NORTH CAROLINA REPORTS

VOLUME 229

This book is an exact photo-reproduction of the original Volume 229 of North Carolina Reports that was published in 1949.

Published by
THE STATE OF NORTH CAROLINA
RALEIGH
1979

Reprinted by
EDWARDS & BROUGHTON COMPANY
RALEIGH, NORTH CAROLINA

NORTH CAROLINA REPORTS
VOL. 229

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1948
FALL TERM, 1948

REPORTED BY
JOHN M. STRONG

RALEIGH
BYNUM PRINTING COMPANY
PRINTERS TO THE SUPREME COURT
1949

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

☞ In quoting from the *reprinted* Reports, counsel will cite always the marginal (*i.e.*, the original) 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 opinion of the Court, consisting of three members, from 1879 to 1889. The opinions of the Court, consisting of five members, from 1889 to 1 July, 1937, are published in volumes 102 to 211, both inclusive. Since 1 July, 1937, and beginning with volume 212, the Court has consisted of seven members.

JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

SPRING TERM, 1948—FALL TERM, 1948.

CHIEF JUSTICE:

WALTER P. STACY.

ASSOCIATE JUSTICES:

WILLIAM A. DEVIN,
M. V. BARNHILL,
J. WALLACE WINBORNE,
A. A. F. SEAWELL,
EMERY B. DENNY,
S. J. ERVIN, JR.

ATTORNEY-GENERAL:

HARRY McMULLAN.

ASSISTANT ATTORNEYS-GENERAL:

T. W. BRUTON,
H. J. RHODES,
RALPH MOODY,
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.

JUDGES

OF THE

SUPERIOR COURTS OF NORTH CAROLINA

EASTERN DIVISION

Name	*District*	*Address*
CHESTER MORRIS	First	Currituck.
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	Goldsboro

WESTERN DIVISION

JOHN H. CLEMENT	Eleventh	Winston-Salem.
H. HOYLE SINK	Twelfth	Greensboro.
F. DONALD PHILLIPS	Thirteenth	Rockingham.
WILLIAM H. BOBBITT	Fourteenth	Charlotte.
FRANK M. ARMSTRONG	Fifteenth	Troy.
WILSON WARLICK[1]	Sixteenth	Newton.
J. A. ROUSSEAU	Seventeenth	North Wilkesboro.
J. WILL PLESS, JR.	Eighteenth	Marion.
ZEB V. NETTLES	Nineteenth	Asheville.
DAN K. MOORE	Twentieth	Sylva.
ALLEN H. GWYN	Twenty-first	Reidsville.

SPECIAL JUDGES

GEORGE B. PATTON	Franklin
CHARLES L. COGGIN	Salisbury
GEORGE A. SHUFORD	Asheville
PEYTON MCSWAIN[2]	Shelby.

EMERGENCY JUDGES

HENRY A. GRADY	New Bern.
G. V. COWPER[3]	Kinston.
MICHAEL SCHENCK[4]	Hendersonville.
FELIX E. ALLEY, SR.	Waynesville.

[1]Resigned 14 February, 1949, to accept appointment as U. S. District Judge.
[2]Appointed 13 September, 1948.
[3]Died 4 November, 1948.
[4]Died 5 November, 1948.

SOLICITORS

EASTERN DIVISION

Name	*District*	*Address*
JOHN W. GRAHAM[1]	First	Edenton.
GEORGE M. FOUNTAIN	Second	Tarboro.
ERNEST R. TYLER	Third	Roxobel.
W. JACK HOOKS	Fourth	Kenly.
W. J. BUNDY	Fifth	Greenville.
J. ABNER BARKER	Sixth	Roseboro.
WILLIAM Y. BICKETT	Seventh	Raleigh.
CLIFTON L. MOORE	Eighth	Burgaw.
F. ERTEL CARLYLE[2]	Ninth	Lumberton.
WILLIAM H. MURDOCK	Tenth	Durham.

WESTERN DIVISION

WALTER E. JOHNSTON, JR.	Eleventh	Winston-Salem.
CHARLES T. HAGAN, JR.	Twelfth	Greensboro.
M. G. BOYETTE	Thirteenth	Carthage.
BASIL L. WHITENER	Fourteenth	Gastonia.
JOHN R. MCLAUGHLIN	Fifteenth	Statesville.
JAMES C. FATHING	Sixteenth	Lenoir.
AVALON E. HALL	Seventeenth	Yadkinville.
C. O. RIDINGS	Eighteenth	Forest City.
W. K. MCLEAN	Nineteenth	Asheville.
THADDEUS D. BRYSON, JR.	Twentieth	Bryson City.
R. J. SCOTT	Twenty-first	Danbury.

[1]Succeeded 1 January, 1949, by Walter W. Cohoon, Elizabeth City.
[2]Resigned 4 November, 1948. Succeeded by Malcolm B. Seawell 6 November, 1948.

