *In re General Election,* 207 N. C., 879.

Elections. Whether Justices and Judges were to be elected for full term of eight years or for unexpired term of predecessors. *In re Term of Office of Justices and Judges,* 114 N. C., 923.

Extradition. Distinction between crimes and misdemeanors within meaning of Federal extradition statute. *In re Extradition,* 61 N. C., 64.

Public Office. Terms of office of members of the General Assembly. *In re Legislative Term of Office,* 64 N. C., 785.

Public Office. Acceptance of office of Brigadier General under the Confederate States vacated the Office of Adjutant General of North Carolina. *In re Martin,* 60 N. C., 153.

Public Office. State official may be given leave of absence to accept temporary officer's commission in Army of the United States. *In re Yelton,* 223 N. C., 845.

Public Office. Acceptance of judgeship of United States Zonal Court in Germany would vacate office of Judge of the Superior Court. *In re Phillips,* 226 N. C., 772.

Public Office. *In re* proposed legislation to provide subsistence and travel allowance of members of the General Assembly, 227 N. C., 705.

Supreme Court. Time of commencement of terms of the Supreme Court. *In re Terms of Supreme Court,* 227 N. C., 723.

ADDRESS

BY HALLETT SIDNEY WARD

ON

PRESENTATION OF THE PORTRAIT

OF

HON. WILLIAM MARION BOND

TO THE

SUPREME COURT OF NORTH CAROLINA

ON TUESDAY, 26 AUGUST, 1947

May it please your Honors: Since your last adjournment, the only surviving son of the late Judge William Marion Bond, Mr. Lyn Bond, a lawyer of Tarboro, and his only sister, Mrs. Julia Dixon of Norfolk, Va., moved by pride and affection for their distinguished father, suggested to the *Chief Justice* the placing of his portrait on the walls of this building among the large number of his official kindred and kind. I was advised by the son that the *Chief Justice* kindly approved, and in obedience to their request I come to present it.

However, a stunning shock came on July 11; this young man, Lyn Bond, was suddenly taken by death in the flower of a vigorous and useful life, thus leaving Mrs. M. H. Dixon the only immediate survivor of what was lately one of the happiest families I ever knew. Mrs. Dixon is with us this morning. There were two other sons older than Lyn, William M., Jr., and Edward Griffith. William was practicing in Plymouth when called by his state of health to a higher climate. He stopped in Denver, opened an office and plunged immediately into a professional success that was a marvel to his friends. This success was so pronounced that he was able at the end of ten years to return to Edenton and build a fine house, but he passed on April 11, 1944, leaving a widow and one son of his own name. The next son, Edward Griffith, was killed on the battle line in the first World War. So it is, that with Mrs. Dixon and Lyn's widow only, I come bearing the service of presenting this portrait for a place his fine life merited.

It is a gracious privilege, and my selection for that service was because I knew him as it falls to the lot of few men to know another, and with a personal affection and profit that falls to the lot of few men by association with another man. By the custom of such occasions, it seems to become my right to ask your indulgence for a brief review of his career.

He was born in Edenton, North Carolina, July 14, 1858, the son of William E. and Virginia Darden Bond. At this birth, the father was a man of substantial estate as far as property in slaves could be said to be substantial and was a gentleman of finished and accumulated education. He stood out (unfortunately, I think it may be said) in a small but stubborn minority of that community as a zealous opponent of the prevailing Southern political opinion and was presidential elector for the Bell and Everett ticket in 1860 and made an active canvass of the District in public debate. Joint debates, three from the same platform, for that campaign. In that day, you know, unlike the present, it was impossible to talk a crowd to death. Opinion was unanimous that Mr. Bond was the only scholar that spoke. Secession went against him and his slaves went and practically all else and the boy, who is the subject of this sketch, was six years old. The father never made a financial come-back. An old gentleman introduced himself in Plymouth, by saying: "I studied Greek under your father." The answer was affable and courteous: "But excuse me, Mr. Lewis, if I say I think you were both engaged in a very sorry business." They parted with a merry laugh. This shows the father, earning a very meagre income of course, for teaching Greek could not be remunerative to teacher or pupil.

And now we have a boy six years old with a brother four and a sister younger in a home swept by the holocaust of war. Born in Edenton, North Carolina, in 1858, six years old at the close of the war! This presents a picture that this generation never knew and history's pages do not disclose it to them. Boyhood and adolescence passed in Eastern North Carolina through the two decades following the Civil War, especially in the counties lying on the Seaboard between the Virginia line and Wilmington, and its privations and struggles are not appreciated by those who hear or will read these remarks. The home life of peoples do not reach the pages of history directly. Battles and big incidents of government and outstanding landmarks, exploits of heroes and highlights fill those pages. It was ever so and ever will be. Macaulay, in his essay on "Hallam's History of England," presents this unfortunate fact with even more than his usual force of philosophy and charm of expression. The history of these counties, and of Edenton, tells about the fall of Roanoke Island and of New Bern before Burnside's invading armies, and of the outstanding men who fell in those battles. But it does not follow the horde of stragglers that broke away from those Federal Armies (or perhaps never were truly attached to them) and plundered through the roads and by-ways of country life, attaching themselves to local Buffaloes who were residents and could lead them to the recesses of hiding, back in the woods and everywhere else where the horses and milk cows were left tied, and to every suggested hiding place where last

year's ham might be found. This sad story is left to tradition, and has faded from memory. It reached into the little towns supplied by the farms.

I am talking about little Bill Bond from six to twenty and of his life's environment and of the unnumbered others of his fellows of the same world. It is true and applies to the conditions I try to describe that a gracious God seems always to stretch out a saving hand. The story of the production of the rivers of those counties, of fish through these two decades, cannot now be told because the narrator of the actual truth cannot risk his reputation for veracity merely to try to educate an incredulous listener. Therefore, let it only be said that the herring production was phenomenal through the long reaches of the Chowan, Roanoke and Neuse and their tributaries. At a cost of one to three dollars a thousand, this food was conditioned and carried to the smoke houses, two to three thousand to the family, every spring. The West Indies Islands were equally bountiful of molasses and swamp owners kept sail crafts carrying staves and shingles to these islands and bringing back molasses at twenty cents per gallon, in packages of sixty gallons and with labor at fifty cents per day. The fields, unfertilized, undrained and half-tended would yield two or three barrels of corn per acre, providing enough cornbread; every neighborhood had a yaupon bush, one enough for four or five families, wholesome tea but not good. So it's herring and cornbread and molasses and yaupon tea for every single breakfast, not as variety but as staple. It was sufficient to promote physical growth, but required a good sharp appetite for a keen relish. These meager provisions brought lifesaving food, but did not bring a coat, nor shoe, nor horse, nor cow, nor a silver dollar for any purpose and not a single schoolhouse could they build. The public school, even in the county-seat town, did not get on its first feet until this boy was sixteen or more. His aspirations were stimulated to service of distinction to fill the years of approaching manhood by the returning Confederate soldier, the like of whom for reports of great and big things and of gigantic exploits, told by the accomplishment of classical lying, this world never saw in any others.

Lying around on the tables in the home, he finds dusty volumes, most likely the Bible or Bunyan's Pilgrim's Progress. In this I compare him to the average boy of his age and time and place. He does not take to the style of the Bible easily. Pilgrim's Progress is better. Robinson Crusoe still better, if he happens to find it. His ambition and spirit of emulation turned him to one advantage—nature is always good in its law of compensation, and finds something to help in time of need—he had time to pick up the nuggets of gold and precious stones that lie along the pathway of him who walks with the classics and his educated

father had them. He should have picked up many from this Greek-teaching father, but truth is that old scholar and defeated reactionary was struggling with discouragement. Everything had gone against him and from him, except bags of Confederate money. This growing, striving boy picked up these nuggets wherever they were to be found and stored many of them away in memory's locker where they kept fresh and ready through all his years of future speech-making and charming conversations. I think here of the hypnotic talks in the Taverns of Fleet Street of Dr. Sam Johnson, which Boswell has of course exaggerated, in which Johnson was urging this practice and its high value upon the youth of England. When the high school puts the harness on the fourteen-year-old and sets out his courses of study and prescribes the monthly exams and the college beckons with its extended curriculum and cracks the whip for the race, the high landmarks of these classics that memory ought to store up while it's "Young and stout and strong" get only a passing salute, but are seldom taken into comradeship and communion within the working hours. Bond's mind was well stored by reason of these opportunities with these gems of thought and speech gathered up out of the workmanship of the "Dead but sceptered sovereigns who still rule our spirits from their urns." In advanced life and rush of business, he took out his notebook and wrote down the opening lines of "Dershaven's Ode to God" as they were repeated to him, because they enchanted his taste for the sublime, saying he was going to memorize them, but he was told, "You have smoked too many Old Virginia Cheroots for that; you will never do it," and I think he never did. Gone were the days for memory's successes.

He had another big helper in his self-efforts to learning and manhood's fruition. Edenton, in the center of the Congressional and Judicial Districts, had more political conventions, also religious, than any town in all that country and let no man underrate them for their value to one whose mind was open and fertile to every thought and expression to catch and hold it and build to it for future use. Here the strongest intellects in all these defeated Southern States gathered for the clashes and combats of platform debate. Here Jesse Yeates, Louis Latham, James Edwin Moore, Tom Skinner, John Gatlin, Octavious Coke and Thomas J. Jarvis, as the lawyers; and Dr. Dick Dillard, the elder, and Dr. R. H. Winborne (the last two on their native heaths) with the great Dr. O'Hagan of Greenville who was very frequently with them, were often assembled. The Gods of Olympus threw their thunderbolts about and the heavens shook and the earth trembled by the powers of intellect. Bond from ten to twenty was sitting at their feet, and doubt it not, he took it all in and carried it along with him through life.

Be it remembered that Edenton in that day was strong in doctors as it was in lawyers and two of them must be noted for eminent learning and for service to the needs of social and political life. They are Doctors Richard Dillard, the first, and Dr. R. H. Winborne. Dr. Dillard's grandson, Richard Dillard Dixon, was recently on our Superior Court Bench and is now serving the judiciary in Germany. A son of Dr. Winborne's is among your numbers, now on this Bench. I saw the father in my early boyhood but with a distinct recollection. He carried a towering personality and spoke in these public assemblies with a power that no lawyer surpassed. Eye and ear witnesses brought it to me and stamped it on memory, that he made a speech, one minute long, in an agitated mass meeting in Edenton called to discuss threats of violence in an approaching election, which speech was made in response to one by Henry Gilliam (afterwards Judge Gilliam) of same length, which two speeches together had an effect on the troubles of the hour like that to the winds on Galilee, "Peace be still."

About half of a generation after these two great men, another Edenton doctor took over their professional mantle but not their political activities—the necessity had been removed—and sent also a son to the Bar instead of to the sick bed. That was Dr. Jack McMullan. That son is now our Attorney-General. So we have three Edenton doctors sending their sons to the judiciary and valuable as their public service has been, I think they would have served and pleased their Lord as well in the footsteps of their fathers.

These associations and boyhood readings were William Bond's university and gave him an insight into the reaches of personality, and doubts arise whether Chapel Hill, eagerly as he craved it, could have done for him so good a job. I thus bring him to early manhood through meager local-school support, little enough for me to say practically none, to a clerkship in a drugstore through the day hours and the evening hours in the law office of Judge William A. Moore. I am in the later Seventies and while reconstruction was well on the way out, in most of the Eastern towns, its still threatening clouds hung dark over Edenton and that difference attributable chiefly to that particular law teacher. I make this digression to say this because it is hidden history of an important character which has come to me so often from Bond's own lips, that this law teacher of his was perhaps the best lawyer and the finest intellect in the State and yet I repeat reconstruction and its deep damnation hung over Edenton by this man's efforts and influence, when the sun was shining in the other Eastern towns. From this law office study, Bond found the means to get up here to Raleigh and spend a short time with Judge Strong, who prepared many of the Eastern lawyers in the course of a long and valuable service.

He was admitted at the January Term, 1880, and went home to Edenton to struggle with the hard, lean days that fall to the lot of them all. He made no association and had no connections to bring in practice, and so progress dragged along with a leaden heel. Comes 1884. He was nominated to the State Senate with a silent partner from Camden. Campaign speeches were compulsory. He made a fine impression. At Gatesville, Gov. Jarvis drew the crowd and Bond did the speaking and there was never thereafter a Court in that county that he did not have a case until he left the Bar for the Bench.

I present him now as a model, First District lawyer of thirty-three years active work in nine counties of the District and at the Bar of this Court through seventy volumes of its Reports. I cannot recall any case, civil or criminal, of outstanding importance that he did not appear in. He was in the great Wilcox homicide and Harrison kidnapping cases, never outstripped by any compeer; was on the Bench when the Brown will case was tried. In personal and professional integrity and morality, he was as clean and transparent as the icicles that hung from Diana's Temple. Clear of thought and attractive of expression. On the death of Mr. J. H. (Jack) Blount of Greenville, he moved there and stayed longer than he could stay anywhere in peace away from Edenton, about two years. I imagine when he said his prayers, he raised the window towards Edenton as Daniel the Prophet did toward Jerusalem in the Babylonian Prison. After about two years he went back in the flesh from where his heart and soul had never left.

There wasn't a lawyer in the First District that didn't regret his going on the Bench by reason of the loss of his personal touch. He left them and accepted this honor at the appointment of Gov. Craig on the resignation of Judge Bragaw in 1913 and continued in that office until his death in Durham while holding that court, March 31, 1928. Fifteen years on the Superior Court Bench; seventy years of active and combative life, without enemies or defamers.

He had married Laura Griffin in Norfolk, November, 1885, his fifth year at the Bar. She predeceased him by five years. With the four children I have already named coming up in that home, it was my privilege of being with them many times and I have never seen so much sunshine, perhaps in any other, due in part to the unusual wit and humor that was his most conspicuous gift. It radiated in every passing subject and yet I have to recall the heavy stroke that fell when the news came from the battle line that Ed would not again be with them. That stroke, of course, struck his sunny nature with a blight that no father could ever survive.

Strange to say, in politics Judge Bond was strongly a conservative. Passing strange, I say to me to be accounted for, if at all, by con-

necting it possibly by the law of inheritance with that Bell and Everett campaign of his father's and the political views behind it. "Levi, who received tithes, paid tithes in Abraham, for he was yet in the loins of his father when Melchisedec met him." Heb. 7, 9-10. His bread and meat for the first twenty years of his practice, came from the class that sat at the foot of capital and industry, wore its harness, plowed its furrows and lived on its allowances. Out of this order of clientage, he made a living and educated the four, but of course never made enough money to hurt him until in the last ten years. When the plunderers of the forest and swamps came down after the golden fleece and had a few years experience and troubles in the courthouses, they found him attractive and necessary to lean on his strong arm and faithfully did he serve these lumber companies. He had sense enough to estimate his value to them and thereby to make the last ten years at the Bar highly prosperous. This professional association did not make a political reactionary out of him, however. He was that before.

If human character and mentality had not been made up with such complexities the Psalmist could not have told his God that the man he had made was "Fearfully and wonderfully made." Although, always loyal to his party alignment he did not join his friends in the full measure of their admiration of the "Crown of Thorns and Cross of Gold" speech. It was the job of affectionate mischief, however, to contend with him and aggravate him with the statement that the speech was not half as bad an attack on his friends, the capitalists, as the Fifth Chapter of St. James Epistle and that in fact it was that Scriptural Chapter embossed and embellished and set to the music of Western oratory. He had a profound reverence for the Bible and although he disliked the Bryan speech, was silent on St. James. He was a good-natured critic and quarreler about the speech that Judge Clark made several times in the State in which the Judge proved to his own satisfaction that it was within the legitimate power of government to remove poverty and all inequality from the earth. He admired Judge Clark in person but the speech had the smattering of demagoguery. The speech was greatly admired by Judge Clark's friends and was only weak in theology—he did not recognize that the earth was under a curse until the day of the new earth and heaven and that he was an indefinite time ahead of the promised time when all the deserts and fallow lands would bloom together.

Judge Bond's religious life was under the training of the perfect orthodoxy of the Baptist Church. He was loyal to it and co-operated to the end, "Holding the mystery of the faith in a pure conscience," doubtful and hesitant, however, about the doctrine of positional salvation and apparently disturbed to some extent by one of his favorite

quotations from St. Peter, "If the righteous shall scarcely be saved, where shall the ungodly and sinner appear." He found perhaps the same kind of conflicts and opposing doctrines in his Bible and its theology that he did in the Supreme Court opinions. It must be admitted that the student of both as he struggles for the truth meets confusion on the way and halts between conclusions.

Judge Bond's life radiated with a surpassing gift of natural wit and humor. I don't mean he was a joke teller, far from that. From a Chinese Philosopher I quote: "The importance of humor should never be forgotten for a high sense of it changes the quality and character of our entire cultural life. There is purifying power in it both for individuals and for nations. If they have a proper sense of it, they have the key to good sense, to simple thinking, to a peaceable temper and to a cultural outlook on the world." Personality plays its never failing part in it.

In the courthouses of his thirty years, Sheriffs and Judges had more trouble on account of him than with all their other official duties, to keep the noise of laughter under such control that the court could function. Very frequently, they both gave up the job and let the circus carry on.

At the Bar of this Court, he brought it many times without the slightest jar to the cultural dignity of the occasion and the surroundings. Spring Term, 1895! New Justices, Faircloth, Furches and Montgomery. He had an appeal in a *quo warranto* in which the plaintiff had somehow gotten by without alleging the plaintiff's citizenship and interest in the case. On the call of the case by the *Chief Justice,* he moved for nonsuit on that ground, stating that the complaint did not show whether the plaintiff was a resident and citizen of Chowan County or whether he might, or might not be, a Cuban insurgent (the Cuban revolution was raging and the expression on everybody's lip) and wondered if he was in fact a Cuban insurgent, what he had to do with who held office in Chowan County. During these remarks, the *Chief Justice* and Mr. Bradley were talking across the Bench, presumably about the records Mr. Bradley was handing up. The *Chief Justice* didn't have ears for both Bond and Bradley talking at the same time and when Bond had passed on, the *Chief Justice* with an innocence that was simply pathetic, leaned forward and said: "You say the plaintiff is a Cuban insurgent?" Judge Clark started the laugh and the lawyers took it up to the point where the Marshal called for order and most of them went out the hall.

Comes September Term, 1900. The Grand Father Amendment had just passed at the election about ten days before. Every lawyer in the First District came to the court, most of them only to talk, to meet folks; to see Raleigh and tell how happy they were, for it was the happiest

crowd of lawyers that ever met in Raleigh. The only silent man in Raleigh was *Chief Justice Furches.* He saw nothing to be happy for and was as silent as a Far-Creek oyster. Adjournment hour; all strolled down to the Yarborough for dinner. In the dining hall, long tables with oval ends, just sufficient to seat the First District at one, with Judge Furches at the head. With deference to him, courtesy demanded that no reference be made to the election but you can't hold such enthusiasm as that silent for long. From somebody it bubbled out. The Chief Justice touched the table with his fork handle and got attention and said: "One thing troubles me and that is how you gentlemen from the East will be able now to bring up your former large majorities." Deep silence for a few minutes. Bond's humor came forward: "One thing, Judge, I expect you to agree to, and that is that where one political party is able to get a majority in excess of the registered vote of both political parties, there is no suppression of the ballot." I have not heard from Judge Furches on the subject since.

In Hyde County there was a famous cow stolen. She was the pet of the neighborhood among the colored folks. She was solid black, except her tail, that was solid white. No other cow ever had that flesh mark. John Anderson was indicted for the larceny and ran a small freight boat from Hyde County ports to Washington. Bond was employed for the State and the future Governor retired from the active management as Solicitor, turned the case over to Bond and sat back and greatly enjoyed the circus. The State relied on recent possession and the presumption. Bond found a Negro witness who was as fine a dramatist as himself who went on Anderson's freight boat a day or two after the killing of the cow and saw a pile of raw hides and noticed the end of a white tail sticking out about the bottom of the pile. The way that Negro described to the Court how he came to discover and how he walked around the pile and watched that white tail and followed it to Washington and saw it unloaded, walking around the pile as he presented it on the floor of the courthouse, showed to me that Bond had helped in those dramatics. They were too much like him and in some respects the Negro excelled him. By his humor and his recurring wit he kept the packed audience of that courthouse in laughter beyond the control of the court for half a day. It was apparent that Anderson had been laughed into conviction for with the able legal ability representing the State who ought not to have resisted the defendant's contention, he was unable to get the court to hold that no presumption had been raised because the possession was in a common carrier and the defendant had to come to this Court for his freedom. If a lawyer can show his adversary's case to be ridiculous and get the Court and the crowd to laughing at it, he has won and Bond did it a hundred times.

In Gates County court, the complaint and evidence supporting an oral slander, alleged the slander to be "Dor's Umphlett (the plaintiff) stole a rabbit out'er Holly's Gum." The rabbit and the gum were enough for Bond. There was no keeping the courthouse quiet and the plaintiff got no trial. On a second hearing, but a little more serious, Bond demurred on the ground that the word "Gum" could be a standing tree with a hollow that rabbits frequent and hide in as well as a boy's box he sets on the ground to catch them, which everybody knew the plaintiff meant. The rabbit was therefore *ferae naturae*. Judge Erastus Jones sustained the demurrer and the rabbit and the gum and the slander all went together into history.

Judge Shaw of Greensboro was holding a Special Term to try titles to swamp lands in Tyrrell County. Two Methodist preachers made their ministerial visitation to the Solicitor to advise him that the swamps had more liquor stills in them than they had timber cutters. The Solicitor got from them names of twenty-four defendants and woke Judge Shaw at a late hour to sign a Bench warrant for the whole group. Judge Shaw's opportunity to serve his lord and master, Prohibition, dissipated all drowsiness and made him happy. The warrant was the first Bench warrant Tyrrell County had ever heard of and scared the Sheriff so that he took a posse with him and went out and before the Court convened next morning had them all—more moonshiners than I ever saw at one look. For some reason, forgotten, Mr. Aydlett, who shared largely the practice of that court, was temporarily away that morning and the whole group went to Bond. I had to go in the room where they were huddled with him and saw more money than I ever had remembered seeing one man have at one time. He couldn't hide it in his pockets. I have said before that while he was fair and honest in everything, he knew the time and place to collect a fee and how to fix the amount of it and this talent didn't fail him in this instance. Judge Shaw seeing the chance to serve his favorite hobby, turned away from the Civil Docket, refused to accept waivers of examination, insisted on putting the evidence on record and the balance of the week was consumed with the moonshiners. While Bond and I lay sleeping on separate beds, a gang of marauders, supposed to be about twenty-five, assembled before the door of our room and poured a volley of about a dozen shotgun fires in the door and walls of the room. They were supposed to be Bond's clients. I was lying nearer the shots and sprang from the bed first. Bond's description of that incident and of me and my antics was carried as far as he went as long as he lived, embellished, exaggerated and made to fit the comic stage. There was never any use of my denying anything as it was repeated to me as coming from him years afterwards and I stopped trying and only say now, "I did not get under the bed, nor attempt to wrap up in the carpet."

He could even find humor in his Bible. There is humor in the Bible that can be reverently pointed out, but few people see it. It took Bond's spirit of humor to see the joke in that 7,500 he-goats that the Arabians sent to old Jehosephat, 11 Chronicles, 17:11. The average reader, reading that story, has never thought of the atmospheric conditions of Jerusalem with 7,500 billy goats herded together and marching through it, notwithstanding he may be familiar with Tom Moore's lines:

> "You may break, you may shatter the vase if you will,
> But the scent of the roses remain with it still."

Even in the solemn story of the importunate widow, harassing the old King to be avenged of her enemies, was seen by him to present primarily the picture of the old King that "Feared not God nor man," turning to his courtiers and saying: "Give this woman the half of my kingdom if it takes that to stop her. I can stand her no longer."

He gave his best efforts to his official duties and was universally personally popular with the Bar in the exercise of them. Seeing him in that service for fifteen years and knowing his character and his nature as I did, I often thought that great and honorable as the judicial office is, there are qualities and traits of human life and character higher and stronger in the Divine crucible than those that following the precedents, doctrines and formulas make the greatest Judges. And this is my estimate of his Judgeship. The case had to go right as he saw it, or he would not go with it.

I beg to return my personal thanks to the *Chief Justice* for this opportunity to pay this last tribute to his memory. "We were lovely in life and in death not divided."

REMARKS OF CHIEF JUSTICE STACY, UPON ACCEPTING THE PORTRAIT OF WILLIAM MARION BOND, IN THE SUPREME COURTROOM, 26 AUGUST, 1947

For a third of a century, from 1880 to 1913, W. M. Bond followed the courts of the First Judicial District. In his career as a lawyer, he represented all sorts and conditions of people—high and low, rich and poor, saint and sinner. He was both an advocate and a pleader. At first his fortunes ebbed and flowed with the general economic tides of the community. His mastery of the spoken word, however, soon won

for him a commanding place at the bar. This he maintained with increasing power and influence until 1913 when he was named to the Superior Court bench. The balance of his days were spent in the discharge of the duties of this most important position. No office in the State affords quite the opportunity for genuine, unadvertised, public service as that of Judge of our Superior Courts.

The Superior Court judge comes in intimate contact with the life of the people. It is a great thing to have power; it is an awful thing to use it. No one appreciated this more than did Judge Bond. In one of his first courts, when he came to sentence a youthful offender, he used an expression which is recalled even to this day. He remarked that in his long experience in the criminal courts of the First Judicial District he had "literally waded through an ocean of tears." He was gentle with the first offender, kind to the downtrodden, and gave an attentive ear to those who stood in need of help. He often said that if he ever imposed a death sentence, and the Supreme Court should later hold the evidence insufficint to carry the case to the jury, he would resign his position on the bench. This statement, now recalled, gives clear indication of where his sympathies lay. His kindness of heart was his crowning virtue.

Judge Bond had an engaging sense of humor which seemed never to fail him. When some ruling of his was reversed by the Supreme Court, which was seldom, or a new trial was granted in a case which he tried, he was wont to remark with a smile: "Just think of the mistakes I have made which will never be brought to the attention of those gentlemen. Furthermore, I know the members of the Supreme Court. They are all good lawyers, good enough at least to make sure of their own calling. Why if they should affirm every case, the State would soon conclude there was no need for the Court, and the reformers would surely set about to abolish it." And then with a twinkle in his eye he would add: "And I might join them."

We have listened with appreciation to the faithful tribute which his friend and ours has paid him today. He has made him live again in memory for a time.

We are glad to receive this splendid portrait. The Marshal will see that it is assigned to its appropriate place, and these proceedings will be published in the forthcoming volume of the Reports.

WORD AND PHRASE INDEX.

Abandonment—Of contract, *Bell v. Brown*, 319.

Abatement and Revival—Pendency of prior action, *Boney v. Parker*, 350; abatement of public nuisance, *McLean v. Townsend*, 642.

Abortion—Nature and elements of crime, *S. v. Jordan*, 579; sufficiency of evidence and nonsuit, *S. v. Jordan*, 579.

Absence—Presumption of death after seven years absence, *Trust Co. v. Deal*, 691.

Accident—Within meaning of Compensation Act, *Edwards v. Publishing Co.*, 184; *Gabriel v. Newton*, 314.

Acknowledgment—Notary's certificate may be amended to include name of husband inadvertently omitted, *Banks v. Shaw*, 172.

Actions—Joinder of parties, see Parties; joinder of causes, see Pleadings; action by guest and action by driver against owner of another vehicle involved in collision should not be tried together, *Dixon v. Brockwell*, 567; plea in abatement for pendency of action, *Boney v. Parker*, 350; proceedings under Declaratory Judgment Act, see Declaratory Judgment Act; action *held* one to quiet title and not attacking mortgage for fraud, *Cauble v. Trexler*, 307; actions arising out of wrongful or illegal act, *Hodges v. Hodges*, 334; *Cauble v. Trexler*, 307; *Gaskins v. Sidbury*, 468; *Davenport v. Patrick*, 686.

Administrators and Administration—See Executors and Administrators.

Admissions—Of defendant competent, *S. v. Ragland*, 162; *S. v. Artis*, 371.

Adopted Children—Inheritance by, *Phillips v. Phillips*, 438.

Adultery—Wife may not testify as to husband's declarations tending to show his illicit relationship with defendant, *Knighten v. McClain*, 682.

Adverse Possession—Whether party registering instrument held thereunder or held adversely was question of fact for jury, *Creech v. Corbett*, 276; party may not claim by adverse possession in face of stipulation of record that title was not in question, *Austin v. Hopkins*, 638; hostile character of possession by widow against heirs, *Sheppard v. Sykes*, 606; tacking possession, *Boyce v. White*, 640; fitting description to land claimed under color, *Smith v. Benson*, 56; presumptions and burden of proof, *Pearson v. Pearson*, 31; sufficiency of evidence and nonsuit, *Pearson v. Pearson*, 31; *White v. Woodard*, 332; *Edwards v. Benbow*, 466.

Agency—See Principal and Agent.

Agreement of Parties—Party may not claim by adverse possession in face of stipulation of record that title was not in question, *Austin v. Hopkins*, 638.

Agriculture—Mortgage executed for difference between original mortgage debt and amount received in satisfaction from Federal Land Bank mortgage, *held* void, *Cauble v. Trexler*, 307.

Aiding and Abetting—Bigamy, *S. v. Jones*, 94; drunken driving, *S. v. Gibbs*, 677.

Alcoholic Beverage Control Act—See Intoxicating Liquor.

Alienation of Affections—Wife may maintain action for, *Knighten v. McClain*, 682.

Alienist — Communications between defendant and alienist are not privileged, *S. v. Litteral*, 527.

Aliens—Attack of credibility of defendant for alleged misstatement of citizenship, *S. v. DeMai*, 657.

Allegata—Probata must be supported by, *Suggs v. Braxton*, 50; *S. v. Jones*, 94.

Alteration of Instruments — Rights and remedies of party defrauded, *Gaskins v. Sidbury*, 468.

Amendment — Motion in Supreme Court to amend complaint, *Hylton v. Mount Airy*, 622.

Answer—See Pleadings.

Appeal and Error—Appeal from order of clerk adjudging petitioners entitled to cartway *held* not premature, *Triplett v. Lail*, 274; right of bus carrier to appeal from denial of franchise by Utilities Commission, *Utilities Comm. v. McLean*, 679; appeals from Industrial Commission, see Master and Servant; nature and ground of appellate jurisdiction of Supreme Court in general, *Gill v. McLean*, 201; parties who may appeal—"party aggrieved," *Gill v. McLean*, 201; parties entitled to object and take exception, *Dillon v. Wentz*, 117; *Gill v. McLean*, 201; exceptions to findings of fact, *Manning v. Ins. Co.*, 251; objections and exceptions to evidence, *Williams v. Young*, 472; *Trust Co. v. Deal*, 691; requirement that matter be brought to trial court's attention to support exception to charge, *In re Will of West*, 204; necessity for apt motions to nonsuit to present question of sufficiency of evidence, *Tomlins v. Cranford*, 323; theory of trial in lower court, *Thrift Corp. v. Guthrie*, 431; duty to make out and serve statement of case on appeal, *Privette v. Allen*, 164; settlement of case on appeal, *Hoke v. Greyhound Corp.*, 374; powers of and proceedings in lower court after appeal, *Hoke v. Greyhound Corp.*, 374; form and requisites of transcript—separate appeals, *Hoke v. Greyhound Corp.*, 412; matters properly included in record, *Ingram v. Easley*, 442; conclusiveness and effect of record, *Tomlins v. Cranford*, 323; *Ingram v. Easley*, 442; assignments of error not brought forward in briefs, *Bell v. Brown*, 319; abandonment of appeals—jurisdiction of Superior Court, *Hoke v. Greyhound Corp.*, 374; motions to dismiss for failure to serve case on appeal, *Privette v. Allen*, 164; dismissal of appeal for failure to file briefs, *Wilson v. Ervin*, 396; for want of jurisdiction, *Hoke v. Greyhound Corp.*, 374; scope and extent of review in general, *Reynolds Foundation v. Trustees of Wake Forest*, 500; presumptions and burden of showing error, *Bell v. Brown*, 319; prejudicial and harmless error in instructions, *In re Will of West*, 204; *Dixon v. Brockwell*, 567; *Taylor v. Motor Co.*, 365; *Holmes v. Cab Co.*, 581; *In re Will of Wallace*, 459; *Sumner v. Sumner*, 610; review of exceptions to judgment or to signing of judgment, *Brown v. Truck Lines*, 65; *Brown v. Truck Lines*, 299; *Land Bank v. Cherry*, 105; *Manning v. Ins. Co.*, 251; *Hylton v. Mt. Airy*, 622; legal and discretionary determinations, *Akin v. Bank*, 453; review of findings of fact, *Exterminating Co. v. Wilson*, 96; *Craver v. Spaugh*, 129; *Flythe v. Wilson*, 230; review of orders on motions for bill of particulars, *Building Co. v. Jones*, 282; review of judgments on motions to nonsuit, *Hammett v. Miller*, 10; *Klassette v. Drug Co.*, 353; review of judgments upon demurrers, *Temple v. Watson*, 242; review of orders on motions to set aside default judgments, *Rierson v. York*, 575; disposition of cause, *Gaskins v. Sidbury*, 468; *Dixon v. Brockwell*, 567; jurisdiction and proceedings in lower court after remand, *Westcott v. Bank*, 644.

Argument—Which of two defendants should have last argument to jury within discretion of trial court, *Trust Co. v. Braznell*, 211.

"Arising Out of and in Course of Employment"—*Riddick v. Cedar Works*, 647; *DeVine v. Steel Co.*, 684.

Assault—With intent to commit rape, *S. v. Rogers*, 67; *S. v. Moore*, 326; with deadly weapon with intent to kill, *S. v. Revels*, 34; *S. v. Jones*, 402; assault upon female, *S. v. Silver*, 352; defendant may be convicted under indictment for assault with intent to commit rape, *S. v. Moore*, 326; *S. v. Johnson*, 587; liability of taxi company for assault by in-

truders on passenger, *Smith v. Cab Co.*, 572.

Assignment—Assignment of lease and subletting are not same, *Rogers v. Hall*, 363.

Assignments of Error—Not set out in brief deemed abandoned, *S. v. Cogdale*, 59; *S. v. Jones*, 94; *S. v. Fairley*, 134; *Bell v. Brown*, 319; necessity for, *S. v. Montgomery*, 100; review of exception to judgment or signing of judgment, *Brown v. Truck Lines*, 65.

"Attempt"—*S. v. Jones*, 402.

Attorney and Client—In action to determine title to assets, costs and attorney fees held properly taxed against funds of the estate, *Wescott v. Bank*, 39; which of two defendants should have last argument to jury within discretion of trial court, *Trust Co. v. Braznell*, 211; motion for continuance in absence of counsel, *Tomlins v. Cranford*, 323; attorney's neglect not imputed to client, *Rierson v. York*, 575; right to appear *in propria persona*, *S. v. Pritchard*, 168; where attorney declines proffered employment, communications are not privileged, *S. v. Davenport*, 475; where defendant testifies as to communication with attorney, State may cross-examine him in regard thereto, *S. v. Artis*, 371; prosecution of attorney for conspiracy to work fraud on courts, *S. v. Blanton*, 517; disbarment by court, *S. v. Blanton*, 517.

Attorney General — Attorney-General and not Solicitor must institute suit to abate public nuisance, *McLean v. Townsend*, 642.

Attractive Nuisance—*Boyette v. R. R.*, 406.

Automobiles—Insurance on, see Insurance; chattel mortgage on, *Thrift Corp. v. Guthrie*, 431; *Finance Co. v. Clary*, 247; bus companies, respective powers of Utilities Commission and municipal corportion to grant franchise, *Coach Co. v. Transit Co.*, 391; right of bus carrier to appeal from denial of franchise by Utilities Commission, *Utilities Comm. v. McLean*, 679; emergency price control, *Taylor v. Motor Co.*, 365; owner of third car involved in collision may be joined on petition, *Colbert v. Collins*, 395; liability of taxi company for assault by intruders on passenger, *Smith v. Cab Co.*, 572; stopping, parking and parking lights, *Hammett v. Miller*, 10; skidding, *Hoke v. Greyhound Corp.*, 412; sudden emergency, *Hoke v. Greyhound Corp.*, 412; legal driving age and driving license, *Hoke v. Greyhound Corp.*, 412; exemptions to speed regulations—officers of the law, *Glosson v. Trollinger*, 84; right side of road and passing vehicle traveling in opposite direction, *Hoke v. Greyhound Corp.*, 412; bicycles, *Holmes v. Cab Co.*, 581; competency of evidence in general, *Hoke v. Greyhound Corp.*, 412; sufficiency of evidence and nonsuit on issue of negligence, *Hammett v. Miller*, 10; *Carter v. Motor Lines*, 193; *Stewart v. Cab Co.*, 368; on issue of contributory negligence, *Glosson v. Trollinger*, 84; instructions, *Hoke v. Greyhound Corp.*, 412; *Holmes v. Cab Co.*, 582; issues and verdict, *Glosson v. Trollinger*, 84; instructions in accident cases, *Stewart v. Cab Co.*, 368; actions by guests or passengers, *Dixon v. Brockwell*, 567; nature and extent of liability for negligence of servant or agent, *Carter v. Motor Lines*, 193; *Harris v. Carter*, 262; pleadings in action to hold owner liable for driver's negligence, *Presnell v. Beshears*, 279; sufficiency of evidence on issue of *respondeat superior*, *Carter v. Motor Lines*, 193; *Harris v. Carter*, 262; *Temple v. Stafford*, 630; sufficiency of evidence and nonsuit in homicide prosecutions, *S. v. Hough*, 596; prosecutions for drunken driving, *S. v. Kelly*, 62; *S. v. Gibbs*, 677.

Bankruptcy—Actions to collect assets, *Flythe v. Wilson*, 230.

Banks and Banking—Letters held insufficient to constitute gift of bank deposit, *Wescott v. Bank*, 39.

Betterments—Right to recover for improvements—contracts to convey, *Dupree v. Moore*, 626.

Bicycles—Bicycle carried by pedestrian not required to be lighted, *Holmes v. Cab Co.*, 581.

Bigamy—Aiding and abetting bigamy, *S. v. Jones*, 94; prior bigamous marriage *held* competent to show motive in prosecution for murder of wife, *S. v. Phillips*, 277.

"Big Apple" Case—*S. v. Davenport*, 475.

Bill of Discovery—Nature of remedy of inspection and production of writings, *Flanner v. St. Joseph Home*, 342; nature and scope of remedy to obtain information to draft complaint, *Flanner v. St. Joseph Home*, 342.

Bill of Particulars—Application for is addressed to discretion of court, *Building Co. v. Jones*, 282.

Bills and Notes—Contract to sell notes for owner, *Strickland v. Bingham*, 221.

Blasphemy—Prosecution for disorderly conduct for using profanity in public place, *S. v. Jones*, 170.

Bond—Defense bond in action in ejectment, see Ejectment.

Boundaries—Calls to natural objects, *White v. Woodard*, 332; issues and instructions, *Austin v. Hopkins*, 638.

Breach of the Peace—Prosecution for disorderly conduct for using profanity in public place, *S. v. Jones*, 170.

Breaking—Is not essential to nonburglarious entry, *S. v. Mumford*, 132.

Briefs—Assignments of error not set out in brief deemed abandoned, *S. v. Cogdale*, 59; *S. v. Jones*, 94; *S. v. Fairley*, 134; *Bell v. Brown*, 319; appeal will be dismissed for failure to file, *Wilson v. Ervin*, 396.

Brokers—Power and authority of brokers, *Strickland v. Bingham*, 221; right to commissions where sale is not consummated, *Eller v. Fletcher*, 345; rights and remedies of third person against broker, *Strickland v. Bingham*, 221.

Brutum Fulmen—Development Co. v. Bearden, 124.

Burden of Proof—Erroneous charge on must be held for prejudicial error, *S. v. Gause*, 26; *S. v. Johnson*, 587; *Sumner v. Sumner*, 610; *In re Will of West*, 204; *Sumner v. Sumner*, 610; charge on *held* not prejudicial when construed contexually, *S. v. Cannon*, 338; *S. v. Jones*, 402; in caveat proceedings, *In re Will of West*, 204; in action in ejectment, *Smith v. Benson*, 56; is on plaintiff to establish each element of cause, *Carter v. Motor Lines*, 193; is on defendant upon affirmative defenses, *Pearson v. Pearson*, 31; of proving rescission as defense to action for specific performance, *Bell v. Brown*, 319; in action on theft policy providing liability in case of "mysterious disappearance," *Davis v. Indemnity Co.*, 80; is on plaintiff in ejectment to prove validity of sheriff's deed relied on in chain of title, *Board of Education v. Gallop*, 599; is on insurer to prove that misrepresentation was fraudulent, *Carroll v. Ins. Co.*, 456; of proving presumptive death from seven years absence, *Trust Co. v. Deal*, 691; is on defendant to prove possession of liquor was within exception allowed by statute, *S. v. Wilson*, 43; burden is on State to show breach of terms under which execution was suspended, *S. v. Sullivan*, 680; State has no greater burden when relying on circumstantial evidence, *S. v. Ewing*, 535; presumption in criminal prosecutions generally, *S. v. Godwin*, 449; in homicide prosecution where killing with deadly weapon is established, *S. v. Staton*, 409.

Burglary—In first degree and in second degree, *S. v. Mumford*, 132; *S. v. Hooper*, 633; breaking and entering otherwise than burglariously, *S. v. Mumford*, 132; suffi-

ciency of evidence and nonsuit, *S. v. Mumford*, 132; *S. v. Hooper*, 633; instructions on question of less degree of crime, *S. v. Hooper*, 633.

Bus Companies—Respective powers of Utilities Commission and Municipal corporations to grant franchise, *Coach Co. v. Transit Co.*, 391; right of bus carrier to appeal from denial of franchise by Utilities Commission, *Utilities Comm. v. McLean*, 679.

Cancellation and Rescission of Instruments—Rights of parties upon cancellation of deed, *Tomlins v. Cranford*, 323.

Candidates—Criminal prosecution for libeling candidate, *S. v. Pritchard*, 168.

Capital Crime—Judgment must show on face conviction of capital crime, *S. v. Montgomery*, 100.

Carriers—Right of bus carrier to appeal from denial of franchise by Utilities Commission, *Utilities Comm. v. McLean*, 679; presumption of negligence in killing of livestock by railroad company does not apply unless action is brought within six months, *Coburn v. R. R.*, 695; who are common carriers, *Smith v. Cab Co.*, 572; matters and transactions subject to State regulation, *Coach Co. v. Transit Co.*, 391; licensing and franchise of carriers, *Brown v. Truck Lines*, 299; *Coach Co. v. Transit Co.*, 391; rights and remedies of carrier under franchise, *Coach Co. v. Transit Co.*, 391; liability of carrier for assaults by intruders upon passengers, *Smith v. Cab Co.*, 572.

Cartways—Appeal from order of clerk adjudging petitioners entitled to cartway *held* not premature, *Triplett v. Lail*, 274.

Case on Appeal—Dismissal of appeal for failure to file statement of case, *S. v. Ewing*, 107; *S. v. McLeod*, 411; *S. v. Sanders*, 474; *S. v. O'Dear*, 649; *S. v. Cherry*, 650; *S. v. Douglas*, 696; extension of time for filing may not be given beyond term of Supreme Court to which appeal must be taken, *S. v. Lampkin*, 620; record in case on appeal from judgment denying motion upon facts found, *Privette v. Allen*, 164; only trial judge has jurisdiction in regard to, *Hoke v. Greyhound Corp.*, 374; procedure where death of judge prevents settlement of case, *S. v. Cannon*, 336.

Caveat—See Wills.

Charge—See Instructions.

Charities—Bill of discovery will not lie to determine whether hospital carried liability insurance, *Flanner v. St. Joseph Home*, 342; nature and essentials of charities, *Reynolds Foundation v. Trustees of Wake Forest*, 500; control, management and appropriation of funds, *Reynolds Foundation v. Trustees of Wake Forest*, 500.

Charlotte—Firemen's Mutual Benefit Association, *Dillon v. Wentz*, 117.

Chattel Mortgages—Competency of instrument in evidence, *Finance Co. v. Clary*, 247; lien of mortgages registered in other states, *Thrift Corp. v. Guthrie*, 431; actions, *Finance Co. v. Clary*, 247; *Thrift Corp. v. Guthrie*, 431.

Chattels, Real—Lease is, *Moche v. Leno*, 159.

Chickens—*S. v. Jones*, 47.

Children—Attactive Nuisance, *Boyette v. R. R.*, 406; permitting person under legal driving age to operate car is negligence, *Hoke v. Greyhound*, 412; word "heirs" held to mean issue or children, *Conrad v. Goss*, 470; limitation over to testator's children and grandchildren takes estate to class *per capita*, *In re Battle*, 672; father's duty to support, *Wells v. Wells*, 614.

Circumstantial Evidence—Conspiracy may be proved by, *S. v. Davenport*, 475; sufficiency of to be submitted to jury, *S. v. Ewing*, 535.

Cities and Towns—See Municipal Corporations.

Citizenship—Attack of credibility of defendant for alleged misstatement of, *S. v. DeMai*, 657.

City of Charlotte—Firemen's Mutual Benefit Association, *Dillon v. Wentz*, 117.

Clerks of Court—Appeal from order of clerk adjudging petitioners entitled to cartway *held* not premature, *Triplett v. Lail*, 274; administration, see Executors and Administrators; no presumption that clerk issued successive executions, *Board of Education v. Gallop*, 599; proceeding to test validity of clerk's appointment of justice of the peace, *Ethcridge v. Leary*, 636.

Cloud on Title—Party claiming under independent source may not intervene, *Moore v. Massengill*, 244; action *held* one to quiet title and not attacking mortgage for fraud, *Cauble v. Trexler*, 307; plaintiff's evidence held sufficient for directed verdict, *Edwards v. Benbow*, 466.

Collateral Heirs—Of blood of ancestor, when rule applies, *Jones v. Jones*, 424.

Collision Insurance—*Suggs v. Braxton*, 50; *Manning v. Insurance Co.*, 251.

Color of Title—Deed is color only as to land described and possessor must fit description to land claimed, *Smith v. Benson*, 56.

Commerce—License tax on horse and mule dealers held not tax on interstate commerce, *Nesbitt v. Gill*, 174; owner driving truck in interstate commerce under lease agreement with franchise carrier *held* employee and not independent contractor, *Brown v. Truck Lines*, 299.

Common Carriers—See Carriers.

Common Law—Burglary is common law offense, *S. v. Mumford*, 132; in force in this State, *Moche v. Leno*, 159.

Compensation Act—See Master and Servant.

Complaint—See Pleadings.

Concurring Negligence—In automobile guests' action instruction on concurring negligence held error, *Dixon v. Brockwell*, 567.

Condemnation—See Eminent Domain.

Conditions Precedent—To right to institute action on collision policy, *Manning v. Insurance Co.*, 251.

Confessions—S. v. Thompson, 19; *S. v. Litteral*, 527.

Conflict of Laws—Lien of chattel mortgage registered in another state, *Thrift Corp. v. Guthrie*, 431; effect of widow's dissent filed in another state in which testator died domiciled, *Coble v. Coble*, 547; where Federal Court releases prisoner to sheriff, State Court acquires jurisdiction, *S. v. Litteral*, 527.

Confrontation—Right of, *S. v. Stanley*, 650.

Congress—Act within constitutional powers is supreme, *Taylor v. Motor Co.*, 365.

Consent Judgment — Consent must subsist at time of signing to give court jurisdiction, *Lee v. Rhodes*, 240.

Consolidation of Actions—Action by guest and action by driver against owner of another vehicle involved in collision should not be tried together, *Dixon v. Brockwell*, 567.

Conspiracy—Nature and elements of the crime, *S. v. Davenport*, 475; indictment, *S. v. Davenport*, 475; *S. v. Blanton*, 517; competency of evidence, *S. v. Davenport*, 475; *S. v. Blanton*, 517; sufficiency of evidence and nonsuit, *S. v. Warren*, 380; *S. v. Davenport*, 475; *S. v. Blanton*, 517; instructions, *S. v. Blanton*, 517.

Constitutional Law—Contract not to engage in same business after termination of employment, *Exterminating Co. v. Wilson*, 96; constitutional restrictions and limitations on taxation, see Taxation; legislative declaration that tax authorized is for public purpose is not conclusive, *Nash v. Tarboro*, 283; general rules of construction, *Purser v. Ledbetter*, 1; *In re* House Bill No. 65, 708; delegation and reservation of powers, *In re* House Bill No. 276, 705; powers of legislature in general, *In re* House Bill No. 276, 705; legislative powers of Congress, *Taylor v. Motor Co.*, 365; powers of Legis-

lature in regard to municipal corporations, *Purser v. Ledbetter*, 1; power and duty of courts to determine constitutionality of statutes, *Nash v. Tarboro*, 283; personal, political and civil rights, *Thomas v. Baker*, 226; monopolies and exclusive emoluments, *Boyce v. Gastonia*, 139; equal protection and application of laws, *Phillips v. Phillips*, 438; vested rights and titles, *Pinkham v. Mercer*, 72; *Boyce v. Gastonia*, 139; remedies and procedure, *Pinkham v. Mercer*, 72; transactions constituting burden on interstate commerce, *Nesbitt v. Gill*, 174; necessity of indictment, *S. v. Stanley*, 650; right of defendant in criminal prosecution to trial by impartial jury, *S. v. Kirksey*, 445; *S. v. Koritz*, 552; *S. v. Litteral*, 527; *S. v. Stanley*, 650; right to confront accusers and witnesses, *S. v. Stanley*, 650; right of defendant not to incriminate self, *S. v. Ragland*, 162.

Constructive Trusts—*Pearson v. Pearson*, 31; *Development Co. v. Bearden*, 124; *Strickland v. Bingham*, 221; *Owen v. Hines*, 236; *Sheppard v. Sykes*, 606.

Contentions—Error in statement of must be brought to trial court's attention, *S. v. Thompson*, 19; *S. v. Warren*, 380; unless error is misstatement of burden of proof, *S. v. Gause*, 26; *S. v. Johnson*, 587; but where statement of contains incorrect instruction as to law, it will nevertheless be held error, *S. v. Gause*; charge on contentions, *S. v. Warren*, 380; *S. v. Davenport*, 475; *S. v. Litteral*, 527; *S. v. DeMai*, 657; *S. v. Pritchard*, 168; where court gives contentions of one party, it must give those of the other, *In re Will of West*, 204; *S. v. Fairley*, 134.

Continuance—Motion for in absence of counsel, *Tomlins v. Cranford*, 323.

Contractor—Evidence held sufficient to support finding that plaintiff was employee and not independent contractor, *Creighton v. Snipes*, 90; evidence held to sustain finding that defendant was contractee and not landlord for purpose of Unemployment Compensation Commission, *Unemployment Compensation Comm. v. Harvey & Son Co.*, 291; owner driving truck in interstate commerce under lease agreement with franchise carrier *held* employee and not independent contractor, *Brown v. Truck Lines*, 299.

Contracts—Insurance contracts, see Insurance; specific performance of, see Specific Performance; to convey realty, see Vendor and Purchaser; required to be in writing, *Bell v. Brown*, 319; *Johnson v. Wallin*, 669; defense that contract was made to hinder and defraud creditors, *Hodges v. Hodges*, 334; by charitable foundation to pay income to educational corporation, *Reynolds Foundation v. Trustees of Wake Forest College*, 500; by city to remove tracks of street railway, *Boyce v. Gastonia*, 139; by accepting benefits, heirs ratify option or lease of deceased mentally incompetent lessor, *Walker v. McLaurin*, 53; contracts against public policy, *Cauble v. Trexler*, 307; in restraint of trade, *Sonotone Corp. v. Baldwin*, 387; *Exterminating Co. v. Wilson*, 96; in violation of statutory policy, *Cauble v. Trexler*, 307; general rules of construction, *Boyce v. Gastonia*, 139; term and duration—renewals and extensions, *Sonotone Corp. v. Baldwin*, 387; modification, rescission and abandonment by acts of parties, *Bell v. Brown*, 319; sufficiency of evidence and nonsuit, *Strickland v. Bingham*, 221; right of action against third persons interfering with contractual rights, *Winston v. Lumber Co.*, 339.