SUPERIOR COURTS, FALL TERM, 1948

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 Morris

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

SECOND JUDICIAL DISTRICT

Judge Bone

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

THIRD JUDICIAL DISTRICT

Judge Parker

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

FOURTH JUDICIAL DISTRICT

Judge Williams

Chatham—Aug. 2† (2); Oct. 25.
Harnett—Sept. 6* (A); Sept. 20†; Oct. 4† (A) (2); Nov. 15* (2).
Johnston—Aug. 16*; Sept. 27† (2); Oct. 18 (A); Nov. 8†; Nov. 15† (A); Dec. 13 (2).
Lee—July 19*; July 26†; Sept. 13†; Sept. 20† (A); Nov. 1*; Dec. 13† (A).
Wayne—Aug. 23; Aug. 30† (2); Oct. 11† (2); Nov. 29 (2).

FIFTH JUDICIAL DISTRICT

Judge Frizzelle

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

SIXTH JUDICIAL DISTRICT

Judge Stevens

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

SEVENTH JUDICIAL DISTRICT

Judge Harris

Franklin—Sept. 20† (2); Oct. 11*; Nov. 29† (2).
Wake—July 12*; Sept. 6* (2); Sept. 20† (A) (2); Oct. 4*; Oct. 18† (3); Nov. 8*; Nov. 15† (2); Nov. 29† (A); Dec. 6* (A); Dec. 13*; Dec. 20†.

EIGHTH JUDICIAL DISTRICT

Judge Burney

Brunswick—Sept. 6; Sept. 20†.
Columbus—Aug. 30*; Sept. 27† (2); Nov. 15*; Nov. 22† (2).
New Hanover—July 26*; Aug. 16†; Aug. 23*; Oct. 11† (2); Nov. 1*; Nov. 8; Dec. 6† (2).
Pender—July 19†; Sept. 13*; Oct. 25†.

NINTH JUDICIAL DISTRICT

Judge Nimocks

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

TENTH JUDICIAL DISTRICT

Judge Carr

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

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT

Judge Gwyn

Ashe—July 26† (2); Oct. 25*.
Alleghany—Oct. 4.
Forsyth—July 5* (2); Sept. 6* (2); Sept. 20† (2); Oct. 4† (A); Oct. 11* (2); Oct. 25† (A); Nov. 1†; Nov. 15*; Nov. 22† (2); Dec. 6* (2).

TWELFTH JUDICIAL DISTRICT

Judge Bobbitt

Davidson—Aug. 23; Sept. 13† (2); Oct. 4† (A) (2); Nov. 22 (A) (2).
Guilford—Greensboro Division—July 12*; Aug. 2*; Aug. 30† (2); Aug. 30†; Sept. 13* (A); Sept. 27† (3); Sept. 27† (A); Oct. 18*; Nov. 1* (3); Nov. 22† (2); Dec. 6† (A) (2); Dec. 6*; Dec. 20*.
Guilford—High Point Division—July 19*; Aug. 9†; Sept. 20*; Oct. 25*; Nov. 1† (A) (2); Dec. 13*.

THIRTEENTH JUDICIAL DISTRICT

Judge Armstrong

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

FOURTEENTH JUDICIAL DISTRICT

Judge Warlick

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

FIFTEENTH JUDICIAL DISTRICT

Judge Rousseau

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

SIXTEENTH JUDICIAL DISTRICT

Judge Pless

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

SEVENTEENTH JUDICIAL DISTRICT

Judge Nettles

Avery—July 5 (2); Oct. 18 (2).
Davie—Aug. 30; Dec. 6†.
Mitchell—July 26† (2); Sept. 20 (2).
Wilkes—Aug. 9 (3); Oct. 4† (2); Dec. 13 (2).
Yadkin—Sept. 6; Nov. 22† (2).

EIGHTEENTH JUDICIAL DISTRICT

Judge Alley

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

NINETEENTH JUDICIAL DISTRICT

Judge Clement

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

TWENTIETH JUDICIAL DISTRICT

Judge Sink

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

TWENTY-FIRST JUDICIAL DISTRICT

Judge Phillips

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

---

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

UNITED STATES COURTS FOR NORTH CAROLINA

DISTRICT COURTS

Eastern District—DON GILLIAM, *Judge*, Wilson.
Middle District—JOHNSON J. HAYES, *Judge*, Greensboro.
Western District—WILSON WARLICK, *Judge*, Newton.

EASTERN DISTRICT

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

Raleigh, Civil and criminal term, second Monday in March and September; criminal term, fourth Monday after the 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, third Monday after the second Monday in March and September. SADIE A. HOOPER, Deputy Clerk, Elizabeth City.

Washington, sixth Monday after the second Monday in March and September. GEO. TAYLOR, Deputy Clerk, Washington.

New Bern, fifth Monday after the second Monday in March and September. MATILDA H. TURNER, Deputy Clerk, New Bern.

Wilson, seventh Monday after the second Monday in March and September. MRS. EVA L. YOUNG, Deputy Clerk, Wilson.

Wilmington, tenth Monday after the second 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.
R. KENNEDY HARRIS, Assistant United States Attorney, Greensboro.
MISS EDITH HAWORTH, Assistant United States Attorney, Greensboro.
THEODORE C. BETHEA, Assistant United States Attorney, Reidsville.
FRED M. LOMAX, 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. CHAS. A. RHINEHART, 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

THOS. A. UZZELL, JR., United States Attorney, Asheville.
FRANCIS H. FAIRLEY, Assistant United States Attorney, Charlotte.
JAMES B. CRAVEN, JR., 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, 1949.

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 7th day of August, 1948:

ALLRAN, WILLIAM JAMES	Cherryville.
AUSBAND, FRANK CROWELL	Winston-Salem.
AYCOCK, FRANK BAYARD, JR.	Currituck.
AYSCUE, GEORGE ALBERT	Monroe.
BAILEY, JAMES RUFFIN	Raleigh.
BARNES, WILLIAM FAISON	Pinetops.
BELL, PAUL BUCKNER	Black Mountain.
BLACK, BEDFORD WORTH	Kannapolis.
BRADLEY, RAYMOND WEST, JR.	Bessemer City.
BRASWELL, THOMAS EDWARD, JR.	Elm City.
BRIDGERS, HERBERT VINSON	Enfield.
BRITT, ALBERT MITCHELL	Clinton.
BRITT, WILLIAM ROSS	Four Oaks.
BROADFOOT, WINSTON	Wilmington.
BROWN, BRUCE BAILEY	Clyde.
BRYANT, WALTER RUDOLPH	Lasker.
BUTLER, ROBERT HEMAN	St. Pauls.
BYNUM, FREDERICK WILLIAMSON, JR.	Rockingham.
CAMPBELL, CHARLES WAYNE	Hickory.
CANADAY, CLAUDE CARL, JR.	Benson.
CARNES, EVERETT CORNELL, JR.	Four Oaks.
CHILDERS, MAX LAMAR	Lenoir.
CHILDS, WADE HAMPTON, JR.	Lincolnton.
COLE, BEN NOOE	Charlotte.
COLTON, HENRY ELLIOTT	Chapel Hill.
COOKE, FRANK PATTON	Kannapolis.
COOPER, JAMES CRAWFORD, JR.	Henderson.
COX, GUY HILL, JR.	Thomasville.
CRAVER, PHILIP ROSWELL	Lexington.
CRISP, WILLIAM THOMAS, II	Candler.
CURRIE, JAMES SLOAN	Clarkton.
CURRIN, HUGH MARTIN	Oxford.
DAILEY, FRANK WALTER	Creedmoor.
DAMERON, EDGAR SAMUEL WILLIAMSON, JR.	Burlington.
DELBRIDGE, WILLIAM CLEVELAND	Spring Hope.
EDWARDS, ELTON	Morehead City.
ELIAS, MELVIN KOPE	Asheville.
ELMORE, WILLIAM EDWARD, JR.	Lumberton.
FOLGER, CHARLES LEE	Dobson.
FOLGER, WORTH BARNARD	Dobson.
FORD, RICHARD BRAMLEY	Biltmore.
FRIDAY, WILLIAM CLYDE	Dallas.
FRIEDBERG, EDWIN PETER	Durham.
FULLENWIDER, WILLIAM HARRY	Monroe.
FULLER, MANLEY KEARNS, JR.	Laurinburg.
GIBBONS, LEMUEL HARDY	Hamlet.

GILLILAND, JAMES DANIEL.....Macon.
GREGORY, JAMES CARL.....Zebulon.
GUPTON, WILLIS FLETCHER.....Winston-Salem.
HAINES, WILLIAM EMENS.....Durham.
HARRILL, JACK MILLS.....Forest City.
HARRIS, WILLIAM HENRY, JR.....Norwood.
HOLLAND, ROSCOE MAURICE.....Clinton.
HOLLOWELL, BERNARD BENJAMIN.....Aurora.
HORTON, AUDREY LENORE SHUMAKER.....Asheville.
HORTON, SHELBY EDMUND, JR.....Asheville.
HYLDBURG, CARL ALBERT, JR.....Durham.
JORDAN, JOHN RICHARD, JR.....Winton.
JOSLIN, WILLIAM.....Raleigh.
KIRBY, JAMES RUSSELL.....Lucama.
KITTRELL, ROBERT GILLIAM, JR.....Henderson.
LANE, THOMAS GUY, JR.....Charlotte.
LEVINE, SOLOMON.....Raleigh.
MACLEAN, HECTOR.....Lumberton.
MCCOWN, WALLACE HARDIN.....Durham.
MCCOY, DONALD WHITFIELD.....Laurinburg.
MCKEEVER, HOBART LORING.....Chapel Hill.
MCMURRAY, JOHN HORACE.....Swannanoa.
MANN, FLETCHER CULLEN, JR.....Pittsboro.
MARKHAM, JOHN EDWARD.....Durham.
NARRON, TALMADGE L. G.....Kenly.
NEAVES, CHARLES MITCHELL.....Elkin.
OGBURN, WILLIAM HUBERT.....Chapel Hill.
PAGE, ROBERT NEWTON, III.....Aberdeen.
PASCHAL, HARRY EDWARD.....Wake Forest.
PEARCE, WILLIAM PERSON, JR.....Youngsville.
PETREE, WILLIAM HORTON.....Winston-Salem.
POPE, WILLIAM ROBERT.....Mount Mourne.
PRICE, GEORGE GALLOWAY TAPSCOTT.....Taylorsville.
RETCHIN, DANIEL DAVID.....Wilmington.
RICHARDSON, ROBERT EMMETT, JR.....Lumberton.
ROSE, ZENO HARDY, JR.....Robersonville.
SETTLE, LEE WARREN.....N. Wilkesboro.
SIMPSON, MARTIN BLAND, JR.....Elizabeth City.
SMITH, BILLY CEVUS.....Pittsboro.
SPENCE, ROBERT ATWELL.....Kinston.
STEWART, DUGALD, III.....Laurinburg.
STONE, JERRY BROADWELL.....Durham.
TAYLOR, FRANCIS SPROTT.....Concord.
TAYLOR, HOYT PATRICK, JR.....Wadesboro.
TAYLOR, WILEY HIGGINS, JR.....Beaufort.
TODD, FRANK LESESNE.....Hendersonville.
TRAVIS, JOSEPH COLLINS.....Charlotte.
VICK, JOE PITTS.....Durham.
WALKER, DANIEL JOSHUA, JR.....Burlington.
WARD, ALFRED DECATUR.....New Bern.
WARNER, TIM GOODE.....Greensboro.
WARREN, ERROL JORDAN.....Rocky Mount.
WEBSTER, WILLIAM TERRELL, JR.....Gastonia.
WELLS, THOMAS MASLIN, JR.....Chapel Hill.