Contributory Negligence — Evidence held to require submission of, *Glosson v. Trollinger*, 84; instruction on contributory negligence held not error when construed contextually, *Holmes v. Cab Co.*, 581; nonsuit on ground of, *Lee v. Upholstery Co.*, 88; *Marzelle v. Manufacturing Co.*,

674; *ex vi termini* is predicated upon negligence on part of defendant, *Stewart v. Cab Co.*, 368; complaint held not to disclose contributory negligence as matter of law and demurrer is properly overruled, *Smith v. Cab Co.*, 572.

Corporations—Election, qualification and tenure of corporate officers, *Thomas v. Baker*, 226; jurisdiction of and proceedings in Superior Court where corporation is unable to elect officers, *Thomas v. Baker*, 226; authority and duties of directors, *Thomas v. Baker*, 226; estopped and ratification by corporation of acts of officers or agents, *Thomas v. Baker*, 226; property and conveyances, *Tuttle v. Building Corp.*, 146.

Corroborative Evidence—General objection to evidence competent as corroborative insufficient, *S. v. Cogdale*, 59.

Costs—In action to determine title to assets, costs and attorney fees held properly taxed against funds of the estate, *Wescott v. Bank*, 39.

Counsel—See Attorney and Client.

Counties—Demand for return of taxes paid under protest held sufficient, *R. R. v. Polk County*, 697.

County Courts—Appeal from municipal-county court, *S. v. Wilson*, 43.

Course of Employment—Within meaning of Compensation Act, *Riddick v. Cedar Works*, 647.

Courts—Construction of constitution is question for courts, *Purser v. Ledbetter*, 1; legislative declaration that tax authorized is for public purpose is not conclusive, *Nash v. Tarboro*, 283; sufficiency of evidence is question of law for the courts, *Klassette v. Drug Co.*, 353; supervisory power of Supreme Court, *Wescott v. Bank*, 644; jurisdiction of Superior Court to correct judgment, *Land Bank v. Cherry*, 105; jurisdiction of Superior Court where corporation is unable to elect officers, *Thomas v. Baker*, 226; jurisdiction to authorize trustees to sell property cannot be invoked under Declaratory Judgment Act, *Brandis v. Trustees of Davidson College*, 329; rule that courts will not exercise jurisdiction where parties are *in pari delicto*, *Cauble v. Trexler*, 307; *Hodges v. Hodges*, 334; Superior Court has discretionary power to change venue, *English v. Brigman*, 260; discretionary denial for new trial for newly discovered evidence not appealable, *S. v. Blair*, 70; motion to strike made in apt time is not discretionary, *Development Co. v. Bearden*, 124; *Privette v. Morgan*, 264; appeal from municipal-county court, *S. v. Wilson*, 43; count on which defendant is found not guilty in Recorder's Court is not before Superior Court on appeal, *S. v. Jones*, 170; our courts have no jurisdiction over crimes committed outside of State, *S. v. Jones*, 94; but have jurisdiction over conspiracy effectuated here though conspiracy be formed in another state, *S. v. Warren*, 380; where Federal Court releases prisoner to sheriff, State Court acquires jurisdiction, *S. v. Litteral*, 527; expression of opinion by court in examination of witnesses, *S. v. Davenport*, 475; *S. v. Woolard*, 645; *Etheridge v. Leary*, 636; original jurisdiction of Superior Courts in general, *Coach Co. v. Transit Co.*, 391; appeals to Superior Court from Clerk, *Triplett v. Lail*, 274; jurisdiction after order or judgment of another Superior Court judge, *Hoke v. Greyhound Corp.*, 374; administration of Federal Statutes in State courts, *Taylor v. Motor Co.*, 365; administration and application of laws of this and other states, *Thrift Corp. v. Guthrie*, 431; *Coble v. Coble*, 547.

Covenants—Not to assign, *Rogers v. Hall*, 363.

Criminal Conversation—Wife may maintain action for, *Knighten v. McClain*, 682.

Criminal Law—Indictment and Warrant, see Indictment and Warrant; elements of and prosecutions for particular crimes, see particular

titles of crimes; right to trial by impartial jury, *S. v. Kirksey*, 445; *S. v. Litteral*, 527; *S. v. Koritz*, 552; principals—aiders and abettors, *S. v. Gibbs*, 677; jurisdiction in general, *S. v. Jones*, 94; place of crime, *S. v. Jones*, 94; *S. v. Warren*, 380; jurisdiction of Federal and State Courts, *S. v. Litteral*, 527; appeals to Superior Court, *S. v. Wilson*, 43; *S. v. Jones*, 170; presumptions and burden of proof, *S. v. Godwin*, 449; *S. v. Ewing*, 535; relevancy of evidence, *S. v. Ragland*, 162; evidence of guilt of other offenses, *S. v. Litteral*, 527; evidence of similar facts or transactions, *S. v. Kelley*, 62; evidence and record at former trial or proceedings, *S. v. Phillips*, 277; expert testimony, *S. v. Stanley*, 650; footprints, *S. v. Ragland*, 162; qualification of experts, *S. v. DeMai*, 657; telephone conversations, *S. v. Gardner*, 37; confessions, *S. v. Thompson*, 19; *S. v. Litteral*, 527; admissions and declarations, *S. v. Ragland*, 162; *S. v. Artis*, 371; *S. v. DeMai*, 657; *res gestae*, *S. v. Cogdale*, 59; *S. v. Litteral*, 527; photographs, *S. v. Stanley*, 650; privileged communications—attorney and client, *S. v. Artis*, 371; *S. v. Davenport*, 475; physician and patient, *S. v. Litteral*, 527; direct examination—leading questions, *S. v. Cogdale*, 59; redirect examination, *S. v. Warren*, 380; evidence competent for purpose of corroboration, *S. v. Litteral*, 527; evidence competent for restricted purpose, *S. v. Cogdale*, 59; withdrawal of evidence, *S. v. Artis*, 371; *S. v. Davenport*, 475; objections and exceptions to evidence, *S. v. Artis*, 371; *S. v. Litteral*, 527; expression of opinion by court on evidence during progress of trial, *S. v. Davenport*, 475; *S. v. Woolard*, 645; nonsuit, *S. v. Thompson*, 19; *S. v. Phillips*, 277; *S. v. Cogdale*, 59; *S. v. Rogers*, 67; *S. v. Law*, 103; *S. v. Davenport*, 475; *S. v. Ewing*, 535; *S. v. Hough*, 596; directed verdict and peremptory instructions, *S. v. Godwin*, 449; *S. v. Boldin*, 594; instructions on burden of proof, *S. v. Jones*, 402; *S. v. Cannon*, 338; *S. v. Johnson*, 587; charge—statement of evidence and explanation of law arising thereon, *S. v. Thompson*, 19; *S. v. Jones*, 402; *S. v. Davenport*, 475; *S. v. Litteral*, 527; *S. v. DeMai*, 657; expression of opinion by court on weight of evidence in giving instructions, *S. v. Davenport*, 475; *S. v. DeMai*, 657; duty to submit question of guilt of less degrees of crime charged, *S. v. Staton*, 409; *S. v. Goss*, 26; *S. v. Brown*, 383; *S. v. Jones*, 402; *S. v. Hooper*, 633; statement of contentions, *S. v. Litteral*, 527; *S. v. Fairley*, 134; *S. v. Warren*, 380; *S. v. Davenport*, 475; *S. v. DeMai*, 657; form, sufficiency and effect of verdict, *S. v. Revels*, 34; *S. v. Jones*, 47; *S. v. Warren*, 380; *S. v. Wolfe*, 261; power of court to refuse to accept verdict and have jury redeliberate, *S. v. Litteral*, 527; form and sufficiency of judgments, *S. v. Jones*, 47; formalities and requisites of judgment upon conviction of capital crime, *S. v. Montgomery*, 100; suspended judgments and executions, *S. v. Sullivan*, 680; judgments appealable, *S. v. Thomas*, 71; matters reviewable, *S. v. Davenport*, 475; *S. v. Koritz*, 552; *S. v. Kirksey*, 445; making out and serving statement of case on appeal, *S. v. Lampkin*, 620; objections and countercase, *S. v. Lampkin*, 620; "case on appeal," *S. v. Cannon*, 336; term of Supreme Court to which appeal must be taken, *S. v. Lampkin*, 620; conclusiveness and effect of record, *S. v. Gause*, 26; *S. v. Wolfe*, 461; *S. v. Johnson*, 587; form and requisites of objections and exceptions to charge, *S. v. Jones*, 402; necessity for calling court's attention to inaccuracies in statement of evidence or contentions, *S. v. Thompson*, 19; *S. v. Warren*, 380; *S. v. Gause*, 26; *S. v. Johnson*, 587; necessity for, form and requisites of assignments

of error, *S. v. Montgomery*, 100; briefs, *S. v. Cogdale*, 59; *S. v. Jones*, 94; *S. v. Fairley*, 134; dismissal for failure to prosecute appeal, *S. v. Ewing*, 107; *S. v. McLeod*, 411; *S. v. O'Dear*, 649; *S. v. Cherry*, 650; *S. v. Douglas*, 696; *S. v. Little*, 701; *S. v. Sanders*, 474; *S. v. Lampkin*, 620; presumptions and burden of showing error, *S. v. Phillips*, 277; harmless and prejudicial error in general, *S. v. Cogdale*, 59; *S. v. Pritchard*, 168; in instructions, *S. v. Pritchard*, 168; *S. v. Cannon*, 338; *S. v. Hough*, 596; *S. v. Gibbs*, 677; *S. v. Cannon*, 338; *S. v. Jones*, 402; *S. v. Johnson*, 587; *S. v. Wolfe*, 461; *S. v. Gause*, 26; *S. v. Johnson*, 587; *S. v. Stafford*, 409; *S. v. Hooper*, 633; in admission or exclusion of evidence, *S. v. Cogdale*, 59; *S. v. Warren*, 3; *S. v. Artis*, 371; *S. v. Davenport*, 475; *S. v. DeMai*, 657; error relating to one count only, *S. v. Revels*, 34; *S. v. Cogdale*, 59; *S. v. Warren*, 380; *S. v. Godwin*, 449; error cured by verdict, *S. v. Staton*, 409; *S. v. Hooper*, 633; *S. v. DeMai*, 657; review of exceptions to refusal to nonsuit, *S. v. Thompson*, 19; appeal in criminal cases—determination and disposition of cause, *S. v. Jones*, 94.

Culpable Negligence—*S. v. Hough*, 596.

Damages—In condemnation proceedings, see Eminent Domain; in summary ejectment, *Seligson v. Klyman*, 347; punitive damages, *Gaskins v. Sidbury*, 468; relevancy and competency of evidence on issue of damages, *Davis v. R. R.*, 561; *Lowe v. Hall*, 541.

Deadly Weapon—Presumptions from killing with, *S. v. Staton*, 409; pointing rifle at person resulting in fatal injury is manslaughter, *S. v. Boldin*, 594.

Death—Presumption of death from seven years absence, *Trust Co. v. Deal*, 691; grounds and conditions precedent to actions for wrongful death; *Davenport v. Patrick*, 686; evidence in actions for wrongful death, *Hoke v. Greyhound Corp.*, 412; distribution of recovery in actions for wrongful death, *Davenport v. Patrick*, 686.

Decedent—Testimony of transactions with, *Wilson v. Ervin*, 396; *Williams v. Young*, 472 declarations against interest, *Williams v. Young*, 472.

Deception—Is necessary element of fraud, *Cox v. Johnson*, 69.

Declarations—Of defendant competent, *S. v. Ragland*, 162; *S. v. Artis*, 371; declaration of alleged agent not competent unless fact of agency established aliunde, *Carter v. Motor Lines*, 193; by decedents against interest, *Williams v. Young*, 472; not a part of *res gestae* held incompetent, *S. v. DeMai*, 657.

Declaratory Judgment Act—Subject of action, *Brandis v. Trustees of Davidson College*, 329; *Reynolds Foundation v. Trustees of Wake Forest*, 500; real controversy, *Etheridge v. Leary*, 636; judgment or decree, *Reynolds Foundation v. Trustees of Wake Forest*, 500; *Etheridge v. Leary*, 636.

Deeds—Deed is color only as to land described and possessor must fit description to land claimed, *Smith v. Benson*, 56; reformation of, see Reformation of Instruments; contracts to convey, see Vendor and Purchaser; ascertainment of boundaries, see Boundaries; to husband and wife creates estate by entirety, *Ingram v. Easley*, 442; *Akin v. Bank*, 453; execution of deed by corporation, *Tuttle v. Building Corp.*, 146; grantee entitled to return of purchase price upon cancellation, *Tomlins v. Cranford*, 323; rights of grantor where grantee fraudulently alters description in, *Gaskins v. Sidbury*, 468; grantee may not tack possession of grantor, *Boyce v. White*, 640; plaintiff's claim *held* not to depend solely on validity of deed of gift not registered within two years, and nonsuit was error, *Creech v. Corbett*, 276; competency of grantor, *Tomlins v. Cranford*, 323; execution and

acknowledgment, *Banks v. Shaw*, 172; revocation of voluntary deeds, *Pinkham v. Mercer*, 72; reservations and exceptions, *Trust Co. v. Braznell*, 212.

Default Judgments—*Presnell v. Besheers*, 279; motion by nonresident to set aside judgment by default, *Russell v. Edney*, 203.

Defeasible Fee—*Conrad v. Goss*, 470.

Defense Bond—In action in ejectment, see Ejectment.

Demurrer—See Pleadings; complaint held not to disclose contributory negligence as matter of law and demurrer is properly overruled, *Smith v. Cab Co.*, 572; complaint held insufficient to allege fraud and demurrer was proper, *Development Co. v. Bearden*, 124.

Deputy Sheriff — Exemption from speed limits in apprehending law violators, *Glosson v. Trollinger*, 84.

Descent and Distribution—Distinction between descent and purchase, *Jones v. Jones*, 424; adopted children, *Phillips v. Phillips*, 438; collateral heirs, *Jones v. Jones*, 424; rights and liabilities of heirs, *Walker v. McLaurin*, 53; *Carter v. Lilley*, 435; facts held insufficient to give rise to inference of family settlement, *Wescott v. Bank*, 39.

Directed Verdict—In criminal prosecution, *S. v. Godwin*, 449; *S. v. Boldin*, 594.

Disbarment of Attorney—Follows conviction of a felony, *S. v. Blanton*, 517.

Discharge—Army discharge incompetent in negligence action, *Hoke v. Greyhound Corp.*, 412.

Discovery, Bill of—See Bill of Discovery.

Discretion of Court—Motion to strike made in apt time is not discretionary, *Development Co. v. Bearden*, 124; *Privette v .Morgan*, 264; application for bill of particulars is addressed to discretion of court, *Building Co. v. Jones*, 282; Superior Court has discretionary power to change venue, *English v. Brigman*, 260; court has discretionary power to deny motion for continuance in absence of counsel, *Tomlins v. Cranford*, 323; discretionary denial for new trial for newly discovered evidence not appealable, *S. v. Blair*, 70.

Dismissal—Of appeal for failure to prosecute, *S. v. Ewing*, 107; *S. v. McLeod*, 411; *S. v. Sanders*, 474.

Disorderly Conduct—Prosecution and punishment, *S. v. Jones*, 170.

Ditch—Call in deed to, *White v. Woodard*, 332.

Divorce—Instructions in divorce actions, *Sumner v. Sumner*, 610.

Doctors—Communications between defendant and alienist are not privileged, *S. v. Litteral*, 527.

Dominick Chickens—*S. v. Jones*, 47.

Dower—Administratrix can purchase at own sale to protect dower, *Privette v. Morgan*, 264; nature and right to dower in general, *Coble v. Coble*, 547; *Sheppard v. Sykes*, 606.

Drainage—Of surface waters, *Davis v. R. R.*, 561.

Drunken Driving—*S. v. Kelly*, 62; *S. v. Gibbs*, 677.

Easements—Acquisition by condemnation, see Eminent Domain; appeal from order of Clerk adjudging petitioners entitled to cartway *held* not premature, *Triplett v. Lail*, 274.

Ejectment—Burden on plaintiff to prove validity of sheriff's deed when relied on in chain of title, *Board of Education v. Gallop*, 599; right to dismissal of summary ejectment upon tender of rent and costs, *Seligson v. Klyman*, 347; sufficiency of evidence in summary ejectment, *Rogers v. Hall*, 363; damages and judgment, *Seligson v. Klyman*, 347; presumptions and burden of proof in actions in ejectment, *Smith v. Benson*, 56; answer and bond, *Privette v. Allen*, 164; *Hodges v. Hodges*, 334; burden of proof, *Smith v. Benson*, 56; sufficiency of evidence and nonsuit, *Smith v. Benson*, 56; *Creech v. Corbett*, 276.

Elections—Jurisdiction of Superior Court where corporation is unable to elect officers, *Thomas v. Baker*, 226; criminal liabilities—publishing

derogatory reports relating to candidate, *S. v. Pritchard*, 168.
Eleemosynary Corporations—Bill of discovery will not lie to determine whether hospital carried liability insurance, *Flanner v. St. Joseph Home*, 342.
Elevator—Moving freight elevator without notice is negligence, *Lee v. Upholstery Co.*, 88.
Embalmer—Testimony of wounds, *S. v. Stanley*, 650.
Embezzlement—Nature and elements of the crime, *S. v. Blair*, 70.
Emergency Price Control—*Taylor v. Motor Co.*, 365.
Eminent Domain—Delegation of power, *Boyce v. Gastonia*, 139; measure of compensation in general, *Light Co. v. Sloan*, 151; competency and relevancy of evidence of damages, *Light Co. v. Sloan*, 151.
Emoluments—*Boyce v. Gastonia*, 139.
Employer and Employee—See Master and Servant.
Enacting Clause—Statute must contain enacting clause, *In re* House Bill No. 65, 708.
Entirety—See Husband and Wife.
Equity—Jurisdiction to authorize trustees to sell property cannot be invoked under Declaratory Judgment Act, *Brandis v. Trustees of Davidson College*, 329; equitable estoppel, see Estoppel; party must come into equity with clean hands, *Cauble v. Trexler*, 307; *Hodges v. Hodges*, 334; laches, *Pearson v. Pearson*, 31.
Error, Assignments of—See Assignments of Error.
Estates—Created by wills, see Wills; by deeds, see Deeds; estates by entirety, see Husband and Wife; termination of life estate and vesting of remainder, *Haywood v. Briggs*, 108; right to improvements upon death of life tenant, *Haywood v. Briggs*, 108; nature of and grounds for sale of estates for reinvestment, *Pinkham v. Mercer*, 72; joint estates and survivorship in personalty, *Wilson v. Ervin*, 396.
Estoppel—Grantee accepting conveyance subject to unrecorded instrument estopped to deny notice, *Trust Co. v. Braznell*, 211; acceptance of benefits estops party from denying agency, *Tomlins v. Cranford*, 323; by judgment, *Craver v. Spaugh*, 129; *Carter v. Lilley*, 435; *Reynolds Foundation v. Trustees of Wake Forest College*, 500; equitable estoppel—persons who may be estopped, *Dupree v. Moore*, 626; evidence and burden of proof, *Pearson v. Pearson*, 31; nonsuit on ground of estoppel, *Pearson v. Pearson*, 31.
Evidence—In particular actions, see particular titles of actions; in criminal prosecutions, see Criminal Law and particular titles of crimes; sufficiency of evidence and nonsuit, see Trial, Criminal Law and particular titles of actions and prosecution; fair market value of lands taken by condemnation, see Eminent Domain; bill of discovery to obtain evidence, *Flanner v. St. Joseph Home*, 342; admission of evidence must be prejudicial to justify new trial, *S. v. Cogdale*, 59; *S. v. Warren*, 380; *S. v. DeMai*, 657; form and requisites of objections and exceptions to, *Williams v. Young*, 472; in action for criminal conversation with husband, wife may not testify as to incriminating declarations of husband, *Knighten v. McClain*, 682; burden of establishing cause of action in general, *Carter v. Motor Lines*, 193; materiality in general, *Wilson v. Ervin*, 396; facts in issue and relevant to issues, *Light Co. v. Sloan*, 151; similar facts and transactions, *S. v. Kelly*, 62; *Light Co. v. Sloan*, 151; competency in general, *Davis v. R. R.*, 561; transactions or communications with decedent, *Wilson v. Ervin*, 396; *Williams v. Young*, 472; evidence obtained by unlawful means or for unlawful purpose, *Davis v. R. R.*, 561; legal instruments and court records, *Finance Co. v. Clary*, 347; best and secondary evidence, *Board of Education v. Gallop*, 599; admissions and declarations of agent, *Carter v. Motor Lines*, 193; admis-

sions in pleadings, *Light Co. v. Sloan*, 151; declarations in general, *Williams v. Young*, 472; declarations by decedents against interest, *Williams v. Young*, 472; opinion evidence—invasions of province of jury, *Lowe v. Hall*, 541.

Exceptions—Not discussed in briefs deemed abandoned, *S. v. Cogdale*, 59; *S. v. Jones*, 94; *S. v. Fairley*, 134; *Bell v. Brown*, 319; review of exception to judgment or signing of judgment, *Brown v. Truck Lines*, 65; *Land Bank v. Cherry*, 105; *Manning v. Insurance Co.*, 251; *Brown v. Truck Lines*, 299; *Hylton v. Mount Airy*, 622; exception to evidence must be supported by objection to question and motion to strike answer, *S. v. Artis*, 371; to charge, *S. v. Jones*, 402.

Exceptions and Reservations—Deed subject to leasehold estate valid notwithstanding lease unrecorded, *Trust Co. v. Braznell*, 211.

Excusable Neglect—Motion to set aside judgment for, *Presnell v. Beshears*, 279; *Rierson v. York*, 575.

Execution—Evidence held insufficient to show violation of conditions of suspension of execution, *S. v. Sullivan*, 680; issuance of execution and successive executions, *Board of Education v. Gallup*, 599; time of sale, *Board of Education v. Gallop*, 599; title and rights of purchaser at execution sale, *Board of Education v. Gallop*, 599; issuance and levy of execution, *Carter v. Lilley*, 435.

Executors and Administrators—Wife's administrator may not maintain action against husband for wrongful death, *Davenport v. Patrick*, 686; husband is primarily liable for wife's funeral expenses, *Davenport v. Patrick*, 686; jurisdiction and appointment of administrators, *Carter v. Lilley*, 435; title and right to possession of assets of estate, *Wescott v. Bank*, 39; purchase of assets by executor or administrator, *Pearson v. Pearson*, 31; *Privette v. Morgan*, 264; *Development Co. v. Bearden*, 124; allotment of widow's year's allowance, *Development Co. v. Bearden*, 124; *Privette v. Morgan*, 264; actions against estate, *Wilson v. Ervin*, 396; distribution of estate under family settlement, *Wescott v. Bank*, 39; final account and settlement, *Pearson v. Pearson*, 31; costs, commissions and attorneys' fees, *Wescott v. Bank*, 39; actions attacking administration, *Privette v. Morgan*, 264.

Ex Maleficio—*Strickland v. Bingham*, 221.

Ex Mero Motu—Supreme Court will dismiss action *ex mero motu* for want of jurisdiction, *S. v. Jones*, 94.

Expert Testimony—*S. v. Stanley*, 650; *S. v. DeMai*, 657.

Expression of Opinion—On evidence by court, in instructions, *Hoke v. Greyhound Corp.*, 412; in stating contentions, *S. v. Davenport*, 475; in examination of witnesses, *S. v. Davenport*, 475; *S. v. Woolard*, 645.

Fact, Findings of—See Findings of Fact.

Fair Market Value—Evidence of value of lands taken by condemnation, *Light Co. v. Sloan*, 151.

False Pretenses—*S. v. Davenport*, 475.

Family Settlement—Facts held insufficient to give rise to inference of, *Wescott v. Bank*, 39.

Farm Mortgage—Mortgage executed for difference between original mortgage debt and amount received in satisfaction from Federal Land Bank mortgage, *held* void, *Cauble v. Trexler*, 307.

Federal Courts—Where Federal Court releases prisoner to sheriff, State Court acquires jurisdiction, *S. v. Litteral*, 527.

Federal Income Tax Return—Competent as evidence, *Davis v. R. R.*, 561.

Federal Land Bank—Mortgage executed for difference between original mortgage debt and amount received in satisfaction from Federal Land Bank mortgage, *held* void, *Cauble v. Trexler*, 307.

Felony—Conspiracy to commit, is felony, *S. v. Davenport*, 475; disbarment of attorney follows conviction of, *S. v. Blanton*, 517.

Female, Assault Upon—Evidence insufficient, *S. v. Silver*, 352; defendant may be convicted of under indictment for assault with intent to commit rape, *S. v. Moore*, 326; *S. v. Johnson*, 587.

Fiduciary—Running of statute against action to have fiduciary declared constructive trustee, *Sheppard v. Sykes*, 606.

Filing Case on Appeal—Dismissal of appeal for failure to file statement of case, *S. v. Ewing*, 107.

Findings of Fact—That confession was voluntary conclusive when supported by evidence, *S. v. Thompson*, 19; findings of court conclusive when supported by evidence, *Exterminating Co. v. Wilson*, 96; trial court's findings relative to jury list conclusive, *S. v. Kirksey*, 445; *S. v. Koritz*, 552; findings as *res judicata*, *Craver v. Spaugh*, 129; where findings are not set forth presumption is that essential facts were found, *Craver v. Spaugh*, 129; *Flythe v. Wilson*, 230; exception to judgment does not present sufficiency of evidence to support findings, *Brown v. Truck Lines*, 65; *Manning v. Insurance Co.*, 251; but where finding is predicated upon legal effect of written instrument, question is one of law presented by exception to judgment, *Brown v. Truck Lines*, 299; of Unemployment Compensation Commission conclusive when supported by evidence, *Unemployment Compensation Comm. v. Harvey & Son Co.*, 291; of Industrial Commission conclusive when supported by evidence, *Creighton v. Snipes*, 90; *Bell v. Lumber Co.*, 173; *Edwards v. Publishing Co.*, 184; *Gabriel v. Newton*, 314; *Riddick v. Cedar Works*, 647; *DeVine v. Steel Co.*, 684.

Firearms—Robbery with, *S. v. Jones*, 402.

Firemen—Firemen's Mutual Benefit Association, *Dillon v. Wentz*, 117.

Fires—Extinguishment of fires is governmental function of municipality, *Klassette v. Drug Co.*, 353; liability of municipality for death of prisoner caused by fire, *Gentry v. Hot Springs*, 665; duties and liabilities of owner setting out fire on property, *Lumber Co. v. Elizabeth City*, 270.

Fixtures—Right of lessee to remove in general, *Haywood v. Briggs*, 108.

Footprints—*S. v. Ragland*, 162.

"Force"—*S. v. Thompson*, 19.

Forseeability—*Lee v. Upholstery Co.*, 88.

Forfeiture—It must appear from complaint that transactions occurred in other county to justify removal of action for statutory penalty, *Flythe v. Wilson*, 230.

Franchises—Of street railway, *Boyce v. Gastonia*, 139; respective powers of Utilities Commission and municipal corporation to grant franchise to bus company, *Coach Co. v. Transit Co.*, 391; right of bus carrier to appeal from denial of franchise by Utilities Commission, *Utilities Comm. v. McLean*, 679

Fraud—Legal fraud, pleading, *Development Co. v. Bearden*, 124; avoidance of hospital insurance for misrepresentation, *Carroll v. Ins. Co.*, 456; grantee's alteration of description in deed, *Gaskins v. Sidbury*, 468; plaintiff may not maintain action predicated on his own, *Gaskins v. Sidbury*, 468; crime of obtaining money by false pretense, see False Pretense; deception and reliance on misrepresentation, *Cox v. Johnson*, 69; pleadings, *Development Co. v. Bearden*, 124; *Privette v. Morgan*, 264; *Hodges v. Hodges*, 334.

Frauds, Statute of—Upon plea of statute defendant entering into possession under parol contract to convey may recover for improvements, *Dupree v. Moore*, 626; contracts affecting realty in general, *Bell v. Brown*, 319; *Winston v. Lumber Co.*, 339; *Johnson v. Wallin*, 669.

Fraudulent Conveyances—Defense that contract was made to hinder

and defraud creditors, *Hodges v. Hodges*, 334.

Funeral Expenses—Husband is primarily liable for, *Davenport v. Patrick*, 686.

General Assembly—Construction of Constitution is question for courts, *Purser v. Ledbetter*, 1; power over municipal corporations, *Purser v. Ledbetter*, 1; may not raise salaries of its members, *In re Advisory Opinion*, 705; legislative declaration that tax authorized is for public purpose is not conclusive, *Nash v. Tarboro*, 283; authority to regulate intrastate carriers, *Coach Co. v. Transit Co.*, 391; statute must contain enacting clause, *In re* House Bill No. 65, 708.

General Verdict—Will support judgment if only one count is sound, *S. v. Revels*, 34.

General Welfare—Expenditure for parks and recreational facilities not necessary municipal expense, *Purser v. Ledbetter*, 1.

Gifts—Plaintiff's claim *held* not to depend solely on validity of deed of gift not registered within two years, and nonsuit was error, *Creech v. Corbett*, 276; nature and essentials of gifts *inter vivos*, *Wescott v. Bank*, 39; *Williams v. Young*, 472.

Governmental Functions—Extinguishment of fire is governmental function of municipality, *Klassette v. Drug Co.*, 353; city not liable for negligence in performance of, *Gentry v. Hot Springs*, 665.

Grand Jury—Evidence, findings and return of indictment, see Indictment; qualification and selection of grand jurors, *S. v. Koritz*, 552.

Guardian and Ward—Guardianship for missing persons, *Carter v. Lilley*, 435; nature of the relationship, *Owen v. Hines*, 236; title and control of ward's property, *Owen v. Hines*, 236.

Harmless and Prejudicial Error—Error must be prejudicial to entitle appellant to new trial, *S. v. Cogdale*, 59; *S. E. Warren*, 380; burden is on defendant to show alleged error was prejudicial, *S. v. Phillips*, 277; error relating to one count only not prejudicial, *S. v. Revels*, 34; *S. v. Cogdale*, 59; *S. v. Warren*, 380; unless conviction on other counts was influenced and followed as matter of course from conviction on count to which error related, *S. v. Godwin*, 449; failure to submit question of guilt of less degree is not cured by verdict, *S. v. Staton*, 409; in admission or exclusion of evidence, *S. v. Cogdale*, 59; *S. v. DeMai*, 657; in instructions, *S. v. Gause*, 26; *S. v. Pritchard*, 168; *In re Will of West*, 204; *S. v. Cannon*, 338; *Taylor v. Motor Co.*, 365; *S. v. Jones*, 402; *In re Will of Wallace*, 459; *S. v. Wolfe*, 461; *Dixon v. Brockwell*, 567; *Holmes v. Cab Co.*, 581; *S. v. Johnson*, 587; *S. v. Hough*, 596; *Sumner v. Sumner*, 610; *S. v. Gibbs*, 677.

Heart Disease—Death of policeman from heart disease caused by unusual exertion *held* accident, *Gabriel v. Newton*, 314.

Heirs—By accepting benefits, heirs ratify option or lease of deceased mentally incompetent lessor, *Walker v. McLaurin*, 53; word "heirs" held to mean issue or children, *Conrad v. Goss*, 470; possession of widow as adverse to, *Sheppard v. Sykes*, 606; widow as constructive trustee for, *Sheppard v. Sykes*, 606; descent and distribution, see Descent and Distribution.

High Point—Municipal parking ordinance, *Hammett v. Miller*, 10.

Highway Robbery—*S. v. Jones*, 402.

Highways—Proceedings to establish cartways, *Triplett v. Lail*, 274.

Holograph Will—*In re Will of Wallace*, 459.

Homicide—Assault with intent to kill, see Assault; definition of murder in the first degree, *S. v. Kirksey*, 445; voluntary manslaughter, *S. v. Holdin*, 594; involuntary manslaughter—negligence of defendant, *S. v. Hough*, 596; requisites and sufficiency of indictment, *S. v. Kirksey*, 445; presumptions and burden of proof, *S.*

v. Staton, 409; relevancy and competency of evidence in general, *S. v. Artis*, 371; *S. v. DeMai*, 657; declarations, *S. v. DeMai*, 657; admissions, *S. v. Artis*, 371; evidence of motive and malice, *S. v. Phillips*, 277; *S. v. Artis*, 371; of premeditation and deliberation, *S. v. Artis*, 371; *S. v. Stanley*, 650; sufficiency of evidence and nonsuit, *S. v. Montgomery*, 100; *S. v. Phillips*, 277; *S. v. Kirksey*, 445; *S. v. Ewing*, 535; *S. v. Hough*, 596; *S. v. Stanley*, 650; *S. v. DeMai*, 657; peremptory instructions and directed verdict, *S. v. Boldin*, 594; instructions on defenses, *S. v. Fairley*, 134; *S. v. DeMai*, 657; form and sufficiency of issues and instructions on less degrees of crime, *S. v. Gause*, 26; *S. v. Staton*, 409; judgment and sentence, *S. v. Montgomery*, 100.

Horses—License tax on dealers, *Nesbitt v. Gill*, 174.

Hospital Insurance—*Carroll v. Ins. Co.*, 456.

Hospitals—Bill of discovery will not lie to determine whether hospital carried liability insurance, *Flanner v. St. Joseph Home*, 342.

Hotels—Maintenance and operation is not public purpose, *Nash v. Tarboro*, 283.

Husband and Wife—Notary's certificate may be amended to include name of husband inadvertently omitted, *Banks v. Shaw*, 172; wife's right to recover against husband for support of child, *Wells v. Wells*, 614; wife's administrator may not maintain action for wrongful death against husband, *Davenport v. Patrick*, 686; wife's separate estate, *Ingram v. Easley*, 442; liability of husband for debts of wife, *Davenport v. Patrick*, 686; conveyances from wife to husband, *Ingram v. Easley*, 442; husband as agent for wife, *Tomlins v. Cranford*, 323; creation of estates by entireties, *Ingram v. Easley*, 442; *Akin v. Bank*, 453; nature and incidents of estate by entirety, *Wilson v. Ervin*, 396; termination of estates by entirety, *Wilson v. Ervin*, 396; nature and essentials of right of action for alienation and evidence in such actions, *Knighten v. McClain*, 682; nature and essentials of right of action for criminal conversation and competency of evidence in such actions, *Knighten v. McClain*, 682.

Improvements—Right to improvements upon death of life tenant lessor, *Haywood v. Briggs*, 108; right to recover by purchaser entering into possession under oral contract, *Dupree v. Moore*, 626.

Inadvertence—Motion to set aside judgment for, *Presnell v. Beshears*, 279; *Rierson v. York*, 575.

Income Tax Return—Competent as evidence, *Davis v. R. R.*, 561.

Incrimination — Fitting defendant's shoes in tracks does not violate constitutional right against self-incrimination, *S. v. Ragland*, 162.

Independent Contractor — Evidence held sufficient to support finding that plaintiff was employee and not independent contractor. *Creighton v. Snipes*, 90; finding of Industrial Commission that workman was employee of independent contractor upheld, *Bell v. Lumber Co.*, 173; evidence held to sustain finding that defendant was contractee and not landlord for purpose of Unemployment Compensation, *Unemployment Compensation Comm. v. Harvey & Son Co.*, 291; owner driving truck in interstate commerce under lease agreement with franchise carrier *held* employee and not independent contractor, *Brown v. Truck Lines*, 299.

Indictment—On appeal from municipal-county court, defendant may be tried on original warrant or on bill of indictment, *S. v. Wilson*, 43; count on which defendant is found not guilty in Recorder's Court is not before Superior Court on appeal, *S. v. Jones*, 170; for murder, *S. v. Kirksey*, 445; for conspiracy, see Conspiracy; evidence and proceedings before grand jury, *S. v. Blanton*, 517; return of indictment, *S. v. Stanley*, 650; merger of

counts, *S. v. Davenport*, 475; charge of crime, *S. v. Law*, 103; *S. v. Blanton*, 517; motions to quash for improper jury panel, *S. v. Litteral*, 527; definiteness and sufficiency, *S. v. Davenport*, 475; procedure to raise question of variance, *S. v. Law*, 103; proof of guilt of crime charged, *S. v. Law*, 103; sufficiency of indictment to support conviction of less degree of crime charged, *S. v. Jones*, 402; *S. v. Moore*, 326; *S. v. Johnson*, 587; necessity for allegation in indictment to support proof, *S. v. Jones*, 94.

Industrial Commission—See Master and Servant.

Infants—May not create estoppel *in pais* against themselves, *Dupree v. Moore*, 626; protection of property rights by courts, *Trust Co. v. Deal*, 691.

Inference—Distinguished from presumptions, *S. v. Revels*, 34.

Injunctions—Plaintiff held not entitled to enjoin municipality from maintaining street less than 30 feet wide, *Hylton v. Mount Airy*, 622; abatement of public nuisance, *McLean v. Townsend*, 642; subjects of injunctive relief—contracts relating to personal services or occupations, *Exterminating Co. v. Wilson*, 96; franchise rights, *Coach Co. v. Transit Co.*, 391; continuance, modification and dissolution of temporary orders, *Chandler v. Cameron*, 233; *Temple v. Watson*, 242; suspending temporary order upon filing of bond, *Chandler v. Cameron*, 233.

Innocence—Presumption of, *S. v. Godwin*, 449.

In Pari Delicto—*Cauble v. Trexler*, 307; *Hodges v. Hodges*, 334.

In Rem—*Caveat* proceedings are, *In re Will of West*, 204.

Insane Persons—Effect of adjudication of insanity, *Tomlins v. Cranford*, 323; validity of contracts and conveyances, *Walker v. McLaurin*, 53; *Tomlins v. Cranford*, 323; attack and setting aside contracts and conveyances, *Walker v. McLaurin*, 53.

Insanity—Testamentary capacity, see Wills; attack of deed for mental incapacity, *Tomlins v. Cranford*, 323; communications made to alienist testifying in support of defendant's plea of mental irresponsibility not privileged, *S. v. Litteral*, 527.

Instructions—In negligent injury actions, see Negligence; in automobile accident cases, see Automobiles; in homicide prosecution, see homicide; expression of opinion in, *Hoke v. Greyhound Corp.*, 412; charge on contentions, *S. v. Fairley*, 134; *In re Will of West*, 204; *S. v. Warren*, 380; *S. v. Davenport*, 475; *S. v. Litteral*, 527; *S. v. DeMai*, 657; on contributory negligence *held* error, *Stewart v. Cab Co.*, 368; on contributory negligence *held* not error when construed contextually, *Holmes v. Cab Co.*, 581; on burden of proof, *S. v. Cannon*, 338; *S. v. Jones*, 402; *S. v. Johnson*, 587; *S. v. Gause*, 26; *Sumner v. Sumner*, 610; peremptory instructions in criminal prosecution, *S. v. Godwin*, 449; *S. v. Boldin*, 594; peremptory instruction in favor of plaintiff *held* error, *Thrift Corp. v. Guthrie*, 431; duty to give instructions relating to less degrees of crime, *S. v. Gause*, 26; *S. v. Brown*, 383; *S. v. Staton*, 409; *S. v. Hooper*, 633; in prosecution for illegal possession of liquor, court may use language of statutes in charge, *S. v. Wilson*, 43; exceptions to, *S. v. Jones*, 402; when not in record deemed without error, *Bell v. Brown*, 319; *held* to meet requirements of G.S., 1-180, *S. v. Thompson*, 19; harmless and prejudicial error in, *S. v. Pritchard*, 168; *In re Will of West*, 204; *Taylor v. Motor Co.*, 365; *In re Will of Wallace*, 459; *S. v. Wolfe*, 461; *Dixon v. Brockwell*, 567; *Holmes v. Cab Co.*, 581; *S. v. Hough*, 596; *S. v. Gibbs*, 677.

Insurance—Bill of discovery will not lie to determine whether hospital carried liability insurance, *Flanner v. St. Joseph Home*, 342; while ordinarily fact that defendant has

liability insurance is incompetent its admission not prejudicial under the facts, *Hoke v. Greyhound*, 412; construction and operation of insurance contracts, *Manning v. Ins. Co.*, 251; avoidance of policy for misrepresentations relating to health, *Carroll v. Ins. Co.*, 456; actions on accident and health policies, *Carroll v. Ins. Co.*, 456; conditions precedent to liability or right to institute action on liability or collision insurance, *Manning v. Ins. Co.*, 251; actions on liability and collision policies, *Suggs v. Braxton*, 50; actions on theft policies, *Davis v. Indemnity Co.*, 80.

Intent—Evidence held insufficient to show intent to ravish, *S. v. Moore*, 326.

Intent to Kill—*S. v. Revels*, 34.

Interstate Commerce—License tax on horse and mule dealers held not tax on interstate commerce, *Nesbitt v. Gill*, 174; owner driving truck in interstate commerce under lease agreement with franchise carrier *held* employee and not independent contractor, *Brown v. Truck Lines*, 299.

Intervener—Party claiming under independent source may not intervene in action to remove cloud on title, *Moore v. Massengill*, 244.

Intervertebral Disc—Rupture of, *held* accident, *Edwards v. Publishing Co.*, 184.

Intoxicating Liquor—Prosecution for drunken driving, *S. v. Kelly*, 62; *S. v. Gibbs*, 677; construction and operation of statutes, *S. v. Wilson*, 43; possession in general, *S. v. Wilson*, 43; seizures and forfeitures, *S. v. Law*, 103; presumptions and burden of proof, *S. v. Wilson*, 43; competency and relevancy of evidence, *S. v. Wilson*, 43; sufficiency of evidence and nonsuit, *S. v. Wilson*, 43; directed verdict, *S. v. Godwin*, 449; instructions, *S. v. Wilson*, 43.

Irrelevant and Redundant Matter—Motions to strike, *Development Co. v. Bearden*, 124; *Williams v. Thompson*, 166; *Privette v. Morgan*, 264.

Issue—Word "heirs" held to mean issue or children, *Conrad v. Goss*, 470.

Issues—Form of issue in action on theft policy, *Davis v. Indemnity Co.*, 80; undue influence and mental incapacity should be submitted under separate issues, *In re Will of West*, 204; separate issue as to breach of warranty should be submitted in seller's action for purchase price, *Palmer v. Jeannette*, 377; evidence *held* to require submission of issue of contributory negligence, *Glosson v. Trollinger*, 84.

Jails—Liability of municipality for death of prisoner caused by fire, *Gentry v. Hot Springs* 665.

Joinder of Parties—See Parties.

Joint Tenants—No statutory survivorship in personalty, *Wilson v. Erwin*, 396.

Judges—Superior Court has discretionary power to change venue, *English v. Brigman*, 260; only trial court has jurisdiction of matters relating to appeal, *Hoke v. Greyhound Corp.*, 374; procedure where death of judge prevents settlement of case, *S. v. Cannon*, 336.

Judgments—Execution of, see Execution; *non obstante veredicto*, *Palmer v. Jennette*, 377; *Dupree v. Moore*, 626; general verdict will support judgment if only one count is sound, *S. v. Revels*, 34; in criminal cases must be free from ambiguity, *S. v. Jones*, 47; judgment must show on face conviction of capital crime, *S. v. Montgomery*, 100; review of exception to judgment or signing of judgment, *Brown v. Truck Lines*, 65; *Land Bank v. Cherry*, 105; *Manning v. Insurance Co.*, 251; *Brown v. Truck Lines*, 299; *Hylton v. Mount Airy*, 622; party may not challenge correctness of judgment entered in accordance with prayer, *Dillon v. Wentz*, 117; nature and essentials of consent judgments, *Lee v. Rhodes*, 240; judgments by default

in general, *Presnell v. Beshears*, 279; form and requisites of judgments on trial of issues, *Thomas v. Baker*, 226; time and place of rendition, *Lee v. Rhodes*, 240; jurisdiction of court to hear motions or modify and correct own judgments, *Land Bank v. Cherry*, 105; attack of default judgments, *Presnell v. Beshears*, 279; *Rierson v. York*, 575; attack of judgments for fraud, *Development Co. v. Bearden*, 124; setting aside judgments on substituted service, *Russell v. Edney*, 203; persons concluded by judgment, *Carter v. Lilley*, 435; operation of judgments as bar to subsequent action, *Craver v. Spaugh*, 129; *Reynolds Foundation v. Trustees of Wake Forest*, 500; *Carter v. Lilley*, 435; judgments of nonsuit as bar to subsequent action, *Carver v. Spaugh*, 129; rights and remedies of judgment creditor, *Carter v. Lilley*, 435.

Judicial Sales—Sales by executors and administrators, see Executors and Administrators; sale under execution, see Execution.

Jurisdiction—Supreme Court will dismiss action *ex mero motu* for want of, *S. v. Jones*, 94; is essential to valid proceedings, *Gill v. McLean*, 201; of parties is necessary to adjudication, *Etheridge v. Leary*, 636; our courts have no jurisdiction over crimes committed outside of State, *S. v. Jones*, 94; but have jurisdiction over conspiracy effectuated here though conspiracy be formed in another state, *S. v. Warren*, 380; State Court has concurrent jurisdiction for enforcement of civil remedies under Emergency Price Control Act, *Taylor v. Motor Co.*, 365; rule that courts will not exercise jurisdiction where parties are *in pari delicto*, *Cauble v. Trexler*, 307; *Hodges v. Hodges*, 334; consent must subsist at time of signing to give court jurisdiction to sign consent judgment, *Lee v. Rhodes*, 240; of Superior Court to correct judgment, *Land Bank v. Cherry*, 105; of Utilities Commission, *Coach Co. v. Transit Co.*, 391; if Superior Court has no jurisdiction, Supreme acquires none on appeal, *Gill v. McLean*, 201.

Jury—Testimony invading province of, *Lowe v. Hall*, 541; competency, qualification and challenges for cause, *S. v. Kirksey*, 445; *S. v. Davenport*, 475; peremptory challenges, *S. v. Litteral*, 527; *S. v. Koritz*, 552; challenges to array, *S. v. Kirksey*, 445; *S. v. Litteral*, 527; *S. v. Koritz*, 552; alternate jurors, *S. v. Stanley*, 650; rolls and panels, *S. v. Litteral*, 527; *S. v. Koritz*, 552.

Justices of the Peace—Proceeding to test validity of clerk's appointment of, *Etheridge v. Leary*, 636.

Laches—*Pearson v. Pearson*, 31; *Pearce v. Rowland*, 590.

Land Bank—Mortgage executed for difference between original mortgage debt and amount received in satisfaction from Federal Land Bank mortgage, *held* void, *Cauble v. Trexler*, 307.

Landlord and Tenant—By accepting benefits, heirs ratify option or lease of deceased mentally incompetent lessor, *Walker v. McLaurin*, 53; evidence held to sustain finding that defendant was contractee and not landlord for purpose of Unemployment Compensation tax, *Unemployment Compensation Comm. v. Harvey & Son Co.*, 291; liability of landlord and tenant for hazard on abutting sidewalk, *Klassette v. Drug Co.*, 353; *Marzelle v. Manufacturing Co.*, 674; lessee may maintain action against lessor's grantee to reform deed, *Trust Co. v. Braznell*, 211; reformation of deed to protect prior leasehold, *Trust Co. v. Braznell*, 211; deed subject to leasehold estate valid notwithstanding lease unrecorded, *Trust Co. v. Braznell*, 211; covenant not to assign, *Rogers v. Hall*, 363; ejectment, see Ejectment; form, requisites and validity of leases, *Moche v. Leno*, 159; covenants not to assign or sublet, *Rogers v. Hall*, 363; termination

of lease by operation of law—death of life tenant lessor, *Haywood v. Briggs*, 108; right to improvements, *Haywood v. Briggs*, 108.
Larceny—Evidence of conspiracy to steal *held* sufficient, *S. v. Warren*, 380; receiving stolen goods, see Receiving Stolen Goods; indictment—proof and variance, *S. v. Law*, 103; presumption from recent possession, *S. v. Jones* 47.
Leading Questions—Court may permit, *S. v. Cogdale*, 59.
Leases—See Landlord and Tenant.
Legislature—Construction of Constitution is question for courts, *Purser v. Ledbetter*, 1; legislative declaration that tax authorized is for public purpose is not conclusive, *Nash v. Tarboro*, 283; power over municipal corporations, *Purser v. Ledbetter*, 1; authority to regulate intrastate carriers, *Coach Co. v. Transit Co.*, 391; statute must contain enacting clause, *In re* House Bill No. 65, 708; General Assembly may not raise salaries of its members, *In re* Advisory Opinion, 705.
Less Degrees of Crime—Duty to give instructions relating to less degrees of crime, *S. v. Gause*, 26; *S. v. Brown*, 383; *S. v. Jones*, 402; *S. v. Staton*, 409; *S. v. Hooper*, 633; on charge of assault with intent to commit rape, defendant may be convicted of assault on female, *S. v. Moore*, 326; *S. v. Johnson*, 587.
Liability Insurance—Bill of discovery will not lie to determine whether hospital carried liability insurance, *Flanner v. St. Joseph Home*, 342; while ordinarily fact that defendant has liability insurance is incompetent its admission not prejudicial under the facts, *Hoke v. Greyhound*, 412.
Libel and Slander—Criminal prosecution for libeling candidate, *S. v. Pritchard*, 168.
License Tax—On horse and mule dealers, *Nesbitt v. Gill*, 174.
Licenses—Franchise is vested right and not license, *Boyce v. Gastonia*, 139.
Life Estates—See Estates.
Limitation of Actions—Validity of statutes changing limitations, *Pinkham v. Mercer*, 72; action *held* one to quiet title and not attacking mortgage for fraud, *Cauble v. Trexler*, 307; nature and construction of statutes of limitation in general, *Williams v. Thompson*, 166; notice and demand, *Pearson v. Pearson*, 31; computation of period of limitation—fiduciary relationships, *Sheppard v. Sykes*, 606; pleading of limitations, *Williams v. Thompson*, 166.
Liquor—See Intoxicating Liquor.
Livestock — Presumption of negligence in killing of livestock by railroad company does not apply unless action is brought within six months, *Coburn v. R. R.*, 695.
Local Governmental Employees—Dissolution of mutual benefit association upon joining in State Retirement System, *Dillon v. Wentz*, 117.
Loss or Destruction of Records—Admission of secondary evidence of, *Board of Education v. Gallop*, 599.
Lying in Wait—Murder committed by, *S. v. Gause*, 26.
Malpractice—Of physicians, see Physicians and Surgeons.
Manslaughter—See Homicide.
Market Value—Evidence of value of lands taken by condemnation, *Light Co. v. Sloan*, 151.
Marriage—Proceeding to test validity of clerk's appointment of justice of the peace, *Etheridge v. Leary*, 636.
Married Women—See Husband and Wife, Dower, Divorce; wife's right to recover against husband for support of child, *Wells v. Wells*, 614.
Master and Servant—Liability for servant's negligent driving of automobile, *Carter v. Motor Lines*, 193; *Harris v. Carter*, 262; *Presnell v. Beshears*, 279; *Temple v. Stafford*, 630; the relationship in general, *Unemployment Compensation Comm. v. Nissen*, 216; distinction between 'employee' and independent contractor, *Brown v. Truck Lines*, 299; nature and extent of employer's liability for negligence of serv-

ant, *Carter v. Motor Lines*, 193; "employers" liable under Workmen's Compensation Act, *Brown v. Truck Lines*, 299; determination of whether person injured is employee or independent contractor, *Creighton v. Snipes*, 90; *Brown v. Truck Lines*, 299; dual employment, *Creighton v. Snipes*, 90; Workmen's Compensation Act—whether injury results from "accident," *Edwards v. Publishing Co.*, 184; *Gabriel v. Newton*, 314; whether accident "arises out of and in course of employment," *Riddick v. Cedar Works*, 647; *DeVine v. Steel Co.*, 684; causal connection between accident and injury or death, *Gabriel v. Newton*, 314; review of award of Industrial Commission, *Brown v. Truck Lines*, 65; *Brown v. Truck Lines*, 299; *Creighton v. Snipes* 90; *Gabriel v. Newton*, 314; *Riddick v. Cedar Works*, 647; *DeVine v. Steel Co.*, 684; *Bell v. Lumber Co.*, 173; *Edwards v. Publishing Co.*, 184; employers within coverage of Unemployment Compensation Act, *Unemployment Compensation Comm. v. Nissen*, 216; "employing units" liable for unemployment compensation taxes, *Unemployment Compensation Comm. v. Harvey & Son Co.*, 291; reserves under Unemployment Compensation Act, *Unemployment Compensation Comm. v. Nissen*, 216; appeals from Unemployment Compensation Comm., *Unemployment Compensation Comm. v. Harvey & Son Co.*, 291.