WHARTON, RICHARD LINDSEY.....Greensboro.
WHITE, CHARLES WARD.....Durham.
WILLIAMS, GEORGE THOMAS.....Clinton.
WILSON, EDGAR HUNTER.....Asheville.
WILSON, HENRY HALL, JR.....Monroe.

BY COMITY:

BUTLER, JAMES OVERTON.....Winston-Salem from Tennessee

CATHERINE ELIZABETH JOHNSON, Charlottesville, Virginia, and CHARLES DEXTER POWERS, Chapel Hill, while having passed the written examinations have not as of this date complied with all the rules of this Board and therefore license to them have not as yet been issued.

Given over my hand and the seal of the Board of Law Examiners, this the 8th day of December, 1948.

EDWARD L. CANNON, *Secretary,*
(Seal) *Board of Law Examiners, State of North Carolina.*

CASES REPORTED

A

PAGE

Accident & Casualty Ins. Co., MacClure v. ... 305
Akers Motor Lines, McIlroy v. ... 509
Allen, Edmunds v. ... 250
Allsbrook, Myers v. ... 786
American Cigarette & Cigar Co. v. Garner ... 173
Andrews, Cherry v. ... 333
Asheville, Lowman v. ... 247
Asheville, Rhodes v. ... 355
Atkins v. McAden ... 752
Atlantic Coast Line R. R., Hill v. ... 236
Atlantic Coast Line R. R., McCoy v. ... 57
Atlantic Fire Insurance Co., Electric Co. v. ... 518
Atlantic Greyhound Corp., Hill v. 728
Atlantic Greyhound Corp v. Transportation Co. ... 31
Atlantic Greyhound Corp. v. Utilities Comm. ... 31
Attorney-General, Brandis v. ... 411
Attorney-General, Trust Co. v. ... 746

B

Badgett, S. v. ... 348
Bagley, S. v. ... 723
Baker, S. v. ... 73
Ballance, S. v. ... 764
Bank v. Hendley ... 432
Bank v. Marshburn ... 104
Bank & Trust Co. v. McMullan, Attorney-General ... 746
Bank & Trust Co., Parker v. ... 527
Bank & Trust Co. v. School for Boys ... 738
Bank & Trust Co. v. Shelton ... 150
Barlow v. Bus Lines ... 382
Barnard, Shaw v. ... 713
Barnes v. Hotel Corp ... 730
Barnes v Trust Co. ... 409
Barrett, Wheeless v. ... 282
Bass v. Bass ... 171
Bass v. Moore ... 211
Black, Ward v ... 221
Blair, Cannon v. ... 606
Blankenship, S. v. ... 589
Blanton, Gilkey v. ... 792
Bledsoe v. Lumber Co. ... 128
Board of Elections, Ellen v. ... 359

PAGE

Board of Elections, Penland v. ... 449
Board of Elections, States' Rights Democratic Party v. ... 179
Board of Optometry v. Smith ... 612
Board of Trustees of Kinston Graded Schools, Boney v. ... 136
Board of Trustees of New Bern Graded Schools, Wike v. ... 370
Boney v. Kinston Graded Schools 136
Bottoms Truck Lines, Brown v. ... 122
Bowles, Power Co. v. ... 143
Bowman, Light Co. v. ... 682
Boys' School, Trust Co. v. ... 738
Brandis v. McMullan, Attorney-General ... 411
Brock, *In re* Will of ... 482
Brown v. Glass ... 657
Brown v. Moore ... 406
Brown v. Truck Lines ... 122
Brunson, S. v. ... 37
Bullard, Drainage District v. ... 633
Bundy v. Powell ... 707
Bunn, S. v. ... 734
Burke Transit Co., Lambert v. ... 435
Burke Transit Co., Pascal v. ... 435
Bus Co. v. Products Co. ... 352
Bus Lines, Barlow v. ... 382
Byrd, Garris v. ... 343
Byrd, King v. ... 177
Byrd v. Patterson ... 156

C

Calaway v. Harris ... 117
Cameron, Chandler v. ... 62
Cannon v. Blair ... 606
Carolina Coach Co. v. Motor Lines ... 650
Carolina Coach Co., Pridgen v. ... 46
Carolina Coach Co., Townsend v. 523
Carolina & Northwestern R. R. v. Manufacturing Co. ... 695
Carolina Power & Light Co. v. Bowman ... 682
Carolina Power & Light Co., Fleming v. ... 397
Carolina Standard Corp. v. Dockery ... 796
Carr, Hancammon v. ... 52
Casualty Co., MacClure v. ... 305
Central Motor Lines, Coach Co. v. 650
Chandler v. Cameron ... 62

	PAGE
Chaplin, Owens v.	797
Charlotte, James v.	515
Chemical Corp., Lee v.	447
Cherry v. Andrews	333
Church, S. v.	718
Cigar Co. v. Garner	173
City Bus Lines, Barlow v.	382
City of Asheville, Lowman v.	247
City of Asheville, Rhodes v.	355
City of Charlotte, James v.	515
City of Lexington, Patterson v.	637
City of Winston-Salem, Nance v.	732
Clark, Potter v.	350
Coach Co. v. Coach Co.	534
Coach Co. v. Motor Lines	650
Coach Co., Pridgen v.	46
Coach Co., Townsend v.	523
Coach Co., White v.	340
Coach Co., Wyatt v.	340
Coast Line R. R., Hill v.	236
Coast Line R. R., McCoy v.	57
Coble v. Coble	81
Coble Dairy Products Co., Bus Co. v.	352
Cole v. Cole	757
Coleman v. Mercer	245
Coley, King v.	258
Comr. of Revenue, Sabine v.	599
Comr. of Revenue, Henderson v.	313
Comrs., Drainage, v. Bullard	633
Comrs. of McFarlan, Harney v.	71
Comrs. of Moore, Mason v.	626
Comrs. of Weldon, Green v.	450
Conference, Western N. C., v. Tally	1
Correll, S. v.	640
Conservation, Dept. of, West v.	232
County Drainage District v. Bullard	633
Coxe Lumber Co., Bledsoe v.	128
Creech, S. v.	662
Cuthrell v. Greene	475

D

Dairy Products Co., Bus Co. v.	352
Dallas, Hawkins v.	561
Davis, S. v.	386
Davis, S. v.	552
Davis v. Whitehurst	226
Delisle, Hargett v.	384
Dept. of Conservation, West v.	232
Dillingham, Kee v.	262
Dixon, Stewart v.	737
Dockery, Carolina Standard Corp. v.	796
Dollar, Shepherd v.	736
Donivant v. Swaim	114
Drainage District v. Bullard	633
Duke Power Co. v. Bowles	143
Durham, McCullen v.	418

E

Edmunds v. Allen	250
Electric Co. v. Insurance Co.	518
Electric Co. v. Motor Lines	86
Eller v. Wall	359
Estate of Galloway, *In re*	547
Etheridge, *In re* Will of	280

F

Fain, S. v.	644
Felmont, S. v.	701
Fidelity & Guaranty Co., Wike v.	370
Finance Co. v. Putnam	555
Fire Insurance Co., Electric Co. v.	518
Fire Insurance Co., Zibelin v.	567
First-Citizens Bank & Trust Co., Parker v.	527
Fleming v. Light Co.	397
Franklin, S. v.	336
Frye, S. v.	581

G

Galloway, *In re* Estate of	547
Garner, Cigar Co. v.	173
Garner v. Phillips	160
Garrett v. Garrett	290
Garris v. Byrd	343
Gentry, Poole v.	266
Gibson, S. v.	497
Gilkey v. Blanton	792
Gill, Comr. of Revenue, Henderson v.	313
Gill, Comr. of Revenue, Sabine v.	599
Gittlin, Landis v.	521
Glass, Brown v.	657
Gooden, Harrelson v.	654
Goodman, *In re* Will of	444
Gould Morris Electric Co. v. Insurance Co.	518
Gowan, Penland v.	449
Graded Schools, Trustees of, Wike v.	370
Graham v. Graham	565

PAGE

Green v. Kitchin 450
Greene, Cuthrell v. 475
Greyhound Corp., Hill v. 728
Greyhound Corp. v. Transportation Co. 31
Greyhound Corp. v. Utilities Comm 31
Griggs v. York-Shipley, Inc. 572
Guaranty Co., Wike v. 370
Gulf Oil Corp., Rogers v. 241
Gunter, S. v. 552