Material Misrepresentation—In application for hospital policy, *Carroll v. Ins. Co.*, 456.

Mental Capacity—Contract of mental incompetent is voidable and may be ratified, *Walker v. McLaurin*, 53; attack of deed for, *Tomlins v. Cranford*, 323; testamentary capacity, see Wills.

Merger—Of counts in indictment, *S. v. Davenport*, 475.

Minors—Permitting person under legal driving age to operate car is negligence, *Hoke v. Greyhound Corp.*, 412; may not create estoppel *in pais* against themselves, *Dupree v. Moore*, 626; protection of interest of is more important than preservation of rules relating to objections and exceptions to evidence, *Trust Co. v. Deal*, 691.

Misdemeanor—Drunken driving is, *S. v. Gibbs*, 677.

Misrepresentation—In application for hospital policy, *Carroll v. Ins. Co.*, 456.

Missing Persons Statute—*Carter v. Lilley*, 435.

Mistake—Reformation of instruments for, *Trust Co. v. Braznell*, 211.

Monopolies—Contract not to engage in same business after termination of employment, *Exterminating Co. v. Wilson*, 96.

Mortgages—Administrator purchasing at foreclosure sale held trustee, *Pearson v. Pearson*, 31; action on agreement to purchase at foreclosure sale for mortgagor, *Hodges v. Hodges*, 334; notary's certificate may be amended to include name of husband inadvertently omitted, *Banks v. Shaw*, 172; mortgages contrary to statutory policy—mortgages for balance after land bank mortgage, *Cauble v. Trexler*, 307; contract under which mortgagee in possession operated building *held* to constitute mortgagee agent, and mortgagors were entitled to transfer of reserve account by Unemployment Compensation Commission, *Unemployment Compensation Comm. v. Nissen*, 216.

Motions—To strike, *Development Co. v. Bearden*, 124; *Privette v. Morgan*, 264; to set aside judgment, denial of as *res judicata*, *Craver v. Spaugh*, 129; to strike reply, *Williams v. Thompson*, 166; motion for continuance in absence of counsel, *Tomlins v. Cranford*, 323; to nonsuit, see Nonsuit.

Mules—License tax on dealers, *Nesbitt v. Gill*, 174.

Municipal Corporations — Constitutional restrictions and limitations on taxation, see Taxation; powers and functions in general—legislative control and supervision, *Purser*

v. Ledbetter, 1; *Nash v. Tarboro*, 283; municipal employees—firemen, *Dillon v. Wentz*, 117; torts of municipality—governmental and corporate functions, *Klassette v. Drug Co.*, 353; *Gentry v. Hot Springs*, 665; defects or obstructions in street or sidewalks, *Klassette v. Drug Co.*, 353; control, regulation and authority over streets and sidewalks, *Hammett v. Miller*, 10; *Hylton v. Mount Airy*, 622; power to grant, execution and construction of municipal franchises, *Boyce v. Gastonia*, 139; *Coach Co. v. Transit Co.*, 391; revocation of franchises, *Boyce v. Gastonia*, 139; municipal charges and expenses, *Boyce v. Gastonia*, 141; levy and collection of taxes, *Purser v. Ledbetter*, 1; *Nash v. Tarboro*, 283.

Municipal-County Court—Appeal from, *S. v. Wilson*, 43.

Murder—See Homicide.

"Mysterious Disappearance"—Provisions of theft policy that mysterious disappearance of insured property presumed due to theft, *Davis v. Indemnity Co.*, 80.

Mutual Benefit Associations—Nature and essentials, *Dillon v. Wentz*, 117; dues and contributions, *Dillon v. Wentz*, 117; benefits, *Dillon v. Wentz*, 117; dissolution, *Dillon v. Wentz*, 117.

Narcotic Drug Act—Does not provide remedy of abatement, *McLean v. Townsend*, 642.

Necessary Expenses—*Purser v. Ledbetter*, 1.

Negligence—In operation of automobiles, see Automobiles; in failure to control fire on lands, *Lumber Co. v. Elizabeth City*, 270; of physicians, see Physicians and Surgeons; culpable negligence, *S. v. Hough*, 596; bill of discovery will not lie to determine whether hospital carried liability insurance, *Flanner v. St. Joseph Home*, 342; liability of municipality for, *Klassette v. Drug Co.*, 353; *Gentry v. Hot Springs*, 665; presumption of in killing of livestock by railroad company does not apply unless action is brought within six months, *Coburn v. R. R.*, 695; acts and omissions constituting negligence, *Hammett v. Miller*, 10; *Klassette v. Drug Co.*, 353; sudden emergency, *Hoke v. Greyhound Corp.*, 412; condition and use of lands and buildings, *Klassette v. Drug Co.*, 353; *Marzelle v. Mfg. Co.*, 674; attractive nuisance, *Boyette v. R. R.*, 406; proximate cause, *Hammett v. Miller*, 10; *Klassette v. Drug Co.*, 353; *Lee v. Upholstery Co.*, 88; pleadings, *Smith v. Cab Co.*, 572; relevancy and competency of evidence, *Hoke v. Greyhound Corp.*, 412; questions of law and of fact, *Klassette v. Drug Co.*, 353; nonsuit on issue of negligence in general, *Lee v. Upholstery Co.*, 88; *Klassette v. Drug Co.*, 353; nonsuit on issue of contributory negligence, *Lee v. Upholstery Co.*, 88; *Marzelle v. Mfg. Co.*, 675; instructions, *Stewart v. Cab Co.*, 368; *Hoke v. Greyhound Corp.*, 412; *Holmes v. Cab Co.*, 581.

Negroes—Devise and bequest of property to not evidence of lack of testamentary capacity, *In re Will of West*, 204; exclusion from the jury, *S. v. Kirksey*, 445; *S. v. Koritz*, 552.

Newly Discovered Evidence—Discretionary denial of new trial for newly discovered evidence not appealable, *S. v. Blair*, 70.

Non Obstante Veredicto—*Palmer v. Jennette*, 377; *Dupree v. Moore*, 626.

Nonresident—Motion by nonresident to set aside judgment by default, *Russell v. Edney*, 203; recording of will of, *Coble v. Coble*, 547.

Nonsuit—Review of judgments on motions to, *Hammett v. Miller*, 10; *S. v. Thompson*, 19; *Klassette v. Drug Co.*, 353; variance can be taken advantage of by motion to nonsuit, *Suggs v. Braxton*, 50; *S. v. Law*, 103; action in ejectment, unlike processioning proceeding, may be dismissed as of nonsuit, *Smith v. Benson*, 56; is inappropriate in an action for advice of court in

administration of trust, *Trust Co. v. Deal*, 691; as bar to subsequent action, *Craver v. Spaugh*, 129; motion for nonsuit must first be made at close of plaintiff's evidence, *Tomlins v. Cranford*, 323; sufficiency of evidence is question of law for the courts, *Klassette v. Drug Co.*, 353; equivocations in testimony do not justify, *S. v. Thompson*, 19; defendant's evidence held insufficient to justify nonsuit on affirmative defenses on laches, estoppel and adverse possession, *Pearson v. Pearson*, 31; sufficiency of evidence and nonsuit in automobile accident cases, *Hammett v. Miller*, 10; *Carter v. Motor Lines*, 193; *Stewart v. Cab Co.*, 368; on issue of negligence, *Lee v. Upholstery Co.*, 88; *Marzelle v. Manufacturing Co.*, 674; on issue of contributory negligence, *Lee v. Upholstery Co.*, 88; sufficiency of evidence and nonsuit in criminal cases generally, *S. v. Cogdale*, 59; *S. v. Rogers*, 67; *S. v. Davenport*, 475; *S. v. Ewing*, 535; *S. v. Hough*, 596; in prosecutions for receiving, *S. v. Yow*, 585; evidence of identity *held* sufficient, *S. v. Cogdale*, 59; sufficiency of evidence in nonsuit in prosecution for conspiracy, *S. v. Warren*, 380; *S. v. Davenport*, 475; *S. v. Blanton*, 517; evidence of illegal possession of liquor *held* sufficient, *S. v. Wilson*, 43; evidence *held* sufficient in prosecution for assault with intent to commit rape, *S. v. Rogers*, 67; evidence *held* sufficient in prosecution for rape, *S. v. Thompson*, 19; upon insufficiency of evidence to prove assault with intent to commit rape, nonsuit cannot be granted where evidence is sufficient to sustain assault on female, *S. v. Moore*, 326; *S. v. Johnson*, 587; evidence *held* sufficient in prosecution of assault with intent to kill, *S. v. Revels*, 34; sufficiency of evidence and nonsuit in homicide prosecutions, *S. v. Montgomery*, 100; *S. v. Phillips*, 227; *S. v. Kirksey*, 445; *S. v. Ewing*, 535; *S. v. Hough*, 596; *S. v. Stanley*, 650; *S. v. DeMai*, 657.

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—To plaintiff not required for filing of defense bond in ejectment, *Privette v. Allen* 164; grantee accepting conveyance subject to unrecorded instrument estopped to deny notice, *Trust Co. v. Braznell*, 211.

Nuisances—Nature and grounds of remedy of abatement of public nuisances, *McLean v. Townsend*, 642.

Objections — Exception to evidence must be supported by objection to question and motion to strike answer, *S. v. Artis*, 371.

Officers of the Law—Exemption from speed limits in apprehending law violators, *Glosson v. Trollinger*, 84; custody of vehicle seized for illegal transportation, *S. v. Law*, 103.

Opinion Evidence—As to competency of driver is incompetent, *Hoke v. Greyhound Corp.*, 412; as to position of deceased when fatal injury inflicted, *S. v. Stanley*, 650; invasion of province of jury, *Lowe v. Hall*, 541.

Options—See Vendor and Purchaser; by accepting benefits, heirs ratify option or lease of deceased mentally incompetent lessor, *Walker v. McLaurin*, 53.

Parent and Child—Liability for support of child, *Wells v. Wells*, 614.

Parking—*Hammett v. Miller*, 10.

Parks—Expenditure for is not necessary municipal expense, *Purser v. Ledbetter*, 1.

Partial Intestacy—Presumption against, *Jones v. Jones*, 424.

Parties—Lessee may maintain action against lessor's grantee to reform deed, *Trust Co. v. Braznell*, 211; corporation itself not necessary party in proceeding under G. S., 55-114; *Thomas v. Baker*, 226; court will look beyond nominal party to prevent wrongdoer

from recovering for own misconduct, *Davenport v. Patrick*, 686; parties who may or must be joined as defendants, *Owen v. Hines*, 236; right to intervene, *Moore v. Massengill*, 244; joinder of additional parties in general, *Moore v. Massengill*, 244; *Colbert v. Collins*, 395.

Partition—On trial of issue raised by plea of sole seizin, evidence *held* sufficient, *Creech v. Corbett*, 276.

Party Aggrieved—Who may appeal, *Gill v. McLean*, 201.

Penalty—It must appear from complaint that transactions occurred in other county to justify removal of action for statutory penalty, *Flythe v. Wilson*, 230.

Pending Action—Plea in abatement for pendency of action, *Boney v. Parker*, 350.

Per Stirpes—Limitation over to testator's children and grandchildren takes estate to class *per capita*, *In re Battle*, 672.

Peremptory Instructions—In favor of plaintiff *held* error, *Thrift Corp. v. Guthrie*, 431; in criminal prosecution, *S. v. Godwin*, 449; *S. v. Boldin*, 594.

Perjury—Subornation of perjury, *S. v. Cannon*, 338.

Perpetuities—Rules against do not apply to charitable trusts, *Reynolds Foundation v. Trustees of Wake Forest College*, 500.

Personal Property—Lease is, *Moche v. Leno*, 159; survivorship in, *Wilson v. Ervin*, 396; action must be for recovery of specific articles of personalty to justify removal to county wherein situate, *Flythe v. Wilson*, 230.

Photographs — Competency in evidence, *S. v. Stanley*, 650.

Physicians and Surgeons—Communications between defendant and alienist are not privileged, *S. v. Litteral*, 527; expert testimony, *S. v. Stanley*, 650; application and use of knowledge or skill, *Gray v. Weinstein*, 463; sufficiency of evidence of malpractice, *Gray v. Weinstein*, 463.

Plea in Abatement—For pendency of action, *Boney v. Parker*, 350.

Pleadings—Pleading fraud, *Development Co. v. Bearden*, 124; of statute of limitations, see Limitations of Actions; in ejectment, see Ejectment; failure to deny allegation is admission of truth of fact alleged, *Light Co. v. Sloan*, 151; *held* sufficient to allege that driver was defendant's employee, *Presnell v. Beshears*, 279; bill of discovery to obtain information to draft complaint, *Flanner v. St. Joseph Home*, 342; in civil action competent in criminal prosecution to corroborate witness, *S. v. Phillips*, 277; joinder of causes, *Owen v. Hines*, 236; office and prerequisites of reply, *Williams v. Thompson*, 166; office and effect of demurrer, *Hodges v. Hodges*, 334; *Winston v. Lumber Co.*, 339; *Wells v. Wells*, 614; *Gentry v. Hot Springs*, 665; defects appearing on face of pleading and "speaking demurrers," *Hodges v. Hodges*, 334; demurrer for misjoinder of parties and causes, *Owen v. Hines*, 236; demurrer for failure of complaint to state cause, *Presnell v. Beshears*, 279; form and effect of judgments upon demurrers, *Temple v. Watson*, 242; amendment of pleadings after issue joined, *Hylton v. Mount Airy*, 622; proof without allegation, *Suggs v. Braxton*, 50; motions for bill of particulars or that pleading be made more definite, *Privette v. Moore, Building Co. v. Jones*, 282; motions to strike, *Development Co. v. Bearden*, 124, *Privette v. Morgan*, 264, *Williams v. Thompson*, 166.

Policeman—Death from heart disease caused by unusual exertion *held* accident, *Gabriel v. Newton*, 314.

Possession—Presumption of larceny from recent possession, *S. v. Jones*, 47.

"Powers"—Of revocation of deeds, *Pinkham v. Mercer*, 72.

Prayer for Relief—Party may not challenge correctness of judgment entered in accordance with prayer, *Dillon v. Wentz*, 117.

"Pregnant"—*S. v. Jordan*, 579.

Prejudicial Error—See Harmless and Prejudicial Error.
Premature Appeal—Appeal from order of clerk adjudging petitioners entitled to cartway *held* not premature, *Triplett v. Lail*, 274.
Premeditation and Deliberation—Indictment for murder need not allege, *S. v. Kirksey*, 445; brutality of killing may be evidence of, *S. v. Stanley*, 650.
Presumptions—Distinguished from inference, *S. v. Revels*, 34; presumption of continuance of insanity after adjudication, *Tomlins v. Cranford*, 323; against partial intestacy, *Jones v. Jones*, 424; of death after seven years absence, *Trust Co. v. Deal*, 691; from killing with deadly weapon, *S. v. Staton*, 409; from possession of inoxicating liquor, *S. v. Wilson*, 43; of larceny from recent possession, *S. v. Jones*, 47; arising from recent possession does not apply to charge of receiving, *S. v. Yow*, 585; that deed of corporation under seal was executed by authority, *Tuttle v. Building Corp.*, 146; title presumed out of the State, *Smith v. Benson*, 56; all persons presumed to have knowledge of general statutes regardless of delay in publication, *Pinkham v. Mercer*, 72; provisions of theft policy that mysterious disappearance of insured property presumed due to theft, *Davis v. Indemnity Co.*, 80; where findings are not set forth, presumption is that essential facts were found, *Craver v. Spaugh*, 129.
Prima Facie—Possession of intoxicating liquor raises *prima facie* case, *S. v. Wilson*, 43.
Principal and Agent—Real estate agent, see Brokers; distinction between principal and employer, *Unemployment Compensation Comm. v. Nissen*, 216; ratification and estoppel, *Tomlins v. Cranford*, 324; liability of principal for wrongful acts of agent, *Carter v. Motor Lines*, 193; for negligent driving of agent see *Carter v. Motor Lines*, 193 *Harris v. Carter*, 262; *Presnell v. Beshears*, 279, *Temple v. Stafford*, 630.
Principals—Aiders and abettors in commission of misdemeanor are guilty as, *S. v. Gibbs*, 677.
Privileged Communications — Where attorney declines proffered employment, communications are not privileged, *S. v. Davenport*, 475; where defendant testifies as to communication with attorney, State may cross-examine him in regard thereto, *S. v. Artis*, 371; communications between defendant and alienist are not privileged, *S. v. Litteral*, 527.
Probata—Not supported by allegata is unavailing, *Suggs v. Braxton*, 50; *S. v. Jones*, 94.
Probate—See Wills.
Process—Motion by nonresident to set aside judgment by default, *Russell v. Edney*, 203.
Processioning Proceeding—Action in ejectment, unlike processioning proceeding, may be dismissed as of nonsuit, *Smith v. Benson*, 56; boundaries, see Boundaries.
Production of Writings—*Flanner v. Saint Joseph Home*, 342.
Profanity—Prosecution for disorderly conduct for using profanity in public place, *S. v. Jones*, 170.
Prohibition—See Intoxicating Liquor.
Property—Action must be for recovery of specific articles of personalty to justify removal to county wherein situate, *Flythe v. Wilson*, 230; lease is personal property, *Moche v. Leno*, 159; standing timber is realty, *Winston v. Lumber Co.*, 339.
Property Right—Franchise is, *Boyce v. Gastonia*, 139.
Proximate Cause—*Hammett v. Miller*, 10; *Lee v. Upholstery Co.*, 88; *Klassette v. Drug Co.*, 353.
Public Nuisance—Abatement of, *McLean v. Townsend*, 642.
Public Officers—Self-interest disqualifies, *In re Advisory Opinion*, 705; amount of compensation, *In re Advisory Opinion*, 705.
Public Policy—Mortgage executed for difference between original mortgage debt and amount received in satisfaction from Federal Land

Bank mortgage, *held* void, *Cauble v. Trexler*, 307; contract not to engage in same business after termination of employment, *Exterminating Co. v. Wilson*, 96; *Sonotone Corp. v. Baldwin*, 387.

Public Purpose—Expenditure for public parks is public purpose but not necessary municipal expense, *Purser v. Ledbetter*, 1; maintenance of municipal hotel is not public purpose, *Nash v. Tarboro*, 283.

Public Streets—Findings held to support conclusion that municipality acquired street prior to charter amendment directing that streets thereafter acquired be not less than 30 feet in width, *Hylton v. Mount Airy*, 622.

Publication—Motion by non-resident to set aside judgment by default, *Russell v. Edney*, 203.

Punitive Damages — May not be awarded in absence of actual damages, *Gaskins v. Sidbury*, 468.

Purchase—As contradistinguished from descent, *Jones v. Jones*, 424.

Question of Law and of Fact—What is public purpose is question of law, *Nash v. Tarboro*, 283; sufficiency of evidence is question of law for the courts, *Klassette v. Drug Co.*, 353.

Quieting Title—*Moore v. Massengill*, 244; *Cauble v. Trexler*, 307; *Edwards v. Benbow*, 466.

"Quick With Child"—*S. v. Jordon*, 579.

Racial Discrimination—Exclusion of Negroes from the jury, *S. v. Kirksey*, 445; *S. v. Koritz*, 552.

Railroads—Injury to boy climbing on cross ties piled on platform, *Boyette v. R. R.*, 406; action to recover for killing of livestock, *Coburn v. R. R.*, 695; municipal franchise, *Boyce v. Gastonia*, 139.

Rape—Force is necessary element, *S. v. Thompson*, 19; sufficiency of evidence and nonsuit, *S. v. Johnson*, 19; evidence insufficient to show assault on female, *S. v. Silver*, 352; sufficiency of evidence of assault with intent to commit rape, *S. v. Rogers*, 67; *S. v. Moore*, 326; less degree of crime charged, *S. v. Brown*, 384; *S. v. Moore*, 326; *S. v. Johnson*, 587.

Ratification—By accepting benefits, heirs ratify option or lease of deceased mentally incompetent lessor, *Walker v. McLaurin*, 53; by corporation of acts of officers, *Thomas v. Baker*, 226; acceptance of benefits estops party from denying agency, *Tomlins v. Cranford*, 323.

Real Chattels—Lease is, *Moche v. Leno*, 159.

Real Estate Agent—See Brokers.

Realty—Contracts to convey, see Vendor and Purchaser.

Receiving Stolen Goods—Knowledge and felonious intent, *S. v. Yow*, 585; sufficiency of evidence, *S. v. Yow*, 585, verdict, *ibid.*

Recent Possession—Presumption of larceny from, *S. v. Jones*, 47; presumption arising from does not apply to charge of receiving, *S. v. Yow*, 585.

Record—Imports verity, *S. v. Gause*, 26; *S. v. Wolfe*, 461; *S. v. Johnson*, 587; court can judicially know only what appears of record, *Tomlins v. Cranford*, 323; cause will be determined in accordance with facts appearing of record, *Ingram v. Easley*, 442; party may not claim by adverse possession in face of stipulation of record that title was not in question, *Austin v. Hopkins*, 638; only one required upon separate appeals in same action, *Hoke v. Greyhound Corp.*, 412.

Recorder's Courts—Count on which defendant is found not guilty in Recorder's Court is not before Superior Court on appeal, *S. v. Jones*, 170.

Recreation—Expenditure for is not necessary municipal expense, *Purser v. Ledbetter*, 1.

Reformation of Instruments—Mutual mistake, *Trust Co. v. Braznell*, 211; parties, *Trust Co. v. Braznell*, 211; sufficiency of evidence, *Akin v. Bank*, 453.

Registration—As notice, *Trust Co. v. Braznell*, 211.

Redundant Matter—Motions to strike *Development Co. v. Bearden*,

124; *Williams v. Thompson*, 166; *Privette v. Morgan*, 264.

Referendum—Vote is necessary for expenditure of municipal funds for parks or recreational facilities, *Purser v. Ledbetter*, 1.

Registration—Recording of Wills of nonresidents, *Coble v. Coble*, 547.

Removal of Cloud on Title—Party claiming under independent source may not intervene, *Moore v. Massengill*, 244; action *held* one to quiet title and not attacking mortgage for fraud, *Cauble v. Trexler*, 307.

Reply—*Williams v. Thompson*, 166.

Rescission—Of contract, *Bell v. Brown*, 319.

Reservations and Exceptions—Deed subject to leasehold estate valid notwithstanding lease unrecorded, Trust Co. v. Braznell, 211.

Res Gestate—*S. v. Cogdale*, 59; *S. v. DeMai*, 657.

Res Ipsa Loquitur—Fact that truck runs into building is sufficient evidence of negligence, *Carter v. Motor Lines*, 193.

Res Judicata—*Craver v. Spaugh*, 129; does not preclude court from again declaring the validity of trust, *Reynolds Foundation v. Trustees of Wake Forest College*, 500.

Respondeat Superior—Actions to hold owner liable for driver's negligence, *Carter v. Motor Lines*, 193; *Harris v. Carter*, 262; *Presnell v. Beshears*, 279; *Temple v. Stafford*, 630; city not liable for negligence of officers in performance of governmental functions, *Gentry v. Hot Springs*, 665.

Restraining Order—See Injunctions.

Restraint of Trade—Contract not to engage in same business after termination of employment, *Exterminating Co. v. Wilson*, 96; *Sonotone Corp. v. Baldwin*, 387.

Retirement Systems—Municipal may be dissolved upon joinder of members in local governmental employers' retirement system, *Dillon v. Wentz*, 117.

Revocation—Of voluntary deed, *Pinkham v. Mercer*, 72.

Rifle—Pointing rifle at person resulting in fatal injury is manslaughter, *S. v. Boldin*, 594.

Robbery—Murder committed in perpetration of, *S. v. Montgomery*, 100; prosecution for attempted robbery with firearms, *S. v. Jones*, 402.

Rupture—Of intervertebral disc held accident, *Edwards v. Publishing Co.*, 184.

Salaries—General Assembly may not raise salaries of its members, *In re Advisory Opinion*, 705.

Sales—Counterclaim for breach of warranty, *Palmer v. Jennette*, 377.

Seal—Is not necessary to a lease, *Moche v. Leno*, 159; instrument insufficient as conveyance of timber because of want of seal *held* effectual as contract to convey, *Chandler v. Cameron*, 233; on corporate deed raises presumption it was executed by authority, *Tuttle v. Building Corp.*, 146.

Secondary Evidence — Recitals in sheriff's deed are, *Board of Education v. Gallop*, 599.

Self-Defense—Instruction on, *S. v. Fairley*, 134; *S. v. DeMai*, 657.

Self-Incrimination — Fitting defendant's shoes in tracks does not violate constitutional right, *S. v. Ragland*, 162.

Self-Serving Declarations—*Williams v. Young*, 472.

Seizures—Custody of vehicle seized for illegal transportation, *S. v. Law*, 103.

Service of Process—Motion by nonresident to set aside judgment by default, *Russell v. Edney*, 203.

Service of Statement of Case on Appeal—Service not required upon appeal from denial of motion upon facts found, *Privette v. Allen*, 164; extension may not be given beyond term of Supreme Court to which appeal must be taken, *S. v. Lampkin*, 620; dismissal of appeal for failure to file statement of case, *S. v. Ewing*, 107; *S. v. McLeod*, 411; *S. v. Sanders*, 474; *S. v. O'Dear*, 649; *S. v. Cherry*, 650; *S. v. Douglas*, 696.

Settlement of Case on Appeal—Procedure where death of judge prevents settlement of case, *S. v. Cannon*, 336; only trial judge has jurisdiction in regard to settlement, *Hoke v. Greyhound Corp.*, 374.

Shade Trees—Not negligence for municipality to have shade trees along its streets, *Hammett v. Miller*, 10.

Sheriff—Exemption from speed limits in apprehending law violators, *Glosson v. Trollinger*, 84; execution sale, see Execution.

Sic Utere Tuo, etc.—*Thomas v. Baker*, 226.

Sidewalk—Liability for injury to pedestrian, *Klassette v. Drug Co.*, 353; *Marzelle v. Manufacturing Co.*, 674.

Signing of Judgments—Exception to, *Land Bank v. Cherry*, 105; *Manning v. Insurance Co.*, 251; *Hylton v. Mount Airy*, 622; exception to judgment does not present sufficiency of evidence to support findings, *Brown v. Truck Lines*, 65; but where finding is predicated upon legal effect of written instrument, question is one of law presented by exception to judgment, *Brown v. Truck Lines*, 299.

Similar Facts and Transactions—*S. v. Kelly*, 62.

Simple Instrumentalities—Contributory negligence in operation of, *Lee v. Upholstery Co.*, 88.

Skidding—Not alone sufficient to show negligence, *Hoke v. Greyhound Corp.*, 412.

Soldiers—Letters of *held* ineffectual to create trust, *Wescott v. Bank*, 39.

Solicitor—Attorney-General and not Solicitor must institute suit to abate public nuisance, *McLean v. Townsend*, 642.

"Speaking" Demurrer — *Hodges v. Hodges*, 334.

Special Emoluments—*Boyce v. Gastonia*, 139.

Specific Performance — Action for may not be maintained against broker even though he later acquires title, *Strickland v. Bingham*, 221; actions for, *Bell v. Brown*, 319; *Lowe v. Hall*, 541.

Standing Timber—Is realty, *Winston v. Lumber Co.*, 339; action against third person for inducing vendor to breach contract to convey, *Winston v. Lumber Co.*, 339.

State Retirement System—Dissolution of mutual benefit association upon joining in State Retirement System, *Dillon v. Wentz*, 117.

Statement of Case on Appeal—Service not required upon appeal from denial of motion upon facts found, *Privette v. Allen*, 164; procedure where death of judge prevents settlement of case, *S. v. Cannon*, 336; extension for service may not be given beyond term of Supreme Court to which appeal must be taken, *S. v. Lampkin*, 620.

States—Act of Congress within constitutional powers is supreme, *Taylor v. Motor Co.*, 365; State court has no jurisdiction over crimes committed outside of State, *S. v. Jones*, 94; but has jurisdiction over conspiracy effectuated here though conspiracy be formed in another state, *S. v. Warren*, 380.

Statute of Frauds—See Frauds, Statute of.

Statutes—Where statute provides for referendum, vote is prerequisite whether terms of statute are permissive or mandatory, *Purser v. Ledbetter* 1; validity of statutes changing limitations, *Pinkham v. Mercer*, 72; laws in force at time and place of contract become part of, *Boyce v. Gastonia*, 139; all persons presumed to have knowledge of general statutes regardless of delay in publication, *Pinkham v. Mercer*, 72; omission of enacting clause is fatal, *In re House Bill* No. 65, 708; penal statutes strictly construed, *S. v. Jordan*, 579; construction in regard to constitutionality, *Nesbitt v. Gill*, 174; *Nash v. Royster*, 283.

Statutes of Limitations—See Limitations of Actions.

Stipulation of Record—Party may not claim by adverse possession in

face of stipulation of record that title was in question, *Austin v. Hopkins*, 638.

Stores—Liability for injury to pedestrian on abutting sidewalk, *Klassette v. Drug Co.*, 353; *Marzelle v. Manufacturing Co.*, 674.

Street Railway—Municipal franchise, *Boyce v. Gastonia*, 139.

Subletting—Assignment of lease and subletting are not same, *Rogers v. Hall*, 363.

Streets—Not negligence for municipality to have shade trees along its streets, *Hammett v. Miller*, 10; parking on, *Hammett v. Miller*, 10; contract by city to remove tracks of street railway, *Boyce v. Gastonia*, 139; findings *held* to support conclusion that municipality acquired street prior to charter amendment directing that streets thereafter acquired be not less than 30 feet in width, *Hylton v. Mount Airy*, 622.

Subornation of Perjury—*S. v. Cannon*, 338.

Sudden Emergency—*Hoke v. Greyhound Corp.*, 412.

Summary Ejectment—See Ejectment.

Superior Courts—Appeal from Municipal-County court, *S. v. Wilson*, 43; count on which defendant is found not guilty in Recorder's Court is not before Superior Court on appeal, *S. v. Jones*, 170; appeal from order of clerk adjudging petitioners entitled to cartway *held* not premature, *Triplett v. Lail*, 274; jurisdiction of Superior Court where corporation is unable to elect officers, *Thomas v. Baker*, 226; jurisdiction of to correct judgment, *Land Bank v. Cherry*, 105; has concurrent jurisdiction for enforcement of civil remedies under Emergency Price Control Act, *Taylor v. Motor Co.*, 365; has discretionary power to change venue, *English v. Brigman*, 260; court has discretionary power to deny motion for continuance in absence of counsel, *Tomlins v. Cranford*, 323; motion to strike made in apt time is not discretionary, *Development Co. v. Bearden*, 124; *Privette v. Morgan*, 264; only trial court has jurisdiction of matters relating to appeal, *Hoke v. Greyhound Corp.*, 374; ordinarily will not exercise original jurisdiction in matters within scope of powers of Utilities Commission, *Coach Co. v. Transit Co.*, 391.

Supreme Court—Is bound by record, *S. v. Gause*, 26; appellate jurisdiction on review, see Appeal and Error; supervisory power of, *Wescott v. Bank*, 644; will dismiss action *ex mero motu* for want of jurisdiction, *S. v. Jones*, 94; discretionary denial for new trial for newly discovered evidence not appealable, *S. v. Blair*, 70; motion in Supreme Court to amend complaint, *Hylton v. Mount Airy*, 622; duty to declare statute unconstitutional, *Nash v. Tarboro*, 283; court can judicially know only what appears of record, *Tomlins v. Cranford*, 323.

Surface Waters—Drainage of, *Davis v. R. R.*, 561.

Surprise—Motion to set aside judgment for, *Presnell v. Beshears*, 279; *Rierson v. York*, 575.

Survivorship—In personalty, *Wilson v. Ervin*, 396.

Suspended Executions—Evidence *held* insufficient to show violation of conditions of suspension of execution, *S. v. Sullivan*, 680.

Tacking Possession—*Boyce v. White*, 640.

Taxation—"Contribution" imposed by Unemployment Compensation Law is a tax, *Unemployment Compensation Comm. v. Harvey & Son Co.*, 291; State tax on interstate commerce, *Nesbitt v. Gill*, 174; classification of businesses for taxation, *Nesbitt v. Gill*, 174; necessary expenses, *Purser v. Ledbetter*, 1; public purpose, *Nash v. Tarboro*, 283; license taxes, *Nesbitt v. Gill*, 174; claim for return of taxes paid under protest, *R. R. v. Polk County*, 697; tax deeds and titles, *Pearce v. Rowland*, 590.

Taxicabs—Liability of taxi company for assault by intruders on passenger, *Smith v. Cab Co.*, 572.
Telephone Conversations—*S. v. Gardner*, 37.
Temporary Restraining Order—See Injunctions.
Tenants in Common—Partition, see Partition; whether tenant's redemption of land was benefit of co-tenants *held* for jury, *Pearce v. Rowland*, 590.
Testamentary Capacity—See Wills.
Theft Insurance—*Davis v. Indemnity Co.*, 80.
Theory of Complaint—Determines the recovery, *Suggs v. Braxton*, 50.
Theory of Trial—Appeal will follow, *Thrift Corp. v. Guthrie*, 431.
Timber—Purchaser's right to enjoin cutting of timber, see Injunctions; action for negligent burning of, *Lumber Co. v. Elizabeth City*, 270; is realty, *Winston v. Lumber Co.*, 339; action against third person for inducing vendor to breach contract to convey, *Winston v. Lumber Co.*, 339; contract *held* one of employment and not to convey standing timber, *Johnson v. Wallin*, 669.
Torts—Liability of municipality for, *Klassette v. Drug Co.*, 353; *Gentry v. Hot Springs*, 665; particular torts, see particular titles of torts.
Trade Fixtures—Right of lessee to remove upon death of life tenant lessor, *Haywood v. Briggs*, 108.
Trades—Within license tax provision, *Nesbitt v. Gill*, 174.
Transaction or Communication with Decedent—*Wilson v. Ervin*, 396; *Williams v. Young*, 472.
Trees—Not negligence for municipality to have shade trees along its streets, *Hammett v. Miller*, 10.
Trial—Of criminal actions, see Criminal Law; trial of particular actions and proceedings, see particular heads; continuance, *Tomlins v. Cranford*, 323; argument and conduct of counsel, *Trust Co. v. Braznell*, 211; consolidation of actions, *Dixon v. Brockwell*, 567; withdrawal of evidence, *Hoke v. Greyhound Corp.*, 412; variance may be taken advantage of by motion to nonsuit, *Suggs v. Braxton*, 50; motion must be first made at close of plaintiff's evidence, *Tomlins v. Cranford*, 323; sufficiency of of evidence in general, *Lumber Co. v. Elizabeth*, 270; peremptory instructions, *Thrift Corp. v. Guthrie*, 431; charge on burden of proof, *In re Will of West*, 204; expression of opinion by court in charge, *Hoke v. Greyhound Corp.*, 412; statement of contentions, *In re Will of West*, 204; requests for instructions, *Hoke v. Greyhound Corp.*, 412; judgment *non obstanti veredicto*, *Palmer v. Jennette*, 377; *Dupree v. Moore*, 626; new trial for matter prejudicing jury, *Hoke v. Greyhound Corp.*, 412.
Trucks—Owner driving truck in interstate commerce under lease agreement with franchise carrier *held* employee and not independent contractor, *Brown v. Truck Lines*, 299; licensing of carriers, see Carriers; negligent operation of, see Automobiles.
Trusts—Created by will, see Wills; running of statute against action to have fiduciary declared constructive trustee, *Sheppard v. Sykes*, 606; action to establish parol trust, *Hodges v. Hodges*, 334; soldier's letters remitting money to bank held not to create trust, *Wescott v. Bank*, 39; charitable trust, *Reynolds Foundation v. Trustees of Wake Forest*, 500; constructive trusts, *Pearson v. Pearson*, 31; *Development Co. v. Bearden*, 124; *Owen v. Hines*, 236; *Strickland v. Bingham*, 221; *Akin v. Bank*, 453; jurisdiction to authorize sale of trust property may not be invoked in proceedings under declaratory judgment act, *Brandis v. Trustees of Davidson*, 329; nonsuit is inappropriate in action for advice of court in administration of trust, *Trust Co. v. Deal*, 691.
Turlington Act—See Intoxicating Liquor.
Unemployment Compensation Commission—See Master and Servant.

United States—Where Federal Court releases prisoner to sheriff, State Court acquires jurisdiction, *S. v. Litteral*, 527.

Utilities Commission — Jurisdiction and orders, *Coach Co. v. Transit Co.*, 391; appeals from, *Utilities Comm. v. McLean*, 679.

Variance—Can be taken advantage of by motion to nonsuit, *Suggs v. Braxton*, 50; *S. v. Law*, 103; between indictment and proof, *S. v. Jones*, 94; *S. v. Law*, 103.

Vendor and Purchaser—Vendor in executory contract cannot be guilty of embezzlement, *S. v. Blair*, 70; specific performance of contracts, see Specific Performance; purchaser's right to enjoin cutting of timber, see Injunctions; action by vendor for specific performance, *Lowe v. Hall*, 541; right of contractee to recover for improvements, *Dupree v. Moore*, 626; contract held one of employment and not to convey standing timber, *Johnson v. Wallin*, 669; form and requisites of agreement, *Chandler v. Cameron*, 233; *Winston v. Lumber Co.*, 339; construction and operations of contract, *Winston v. Lumber Co.*, 339; rescission and abandonment, *Bell v. Brown*, 319; action against third person including breach, *Winston v. Lumber Co.*, 339.

Venue—Action by trustee in bankruptcy, *Flythe v. Wilson*, 230; action for penalties, *Flythe v. Wilson*, 230; to recover articles of personalty, *Flythe v. Wilson*, 230; change of venue by court, *English v. Brigman*, 260.

Verdict—General verdict will support judgment if only one count is sound, *S. v. Revels*, 34; in criminal cases must be free from ambiguity, *S. v. Jones*, 47; sufficiency of to support sentence for receiving stolen goods, *S. v. Yow*, 585; court may refuse to accept incomplete verdict and give jury additional instructions, *S. v. Litteral*, 527; error cured by, *S. v. Staton*, 409; *S. v. Hooper*, 633; *S. v. DeMai*, 657; conflicting is not ground for judgment *non obstante veredicto*, *Palmer v. Jennette*, 377; failure of verdict to refer to one count amounts to acquittal thereon, *S. v. Warren*, 380; *S. v. Wolfe*, 461; setting aside for error of law is reviewable, *Akin v. Bank*, 453.

"Vested Right"—*Pinkham v. Mercer*, 72; franchise is, *Boyce v. Gastonia*, 139.

Vesting—Of estates, *Robinson v. Robinson*, 155.

Veterans—Army discharge incompetent in negligent action, *Hoke v. Greyhound, Corp.*, 412.

Voluntary Deed — Revocation of, *Pinkham v. Mercer*, 72.

Vote—Is necessary for expenditure of municipal funds for parks or recreational facilities, *Purser v. Ledbetter*, 1.

War—Emergency Price Control, *Taylor v. Motor Co.*, 365; army discharge incompetent in negligent action, *Hoke v. Greyhound Corp.*, 412.

Warrant—On appeal from municipal county court, defendant may be tried on original warrant or on bill of indictment, *S. v. Wilson*, 43.

Waters and Water Courses—Surface waters, *Davis v. R. R.*, 561.

Whiskey—See Intoxicating Liquor.

Widows—Alleged fraud in allotment of year's allowance, *Development Co. v. Bearden*, 124; right of dower upon widow's dissent, *Coble v. Coble*, 547; widow administratrix can purchase at own sale to protect dower, *Privette v. Morgan*, 264; nature of dower, *Coble v. Coble*, 547; *Sheppard v. Sykes*, 606; possession adverse to heirs, *Sheppard v. Sykes*, 606; as constructive trustee for heirs, *Sheppard v. Sykes*, 606.

Wife's Separate Estate—*Ingram v. Easley*, 442.

Wills—Holographic will, *In re Will of Wallace*, 459; probate in common form, *Wescott v. Bank*, 39; recording will of nonresident, *Coble v. Coble*, 547; effect of probate, *In re Will of Neal*, 136; burden of proof in caveat proceedings, *In re Will of West*, 204; evidence of men-

tal incapacity, *In re Will of West*, 204; instruction in caveat proceedings, *In re Will of West*, 204; *In re Will of Wallace*, 459; issues, *In re Will of West*, 204; general rules of construction, *Robinson v. Robinson*, 157; *Jones v. Jones*, 424; *Conrad v. Goss*, 470; *In re Battle*, 672; presumption against partial intestacy, *Jones v. Jones*, 424; vested and contingent interests, *Robinson v. Robinson*, 155; *Conrad v. Goss*, 470; *Elder v. Johnson*, 592; life estates and remainders, *Jones v. Jones*, 424; designation of devisees, *In re Battle*, 672; residuary clauses, *Jones v. Jones*, 424; actions to construe wills, *Trust Co. v. Deal*, 691; right of wife to dissent and effect, *Coble v. Coble*, 547; lapse legacies, *Phillips v. Phillips*, 438.

Witnesses—Court may permit leading questions, *S. v. Cogdale*, 59; re-direct examination as to matter brought out on cross-examination, *S. v. Warren*, 380; transactions or communications with decedent, *Wilson v. Ervin*, 396; *Williams v. Young*, 472; privileged communications, *S. v. Artis*, 371; *S. v. Davenport*, 475; *S. v. Litteral*, 527; expression of opinion by court in examination of, *S. v. Davenport*, 475; *S. v. Woolard*, 645; in action for criminal conversation with husband wife may not testify as to incriminating declarations of husband, *Knighten v. McClain*, 682.

Women—Objection that women were excluded from jury panel, *S. v. Litteral*, 527.

Workmen's Compensation Act—See Master and Servant.

Wrongful Death—See Death.

Year's Allowance—Alleged fraud in allotment of, *Development Co. v. Bearden*, 124.

ANALYTICAL INDEX.

ABATEMENT AND REVIVAL.

§ 9. Pendency of Prior Action—Identity of Actions.

Plea in abatement for pendency of prior action *held* proper only as to parties whose liability is in issue in prior action. *Boney v. Parker*, 350.

ABORTION.

§ 1. Nature and Elements of the Crime in General.

G. S., 14-44, and G. S., 14-45, creates separate and distinct offenses, the first statute being designed to protect the life of a child *in venire sa mere*, and the second being primarily for the protection of the woman. *S. v. Jordan*, 579.

A prosecution under an indictment charging that defendant prescribed certain drugs for a pregnant woman with intent to destroy the child, without allegation that the drug was prescribed with intent to procure a miscarriage or to injure or destroy the woman, is a prosecution under G. S., 14-44. *Ibid.*

§ 2. Administering or Prescribing Drugs with Intent to Destroy Unborn Child.

The words "either pregnant or quick with child" contained in G. S., 14-44, mean "pregnant with child that is quick," since otherwise the words "or quick with child" would be merely confusing surplusage, and since the *sine qua non* of the offense is the intent to destroy the child *in ventre sa mere*, which must be quick before it has independent life. *S. v. Jordan*, 579.

§ 10. Sufficiency of Evidence and Nonsuit.

Evidence that defendant, with intent to produce a miscarriage, gave a certain drug to a woman within thirty days after she had conceived, is insufficient to be submitted to the jury in a prosecution under G. S., 14-44, since in such instance the child could not be quick. *S. v. Jordan*, 579.

ACTIONS.

§ 3c. Actions Arising Out of Wrongful or Illegal Act.

Fact that contract is against good morals must appear on face of complaint in order to sustain demurrer. *Hodges v. Hodges*, 334.

Courts may exercise jurisdiction notwithstanding that parties are *in pari delicto* in order to advance public policy or in furtherance of justice when parties are not equally blameworthy. *Cauble v. Trexler*, 307.

Fraud gives rise to rights in favor of the defrauded but not in favor of the defrauder, since no one is permitted to found a claim on his own wrong. *Gaskins v. Sidbury*, 468.

Public policy will not permit a wrongdoer to enrich himself as a result of his own misconduct. *Davenport v. Patrick*, 686.

ADVERSE POSSESSION.

§ 4f. Hostile Character of Possession as Affected by Relationship Between the Parties—Widow and Heirs.

When a widow remains in possession of the whole estate under an unallotted dower right her possession is an extension of the possession of her deceased husband and is not deemed to be adverse to her children. *Sheppard v. Sykes*, 606.

ADVERSE POSSESSION—*Continued*

A mortgagor died leaving a minor widow and a child *in ventre sa mere*. The mortgage was foreclosed. The widow's father purchased at the foreclosure sale and conveyed to the widow when she attained her majority. *Held:* The widow entered into possession not as surviving widow but in her own right as purchaser, and therefore the principle that her possession is an extension of the possession of her deceased husband, is not applicable, since the continuity of possession was broken. *Ibid.*

§ 7. Tacking Possession.

A grantee claiming by adverse possession a strip of land lying outside of the boundaries called for in the deed may not tack his grantor's possession of such strip, the deed alone being insufficient to create privity between the grantor and the grantee as to such strip. *Boyce v. White*, 640.

§ 9c. Fitting Description to Land Claimed Under Color.

A deed is color of title only for the land designated and described therein, and the party asserting title by adverse possession must offer evidence fitting the description to the land claimed. *Smith v. Benson*, 56.

§ 17. Presumptions and Burden of Proof.

Adverse possession is affirmative defense with burden of proof on defendant. *Pearson v. Pearson*, 31.

§ 19. Sufficiency of Evidence and Nonsuit.

Where an administrator is in possession of lands of the estate under order of court permitting him to continue farming operation thereon, and he purchases at the foreclosure sale of a mortgage on the lands and remains in possession, in the absence of evidence offered by him tending to show when his possession became adverse to the devisees and that it was open, notorious and adverse to them so as to put them on notice, his motion to nonsuit in their action to have him declared a trustee of a constructive trust upon his defenses of adverse possession and laches should be denied. *Pearson v. Pearson*, 31.

In this processioning proceeding to locate the true boundary between the urban lands of the parties, plaintiffs' evidence was to the effect that they had used the strip of land in dispute as a driveway for ingress and egress to their premises for all purposes for the statutory period, that the respective parties had made aprons on the contiguous driveways to their respective properties and that the center between these aprons was the boundary line for which plaintiffs contended. *Held:* Plaintiffs' evidence of adverse user for the purpose for which the land seemed best fitted was sufficient to have been submitted to the jury, and nonsuit on the ground that such user was permissive is error. *White v. Woodard*, 332.

In this action to remove cloud from title, defendant's contention that plaintiff's evidence was sufficient to show adverse possession by defendant, entitling defendant to have the issue as to his adverse possession submitted to the jury, *held* untenable. *Edwards v. Benbow*, 466.

ALTERATION OF INSTRUMENTS.

§ 2. Rights and Remedies of Party Defrauded.

Where a grantee, prior to registration of a deed, fraudulently alters the description so as to include within its terms a greater quantity of land, grantor

ALTERATION OF INSTRUMENTS—*Continued.*

may not waive the fraud and recover the value of the additional land and at the same time recover damages for the fraud, but her remedy is an action to remove cloud from the title to that part of the land not covered by her deed and for damages for the consequent injuries. *Gaskins v. Sidbury*, 468.

APPEAL AND ERROR.

§ 1. Nature and Grounds of Appellate Jurisdiction of Supreme Court in General.

If the Superior Court is without jurisdiction of a proceeding the Supreme Court obtains no jurisdiction by an appeal. *Gill v. McLean*, 201.

§ 3. Parties Who May Appeal—"Party Aggrieved."

Where a proceeding to garnishee funds in a bank account belonging to a delinquent taxpayer, G. S., 105-242, is dismissed for want of jurisdiction, neither the garnishee nor the alleged delinquent taxpayer is the "party aggrieved," G. S., 1-271, and neither may prosecute an appeal. *Gill v. McLean*, 201.

§ 6a. Parties Entitled to Object and Take Exception.

Where judgment is entered in accordance with prayer of a party, notwithstanding that his prayer for relief be in the alternative, such party is not entitled to challenge the correctness of the provisions of the judgment inserted at his request or in conformity with his prayer. *Dillon v. Wentz*, 117.

A party who moves for dismissal is in no position to complain of judgment of dismissal even though entered on a ground other than the one advanced by him. *Gill v. McLean*, 201.

§ 6c (3). Exceptions to Findings of Fact.

Defendant requested the court to make certain findings. The court made other findings as set out in the judgment, and signed and entered the judgment, to which defendant excepted. *Held:* The exception was no more than an exception to the signing of the judgment. *Manning v. Ins. Co.*, 251.

§ 6c (4). Objections and Exceptions to Evidence.

Where the record fails to show what the witness' answer would have been if permitted to testify and the relevancy or materiality of the answer is not made apparent, assignment of error to the exclusion of the testimony cannot be sustained. *Williams v. Young*, 472.

Where the property rights of minors are involved, the protection of these interests by the court is of more importance than the rigid enforcement of the rules relating to the preservation of objections and exceptions to the admission or exclusion of evidence. *Trust Co. v. Deal*, 691.

§ 6c (6). Requirement That Matter Be Brought to Trial Court's Attention to Support Exception to Charge.

As a general rule the ground for objecting to the statement of contentions must be brought to the court's attention in apt time to afford opportunity for correction in order for an exception based thereon to be considered, but this rule has many exceptions based upon the importance of the inadvertence and its probable prejudicial effect. *In re Will of West*, 204.

APPEAL AND ERROR—*Continued.*

§ 7. Necessity for Apt Motions to Nonsuit to Present Question of Sufficiency of Evidence.

An exception to the refusal of a motion for judgment as of nonsuit which is made for the first time at the conclusion of all the evidence presents no question for review. *Tomlins v. Cranford*, 323.

§ 8. Theory of Trial in Lower Court.

An appeal will be determined in accordance with the theory of trial in the lower court. *Thrift Corp. v. Guthrie*, 431.

§ 10a. Duty to Make Out and Serve Statement of Case on Appeal.

Upon appeal from judgment denying motion from facts found, record is case on appeal, and appellant is not required to serve statement. *Privette v. Allen*, 164.

§ 10e. Settlement of Case on Appeal.

The trial judge alone has jurisdiction of matters pertaining to settlement of case on appeal, even though he is out of the district or has retired, and he alone has jurisdiction to modify, amend or strike out entries of appeal or extension of time for service of case on appeal and countercase, or motion to strike out purported case on appeal. *Hoke v. Greyhound Corp.*, 374.

§ 14. Powers of, and Proceedings in Lower Court After Appeal.

After appeal from judgment rendered, the Superior Court has no further jurisdiction of the cause, except (1) that the trial court during the term may modify, amend or set the judgment aside, (2) the judge presiding at a subsequent term may adjudge that the appeal has been abandoned and proceed as though no appeal had been taken, (3) the trial judge has jurisdiction of all matters pertaining to settlement of case on appeal. *Hoke v. Greyhound Corp.*, 374.

§ 20b. Form and Requisites of Transcript—Separate Appeals.

Where there are two appeals in one action, only one transcript, with separate statements of cases on appeal, should be filed. Rule of Practice in the Supreme Court No. 19 (2). *Hoke v. Greyhound Corp.*, 412.

§ 20c. Matters Properly Included in and Appearing of Record.

Where jury trial is waived and the cause submitted to the court by agreement, a deed appearing in the case agreed signed by the parties and which is referred to in the statement of facts agreed, will be considered on appeal notwithstanding objection that the deed was not offered in evidence. *Ingram v. Easley*, 442.