H

Hales v. Renfrow 239
Hamilton, Sanders v. 43
Hammond, S. v. 108
Hancammon v. Carr 52
Hargett v. Delisle 384
Harkey, S. v. 552
Harney v. Comrs. of McFarlen 71
Harrelson v. Gooden 654
Harris, Calaway v. 117
Harris, S. v. 413
Harrison v. R. R. 92
Hawkins v. Dallas 561
Hawley, S. v. 167
Heater, S. v. 540
Henderson v. Gill, Comr. of Revenue 313
Hendley, Bank v. 432
Hendley v. Perry 15
Hicks, S. v. 345
Hill v. Greyhound Corp. 728
Hill v. R. R. 236
Hodge, Taylor v. 558
Hornaday v. Hornaday 164
Horton v. Perry 319
Hotel Corp., Barnes v. 730
Hough, S. v. 532
Howell, Moody v. 198
Hudson-Belk Co., Jackson v. 795
Hudson v. Underwood 273
Hughes v. Thayer 773
Hunter v. Peirson 356
Hurdle, Perry v. 216

I

In re Estate of Galloway 547
In re McKnight 303
In re Taylor 297
In re Walters 111
In re Will of Brock 482
In re Will of Etheridge 280

PAGE

In re Will of Goodman 444
In re Will of Puett 8
Insurance Co., Electric Co. v. 518
Insurance Co., MacClure v. 305
Insurance Co., Stallings v. 529
Insurance Co., Zibelin v. 567

J

Jackson v. Hudson-Belk Co. 795
Jacobs v. Manufacturing Co. 660
James, S. v. 37
James v. Sutton 515
Jones, S. v. 37
Jones, S. v. 276
Jones, S. v. 596
Johnson v. Johnson 541
Johnson, S. v. 701

K

Kee v. Dillingham 262
King v. Byrd 177
King v. Coley 258
King, S. v. 37
Kinston Graded Schools, Boney v. 136
Kitchin, Green v. 450

L

Lambert v. Transit Co. 435
Lamm v. Lamm 248
Landis v. Gittlin 521
Larkin, S. v. 126
Lazarus, Warner v. 27
Ledbetter, Lee v. 330
Ledford v. Ledford 373
Lee v. Chemical Corp. 447
Lee v. Ledbetter 330
Lewis v. Watson 20
Lexington, Patterson v. 637
Life Insurance Co., Stallings v. 529
Life & Trust Co., Barnes v. 409
Light Co. v. Bowman 682
Light Co., Fleming v. 397
Lipe Motor Lines, Electric Co. v. 86
Love, S. v. 99
Lowman v. Asheville 247
Lumber Co., Bledsoe v. 128
Lumberton Coach Co., Coach Co. v. 534
Lunceford, Unemployment Compensation Com. v. 570
Lunsford, S. v. 229

Mc PAGE

MacClure v. Casualty Co. 305
McAden, Atkins v. 752
McCoy v. R. R. 57
McCullen v. Durham 418
McFarlan, Comrs. of, Harney v. 71
McIlroy v. Motor Lines 509
McKnight, *In re* 303
McLeod v. Wrightsville Beach 621
McMullan, Attorney-General, Brandis v. 411
McMullan, Attorney-General, Trust Co., v. 746
McNeill, S. v. 377

M

Manufacturing Co., Jacobs v. 660
Manufacturing Co., R. R. v. 695
Marshburn, Bank v. 104
Mason v. Comrs. of Moore 626
Massey, S. v. 734
Matros v. Owen 472
Medlin v. Powell 323
Meier v. Miller 243
Mercer, Coleman v. 245
Miller, Meier v. 243
Moody v. Howell 198
Moore, Bass v. 211
Moore, Brown v. 406
Moore County Board of Comrs., Mason v. 626
Morse v. Walker 778
Motor Finance Co. v. Putnam 555
Motor Lines, Coach Co. v. 650
Motor Lines, Electric Co. v. 86
Motor Lines, McIlroy v. 509
Muse, S. v. 536
Mutual Fire Insurance Co., Zibelin v. 567
Myers v. Allsbrook 786
Myers, Thomas v. 234

N

Nall v. Nall 598
Nance v. Winston-Salem 732
National Bank v. Marshburn 104
New Bern Graded Schools, Trustees of, Wike v. 370
Noah v. R. R. 176
N. C. Conference v. Tally 1
N. C. Board of Elections, States' Rights Democratic Party v. 179

PAGE

N. C. Dept. of Conservation, West v. 232
N. C. Unemployment Compensation Com. v. Lunceford 570
N. C. Utilities Comm., Greyhound Corp. v. 31

O

Occidental Life Insurance Co., Stallings v. 529
O. Henry Hotel Corp., Barnes v. 730
Oil Corp., Rogers v. 241
Oliver, Ratley v. 120
Optometry, Board of Examiners, v. Smith 612
Ordille, White v. 490
Owen, Matros v. 472
Owens v. Chaplin 797