§ 22. Conclusiveness and Effect of Record.

The Supreme Court can judicially know only what appears of record. *Tomlins v. Cranford*, 323.

Defendant claimed under a deed executed to her ancestor some years prior to the time in question, and introduced the deed in evidence. Plaintiff contended that the evidence failed to show title in the ancestor at the time in question because of want of evidence that the ancestor had not conveyed the property in the interim. *Held:* The Court will not assume the existence of documents about which there is no proof and which plaintiff was under duty

APPEAL AND ERROR—*Continued.*

to offer in evidence if they exist, but will decide the case upon the facts appearing of record. *Ingram v. Easley*, 442.

§ 29. Assignments of Error Not Brought Forward in Briefs.

Assignments of error not brought forward in the brief are deemed abandoned. Rules of Practice in the Supreme Court, No. 28. *Bell v. Brown*, 319.

§ 30a. Abandonment of Appeals—Jurisdiction of Superior Court.

The judge presiding, after notice and on proper showing, may adjudge that an appeal taken at a prior term had been abandoned, and proceed in the cause as if no appeal had been taken. *Hoke v. Greyhound Corp.*, 374.

§ 31b. Motion to Dismiss for Failure to Serve Case on Appeal.

Upon exception and appeal from judgment denying a motion upon facts found and incorporated in the judgment, the record constitutes the case on appeal, and appellant is not required to serve a statement of case on appeal, and motion to dismiss for his failure to do so will be denied. G. S., 1-282. *Privette v. Allen*, 164.

§ 31d. Dismissal of Appeal for Failure to File Briefs.

Where appellant does not file a brief his appeal will be dismissed. Rule of Practice in the Supreme Court, No. 28. *Wilson v. Ervin*, 396.

§ 31j. Dismissal of Appeal for Want of Jurisdiction.

Plaintiffs, contending that the recitals of notice of appeal and agreement for extension of time of service of case on appeal and countercase, signed by the trial judge, were erroneous, moved before another judge at a subsequent term to strike appeal entries and the case on appeal subsequently served. Plaintiff appealed from judgment denying these motions. *Held:* The court was without jurisdiction to hear the motions and the appeal therefrom is dismissed. *Hoke v. Greyhound Corp.*, 374.

§ 37. Scope and Extent of Review in General.

In a proceeding under the Declaratory Judgment Act, the Supreme Court on appeal will not pass on questions relating to the construction of the contract in suit which were not presented for determination in the lower court. *Reynolds Foundation v. Trustees of Wake Forest*, 500.

§ 38. Presumptions and Burden of Showing Error.

Where the charge of the court is not brought forward in the record, it will be presumed to be without error. *Bell v. Brown*, 319.

§ 39f. Prejudicial and Harmless Error in Instructions in General.

While a charge must be considered contextually, such construction cannot be invoked to reconcile conflicting instructions upon a material aspect which are not inter-explanatory or correctional and remain repugnant after such construction. *In re Will of West*, 204.

Conflicting instructions upon a material aspect of the case must be held for reversible error. *Dixon v. Brockwell*, 567.

An exception to the charge will not be sustained when the charge is free from prejudicial error when read contextually. *Taylor v. Motor Co.*, 365; *Holmes v. Cab Co.*, 581.

APPEAL AND ERROR—*Continued.*

A *lapsus linguae* on an immaterial aspect of the case which could not have affected the result cannot be held for reversible error. *In re Will of Wallace*, 459.

The fact that the court, in giving concluding instructions which contained an erroneous placing of the burden of proof upon certain of the issues, states that such instruction was given at the prompting of appellant, will not render the instruction harmless under the doctrine of invited error when the nature of the "prompting" by appellant's counsel is not disclosed and it is not made to appear that appellant at any time assumed the burden of proof upon the issues or requested the court to so charge. *Sumner v. Sumner*, 610.

§ 39h. Harmless and Prejudicial Error in Instructions on Burden of Proof.

Conflicting instructions on burden of proof must be held for prejudicial error. *In re Will of West*, 204; *Sumner v. Sumner*, 610.

§ 40a. Review of Exceptions to Judgment or to Signing of Judgment.

Exceptions and assignments of error to the judgment, findings of fact, and conclusions of law of the Superior Court in affirming an award of the Industrial Commission present the sole question of whether the findings are sufficient to support the judgment and does not present the competency or sufficiency of the evidence to support the findings or any one of them. *Brown v. Truck Lines*, 65.

Where the finding of the Industrial Commission that the injured worker was an employee and not an independent contractor is based upon the legal effect of the written contract, the question is one of law, reviewable on appeal, and is presented by an exception to the judgment of the Superior Court affirming the award of the Industrial Commission. *Brown v. Truck Lines*, 299.

A sole exception to the signing of the judgment presents only the question whether the judgment is supported by the record. *Land Bank v. Cherry*, 105.

An exception to the signing of the judgment presents for review only whether the judgment is supported by the facts found, and does not present the findings, or the sufficiency of the evidence to support any one of them, for review. *Manning v. Ins. Co.*, 251.

An exception to the signing of the judgment presents only the question whether the judgment is supported by the facts found by the court or those set out in the agreed statement of facts or admitted in the pleadings. *Hylton v. Mount Airy*, 622.

§ 40b. Legal and Discretionary Determinations.

Where the trial court sets aside a verdict for error of law and not as a matter of discretion, the ruling is appealable provided the error is specifically designated, and error in failing to have directed a verdict for plaintiff is sufficient for this purpose. *Akin v. Bank*, 453.

§ 40d. Review of Findings of Fact.

Where appellant has made no request for findings, his exceptions to each of the findings of fact will not be sustained when the findings are supported by the evidence. *Exterminating Co. v. Wilson*, 96.

When the judgment below does not set forth in detail the facts found by the court and there is no request for such findings, it is presumed that the court, upon proper evidence, found the essential facts necessary to support the judgment entered. *Craver v. Spaugh*, 129; *Flythe v. Wilson*, 230.

APPEAL AND ERROR—*Continued.*

§ 40g. Review of Orders on Motions for Bill of Particulars.

An application for a bill of particulars is addressed to the sound discretion of the trial court and the court's ruling thereon is not reviewable, except perhaps in extreme cases. G. S., 1-150. *Building Co. v. Jones*, 282.

§ 40i. Review of Judgments on Motions to Nonsuit.

An appeal from judgment as of nonsuit presents the question whether the evidence, considered in the light most favorable to plaintiff, is sufficient to be submitted to the jury. *Hammett v. Miller*, 10; *Klassette v. Drug Co.*, 353.

§ 40j. Review of Judgments Upon Demurrers.

The court sustained defendants' demurrer for failure of the complaint to state a cause of action and overruled the demurrer on the ground of misjoinder of parties and causes, and defendants appealed. *Held:* Upon the sustaining of the demurrer on the first ground there was nothing left to which the demurrer on the second ground could be directed, and the ruling of the court thereon presents no question requiring decision on appeal. *Temple v. Watson*, 242.

§ 40m. Review of Orders on Motions to Set Aside Default Judgments.

The discretionary power of the trial court to set aside a default judgment for mistake, inadvertence, surprise or excusable neglect, G. S., 1-220, is a legal discretion and reviewable. *Rierson v. York*, 575.

Where, on a motion to set aside a default judgment under G. S., 1-220, the trial court finds facts sufficient to support the conclusion that the litigant's neglect was excusable, objection to the order setting aside the default judgment on the ground that the facts were insufficient to show a mistake of fact, is untenable, the finding of excusable neglect and meritorious defense being sufficient to support the judgment, and the Supreme Court being bound by the findings when supported by evidence. *Ibid.*

§ 47. Disposition of Cause—New Trial.

Where a case has been tried on an erroneous theory of law the verdict will be set aside and the judgment vacated and the cause remanded for proper procedure. *Gaskins v. Sidbury*, 468.

Where a new trial is awarded certain appellants for error of law committed in the trial of one of the issues, and judgment against another appellant is based upon that verdict, a new trial as to such other appellant will be necessarily awarded on his appeal. *Dixon v. Brockwell*, 567.

§ 52. Jurisdiction and Proceedings in Lower Court After Remand.

On a former appeal it was held that the evidence was insufficient to engraft a trust on moneys sent to a bank by a soldier overseas, who was later killed, and it was stated that the letters of the soldier were insufficient to show a testamentary intent. After the decision the letters were probated in common form, but no caveat was filed. The Supreme Court in its supervisory power remands the case with direction that appropriate proceedings be undertaken. *Westcott v. Bank*, 644.

ASSAULT.

§ 8d. Assault With Deadly Weapon With Intent to Kill.

Intent to kill may be inferred from the nature of the assault, the manner in which it is made, the conduct of the parties, and other relevant circumstances. *S. v. Revels*, 34.

ASSAULT—*Continued.*

§ 13. Sufficiency of Evidence and Nonsuit.

Evidence tending to show that defendants, acting in concert, made a malicious, unprovoked assault with a knife upon an unarmed victim, inflicting a wound requiring twenty-six stitches externally and three internally to close, is sufficient evidence from which the jury may infer intent to kill, and therefore is sufficient to overrule defendants' motion to nonsuit on the charge of felonious assault, and to support the judge's submission to the jury of the question of defendants' guilt of assault with a deadly weapon with intent to kill. The distinction between an inference which may be drawn from the evidence and a presumption arising upon the evidence pointed out. *S. v. Revels*, 34.

Evidence of defendants' guilt of simple assault *held* sufficient to be submitted to jury. *S. v. Jones*, 402.

ATTORNEY AND CLIENT.

§ 4. Right to Appear in Propria Persona.

A party is entitled to appear *in propria persona*, G. S., 1-111, and when a defendant insists upon this right notwithstanding his ability to employ counsel and the efforts of the trial judge to assign him counsel, it cannot be pressed successfully on appeal that he was prejudiced by the action of the trial court in failing to provide counsel and in permitting him wide latitude in the introduction of evidence. *S. v. Pritchard*, 168.

§ 13. Disbarment by Courts.

The disbarment of an attorney follows as a legal consequence upon his conviction of a felony. *S. v. Blanton*, 517.

AUTOMOBILES.

§ 8d. Stopping, Parking and Parking Lights.

G. S., 20-161, prohibiting the parking of a vehicle upon the paved portion of a highway, by its express terms, does not apply to highways within business or residential districts as defined by statute. *Hammett v. Miller*, 10.

There is no State-wide statute in this State that requires lights to be displayed on vehicles parked in a business or residential district at nighttime. *Ibid.*

The ordinances of the City of High Point, introduced in evidence in this case, do not require parking lights on vehicles parked on a street in conformity with its regulations except as specifically demanded by the city. *Ibid.*

It is not negligence on the part of a municipality to have shade trees along its streets, and therefore the existence of such trees imposes no duty upon the driver of a vehicle in parking thereunder. *Ibid.*

§ 8g. Skidding.

The proof of the skidding of an automobile alone is not such evidence of negligence as to render the owner liable for an injury resulting therefrom, but if the skidding of the car is caused by its negligent operation, the driver is liable for the injury resulting. *Hoke v. Greyhound Corp.*, 412.

§ 8j. Sudden Emergency.

The principle of sudden emergency is not applicable to one who by his own negligence has brought about or contributed to the emergency. *Hoke v. Greyhound Corp.*, 412.

AUTOMOBILES—*Continued.*

§ 8k. Legal Driving Age and Driving License.

Permitting one under legal driving age to operate car is negligence *per se*, but must be a proximate cause of injury to be actionable. *Hoke v. Greyhound Corp.*, 412.

§ 12g. Exemptions to Speed Regulations—Officers of the Law.

Whether officer of law was operating vehicle with due regard for safety within meaning of statute exempting him from *prima facie* speed limits, *held* for jury. *Glosson v. Trollinger*, 84.

§ 13. Right Side of Road and Passing Vehicle Traveling in Opposite Direction.

Right of motorist to assume that driver of vehicle approaching from opposite direction will turn to his right to pass is not absolute, but is subject to rule that he must himself exercise due care and decrease speed when special hazards exist. *Hoke v. Greyhound Corp.*, 412.

§ 15. Bicycles.

Where pedestrian is carrying bicycle across street intersection at night he is not required to have light on the bicycle. *Holmes v. Cab Co.*, 581.

§ 18g (1). Competency of Evidence in General.

Opinion evidence as to the general competency of a driver is inadmissible, the issue being whether the driver was exercising due care in the operation of the vehicle at the time in question and not her competency as a driver. *Hoke v. Greyhound Corp.*, 412.

§ 18h (2). Sufficiency of Evidence and Nonsuit on Issue of Negligence.

Evidence *held* insufficient to show negligence in parking truck without lights at nighttime on residential street. *Hammett v. Miller*, 10.

Evidence that a truck ran into a building at the intersection of public highway is sufficient evidence of negligence on the part of the driver of the truck. *Carter v. Motor Lines*, 193.

Conflicting evidence as to the speed of the respective cars in approaching and entering an intersection at right angles, and as to whether the stop lights were green or red as to each vehicle when it entered the intersection, and as to which entered the intersection first, presents determinative questions of fact for the jury and requires overruling of defendant's motion to nonsuit. *Stewart v. Cab Co.*, 368.

§ 18h (3). Sufficiency of Evidence and Nonsuit on Issue of Contributory Negligence.

Issue of whether officer of law was guilty of contributory negligence in driving at excessive speed on wet street in municipality *held* for jury. *Glosson v. Trollinger*, 84.

§ 18i. Instructions.

Rule that one attempting to pass a car approaching from opposite direction has right to assume up to moment of impact that driver of other car will turn to his right in time to avoid collision, *held* not applicable to defendant upon evidence tending to show defendant failed to exercise due care for own safety and was exceeding reasonable speed under the circumstances, and refusal of

court to give defendant's requested instruction on this phase was not error. *Hoke v. Greyhound Corp.*, 412.

Nor was refusal of requested instruction on principle of sudden emergency error, since evidence disclosed that if defendant was confronted by sudden emergency she contributed to it. *Ibid.*

An instruction that the skidding of defendant's car must have been caused by its operation at an excessive speed under the existing circumstances in order for the jury to answer the issue of negligence in the affirmative *is held*, upon the evidence in the case, sufficient upon this aspect, and the refusal of the court to give requested instructions upon the point in the language of the request was not error. *Ibid.*

An instruction to the effect that it would be negligence *per se* for defendant to permit his child under the legal driving age to operate his automobile but that defendant could not be held liable unless the jury found from the preponderance of the evidence that such negligence was the proximate or one of the proximate causes of the injury, *is held* sufficient to cover this aspect of the case and it was not error for the court to refuse to give requested instructions on the point in the language of the request. *Ibid.*

An instruction to the effect that if the driver of a car failed to exercise reasonable care in that she approached a bridge "at a high rate of speed of 30 to 35 miles an hour over a highway that was wet . . ." *is held* not an expression of opinion that a speed of 30 to 35 miles an hour was excessive when in other portions of the charge the court fully instructed the jury as to the various statutory speed restrictions and regulations, including those where no hazards exist, G. S., 20-141, and it is apparent that the charge when read contextually could not have been misunderstood. *Ibid.*

Plaintiff's evidence was to the effect that at nighttime he was carrying a child's bicycle, too small for him to ride, across a street intersection to a repair shop, and that he was hit by a vehicle entering the intersection against the stop light at a high rate of speed. *Held:* The refusal to give defendants' requested instruction that the failure to have a light on the bicycle was a violation of G. S., 20-129 (f), was not error, since under the circumstances plaintiff was a pedestrian rather than a cyclist. *Holmes v. Cab Co.*, 582.

An instruction upon the issue of contributory negligence which is predicated upon a finding by the jury that defendant had observed all traffic regulations applicable to him must be held for reversible error, since contributory negligence, *ex vit termini*, is predicated upon negligence on the part of defendant with which the negligence of the plaintiff concurs and contributes in producing the injury. *Stewart v. Cab Co.*, 368.

§ 18j. Issues and Verdict.

Evidence of excessive speed by officer of the law on wet street in municipality *held* to require submission of issue of his guilt of contributory negligence on question of whether he was operating vehicle with due regard for safety within meaning of statute exempting officers from *prima facie* speed limits. *Glosson v. Trollinger*, 84.

§ 22. Actions by Guests or Passengers.

Plaintiffs, guests in an automobile, brought this action against the owner of a truck involved in a collision with the car. On the issue of whether plaintiffs were injured by the negligence of defendant, the court in response to a question from a juror as to whether it would be possible to find "both parties"

negligent, replied in the negative, and then correctly instructed the jury that if the jury found that the driver of the car and the driver of the truck were guilty of concurrent negligence, to answer the issue in the affirmative. *Held:* The conflicting instructions must be held for reversible error. *Dixon v. Brockwell*, 567.

Where guests in a car, having no control over its operation, and the driver of the car bring actions against the owner of a truck involved in a collision with the car, it is the better practice to try the actions by the guests separate from the action by the driver of the car, since in the guests' action the issue of concurring negligence of the drivers is not germane, while in the action by the driver of the car the issues of negligence and contributory negligence arise. *Ibid.*

§ 24a. Nature and Extent of Liability for Negligence of Servant or Agent in General.

The master can be held liable for the negligent driving of his servant only if the relationship exists at the time of and in respect to the very transaction out of which the injury arose. *Carter v. Motor Lines*, 193.

In order for the negligence of the driver of a vehicle to be imputed to the owner, the driver must be at the time the owner's servant or agent and acting within the scope of his employment. *Harris v. Carter*, 262.

§ 24c½. Pleadings in Action to Hold Owner Liable for Driver's Negligence.

Allegations that on the date of the accident the truck colliding with plaintiff's vehicle was being operated by named defendants as employees of defendant owner, and that the owner, his agents and employees were negligent in the operation of the truck in respects alleged, *is held* sufficient, as against demurrer, to charge that the employees were acting within the scope of their employment, nor is it fatal that in several instances the allegations of negligence referred to "the driver of defendant's truck" without more definite designation. *Presnell v. Beshears*, 279.

§ 24e. Sufficiency of Evidence on Issue of Respondeat Superior.

Evidence tending to show that the truck causing the injury had painted on its side the name of defendant, a corporation engaged in freight transportation by truck, and that the injury was caused by the negligence of the driver of the truck, *is held* insufficient to make out a *prima facie* case under the doctrine of *respondeat superior*, and defendant's motion to nonsuit should have been allowed, some evidence of the agency of the driver at the time and in respect to the transaction out of which the injury arose being necessary in addition to evidence of ownership and negligence. *Carter v. Motor Lines*, 193.

Ordinarily, whether the driver of a vehicle is the servant or agent of the owner or an independent contractor is a mixed question of law and fact to be submitted to the jury upon proper instructions, but where the facts are known or established, it becomes a matter of legal inference to be determined by the court. *Harris v. Carter*, 262.

Plaintiff's evidence tended to show that defendant's employee took defendant's truck to a garage repairman with directions that the repairman "try the car out" to see if he could locate and repair the trouble. *Held:* Under the circumstances disclosed by plaintiff's evidence the repairman was an independent contractor and not an agent or servant of the owner in driving the

AUTOMOBILES—*Continued.*

car for the purpose of examination and therefore in an action against the owner to recover for negligent operation of the car by the repairman, nonsuit was proper. *Ibid.*

Evidence tending to show that day to day farm laborer was permitted to use farm owner's truck for his own convenience, and that accident in suit occurred on personal trip of laborer during which he incidentally had repair work done on truck for owner, *held* insufficient on issue of *respondeat superior*. *Temple v. Stafford*, 630.

§ 28e. Sufficiency of Evidence and Nonsuit in Homicide Prosecutions.

The evidence tended to show that the car driven by defendant struck the rear of a parked wrecker at nighttime, swerved by the wrecker, ran off to the left side of the highway, ran up and down an embankment, careened back across the highway and turned over about 130 feet from the point of collision. There was evidence tending to show that defendant had been drinking. There was conflict in the evidence as to whether the lights were burning on the wrecker and as to whether it was parked entirely off the pavement and as to whether there was other traffic on the road at the time. *Held:* There was sufficient evidence to support the jury's finding that defendant was guilty of culpable negligence. *S. v. Hough*, 596.

§ 30d. Prosecutions for Drunken Driving.

In a prosecution for drunken driving, evidence that defendant was found intoxicated at his place of business some 12 to 14 hours after the time of the offense charged, without evidence that the state of intoxication was a continuous one, is incompetent and its admission is prejudicial error entitling defendant to a new trial. *S. v. Kelly*, 62.

The unlawful operation of a motor vehicle upon a public highway while under the influence of intoxicating liquor is a misdemeanor. *S. v. Gibbs*, 677.

Evidence tending to show that the owner of a truck rode therein for a distance of 30 or 40 miles on the highway while both he and the driver were under the influence of intoxicating liquor, without evidence that the owner was too drunk to be conscious of what was going on, or that he had relinquished his right of control, *is held* sufficient to show, as against demurrer, that defendant aided and abetted the driver in the commission of the offense of unlawfully operating a motor vehicle upon a public highway while under the influence of intoxicating liquor, and to sustain the owner's conviction as a principal. *Ibid.*

BANKRUPTCY.

§ 5. Actions to Collect Assets.

USCA 11, Sec. 46 (b), relates solely to jurisdiction and does not preclude a trustee in bankruptcy from instituting suit in a county otherwise appropriate. *Flythe v. Wilson*, 230.

BETTERMENTS.

§ 2. Right to Recover for Improvements—Contracts to Convey.

A person let into possession of land under a parol contract and who, in good faith and in reliance on the promise to convey, puts valuable improvements on the land, cannot be ejected at the instance of the promisssor under a plea of the statute of frauds without compensation for the improvements. *Dupree v. Moore*, 626.

BETTERMENTS—*Continued.*

Held: Defendant having alleged and prosecuted his claim for improvements upon the theory of an integral contract to convey, and having failed to show such contract on the part of all of the heirs, his evidence is insufficient to establish a contract to convey necessary to support his claim for improvements. *Ibid.*

BIGAMY.

§ 4. Aiding and Abetting Bigamy.

In a prosecution upon an indictment charging defendant with aiding and abetting bigamy by entering into a marriage with a person then married and not divorced, evidence tending to show that the bigamous marriage was contracted in another state ousts the jurisdiction of our courts and requires dismissal, G. S., 14-183. Since the indictment specifically charged the commission of the crime by contracting the bigamous marriage, evidence that defendant, with knowledge, took the prosecutrix from this State for the purpose of consummating the bigamous marriage, would be unavailing, even if it be conceded that this is evidence of aiding and abetting bigamy. *S. v. Jones*, 94.

BILL OF DISCOVERY.

§ 7a. Nature of Remedy of Inspection and Production of Writings in General.

Plaintiff may not proceed under G. S., 8-89, for an inspection of writings in defendants' possession for the purpose of obtaining information to form the basis of an action against a third party. *Flanner v. St. Joseph Home*, 342.

§ 7b. Nature and Scope of Remedy to Obtain Information to Draft Complaint.

In an action to recover damages for personal injuries, an order for inspection of writings to obtain information to draft the complaint will not lie to discover whether defendant is protected by liability insurance, since the existence of such policy would not enlarge defendant's liability and could not be pleaded. *Flanner v. St. Joseph Home*, 342.

An order for inspection of writings relating to financial operations of defendant to obtain facts to enable plaintiff to draw her complaint will not lie for the purpose of enabling plaintiff to determine whether defendant is a commercial rather than an eleemosynary corporation, since this remedy does not lie to forestall an anticipated defense. *Ibid.*

§ 7c. Nature and Scope of Remedy to Obtain Evidence.

An order for the production of writings to obtain evidence relating to the merits of the controversy is permissible only after issue joined. *Flanner v. St. Joseph Home*, 342.

§ 8. Affidavits and Proceedings.

The affidavit supporting an order for the inspection of records and documents for the purpose of obtaining evidence must designate the records and documents sought to be inspected and show that they relate to the merits of the controversy. *Flanner v. St. Joseph Home*, 342.

BOUNDARIES.

§ 2b. Calls to Natural Objects.

A call in a deed to a stake on a ditch and then with the ditch takes the line to the center of the ditch unless a contrary intent appears from the language of the instrument. *White v. Woodard*, 332.

Where a call in a deed takes the boundary line to the center of a ditch, subsequent widening of the ditch would alter the center line in the direction in which the widening occurs, which change might be material, particularly in respect to urban property, and conflicting evidence as to subsequent changes in the width of the ditch and the consequent changes in the center line is properly submitted to the jury under proper instructions from the court. *Ibid.*

§§ 11, 12. Issues and Instructions.

In a processioning proceeding between parties claiming from a common source to establish the boundary line as called for in their respective deeds, defendant also pleaded title to the disputed strip by adverse possession, but prior to trial it was agreed and stipulated of record that the only question in controversy was the location of the true boundary line between the parties. *Held:* Defendant cannot assert title to the disputed area by adverse possession in the face of the stipulation of record, and it was not error for the trial court to fail to charge the jury on the question of adverse possession. *Austin v. Hopkins*, 638.

BROKERS.

§ 5. Power and Authority of Brokers.

Since it is a matter of common knowledge that a real estate broker is an agent with restricted powers, generally speaking, one who deals with him is held to a knowledge of the extent of the agent's authority. *Strickland v. Bingham*, 221.

§ 11. Right to Commissions When Sale Is Not Consummated.

Under the general rule, a real estate broker is entitled to his stipulated commission, or compensation for his services, when, pursuant to agreement with the owner, he has procured a purchaser ready, able and willing to purchase the property upon the terms offered by the owner. *Eller v. Fletcher*, 345.

§ 12. Actions for Commissions.

A complaint alleging that plaintiff had procured a purchaser ready, able and willing to purchase the *locus in quo* upon the terms stipulated by defendants when they engaged plaintiff's services to secure a purchaser, and that after plaintiff so advised defendants, defendants began to propose and require other conditions and changes in the terms of sale and finally withdrew the offer of sale, *is held* not subject to demurrer on the ground that the complaint disclosed that sale was not consummated, there being nothing in the complaint disclosing that consummation of sale was a condition precedent to right to commission. *Eller v. Fletcher*, 345.

§ 13. Rights and Remedies of Third Person Against Broker.

A party who enters into a contract with a real estate broker to purchase certain lands may not maintain an action against the broker for specific performance upon the later acquisition of title to the lands by the broker, the right of action under the contract being against the owner and not the real estate agent. *Strickland v. Bingham*, 221.

BURGLARY.

§§ 2, 3. Burglary in First Degree and Burglary in Second Degree.

Burglary is a common law offense, the elements of which are the breaking and entering during the nighttime of a dwelling or sleeping apartment with intent to commit a felony therein. Whether the building is occupied at the time affects only the degree. G. S., 14-51. *S. v. Mumford*, 132.

The commission of the intended felony is not necessary to constitute the crime of burglary, it being sufficient if defendant intended to commit a felony at the time of breaking and entering. *S. v. Hooper*, 633.

§ 4. Breaking and Entering Otherwise Than Burglariously.

House breaking or nonburglarious breaking is a statutory and not a common law offense, G. S., 14-54, and under the statute it is unlawful to enter a dwelling with intent to commit a felony therein, either with or without a breaking. *S. v. Mumford*, 132.

§ 11. Sufficiency of Evidence and Nonsuit.

In a prosecution for nonburglarious entry, evidence of a breaking, when available, is always relevant, but proof of a breaking is not essential to sustain conviction, and therefore nonsuit for want of such evidence is properly denied. *Ibid.*

Evidence tending to show that defendant broke and entered a dwelling house at nighttime, which was then occupied, with intent to commit rape, but that he abandoned his intent and fled when his intended victim turned on the light and screamed, *is held* sufficient to overrule defendant's motion to nonsuit on the charge of first degree burglary, the crime having been consummated with the breaking and entry with felonious intent notwithstanding the later abandonment of the intent. *S. v. Hooper*, 633.

§ 12b. Instructions on Question of Less Degree of Crime.

In a prosecution for burglary in the first degree, an instruction to the effect that the jury might render a verdict of the lesser offense of burglary in the second degree if the State had satisfied them beyond a reasonable doubt that defendant broke and entered the building at nighttime with felonious intent and that the dwelling was not then occupied, must be held for reversible error upon appeal from a conviction of burglary in the first degree notwithstanding the fact that all the evidence tended to show burglary in the first degree and notwithstanding a later instruction that the jury had the right to render a verdict of burglary in the second degree even though the evidence tended to show that the building was actually occupied as sleeping quarters at the time. G. S., 15-171. *S. v. Hooper*, 633.

In a prosecution for burglary in the first degree the jury may return a verdict of guilty of burglary in the second degree not only where the evidence tends to show the elements of burglary in the first degree but also upon the jury's finding of facts constituting burglary in the first degree if the jury deems it proper to render the milder verdict, and an instruction to this effect is mandatory. *Ibid.*

CANCELLATION AND RESCISSION OF INSTRUMENTS.

§ 15. Rights of Parties Upon Cancellation of Deed.

Where a deed is set aside for mental incapacity of the grantor, but the decree does not adjudicate defendants' claim for a return of the purchase

CANCELLATION AND RESCISSION OF INSTRUMENTS—*Continued.*

price and for the cost of improvements, the cause must remain on the docket, at the election of defendants, for determination of defendants' rights in respect thereto. *Tomlins v. Cranford*, 323.

CARRIERS.

§ 1. Who Are Common Carriers.

The operator of taxicabs for hire under franchise or license is under duty of a common carrier in regard to the safety of passengers in transit in so far as this rule of liability can be applied to this mode of transportation. *Smith v. Cab Co.*, 572.

§ 2. Matters and Transactions Subject to State Regulation.

The licensing of public carriers of passengers and freight for hire along the public highways of the State is within the exclusive prerogative of the General Assembly, and it may prescribe the condition under which and the agency or agencies by which the privilege will be granted. *Coach Co. v. Transit Co.*, 391.

§ 5. Licensing and Franchise of Carriers.

Where a carrier licensed to transport goods by truck in interstate commerce leases a vehicle from an owner not so licensed and attaches its plates to the vehicle while engaged in transporting goods in interstate commerce, *it is held* the contract of lease will be presumed to have been made in contemplation of the pertinent Federal Statutes and regulations of the Interstate Commerce Commission, requiring retention of control over the vehicle by the franchise owner, and drivers of such vehicle, as a matter of public policy, will be held employees of the carrier and not independent contractors for the purpose of determining liability of the carrier. *Brown v. Truck Lines*, 299.

The licensing of a carrier of passengers for compensation along a regular route between fixed termini from a point within a city thence along a public highway within the city through several unincorporated towns outside the city to a point on the public highway ⅞ of a mile outside the city, is within the exclusive jurisdiction of the Utilities Commission. G. S., 62-103 (k). *Coach Co. v. Transit Co.*, 391.

A municipality granted an exclusive franchise for the operation of a motor bus transportation service over specified streets within the city and "such other routes, with the consent and approval of the city council" as the public transportation might require. Thereafter the municipality approved request for additional route along a public highway from a point within the city to a point ⅞ of a mile beyond the corporate limits. *Held:* The "approval" of the proposed route does not amount to granting of franchise by the city, and *held further* the city has no authority to grant such franchise either under G. S., 160-203, or by virtue of its implied powers. *Ibid.*

License to a common carrier must be written and granted by the Utilities Commission as such, G. S., 62-105, and an oral permit transmitted by telephone by the Chairman of the Utilities Commission is not a valid authorization. *Ibid.*

§ 7½. Rights and Remedies of Carrier Under Franchise.

Injunction will lie to protect the rights and privileges of a duly licensed franchise carrier from infringement by an interloper possessing no franchise or other claim of right. *Coach Co. v. Transit Co.*, 391.

CARRIERS—*Continued.*

§ 21a. (2). Liability of Carrier for Assaults by Intruders Upon Passenger.

A common carrier is under duty to protect its passengers from assault by intruders when by the exercise of due care the acts of violence might have been foreseen or anticipated and the carrier could have avoided injury to the passenger by the exercise of proper care, and the carrier is liable in damages proximately resulting from negligent breach of duty in this respect. *Smith v. Cab Co.*, 572.

While the driver of a taxicab is not under duty to interfere in a fight on the sidewalk between third parties and one who is desirous of becoming a passenger but who has not entered the vehicle, after such person has been accepted as a passenger and entered the conveyance, the duty of a common carrier in regard to the safety of its passengers in transit attaches, and it may be held liable for personal injuries or loss of packages accepted with the passenger for transportation, proximately resulting from negligent breach of this duty. *Ibid.*

Evidence tending to show that a person who had called a cab was assaulted as she left her place of business to enter the cab, that she finally managed to get into the cab and that the driver drove half a block with passenger's assailants surrounding, that the driver then stopped the cab and left the scene, and that the passenger received serious injury in the fight and lost her goods she had taken with her in the cab, *is held* sufficient to overrule defendant cab company's motion to nonsuit. *Ibid.*

CHARITIES.

§ 1. Nature and Essentials of Charities.

Educational corporation dependent upon endowments and gifts is eleemosynary corporation notwithstanding it has paying students. *Reynolds Foundation v. Trustees of Wake Forest*, 500.

A corporation organized and empowered by charter to operate as an eleemosynary institution must continue to operate as a charity under its charter or surrender the charter, and therefore may make a contractual obligation to maintain its status as a charity. *Ibid.*

§ 2. Control, Management and Appropriation of Funds.

Reynolds Foundation, Trustees of Wake Forest College, and Smith Reynolds Trust *held* perpetual charities, and the Foundation and Wake Forest College have authority to execute and perform contract relating to perpetual endowment of the College. *Reynolds Foundation v. Trustees of Wake Forest*, 500.

Where an eleemosynary educational corporation is specifically authorized by amendment to its charter to enter into a contract requiring it to relocate its physical plant and to perform other stipulated conditions and covenants in consideration of an endowment in perpetuity, the grant of power to make the contract carries with it the authority to fulfill its obligations. *Ibid.*

The by-laws of the charitable Foundation required that its Trustees designate quarterly the charitable purposes or beneficiaries for which appropriations were to be made. The Foundation entered into a contract obligating it to pay its income in perpetuity up to a stipulated amount yearly to an eleemosynary educational corporation. *Held:* It appearing that the Foundation was not to change its name, that it has express authority to execute the contract, and that it had or might have other funds requiring action by its Trustees for their

CHARITIES—*Continued.*

proper appropriation, its obligation to pay the amount stipulated in perpetuity does not contravene its by-laws and is within its authority. *Ibid.*

CHATTEL MORTGAGES.

§ 8b. Lien of Mortgages Registered in Other States.

Where an automobile is brought into the State prior to filing or recording of chattel mortgage in another State, the lien of the chattel mortgage does not attach. *Thrift Corp. v. Guthrie*, 431.

§ 13c. Actions.

The introduction in evidence of the original chattel mortgage on an automobile, purporting to have been registered in another state, its registration in such other state in the county where the mortgagor resided not being challenged, with evidence of its execution by the mortgagor, is sufficient to make out a *prima facie* case and overrule defendant's motions to nonsuit in an action by the mortgagee to recover the car against one who bought the car from a purchaser from the mortgagor in this State, the contentions of defendant relating to the integrity of the transaction and his status as an innocent purchaser for value, G. S., 47-20, being matters of defense. *Finance Co. v. Clary*, 247.

A chattel mortgage on an automobile was registered in another state, the laws of which provided that the lien of a chattel mortgage should take effect only from the time it is filed for record. (Ga. Code, 61-2501.) The evidence was conflicting as to whether the automobile was brought into this State by the mortgagor before or after the lien was filed for registration in such other state. The mortgagor sold the car and defendant is the purchaser from his transferee. Defendant conceded that under the general rule the lien of the chattel mortgage is good from the date it was recorded. *Held:* Since there is evidence on the part of defendant that the car was brought to this State prior to the filing of the chattel mortgage for record in such other state, a peremptory instruction in favor of plaintiff mortgagee is error. *Thrift Corp. v. Guthrie*, 431.

COMMON LAW.

So much of the common law as is not destructive of or repugnant to, or inconsistent with, our form of government and which has not been abrogated or repealed by statute, or become obsolete, is in full force and effect in this State. G. S., 4-1. *Moche v. Leno*, 159.

CONSPIRACY.

§ 3. Nature and Elements of the Crime.

Conspiracy to commit a felony is a felony. *S. v. Davenport*, 475. Fact that one conspirator is instigator and dominant actor is immaterial. *Ibid.* Conspiracy is the unlawful agreement. *Ibid.*

§ 4. Indictment.

One conspirator may be tried alone provided indictment shows there was another with whom he conspired. *S. v. Davenport*, 475. Indictment need not charge scheme by which conspiracy was to be executed. *Ibid.* Indictment need not charge subject crime with legal accuracy. *S. v. Blanton*, 517.

CONSPIRACY—*Continued.*

§ 5. Competency of Evidence.

Evidence of acts and declarations of co-conspirator in furtherance of common design is competent provided his participation in conspiracy is shown by evidence *aliunde*. *S. v. Blanton*, 517; *S. v. Davenport*, 475.

§ 6. Sufficiency of Evidence and Nonsuit.

Evidence in this case *held* amply sufficient to sustain conviction and sentence under charge of conspiracy to steal. *S. v. Warren*, 380.

Conspiracy may be established by circumstantial evidence. *S. v. Davenport*, 475. Evidence of defendant's guilt of conspiracy *held* sufficient. *S. v. Davenport*, 475; *S. v. Blanton*, 517.

§ 7. Instructions.

In prosecution of attorney for conspiracy to work fraud on courts by obtaining divorce decrees in this State for nonresidents upon fraudulent allegations and proof of residence here, court properly submitted to jury the State's contention that the attorney's appearance of innocence was part of the fraudulent scheme. *S. v. Blanton*, 517.

CONSTITUTIONAL LAW.

§ 4. General Rules of Construction.

The Constitution will be liberally construed in order to adapt it to changing conditions and advancing social needs, but such rule of construction cannot override limitations prescribing methods of orderly progress, chief among which are the restrictions upon the taxing and spending power. *Purser v. Ledbetter*, 1.

Our Constitution is a limitation rather than a grant of powers. *Ibid.*

The Constitution within its compass is supreme and its directives must be regarded as mandatory and binding upon all, and none may be considered nonessential or unimportant details which may be dispensed with. *In re House Bill No. 65, Appendix.*

§ 5. Delegation and Reservation of Powers.

The voice of the people is the voice of finality, and therefore where a proposal has been submitted to a vote and rejected, governmental officials ordinarily may not take action to effectuate such proposal. *In re House Bill No. 276*, ...

§ 8a. Powers of Legislature in General.

The General Assembly is authorized to fix the compensation of other officials but the people have reserved to themselves the right to determine the amount which the members of the General Assembly shall be paid. Art. II, Sec. 28, and the General Assembly is without authority to provide subsistence and travel allowance for its members in addition to the compensation fixed by the Constitution. *In re House Bill No. 276*, ...

§ 8a (1). Legislative Powers of Congress in General.

An Act of Congress in exercise of powers conferred by the Constitution is supreme. U. S. Constitution, Art. VI, Sec. 2. *Taylor v. Motor Co.*, 365.

CONSTITUTIONAL LAW—*Continued.*

§ 8b. Powers of Legislature in Regard to Municipal Corporations.

Municipal corporations derive their powers almost solely from legislative enactment under Art. VIII, sec. 4, of the State Constitution, and are subject to statutory restrictions and regulations of their taxing power. *Purser v. Ledbetter*, 1.

§ 10b. Courts—Power and Duty to Determination of Constitutionality of Statutes.

While an act of the Legislature will not be declared unconstitutional unless it is clearly so, when a statute is in conflict with a constitutional provision, it is the duty of the Court to so declare. *Nash v. Tarboro*, 283.

§ 15½. Personal, Political and Civil Rights in General.

Liberty of action under the Constitution is not license. *Thomas v. Baker*, 226.

§ 17. Monopolies and Exclusive Emoluments.

City *held* to have received valuable consideration for obligation to remove tracks of utility from street, and therefore expenditure of funds was not emolument not in consideration of public service. *Boyce v. Gastonia*, 139.

§ 18. Equal Protection and Application of Laws.

Section 8, Chap. 281, Public Laws 1941, prescribing an effective date for the provisions of the act relating to inheritance by or through adopted children does not create a discrimination. *Phillips v. Phillips*, 438.

§ 23. Vested Rights and Titles.

There is no vested right in a continuance of the common or statute law, and ordinarily a right created solely by statute may be taken away by repeal or by new legislation. *Pinkham v. Mercer*, 72.

The power to revoke a voluntary conveyance of future interests in lands limited to persons not *in esse* is not a property right, although the rights created by the exercise of the power of revocation are property rights within constitutional protection. *Ibid.*

A franchise to construct and operate a street railway over designated streets is not a mere license but is a property right which may not be taken away except by due process of law. *Boyce v. Gastonia*, 139.

§ 24. Remedies and Procedure.

Where a statute imposing a limitation or restricting the time within which a right may be exercised grants a reasonable time for the exercise of the rights therein affected, delay in the publication of such law has no bearing upon the reasonableness of the limitation since everyone is held to have knowledge of general statutes from their effective dates. *Pinkham v. Mercer*, 72.

Unless arbitrarily exercised, there is a legislative discretion as to the reasonableness of the time allowed for the exercise of rights affected by a change in the statutory limitations. *Ibid.*

§ 31. Transactions Constituting Burden on Interstate Commerce.

A state cannot levy a tax which directly or indirectly imposes an undue burden upon interstate commerce. *Nesbitt v. Gill*, 174.

CONSTITUTIONAL LAW—*Continued.*

The license tax imposed by G. S., 105-47, on dealers purchasing horses and mules for resale applies regardless of whether the animals are raised in this State or are shipped into the State, and therefore the tax is a levy on a local business and does not place a burden upon interstate commerce. *Ibid.*

§ 32. Necessity of Indictment.

The right of a person accused of crime to information as to the nature of the crime is satisfied by his arraignment on a valid indictment. *S. v. Stanley*, 650.

§ 33. Right of Defendant in Criminal Prosecution to Trial by Impartial Jury.

Upon objection that defendant is denied a trial by his peers for the reason that Negroes were excluded from the petit jury, the trial court's findings of fact when supported by sufficient evidence are conclusive on appeal in the absence of gross abuse. *S. v. Kirksey*, 445; *S. v. Koritz*, 552.

Male defendants are not prejudiced by the absence of women from the jury panel. *S. v. Litteral*, 527.

A member of the white race cannot object to the jury list on the ground that it contained a disproportionately small number of Negroes, since he could not be affected by any alleged discrimination against the Negro race. *S. v. Koritz*, 552.

In the composition of jury lists an absolute numerical ratio between the races is not required, the objective being to get a fair cross-section of community judgment and the action of the jury commissioners in applying the standard of qualifications prescribed by law will be upheld unless there is evidence of fundamental unfairness which contravenes due process of law. *Ibid.*

Our statutory requirements that the jury lists be taken from the names of the taxpayers of the county who are of good moral character and of sufficient intelligence are constitutional and valid. *Ibid.*

A defendant does not have the right to be tried by a jury of his own race or to have the representatives of any particular race on the jury, but he is entitled to be tried by a competent jury from which the members of his race have not been excluded intentionally, arbitrarily or systematically. *Ibid.*

Our statutes relating to the selection of jurors prescribed limitations applicable equally to all races without discrimination in respect to race, creed or color. *Ibid.*

Absence of defendant's counsel when judge called court back into session and substituted 13th juror upon emergency, *held* not to deprive defendant of substantial right. *S. v. Stanley*, 650.

§ 34. Right to Confront Accusers and Witnesses.

The right of confrontation is satisfied by defendant's presence at the trial and the right to examine the witnesses, but defendant has no right to be present at the return of the indictment by the grand jury, even in a capital case. *S. v. Stanley*, 650.

§ 35. Right of Defendant Not to Incriminate Self.

Fitting shoes of defendant in tracks found at scene does not violate constitutional protection against self-incrimination. *S. v. Ragland*, 162.

CONTRACTS.

§ 7. Contracts Against Public Policy in General.

Agreements against public policy are illegal and void. *Cauble v. Trexler*, 307.

§ 7a. Contracts in Restraint of Trade.

While the law frowns upon unreasonable restrictions, it favors the enforcement of contracts intended to protect legitimate interests. *Sonotone Corp. v. Baldwin*, 387.

Restrictive covenants in a contract of employment, executed when an employee is raised from a service man to general manager, providing that the employee for a period of two years from the termination of the employment should not engage in the same business within a defined territory comprising thirteen counties of the State or solicit or sell the employer's customers, *are held* reasonable in regard to time and territory and enforceable by restraining order. *Exterminating Co. v. Wilson*, 96.

In a contract of employment of a district manager for a specified territory, covenant that he should not engage in business in competition with the employer for a period of twelve months subsequent to the termination of the contract within the territory or a radius of fifty miles thereof is reasonably limited as to time and territory and affords no more than fair protection to the covenantee without injury to the interest of the public, and therefore the covenant is valid and enforceable. Dissimilitude of contracts arising out of the conventional relationship of master and servant is pointed out. *Sonotone Corp. v. Baldwin*, 387.

Where written contract, duly signed, is extended for subsequent year, it meets requirements of G. S., 75-4, for period of extension, and employer may maintain action to restrain breach for period subsequent to extension. *Ibid.*

§ 7g. Contracts in Violation of Statutory Policy.

A statute on a subject within the province of the lawmaking power is public policy thereon, and an agreement which violates the provision of such statute or which cannot be performed without violating its provisions is illegal and void. *Cauble v. Trexler*, 307.

Mortgage extracted to secure difference between original debt and amount received from Federal Land Bank mortgage *held* against public policy and void. *Cauble v. Trexler*, 307.

§ 8. General Rules of Construction.

The laws existing at the time and place of a contract form a part of it. *Boyce v. Gastonia*, 139.

§ 11½d. Term and Duration—Renewals and Extensions.

Acts of parties and amendment duly executed and signed after expiration of term of contract *held* readoption and extension of agreement for subsequent year. *Sonotone Corp. v. Baldwin*, 387.

§ 14. Modification, Rescission and Abandonment by Acts of Parties.

A written contract, even though involving an interest in land, may be rescinded or abandoned by parol. *Bell v. Brown*, 319.

The rescission or abandonment of a written contract involving an interest in land must be shown by positive and unequivocal acts and conduct which are clearly inconsistent with the contract. *Ibid.*

CONTRACTS—*Continued.*

§ 23. Sufficiency of Evidence and Nonsuit in Actions on Contracts.

Plaintiff's evidence tended to show an agreement by defendant to sell certain notes for not less than a stipulated amount, failure of performance by defendant, and later independent sale of the notes by plaintiff for an amount less than the price stipulated in the agreement. Plaintiff offered no evidence of want of diligence on the part of defendant or of defendant's ability to sell the notes under the conditions imposed, or of any change in the market value of the notes. *Held:* Defendant's motion to nonsuit was properly allowed. *Strickland v. Bingham*, 221.

§ 26. Right of Action Against Third Persons Interfering With Contractual Rights.

A complaint alleging that plaintiff was the purchaser in a duly executed and registered contract to convey timber and that defendants induced the vendors to breach their contract and sell the timber to defendants, states a cause of action. *Winston v. Lumber Co.*, 339.

CORPORATIONS.

§ 5a. Election, Qualification and Tenure of Corporate Officers.

G. S., 55,49, provides that officers of a corporation once in office, shall continue in office until their successors are chosen and qualified. *Thomas v. Baker*, 226.

§ 5b. Jurisdiction of and Proceedings in Superior Court Where Corporation Is Unable to Elect Officers.

Where the directors of a corporation are evenly divided in a dispute as to whether its president should exercise managerial powers, and by reason of such division are unable to elect any officers of the corporation or resolve their differences over the management of the corporation, the Superior Court has jurisdiction in the premises under G. S., 55-114, upon petition properly filed. *Thomas v. Baker*, 226.

In a proceeding under G. S., 55-114, an order continuing corporate officers in their respective offices necessarily carries with it authorization and direction that such officers should continue to exercise the same functions and receive the same emoluments as before the controversy giving rise to the proceeding. *Ibid.*

In a proceeding under G. S., 55-114, it is not necessary that the corporation, as such, be joined as a party, since its inability to take corporate action is the very situation which the statute seeks to remedy. *Ibid.*

G. S., 55-114, is remedial in character, and the power given the court thereunder to continue corporate officers in their respective offices necessarily empowers the court to direct that such officers continue with the same authority and emoluments enjoyed by them prior to controversy. *Ibid.*

G. S., 55-114, empowering the court to continue corporate officers in their respective offices with the same authority and emoluments enjoyed by them prior to controversy, provides an emergency remedy which does not affect the status of the corporation but merely preserves the *status quo* pending determination of controversy in order that the corporation may continue to function, not under the supervision of the court, but by virtue of corporate authority theretofore given, and therefore the remedy violates no constitu-

CORPORATIONS—*Continued.*

tional right of stockholders or directors but only imposes upon them the rules of fair play in the exercise of their property rights. *Ibid.*

§ 6a (1). Authority and Duties of Directors.

Directors of a corporation may confer managerial powers upon its president. G. S., 55-48; G. S., 55-49. *Thomas v. Baker*, 226.

§ 21. Estoppel and Ratification by Corporation of Acts of Officers or Agents.

Where the president of a corporation, with the tacit approval of the directors, assumes general managerial duties, and thereafter the directors in fixing the president's salary take into consideration such additional duties, the authorization for payment for such services authorizes the performance of such services, and constitutes a ratification and approval of the president's managerial functions. *Thomas v. Baker*, 226.

§ 22. Property and Conveyances.

G. S., 55-26.11, does not apply to sale of realty by corporation having general authority to buy and sell real estate. *Tuttle v. Building Corp.*, 146. Nonsuit on ground that plaintiff's evidence disclosed that sale of realty by corporation had not been approved by majority of directors, *held* error. *Ibid.*

Evidence tending to show that a corporation had executed a deed for real estate and placed it in escrow raises a presumption that the deed, being under seal, was executed by authority. *Ibid.*

COURTS.

§ 2. Jurisdiction in General.

Jurisdiction is essential to a valid proceeding. *Gill v. McLean*, 201.

In a proceeding under the Declaratory Judgment Act involving the validity of the appointment of a justice of the peace, a declaration of the court of the marital status of persons who had been married by the justice of the peace but who were not before the court, is clearly beyond its jurisdiction. *Etheridge v. Leary*, 636.

§ 3a. Original Jurisdiction of Superior Courts in General.

The powers vested in the Utilities Commission in respect to the licensing, supervision and control of franchise carriers of passengers and property for compensation and to hear complaints are comprehensive and ordinarily the courts will not exercise original jurisdiction over any question which may arise in respect thereto. *Coach Co. v. Transit Co.*, 391.

Injunction will lie to protect the rights and privileges of a duly licensed franchise carrier from infringement by an interloper possessing no franchise or other claim of right. *Ibid.*

§ 4c. Appeals to Superior Court from Clerk.

Appeal will lie to Superior Court from order of clerk adjudging that petitioners are entitled to cartway by necessity and appointing jury of view to locate cartway. *Triplett v. Lail*, 274.

§ 5. Jurisdiction After Order or Judgment of Another Superior Court Judge.

One Superior Court judge has no power to review the findings, orders, and decrees of another Superior Court judge. *Hoke v. Greyhound Corp.*, 374.

COURTS—*Continued.*

§ 13. Administration of Federal Statutes in State Courts.

State courts have concurrent jurisdiction for the enforcement of civil remedies under the Emergency Price Control Act. *Taylor v. Motor Co.*, 365.

§ 14. Administration and Application of Laws of This and Other States—Conflict of Laws.

Where an automobile is brought into the State prior to filing or recording of chattel mortgage in another State, the lien of the chattel mortgage does not attach. *Thrift Corp. v. Guthrie*, 431.

§ 14. Administration and Application of Laws of This and Other States: Conflict of Laws.

The laws of the state of the *situs* determine what estate a widow who has dissented from her husband's will has in his property; and the laws of the state in which the husband died domiciled and in which the will was probated govern her dissent. *Coble v. Coble*, 547.

Where a widow accepts provision made for her expressly in lieu of dower in her husband's will, she loses dower; but if she validly dissents in the state in which the will is probated, she renounces the will *in toto* and cannot take testamentary benefits under it anywhere. *Ibid.*

CRIMINAL LAW.