P

Palmer v. Smith 612
Parker v. Trust Co. 527
Parkway Bus Co. v. Products Co. 352
Pascal v. Transit Co. 435
Patterson, Byrd v. 156
Patterson v. Lexington 637
Pawtucket Mutual Fire Insurance Co., Zibelin v. 567
Peirson, Hunter v. 356
Penland v. Gowan 449
Perry, Hendley v. 15
Perry, Horton v. 319
Perry v. Hurdle 216
Phillips, Garner v. 160
Phillips, S. v. 538
Phipps v. Vannoy 629
Piedmont Wagon & Manufacturing Co., R. R. v. 695
Pipes, Worley v. 465
Plumtree School for Boys, Trust Co. v. 738
Poole v. Gentry 266
Potter v. Clark 350
Powell, Bundy v. 707
Powell, Medlin v. 323
Power Co. v. Bowles 143
Power & Light Co. v. Bowman 682
Power & Light Co., Fleming v. 397
Pridgen v. Coach Co. 46
Products Co., Bus Co. v. 352
Puett, *In re* Will of 8
Putnam, Finance Co. v. 555

Q

	PAGE
Queen City Coach Co. v. Coach Co.	534
Queen City Coach Co., White v.	340
Queen City Coach Co., Wyatt v.	340

R

R. R., Harrison v.	92
R. R., Hill v.	236
R. R., McCoy v.	57
R. R. v. Manufacturing Co.	695
R. R., Noah v.	176
R. R., Powell, Receiver of, Bundy v.	707
R. R., Powell, Receiver of, Medlin v.	323
R. R., Reynolds v.	176
Ramsey v. Ramsey	270
Ratley v. Oliver	120
Ray, S. v.	40
Renfrow, Hales v.	239
Reynolds v. R. R.	176
Rhodes v. Asheville	355
Robbins v. Robbins	430
Roberts v. Sawyer	279
Robertson Chemical Corp., Lee v.	447
Robeson County Drainage District v. Bullard	633
Robinson, S. v.	647
Rogers v. Oil Corp.	241
Roodenko, S. v.	701
Rustin, S. v.	701

S

Sabine v. Gill, Comr. of Revenue	599
Safie Manufacturing Co., Jacobs v.	660
Sanders v. Hamilton	43
Sawyer, Roberts v.	279
Sawyer, S. v.	229
School for Boys, Trust Co. v.	738
Schools, Kinston Graded, Boney v.	136
Schools, Trustees of, Wike v.	370
Seaboard R. R., Powell, Receiver of, Bundy v.	707
Seaboard R. R., Powell, Receiver of, Medlin v.	323
Seashore Transportation Co., Greyhound Corp. v.	31
Security Life & Trust Co., Barnes v.	409
Service Co., Griggs v.	572
Shaw v. Barnard	713
Shelton, Trust Co. v.	150
Shepherd v. Dollar	736
Smith, Palmer v.	612
Southern R. R., Harrison v.	92
Southern R. R., Noah v.	176
Southern R. R., Reynolds v.	176
Speller, S. v.	67
Stallings v. Insurance Co.	529
Standard Corp. v. Dockery	796
Starr Electric Co. v. Motor Lines	86
S. v. Badgett	348
S. v. Bagley	723
S. v. Baker	73
S. v. Ballance	764
S. v. Blankenship	589
S. v. Brunson	37
S. v. Bunn	734
S. v. Church	718
S. v. Correll	640
S. v. Creech	662
S. v. Davis	386
S. v. Davis	552
S. v. Fain	644
S. v. Felmont	701
S. v. Franklin	336
S. v. Frye	581
S. v. Gibson	497
S. v. Gunter	552
S. v. Hammond	108
S. v. Harkey	552
S. v. Harris	413
S. v. Hawley	167
S. v. Heater	540
S. v. Hicks	345
S. v. Hough	532
S. v. James	37
S. v. Johnson	701
S. v. Jones	37
S. v. Jones	276
S. v. Jones	596
S. v. King	37
S. v. Larkin	126
S. v. Love	99
S. v. Lunsford	229
S. v. McKnight	303
S. v. McNeill	377
S. v. Massey	734
S. v. Muse	536
S. v. Phillips	538
S. v. Ray	40
S. v. Robinson	647
S. v. Roodenko	701
S. v. Rustin	701
S. v. Sawyer	229

PAGE

S. v. Speller 67
S. v. Strickland 201
S. v. Sullivan 251
S. v. Swink 123
S. v. Taylor 297
S. v. Wagley 552
S. v. Watkins 37
S. v. Watson 348
S. v. Wellborn 617
S. v. West 99
S. v. West 416
S. v. Williams 348
S. v. Williams 415
S. v. Wilson 108
State *ex rel.* Owens v. Chaplin..... 797
State *ex rel.* Unemployment Compensation Com. v. Lunceford.. 570
States' Rights Democratic Party v. Board of Elections..... 179
Stewart v. Dixon..... 737
Stoker Service Co., Griggs v. 572
Strickland, S. v. 201
Sullivan, S. v. 251
Sutton, James v. 515
Swaim, Donivant v. 114
Swink, S. v. 123