§ 8. Principals—Aiders and Abettors.

All who participate in the commission of a misdemeanor, as aiders and abettors or otherwise, are guilty as principals. *S. v. Gibbs*, 677.

§ 12a. Jurisdiction in General.

Where want of jurisdiction appears on face of record, Supreme Court will dismiss prosecution *ex mero motu*. *S. v. Jones*, 94.

§ 12b. Place of Crime.

The courts of this State have no jurisdiction over an offense committed in another, and when the evidence, whether for the State or the defendant, shows that the offense was committed out of this State, jurisdiction is ousted. *S. v. Jones*, 94.

Our courts have jurisdiction of a prosecution for conspiracy executed within the State even though the conspiracy be formed out of the State. *S. v. Warren*, 380.

§ 12d. Jurisdiction of Federal and State Courts.

Where persons held by Federal officers on a Federal charge are released by order of the District Judge to the sheriff for trial in the State Court, *held*, upon obtaining custody through the comity and courtesy existing between the courts of the two jurisdictions, the State Court acquired jurisdiction. *S. v. Litteral*, 527.

§ 14. Appeals to Superior Court.

On appeal to the Superior Court from a municipal county court having exclusive original jurisdiction of the offense charged, the solicitor may amend the warrant or put defendant on trial under a bill of indictment charging the same offense. Whether, in addition thereto, the solicitor may incorporate in

CRIMINAL LAW—*Continued.*

the bill of indictment related counts charging violations of the same section of the Act under which defendant was prosecuted in the municipal county court, *quære*. *S. v. Wilson*, 43.

Where in the trial in Recorder's Court defendant is found guilty on the first count and not guilty on the second, and appeals to the Superior Court, the charge on the second count is not before the Superior Court and a conviction on the second count in the Superior Court will be set aside as a nullity. *S. v. Jones*, 170.

§ 28. Presumptions and Burden of Proof.

Upon defendant's plea of not guilty the presumption of innocence attaches and goes with him throughout the trial and stands until overcome by proof or an adverse verdict, and casts the burden on the State to prove guilt beyond a reasonable doubt. *S. v. Godwin*, 449.

In order to sustain conviction, circumstantial evidence, in the same manner as direct proof, must be sufficient to convince the jury of the fact of guilt beyond a reasonable doubt, and statements that circumstantial evidence must "exclude a rational doubt" or "exclude every rational hypothesis of innocence" are merely converse statements of the general rule as to the *quantum* of proof required, and do not impose upon the State, when relying upon circumstantial evidence, any greater intensity of proof. *S. v. Ewing*, 535.

§ 29a. Relevancy of Evidence in General.

Defendant was charged with committing rape after his escape with other prisoners from custody. A voluntary statement that he had falsely accused another of the prisoners with having committed the crime was admitted in evidence without objection. *Held:* Testimony of the sheriff that defendant had made inquiry as to whether the other prisoners had been apprehended is relevant and competent. *S. v. Ragland*, 162.

§ 29b. Evidence of Guilt of Other Offenses.

Where an alienist has testified as to the mental irresponsibility of defendant based upon his examination of defendant, the fact that the cross-examination of the witness in regard to the basis of his opinion incidentally discloses defendant's past criminal record does not render the cross-examination incompetent, since the matter is within the proper scope of the cross-examination. *S. v. Litteral*, 527.

§ 29f. Evidence of Similar Facts or Transactions.

Whether the existence of a state of affairs at one time is competent to show the existence of the same state at another time is a question of materiality or remoteness to be determined upon the facts of each particular case in accordance with the nature of the subject matter, the length of time intervening, and a showing, if any, as to whether conditions had remained unchanged. *S. v. Kelly*, 62.

§ 30. Evidence and Record at Former Trial or Proceedings.

Where testimony of a witness as to her bigamous marriage with defendant is competent, the complaint filed by her in an action to annul the marriage is competent for the purpose of corroborating her testimony. G. S., 1-149. *S. v. Phillips*, 277.

CRIMINAL LAW—*Continued.*

§ 31a. Expert Testimony in General.

A physician, qualified as an expert, testified from his examination of the body that deceased was in a prone position when the fatal injuries were inflicted because, if the deceased had been standing, the quantity and pressure of the blood which would have gushed forth from the severed arteries of the neck would have sprayed a larger area with blood. *Held:* The reasons assigned by the witness for his conclusion bring the conclusion well within the rule of expert opinion testimony. *S. v. Stanley*, 650.

Testimony of an embalmer describing the wounds he found on the body in the course of preparing the body for burial is testimony as to an observed fact not requiring expert testimony. *Ibid.*

§ 31e. Footprints.

Testimony of an officer that he took one of the shoes defendant was wearing when apprehended and fitted it into footprints found at the scene of the crime is competent and does not invade the constitutional protection against self-incrimination. *S. v. Ragland*, 162.

§ 31h. Qualification of Experts.

A witness who has seen foreign service in the U. S. Army and who has been an Army instructor in small arms is competent to testify as to the caliber and range of the rifle used in the perpetration of the killing. *S. v. DeMai*, 657.

Where, after testimony qualifying a witness as an expert, the court admits expert testimony of the witness, it will be presumed that the court found the witness to be an expert notwithstanding the absence of a specific announcement of the preliminary ruling. *Ibid.*

§ 32½. Telephone Conversations.

A written statement made by defendant and evidence of oral statements made by him to officers disclosing that defendant had made a telephone call to the Acting Coroner on the afternoon of the date in question, and testimony of a witness that when he called at defendant's home a short time after the hour in question, defendant stated that he had called the Acting Coroner *is held* a sufficient identification of defendant as the person who made the call to admit of testimony by the Acting Coroner as to the telephone conversation had with a person purporting to be defendant. *S. v. Gardner*, 37.

§ 33. Confessions.

The finding by the trial court upon conflicting evidence that the confessions offered in evidence were not obtained by threats, assaults, beatings and ill treatment, is conclusive. *S. v. Thompson*, 19.

A confession cannot be held as a matter of law to have been made under compulsion of hope because of the fact that officers, after a defendant had expressed a desire to speak, advised that it would be better for defendants to tell the truth. The distinction between such admonition and advice to confess guilt or language inducing a defendant to make an untrue statement, pointed out. *Ibid.*

A voluntary confession is admissible in evidence against the party making it; an involuntary one is not. A confession is voluntary in law when and only when, it is in fact voluntarily made. *Ibid.*

The voluntariness of a confession is primarily a question for the trial court, and its decision in respect thereto can be reviewed only upon matters of law,

CRIMINAL LAW—*Continued.*

viz., the standard for determining whether a confession is involuntary, what evidence is competent upon the question, and whether the evidence is sufficient to support the trial court's findings. *Ibid.*

The absence of a finding of record that the confession of a defendant was voluntary, is not fatal, since the court's ruling admitting the confession in evidence, must, of necessity, have been predicated upon such finding. *S. v. Litteral*, 527.

Nothing else appearing, a confession will be presumed voluntary, and the fact that it is made in the presence of armed officers after defendant's arrest does not render it incompetent. *Ibid.*

§ 34a. Admissions and Declarations in General.

Declarations and admissions of a defendant are competent against him in a criminal action. *S. v. Ragland*, 162.

Testimony of declarations and admissions made by defendant is competent against him, and objection that defendant was not first cautioned as to his rights by the witness is untenable. *S. v. Artis*, 371.

Declarations of deceased as to reason for going to scene of encounter *held* incompetent because not part of *res gestæ*, but admission of such testimony *held* harmless on this record. *S. v. DeMai*, 657.

§ 35. Res Gestæ.

In this prosecution for breaking and entering otherwise than burglariously and for assault with intent to commit rape, testimony of prosecuting witness relative to her having called her nephew, whom she knew was not in the house, in order to frighten her assailant, *is held* competent as part of the *res gestæ*. *S. v. Cogdale*, 59.

Where prosecutrix testifies that she was assaulted and left in distress in a field, testimony of her exclamatory cry for help is competent. *S. v. Litteral*, 527.

§ 38d. Photographs.

Where a witness testifies that photographs accurately represented the scene, the use of the photographs to illustrate the witness' testimony is competent, and objection thereto on the ground that the witness did not make the photographs is untenable. *S. v. Stanley*, 650.

§ 39a. Privileged Communications—Attorney and Client.

Where defendant testifies as to a communication between him and his attorney, the State may cross-examine him in regard thereto. *S. v. Artis*, 371.

Where an attorney declines proffered employment the relationship of attorney and client is not created, and defendant may not object to testimony by the attorney in corroboration of a State's witness on the ground that the communications were privileged. *S. v. Davenport*, 475.

§ 39b. Privileged Communications—Physician and Patient.

The relationship of patient and physician within the purview of G. S., 8-53, does not exist between a defendant and an alienist examining him in regard to his sanity. *S. v. Litteral*, 527.

Where a defendant offers testimony of an alienist in support of his plea of mental irresponsibility, he waives any confidential relationship and the State

CRIMINAL LAW—*Continued.*

may cross-examine such witness concerning all matters covered in the examination-in-chief. *Ibid.*

§ 42b (1). Direct Examination—Leading Questions.

The court has the discretionary power to permit the solicitor to ask a witness leading questions. *S. v. Cogdale*, 59.

§ 42b (2). Re-direct Examination.

On re-direct examination a witness may explain or refute an inference brought out on cross-examination even though such testimony would otherwise be incompetent. *S. v. Warren*, 380.

§ 42d. Evidence Competent for Purpose of Corroboration.

Where the credibility of prosecutrix' testimony is put in issue by the plea of not guilty and by cross-examining her, testimony tending to support her version of the occurrences attendant the crime is competent for the purpose of corroboration. *S. v. Litteral*, 527.

Prosecutrix' statement to officers, giving her version of the crime, reduced to writing and signed by her, is competent for the purpose of corroborating her testimony. *Ibid.*

A witness testified he saw defendants in an automobile on the afternoon and evening before the crime was committed, and made a memorandum describing the car and the number of its license plate. Officers testified that they found the license plate in a stove pipe in the loft of a barn at the home of one of defendants, and made a memorandum thereof. *Held:* The memoranda were competent for the purpose of corroborating the witnesses. *Ibid.*

§ 48c. Admission of Evidence—Evidence Competent for Restricted Purpose.

A general objection to testimony which is competent for the purpose of corroboration is untenable. *S. v. Cogdale*, 59.

§ 48d. Withdrawal of Evidence.

Where evidence is withdrawn by the court and the jury instructed not to consider it, any error in its admission is averted. *S. v. Artis*, 371; *S. v. Davenport*, 475.

§ 48f. Objections and Exceptions to Evidence.

An exception to the admission of evidence cannot be sustained when there is no objection to the question prompting the answer and no motion to strike the answer. *S. v. Artis*, 371.

Where prosecutrix' written statement is competent for the purpose of corroborating her testimony and is admitted for this purpose, if some parts of the statement do not tend to corroborate her testimony, it is incumbent on defendants to move to strike or exclude such parts, and a general objection to the statement as a whole is ineffective. *S. v. Litteral*, 527.

§ 50d. Expression of Opinion by Court on Evidence During Progress of Trial.

The remarks of the trial court in a lengthy trial involving numerous witnesses that it was unnecessary for the witnesses to go over their testimony again and again, will not be held for error as an expression of opinion, it

being clear the remarks were made in an effort to expedite the trial and were proper and necessary. *S. v. Davenport*, 475.

In a prosecution for carnal knowledge of a female child over twelve and under sixteen years of age, the repeated remarks of the court in directing the sheriff to quiet the spectators, made immediately after cross-examination of prosecutrix to impeach her testimony, that "you people cannot laugh at the predicament of this poor little girl; the only difference between you and she is that you haven't been caught," *is held* to violate G. S., 1-180, as tending to invoke sympathy for prosecutrix and thereby bolster her testimony and as tending to impair the effect of defendant's plea of not guilty. *S. v. Woolard*, 645.

§ 52a. Nonsuit.

Equivocation on the part of prosecutrix would not justify taking the case from the jury. *S. v. Thompson*, 19.

The fact that the State offers in evidence testimony of statements made by defendant, any one of which standing alone might exculpate, does not justify nonsuit when proof of the State's case does not rest upon such statements, but to the contrary the fact that the defendant made a multiplicity of inconsistent and contradictory statements is an incriminating circumstance against him. *S. v. Phillips*, 277.

Where a defendant bases his motions to nonsuit solely on the insufficiency of evidence identifying him as the perpetrator of the crime, the fact that the crime was committed as charged being admitted, testimony of prosecuting witness positively identifying defendant as her assailant is alone sufficient to sustain the overruling of defendant's motions, particularly under the rule that the evidence must be taken most favorably to the State. *S. v. Cogdale*, 59.

Upon motion to nonsuit, the evidence is to be taken most strongly against defendant and if there is more than a scintilla of evidence of guilt, defendant's motion to nonsuit is properly denied. *S. v. Rogers*, 67.

A fatal variance between an indictment and proof may be taken advantage of by motion to nonsuit, since in such instance there is no sufficient evidence to support the charge as laid in the indictment. *S. v. Law*, 103.

Upon motion to nonsuit, the evidence is to be considered in the light most favorable to the State and it is entitled to the benefit of every reasonable inference fairly deducible therefrom, and when so considered, if there be more than a scintilla of competent evidence to support each of the essential elements of the offense charged, the motion should be overruled, without consideration by the court as to the *quantum* of proof required of the State, it being for the jury to say whether they are convinced beyond a reasonable doubt of the fact of guilt upon such evidence. *S. v. Davenport*, 475.

On motion to nonsuit only the evidence favorable to the State will be considered. *S. v. Ewing*, 535; *S. v. Hough*, 596.

Circumstantial evidence which raises a reasonable inference of defendant's guilt is sufficient to be submitted to the jury, it being for the jury to say whether it convinces them of the fact of guilt beyond a reasonable doubt. *S. v. Ewing*, 535.

§ 52b. Directed Verdict and Peremptory Instructions in Criminal Prosecutions.

It is rarely proper to direct a verdict for the State in a criminal prosecution, and where there is no admission or presumption calling for explanation

CRIMINAL LAW—*Continued.*

or reply on the part of defendant, an instruction that if the jury should find beyond a reasonable doubt the facts to be as shown by all the evidence, to return a verdict of guilty, must *be held* for reversible error, certainly where the court fails to charge that if the jury has a reasonable doubt of defendant's guilt to acquit her. *S. v. Godwin*, 449.

Upon evidence that defendant pointed rifle at deceased, and that shot therefrom inflicted fatal wound, directed verdict of manslaughter was justified under G. S., 14-34. *S. v. Boldin*, 594.

§ 53b. Instructions on Burden of Proof.

The failure of the court to add the words "beyond a reasonable doubt" in each instance that it uses the phrase "if the State has satisfied you from the evidence" cannot be held for prejudicial error when the court has used the words "beyond a reasonable doubt" in each portion of the charge excepted to and has theretofore correctly instructed the jury as to the *quantum* of proof required of the State. *S. v. Jones*, 402; *S. v. Cannon*, 338.

Where, in giving additional instructions in response to a juror's request, the court charges that the jury "must be satisfied" from the evidence rather than "satisfied beyond a reasonable doubt," the charge must be held for prejudicial error even though in other portions of the instructions the court had correctly stated the intensity of proof required of the State. *S. v. Johnson*, 587.

Inadvertent use of phrase "by the greater weight of the evidence," instead of "beyond a reasonable doubt," must perforce be held for reversible error. *Ibid.*

§ 53d. Charge—Statement of Evidence and Explanation of Law Arising Thereon.

The charge of the court in this case *held* to have complied with the statutory requirement that the court state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon. G. S., 1-180. *S. v. Thompson*, 19.

The word "attempt" is self-explanatory, and the failure of the court to define and explain its meaning in the absence of prayer for special instructions is not reversible error upon this record. *S. v. Jones*, 402.

In this case the charge of the court in stating the evidence and explaining the law arising thereon *is held* free from prejudicial error. *S. v. Davenport*, 475.

An instruction that the jury should be governed by their recollection of the evidence in arriving at a verdict, is without error. *S. v. Litteral*, 527.

The court need not recite the evidence in detail otherwise than in stating the contentions of the parties on the evidence. *S. v. DeMai*, 657.

§ 53f. Expression of Opinion by Court on Weight of Evidence in Giving Instructions.

An exception based upon the length of the statement of the State's contentions in comparison with that given those of defendant *held* untenable. *S. v. Davenport*, 475; *S. v. DeMai*, 657.

§ 53g. Duty to Submit Question of Guilt of Less Degrees of Crime Charged.

Court must submit question of defendant's guilt of less degree of crime when supported by evidence, *S. v. Staton*, 409; *S. v. Goss*, 26; but not when there is no evidence of guilt of less degree. *S. v. Brown*, 383.

CRIMINAL LAW—*Continued.*

Defendant was charged with an attempt to commit highway robbery with firearms. The State's evidence was sufficient as to each essential element of attempt to commit robbery but was insufficient to show the use of firearms in the attempt. *Held:* The court correctly submitted the evidence to the jury on the question of defendant's guilt of the less grave offense of attempt to commit highway robbery. G. S., 15-170. *S. v. Jones*, 402.

In a prosecution for burglary in the first degree the jury may return a verdict of guilty of burglary in the second degree not only where the evidence tends to show the elements of burglary in the first degree but also upon the jury's finding of facts constituting burglary in the first degree if the jury deems it proper to render the milder verdict, and an instruction to this effect is mandatory. *S. v. Hooper*, 633.

§ 53k. Instructions—Statement of Contentions. (Requirement that misstatement be brought to court's attention, see hereunder § 78e (2)).

The court is not required to give all the contentions, but only to state them as fairly for one side as for the other. *S. v. Litteral*, 527.

Where the court states contention of the State on a particular phase of the case it is error for the court to fail to state defendant's opposing contention arising out of the evidence on the same aspect of the case. G. S., 1-180. *S. v. Fairley*, 134.

An objection to the court's statement of a contention of the State on the ground that it was not supported by the evidence of record cannot be sustained when such contention is a reasonable, logical and fair deduction from the evidence adduced. *S. v. Warren*, 380.

An exception based upon the length of the statement of the State's contentions in comparison with that given those of defendant *held* untenable. *S. v. Davenport*, 475; *S. v. DeMai*, 657.

The language used by the court in stating the respective contentions of defendant and the State will not be held for prejudicial error when the expressions used by the court are based on the evidence and legitimate deductions therefrom. *S. v. DeMai*, 657.

Defendant testified he was born in the United States but on cross-examination admitted that he had registered as an alien in 1940 under the Alien Registration Act, and stated without objection that his reason for so doing was some doubt as to which side of the international boundary line he was born on, and that he did not want to risk deportation. *Held:* The courts' statement of the State's contention to the effect that the registration under the Alien Registration Act was not in good faith but to obtain advantages which might accrue from registering thereunder, with a further instruction that the whole matter was irrelevant but that the jury might consider it only upon the question of the credibility of the witness, is without prejudicial error. *Ibid.*

§ 54b. Form, Sufficiency and Effect of Verdict.

A general verdict of guilty will support judgment imposing concurrent sentences if but one count is sound. *S. v. Revels*, 34.

Verdicts and judgments in criminal cases ought to be clear and free from ambiguity or uncertainty. *S. v. Jones*, 47.

The failure of the verdict to refer to one of the counts in the bill of indictment amounts to an acquittal on that count. *S. v. Warren*, 380; *S. v. Wolfe*, 261.

CRIMINAL LAW—*Continued.*

§ 54e. Power of Court to Refuse to Accept Verdict and Have Jury Redeliberate.

Where the verdict rendered against one defendant is incomplete, it is proper for the court to refuse to accept it and to instruct the jury again as to the form of the permissible verdicts, and such defendant cannot complain that the jury shortly thereafter rendered a verdict in proper form adverse to him. *S. v. Litteral*, 527.

§ 60a. Form and Sufficiency of Judgments in Criminal Cases in General.

Verdicts and judgments in criminal cases ought to be clear and free from ambiguity or uncertainty. *S. v. Jones*, 47.

§ 61b. Formalities and Requisites of Judgment Upon Conviction of Capital Crime.

Where the judgment upon a verdict of guilty of murder in the first degree states that the defendant had been convicted of murder, the cause must be remanded in order that it appear on the face of the judgment that the conviction was for murder in the first degree, since the judgment alone is certified to the warden of the State Penitentiary. G. S., 14-17; G. S., 15-188; G. S., 15-189; G. S., 15-190. *S. v. Montgomery*, 100.

§ 62f. Suspended Judgments and Executions.

Evidence *held* insufficient to support finding that minor had violated terms of judgment suspending execution upon condition that minor be committed to training school, obey its rules and regulations without attempting to escape therefrom. *S. v. Sullivan*, 680.

Upon motion by the solicitor for execution of a suspended sentence, the burden is on the State to offer affirmative evidence of violation of the conditions of the judgment. *Ibid.*

§ 67b. Judgments Appealable.

An appeal to the Supreme Court does not lie from a discretionary determination of an application by defendant for a new trial on the ground of newly discovered evidence. *S. v. Thomas*, 71.

§ *7c. Matters Reviewable.

All questions as to the competency of jurors are for the decision of the trial court, and its rulings thereon are not subject to review unless accompanied by some imputed error of law. *S. v. Davenport*, 475.

The finding of the trial court, when supported by evidence, that no discrimination was intended or resulted from the manner in which the jury list was prepared, is sufficient to support its action overruling a challenge to the array on the ground that the jury list contained a disproportionately small number of Negroes, and such ruling will not be disturbed on appeal in the absence of some pronounced ill consideration. *S. v. Koritz*, 552; *S. v. Kirksey*, 445.

§ 73a. Making Out and Serving Statement of Case on Appeal.

Defendant may not be allowed an extension of time for making up and serving his statement of case on appeal beyond the term of the Supreme Court to which the case must be brought under the rules governing appeals. *S. v. Lampkin*, 620.

CRIMINAL LAW—*Continued.*

§ 73b. Objections and Countercase.

Time for serving statement of case and countercase cannot be extended beyond the term of the Supreme Court to which the case must be brought under the rules governing appeals. *S. v. Lampkin*, 620.

§ 73d. "Case on Appeal."

Where the death of the trial judge prevents settlement of case on appeal, and thereafter the solicitor offers to withdraw his exceptions to the defendant's statement and the Attorney-General in apt time moves in the Supreme Court that defendant's statement be taken as the case on appeal, the motion of defendant for a new trial will be denied and the motion of the Attorney-General allowed, defendant being in no position to complain of statement of case made out by himself. G. S., 15-180; G. S., 1-282; G. S., 1-283. *S. v. Cannon*, 336.

§ 74. Term of Supreme Court to Which Appeal Must Be Taken.

The rules governing appeals are mandatory and not directory and the time for settling a case on appeal cannot be extended beyond the term of the Supreme Court to which the appeal is required to be brought, whether by consent of counsel or by order of court or by consent of counsel with approval of the court, and an extension which runs counter to the rules governing appeals does not preserve or regain the right of appeal. *S. v. Lampkin*, 620.

§ 77d. Conclusiveness and Effect of Record.

The Supreme Court is bound by the record. *S. v. Gause*, 26; *S. v. Wolfe*, 461; *S. v. Johnson*, 587.

§ 78e (1). Form and Requisites of Objections and Exceptions to Charge in General.

An exception to a specific portion of the charge is insufficient to present the contention that the charge failed to state the evidence and declare and explain the law arising thereon, G. S., 1-180, unless such portion is in itself fatally defective. *S. v. Jones*, 402.

§ 78e (2). Necessity for Calling Court's Attention to Inaccuracies in Statement of Evidence or Contentions.

An exception to the statement of a contention of the State is unavailing when defendant makes no objection at the time and fails to call the matter to the court's attention at any time during the trial so as to afford opportunity for correction. *S. v. Thompson*, 19; *S. v. Warren*, 380.

An instruction defining the *quantum* of proof required of the State as "by the greater weight of the evidence" must be held for reversible error even though the inadvertence is in the statement of contentions and not brought to the trial court's attention at the time. *S. v. Gause*, 26; *S. v. Johnson*, 587.

§ 78g. Necessity for, Form and Requisites of Assignments of Error.

Where there is no valid objection to the evidence taken by defendant during the trial and no assignment of error based upon the admission or exclusion of the evidence, it will be deemed that no error was committed in the taking of the evidence. *S. v. Montgomery*, 100.

Where there is no assignment of error to the charge, it will be deemed that the charge was without error. *Ibid.*

CRIMINAL LAW—*Continued.*

§ 79. Briefs.

Assignments of error not set out in appellant's brief are deemed abandoned. Rule of Practice in the Supreme Court, No. 28. *S. v. Cogdale*, 59; *S. v. Jones*, 94; *S. v. Fairley*, 134.

Exceptions to the admission of evidence will be deemed abandoned when appellant's brief fails to point out any ground of objection. *S. v. Cogdale*, 59.

§ 80b (4). Dismissal for Failure to Prosecute Appeal.

Where defendant fails to file statement of case on appeal within time allowed, the motion of the Attorney-General to docket and dismiss will be granted, but when defendant has been convicted of a capital felony, this will be done only after an inspection of the record fails to disclose error. *S. v. Ewing*, 107.

Where defendant gives notice of appeal but fails to serve case on appeal within the time allowed or take any action toward perfecting the appeal, the motion of the Attorney-General to docket and dismiss will be allowed, but where defendant has been convicted of a capital felony this will be done only after an inspection of the record proper fails to disclose error. *S. v. McLeod*, 411; *S. v. O'Dear*, 649; *S. v. Cherry*, 650; *S. v. Douglass*, 696; *S. v. Little*, 701.

Where writ of *certiorari* is allowed, but thereafter appellant fails to file case on appeal in the Superior Court, notwithstanding it had been settled by the trial judge, or docket same in the Supreme Court, and counsel for appellant advises that the appeal will not be perfected, the motion of the Attorney-General to docket the appeal and dismiss the writ of *certiorari* must be allowed, but in a capital case this will be done only after an examination of the record proper fails to disclose error. *S. v. Sanders*, 474.

Where defendants failed to make out and serve statement of case on appeal within the time available under the rules governing appeals, the motion of the Attorney-General to docket and dismiss must be allowed, but where defendants had been convicted of a capital felony and one of them files a purported statement of case on appeal under an extension of time by consent beyond the time available under the rules governing appeals, the motion to docket and dismiss will be allowed only after an inspection of the record proper as to the one and of the purported statement of case on appeal as to the other, fails to disclose error. *S. v. Lampkin*, 620.

§ 81b. Presumptions and Burden of Showing Error.

The burden is on appellant to show that alleged error was prejudicial. *S. v. Phillips*, 277.

§ 81c (1). Harmless and Prejudicial Error in General.

Appellant has the burden not only of showing error but also that the alleged error affected his rights substantially and not merely theoretically. *S. v. Cogdale*, 59.

Failure to appoint counsel for defendant cannot be held prejudicial when it appears that defendant was able to employ counsel, but preferred to appear *in propria persona*. *S. v. Pritchard*, 168.

§ 81c (2). Harmless and Prejudicial Error in Instructions.

The court's statement of contentions will not be held for reversible error even if inexact in some particulars when the alleged error is without material significance on the record. *S. v. Pritchard*, 168.

CRIMINAL LAW—*Continued.*

The charge of the court will be considered contextually, and when, so construed, it is without prejudicial error an exception thereto will not be sustained. *S. v. Cannon*, 338; *S. v. Hough*, 596; *S. v. Gibbs*, 677.

A charge which fails to repeat in each instance the phrase "beyond a reasonable doubt" in charging upon the *quantum* of proof required to establish defendant's guilt of each of the elements of the offense, but which ends with an admonition that the jury should be satisfied from the evidence beyond a reasonable doubt as to defendant's guilt of each and every essential element of the offense as defined in order to convict, *is held* not prejudicial. *S. v. Cannon*, 338.

The failure of the court to add the words "beyond a reasonable doubt" in each instance that it uses the phrase "if the State has satisfied you from the evidence" cannot be held for prejudicial error when the court has used the words "beyond a reasonable doubt" in each portion of the charge excepted to and has theretofore correctly instructed the jury as to the *quantum* of proof required of the State. *S. v. Jones*, 402.

Where, in giving additional instructions in response to a juror's request, the court charges that the jury "must be satisfied" from the evidence rather than "satisfied beyond a reasonable doubt," the charge must be held for prejudicial error even though in other portions of the instructions the court had correctly stated the intensity of proof required of the State. *S. v. Johnson*, 587.

Two defendants were tried together for the same offense. *Held:* A charge susceptible to the construction that should the jury find beyond a reasonable doubt that either committed the offense charged, they should return a verdict of guilty as to both, must be held for reversible error. *S. v. Wolfe*, 461.

Where the court in different portions of the charge gives correct and incorrect instructions as to the *quantum* of proof required of the State, the charge must be held for prejudicial error, since the jury may have acted upon that portion which was incorrect. *S. v. Gause*, 26; *S. v. Johnson*, 587.

Error in instructions relating to less degrees of crime charged *held* prejudicial notwithstanding conviction of highest degree. *S. v. Stafford*, 409; *S. v. Hooper*, 633.

§ 81c (3). Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

The admission of evidence, even if incompetent, does not entitle defendant to a new trial when defendant does not make it appear that he was prejudiced thereby. *S. v. Cogdale*, 59; *S. v. Warren*, 380.

Where evidence is withdrawn and jury instructed not to consider it, its admission will not ordinarily be held prejudicial. *S. v. Artis*, 371; *S. v. Davenport*, 475.

While testimony of a declaration of a deceased made prior to the fatal encounter as to his reason for going to a place near the scene where the altercation took place is incompetent because not a part of the *res gestæ*, the admission of testimony of such declaration cannot be held prejudicial when there is no evidence that deceased knew of the proximity of defendant and no evidence that deceased went to the scene for other than some lawful purpose. *S. v. DeMai*, 657.

§ 81c (4). Error Relating to One Count Only.

Where a general verdict of guilty is returned, the verdict is sufficient to uphold the judgment imposing concurrent sentences if any one of the counts

is sound, and therefore on appeal exceptions relating to other counts are immaterial and need not be reviewed. *S. v. Revels*, 34; *S. v. Cogdale*, 59; *S. v. Warren*, 380.

Defendant was convicted on three counts, sentence on the first two to run concurrently and sentence on the third to begin at the expiration of the first two, suspended on good behavior. *Held:* There being error in the conviction on the first two counts and it being apparent that the conviction on the third count was necessarily influenced by and followed as a matter of course from the convictions on the first two counts, a new trial must be awarded on the third count also. *S. v. Godwin*, 449.

§ 81c (5). Error Cured by Verdict.

Error in failing to submit the question of defendant's guilt of a lesser degree of the crime is not cured by a verdict of guilty of a higher offense, since it cannot be known whether the jury would have rendered a milder verdict if permitted to do so. *S. v. Staton*, 409; *S. v. Hooper*, 633.

Where defendant is convicted of murder in the second degree, any error in the instructions of the court relating to murder in the first degree cannot be held prejudicial in the absence of a showing that the verdict of second degree murder was thereby affected. *S. v. DeMai*, 657.

§ 81f. Review of Exceptions to Refusal to Nonsuit.

On appeal from the overruling of defendants' demurrers to the evidence the Supreme Court is not concerned with the weight of the testimony or with its truth or falsity, but only whether the evidence is sufficient to carry the case to the jury and sustain the indictment, considering the evidence in the light most favorable to the State and giving it the benefit of every fact and inference of fact which may be reasonably deduced therefrom. *S. v. Thompson*, 19.

§ 83. Appeal in Criminal Cases—Determination and Disposition of Cause.

The Supreme Court on appeal will take notice of want of jurisdiction and dismiss the action *ex mero motu*. *S. v. Jones*, 94.

DAMAGES.

§ 7. Punitive Damages.

Punitive damages may not be awarded where plaintiff is not entitled to recover any actual damages. *Gaskins v. Sidbury*, 468.

§ 11. Relevancy and Competency of Evidence on Issue of Damages.

Where plaintiff introduces evidence as to loss of income upon the issue of damages, plaintiff's Federal income tax report is competent for the purpose of contradicting plaintiff's testimony on this aspect. *Davis v. R. R.*, 561.

A witness may not give an opinion as to the amount of damages suffered by plaintiff, the ascertainment of damages being the province of the jury, and an instruction upon such testimony upon the issue of damages is perforce erroneous. *Lowe v. Hall*, 541.

DEATH.

§ 1. Presumption of Death from Seven Years Absence.

The presumption of death from seven years absence arises only upon proof that the absent person left his own place of residence without intelligence from or concerning him for the required period, and mere absence from a

DEATH—*Continued.*

place where his relatives reside but which is not his own place of residence is insufficient to raise the presumption. *Trust Co. v. Deal*, 691.

The presumption of death from seven years absence is rebuttable, and the jury should consider all facts and circumstances surrounding the absent person's disappearance which has any direct bearing upon his reason for leaving or the probability or improbability that there would have been a communication from him. *Ibid.*

Where, in an action for the advice and instruction of the courts in the administration of a trust created by will, the question for determination is the death of one of the beneficiaries under the presumption of death arising from seven years absence, the burden of proof upon the issue is upon the other beneficiaries who would benefit rather than upon the plaintiff trustee. *Ibid.*

The presumption of death arising from seven years absence raises no presumption that the absent person died without issue him surviving. *Ibid.*

§ 3. Grounds and Conditions Precedent to Actions for Wrongful Death.

An administrator instituted this action for wrongful death against intestate's husband upon allegations that the husband's negligence caused the death of his intestate. Intestate left no children her surviving. *Held:* The husband being the sole beneficiary of any recovery, G. S., 28-149 (9), the courts will look beyond the nominal party plaintiff, and recovery will not be allowed, even to the extent of funeral expenses, under the principle that a wrongdoer will not be permitted to enrich himself as a result of his own misconduct. *Davenport v. Patrick*, 686.

§ 8. Evidence in Actions for Wrongful Death.

Army discharge of intestate is incompetent for any purpose. *Hoke v. Greyhound Corp.*, 412.

§ 9. Distribution of Recovery in Actions for Wrongful Death.

The right of action for wrongful death is purely statutory, and provisions of the statute authorizing the institution and maintenance of such action are no more binding on the courts than the provisions of the same statute directing the distribution of recovery and the persons entitled to distribution of such recovery are to be determined as of the time of intestate's death. *Davenport v. Patrick*, 686.

DECLARATORY JUDGMENT ACT.

§ 2a. Subject of Action.

While proceedings under the Declaratory Judgment Act, G. S., 1-253, *et seq.*, will be given wide latitude, a proceeding may not be maintained thereunder by trustees under a will to invoke the general equitable powers of the court to authorize them to sell, mortgage or lease a part of the trust property for benefit and preservation of the trust, since such remedy goes far beyond a mere declaration of plaintiffs' rights or a mere obtaining of direction to plaintiffs to do or refrain from doing any act in their fiduciary capacity, and judgment entered in such proceeding will be vacated and the proceeding dismissed. *Brandis v. Trustees of Davidson College*, 329.

A charitable foundation and an eleemosynary educational corporation executed a contract under which, in consideration of mutual promises and covenants, the Foundation obligated itself to pay to the education corporation income of the Foundation up to a designated amount each year in perpetuity.

DECLARATORY JUDGMENT ACT—*Continued.*

This proceeding was instituted under the Declaratory Judgment Act, and the Trustee of the Trust from which the Foundation obtained its principal income was made a party. *Held:* The courts have jurisdiction under the Declaratory Judgment Act to declare the status and authority of the parties and the validity and enforceability of the contract. *Reynolds Foundation v. Trustees of Wake Forest*, 500.

§ 2b. Real Controversy.

Where, in a proceeding under the Declaratory Judgment Act to establish the validity of the appointment by the Clerk of the Superior Court of a justice of the peace for an unexpired term, G. S., 7-114, the answers admit the allegations of the petition to the effect that the appointment of petitioner was valid, the admission dehearts the proceeding and renders it moot, and the proceeding will be dismissed for want of real controversy. *Etheridge v. Leary*, 636.

§ 6. Judgment or Decree.

This proceeding was instituted to determine the status of the parties and the validity and enforceability of a contract entered into by a charitable Foundation and an eleemosynary educational institution. *Held:* The adjudication of the validity of the contract, the status of the parties, direction to the parties to perform their obligations, including specific directions in regard to matters necessary to the enforceability of the contract, is authorized by G. S., 1-255. *Reynolds Foundation v. Trustees of Wake Forest*, 500.

This action was instituted to determine the validity of a contract between a charitable Foundation and a religious denominational educational institution. The contract required that the State Convention of the denomination should continue in existence and continue its moral and financial support of the educational institution in the same manner as theretofore, and that, by direction of the Convention the validity of the contract to be established by judicial determination. The convention approved the contract and assumed its obligations thereunder and was made a party to the proceedings. *Held:* Decree that the Convention has the power and authority to perform the acts stipulated in the contract, though not a party to the contract, is auhorized. *Ibid.*

A charitable Foundation and an educational institution entered into a contract which obligated the Foundation to pay in perpetuity a certain sum yearly, income for the first five years to be held and turned over to the educational institution at the expiration of that period. *Held:* Adjudication that the annual payments subsequent to the five-year period were not cumulative and that if the annual net income of the Foundation in any year should be less than the sum stipulated the Foundation should be under no obligation in any other year to make up the deficiency, *is upheld. Ibid.*

In a proceeding under the Declaratory Judgment Act involving the validity of the appointment of a justice of the peace, a declaration of the court of the marital status of persons who had been married by the justice of the peace but who were not before the court, is clearly beyond its jurisdiction. *Etheridge v. Leary*, 636.

DEEDS.

§ 2a. Competency of Grantor.

Evidence that prior to the execution of the deed, the grantor had been adjudged insane, with other evidence that grantor did not have sufficient

mental capacity to know and understand what she was about when she signed the deed, and that defendants had notice of grantor's insanity, *is held* sufficient to be submitted to the jury in grantor's action, brought by her next friend, to set aside the deed on the ground of mental incapacity. *Tomlins v. Cranford*, 323.

§ 3. Execution and Acknowledgment.

When it is properly made to appear that the notary took the acknowledgment of grantors and the private examination of the wife, but inadvertently omitted the name of the husband from his certificate, the certificate can be amended subsequently to speak the truth, no rights of creditors or third parties being involved. *Banks v. Shaw*, 172.

§ 6½. Revocation of Voluntary Deeds.

In determining the validity of a deed revoking a voluntary conveyance of future interests limited to persons not *in esse*, G. S., 39-6, the equitable jurisdiction of the court over trust estates is not involved. *Pinkham v. Mercer*, 72.

The power to revoke a voluntary conveyance of future interests limited to persons not *in esse* under the provisions of G. S., 39-6, rests solely in the grantor conveying such interests, and where deeds are executed by the owner of lands to each of his children for the purpose of dividing his lands among them, the fact that each of the children joins in the deeds to the others gives them no right upon the death of the grantor to revoke the contingent limitation over to unborn children of one of them, since they cannot succeed the grantor in the power of revocation and are strangers to that power. *Ibid.*

The right to revoke a voluntary conveyance of future interests in lands limited to persons not *in esse* is a personal power and privilege created by statute and not a vested right within constitutional protection. *Ibid.*

Even though the statutory power of revocation of a voluntary conveyance of future interests in lands limited to persons not *in esse* be regarded as a vested right, the amendment of G. S., 39-6, by Public Laws of 1943, ch. 437, giving the grantor six months after its effective date to exercise the right of revocation or to file notice of intention to do so, is a reasonable limitation, and therefore the application of the limitation of the amendment to deeds executed prior to its effective date is constitutional. *Ibid.*

§ 15. Reservations and Exceptions.

While registration is the sole method of charging subsequent purchasers with notice, where a grantee accepts a conveyance of real property subject to an outstanding claim or interest evidenced by an unrecorded instrument executed by his grantor, he takes the estate burdened by such claim or interest and by his acceptance of the deed agrees to stand seized subject to the unrecorded instrument and estops himself from asserting its invalidity. *Trust Co. v. Braznell*, 212.

DESCENT AND DISTRIBUTION.

§ 2. Distinction Between Descent and Purchase.

"Purchase" as contradistinguished from "descent" means every mode of acquisition of an estate known to law except that by which an heir on the death of his ancestor becomes substituted in his place as owner by operation of law. *Jones v. Jones*, 424.

DESCENT AND DISTRIBUTION—*Continued.*

§ 6. Adopted Children.

Defendant was adopted prior to 15 March, 1941, the effective date of Public Laws 1941, Chap. 281, Secs. 4, 8 (G. S., 48-6, G. S., 48-15). The adoptive parent was named as devisee and legatee in his mother's will, but predeceased his mother. *Held:* The adopted child takes no interest in the property bequeathed and devised to the adoptive parent. *Phillips v. Phillips*, 438.

§ 10a. Collateral Heirs.

In order for G. S., 29-1 (4), to apply it is necessary that the person dying intestate without lineal descendants should have acquired the land by descent, or if acquired by purchase, that such person be an heir or one of the heirs of the grantor or devisor. *Jones v. Jones*, 424.

A husband who had acquired real estate by descent, devised same to his wife by will. *Held:* The wife took by purchase, and since she is not an "heir," the provisions of G. S., 29-1 (4), do not apply, and upon her death without lineal descendants the land descends to her collateral heirs rather than to those of her husband. *Ibid.*

§ 12. Rights and Liabilities of Heirs.

Where an incompetent person purports to enter into a contract, after his death his heirs may ratify the agreement or they may disaffirm it, and acceptance of benefits thereunder which knowledge of the facts is a ratification of the agreement precluding a subsequent disaffirmance. *Walker v. McLaurin*, 53.

In a suit to subject lands of a missing person to the payment of judgment liens, a guardian for the missing person was appointed, Art. 9, Chap. 33, and the heirs of the missing person were made parties. Commissioners were appointed to sell the lands but the court further adjudicated that the missing person was dead under the presumption arising from seven years absence. The sale of commissioners was subsequently confirmed. *Held:* The sale of the lands of a decedent in an independent proceeding to satisfy judgment liens is invalid, and the decree of confirmation cannot operate to estop the heirs and in effect validate the title of the purchaser at the sale. *Carter v. Lilley*, 435.

DISORDERLY CONDUCT.

§ 2. Prosecution and Punishment.

Defendant was charged with disorderly conduct at a public place "by using indecent language." The municipal ordinance provided that it should be unlawful to disturb the good order, peace and quiet of the town. The evidence disclosed that defendant was told by an officer to move his car from a zone newly marked for loading, that defendant inquired when "all this God damn stuff" was started in the town, and that the officer immediately arrested him because he had "run his mouth" and was "killing time." *Held:* The record fails to support the charge. *S. v. Jones*, 170.

DIVORCE.

§ 9a. Instructions in Divorce Actions in General.

Where, in the husband's action for divorce on the ground of two years separation, the wife files a cross action for divorce *a mensa*, an instruction which inadvertently places the burden of proof upon the plaintiff as to the issues submitted upon the defendant's cross action must be held for reversible error. *Sumner v. Sumner*, 610.

DOWER.

§ 7. Nature and Right to Dower in General.

Where a widow dissents and renounces provision made for her expressly in lieu of dower in her husband's will, she is entitled to dower in the same manner as though her husband had died intestate. *Coble v. Coble*, 547.

The widow is not a tenant in common with the heirs at law, but her estate is superimposed upon the estate of the heirs and is superior thereto. *Sheppard v. Sykes*, 606.

EJECTMENT.

§ 5½. Right to Dismissal of Summary Ejectment Upon Tender of Rent and Costs.

G. S., 42-33, applies to actions to recover possession of demised premises "upon a forfeiture for the nonpayment of rent" and not to actions to recover possession of property for one of the causes enumerated in G. S., 42-26. *Seligson v. Klyman*, 347.

§ 7. Sufficiency of Evidence in Summary Ejectment.

Averment in the affidavit in summary ejectment that defendants entered into possession as lessees and their term had expired is jurisdictional. G. S., 42-28, and plaintiff must prove her case as alleged. *Rogers v. Hall*, 363.

§ 8. Damages and Judgment.

Plaintiff brought this action to summarily eject his tenant who wrongfully held over, and elected not to claim therein rents or damages for occupation for the period subsequent to the term, G. S., 42-28. Upon defendant's appeal to the Superior Court it appeared that defendant, on the day prior to trial in that court, had surrendered possession, and defendant's motion to dismiss upon his tender of rents and costs was allowed. G. S., 42-33. *Held:* The judgment of dismissal is vacated and the cause remanded for judgment awarding plaintiff his costs, it being error to force plaintiff to accept rents at the rate stipulated in the lease agreement contrary to his election. *Seligson v. Klyman*, 347.

Where a tenant wrongfully holds over, the landlord is entitled to obtain possession of his property and also damage for its wrongful detention, which is not necessarily the rent at the rate stipulated in the lease, but indemnity or compensation for the loss, special or otherwise, naturally and proximately resulting, which defendant, in the light of the circumstances, could have reasonably foreseen. *Ibid.*

§ 15. Presumptions and Burden of Proof in Actions in Ejectment.

In an action involving title to real property, the State not being a party, title is conclusively presumed out of the State without presumption in favor of either party, G. S., 1-36, and plaintiff must rely upon the strength of his own title. *Smith v. Benson*, 56.

§ 14. Answer and Bond.

Neither formal order fixing the amount of the defense bond required of defendant in actions for the recovery of real property, nor notice to plaintiff, is required. G. S., 1-111. *Privette v. Allen*, 164.

Where, in an action in ejectment, defendant, after consultation with the clerk, tenders justified bond in the minimum amount required by the statute, G. S., 1-111, and the clerk accepts the bond and makes notation thereof on the

EJECTMENT—*Continued.*

records, there is a substantial compliance with the statute and plaintiff's motion to strike the answer is properly denied, plaintiff's remedy if he deems the bond insufficient being by motion in the cause. *Ibid.*

Action to establish parol trust upon agreement to purchase for mortgagor at foreclosure sale is not action for recovery or real property within meaning of G. S., 1-111, and defendant is not required to file bond. *Hodges v. Hodges*, 334.

§ 15. Burden of Proof.

Where, in an action to recover possession of real property and damages for trespass thereon, defendant denies plaintiff's title and defendant's trespass, nothing else appearing, plaintiff has the burden of proving title in himself and trespass by defendant. *Smith v. Benson*, 56.

§ 17. Sufficiency of Evidence and Nonsuit.

Where, in an action for the recovery of real property in which defendant denies plaintiff's title, plaintiff seeks to establish title by adverse possession under color, but fails to offer evidence fitting the description in the deed relied on as color of title to the land in dispute, nonsuit is proper. *Smith v. Benson*, 56.

Nonsuit is properly entered in an action involving title to real property upon failure of plaintiff to establish title to the land in question, the action being unlike a processioning proceeding which may not be dismissed as in case of nonsuit. *Ibid.*

Upon the plea of sole seizin in a proceeding for partition, evidence at the trial tended to show: Petitioners' ancestor conveyed the lands by deed of gift not registered within two years of its execution which deed provided that should the grantee die without issue the lands should revert to grantor's heirs. The grantee died without issue and petitioners claim under the reverter clause. Respondents, devisees under the will of the grantee, claim that she was in adverse possession of the land for the statutory period. *Held:* Judgment of nonsuit is erroneous, since if the deed of gift is void, petitioners still claim lands as heirs of the original ancestor, and since the claim of adverse possession, which depends upon whether respondents' testatrix, having recorded the deed, held under the instrument or adversely, presents a question of fact. *Creech v. Corbett*, 276.

ELECTIONS.

§ 23e. Criminal Liabilities—Publishing Derogatory Reports Relating to Candidate.

In this prosecution for willfully publishing and circulating false reports, derogatory on their face, against a candidate with intent to affect the chances for nomination, G. S., 163-196 (11), no prejudicial error in the trial was made to appear and therefore the verdict and judgment is upheld. *S. v. Pritchard*, 168.

EMBEZZLEMENT.

§ 1. Nature and Elements of the Crime.

The offense of embezzlement is exclusively statutory, and the statute does not embrace a vendor in an executory contract of purchase and sale. *S. v. Blair*, 70.

EMERGENCY PRICE CONTROL.

§ 3. Regulations.

Proper regulations promulgated under the Emergency Price Control Act have the binding effect of law. *Taylor v. Motor Co.*, 365.

§ 4. Right to Maintain Civil Remedy.

The Emergency Price Control Act continues in force for the purpose of sustaining any proper suit with respect to rights or liabilities accruing thereunder prior to the cessation of its price fixing provisions. *Taylor v. Motor Co.*, 365.

§ 6. Pleadings in Civil Action.

A complaint alleging violation of regulations duly promulgated under authority of the Emergency Price Control Act, 50 USCA, 901, *held* sufficient as against demurrer. *Taylor v. Motor Co.*, 365.

§ 7. Competency of Evidence in Civil Action.

In an action to recover the penalty for violation of regulations promulgated under the Emergency Price Control Act, the admission in evidence of the regulations set out in Federal Register is permitted by statute, 44 USCA, 307. *Taylor v. Motor Co.*, 365.

§ 9. Relief and Judgment.

The Superior Court is a court of general jurisdiction and has the power to award plaintiff reasonable attorney's fees authorized by the Emergency Price Control Act. *Taylor v. Motor Co.*, 365.

EMINENT DOMAIN.

§ 5. Delegation of Power.

A provision in a contract by a city to acquire for a public utility a right of way of a designated width with such additional width as in the judgment of the railroad company would be required for cuts and fills delegates to the railway company only authority to say what additional width will be required to take care of proper slopes of cuts and fills, which is a matter of engineering rather than a delegation of authority, and is valid. *Boyce v. Gastonia*, 139.

§ 8. Measure of Compensation in General.

Where petitioner, the owner of an easement theretofore acquired over respondent's lands, imposes an additional burden thereon, respondent is entitled to recover for the taking of the additional land and injury, if any, to the remainder of the premises, which is to be measured by the difference in the fair market value of the lands subject to the prior easement, immediately before and immediately after the placing of the additional burden thereon. *Light Co. v. Sloan*, 151.

§ 18c. Competency and Relevancy of Evidence of Damages.

In proceedings to assess damages for the taking of an additional easement over respondent's land, petitioner is entitled to have the existence of the prior easement considered upon the question of damages. *Light Co. v. Sloan*, 151.

Where it is admitted that petitioner held a prior easement on the premises, and the parties stipulate that the sole question for determination is the compensation to be paid for additional easement, the existence of the prior easement is established and petitioner has the benefit thereof, and therefore judgment in the condemnation proceedings wherein the prior easement was ob-

EMINENT DOMAIN—*Continued.*

tained is irrelevant and incompetent for the purpose of showing the existence of the prior easement. *Ibid.*

Evidence of compensation paid for an original easement on respondent's land in 1928 is too remote to be competent to establish the value of an additional easement taken in 1943. *Ibid.*

The amount paid under a consent judgment in proceedings to assess compensation for the taking of lands under the power of eminent domain is incompetent to establish the value of the lands upon a subsequent taking of additional lands of respondent, since compromise settlements are not fair indications of market value. *Ibid.*

EQUITY.

§ 2b. Party Must Come Into Equity With Clean Hands.

The rule that equity will not exercise jurisdiction when the parties are *in pari delicto* is the policy of the law in this State, but the rule is subject to limitations and exceptions, among which are that relief may be given when to do so will advance public policy and that when the parties are not equally blameworthy relief may be given in furtherance of justice to prevent a party from benefiting from the fruits of his own wrong. *Cauble v. Trexler*, 307.

Fact that action is against good morals must appear from face of complaint in order for demurrer on this ground to be sustained. *Hodges v. Hodges*, 334.

§ 3. Laches.

Laches is affirmative defense with burden of proof on defendant. *Pearson v. Pearson*, 31.

Defendants' evidence *held* insufficient to justify nonsuit on ground of laches. *Ibid.*

ESTATES.

§ 9a. Termination of Life Estate and Vesting of Remainder.

The death of the life tenant terminates a lease executed by her and all rights or agreements therein created, and title passes to the remaindermen by operation of law unaffected by the lease. *Haywood v. Briggs*, 108.

Upon death of life tenant her lease is void, and remaindermen cannot ratify it. *Ibid.*

§ 9b. Right to Improvements Upon Death of Life Tenant.

The remaindermen are not privies to a lease executed by the life tenant, and upon the death of the life tenant, her lessees are not entitled to assert against the remaindermen an agreement in the lease giving lessees the right to remove improvements placed upon the land by them. *Haywood v. Briggs*, 108.

While by agreement between lessor and lessee, fixtures which would otherwise be classified as realty may be deemed personalty and removable as trade fixtures, such right of removal cannot be asserted by lessee of a life tenant as against the remaindermen, since the remaindermen were not in privity. *Ibid.*

§ 10. Nature of, and Grounds for Sale of Estates for Reinvestment.

In determining the validity of a deed revoking a voluntary conveyance of future interests limited to persons not *in esse*, G. S., 39-6, the equitable jurisdiction of the court over trust estates is not involved. *Pinkham v. Mercer*, 72.

ESTATES—*Continued.*

§ 16. Joint Estates and Survivorship in Personalty.

Since the statutory abolition of survivorship in joint tenancy, G. S., 14-2, the right of survivorship in personalty may be created only by contract. *Wilson v. Ervin*, 396.

ESTOPPEL.

§ 10. Equitable Estoppel—Persons Who May Be Estopped.

Minors, since they do not have the capacity to contract, cannot create an estoppel *in pais* against themselves. *Dupree v. Moore*, 626.

§ 11b. Evidence and Burden of Proof.

Estoppel is affirmative defense with burden of proof on defendant. *Pearson v. Pearson*, 31.

§ 11c. Nonsuit on Ground of Estoppel.

Defendant's evidence *held* insufficient to justify nonsuit on his motion on ground of estoppel. *Pearson v. Pearson*, 31.

EVIDENCE.

§ 7a. Burden of Establishing Cause of Action in General.

Where the allegations of the complaint are denied, the burden is on plaintiff to offer evidence in support of each essential element of his cause of action or facts from which a presumption in his favor in regard thereto arises, and thus establish his case. *Carter v. Motor Lines*, 193.

§ 24. Materiality in General.

The witness testified that he had never represented defendant's intestate in any business affairs. *Held:* Testimony that intestate had never told the witness that intestate had paid plaintiff any of the funds in controversy is no evidence that intestate had not made such payments, and is incompetent. *Wilson v. Ervin*, 396.

§ 25. Facts in Issue and Relevant to Issues.

Evidence offered to prove fact which is admitted in pleadings, is irrelevant. *Light Co. v. Sloan*, 151.

§ 26. Similar Facts and Transactions.

Whether the existence of a state of affairs at one time is competent to show the existence of the same state at another time is a question of materiality or remoteness to be determined upon the facts of each particular case in accordance with the nature of the subject matter, the length of time intervening, and a showing, if any, as to whether conditions had remained unchanged. *S. v. Kelly*, 62.

Evidence of compensation paid for original easement in 1928 is too remote to be competent to establish value of additional easement taken in 1943. *Light Co. v. Sloan*, 151.

§ 27. Competency in General.

Where evidence is material and competent, objection on the ground that it would tend to discredit the party in the eyes of the jury is untenable. *Davis v. R. R.*, 561.

EVIDENCE—*Continued.*

§ 32. Transactions or Communications With Decedent.

Where, in an action to establish a claim against an estate, plaintiff introduces evidence that prior to his death decedent had received the funds in dispute, testimony by her that she had never received any part of the funds is tantamount to testifying that decedent had not paid her any part thereof, and is incompetent under G. S., 8-51. *Wilson v. Ervin*, 396.

Where, in claim and delivery by an administrator, the replevin bond of defendant is superseded by a replevin bond given by intervener, the surety on the original bond has no pecuniary interest in the outcome of the action and is competent to testify for intervener as to a declaration made by decedent. *Williams v. Young*, 472.

§ 32½. Evidence Obtained by Unlawful Means or for Unlawful Purpose.

Where the Federal income tax report of a party is competent for the purpose of contradicting his testimony as to loss of income upon the issue of damages, objection thereto on the ground that the report was improperly secured and not used for any purpose permitted under Federal Law, is unavailing, there being no objection on the ground that the report was not properly exemplified. *Davis v. R. R.*, 561.

§ 35. Legal Instruments and Court Records.

Where a party offers in evidence the original chattel mortgage with oral evidence as to its signature by the mortgagor, the instrument is competent notwithstanding the absence of a seal to authenticate the notation on the instrument of its registration. Neither G. S., 8-20, relating to the registration in a county of an instrument taken from the registry of another when evidenced by the certificate and seal of the Register of Deeds, nor USCA, Title 28, Sec. 688, as amended, is applicable. *Finance Co. v. Clary*, 347.

§ 37. Best and Secondary Evidence.

Recitals in sheriff's deed that it was executed pursuant to sale under live execution in his hands are only secondary evidence of such fact and cannot be admitted for that purpose until the loss or destruction of the original records is clearly proven to the satisfaction of the court. *Board of Education v. Gallop*, 599.

§ 32d. Admissions and Declarations of Agent.

A declaration of an agent, even though it be part of the *res gestæ*, is not competent against the alleged principal unless the fact of agency it established *aliunde*. *Carter v. Motor Lines*, 193.

§ 42f. Admissions in Pleadings.

The failure of the answer to deny an allegation of the complaint is an admission of the fact alleged which is as binding on the parties as if found by the jury, and therefore evidence offered to prove such fact is irrelevant. *Light Co. v. Sloan*, 151.

§ 43a. Declarations in General.

In an action in claim and delivery by an administrator, testimony as to declaration made by deceased to the effect that she had "loaned" rather than "given" the property to intervener claiming by gift *inter vivos*, *is held* incompetent both on the ground that it is hearsay and on the ground that the declaration is self-serving. *Williams v. Young*, 472.

EVIDENCE—*Continued.*

§ 43b. Declarations by Decedents Against Interest.

In an action in claim and delivery by an administrator, testimony by a disinterested witness as to a declaration made by decedent that the property in suit belonged to intervener, is competent as a declaration against interest. *Williams v. Young*, 472.

But testimony of a self-serving declaration by decedent is incompetent. *Ibid.*

§ 49. Opinion Evidence—Invasion of Province of Jury.

A witness may not give an opinion as to the amount of damages suffered by plaintiff, the ascertainment of damages being the province of the jury, and an instruction upon such testimony upon the issue of damages is perforce erroneous. *Lowe v. Hall*, 541.

EXECUTION.

§ 6. Issuance of Execution and Successive Executions.

Where sale is had more than sixty days after issuance of the original execution, there can be no presumption that successive executions were issued in the absence of showing that the requisite fees were tendered the clerk, since the clerk is not bound to issue any execution unless the proper fees are tendered to him. G. S., 1-305. *Board of Education v. Gallop*, 599.

§ 16. Time of Sale.

Under C. S., 672, an execution sale had more than sixty days (now 90 days, G. S., 1-310) from date of issuance of execution, is void. *Board of Education v. aGllop*, 599.

§ 22. Title and Rights of Purchaser at Execution Sale.

Where sheriff's deed is attacked on the ground that it was not supported by a live execution in the sheriff's hands, such attack goes to the complete invalidity of the deed, and it is incumbent upon the party relying upon such deed as a link in his chain of title to prove, *dehors* the recitals in the deed, that it was executed pursuant to a sale under a live execution. *Board of Education v. Gallop*, 599.

Sheriff's deed constituting a link in plaintiff's title was attacked on the ground that it was not supported by a live execution. Plaintiff introduced a purported "execution" signed by the clerk, but which did not have notation as to date of issue, G. S., 1-310, nor notation by the sheriff of the date received and the date of execution, G. S., 2-41, nor entry of any return on the judgment docket, G. S., 1-321. *Held:* The purported "execution" is insufficient as an original and is ineffectual if relied upon as a replica of an original execution which had been lost. *Ibid.*

Recitals in sheriff's deed that it was executed pursuant to sale under live execution in his hands are only secondary evidence of such fact and cannot be admitted for that purpose until the loss or destruction of the original records is clearly proven to the satisfaction of the court. *Ibid.*

§ 6. Issuance and Levy of Execution.

Upon death of judgment debtor, the judgment creditor may not proceed independently to enforce his judgment but is remitted to the personal representative of the judgment debtor. *Carter v. Lilley*, 435.

EXECUTORS AND ADMINISTRATORS.

§ 2a. Jurisdiction and Appointment of Administrators.

While the death of intestate must be established as a jurisdictional fact to empower the Clerk of the Superior Court to issue letters of administration, G. S., 28-1, G. S., 28-5, the Clerk may upon evidence that a person has been absent from his domicile for seven years without being heard from by those who would be expected to hear from him if living, adjudge that such person is dead and appoint an administrator of his estate. *Carter v. Lilley*, 435.

§ 8. Title and Right to Possession of Assets of Estate.

Where, in an action to determine ownership of funds deposited by a deceased member of the armed forces, letters written by him are introduced in evidence disclosing his intention to retain sole control over the funds deposited by him for his own use and benefit but expressing the desire that in the event of his death the funds should go to a named "beneficiary," but the letters are not proven as a will, *held* the letters are ineffectual as a testamentary disposition of the funds, and are insufficient to establish an express trust or show a gift *inter vivos* or *causa mortis*, and his administrator is entitled to the funds, there being no facts which would give rise to an inference of a family settlement. *Wescott v. Bank*, 39.

§ 13g. Purchase of Assets by Executor or Administrator.

An administrator or executor in possession of lands of the estate under a court order permitting him to continue the farming operations thereon, who purchases the lands at a foreclosure sale of a mortgage thereon, nothing else appearing, holds title as a trustee for the estate, and his purchase will be set aside as a matter of course at the instance of the interested parties. *Pearson v. Pearson*, 31.

And the statute of limitations does not begin to run against such action, in the absence of demand and refusal, until the administration is closed. *Ibid.*

Where an administratrix has a dower interest in lands of the estate ordered to be sold to make assets, and the lands are subject to a mortgage, the administratrix is entitled to purchase the lands at her own sale in order to protect her interest therein as an exception to the general rule. *Privette v. Morgan*, 264.

An administrator acts in a fiduciary capacity in the control and disposition of assets of the estate and he cannot purchase assets at a sale under order of court to his own profit and the detriment of the estate. *Development Co. v. Bearden*, 124.

But allegation that administrator acquired assets without allegation that he bought or acquired same at his sale is insufficient. *Ibid.*

Attack upon confirmed sale is attack upon judgment, requiring allegation and proof of actual fraud. *Ibid.; Privette v. Morgan*, 264.

Allegations that the administratrix sold assets of the estate under order of court for a nominal amount when she knew or should have known that the assets were solvent and could and should have been collected in full, without allegation of fraudulent intent, are insufficient in an action by a creditor of the estate to have the sale set aside. *Ibid.*

§ 15g. Allotment of Widow's Year's Allowance.

In an action by a creditor of the estate, allegations that the administratrix "arranged" to have a share of stock belonging to the estate allotted to the widow as a part of her year's allowance at a nominal sum regardless of its

EXECUTORS AND ADMINISTRATORS—*Continued.*

true worth, without allegation of fraudulent intent, is insufficient to state a cause of action to have the allotment set aside on the ground of fraud. *Development Co. v. Bearden*, 124.

Attack upon allotment of year's allowance to widow is attack upon judgment, requiring allegation and proof of actual fraud. *Ibid.; Privette v. Morgan*, 264.

§ 19. Actions Against Estate.

Husband and wife sold land held by them by entireties. After his death she sued his estate to recover the proceeds of sale, part of which was in cash and part in purchase money notes. *Held:* There being no right of survivorship in the proceeds of sale as a matter of law, in the absence of competent evidence that the husband had not paid her any part of the cash proceeds, and the absence of evidence as to whom the notes were made payable, the administrator's motion to nonsuit should have been allowed. *Wilson v. Ervin*, 396.

§ 24. Distribution of Estate Under Family Settlement.

Facts *held* insufficient to give rise to inference of family settlement for distribution of estate. *Wescott v. Bank*, 39.

§ 26. Final Account and Settlement.

An estate is not settled and the duties of administration continue until all debts have been paid or all assets of the estate exhausted. *Pearson v. Pearson*, 31.

§ 29. Costs, Commissions and Attorneys' Fees.

In an action by a claimant of funds deposited by a deceased soldier, against the bank, the soldier's administrator and his minor next of kin, judgment that counsel fees for defendants should be paid from the funds is without error. *Wescott v. Bank*, 39.

§ 31. Actions Attacking Administration.

Action against administratrix for fraud in connection with decrees entered in administration must sufficiently particularize fraudulent acts relied on. *Privette v. Morgan*, 264.

FALSE PRETENSES.

§ 1. Nature and Elements of the Crime.

The statutory crime of false pretense is the making of a false representation of a subsisting fact calculated to deceive and which does deceive and is intended to deceive, by which one man obtains value from another. *S. v. Davenport*, 475.

§ 2. Prosecutions for False Pretense.

An indictment for obtaining money by means of false pretenses which charges that defendant made false and fraudulent representations knowing them to be false, with intent to deceive and defraud named individuals, and others, that such misrepresentations did deceive the named individuals, and others, and that defendant did thereby unlawfully obtain large sums of money with intent then and there to defraud, *is held* sufficient to charge a violation of G. S., 14-100. *S. v. Davenport*, 475.

FALSE PRETENSES—*Continued.*

Evidence *held* for jury in prosecution for obtaining money by false pretenses in borrowing money at 5% per week, to use in loan business, under representations that business was sound and legal and that checks given lenders would be paid at any time upon presentation. *Ibid.*

FIRES.

§ 3. Duties and Liabilities of Owner Setting Out Fire on Property.

Whether fire on defendant's land was origin of forest fire *held* speculative upon the evidence, and nonsuit is proper. *Lumber Co. v. Elizabeth City*, 270.

FIXTURES.

§ 4. Right of Lessee to Remove in General.

The remaindermen are not privies to a lease executed by the life tenant, and upon the death of the life tenant, her lessees are not entitled to assert against the remaindermen an agreement in the lease giving lessees the right to remove improvements placed upon the land by them. *Haywood v. Briggs*, 108.

§ 5. Right of Lessee to Remove Trade Fixtures.

While by agreement between lessor and lessee, fixtures which would otherwise be classified as realty may be deemed personalty and removable as trade fixtures, such right of removal cannot be asserted by lessee of a life tenant as against the remaindermen, since the remaindermen were not in privity. *Haywood v. Briggs*, 108.

FRAUD.

§ 5. Deception and Reliance on Misrepresentation.

The law will not permit one to predicate an action for fraud upon a representation which he knows to be false, for he cannot be deceived by that which he knows. *Cox v. Johnson*, 69.

§ 9. Pleadings.

To state a cause of action for legal fraud the complaint must set out with sufficient particularity facts from which legal fraud arises. *Development Co. v. Bearden*, 124.

To state a cause of action for actual fraud, the complaint must allege fraudulent intent and the acts constituting the fraud. *Ibid.; Privette v. Morgan*, 264.

Allegations that an administratrix arranged to have stock of a corporation owned by the estate and sold under order of court transferred to her, without stipulating whether the stock was purchased directly at the sale or from one who was a *bona fide* purchaser at the sale, is insufficient to state a cause of action. *Development Co. v. Bearden*, 124.

In an action by a creditor of the estate, allegations that the administratrix "arranged" to have a share of stock belonging to the estate allotted to the widow as a part of her year's allowance at a nominal sum regardless of its true worth, without allegation of fraudulent intent, is insufficient to state a cause of action to have the allotment set aside on the ground of fraud. *Ibid.*

Allegations that the administratrix sold assets of the estate under order of court for a nominal amount when she knew or should have known that the assets were solvent and could and should have been collected in full, without

FRAUD—*Continued.*

allegation of fraudulent intent, are insufficient in an action by a creditor of the estate to have the sale set aside. *Ibid.*

Where in an action against an administratrix the facts alleged do no more than raise a suspicion of wrongdoing, however grave, they are insufficient to state a cause of action for fraud, and allegation that the acts of defendant were "a fraud upon the court" and "a fraud upon the creditors" of the estate, is a mere conclusion of the pleader or a *brutum fulmen. Ibid.*

Where fraud does not appear from complaint it cannot be established by demurrer. *Hodges v. Hodges*, 334.

FRAUDS, STATUTE OF.

§ 9. Contracts Affecting Realty in General.

A written contract, even though involving an interest in land, may be rescinded or abandoned by parol. *Bell v. Brown*, 319.

Contract to convey standing timber must be in writing and executed with same formalities as are required in transfers of real property. *Winston v. Lumber Co.*, 339.

Growing trees are a part of the land, and a contract for the sale thereof comes within the meaning and intent of the statute of frauds. G. S., 22-2. *Johnson v. Wallin*, 669.

A contract under which plaintiff was to cut certain trees on defendant's land, haul them and saw them into lumber, deliver 6,000 feet of the lumber to defendant and keep the remainder as payment for cutting the trees, hauling the logs and manufacturing the lumber, is not a contract for the sale of growing timber, but is a contract of employment for the conversion of trees growing on defendant's land into logs and the manufacture of the logs into lumber for the primary benefit of defendant, for which plaintiff was to be compensated in logs, and the exclusion of parol evidence of such contract is erroneous. *Ibid.*

GIFTS.

§ 1. Nature and Essentials of Gifts Inter Vivos.

Letters disclosing the intent of a depositor that bank deposits made by him should be held for his use and benefit and that he should have exclusive control over the funds, though expressing a desire that in the event of the depositor's death the fund should go to a named "beneficiary," are insufficient to show either a gift *inter vivos* or a gift *causa mortis*. *Wescott v. Bank*, 39.

Evidence that the owner gave intervener the property in dispute and that the gift was completed by delivery of the property to the donee *held* sufficient to support intervener's claim to the property by gift *inter vivos*. *Williams v. Young*, 472.

GRAND JURY.

§ 1. Qualification and Selection of Grand Jurors.

Where on appeal to the Superior Court defendants are tried on warrants sworn out in a municipal court and not on bills of indictment, the composition of the grand jury could in no way affect them and their objection to the method of selecting grand jurors is irrelevant. *S. v. Koritz*, 552.

GUARDIAN AND WARD.

§ 1c. Guardianship for Missing Persons.

Art. 9, Chap. 33, relates solely to estates of living persons, and where in a proceeding thereunder the court finds that the missing person is dead under the presumption of death arising from seven years absence, the administration of the estate of such missing person becomes a matter for the probate court and proceedings under the statute are *coram non judice*. *Carter v. Lilley*, 435.

§ 2. Nature of the Relationship.

Guardianship is a trust relation in which the guardian acts for the ward as a trustee and subject to the same rules as govern other trustees. *Owen v. Hines*, 236.

§ 12. Title and Control of Ward's Property.

Legal title to guardianship property is in the infant ward rather than the guardian, who is a mere custodian and manager and has no beneficial title to the property, and therefore where a guardian takes title individually to property of the estate, he holds title as trustee for the ward. *Owen v. Hines*, 236.

HIGHWAYS.

§ 16. Proceedings to Establish Cartways.

In a proceeding to establish a cartway or way of necessity from lands of petitioners to a State Highway, G. S., 136-68, G. S., 136-69, an order of the clerk adjudging that petitioners are entitled to the relief and appointing a jury of view to "lay off" the cartway, is a final determination of the right to the easement, leaving only the mechanics of execution to the jury of view, and therefore an appeal to the Superior Court by respondents whose lands are affected is not premature, and judgment of the Superior Court dismissing the appeal and remanding the cause to the clerk, is erroneous. *Triplett v. Lail*, 274.

HOMICIDE.

§ 3. Definition of Murder in the First Degree.

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. *S. v. Kirksey*, 445.

§ 7. Voluntary Manslaughter.

Pointing rifle at person, resulting in fatal injury, is manslaughter. *S. v. Boldin*, 594.

§ 8a. Involuntary Manslaughter—Negligence of Defendant.

Evidence of culpable negligence in driving car *held* for jury. *S. v. Hough*, 596.

§ 14. Requisites and Sufficiency of Indictment.

An indictment for murder in the first degree need not allege deliberation and premeditation, an indictment in the form prescribed by statute, G. S., 15-144, being sufficient. G. S., 14-17, G. S., 15-172. *S. v. Kirksey*, 445.

§ 16. Presumptions and Burden of Proof.

Where the intentional killing with a deadly weapon is admitted or established, defendant has the burden of satisfying the jury of the absence of malice in order to escape conviction of murder in the second degree, and that

HOMICIDE—*Continued.*

it was justifiable in order to avoid conviction of manslaughter. *S. v. Staton*, 409.

§ 17. Relevancy and Competency of Evidence in General.

Description of the wounds found on the deceased is competent. *S. v. Artis*, 371.

Testimony of the wife of deceased as to the condition of his health just prior to the killing *held* not prejudicial. *Ibid.*

The evidence tended to show that deceased's three sons and a nephew were with him at the time of the fatal encounter with the defendant. *Held:* Testimony of one of the sons that he went to the scene to keep deceased from getting into trouble with defendant is competent to negative the suggestion arising on defendant's evidence that the witness went to the scene to attack defendant. *S. v. DeMai*, 657.

§ 18. Declarations.

Testimony of declaration of deceased as to reason for his going to scene of encounter, unrelated to altercation *held* incompetent because not part of *res gestæ*, but admission of testimony was not prejudicial in absence of evidence that deceased knew of proximity of defendant or went to scene other than for lawful purpose. *S. v. DeMai*, 657.

§ 19. Admissions.

Testimony of a witness as to a conversation with defendant relating to where defendant had left his gun after the killing and where witness had found the body of deceased is competent. *S. v. Artis*, 371.

§ 20. Evidence of Motive and Malice.

Where the State's case tends to show that defendant husband killed his wife in culmination of family discord, testimony relating to a prior bigamous marriage by defendant is competent as a link in the chain of circumstantial evidence tending to show motive. *S. v. Phillips*, 277.

The evidence tended to show that defendant, a tenant, killed his landlord. *Held:* Evidence of the contract between the parties, the landlord's repeated refusals to sign lien waivers on the crop and testimony as to the poor condition of the crop is competent to show ill will and motive. *S. v. Artis*, 371.

§ 21. Evidence of Premeditation and Deliberation.

Premeditation and deliberation may be inferred from evidence that defendant dealt lethal blows after deceased had been felled and rendered helpless. *S. v. Artis*, 371.

Brutality in manner of killing may be sufficient evidence of premeditation and deliberation. *S. v. Stanley*, 650.

§ 25. Sufficiency of Evidence and Nonsuit.

Evidence tending to show the commission of murder in the perpetration of a robbery and identifying defendant as the perpetrator of the crime is sufficient to be submitted to the jury on capital charge of murder in the first degree, and defendant's motion for judgment as of nonsuit was properly denied. *S. v. Montgomery*, 100.

Evidence that defendant shot and killed his wife in culmination of family discord occasioned by his infidelity and bigamous marriage to another woman,

together with evidence of the absence of powder burns and location of the fatal wound negating an inference that it was self-inflicted, *held* sufficient to be submitted to the jury on question of defendant's guilt of murder in the first degree. *S. v. Phillips*, 277.

Evidence that defendant went to the home of his mother-in-law about sundown and assaulted his estranged wife, cutting a gash in her arm, and that when his wife returned from the hospital about midnight, defendant was seen in the yard by the light of the car, that his wife got out of the car, and that defendant shot and killed her as she was attempting to run behind it, is sufficient evidence of murder in the first degree to be submitted to the jury. *S. v. Kirksey*, 445.

The evidence tended to show that over a period of years defendant habitually and repeatedly threatened, cursed and brutally assaulted his wife, and on occasions threw her bodily to the ground, and that defendant was alone with her when she was found on the floor of her bedroom in an unconscious condition suffering from many contusions and bruises. There was expert opinion evidence that she died as a result of hemorrhage from a blow on the head. There was testimony that this injury might have resulted from a fall. *Held:* The evidence was sufficient to overrule defendant's motion to nonsuit and to sustain his conviction of manslaughter. *S. v. Ewing*, 535.

Evidence of culpable negligence in driving car *held* for jury on charge of manslaughter. *S. v. Hough*, 596.

The evidence tended to show that defendant killed his wife by making two separate slashes of a razor across her throat, which overlapped and cut her throat from ear to ear to a depth which almost decapitated her. *Held:* The brutal and vicious manner of the slaying is sufficient to support an inference of premeditation and deliberation, and defendant's motion to nonsuit on the capital felony was properly overruled. *S. v. Stanley*, 650.

Where the State's evidence tends to show an intentional killing by defendant with a deadly weapon, and defendant relies upon evidence of self-defense, defendant's motion to nonsuit is properly overruled. *S. v. DeMai*, 657.

§ 26. Peremptory Instructions and Directed Verdict.

The evidence tended to show that after an altercation with her husband, defendant got a loaded rifle from another room, went back in the kitchen and shot and killed her unarmed husband as he started back in the house. Defendant testified she pointed the rifle at him and "reckoned" she pulled the trigger, and that she did not know why she shot him. *Held:* An instruction that if the jury should find the facts to be as all the evidence tended to show to return a verdict of guilty of manslaughter, otherwise to acquit defendant, is without error. G. S., 14-34. *S. v. Boldin*, 594.

§ 27f. Instructions on Defenses.

There was evidence on behalf of the State that defendant brought on the difficulty or willingly entered into the combat, and evidence on behalf of defendant that after combat joined he ran up the road, pursued by his antagonist, that defendant motioned his antagonist to stop and did not fire the fatal shot until defendant had retreated some 100 yards. *Held:* An instruction stating the State's contention that defendant was not entitled to perfect self-defense "unless he withdrew from the combat" without reference to defendant's evidence or contention that he did in fact withdraw from the combat must be held for reversible error. *S. v. Fairley*, 134.

HOMICIDE—*Continued.*

While an instruction upon the perfect right of self-defense which is predicated upon a felonious assault being made on defendant, must be held for prejudicial error, nothing else appearing, where the court proceeds further and explains the principle of law applicable to non-felonious assault under the evidence presented in the case by instructing the jury that if the jury were satisfied that deceased and others with guns threatened defendant and approached close enough to inflict serious injury, even though a gun was not pointed at defendant, that would constitute an assault, the charge will not be held for reversible error. *S. v. DeMai*, 657.

Where the State's evidence, though contradicted by that of defendant, tends to show that defendant was at fault in bringing on the controversy in that he was armed with a high-powered automatic rifle, asserted his intention of immediately killing deceased, which caused deceased to desist from going where he had a right to go and to send for his gun to withstand defendant's present menace of violence, and that thereafter defendant opened the engagement and shot and killed his unarmed adversary, *is held* to warrant an instruction upon the duty to retreat, defendant's evidence to the contrary and his contention that he had made out complete self-defense having been called to the attention of the jury. *Ibid.*

§ 27h. Form and Sufficiency of Issues and Instructions on Less Degrees of Crime.

Where all the evidence tends to show murder perpetrated by lying in wait, the court properly limits the jury to a verdict of guilty of murder in the first degree or a verdict of not guilty, G. S., 14-17, but where the evidence tending to show that defendant intentionally killed deceased with a deadly weapon is susceptible to more than one inference as to whether defendant was lying in wait, it is error for the court to fail to submit the question of defendant's guilt of murder in the second degree. G. S., 15-172. *S. v. Gause*, 26.

Defendant's evidence tended to show that he secreted himself at night in his barn in order to catch an intruder who had been entering the barn, that on the night in question a person approached defendant's cow stall, that defendant hailed him several times and shot and killed him after he had failed to answer and persisted in undoing the rope on the cow stall. Defendant testified that he apprehended his own life was in danger. *Held:* Upon defendant's testimony tending to show a want of malice, it was error for the court to refuse to submit the question of defendant's guilt of manslaughter. *S. v. Staton*, 409.

§ 29. Judgment and Sentence.

Where the judgment upon a verdict of guilty of murder in the first degree states that the defendant had been convicted of murder, the cause must be remanded in order that it appear on the face of the judgment that the conviction was for murder in the first degree, since the judgment alone is certified to the warden of the State Penitentiary. G. S., 14-17; G. S., 15-188; G. S., 15-189; G. S., 15-190. *S. v. Montgomery*, 100.

HUSBAND AND WIFE.

§ 6. Wife's Separate Estate.

Where the husband is named as grantee with his wife in the introductory recital, but the granting clause, the *habendum* and the warranty of title are

to "said party of the second part, her heirs and assigns" the deed conveys nothing to the husband *Ingram v. Easley*, 442.

Where property constituting the separate estate of the wife is the sole consideration in the exchange of this property for other realty, the wife alone is entitled to such other realty, and deed to such realty, even though it be made to them jointly, does not create an estate by entirety. *Ibid.*

§ 7. Liability of Husband for Debts of Wife.

An administrator instituted this action for wrongful death against intestate's husband alleging that intestate's death resulted from the husband's negligence. Recovery was allowed to the extent of expenses for burial of intestate. G. S., 28-173. *Held:* The husband is primarily liable for the burial expenses of his wife, and he would be the beneficiary of such recovery, and therefore recovery for burial expenses by the administrator will not be allowed. *Davenport v. Patrick*, 686.

§ 12c. Conveyances from Wife to Husband.

Wife may not convey separate estate to husband either directly or indirectly without complying with G. S., 52-12. *Ingram v. Easley*, 442.

§ 13a (3). Husband as Agent for Wife.

Where a husband acts for his wife in the negotiations and in procuring the execution of a deed to her, notice to him is notice to her, and she cannot claim under the deed and at the same time deny the fact of agency. *Tomlins v. Cranford*, 323.

§ 14. Creation of Estates by Entireties.

Where husband is named as grantee in preliminary recitals, but granting clause, *habendum*, and warranty are "to party of second part, her heirs and assigns," deed does not create estate by entireties. *Ingram v. Easley*, 442.

Where separate estate of wife is sole consideration in exchange of property, deed to husband and wife for such other property cannot create estate by entireties. *Ibid.*

Where husband purchases land and has deed made to trustee of passive trust for benefit of himself and wife, nothing else appearing, instrument creates estate by entirety. *Akin v. Bank*, 453.

§ 15a. Nature and Incidents of Estate by Entirety in General.

An estate by entirety in personal property is not recognized in this State. *Wilson v. Ervin*, 396.

§ 15c. Termination of Estates by Entirety.

An estate by entirety may be destroyed or dissolved by the joint acts of the parties, and sale by husband and wife terminates the estate and the proceeds of the sale will be held by them as tenants in common without right of survivorship unless they exercise their right to provide otherwise by contract. *Wilson v. Ervin*, 396.

§§ 26, 28. Nature and Essentials of Right of Action for Alienation and Evidence in Such Actions.

Wife may maintain action for alienation of affections of husband. *Knighten v. McClain*, 682. But wife may not testify as to statements made by him tending to show his illicit relationship with defendant. *Ibid.*

HUSBAND AND WIFE—*Continued.*

§§ 33, 35. Nature and Essentials of Right of Action for Criminal Conversation and Competency of Evidence in Such Actions.

Wife may maintain action for criminal conversation with her husband. *Knighten v. McClain*, 682. But may not testify as to statements made by him tending to show his illicit relation with defendant. *Ibid.*

INDICTMENT.

§ 4. Evidence and Proceedings Before Grand Jury.

While an indictment founded solely upon incompetent evidence may be subject to quashal, witnesses who testified before the grand jury may not be examined in order to show the nature and character of evidence upon which the bill was founded. *S. v. Blanton*, 517.

§ 6. Return of Indictment.

In capital cases the indictment must be returned in open court by the grand jury in a body or by a majority of them, G. S., 15-141, but the indictment and its return are no part of the trial and therefore defendant's constitutional right of confrontation is not infringed by his absence when the indictment is returned. *S. v. Stanley*, 650.

§ 8½. Merger of Courts.

A count charging conspiracy to commit a felony is not merged with a count charging commission of the felony. *S. v. Davenport*, 475.

§ 9. Charge of Crime.

The object of an indictment is to inform the prisoner with what he is charged, as well to enable him to make his defense as to protect him from another prosecution for the same criminal act. *S. v. Law*, 103.

In this prosecution for conspiracy to suborn of perjury, the first paragraph of the indictment alleged conspiracy to suborn of perjury in general terms, followed by ten separate paragraphs repeating the charge of conspiracy with specific reference to the causes in which the perjuries were alleged to have been committed, each sufficient in itself to charge conspiracy to suborn of perjury in the instance set out. *Held:* The indictment was a one count indictment, and when construed as a whole is sufficient under the statute, G. S., 15-153, notwithstanding that the first paragraph, standing alone, may be insufficient to charge the crime with requisite definiteness. *S. v. Blanton*, 517.

§ 13. Motions to Quash for Improper Jury Panel.

A motion to quash the indictment on the ground that no women were summoned to serve on the jury is untenable when it appears that defendants did not exhaust their peremptory challenges and thus that they obtained a jury acceptable to them. *S. v. Litteral*, 527.

§ 11. Definiteness and Sufficiency in General.

An indictment will not be quashed for mere informality or refinement or for technical objections which do not affect the merits, and if it contains sufficient matter to enable the court to proceed to judgment, a motion to quash for redundancy or inartificiality is addressed to the sound discretion of the trial court. *S. v. Davenport*, 475.

INDICTMENT—*Continued.*

§ 19. Procedure to Raise Question of Variance.

Fatal variance between indictment and proof may be presented by motion to nonsuit. *S. v. Law*, 103.

§ 20. Proof of Guilt of Crime Charged.

The indictment charged larceny of a vehicle the property of a municipality. The evidence tended to show that the automobile had been seized by a municipal police officer for illegal transportation of intoxicating liquor and placed by him in the municipal parking lot, and that the car was taken therefrom by defendants during the night. *Held:* There is a fatal variance between charge and proof in that the vehicle was not the property of the municipality. *S. v. Law*, 103.

§ 22. Sufficiency of Indictment to Support Conviction of Less Degree of Crime Charged.

Defendant was charged with an attempt to commit highway robbery with firearms. The State's evidence was sufficient as to each essential element of attempt to commit robbery but was insufficient to show the use of firearms in the attempt. *Held:* The court correctly submitted the evidence to the jury on the question of defendant's guilt of the less grave offense of attempt to commit highway robbery. G. S., 15-170. *S. v. Jones*, 402.

Indictment for assault with intent to commit rape will support conviction of assault upon a female. *S. v. Moore*, 326; *S. v. Johnson*, 587.

§ 24. Necessity for Allegation in Indictment to Support Proof.

The indictment controls the prosecution, and evidence not supported by the indictment is unavailing. *S. v. Jones*, 94.

INFANTS.

§ 2. Protection of Property Rights by Courts.

Where the property rights of minors are involved, the protection of these interests by the court is of more importance than the rigid enforcement of the rules relating to the preservation of objections and exceptions to the admission or exclusion of evidence. *Trust Co. v. Deal*, 691.

INJUNCTIONS.

§ 4a. Subjects of Injunctive Relief—Contracts Relating to Personal Services or Occupations.

Restrictive covenants in a contract of employment, executed when an employee is raised from a service man to general manager, providing that the employee for a period of two years from the termination of the employment should not engage in the same business within a defined territory comprising thirteen counties of the State or solicit or sell the employer's customers, are *held* reasonable in regard to time and territory and enforceable by restraining order. *Exterminating Co. v. Wilson*, 96.

§ 4i. Subjects of Injunctive Relief—Franchise Rights.

Injunction will lie to protect the rights and privileges of a duly licensed franchise carrier from infringement by an interloper possessing no franchise or other claim of right. *Coach Co. v. Transit Co.*, 391.

INJUNCTIONS—*Continued.*

§ 8. Continuance, Modification and Dissolution of Temporary Orders.

Defendants claim under a registered paper writing insufficient to constitute a deed, but effectual in law as a contract to convey the merchantable timber on the tract of land in question. The instrument was executed by only one tenant in common, but defendants contended he was acting for himself and as agent for his co-tenants. Plaintiff claims under a subsequently executed timber deed executed by all the tenants in common. *Held:* On the record plaintiff has a *prima facie* title to at least a two-thirds interest in the timber, and he is entitled to have the temporary order restraining defendants from further cutting and removing timber continued to the hearing. G. S., 1-487. *Chandler v. Cameron*, 233.

Upon the hearing of an order to show cause why a temporary restraining order should not be continued to the hearing, the court sustained defendants' demurrer on the ground of the failure of the complaint to allege facts sufficient to sustain any of the causes of action, with leave to plaintiffs to amend, and overruled defendants' demurrer for misjoinder of parties and causes. Defendants appealed. *Held:* Upon the sustaining of the demurrer upon the first ground, defendants were entitled to have the temporary restraining order dissolved upon motion. *Temple v. Watson*, 242.

§ 8½. Suspending Temporary Order Upon Filing of Bond.

Under G. S., 1-488, the judge may enter an order permitting the cutting of timber pending final determination of the controversy upon the filing of bond only in the event the court finds that one of the parties is clearly an interloper without a *bona fide* claim of right and that the other party is acting in good faith under a title *prima facie* valid, and it is error for the court to enter such order when the court fails to make such findings but finds to the contrary that the party against whom the order is entered is acting in good faith under a paper writing purporting to convey an interest in the timber. *Chandler v. Cameron*, 233.

INSANE PERSONS.

§ 4½. Effect of Adjudication of Insanity.

Where judication of insanity is shown there is a presumption that insanity continues. *Tomlins v. Cranford*, 323.

§ 11. Validity of Contracts and Conveyances.

An agreement entered into by a person who is mentally incompetent, but who has not been formally so adjudicated, is voidable and not void. *Walker v. McLaurin*, 53.

A deed executed by a person who has been adjudged to be insane, *sans* proof of restoration of sanity, is void. *Tomlins v. Cranford*, 323.

§ 12. Attack and Setting Aside Contracts and Conveyances.

Where a lease containing an option is attacked on the ground of want of mental capacity of lessor, and it appears that lessor's mental condition remained unchanged until his death, the refusal of the court to submit an issue tendered by lessee optionee as to lessor's ratification of the agreement is without error. *Walker v. McLaurin*, 53.

Where an incompetent person purports to enter into a contract, after his death his heirs may ratify the agreement or they may disaffirm it, and accept-

ance of benefits thereunder with knowledge of the facts is a ratification of the agreement precluding a subsequent disaffirmance. *Ibid.*

In this action for specific performance of an option contained in a lease, the administrator and heirs of deceased lessor denied the existence of a valid option upon allegations that at the time of its execution lessor did not have sufficient mental capacity to execute the agreement. Plaintiff introduced evidence that after lessor's death one of the heirs directed plaintiff to pay the rent to him as administrator of the estate. *Held:* It was error for the court to refuse to submit an issue as to the ratification of the agreement by defendant heirs as alleged in plaintiff's reply. *Ibid.*

INSURANCE.

§ 13a. Construction and Operation of Insurance Contracts in General.

A policy of insurance will be construed most strongly against insurer and all doubt and ambiguity will be resolved in favor of insured. *Manning v. Ins. Co.*, 251.

§ 31a. Avoidance of Policy for Misrepresentations Relating to Health.

A misrepresentation in an application for a policy will not avoid the policy unless it was made with intent to deceive or unless it materially affected the acceptance of the risk by insurer and contributed to the event on which the policy became payable. *Carroll v. Ins. Co.*, 456.

§ 41. Actions on Accident and Health Policies.

In this action on a policy of hospital insurance, plaintiff's evidence tended to show that she incorrectly stated in her application that she did not have hernia but that the statement was not made with intent to deceive, that plaintiff was hospitalized and operated upon for appendicitis, and that during the operation the surgeon incidentally repaired the hernia but there was no evidence that any additional charge therefor was included in the surgical fee. *Held:* Whether the misrepresentation was material was a question for the jury upon the evidence, and defendant's motion to nonsuit was properly denied. *Carroll v. Ins. Co.*, 456.

The burden is upon insurer to prove that a misrepresentation in an application for insurance was fraudulent, and where insured's evidence negates fraud and insurer offers no evidence, an instruction to the jury that there was no evidence of intent to deceive is without error. *Ibid.*

The evidence tended to show that in her application for hospital insurance plaintiff inadvertently misrepresented that she did not have hernia, that subsequent to the issuance of the policy plaintiff was hospitalized for appendicitis, that during this operation the surgeon incidentally repaired the hernia. *Held:* A charge to the effect that the misrepresentation would bar recovery if the hernia in any way contributed to the hospitalization or materially affected the acceptance of the risk by insurer so that insurer would not have written the policy in the form it was issued if the existence of the hernia had been known, *is held* without error, G. S., 58-30, the question of materiality of the misrepresentation being for the jury upon the evidence. *Ibid.*

§ 44a. Conditions Precedent to Liability or Right to Substitute Action on Liability or Collision Insurance.

This action was instituted under a "single interest collision coverage" rider on an automobile collision policy, insuring the mortgagee from loss on the note

secured by the chattel mortgage. The note was payable in one installment six months after purchase. The policy rider provided, as a condition precedent to liability, that the mortgagee should have made all reasonable efforts to collect overdue payments on the note, and failing to do so, should have repossessed the automobile. The car was damaged by collision some four months after purchase. *Held:* At the time of collision when liability under the policy attached, no payment on the note was due, and therefore the mortgagee was not required to demand payment by the endorser on the note as a condition precedent to the institution of action against insurer. *Manning v. Ins. Co.*, 251.

§ 50. Actions on Liability and Collision Policies.

Where in an action on an automobile collision policy, plaintiff alleges coverage under a binder, which binder shows that the insurance thereby contracted expired prior to the occurrence of the collision and that the premium received by insurer was the ratable amount to the date of expiration, insurer's motion to nonsuit is properly allowed notwithstanding evidence tending to show modification or extension of the insurance coverage when such evidence is not predicated upon allegations in the complaint. *Suggs v. Braxton*, 50.

§ 60. Actions on Theft Policies.

Under terms of policy of theft insurance, presumption of theft from mysterious disappearance of property is rebuttable, but issue should relate to whether property was stolen and not to whether it had mysteriously disappeared. *Davis v. Indemnity Co.*, 80.

In an action on a policy of theft insurance which provides that mysterious disappearance of property insured shall be presumed to be due to theft, any evidence tending to show that the property was lost or mislaid or that its disappearance was not due to theft, should be considered by the jury as evidence tending to rebut the presumption of theft arising from proof of the mysterious disappearance of the property. *Ibid.*

In an action on a policy of theft insurance, the burden of proof remains at all times upon insured to prove that property insured was stolen, aided by any rule of evidence or presumption arising under the terms of the insurance contract. *Ibid.*

In this action on a policy of theft insurance which provided that the mysterious disappearance of insured property should be presumed to be due to theft, plaintiff's evidence tended to show that while on a fishing trip with a friend, the boat capsized, and that when he emerged from the lake, he discovered that his money had disappeared. *Held:* The evidence was sufficient to be submitted to the jury upon the issue, and the refusal of insurer's motion to nonsuit was without error.

In an action on a policy of theft insurance which provides that mysterious disappearance of property insured shall be presumed to be due to theft, the submission of an issue as to whether insured's property mysteriously disappeared is error, since the issue relates only to the existence of the presumption and not to the fact of larceny or theft, and is insufficient to support a judgment for insured. *Ibid.*

INTOXICATING LIQUOR.

§ 2. Construction and Operation of Statutes.

In a county which has not elected to come under the Alcoholic Beverage Control Act, the Turlington Act, as modified by the later statute, is in full force and effect. G. S., 18-61. *S. v. Wilson*, 43.

§ 4a. Possession in General.

A person living in a county which has not elected to come under the Alcoholic Beverage Control Act may lawfully transport to and keep in his private dwelling, for his own use, not more than one gallon of tax-paid liquor, but subject to this exception, possession within such territory of any quantity of liquor is *prima facie* evidence that its possession is in violation of G. S., 18-2. *S. v. Wilson*, 43.

§ 8. Seizures and Forfeitures.

Where a vehicle is seized by a municipal police officer for illegal transportation of intoxicating liquor, the vehicle is in the custody of the officer or of the law and not the municipality. G. S., 18-6. *S. v. Law*, 103.

§ 9b. Presumptions and Burden of Proof.

The provision of G. S., 18-11, making it lawful to possess liquor in a private dwelling for family purposes, is an exception to the general rule, and the burden of proof in respect thereto is on defendant. *S. v. Wilson*, 43.

§ 9c. Competency and Relevancy of Evidence.

In a prosecution under G. S., 18-2, evidence tending to show that the liquor in defendant's possession was nontax-paid is competent. *S. v. Wilson*, 43.

§ 9d. Sufficiency of Evidence and Nonsuit.

Where, in a prosecution for unlawful possession of intoxicating liquor for the purpose of sale in a county which has not elected to come under the Alcoholic Beverage Control Act, G. S., 18-2, the State offers evidence that defendant had in his possession approximately 17½ gallons of liquor, and there is no evidence that defendant's possession was for the use of himself, his family and *bona fide* guests, defendant's motion to nonsuit is properly denied, since G. S., 18-11, applies. Prosecutions under G. S., 18-50, distinguished on the ground that that statute creates no presumption or rule of evidence from the fact of possession. *S. v. Wilson*, 43.

§ 9e. Directed Verdict.

In this prosecution for the sale of nontax-paid whiskey the sole witness was an employee of the A.B.C. Board whose testimony disclosed that he procured the sales by defendant by persistent entreaty and duplicity. *Held:* Under defendant's plea of not guilty, defendant was entitled to the benefit of any reasonable doubt as to the credibility of the State's witness, and therefore an instruction that if the jury should find beyond a reasonable doubt the facts to be as shown by all the evidence to return a verdict of guilty, is erroneous. *S. v. Godwin*, 449.

§ 9f. Instructions.

In a prosecution for unlawful possession of intoxicating liquor for the purpose of sale in a county which has not elected to come under the Alcoholic Beverage Control Act, the court may properly charge the law in the language of G. S., 18-11, and G. S., 18-13, since the law therein stated constitutes a material part of the law of the case. *S. v. Wilson*, 43.

JUDGMENTS.

§ 1. Nature and Essentials of Consent Judgments.

A consent judgment is the contract of the parties entered upon the records with the approval and sanction of a court of competent jurisdiction, and is not, strictly speaking, a judgment of the court. *Lee v. Rhodes*, 240.

Pending trial, plaintiff's attorney, plaintiff being present and making no objection, announced that the parties had agreed to a settlement. The court approved the terms of the settlement, directed the withdrawal of a juror and ordered a mistrial. Upon tender of judgment by defendants' attorney in accordance with the settlement, plaintiff appeared *in propria persona*, repudiated the agreement and requested the court not to sign the judgment. *Held:* The court was without jurisdiction to sign the judgment. *Ibid.*

§ 9. Judgments by Default in General.

Failure to plead within the time allowed admits the averments in the complaint entitling plaintiff to recover on the cause of action therein stated, G. S., 1-212, but does not preclude defendants from showing that the averments are insufficient to constitute a cause of action entitling plaintiff to any relief. *Presnell v. Beshears*, 279.

§ 17a. Form and Requisites of Judgments on Trial of Issues in General.

Where a judgment is without error in awarding affirmative relief, a further provision of the judgment dismissing the proceeding will be stricken out or disregarded as an inadvertence. *Thomas v. Baker*, 226.

§ 19. Time and Place of Rendition.

Ordinarily, where a judgment is rendered in open court and some memorandum or minute of the court appears of record showing what the judgment is, formal judgment based thereon may be later entered, but this rule does not apply to a consent judgment which requires the consent of the parties to subsist at the time it is signed in order to give the court jurisdiction. *Lee v. Rhodes*, 240.

§ 20a. Jurisdiction of Court to Hear Motions or Modify and Correct Own Judgments.

The Superior Court has the power, on motion in the cause after notice, to correct clerical errors in the judgment and to make the record speak the truth. *Land Bank v. Cherry*, 105.

§ 27a. Attack of Default Judgments.

Defendants, by motion to set aside a judgment rendered by default and inquiry, are entitled to have the judgment vacated if the complaint is insufficient to allege a cause of action, without a showing of excusable neglect, since in such case there is no basis upon which the default judgment can be predicated. *Presnell v. Beshears*, 279.

Upon a motion to set aside a default judgment, whether the neglect is excusable or not is to be determined with reference to the litigant's neglect and not that of the attorney. *Rierson v. York*, 575.

Under G. S., 1-220, a judgment may be set aside for excusable neglect irrespective of whether the neglect is induced by mistake of fact. *Ibid.*

Findings that the neglect of the defendant was due to the incapacity of her lawyer induced by serious illness, that she had used due diligence and that the attorney's neglect should not be imputed to her, and that defendant has a meritorious defense, is sufficient to support the court's order setting aside a default judgment under G. S., 1-220. *Ibid.*

JUDGMENTS—*Continued.*

§ 27e. Attack of Judgments for Fraud.

The attack, on the ground of fraud, of the allotment to the widow of property as a part of her year's allowance, and of the sale of personalty of the estate, ordered and confirmed by the court, is an attack upon judgments requiring allegation and proof of actual fraud. *Development Co. v. Bearden*, 124.

§ 27g. Setting Aside Judgments on Substituted Service.

A nonresident served by publication is entitled to an order setting aside a judgment by default of inquiry, G. S., 1-212, upon good cause shown, within one year after rendition of the judgment or notice thereof, and such notice means actual notice, and therefore evidence disclosing that defendant did not have actual notice of the pendency of the action is sufficient to support the trial court's finding that he had no notice thereof. G. S., 1-108. *Russell v. Edney*, 203.

§ 29. Persons Concluded by Judgment.

Heirs of missing person presumed dead cannot be estopped by fact that they were parties to independent proceeding to subject lands to payment of judgments, since such proceedings are invalid and title of the purchaser cannot thus be validated. *Carter v. Lilley*, 435.

§ 32. Operation of Judgments as Bar to Subsequent Action in General.

Where a fact is in issue or its establishment is necessary to support judgment rendered, the judgment is *res judicata* as to such fact even though no specific finding may have been made in reference thereto, and the same matter may not again be litigated by the parties or their privies in the same or any other court. *Craver v. Spaugh*, 129.

In an action on claims against an estate defendant administrator pleaded the bar of the statutes of limitations, G. S., 1-52 (1), G. S., 28-112. Plaintiffs in reply pleaded agreement not to plead the statutes. Judgment of dismissal was entered. Plaintiffs moved to set aside the judgment for excusable neglect, G. S., 1-220. The court found that plaintiffs do not have a meritorious cause of action and denied the motion to set aside. *Held:* The finding of the court was necessarily predicated upon preliminary determination that the claims were barred and that there was no valid enforceable agreement not to plead the bar of the statutes, and therefore the denial of the motion to vacate is *res judicata* as to these matters and is a bar to a subsequent action by plaintiffs on the same claims. *Ibid.*

The fact that the existence and validity of a charitable trust and its corporate beneficiary has been declared in an action to establish the validity of their creations does not preclude the courts under the doctrine of *res judicata* from making like declarations in a subsequent action involving the status of the charities and their power to enter into a contract with an eleemosynary educational corporation. *Reynolds Foundation v. Trustees of Wake Forest*, 500.

Judgment in a proceeding which is *coram non judice* cannot be the basis of an estoppel. *Carter v. Lilley*, 435.

§ 33a. Judgments of Nonsuit as Bar to Subsequent Action.

A judgment of nonsuit does not bar a subsequent action on the same cause instituted within one year unless the evidence is substantially identical, and therefore the plea of *res judicata* to the second cause cannot be determined from the pleadings alone. G. S., 1-25. *Craver v. Spaugh*, 129.

JUDGMENTS—*Continued.*

§ 45. Rights and Remedies of Judgment Creditor.

Upon the death of a judgment debtor a judgment creditor may not proceed independently to enforce his judgment, but must look to the personal representative whose duty it is to administer the whole estate, and this rule applies to presumptive death of the judgment debtor arising from his absence for seven years without being heard from by those who would be expected to hear from him if living. *Carter v. Lilley*, 435.

JURY.

§ 1. Competency, Qualification and Challenges for Cause.

Objection that defendant was denied a trial by his peers for the reason that Negroes were excluded from the petit jury must be presented by a challenge to the array and cannot be presented by defendant's challenge to the twelfth juror after he had exhausted his peremptory challenges, the fact that the veniremen tendered as the twelfth juror is a white man not being ground for challenge for cause. G. S., 15-163. *S. v. Kirksey*, 445.

Where a prospective juror states that it would require evidence to remove his impression against defendant, but further states upon interrogation by the court that he could render a fair and impartial verdict upon the evidence despite anything he might have heard or read, the action of the court in overruling defendant's challenge to the juror for cause presents no reviewable question of law. G. S., 9-14. *S. v. Davenport*, 475.

All questions as to the competency of jurors are for the decision of the trial court, and its rulings thereon are not subject to review unless accompanied by some imputed error of law. *Ibid.*

§ 2. Peremptory Challenges.

Defendant must exhaust his peremptory challenges in order for challenge to array to be considered, since he must show that he was prejudiced. *S. v. Litteral*, 527; *S. v. Koritz*, 552.

§ 3. Challenges to the Array.

Objection that defendant was denied a trial by his peers for the reason that Negroes were excluded from the petit jury must be presented by a challenge to the array and cannot be presented by defendant's challenge to the twelfth juror after he had exhausted his peremptory challenges, the fact that the veniremen tendered as the twelfth juror is a white man not being ground for challenge for cause. G. S., 15-163. *S. v. Kirksey*, 445.

A motion to quash the indictment on the ground that no women were summoned to serve on the jury is untenable when it appears that defendants did not exhaust their peremptory challenges and thus that they obtained a jury acceptable to them. *S. v. Litteral*, 527.

In respect of special veniremen summoned to serve as petit jurors, upon the overruling of defendant's challenge to the array on the ground of discrimination against members of the Negro race, defendants still have available challenges to the polls, and where they fail to exhaust their peremptory challenges they may not object to the composition of the jury, their right being not to select but to reject jurors, and it being necessary that the court's action in the matter be hurtful and its effect unavoidable before it will be held to vitiate the trial. *S. v. Koritz*, 552.

Mere irregularity on the part of the jury commissioners in preparing the jury list, unless obviously, designedly, or intentionally discriminatory, does not vitiate the list or afford a challenge to the array. *Ibid.*

JURY—*Continued.*

§ 5b. Alternate Jurors.

Upon emergency arising after afternoon adjournment of the court and after defendant's counsel had left and was too far away to be available, the judge called the court back in session and in open court, and in defendant's presence, substituted the 13th juror in the exercise of his discretion, G. S., 9-21. *Held:* There being no suggestion of any unusual reason demanding the presence of defendant's counsel, it cannot be held that defendant was prejudiced or deprived of any fundamental right by the action of the court. *S. v. Stanley*, 650.

§ 8. Jury Rolls and Panels.

When the jury is drawn and summoned and the grand jury selected and impaneled before the effective date of the Amendment of 1946, the absence of women on the jury panel is not a defect, even though the bill of indictment is returned after the Amendment's effective date, since the Amendment merely makes women eligible for jury service and time must be allowed to implement the constitutional provision. *S. v. Litteral*, 527.

Mere irregularity on the part of the jury commissioners in preparing the jury list, unless obviously, designedly, or intentionally discriminatory, does not vitiate the list or afford a challenge to the array. *S. v. Koritz*, 552.

The finding of the trial court, when supported by evidence, that no discrimination was intended or resulted from the manner in which the jury list was prepared, is sufficient to support its action overruling a challenge to the array on the ground that the jury list contained a disproportionately small number of Negroes, and such ruling will not be disturbed on appeal in the absence of some pronounced ill consideration. *Ibid.*

LANDLORD AND TENANT.

§ 2. Form, Requisites and Validity of Leases in General.

A lease for a term of years is personal property, and is governed by the rules of law applicable to personal property and not by the requirements of law for the conveyance of real property. *Moche v. Leno*, 159.

A seal is not necessary to the validity of a lease regardless of the length of the term. The common law, which did not require leases to be in writing, is in full force and effect, modified only by the statutory requirement that a lease of more than three years be in writing, G. S., 22-2. *Ibid.*

§ 14. Covenants Not to Assign or Sublet.

Both a covenant not to assign and a covenant not to sublet are restrictions upon the common law right of alienation, and will be strictly construed to prevent the restraint from going beyond the expressed stipulation. *Rogers v. Hall*, 363.

A covenant not to assign and a covenant not to sublet are not identical in meaning or effect, and a lease which contains a covenant not to sublet but no covenant not to assign, is not breached by an assignment. *Ibid.*

§ 15½. Termination of Lease by Operation of Law—Death of Life Tenant Lessor.

The death of the life tenant terminates a lease executed by her and all rights or agreements therein created, and title passes to the remaindermen by operation of law unaffected by the lease. *Haywood v. Briggs*, 108.

The fact that lessees of a life tenant are permitted to remain in possession for several months after the death of the life tenant before institution of action

LANDLORD AND TENANT—*Continued.*

by the remaindermen to assert their title, does not bar the remaindermen or constitute an acquiescence by them in a provision of the lease giving lessees the right to remove improvements, since upon the death of the life tenant the lease is void and is not subject to confirmation by the remaindermen. *Ibid.*

LARCENY.

§ 4. Indictment—Proof and Variance.

The indictment charged larceny of a vehicle the property of a municipality. The evidence tended to show that the automobile had been seized by a municipal police officer for illegal transportation of intoxicating liquor and placed by him in the municipal parking lot, and that the car was taken therefrom by defendants during the night. *Held:* There is a fatal variance between charge and proof in that the vehicle was not the property of the municipality. *S. v. Law*, 103.

§ 5. Presumption From Recent Possession.

The possession of property some 16 or 20 days after the alleged theft, while a pertinent circumstance, is insufficient to raise the presumption that the possessor was the thief. *S. v. Jones*, 47.

The presumption arising from the recent possession of stolen property does not apply until the identity of the property is established. *Ibid.*

Defendants were tried on consolidated bills of indictment, one charging larceny of Dominick and yellow chickens from one person and the other larceny of White Rock chickens from another person. *Held:* Evidence that on the day after the alleged theft defendants sold a number of "white chickens," introduced without limiting it to the second bill, either in its admission or the instruction to the jury, raises no presumption in regard to the larceny of the property described in the first bill, and an instruction on the presumption arising from recent possession must be held for reversible error upon appeal from a verdict of guilty referring only to the first bill. *Ibid.*

LIMITATION OF ACTIONS.

§ 1. Nature and Construction of Statutes of Limitation in General.

Lapse of time does not discharge a liability but merely bars recovery. *Williams v. Thompson*, 166.

§ 5c. Notice and Demand.

Where an administrator in possession purchases lands of the estate at the foreclosure of a mortgage thereon, an action to have him declared a trustee of a constructive trust does not begin to run, in the absence of demand and refusal, until he completes and closes the administration. *Pearson v. Pearson*, 31.

§ 9. Computation of Period of Limitation—Fiduciary Relationships.

Where a fiduciary, either by operation of law or by agreement, enters into possession, time will not run during the existence of the relationship so as to bar an action to establish a resulting or constructive trust until there has been an unqualified disavowal by clear and unequivocal acts or words. *Sheppard v. Sykes*, 606.

Where a widow enters into possession of the estate of her husband, not under her unallotted dower right, but as purchaser from the purchaser at the fore-

LIMITATION OF ACTIONS—*Continued.*

closure sale of a mortgage on the land executed by the husband, she holds same adverse to the heirs, and the principle of law that time will not begin to run against an action to have her declared trustee of a resulting or constructive trust in favor of the minor heirs until the termination of the relationship by clear and unequivocal acts or words, is not applicable. *Ibid.*

§ 15. Pleading of Limitations.

Statutes of limitations, except those annexed to the cause of action itself, must be pleaded. *Williams v. Thompson*, 166.

The petition for the sale of land to make assets alleges the existence of a claim by the defendant municipality, without admitting its amount or validity. The municipality filed answer asserting a lien for taxes, street assessments, and other items, and prayed judgment therefor. *Held:* Plaintiff was entitled to set up the plea of the statute of limitations by way of reply to the answer. *Ibid.*

MASTER AND SERVANT.

§ 1. The Relationship in General.

Contract under which mortgagee in possession operated mortgaged building *held* to constitute mortgagee agent of mortgagors in its operation and not employer of workers employed in its operation. *Unemployment Compensation Comm. v. Nissen*, 216.

§ 4a. Distinction Between "Employee" and Independent Contractor.

The authority and control retained by the person for whom the work is being done is the criterion for determining whether the workman is an employee or an independent contractor. *Brown v. Truck Lines*, 299.

§ 22a. Nature and Extent of Employer's Liability for Negligence of Servant.

The doctrine of *respondeat superior* applies only when the relation of master and servant or principal and agent is shown to exist between the wrongdoer and the person sought to be charged, at the time and in respect to the very transaction out of which the injury arose. *Carter v. Motor Lines*, 193.

§ 38. "Employers" Liabile Under Workmen's Compensation Act.

An employer within the purview of the Workmen's Compensation Act may not escape liability thereunder by any provision in his contract with an employee under which the employee agrees to indemnify and save the employer harmless from any claim arising in the performance of the work. G. S., 97-6. *Brown v. Truck Lines*, 299.

§ 39b. Determination of Whether Person Injured Is Employee or Independent Contractor.

Evidence tending to show that in moving a sawmill from one location to another the employee was under the detailed supervision of the employer's foreman but that there was an agreement that when the sawmill was ready for operation at its new location the employee would operate it as an independent contractor, does not support a contention that the employee was an independent contractor while working in moving the sawmill, and an injury received by him during this operation is compensable under the Workmen's Compensation Act. *Creighton v. Snipes*, 90.

A written agreement under which a licensed carrier by truck in interstate commerce leases an owner driven vehicle for an interstate trip, with provision

MASTER AND SERVANT—*Continued.*

that carrier's Interstate Commerce Identification plates be attached for the trip and removed at the destination terminal and that upon discharge of the truck's lading at destination the truck be delivered into the possession of the lessor, *is held* to constitute the owner-driver an employee of the carrier within the purview of the Workmen's Compensation Act while transporting goods in interstate commerce. *Brown v. Truck Lines*, 299.

§ 39f. Dual Employment.

Evidence *held* to support finding that at time of injury claimant was employee of partnership and not of partner individually. *Creighton v. Snipes*, 90.

§ 40b. Workmen's Compensation Act—Whether Injury Results From "Accident."

The word 'accident" as used in the Workmen's Compensation Act is an unlooked for and untoward event which is not expected or designed by the injured employee. *Edwards v. Publishing Co.*, 184; *Gabriel v. Newton*, 314.

Evidence *held* to sustain finding that rupture of intervertebral disc of back while lifting weight was result of an accident. *Edwards v. Publishing Co.*, 184.

Death of policeman from heart attack resulting from injury to heart caused by unusual exertion in course of employment *held* result of "accident." *Gabriel v. Newton*, 314.

§§ 40c, 40d. Whether Accident "Arises Out of and in Course of Employment."

Claimant was employed as a lumber-piler and was instructed to stay away from the saws, but there was evidence that on the day of his injury he was instructed to leave his regular job and to perform some work in the vicinity of one of the saws, and that while waiting at the place designated he started to assist another employee, in the absence of the regular sawyer, in cutting off a board, and suffered an injury when his hand came in contact with the saw. Two men were usually required to operate the saw. *Held:* The evidence was sufficient to sustain the finding of the Industrial Commission that the injury arose out of and in the course of his employment. *Riddick v. Cedar Works*, 647.

Evidence *held* sufficient to sustain findings that fall of employee subject to epileptic fits to concrete platform while he was lowering flag in performance of duties, arose out of and in course of employment. *DeVine v. Steel Co.*, 684.

§ 40e. Causal Connection Between Accident and Injury or Death.

The evidence tended to show that a policeman suffered acute dilatation of the heart occasioned by unusual exertion in the course of his employment. There was expert opinion evidence that such injury to the heart muscle might be permanent and progressive and there was expert testimony that there was a causal connection between this injury and a fatal heart attack occurring some ten months thereafter. *Held:* The evidence is sufficient to support the finding of the Industrial Commission that the injury to the heart caused by the unusual physical exertion was the cause of death. *Gabriel v. Newton*, 314.

§ 55d. Review of Award of Industrial Commission.

Exceptions and assignments of error to the judgment, findings of fact, and conclusions of law of the Superior Court in affirming an award of the Industrial Commission present the sole question of whether the findings are suffi-

cient to support the judgment and does not present the competency or sufficiency of the evidence to support the findings or any one of them. *Brown v. Truck Lines*, 65.

Where the finding of the Industrial Commission that the injured worker was an employee and not an independent contractor is based upon the legal effect of the written contract, the question is one of law, reviewable on appeal, and is presented by an exception to the judgment of the Superior Court affirming the award of the Industrial Commission. *Brown v. Truck Lines*, 299.

Findings of fact of the Industrial Commission which are supported by competent evidence are conclusive on the courts even though there may be evidence which would have supported a finding to the contrary. *Creighton v. Snipes*, 90; *Gabriel v. Newton*, 314; *Riddick v. Cedar Works*, 647; *DeVine v. Steel Co.*, 684.

The findings of the Industrial Commission that deceased was not an employee of defendant but an employee of independent contractors for defendant, is conclusive when supported by the evidence even if the record be such as would permit a contrary finding. *Bell v. Lumber Co.*, 173.

In reviewing an award to plaintiff by the Industrial Commission, approved by the Superior Court, the evidence will be considered in the light most favorable for the establishment of the claim, since the findings of fact and the permissible inferences to be drawn therefrom are conclusive when supported by any competent evidence. *Edwards v. Publishing Co.*, 184; *Gabriel v. Newton*, 314.

A finding of the Industrial Commission based upon sufficient competent evidence will not be disturbed because of the fact that evidence objectionable under technical rules may also have been admitted. *Gabriel v. Newton*, 314.

§ 58. Employers Within Coverage of Unemployment Compensation Act.

Whether a mortgagee who takes possession of and operates the mortgaged building under an agreement assigning rents is an agent of the mortgagors or an employer of workers engaged in the operation of the building, must be determined by the provision of the agreement, and the fact that the mortgagee, in its other activities in this State, is an employer as defined by the Unemployment Compensation Act is immaterial. G. S., 96-8 (e). *Unemployment Compensation Comm. v. Nissen*, 216.

§ 59b. "Employing Units" Liable for Unemployment Compensation Taxes.

In imposing liability for unemployment compensation taxes, the General Assembly is not limited to the relationship of employer and employee as defined under the common law, but may determine "employing units" subject to the tax either by direct definition or by reasonable administrative procedure. *Unemployment Compensation Comm. v. Harvey & Son Co.*, 291.

A person who is a contractor within the meaning of G. S., 96-8 (f) (8), is liable for unemployment compensation taxes for wages paid to his employees for the period subsequent to the effective date of Chap. 231, Session Laws 1945, until March 18, 1947, the effective date of the repeal of this section. *Ibid.*

The "contribution" imposed by the Unemployment Compensation Law is a tax, and an amendment which repeals a former provision imposing the tax upon specified persons will be given prospective effect only, and such persons will be held liable for taxes accrued prior to the repeal in the absence of a provision expressly or impliedly releasing them from such liability. *Ibid.*

MASTER AND SERVANT—*Continued.*

Contract *held* to constitute defendant contractee and not landlord for purpose of levy of unemployment compensation tax. *Ibid.*

§ 59e. Reserves Under Unemployment Compensation Act.

Where a mortgagee in possession after default operates the mortgaged building as agent for the mortgagors under the terms of an agreement assigning rents, the mortgagors are the employers of workers engaged in the operation of the building and are entitled to have the Unemployment Compensation Commission transfer from the name of the mortgagee to their name the reserve account on wages earned by the employees during the period of such operation. *Unemployment Compensation Comm. v. Nissen*, 216.

G. S., 96-9 (c) (4), does not require mutual consent of the parties for the transfer of a reserve credited to a particular "employer" under a misapprehension of the facts or the status of the person, firm or corporation making the contribution. Further, the Unemployment Compensation Act did not require mutual consent for such transfer prior to the amendment of 1945.

§ 62. Appeals From Unemployment Compensation Commission.

The findings of the Unemployment Compensation Commission are conclusive when supported by evidence, both in the Superior Court and upon further appeal to the Supreme Court. G. S., 96-4 (m). *Unemployment Compensation Comm. v. Harvey & Son Co.*, 291.

Where the findings of the Unemployment Compensation Commission are supported by evidence, the Supreme Court may determine only whether the conclusions of law and orders of the Commission are properly predicated upon the facts found. *Ibid.*

MORTGAGES.

§ 1b. Mortgages Contrary to Statutory Policy—Mortgages for Balance After Land Bank Mortgage.

Where a mortgagee agrees to the scaling down of his debt as required by the Land Bank Commissioner as a condition precedent to making a loan to the debtor with which to satisfy the indebtedness, a mortgage deed thereafter taken by the creditor to secure a note for difference between original indebtedness and the amount received in satisfaction thereof is void as against public policy. 12 USCA, 1016, *et seq. Cauble v. Trexler*, 307.

In an action attacking a mortgage executed at the insistence of the creditor to secure the difference between the original indebtedness and the amount loaned by the Federal Land Bank Commissioner to satisfy the original mortgage indebtedness, equity will not deny relief on the ground that the plaintiff was *in pari delicto*, but will act to prevent the mortgagee from collecting on the instrument. *Ibid.*

MUNICIPAL CORPORATIONS.

§ 5. Powers and Functions in General—Legislative Control and Supervision.

Municipal corporations derive their powers almost solely from legislative enactment under Art. VIII, sec. 4, of the State Constitution, and are subject to statutory restrictions and regulations of their taxing power. *Purser v. Ledbetter*, 1.

A municipal corporation has only such powers as are expressly granted it by the Legislature or which are fairly implied or incident thereto, or which are

MUNICIPAL CORPORATIONS—*Continued.*

essential to the accomplishment of its declared objects and purposes. *Nash v. Tarboro*, 283.

§ 11½. Municipal Employees—Firemen.

Upon dissolution of firemen's mutual benefit association by common consent upon joinder of municipal employees in local governmental employees' retirement system, municipal firemen cannot be required to continue contributions from salary to the association notwithstanding previous rule that firemen must be members of the association. *Dillon v. Wentz*, 117.

§ 12. Torts of Municipality—Governmental and Corporate Functions.

The maintenance of the fire department and the extinguishment of fires is a governmental function of a municipality, and, in the absence of statutory provision to the contrary, a municipality incurs no liability either for inadequacy of equipment or for negligence of its firemen. *Klassette v. Drug Co.*, 353.

This action was instituted solely against a municipal corporation to recover for wrongful death upon allegations of gross neglect and culpable negligence on the part of the chief of police and jailer and the mayor and board of aldermen resulting in the death of plaintiff's intestate when he was suffocated in a fire originating in a room adjacent to the cell in which the police chief and jailer had incarcerated intestate. *Held:* Defendant's demurrer to the complaint was properly sustained upon the ground of governmental immunity since a municipality may not be held liable upon the theory of *respondeat superior* for gross neglect or culpable negligence of its officers in the discharge of their governmental duties. G. S., 153-179, is not applicable. *Gentry v. Hot Springs*, 665.

§ 14a. Torts of Municipalities—Defects or Obstructions in Streets or Sidewalks.

A municipality is not an insurer of the safety of its streets and sidewalks but is required only to exercise ordinary care and due diligence to see that they are reasonably safe from dangers or defects which can or ought to be discovered in the exercise of ordinary care and prudence. *Klassette v. Drug Co.*, 353.

A municipality is not under duty to guard against wetness of a sidewalk from water flowing from a building in which its fire department had extinguished a fire, no more than it is under duty to guard against wetness due to rain. *Ibid.*

Plaintiff's evidence tended to show that the sidewalk adjacent to a building in which a fire had occurred the previous day was wet from a liquid flowing beneath the door, that plaintiff saw the condition but nevertheless walked through it and slipped and fell to her injury. Plaintiff's evidence also tended to show that there was some colorless oil in the liquid which caused her to fall. *Held:* Plaintiff's evidence discloses that even if there was oil in the water, it was not visible, and therefore the evidence fails to show a hazard or danger which the officers of the city should have discovered in the exercise of due care. *Ibid.*

And further, evidence established contributory negligence of pedestrian. *Ibid.*

MUNICIPAL CORPORATIONS—*Continued.*

§ 25b. Control, Regulation and Authority Over Streets and Sidewalks.

It is not negligence on the part of a municipality to have shade trees along its streets, and therefore the existence of such trees imposes no duty upon the driver of a vehicle in parking thereunder. *Hammett v. Miller*, 10.

Where the facts agreed show that a street was received and accepted by a municipality upon its incorporation, without reference to the width of such street, and that the municipality had kept up and maintained same as a public street at a width of less than thirty feet, the facts are sufficient to support the conclusion of law by the court that the town had acquired the street, at least by prescription, and that therefore such street does not come within the provision of a subsequent amendment to the town's charter stipulating that streets thereafter opened and constructed within the town should not be less than thirty feet in width, and judgment of the court that plaintiffs are not entitled to restrain the municipality from improving said street by hard surfacing for a width of less than thirty feet, in accordance with the discretionary power given the municipal authorities as to streets acquired and established prior to the amendment, is affirmed. *Hylton v. Mount Airy*, 622.

§ 26. Power to Grant, Execution and Construction of Municipal Franchise.

Municipal corporations have statutory authority to grant franchises for public utilities upon reasonable terms for a period not exceeding sixty years with power to renew at the expiration of that period. G. S., 160-2. *Boyce v. Gastonia*, 139.

Where a franchise granted by a municipality fails to stipulate a term, the statutory term of sixty years will be read into the contract as a part thereof. G. S., 60-2. *Ibid.*

A municipality granted an exclusive franchise for the operation of a motor bus transportation service over specified streets within the city and "such other routes, with the consent and approval of the city council" as the public transportation might require. Thereafter the municipality approved request for additional route along a public highway from a point within the city to a point ⅞ of a mile beyond the corporate limits. *Held:* The "approval" of the proposed route does not amount to granting of franchise by the city, and *held further*, the city has no authority to grant such franchise either under G. S., 160-203, or by virtue of its implied powers. *Coach Co. v. Transit Co.*, 391.

§ 29. Revocation of Franchises.

A provision in a franchise for a street railway that the grantee should save the city harmless from all damages or loss on account of anything growing out of the construction and operation of the said railway cannot be construed as a reservation of right in the city to revoke the franchise at will. *Boyce v. Gastonia*, 139.

§ 41. Municipal Charges and Expenses.

Contract of city to remove tracks of public utility in consideration of abandonment of franchise, in order to improve street, is for necessary expense and valid. *Boyce v. Gastonia*, 141.

§ 42. Levy and Collection of Taxes. (Constitutional requirements and restrictions see Taxation.)

Where a statute authorizing municipal expenditures for a certain purpose provides that the question of a bond issue pursuant thereto should be sub-

mitted to a vote, the provision for referendum, whether expressed in terms permissive or mandatory, is prerequisite to proceedings by the municipality thereunder. *Pierson v. Ledbetter*, 1.

While a municipality has both governmental and proprietary powers, it may not levy a tax, even in the exercise of a proprietary power, except for a public purpose. *Nash v. Tarboro*, 283.

MUTUAL BENEFIT ASSOCIATIONS.

§ 1. Nature and Essentials.

An organization of municipal firemen operated under private laws of the Legislature (ch. 12, Private Laws of 1933; ch. 307, Private Laws of 1941) which is under the exclusive control of the active members thereof and the trustees elected by them, and which requires a two-thirds vote of the active members to authorize the municipality to make deductions from salaries of the firemen for the benefit of the association, is an unincorporated mutual benefit association. *Dillon v. Wentz*, 117.

§ 4. Dues and Contributions.

Where firemen of a municipality are required to be members of an unincorporated mutual benefit association whose funds are raised entirely by contributions from its members without municipal participation therein, *held* upon abandonment of the purposes of the association by common consent, the members of the municipal fire department are not legally bound to continue making contributions to the association. *Dillon v. Wentz*, 117.

§ 5. Benefits.

A member of a mutual benefit association has a mere expectancy and no vested right in its assets until a claim for benefits under the provisions of the association has matured. *Dillon v. Wentz*, 117.

Where the retirement fund of an unincorporated mutual benefit association is created wholly or in part from contributions by its members, an accrued annuity or benefit, unlike a pension, constitutes a vested interest in the assets of the association. *Ibid.*

§ 6. Dissolution.

An unincorporated mutual benefit association of firemen of a municipality operating under private laws to provide retirement benefits to its members may be discontinued and its assets liquidated under an amendment or repeal of the private laws upon abandonment of its purposes by common consent. Ch. 423, Session Laws of 1945. *Dillon v. Wentz*, 117.

Upon the dissolution of an unincorporated mutual benefit association of firemen of a municipality, those members or their dependents who have accrued annuities or benefits, either under the provisions of the original organization or under an amendment authorizing benefits for non-service connected disabilities or for refund of a part of their contributions upon dismissal or resignation from the fire department (ch. 307, Private Laws of 1941) have a vested right, and their claims must be satisfied in full before distribution of the remainder of the assets to the active members. Transfer of membership to the State Retirement System cannot extinguish such vested rights. *Ibid.*

Upon the dissolution of an unincorporated mutual benefit association, accrued claims may be satisfied by computing the present cash value of an annuity under provisions of the mortuary tables, and it is not necessary that the total assets of the association be held in trust for the payment of such claims. *Ibid.*

NEGLIGENCE.

§ 1. Acts and Omissions Contributing Negligence in General.

Negligence is the failure to perform some legal duty owed the injured party under the circumstances, which negligent breach of duty proximately causes injury. *Hammett v. Miller*, 10; *Klassette v. Drug Co.*, 353.

§ 2. Sudden Emergency.

Person in sudden emergency is required to exercise care of reasonably prudent man in similar circumstances, but principle does not apply to one whose negligence contributes to the emergency. *Hoke v. Greyhound Corp.*, 412.

§ 4a. Condition and Use of Lands and Buildings in General.

Neither owner nor lessee may be held liable for dangerous condition of adjacent sidewalk from water thrown on fire in store by municipal firemen, or for oil on sidewalk unless they were at fault in creating condition. *Klassette v. Drug Co.*, 353.

Evidence that plaintiff slipped and fell to his injury on the sidewalk when he stepped into a mixture of syrup and water which flowed from the doors of defendants' building across the entire sidewalk, and that men were seen working on the inside of the building with brooms, *is held* sufficient to be submitted to the jury on the issue of defendants' negligence and to withstand motion for judgment of nonsuit. *Marzelle v. Mfg. Co.*, 674.

Plaintiff's evidence was to the effect that he slipped and fell on the sidewalk when he stepped into a mixture of syrup and water which flowed across the entire sidewalk from the doors of defendants' building, that cars were parked at the curb adjacent to the sidewalk, and traffic in the street prevented a person from walking in the street outside the parked cars, and that the substance had the appearance of dirty water with nothing in its appearance or odor to import danger therefrom. *Held:* Whether defendant was guilty of contributory negligence was a question for the jury. *Ibid.*

§ 4b. Attractive Nuisances.

The evidence tended to show that defendant railroad company piled used trestle timbers on its platform a short distance from a public road. Some of the timbers were piled with the narrow rather than the wider side down, and some had protruding bolts in them. The pile sloped a little, but there was no evidence that the timbers were piled in an unusual way. Plaintiff, a six-year-old boy, climbed upon the platform and was injured when one of the timbers fell on his foot. Children had been observed to play on piles of timber from time to time placed on the platform. *Held:* The pile of timber was not inherently dangerous, and under the circumstances defendant was not under duty to have anticipated and guarded against injury to children therefrom, nor does the evidence establish actionable negligence in the manner in which the timbers were piled. *Boyette v. R. R.*, 406.

§ 5. Proximate Cause.

Proximate cause is that cause which produces the result in continuous sequence and without which the injury would not have occurred, under circumstances from which a man of ordinary prudence could have foreseen that such result was probable. *Hammett v. Miller*, 10; *Klassette v. Drug Co.*, 353.

Foreseeability is essential element of proximate cause. *Lee v. Upholstery Co.*, 88.

NEGLIGENCE—*Continued.*

§ 16. Pleadings.

In this action by a passenger in a cab to recover for injuries resulting from an assault by intruders, the complaint *is held* not to establish contributory negligence as a matter of law, and defendant cab company's demurrer *ore tenus* was properly overruled. *Smith v. Cab Co.*, 572.

§ 18. Relevancy and Competency of Evidence.

Army discharge of person injured is incompetent for any purpose, but where trial court has withdrawn it from evidence and instructed jury not to consider it, its admission will not be held reversible error. *Hoke v. Greyhound Corp.*, 412.

While ordinarily the fact that a defendant in an action for negligence is protected by liability insurance is incompetent, where it appears that a witness for one of the defendants was an employee of a casualty company, the fact that the existence of a liability policy is brought out as an incident upon her cross-examination does not necessarily constitute reversible error, particularly where it is apparent from all the pertinent facts that no prejudicial effect resulted. *Ibid.*

§ 19a. Questions of Law and of Fact.

Whether there is sufficient evidence to support the issue of negligence is a question of law. *Klassette v. Drug Co.*, 353.

§ 19b (1). Nonsuit on Issue of Negligence in General.

Plaintiff fell in open elevator pit when rope he was using to tie load on truck slipped, causing him to lose balance and step backward. *Held:* If defendant were negligent in moving its elevator without notice to plaintiff, defendant could not have anticipated or foreseen the independent act of negligence on the part of plaintiff which was a proximate cause of the injury, and defendant's motion to nonsuit should have been allowed. This result obtains even though plaintiff be regarded as an invitee, and therefore whether plaintiff was an invitee or a licensee need not be determined. *Lee v. Upholstery Co.*, 88.

If plaintiff's evidence fails to establish either negligence or proximate cause, nonsuit is proper. *Klassette v. Drug Co.*, 353.

§ 19c. Nonsuit on Issue of Contributory Negligence.

Plaintiff's evidence tended to show that after loading his truck from an elevator on defendant's premises he moved the truck some 8 feet from the building to tie the load down, that while so doing the rope slipped in his hand causing him to lose balance, and that in taking some 3 to 5 steps backward in attempting to regain his balance, he fell into the open elevator pit to his injury. *Held:* Plaintiff's own evidence discloses that his own negligence in handling simple instrumentalities under his own control was the proximate cause or one of the proximate causes of his injury; and nonsuit was proper. *Lee v. Upholstery Co.*, 88.

Judgment of involuntary nonsuit on the ground of contributory negligence cannot be upheld unless the evidence is so clear on that issue that reasonable minds could draw no other inference. *Mozelle v. Mfg. Co.*, 675.

§ 20. Instructions.

Instructions upon issue of contributory negligence which is predicated upon a finding that defendant was without fault, *held* reversible error, since contributory presupposes negligence on part of defendant with which negligence of plaintiff concurs. *Stewart v. Cab Co.*, 368.

NEGLIGENCE—*Continued.*

An instruction that if the jury should find certain specific facts from the greater weight of the evidence such conduct "would be negligence" instead of "would constitute negligence," *held* not an expression of opinion in violation of G. S., 1-180, even when considered with a subsequent instruction applying the rule of the prudent man to the conduct of defendant when confronted by an emergency. *Hoke v. Greyhound Corp.*, 412.

This action was submitted to the jury on the issues of negligence, contributory negligence and damages. The court charged to the effect that if defendant was guilty of negligence and that if such negligence was the proximate cause of injury, then "liability" would follow. *Held:* The use of the term "liability" cannot be held for prejudicial error. *Holmes v. Cab Co.*, 581.

A charge that if defendant was guilty of contributory negligence which proximately caused injury, "liability" would follow, cannot be held for prejudicial error as implying that legal liability would attach regardless of contributory negligence when it appears that the court thereafter defined contributory negligence and charged that it would bar recovery if it constituted a proximate cause of the injury. *Ibid.*

The use of the phrase "the proximate cause" of injury instead of "a proximate cause" of injury in defining contributory negligence that would bar recovery, cannot be held for prejudicial error when it appears that the court repeatedly charged that contributory negligence need not be the sole proximate cause of the injury in order to bar recovery by plaintiff. *Holmes v. Cab Co.*, 581.

NUISANCES.

§ 7. Nature and Grounds of Remedy of Abatement of Public Nuisances.

In the absence of statutory provision, a suit to abate a public nuisance, except at the instance of an individual who suffers special damage, may be maintained only by the State on relation of its Attorney-General and not on the relation of the Solicitor of the District. *McLean v. Townsend*, 642.

A suit cannot be maintained to abate a public nuisance as defined by G. S., 90-103, since G. S., 19-2 to 19-8, are not applicable, and the Narcotic Drug Act does not provide the remedy of abatement. *Ibid.*

PARENT AND CHILD.

§ 5. Liability for Support of Child.

The father is under moral and legal duty to provide for the support of his child, which duty ordinarily terminates when the child reaches his majority. *Wells v. Wells*, 614.

Where a child, who prior to and after reaching the age of twenty-one years, is and continues to be insolvent, unmarried and incapable, mentally and physically, of earning a livelihood, the father continues to be under legal duty to provide for the support of such child. *Ibid.*

This action was instituted by the wife against her husband to recover for moneys expended in the support of their son after he had attained his majority upon allegations that the son because of mental and physical disability was unable to support himself, that the husband had abandoned the child and failed to provide adequate support, and that by reason of the husband's misconduct the wife had been compelled to supply the child with the necessities of life. *Held:* The inference is reasonably deducible from the facts alleged that the expenditures by the wife were compelled by necessity, and the husband's demurrer to the complaint should have been overruled. *Ibid.*

PARTIES.

§ 8. Parties Who May or Must Be Joined as Defendants.

All persons who have, or claim, any interest in a controversy adverse to plaintiff, or who are necessary parties to a complete determination of the action, may be made defendants, and any person claiming title or right of possession to real estate may be made a party plaintiff or defendant as the case requires. G. S., 1-69. *Owen v. Hines*, 236.

In an action to establish a trust in lands upon allegations that defendant guardian took title individually to lands belonging to the estate and thereafter repudiated the trust relationship and conveyed the lands to his wife, who took with full knowledge of the facts, the wife is properly joined as a party defendant to the end that the entire controversy be settled in one action and that she be concluded by the judgment in respect to the principal question. *Ibid.*

§ 7. Right to Intervene.

In an action to remove cloud upon title between parties claiming from a common source, it is error to permit a party claiming under a title paramount to and independent of the common source, to intervene. *Moore v. Massengill*, 244.

§ 10a. Joinder of Additional Parties in General.

G. S., 1-73, provides for the joinder of such parties as are necessary to a complete determination of the controversy between the original parties, but does not authorize the joinder of a party claiming under an independent cause of action not essential to a full and complete determination of the original cause of action. *Moore v. Massengill*, 244.

In this action, involving a collision between two automobiles, the Superior Court granted defendants' petition for the joinder of the owner and driver of a third car involved in the collision. *Held:* The order of the Superior Court must be affirmed, since if the additional parties defendant are proper parties, joinder was in the discretion of the court and not subject to review, or if such additional parties are necessary parties to a complete determination of the controversy, the court was required to have them brought in as parties defendant. *Colbert v. Collins*, 395.

PERJURY.

§ 4. Subornation of Perjury.

The suborner of perjury and the perjurer stand upon an equal footing, especially in respect to turpitude and punishment. G. S., 14-210. *S. v. Cannon*, 338.

PHYSICIANS AND SURGEONS.

§ 16. Application and Use of Knowledge or Skill.

A physician may be held liable for injury resulting either from his failure to use reasonable care and diligence in the practice of his art or his failure to exercise his best judgment in the treatment of the case. *Gray v. Weinstein*, 463.

§ 20. Sufficiency of Evidence of Malpractice.

Facts disclosed by evidence *held* to raise issue of whether defendant used due care and diligence without proof that treatment was improper or not approved practice in general use. *Gray v. Weinstein*, 463.

PLEADINGS.

§ 2. Joinder of Causes.

If causes of action are not entirely distinct and unconnected, if they arise out of one and the same transaction, or a series of transactions forming one dealing and all tending to one end, and if one connected story can be told of the whole, they may be joined in order that the whole controversy may be determined in one action. G. S., 1-123. *Owen v. Hines*, 236.

§ 13. Office and Prerequisites of Reply.

The right to reply is not restricted to cases in which defendant pleads a counterclaim, but a reply is proper if the answer alleges facts which, if established, entitles defendant to some relief. G. S., 1-140; G. S., 1-141. *Williams v. Thompson*, 166.

Where answer of municipality to petition to sell lands to make assets, asserts lien for taxes and street assessments, and prays judgment therefor, plaintiff is entitled to plead statutes of limitation by way of reply. *Ibid.*

§ 15. Office and Effect of Demurrer.

Upon demurrer the facts will be taken as alleged, and in passing on the matter the court is not concerned with how the facts may ultimately turn out to be. *Hodges v. Hodges*, 334.

The office of demurrer is to test the sufficiency of a pleading, admitting for the purpose the allegations of fact contained therein and, ordinarily, relevant inferences of fact necessarily deducible therefrom. *Winston v. Lumber Co.*, 339; *Wells v. Wells*, 614.

Upon demurrer, the pleading will be liberally construed with every reasonable intendment and presumption in favor of the pleader, and the demurrer will not be sustained unless the pleading is fatally defective. *Ibid.*

A demurrer tests the sufficiency of the complaint to state a cause of action, admitting for the purpose the allegations of fact and inferences of fact reasonably deducible therefrom, but it does not admit the conclusions of law asserted by the pleader thereon. *Gentry v. Hot Springs*, 665.

§ 18. Defects Appearing on Face of Pleading and "Speaking Demurrers."

When fraud does not appear from the allegations of the complaint, fraud cannot be established by demurrer. *Hodges v. Hodges*, 334.

§ 19b. Demurrer for Misjoinder of Parties and Causes.

Action against guardian and his wife for mismanagement and to declare him constructive trustee and to set aside conveyance by him to his wife, demurrer for misjoinder of parties and causes was properly overruled. *Owen v. Hines*, 236.

§ 19c. Demurrer for Failure of Complaint to State Cause.

Upon demurrer, the complaint will be liberally construed and the demurrer overruled if in any portion of the complaint or to any extent it presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose fairly can be gathered from it. G. S., 1-151. *Presnell v. Beshears*, 279.

§ 20½. Form and Effect of Judgments Upon Demurrers.

The court sustained defendants' demurrer for failure of the complaint to state a cause of action and overruled the demurrer on the ground of misjoinder of parties and causes, and defendants appealed. *Held:* Upon the sustaining of the demurrer on the first ground there was nothing left to which the de-

PLEADINGS—*Continued.*

murrer on the second ground could be directed, and the ruling of the court thereon presents no question requiring decision on appeal. *Temple v. Watson*, 242.

§ 22b. Amendment of Pleadings After Issue Joined.

A motion to amend the complaint so as to substantially change the character of the cause at issue, especially in the Supreme Court on appeal, will not be allowed. G. S., 1-163. *Hylton v. Mount Airy*, 622.

§ 24c. Proof Without Allegation.

The theory of the complaint determines the recovery, and proof not supported by allegation is unavailing. *Suggs v. Braxton*, 50.

A material variance between the allegation and proof may be taken advantage of by motion for judgment as of nonsuit. *Ibid.*

§ 27. Motions for Bill of Particulars or That Pleading Be Made More Definite.

Motion to require complaint to be made more definite and certain is addressed to discretion of trial court. *Privette v. Moore*, 264.

An application for a bill of particulars is addressed to the sound discretion of the trial court and the court's ruling thereon is not reviewable, except perhaps in extreme cases. G. S., 1-150. *Building Co. v. Jones*, 282.

§ 30. Motions to Strike—Discretionary or Legal Right to Relief.

The court is bound to strike from a pleading matters which are irrelevant or redundant within the purview of G. S., 1-153, when motion therefor is made within the statutory period, the relief being a matter of right and not of discretion in such instance. *Development Co. v. Bearden*, 124; *Privette v. Morgan*, 264.

§ 31. Grounds for Striking Matter From Pleading.

Where the facts alleged as a basis for a purported second cause of action are insufficient to constitute a cause of action, they should be stricken upon motion aptly made, since such matters are irrelevant and redundant as to the first cause of action and would tend to confuse the issue raised by it. *Development Co. v. Bearden*, 124.

On a motion to strike, the test of relevancy of a pleading is whether the pleader has the right to offer in evidence at the trial the facts relied upon to sustain the plea, and if such facts, when established, constitute a cause of action or defense. *Williams v. Thompson*, 166.

If the ultimate fact pleaded in a reply is not inconsistent with the cause of action alleged in the complaint and constitutes a defense, in whole or in part, to a plea of affirmative relief set up in the answer, it should not be stricken. *Ibid.*

Where, in an action attacking the administratrix and guardian in the administration of an estate on the ground of fraud, recitals and denunciations of fraud in matters not necessary to a statement of any cause of action set forth in the pleading, G. S., 1-122, should be stricken as a matter of right upon motion made in apt time. *Privette v. Morgan*, 264.

Allegations insufficient to allege cause of action for fraud because of failure to allege with sufficient particularity fraudulent acts complained of, *held* should have been stricken upon motion aptly made. *Ibid.*

PRINCIPAL ANG AGENT.

§ 1. The Relationship and Distinctions Between This and Other Relationships.

Contract under which mortgagee in possession operated building *held* to constitute mortgagee agent of mortgagors in its operation and not employer of workers employed in its operation. *Unemployment Compensation Comm. v. Nissen*, 216.

§ 7d. Ratification and Estoppel.

Where a husband acts for his wife in the negotiations and in procuring the execution of a deed to her, notice to him is notice to her, and she cannot claim under the deed and at the same time deny the fact of agency. *Tomlins v. Cranford*, 324.

§ 10. Liability of Principal for Wrongful Acts of Agent.

The doctrine of *respondeat superior* applies only when the relation of master and servant or principal and agent is shown to exist between the wrongdoer and the person sought to be charged, at the time and in respect to the very transaction out of which the injury arose. *Carter v. Motor Lines*, 193.

PROPERTY.

§ 2a. Kinds of Property—Real Property.

Standing timber is realty. *Winston v. Lumber Co.*, 339.

PUBLIC OFFICERS.

§ 5b. Authority and Powers in General.

Self-interest disqualifies one from action in a public capacity where unbiased judgment is required. *In re Advisory Opinion*, 705.

§ 11. Amount of Compensation.

The General Assembly is authorized to fix the compensation of other officials but the people have reserved to themselves the right to determine the amount which the General Assembly shall be paid, Art. II, Sec. 28, and the General Assembly is without authority to provide subsistence and travel allowance for its members in addition to the compensation fixed by the Constitution. *In re Advisory Opinion*, 705.

QUIETING TITLE.

§ 2. Actions.

In an action to remove cloud upon title between parties claiming from a common source, it is error to permit a party claiming under a title paramount to and independent of the common source, to intervene. *Moore v. Massengill*, 244.

An action attacking a mortgage executed at the insistence of the creditor to secure the difference between the original indebtedness and the amount loaned by the Federal Land Bank Commissioner to satisfy the original mortgage indebtedness, plaintiff having been in actual possession of the land from the date of said mortgage, is not barred by the three year statute of limitations, G. S., 1-52 (9), since it is an action to remove cloud on title which is a continuing one to which the statute is not applicable. *Cauble v. Trexler*, 307.

In an action to remove cloud from title to lands claimed from a common source, the introduction in evidence by plaintiff of deeds constituting his chain

QUIETING TITLE—*Continued.*

of title containing descriptions sufficient in themselves to refer to the same lands, makes out a *prima facie* case, and defendant having admitted claiming title to the lands described in the deed to plaintiff, and having introduced no evidence, an instruction for the jury to answer the issue in plaintiff's favor if they believe the evidence, is without error. *Edwards v. Benbow*, 466.

RAILROADS.

§ 11. Actions to Recover for Killing of Livestock.

The provisions of G. S., 60-81, making the killing of livestock by the engine or cars running upon any railroad *prima facie* evidence of negligence in an action against the railroad company for damages, do not apply unless the action is brought within six months after the cause of action accrued, and in this case evidence of negligence without the benefit of such presumption *is held* insufficient. *Coburn v. R. R.*, 695.

RAPE.

§ 1. Elements of the Offense—Force.

In order to constitute the crime of rape the carnal knowledge of prosecutrix must be attained forcibly and against her will. *S. v. Thompson*, 19.

"Force" necessary to constitute rape need not be actual physical force. Fear, fright, or coercion may take the place of force. *Ibid.*

§ 4. Sufficiency of Evidence and Nonsuit on Capital Charge.

Testimony of prosecutrix that she "did not object to the intercourse . . . because . . . I was afraid they would kill me" and that she did not consent and used as much force as she could to prevent defendant from having sexual intercourse with her, is sufficient evidence that the intercourse was attained by force and against her will. *S. v. Johnson*, 19.

The evidence tended to show that prosecutrix was attacked and ravished by three defendants in turn, and that the fourth defendant returned as the last of the three was committing the act, and that then the fourth defendant carnally knew prosecurix. *Held:* It is for the jury to determine whether prosecutrix was prevented from fiercely resisting the fourth defendant from fear or the exhibition of force, or whether under the circumstances resistance would have been futile and might have been fatal. *Ibid.*

Testimony in this case *held* sufficient to show that defendant was guilty of rape as a principal, co-conspirator, or aider and abettor, an such defendant's motion to nonsuit was properly overruled. *Ibid.*

§ 23. Prosecution and Punishment for Assault Upon a Female.

In a prosecution for assault upon a female, evidence tending to show only that defendant asked prosecutrix an improper question, unaccompanied by a show of violence, threats or any display of force, is insufficient to be submitted to the jury, and defendant's motion to nonsuit should have been granted. *S. v. Silver*, 352.

§ 25. Prosecutions for Assault With Intent to Commit Rape.

Evidence tending to show that defendant assaulted prosecutrix, leaving his finger marks on her throat and tearing her dress, that prosecutrix escaped from him, ran to a nearby house and stated that a man had tried to rape her,

RAPE—*Continued.*

is held sufficient to be submitted to the jury on a charge of assault with intent to commit rape. *S. v. Rogers*, 67.

Evidence *held* insufficient to show that assault was made with intent to ravish notwithstanding any resistance prosecutrix might make. *S. v. Moore*, 326.

§ 27. Submission of Evidence of Less Degrees Upon Failure of Evidence of Higher Offense.

Where in a prosecution under a bill of indictment charging assault with intent to commit rape the evidence discloses an assault but is insufficient to prove intent to ravish prosecutrix notwithstanding any resistance on her part, defendant is entitled to nonsuit on the offense charged, but is not entitled to his discharge, since he may be convicted under the bill of indictment for assault upon a female as though this offense had been separately charged in the bill. *S. v. Moore*, 326; *S. v. Johnson*, 587.

Where all the evidence tends to show that defendant ravished prosecutrix by force and against her will, defendant's sole defense being insanity, the trial court properly limits the jury to a verdict of guilty of rape or not guilty, and the refusal of defendant's request to submit the question of defendant's guilt of lesser offenses, is without error, there being no evidence to support conviction of lesser degrees of the offense charged. G. S., 15-169; G. S., 15-170. *S. v. Brown*, 384.

RECEIVING STOLEN GOODS.

§ 2. Knowledge and Felonious Intent.

The offense pronounced by G. S., 14-71, consists of receiving with guilty knowledge and felonious intent goods which previously had been stolen, and sufficient evidence of all the essential elements of the offense must be made to appear in order to sustain a conviction. *S. v. Yow*, 585.

§ 4. Presumptions and Burden of Proof.

The inference arising from the recent possession of stolen property has no application to a charge of receiving. *S. v. Yow*, 585.

§ 6. Sufficiency of Evidence and Nonsuit.

Evidence that the witness had had a pistol stolen from his car in front of defendant's sandwich shop, that defendant was advised of the theft and promised if he found out anything about it he would let the witness know and try to get the pistol back for him, and that some two months thereafter the pistol was found upon search in defendant's absence in a dresser drawer in the bedroom of defendant's wife, *is held* insufficient to be submitted to the jury in a prosecution for receiving stolen goods knowing them to have been stolen, since the evidence fails to show defendant received the property, or, if he did, that he had felonious intent. *S. v. Yow*, 585.

§ 8. Verdict and Judgment.

A verdict of "guilty of receiving stolen goods" is insufficient to support a judgment imposing sentence for receiving stolen goods knowing them to have been stolen. *S. v. Yow*, 585.

REFORMATION OF INSTRUMENTS.

§ 8. Mutual Mistake.

As a general rule, an instrument may not be reformed for a naked mistake of law, but where by reason of error of expression or mistake as to the force and effect of the language used, the contract fails to express the true intent of the parties, reformation will lie to correct the mistake of fact induced by error of law. *Trust Co. v. Braznell*, 211.

Mutual mistake in failing to include effective provision in instrument because of reliance on ineffectual language justifies reformation. *Ibid.*

§ 6. Parties.

A lessee may maintain an action against his lessor's grantee to reform the deed to make it express the true contract in respect to the leasehold estate. *Trust Co. v. Braznell*, 211.

§ 10. Sufficiency of Evidence and Nonsuit.

The evidence tended to show that claimant's adoptive father made declarations before and after, but none contemporaneously with, his purchase of the realty in question, to the effect that he was buying, or had bought, it for claimant and her children, but that he usually added that he wanted her to have a place to live as long as she "did right," and that he was not having deed made to her in order to prevent her from losing or disposing of the property. The evidence further tended to show that he instructed the draftsman to make the deed to a bank as trustee for himself and wife, and that the deed was executed according to his instructions. *Held:* The evidence is insufficient to be submitted to the jury on the issue of reformation of the deed to enforce a parol trust in the adopted child's favor, there being no evidence of mutual mistake or error on the part of the draftsman. *Akin v. Bank*, 453.

REGISTRATION.

§ 4. Registration as Notice.

While registration is the sole method of charging subsequent purchasers with notice, where a grantee accepts a conveyance of real property subject to an outstanding claim or interest evidenced by an unrecorded instrument executed by his grantor, he takes the estate burdened by such claim or interest and by his acceptance of the deed agrees to stand seized subject to the unrecorded instrument and estops himself from asserting its invalidity. *Trust Co. v. Braznell*, 211.

RETIREMENT SYSTEMS.

§ 9. Membership in Local Governmental Employees' Retirement System.

Municipal firemen's mutual benefit association may be dissolved by common consent upon joinder of municipal employees in local governmental employees' retirement system. *Dillon v. Wentz*, 117.

ROBBERY.

§ 1a. Nature and Elements of the Crime in General.

The effect of Chap. 187, P. L. 1929 (G. S., 14-87) is merely to provide a more severe punishment for robbery and for attempt to rob when the offenses are committed by the use or threatened use of firearms or other dangerous weapons, without otherwise adding to or subtracting from the common law offense of robbery. *S. v. Jones*, 402.

ROBBERY—*Continued.*

§ 3. Prosecution and Punishment.

Defendant was charged with an attempt to commit highway robbery with firearms. The State's evidence was sufficient as to each essential element of robbery but was insufficient to show the use of firearms in its perpetration. *Held:* The court correctly submitted the evidence to the jury on the question of defendant's guilt of the less grave offense of attempt to commit highway robbery. G. S., 15-170. *S. v. Jones*, 402.

SALES.

§ 27. Actions and Counterclaims for Breach of Warranty.

In this action to recover balance due on the purchase price of potatoes delivered under contract, defendants claimed breach of warranty of merchantability. No issue as to damages for breach of warranty was submitted. *Held:* The instructions of the trial court as to the damages recoverable for breach of warranty and as to the amount recoverable by plaintiff for balance of purchase price, submitted under the one issue as to the amount, if any, defendants are indebted to plaintiffs, *is held* not sufficiently clear to guide the jury in arriving at a proper conclusion, and a new trial is ordered. *Palmer v. Jennette*, 377.

SPECIFIC PERFORMANCE

§ 1. Contracts Specifically Enforceable.

A party who enters into a contract with a real estate broker to purchase certain lands may not maintain an action against the broker for specific performance upon the later acquisition of title to the lands by the broker, the right of action under the contract being against the owner and not the real estate agent. *Strickland v. Bingham*, 221.

§ 4. Actions for Specific Performance.

Where, in an action for specific performance, defendants admit the execution of the option, the burden is on defendants to prove rescission or abandonment of the agreement when relied on by them as a defense. *Bell v. Brown*, 319.

In an action for specific performance by vendor, the vendee may not ask for rescission on the ground of fraud and at the same time claim damages for breach of warranty. *Lowe v. Hall*, 541.

The purchaser contended that he accepted deed upon fraudulent representations of good title whereas conveyance included a particular strip of land to which vendor did not have good title. Vendor contended that the conveyance did not include said strip. There was evidence that the purchaser, an attorney, had theretofore investigated the title and had accepted fees for such services and had had opportunity to re-examine title prior to delivery of deed which he accepted. *Held:* The issue of fraud was properly submitted to the jury, and the purchaser's motion to nonsuit in the vendor's action for specific performance was properly overruled. *Lowe v. Hall*, 511.

STATUTES.

§ 1. Constitutional Requirements and Restrictions in Enactment.

The omission of the enacting clause prescribed by Art. II, Sec. 21, of the Constitution of North Carolina, renders a purported Act of the General Assembly inoperative and void. *In re House Bill, No. 65, Appendix*, 708.

STATUTES—*Continued.*

Expressions in a purported Act of the General Assembly which merely declare the legislative policy may not be held a "substitute" for the enacting clause if, indeed, there may be any substitute for the language of the constitutional formula. *Ibid.*

The enacting clause must be incorporated in a bill at the time it is passed by both houses of the General Assembly, and the fact that the bill is a committee substitute for the original bill which may have contained an enacting clause is immaterial. *Ibid.*

§ 10. Construction of Penal Statutes.

Penal statutes must be strictly construed. *S. v. Jordan*, 579.

§ 6. Construction in Regard to Constitutionality.

A statute will not be declared unconstitutional unless it is clearly so. *Nesbitt v. Gill*, 174; *Nash v. Tarboro*, 283.

If a statute is susceptible to two interpretations, one constitutional and the other unconstitutional, the former will be adopted. *Nesbitt v. Gill*, 174.

TAXATION.

§ 7. State Tax on Interstate Commerce.

The license tax imposed on dealers purchasing horses or mules for resale by G. S., 105-47, both in its provisions for graduation according to the number of carloads of horses or mules purchased for resale and the head tax on such animals purchased for resale, is imposed and the exceptions to the head tax are applicable regardless of whether such animals are raised in this State or are shipped into the State from other states, and therefore the statute makes no discrimination between local or interstate commerce. *Nesbitt v. Gill*, 174.

§ 1c. Classification of Businesses, Trades and Professions.

The word "trades" as used in Sec. 3, Art. V of the State Constitution means any employment or business engaged in for gain or profit. *Nesbitt v. Gill*, 174.

The purchase of horses or mules for the purpose of resale, at wholesale or retail, is a trade within the meaning of Sec. 3, Art. V, of the State Constitution, and the imposition of a license tax on such trade, is valid. *Ibid.*

In imposing license taxes on trades and professions it is not required that there be uniformity, but it is sufficient if the selection and classification of the subjects for such taxation be reasonable and just and the tax apply alike in its exactions and exemptions to all persons belonging to the prescribed class or business. *Ibid.*

In determining whether a license tax is just and equitable, the fact that in levying a tax upon a particular business, such business is exempt from some other comparable tax may be considered. *Ibid.*

The imposition of an additional license tax of $3.00 per head on horses and mules, required to be paid by dealers purchasing such animals for resale, G. S., 105-47, is a just and equitable manner for determining the amount of license tax to be paid by such dealers, based upon the quantity of business done by them, particularly in view of the fact that such sales have been exempt from the 3% sales tax and the head tax substituted. *Ibid.*

Under the provisions of G. S., 105-47, a dealer is exempt from the head tax on horses and mules therein imposed: (1) On horses and mules purchased from another dealer within the State who has paid the tax; (2) On horses

TAXATION—*Continued.*

and mules received in part payment; and (3) On horses and mules repossessed for failure of a purchaser to pay the purchase price, and such exemptions are based upon reasonable distinctions and apply to all dealers alike and therefore do not violate any provisions of the State or Federal Constitution. *Ibid.*

§ 4. Necessary Expenses.

What is a necessary expense under Art. VII, sec. 7, of the State Constitution is a question for the courts, and while great weight will be given a legislative declaration in a statute that the expenditure of funds therein authorized is for a necessary expense, such declaration is not binding on the courts. *Purser v. Ledbetter*, 1.

Approval of taxation by popular vote is the rule, and the power to impose a tax for a necessary expense without a vote is an exception to the rule. Art. VII, sec. 7, of the State Constitution. *Ibid.*

The imposition of a tax or the expenditure of funds derived therefrom for municipal parks and recreational facilities is for a public purpose but it is not for a necessary municipal expense, Art. VII, sec. 7, of the State Constitution, and the expenditure of funds for this purpose derived from a tax imposed without a referendum will be enjoined by the courts. This result is not affected by the fact that the statute authorizing expenditure of funds for this purpose declares it to be for a necessary municipal expense. *Ibid.*

§ 5. Public Purpose.

There can be no lawful tax which is not levied for a public purpose. Art. V, Sec. 3. *Nash v. Tarboro*, 283.

What is a public purpose in the exercise of the taxing power is, in the final analysis, a question of law for the determination of the courts. *Ibid.*

Legislative authority for the imposition of a tax will not be declared unconstitutional on the ground that the purpose of the tax is not a public one unless the violation of this constitutional provision is clear. *Ibid.*

What is a public purpose within the exercise of the taxing power must be determined in the light of custom and usage, and what is not considered necessary to the support and proper use of the government at one time may, by reason of changed conditions and circumstances, be classified as a public purpose at a later time. *Ibid.*

The cost of construction, maintenance and operation of a hotel by a municipal corporation is not a public purpose, Art. V, Sec. 3, and the General Assembly may not authorize a municipality to levy a tax therefor, even with the approval of the voters. Chap. 413, Session Laws 1945. *Ibid.*

§ 14. Definitions and Distinctions Between Kinds of Taxes—License Taxes.

The $3.00 per head tax on horses and mules required to be paid by dealers purchasing such animals for resale is not a privilege tax for the right to purchase horses or mules nor an *ad valorem* tax on the animals purchased, but is merely the method prescribed by statute for the determination of the amount of license tax to be paid by those engaging in the business. *Nesbitt v. Gill*, 174.

§ 38c. Actions to Recover Taxes Paid Under Protest.

Where the tax collector is also treasurer of the county, a written demand for the return of taxes paid to him under protest addressed to him in his

TAXATION—*Continued.*

capacity as tax collector without the appellation "treasurer" is a reasonable compliance with the statute, G. S., 105-267, and will support an action for the recovery of the taxes. *R. R. v. Polk County*, 697.

§ 42. Tax Deeds and Titles.

Respondent, a tenant in common in expectancy in possession of the land, redeemed it from the county after tax foreclosure. There was conflict in the evidence as to whether respondent had promised petitioner to pay the taxes. Petitioner had knowledge of the tax foreclosure proceedings. This proceeding for partition was instituted some thirteen years after the redemption from tax foreclosure. *Held:* Whether respondent's redemption of the land was for the benefit of petitioner depends upon whether respondent was under any legal or moral obligation to pay the taxes, and this question together with the plea of laches should have been submitted to the jury, and a directed verdict for petitioner must be held for error. *Pearce v. Rowland*, 590.

TENANTS IN COMMON.

§ 7. Mutual Rights and Liabilities—Taxes.

Respondent, a tenant in common in expectancy in possession of the land, redeemed it from the county after tax foreclosure. There was conflict in the evidence as to whether respondent had promised petitioner to pay the taxes. Petitioner had knowledge of the tax foreclosure proceedings. This proceeding for partition was instituted some thirteen years after the redemption from tax foreclosure. *Held:* Whether respondent's redemption of the land was for the benefit of petitioner depends upon whether respondent was under any legal or moral obligation to pay the taxes, and this question together with the plea of laches should have been submitted to the jury, and a directed verdict for petitioner must be held for error. *Pearce v. Rowland*, 590.

TRIAL.

§ 4. Continuance.

Nothing else appearing, the trial court has the discretionary power to deny a motion for a continuance for absence of counsel. *Tomlins v. Cranford*, 323.

§ 7. Argument and Conduct of Counsel.

Which of two defendants, defendants having offered no evidence, shall make the last argument to the jury is within the discretion of the presiding judge. *Trust Co. v. Braznell*, 211.

§ 11. Consolidation of Actions for Trial.

Where guests in a car, having no control over its operation, and the driver of the car bring actions against the owner of a truck involved in a collision with the car, it is the better practice to try the actions by the guests separate from the action by the driver of the car, since in the guests' actions the issue of concurring negligence of the drivers is not germane, while in the action by the driver of the car the issues of negligence and contributory negligence arise. *Dixon v. Brockwell*, 567.

§ 16. Withdrawal of Evidence.

Where the army discharge of plaintiff's intestate has been admitted in evidence but the court thereafter of its own motion withdraws the discharge from the consideration of the jury and instructs the jury not to consider it, the incident will not be held prejudicial. *Hoke v. Greyhound Corp.*, 412.

TRIAL—*Continued.*

§ 21. Office and Effect of Motion to Nonsuit.

A material variance between the allegation and proof may be taken advantage of by motion for judgment as of nonsuit. *Suggs v. Braxton*, 50.

Motion to nonsuit must be made at close of plaintiff's evidence, and motion first made at close of all evidence is too late. *Tomlins v. Cranford*, 323.

§ 23a. Sufficiency of Evidence in General.

There must be legal evidence of every material fact necessary to support a verdict, and evidence which raises a mere possibility or conjecture in regard thereto is insufficient to be submitted to the jury. *Lumber Co. v. Elizabeth City*, 270.

§ 29. Peremptory Instruction in Favor of Party Having Burden of Proof.

A peremptory instruction in favor of plaintiff cannot be sustained unless in no aspect of the evidence is it sufficient to support defendant's defense. *Thrift Cop. v. Guthrie*, 431.

§ 31d. Charge on Burden of Proof.

Charge that burden was on plaintiff to satisfy jury of affirmative of issue by preponderance of evidence but if preponderance of evidence on issue was on side of defendant, to answer the issue in the negative, *held* conflicting and to constitute reversible error. *In re Will of West*, 204.

§ 31e. Expression of Opinion in Charge on Weight or Credibility of Evidence.

An instruction to the effect that if the driver of a car failed to exercise reasonable care in that she approached a bridge "at a high rate of speed of 30 to 35 miles an hour over a highway that was wet . . ." *is held* not an expression of opinion that a speed of 30 to 35 miles an hour was excessive when in other portions of the charge the court fully instructed the jury as to the various statutory speed restrictions and regulations, including those where no hazards exist, G. S., 20-141, and it is apparent that the charge when read contextually could not have been misunderstood. *Hoke v. Greyhound Corp.*, 412.

§ 31f. Statement of Contentions.

The court is not required to give the contentions of the litigants at all, but where the court undertakes to state the contentions of one party upon a particular phase of the case it is incumbent upon the court to give the contentions of the other party upon the same aspect. G. S., 1-180. *In re Will of West*, 204.

Ordinarily objection to statement of contentions must be brought to trial court's attention in apt time. *Ibid.*

§ 32. Request for Instructions.

When instructions requested are given in substance in so far as they are applicable to the evidence, it is sufficient, it not being necessary that they be given in the language of the request. *Hoke v. Greyhound Corp.*, 412.

§ 45. Judgment Non Obstanti Veredicto.

Conflicting or contradictory answers to the issues is not ground for judgment *non obstante veredicto*, it being the practice of the court to grant a new trial if the verdict is so contradictory as to invalidate the judgment. *Palmer v. Jennette*, 377.

TRIAL—*Continued.*

Motion for judgment *non obstante veredicto* may not be granted if the pleadings raise issuable matter. *Dupree v. Moore*, 626.

§ 48. Motions for New Trial for Misconduct or Matters Tending to Prejudice Jury.

Defendants were sued upon the theory of joint and concurrent negligence. An eyewitness of the collision disclosed in her testimony for one of the defendants that she was employed by a casualty company. On cross-examination she was asked if she knew that the casualty company had a direct interest in the outcome of the suit, and replied in the affirmative. The other defendant's objection was sustained and his motion to strike the answer was allowed, but his motion for a mistrial was denied. *Held:* It does not appear that movent was prejudiced by the incident and his exception to the denial of the motion cannot be sustained. *Hoke v. Greyhound Corp.*, 412.

TRUSTS.

§ 2b. Actions to Establish Parol Trusts.

A complaint alleging an agreement by defendant to purchase plaintiff's residence at foreclosure sale under deed of trust with money borrowed from original lender and to hold same for plaintiff until he could arrange to pay off certain judgments then standing against the property, that plaintiff is now ready to pay off said judgments but that defendant refuses to comply with this part of the agreement *is held* not demurrable on the ground that plaintiff seeks to invoke a contract made for the purpose of hindering, delaying and defrauding creditors. *Hodges v. Hodges*, 334.

An action to establish a parol trust, with prayer that defendant be directed to execute deed to plaintiff, is not an action for recovery or possession of real property within the meaning of G. S., 1-111, and plaintiff is not entitled to have the answer stricken and judgment by default final rendered for failure of defendant to file bond. G. S., 1-211 (4). *Ibid.*

§ 3a. Written Trusts in General.

Letters disclosing the intent of a depositor that bank deposits made by him should be held for his use and benefit and that he should have exclusive control over the funds, though expressing a desire that in the event of his death the fund should go to a named "beneficiary," are insufficient to establish an express trust, there being no evidence of intention to transfer or assign a present beneficial interest in the funds deposited. *Wescott v. Bank*, 39.

§ 3d. Charitable Trusts.

Rules against perpetuities do not apply to charitable trusts. *Reynolds Foundation v. Trustees of Wake Forest*, 500. Parties *held* perpetual trusts. *Ibid.* Foundation *held* authorized to obligate greater part of income in perpetuity notwithstanding by-law requiring quarterly appropriation of its funds. *Ibid.*

The creation of a charitable trust whose purpose is to be accomplished by the transfer of all its income, not directed to be accumulated, to a corporation created in accordance with directives of the trust indenture solely for the accomplishment of charitable works in this State, is valid. *Ibid.*

§ 5b. Transactions Creating Constructive Trusts.

An administrator or executor in possession of lands of the estate under a court order permitting him to continue the farming operations thereon, who

purchases the lands at a foreclosure sale of a mortgage thereon, nothing else appearing, holds title as a trustee for the estate, and his purchase will be set aside as a matter of course at the instance of the interested parties. *Pearson v. Pearson*, 31.

An administrator acts in a fiduciary capacity in the control and disposition of assets of the estate and he cannot purchase assets at a sale under order of court to his own profit and the detriment of the estate. *Development Co. v. Bearden*, 124.

Legal title to guardianship property is in the infant ward rather than the guardian, who is a mere custodian and manager and has no beneficial title to the property, and therefore where a guardian takes title individually to property of the estate, he holds title as trustee for the ward. *Owen v. Hines*, 236.

Defendant may not be declared trustee *ex maleficio* upon evidence which shows no fiduciary relationship at time he purchased lands. *Strickland v. Bingham*, 221.

Evidence that before and after execution of deed, plaintiff's adoptive father made statements that he was buying the property for plaintiff, but that deed was executed according to his instructions to himself and wife, *is held* insufficient for jury on issue of reformation of deed to enforce parol trust in plaintiff's favor. *Akin v. Bank*, 453.

A mortgagor died leaving a minor widow and a child *in ventre sa mere*. The mortgage was foreclosed and the land was purchased by the widow's father at the foreclosure sale and reconveyed to the widow upon her majority. This action was instituted by the child twenty-five years after attaining her majority to have the widow declared the trustee of a resulting or constructive trust in her favor upon allegations that the widow procure the foreclosure of the mortgage and that her father bid in the land for her as her agent. There was no evidence that the widow procured the foreclosure of the mortgage, but it appeared to the contrary that foreclosure was dictated by common prudence, since the estate was insufficient to pay secured claims and there was no one legally capable of negotiating an extension of the debt, nor evidence that the widow's father acted as her agent rather than in her interest as her father. *Held:* The evidence is insufficient to impress a trust upon the widow's title for benefit of plaintiff. *Ibid.*

§ 20. Actions for Authority to Sell Trust Property.

Proceeding may not be maintained under the Act for purpose of invoking equitable jurisdiction of court to authorize trustees to sell property to preserve trust. *Brandis v. Trustees of Davidson College*, 329.

§ 31a. Actions for Advice and Instruction of Court in Distribution of Estate.

A petition by a trustee for advice and instruction of the court in the administration of a trust created by will is not strictly speaking an adversary action but is in the nature of a proceeding *in rem*, and plaintiff is entitled to the relief prayed, and therefore motion to nonsuit by any of defendant beneficiaries is not appropriate. *Trust Co. v. Deal*, 691.

UTILITIES COMMISSION.

§ 2. Jurisdiction.

Utilities Commission has exclusive jurisdiction to license carrier of passengers for hire along regular route between fixed termini from point within city

UTILITIES COMMISSION—*Continued.*

and thence along public highway to point on public highway .7 mile outside of city. *Coach Co. v. Transit Co.*, 391.

The powers vested in the Utilities Commission in respect to the licensing, supervision and control of franchise carriers of passengers and property for compensation and to hear complaints are comprehensive and ordinarily the courts will not exercise original jurisdiction over any question which may arise in respect thereto. *Ibid.*

§ 3. Hearings, Judgments, and Orders.

License to a common carrier must be written and granted by the Utilities Commission as such, G. S., 62-105, and an oral permit transmitted by telephone by the Chairman of the Utilities Commission is not a valid authorization. *Coach Co. v. Transit Co.*, 391.

§ 5. Appeals From Utilities Commission.

An applicant for a franchise to operate motor vehicles upon designated public highways of the State for commercial purposes, who at the time has no prior or subsisting right to be affected thereby, is not entitled to appeal to the courts from the determination of the Utilities Commission denying the application and awarding the franchise to an opposing applicant. *Utilities Com. v. McLean*, 679.

VENDOR AND PURCHASER.

§ 2c. Form and Requisites of Agreement.

A recorded paper writing executed by one tenant in common which purports to convey the merchantable timber on lands held in common and which provides that the balance of the purchase price should become due upon delivery of timber deed, though ineffectual as conveyance because of the want of a seal, is nevertheless effective as a contract to convey, enforceable in equity, at least against the tenant executing same and those claiming under him by subsequently recorded conveyance. *Chandler v. Cameron*, 233.

Standing timber is a part of the realty and a contract to sell and convey timber must be in writing and executed with the same formalities as are required in the transfer of real property, and in order to be enforceable against creditors and purchasers for value, it must be probated and registered as provided by statute. *Winston v. Lumber Co.*, 339.

§ 5b. Construction and Operation of Contracts to Convey.

A duly executed and registered contract to convey timber creates a property right in the parties thereto, and any interference by a third party with the relation and rights created thereby is actionable. *Winston v. Lumber Co.*, 339.

§ 13. Rescission and Abandonment.

If an optionee, after the execution of the instrument giving him the right to purchase a residence upon its completion at a stipulated price, requests alterations in the plans which materially increase the cost of construction, he is guilty of conduct inconsistent with the continuance of the option to purchase for the amount stipulated, and such conduct is sufficient to support the optionor's contention that the optionee verbally released him from the option prior to the making of the alterations. *Bell v. Brown*, 319.

The evidence disclosed that during construction of a residence, alterations materially increasing the cost were made at the request of optionee. The evidence was conflicting as to whether such alterations were made before or

VENDOR AND PURCHASER—*Continued.*

after the execution of the option. *Held:* The conflicting evidence was properly submitted to the jury upon the optionor's contention that the optionee verbally released him from the agreement. *Ibid.*

§ 25b. Action Against Third Party Inducing Breach.

A complaint alleging that plaintiff was the purchaser in a duly executed and registered contract to convey timber and that defendants induced the vendors to breach their contract and sell the timber to defendants, states a cause of action. *Winston v. Lumber Co.*, 339.

VENUE.

§ 1b. Actions by Trustees in Bankruptcy.

USCA 11, Sec. 46 (b), relates solely to jurisdiction and does not preclude a trustee in bankruptcy from instituting suit in a county otherwise appropriate. *Flythe v. Wilson*, 230.

§ 2c. Actions for Penalties.

Upon motion for change of venue as a matter of right on the ground that the action is to recover a statutory penalty or forfeiture growing out of matters and transactions which occurred in another county, the denial of the motion will not be held for error where the complaint fails to show in what county the alleged cause of action arose and there is no finding or request for finding in respect to this fact. G. S., 1-177. *Flythe v. Wilson*, 230.

§ 2d. Actions to Recover Articles of Personalty.

G. S., 1-76, requiring that actions for the recovery of personal property be tried in the county in which the subject of the action, or some part thereof, is situated, applies only to actions for the recovery of specific tangible articles of personal property and not to actions for monetary recovery. *Flythe v. Wilson*, 230.

§ 4e. Power of Court to Change Venue Ex Mero Motu.

The judge of the Superior Court has inherent discretionary power to order a change of venue *ex mero motu* when, because of existing circumstances, a fair and impartial trial cannot be had in the county in which the case is called for trial. *English v. Brigman*, 260.

WATERS AND WATER COURSES.

§ 4. Mutual Rights and Liabilities in Regard to Surface Waters.

Where a lower tract of land naturally receives the flow of surface waters from higher lands, the owners of the higher lands are not liable for damages from the drainage even though the flow is increased or accelerated by the removal of obstructions from, or the leveling or resurfacing of the higher lands, or the laying of pipes so as to drain the water under instead of over railroad tracks on the higher lands, provided they do not alter the natural drainage and provided there is no difference in the manner of its discharge which augments the damage from the natural flow, and an instruction to this effect is without error. *Davis v. R. R.*, 561.

WILLS.

§ 8. Holographic Wills—Handwriting of Testator.

A paper-writing probated as a holograph will had the day, date and year printed on its face, with changes in the date and year in script. There was evidence that the changes were in the handwriting of the deceased. *Held:* An instruction that a holograph will is not required to be dated and that if the written words appearing in the handwriting of the deceased were sufficient within themselves to express dispositive intent, the mere presence of the printed words and figures, not essential to the meaning of the words in writing, would not perforce destroy the testamentary character of the script, is without error. *In re Will of Wallace*, 459.

§ 15a. Necessity for and Procedure to Probate in Common Form.

The right to dispose of property by will is conferred and regulated by statute, and therefore letters written by a member of the armed forces which are not offered or proven in the manner or form prescribed by the statutes, G. S., 31-3, G. S., 31-26, are ineffectual as a testamentary disposition of property. *Wescott v. Bank*, 39.

§ 15b. Recording Wills of Nonresidents.

The will of a nonresident recorded here, G. S., 31-27, should include as a muniment of title, the proceedings in dissent as same appear of record in the probate court in the county in which the will was probated, and when such dissent proceedings have not been included in the papers recorded they may be filed and recorded *nunc pro tunc* when the rights of third parties have not intervened. *Coble v. Coble*, 547.

§ 16. Effect of Probate.

A paper writing admitted to probate in common form as the last will and testament of the deceased stands until declared void by a competent tribunal and, until so set aside, stands as against unprobated paper writings previously executed by deceased. G. S., 31-19. *In re Will of Neal*, 136.

§ 17. Nature of Caveat Proceedings—Right of Caveators to Have Writings Probated for Purpose of Attack.

Where propounders offer for probate separate and inconsistent paper writings successively executed by deceased, and the clerk admits the one executed last in point of time as constituting the last will and testament of deceased revoking all prior wills, and propounders do not prosecute an appeal from the clerk's refusal to admit the prior instruments to probate, upon caveat to the paper writing probated, caveators are not entitled to an order that the prior paper writings be admitted to probate for the purpose of attacking all of the paper writings in the one action. *In re Will of Neal*, 136.

§ 22. Burden of Proof in Caveat Proceedings.

A caveat proceeding is *in rem* with the burden on propounders to prove the formal execution of the paper, and the burden on caveator to prove by the greater weight of the evidence undue influence or mental incapacity when relied upon by him. *In re Will of West*, 204.

§ 23b. Competency of Evidence on Issue of Mental Capacity.

In cases of doubtful testamentary capacity, testator's exclusion from his bounty of those related to him by blood is competent. *In re Will of West*, 204.

WILLS—*Continued.*

§ 25. Instructions in Caveat Proceedings.

In this caveat proceeding caveator strongly contended that the fact that testator left half his estate to two Negroes and only half to those related to him by blood disclosed mental incapacity. Propounders contended upon supporting evidence that the Negroes were testator's natural children. *Held:* The court having given caveator's contentions upon this phase of the case, it was error for the court not to have given propounders' contentions in explanation thereof. *In re Will of West*, 204.

In a caveat proceeding an instruction to the effect that the burden was on caveator to prove mental incapacity by the greater weight of the evidence but that if the preponderance of the evidence on the issue was on the side of propounders to answer the issue as contended by propounders, *is held* contradictory and confusing and constitutes prejudicial error. *Ibid.*

Where the court has properly submitted to the jury conflicting evidence as to whether the paper-writing probated and every part thereof is in the handwriting of deceased, an inadvertence in directing a verdict on a subsequent issue as to whether the paper-writing was executed according to the formalities of the law, in the light of the jury's affirmative finding to the previous issue, is not held for reversible error. *In re Will of Wallace*, 459.

§ 26. Issues in Caveat Proceedings.

Where a will is attacked on the ground of undue influence and mental incapacity it is the better practice to submit separate issues in regard thereto rather than the single issue of *devisavit vel non*. *In re Will of West*, 204.

§ 31. General Rules of Construction.

The primary purpose in interpreting wills is to ascertain what the testator desired to be done with his estate. *Robinson v. Robinson*, 157; *Jones v. Jones*, 424.

A will is to be construed from its four corners and effect be given to every part thereof in order to ascertain and carry out the intention of the testatrix as therein expressed. *Conrad v. Goss*, 470.

Where the language of a will is clear there is no occasion for interpretation. *In re Battle*, 672.

§ 32. Presumption Against Partial Intestacy.

In seeking the intent of the testator as expressed in the language used by him it will be presumed that he did not intend to die intestate as to any part of his property, and where two constructions are permissible, that construction will be adopted which avoids partial intestacy.. *Jones v. Jones*, 424.

§ 33a. Estates and Interests Created in General.

An unrestricted devise of realty, nothing else appearing, constitutes a devise in fee, G. S., 31-38. *Elder v. Johnston*, 592.

§ 33c. Vested and Contingent Interests and Defeasible Fees.

The law favors the early vesting of estates. *Robinson v. Robinson*, 155.

A devise and bequest of property in trust for the benefit of testator's grandchildren with provision that when the youngest should reach the age of twenty-one the trustee should divide up and deliver the property to them in equal parts, *is held* to vest the beneficial interest in testator's grandchildren living at the time of his death, no contrary intent appearing from the will, and

therefore where one of the grandchildren marries and dies before the termination of the trust, his share should be paid to his widow under the provisions of his will in the settlement of the trust estate. *Ibid.*

The will in suit devised the property in controversy to testatrix' son with the added provision that should he die without "heirs" the property should go to testatrix' daughter. *Held:* The word "heirs" means children or issue, and under the devise the testatrix' son takes a fee defeasible upon his dying without issue him surviving, and the roll must be called at the date of his death to determine the effectiveness of the limitation over. *Conrad v. Goss*, 470.

Testatrix devised her real and personal property to be equally divided among her children with provision that it be sold and proceeds equally divided among them if they could not agree upon a physical division. By subsequent item she provided that realty devised to any of her children who should die before their children became of age, should not be sold until the youngest child of such deceased child became of age, unless a like amount of money were invested in real estate of equal value. *Held:* The subsequent item contained no limitation over and imposed no condition upon the estate devised, and upon the voluntary partition between devisees, a devisee can convey the lands allotted to him in fee simple. *Elder v. Johnston*, 592.

§ 33g. Life Estates and Remainders.

A devise of land to testator's sons "to have the use . . . this use to last through natural life of my said sons" vests in the sons no more than a life estate. *Jones v. Jones*, 424.

§ 34. Designation of Devisees and Legatees and Their Respective Shares.

Testator devised the tract of land in question to his son for life, remainder to his son's children, with provision that if the son should die without issue him surviving the land should go to such of testator's children and grandchildren as survived the son. *Held:* Upon the death of the life tenant without issue him surviving, the surviving children and grandchildren of testator take *per capita* and not *per stirpes*. *In re Battle*, 672.

As a general rule, where a devise is to a class, the devisees take share and share alike unless it clearly appears that testator intended a different division. *Ibid.*

§ 38. Residuary Clauses.

Where a will conveys a life estate to testator's sons without limitation over of the fee, and contains a residuary clause "the rest and residue of my property I give to my wife one-half and the other one-half to my children," *held* the residuary clause is broad enough to include both real and personal property and will be construed to dispose of the remainder in the real property in order to avoid partial intestacy, there being no intent to the contrary apparent and unequivocally expressed in the will. *Jones v. Jones*, 424.

§ 39. Actions to Construe Wills.

A petition by a trustee for advice and instruction of the court in the administration of a trust created by will is not strictly speaking an adversary action but is in the nature of a proceeding *in rem*, and plaintiff is entitled to the relief prayed, and therefore motion to nonsuit by any of defendant beneficiaries is not appropriate. *Trust Co. v. Deal*, 691.

Where, in an action for the advice and instruction of the courts in the administration of a trust created by will, the question for determination is

WILLS—*Continued.*

the death of one of the beneficiaries under the presumption of death arising from seven years absence, the burden of proof upon the issue is upon the other beneficiaries who would benefit rather than upon the plaintiff trustee. *Ibid.*

§ 40. Right of Wife to Dissent and Effect Thereof.

Testator died in South Carolina and his will was duly probated there. His widow filed a dissent valid under the laws of that State. *Held:* She is entitled to her dower rights in lands owned by testator within North Carolina upon the filing of an authenticated copy of the will as proven and probated, without also dissenting here. *Coble v. Coble*, 547.

§ 42. Lapsed Legacies.

Judgment that the widow of a devisee dying prior to the death of testatrix takes nothing under the terms of the will is without error of law. *Phillips v. Phillips*, 438.

GENERAL STATUTES CONSTRUED.

(For convenience in annotating.)

G. S.

1-11. Party is entitled to appear *in propria persona*, and when he insists on right, failure of court to assign counsel cannot be successfully pressed as prejudicial. *S. v. Pritchard*, 168.

1-25. Plea of *res judicata* in action commenced within one year of prior action nonsuited cannot be determined from pleadings alone. *Craver v. Spaugh*, 129.

1-36. When State is not party to action, title is conclusively presumed out of the State, without presumption in favor of either party. *Smith v. Benson*, 56.

1-52 (9). Suit attacking validity of mortgage executed at instance of creditor to secure difference between original mortgage and amount loaned by Federal Land Bank, *held* action to remove cloud on title, and three year statute does not apply. *Cauble v. Trexler*, 307.

1-69. Wife of guardian is properly joined as defendant in action alleging that guardian took title in himself to lands belonging to estate and repudiated trust relationship and conveyed lands to his wife. *Owen v. Hines*, 236.

1-73. Provides for joinder of parties necessary to complete determination of controversy between original parties, but does not authorize joinder of party claiming under an independent cause of action not essential to full determination of original action. *Moore v. Massengill*, 244.

1-76 (4). Applies only to action for recovery of specific tangible articles of personal property and not to actions for monetary recovery. *Flythe v. Wilson*, 230.

1-77. Denial of motion for change of venue on grounds of statute will not be held erroneous when complaint fails to show in what county cause of action arose and there is no finding or request for a finding in respect to this fact. *Flythe v. Wilson*, 230.

1-108; 1-212. Right of nonresident served by publication to set aside default judgment upon good cause shown within year of notice of judgment means actual notice. *Russell v. Edney*, 203.

1-111. Neither formal order fixing amount of bond nor notice to plaintiff is required of defendant in actions for recovery of real property. *Privette v. Allen*, 164.

1-111, 1-211 (4). Action to establish parol trust is not action for recovery of real property, and plaintiff is not entitled to default judgment upon defendant's failure to file bond. *Hodges v. Hodges*, 334.

1-122. Recitals of fraud or misconduct not necessary to any cause set forth in complaint should be stricken on motion aptly made, such motion, if made in apt time, being made as matter of right. *Privette v. Morgan*, 264.

1-123. Action against guardian alleging that guardian took title in himself of lands belonging to estate, repudiated trust relationship upon wards' majority and conveyed lands to his wife, and against his wife, seeking to recover monetary judgment and that sum be declared lien on lands, *held* not demurrable. *Owen v. Hines*, 236.

1-127 (3). Plea in abatement for pendency of prior action *held* proper only as to parties whose liability is at issue in prior action. *Boney v. Parker*, 350.

GENERAL STATUTES CONSTRUED—*Continued.*

G. S.

1-140; 1-141. Right to reply is not limited to cases in which defendant pleads a counterclaim, but reply is proper if answer alleges facts entitling defendant to affirmative relief. *Williams v. Thompson*, 166.

1-149. Where, in criminal prosecution, fact of defendant's bigamous marriage is relevant and competent, complaint in action to annul marriage is competent to corroborate testimony of witness. *S. v. Phillips*, 277.

1-150. Application for bill of particulars is addressed to court's discretion, and ruling thereon is not ordinarily reviewable. *Building Co. v. Jones*, 282.

1-151. Upon demurrer, complaint must be liberally construed. *Presnell v. Beshears*, 279.

1-153. When motion is made in apt time, relief of having irrelevant matter stricken is matter of right and not discretion. *Development Co. v. Bearden*, 124.

1-163. Motion to amend complaint so as to substantially change cause of action will not be allowed in Supreme Court. *Hylton v. Mount Airy*, 622.

1-180. Where court states contention of one party on particular phase of case it is error to fail to state contention of adverse party on same phase. *S. v. Fairley*, 134. Court is not required to give contentions of litigants at all, but when it undertakes to give contentions of one party it must give contentions of adverse party on same phase. *In re Will of West*, 204. Use of phrase "would be negligence" instead of "would constitute negligence" *held* not expression of opinion. *Hoke v. Greyhound Corp.*, 412. Remark of court that spectators should not laugh at condition of prosecutrix, "this poor little girl," *held* error. *S. v. Woolard*, 645. Exception to specific portion of charge is insufficient to present contention that court failed to state law and explain evidence arising thereon unless such portion is in itself defective. *S. v. Jones*, 402.

1-212. Default judgment does not preclude defendant from showing averments of complaint are insufficient to state cause of action. *Presnell v. Beshears*, 279.

1-220. Where denial of motion to set aside judgment for excusable neglect is necessarily predicated upon preliminary determination that claims were barred by G. S., 1-52 (1), and G. S. 28-112, denial of motion to set aside is *res judicata* and bars subsequent action on same claims. *Craver v. Spaugh*, 129. Finding of excusable neglect, irrespective of any mistake of fact, justifies setting aside of judgment. *Rierson v. York*, 575. Power to set aside judgment is legal discretion and reviewable. *Ibid.*

1-253. Trustees may not seek authority from court to sell or mortgage trust property by proceedings under Declaratory Judgment Act. *Brandis v. Trustees of Davidson College*, 329.

1-255. In proceeding to determine validity of contract between charitable foundation and eleemosynary educational institution, adjudication of validity of contract, status of parties, direction to parties to perform their obligations, *held* authorized. *Reynolds Foundation v. Trustees of Wake Forest*, 500.

GENERAL STATUTES CONSTRUED—*Continued.*

G. S.

1-271; 105-242. Where proceeding to garnishee funds of bank account belonging to delinquent taxpayer is dismissed for want of jurisdiction, neither garnishee nor alleged delinquent taxpayer may appeal. *Gill v. McLean*, 201.

1-282. Upon appeal from judgment denying motion on facts found and incorporated in judgment, the record constitutes case on appeal and appellant is not required to serve statement of case on appeal. *Privette v. Allen*, 164.

1-305. No presumption that clerk issued successive executions in absence of showing that requisite fees were tendered. *Board of Education v. Gallop*, 599.

1-487. Plaintiff making out *prima facie* title to at least ⅔ interest in standing timber has right to continuance of temporary restraining order to hearing. *Chandler v. Cameron*, 233.

1-488. Judge may enter order permitting cutting of timber pending final determination of controversy upon filing of bond only upon finding that one of parties is interloper and that other party is acting in good faith under title *prima facie* valid. *Chandler v. Cameron*, 233.

2-41; 1-310; 1-321. Purported "execution" signed by clerk, but without notation as to date of issue, date of receipt by sheriff or date of execution, *held* insufficient as original execution and ineffectual if relied on as replica of original execution which had been lost. *Board of Education v. Gallop*, 599. Execution sale held after expiration of maximum time allowed is void. *Ibid.*

4-1. Common law not destructive of or repugnant to or inconsistent with our form of government and which has not been abrogated or repealed by statute or become obsolete, is in effect. *Moche v. Leno*, 159.

7-114. Validity of appointment of justice of the peace for unexpired term by clerk *held* not presented in this proceeding under the Declaratory Judgment Act, since admissions disclosed want of real controversy. *Etheridge v. Leary*, 636.

8-20. Does not apply introduction or original chattel mortgage with oral evidence of signature by mortgagor notwithstanding absence of seal to authenticate notation of registration. *Finance Co. v. Clary*, 247.

8-51. After plaintiff had testified that decedent received funds, testimony that she had not received any part of funds from decedent is incompetent. *Wilson v. Ervin*, 396.

8-53. Communications between defendant and alienist not privileged. *S. v. Litteral*, 527.

8-56. In wife's action for alienation of affections of husband and for criminal conversation, testimony by her of declaration by him tending to establish illicit relations with defendant, are incompetent. *Knighten v. McClain*, 682.

8-89. Plaintiff may not proceed under the statute to obtain information to form basis of action against third person. *Flanner v. St. Joseph Home*, 342. Order will not issue to discover whether defendant has liability insurance. *Ibid.* Order for production of writing to obtain evidence is permissible only after issue is joined. *Ibid.* Order to obtain information to draw complaint will not lie to anticipate de-

GENERAL STATUTES CONSTRUED—*Continued.*

G. S.

fense. *Ibid.* Affidavit for order to obtain evidence must designate records and show that they are relevant. *Ibid.*

9-14. Overruling of challenge for cause upon finding that juror could render fair and impartial verdict not reviewable. *S. v. Davenport*, 475.

9-21. Action of court in reconvening court and substituting 13th juror in emergency in absence of defendant's counsel, *held* not prejudicial. *S. v. Stanley*, 650.

14-17; 15-172. Indictment for murder in first degree need not allege premeditation and deliberation, the form prescribed by G. S., 15-144, being sufficient. *S. v. Kirksey*, 445. Where more than one inference is permissible from evidence as to whether defendant was lying in wait when he killed deceased, it is error to fail to submit question of guilt of murder in second degree. *S. v. Gause*, 26.

14-17; 15-188; 15-189; 15-190. It must appear on face of judgment that conviction was for murder in first degree. *S. v. Montgomery*, 100.

14-34. Pointing loaded gun at another, resulting in death, is manslaughter. *S. v. Boldin*, 594.

14-44; 14-45. Statutes create separate offenses. In prosecution under 14-44, child must be quick. *S. v. Jordon*, 579.

18-61. In county which has not elected to come under A.B.C. Act, Turlington Act as modified by the later statute is in full force. *S. v. Wilson*, 43.

20-129 (f). Statute does not apply to bicycle carried across street by pedestrian. *Holmes v. Cab Co.*, 581.

20-141. Instruction as to speed restrictions *held* without error. *Hoke v. Greyhound Corp.*, 412.

20-141; 20-145. Whether officer of law was operating vehicle with due regard for safety within meaning of statute *held* for jury. *Glosson v. Trollinger*, 84.

20-148. Right of motorist to assume that driver approaching from opposite direction will turn to his right of highway is not absolute, but is subject to motorist's own duty to exercise due care and requirement that he reduce speed when special hazards exist. *Hoke v. Greyhound Corp.*, 412.

20-161. Prohibition against parking vehicles on highway does not apply to highways within municipalities. *Hammett v. Miller*, 10.

22-2. Seal is not necessary to lease regardless of length of term, only change in common law is statutory requirement that lease for more than three years be in writing. *Moche v. Leno*, 159. Contract *held* one of employment to cut and manufacture timber, compensation payable in lumber, and not contract to convey standing timber. *Johnson v. Wallin*, 669.

28-1; 28-5. Clerk may issue letters of administration upon evidence that person has been missing for seven years without having been heard from by those naturally expected to do so. *Carter v. Lilley*, 435.

28-147. Action against administratrix for fraud in connection with decrees entered in administration must sufficiently particularize fraudulent acts relied on. *Privette v. Morgan*, 264.

28-149 (9). Where husband is sole beneficiary of wife's estate, her administrator cannot maintain action against him for wrongful death of wife. *Davenport v. Patrick*, 686.

GENERAL STATUTES CONSTRUED—*Continued.*

G. S.

28-173. Where husband is sole beneficiary of wife's estate, her administrator may not maintain an action against him for her wrongful death, even to extent of funeral expenses. *Davenport v. Patrick*, 686.

29-1 (4). Where wife takes land as devisee under husband's will, she is not an "heir," and statute does not apply. *Jones v. Jones*, 424.

31-3; 31-26. Letters written by member of armed services which are not offered or proven as required by statute are ineffectual as testamentary disposition of property. *Wescott v. Bank*, 39.

31-19. Paper writing probated stands as last will until declared void by a competent tribunal. *In re Will of Neal*, 136.

31-27. Will of nonresident recorded here should include widow's dissent appearing of record as a muniment of title. *Coble v. Coble*, 547.

31-38. Unrestricted devise of realty, nothing else appearing, constitutes devise in fee. *Elder v. Johnston*, 592.

33-56, *et seq.* Statute applies solely to estates of living persons and not to those presumed dead from seven years absence. *Carter v. Lilley*, 435.

14-51. Whether building is occupied at time of breaking affects only degree of burglary. *S. v. Munford*, 132.

14-54. Proof of breaking is not necessary to conviction of nonburglarious breaking and entering. *S. v. Munford*, 132.

14-71. Evidence must show both guilty knowledge and felonious intent. *S. v. Yow*, 585.

14-87. Effect of statute is merely to provide more severe punishment when robbery or attempt is committed by use of firearms. *S. v. Jones*, 402.

14-100. Indictment *held* sufficient to charge false pretense. *S. v. Davenport*, 475.

14-183. In prosecution for aiding and abetting bigamy by entering into marriage with person already married and not divorced, evidence that marriage was contracted in another state ousts jurisdiction of our court. *S. v. Jones*, 94.

15-141. Defendant need not be present when indictment is returned. *S. v. Stanley*, 650.

15-153. Indictment *held* sufficient to charge subornation of perjury. *S. v. Blanton*, 517.

15-163. Fact that veniremen tendered as twelfth juror is white man is not ground for challenge for cause. *S. v. Kirksey*, 445.

15-169; 15-170. Where all evidence tends to show rape, charge limiting jury to verdicts of guilty of rape or not guilty, without submitting question of guilt of less degrees, is not error. *S. v. Brown*, 383.

15-170. Where there is no evidence of use of firearms in attempt to rob, submission of case on less serious offense of attempt to rob without use of firearms is proper. *S. v. Jones*, 402.

15-171. In burglary prosecution, it is mandatory for court to charge that jury may render verdict of second degree burglary if they deem it proper to do so even though they are satisfied of facts constituting burglary in first degree. *S. v. Hooper*, 633.

15-173. In prosecution for assault with intent to commit rape, nonsuit cannot be allowed where evidence is sufficient to support verdict of guilty

GENERAL STATUTES CONSTRUED—*Continued.*

G. S.

of assault upon female. *S. v. Johnson*, 587. More than scintilla of evidence takes case to jury, it being for jury to say whether the evidence convinces them beyond reasonable doubt. *S. v. Davenport*, 475.

15-180; 1-282; 1-283. Where trial judge's death prevents settlement of case on appeal, and solicitor withdraws objections to defendant's statement, which becomes statement of case on appeal, defendant cannot complain and his motion for new trial will be denied. *S. v. Cannon*, 336.

18-2. Person living in county which has not elected to come under A.B.C. Act may transport and possess in private dwelling for personal use not more than one gallon of tax-paid liquor; possession of quantity in excess of one gallon is *prima facie* evidence that possession is in violation of statute. *S. v. Wilson*, 43. Evidence that liquor was non-tax-paid is competent. *Ibid.*

18-6. Vehicle seized by municipal officer for illegal transportation is in custody of the officer and not the municipality. *S. v. Law*, 103.

18-11. Burden is on defendant to prove that liquor in possession was in private dwelling for family purposes. *S. v. Wilson*, 43. In absence of such evidence by defendant, presumption from possession of 17½ gallons of liquor applies. *Ibid.*

39-6. Power to revoke voluntary conveyance of future interests limited to persons not *in esse* rests solely in grantor of such interests. *Pinkham v. Mercer*, 72. Even though power of revocation be regarded as vested right, amendment by Ch. 437, Session Laws of 1943, provides reasonable limitation of six months for exercise of such right. *Ibid.*

41-2. Since statute, right of survivorship in personalty may be created only by contract. *Wilson v. Ervin*, 396.

41-7. Where husband has deed made to trustee of passive trust for himself and wife, nothing else appearing, instrument creates estate by entirety. *Akin v. Bank*, 453.

42-28. Averment that defendants entered possession as lessees is jurisdictional in action in summary ejectment. *Rogers v. Hall*, 363.

42-33. Applies to action to recover possession upon forfeiture for nonpayment of rent and not to action to recover possession for one of causes enumerated in G. S., 42-26. *Seligson v. Klyman*, 347. Where plaintiff elects not to claim rents, dismissal of action upon tender of rents due and costs, is error. *Ibid.*

47-20. In action by mortgagee to recover mortgaged chattel, status of defendant as innocent purchaser is matter of defense. *Finance Co. v. Clary*, 247.

48-6; 48-15. Where adoption is prior to 15 March, 1941, adopted child takes no interest in property devised to adoptive parent who died prior to testatrix. *Phillips v. Phillips*, 438.

50-7. Where defendant files cross-action for divorce from bed and board, instruction that places burden of proof on plaintiff on the cross-action must be held for reversible error. *Sumner v. Sumner*, 610.

52-12. Where property belonging to wife's separate estate is exchanged for other property, deed, even though made to them jointly, does not create estate by entireties. *Ingram v. Easley*, 442.

55-26.9; 25-26.10. Nonsuit on ground that plaintiff's evidence disclosed that sale of realty by corporation had not been approved by majority of directors, *held* error. *Tuttle v. Building Corp.*, 146.

GENERAL STATUTES CONSTRUED—*Continued.*

G. S.

55-26.11. Does not apply to sale of realty by corporation having general power to buy and sell real estate. *Tuttle v. Building Corp.*, 146.

55-114. Statute gives jurisdiction to court to continue officers of corporation in power with same powers and emoluments when corporation is incapable of action because its directors are evenly divided. *Thomas v. Baker*, 226.

58-30. Instruction in action on hospitalization policy, that misrepresentation as to hernia would bar recovery if it in any way materially affected the acceptance of the risk, *held* without error. *Carroll v. Ins. Co.*, 456.

60-81. Presumption of negligence of railroad company in killing livestock does not apply unless action is brought within six months after accrual. *Coburn v. R. R.*, 695.

62-103 (k). Licensing of carrier from point within city to point on highway ⅞ mile outside of city is within exclusive jurisdiction of Utilities Commission. *Coach Co. v. Transit Co.*, 391.

62-105. License to common carrier must be written and granted by Utilities Commission as such, and telephonic authority is nullity. *Utilities Com. v. Coach Co.*, 391.

75-4. Where written contract is extended under its terms, defense, in action to enjoin employee from engaging in competition, that covenant did not meet requirements of statute, is untenable. *Sonotone Corp. v. Baldwin*, 387.

90-103. Suit to abate public nuisance as defined by this statute cannot be maintained under G. S., 19-2 to 19-8. *McLean v. Townsend*, 642.

96-4 (m). Findings of Unemployment Compensation Commission are conclusive on appeal when supported by evidence. *Unemployment Compensation Com. v. Harvey & Son Co.*, 291.

96-8 (e). Contract *held* to constitute defendant contractee and not landlord for purpose of unemployment compensation tax. *Unemployment Compensation Com. v. Harvey & Son Co.*, 291. Whether manager of building is agent of owners or employer of workers engaged in its operation depends upon provisions of agreement and not whether he is employer as defined in Act in regard to other activities in the state. *Unemployment Compensation Com. v. Nissen*, 216.

96-9 (c) (4). Does not require mutual consent of parties to transfer of a reserve credited to "employer" under misapprehension of status of such "employer." *Unemployment Compensation Com. v. Nissen*, 216.

97-2 (f). Death of policeman from heart attack resulting from injury to heart caused by unusual exertion in course of employment *held* result of "accident." *Garrell v. Newton*, 314. Evidence *held* to sustain finding that rupture of intervertebral disc of back while lifting printing press plate was result of accident. *Edwards v. Publishing Co.*, 184.

97-6. Employer may not escape liability under Workmen's Compensation Act by any contractual provision with employee. *Brown v. Truck Lines*, 299.

105-47. Imposition of license tax on persons engaged in business of purchasing horses and mules for resale *held* valid. *Nesbitt v. Gill*, 174.

105-267. Same person was tax collector and treasurer of county. Demand on him as tax collector for return of taxes paid under protest *held* sufficient. *R. R. v. Polk County*, 697.

GENERAL STATUTES CONSTRUED—*Continued.*

G. S.

136-68; 136-69. Order of clerk adjudging that petitioners are entitled to relief and appointing a jury of view to "lay off" the cartway, is final determination from which appeal will lie. *Triplett v. Lail*, 274.

153-179. Not applicable to action against municipality for death of prisoner in cell due to fire upon alleged negligence in manner of maintenance of jail and in not providing means of letting prisoner out in emergency. *Gentry v. Hot Springs*, 665.

160-2. Municipality may grant franchise for period not exceeding 60 years, and when franchise does not stipulate term the statutory term of 60 years will be read into it. *Boyce v. Gastonia*, 139.

160-203. Does not empower city to grant franchise to common carrier operating from within city to point ⅞ mile outside of city on public highway. *Utilities Com. v. Coach Co.*, 391.

163-196 (11). Conviction of violation of statute upheld. *S. v. Pritchard*, 168.

CONSTITUTION OF NORTH CAROLINA, SECTIONS OF, CONSTRUED.

(For convenience in annotating.)

ART.

I, sec. 7. Contract of city to remove tracks of public utility in consideration of abandonment of its franchise, in order to improve street, is for necessary expense and valid. *Boyce v. Gastonia*, 139.

II, sec. 21. Omission of enacting clause in statute is fatal. *In re House Bill No. 65*, 708.

11, sec. 28. General Assembly is without authority to provide subsistence and travel allowance to members in addition to compensation fixed by Constitution. *In re Constitutionality of House Bill No. 276*, ...

V, sec. 3. Imposition of license tax on persons engaged in business of purchasing horses and mules for resale *held* valid. *Nesbitt v. Gill*, 174. There can be no lawful tax which is not levied for public purpose. Cost of constructing and operating hotel by municipality is not for public purpose. *Nash v. Tarboro*, 283.

VII, sec. 7. What is necessary expense is question for courts. Imposition of tax or expenditure of funds derived therefrom for municipal parks and recreational facilities is not for necessary expense. *Purser v. Ledbetter*, 1.

VIII, sec. 4. Municipalities are subject to statutory restrictions and regulations of their taxing power. *Purser v. Ledbetter*, 1. Statute authorthorizing expenditure of funds for purpose not necessary municipal expense without vote is void. *Ibid.*