T

Tally, Western N. C. Conference v. 1
Taylor v. Hodge..... 558
Taylor, *In re*..... 297
Thayer, Hughes v. 773
Thomas v. Myers..... 234
Tillman, Williams v. 434
Town of Dallas, Hawkins v..... 561
Town of McFarlan, Comrs. of, Harney v. 71
Town of Weldon, Comrs. of, Green v. 450
Town of Wrightsville Beach, McLeod v. 621
Townsend v. Coach Co..... 523
Transit Co., Lambert v. 435
Transit Co., Pascal v. 435
Transportation Co., Greyhound Corp. v. 31
Truck Lines, Brown v. 122
Trull v. Trull..... 196
Trust Co., Barnes v. 409
Trust Co. v. McMullan, Attorney-General..... 746
Trust Co., Parker v. 527

PAGE

Trust Co. v. School for Boys..... 738
Trust Co. v. Shelton..... 150
Trustees of Kinston Graded Schools, Boney v. 136
Trustees of New Bern Graded Schools, Wike v. 370
Trustees of Zion Church, Brown v. 406

U

Underwood, Hudson v. 273
Unemployment Compensation Com. v. Lunceford..... 570
U. S. Fidelity & Guaranty Co., Wike v. 370
Utilities Comm., Greyhound Corp. v. 31

V

Vannoy, Phipps v. 629
Vestal v. White..... 414

W

Wachovia Bank & Trust Co. v. McMullan, Attorney-General..... 746
Wachovia Bank & Trust Co. v. School for Boys..... 738
Wachovia Bank & Trust Co. v. Shelton 150
Wade, Whitaker v. 327
Wagley, S. v. 552
Walker, Morse v. 778
Wall, Eller v. 359
Walters, *In re*..... 111
Ward v. Black..... 221
Warner v. Lazarus..... 27
Watkins, S. v. 37
Watson, Lewis v. 20
Watson, S. v. 348
Weldon, Comrs. of, Green v..... 450
Wellborn, S. v. 617
West v. Dept. of Conservation..... 232
West, S. v. 99
West, S. v. 416
Western N. C. Conference v. Tally 1
Wheeler v. Wilder..... 379
Wheeless v. Barrett..... 282
Whitaker v. Wade..... 327
White v. Coach Co. 340
White v. Ordille..... 490
White, Vestal v. 414
Whitehall Co., Young v. 360
Whitehurst, Davis v. 226

	PAGE
Wike v. Guaranty Co.	370
Wilder, Wheeler v.	379
Will of Brock, *In re*	482
Will of Etheridge, *In re*	280
Will of Goodman, *In re*	444
Will of Puett, *In re*	8
Williams, S. v.	348
Williams, S. v.	415
Williams v. Tillman	434
Wilson, S. v.	108
Winston-Salem, Nance v.	732
Worley v. Pipes	465
Wright v. Wright	503
Wrightsville Beach, McLeod v.	621
Wyatt v. Coach Co.	340
Y	
York-Shipley, Inc., Griggs v.	572
Young v. Whitehall Co.	360
Z	
Zibelin v. Insurance Co.	567
Zion Church, Trustees of, Brown v.	406

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

S. v. Whitaker, 228 N. C. 352. Affirmed 15 February, 1949.

Mfg. Co. v. Arnold, 228 N. C. 375. Application for *certiorari* abandoned.

S. v. Gentry, 228 N. C. 643. Petition for *certiorari* denied 11 October, 1948.

ON APPEAL TO THE SUPREME COURT OF THE UNITED STATES

S. v. Bunn, 229 N. C. 734.

Hill v. R. R., 229 N. C. 236.

CASES CITED

A

Abbitt v. Gregory....201 N. C. 577.... 322
Abell v. Power Co....159 N. C. 348.... 91
Abernethy v. Burns....206 N. C. 370.... 302
Adams v. Cleve....218 N. C. 302.... 373
Adams v. Durham....189 N. C. 232.... 139
Aderholt v. R. R....152 N. C. 411.... 95
Akin v. Bank....227 N. C. 453.... 427
Albertson v. Albertson....207 N. C. 547.... 141
Albertson, *In re*....205 N. C. 742....431, 631, 632
Albright v. Albright....172 N. C. 351.... 446
Aldridge v. Ins. Co....194 N. C. 683.... 569
Alexander v. Johnston....171 N. C. 468.... 367
Alexander v. Lowrance....182 N. C. 642.... 150
Alexander v. Utilities Co....207 N. C. 438.... 712
Allen v. Bottling Co....223 N. C. 118.... 353
Allen v. Carr....210 N. C. 513.... 770
Alston v. R. R....207 N. C. 114.... 376
Aman v. R. R....179 N. C. 310.... 578
Anderson v. Amusement Co....213 N. C. 130....639, 731
Anderson v. Anderson....177 N. C. 401.... 173
Anderson v. Ins. Co....152 N. C. 1.... 162
Anderson v. Ins. Co....211 N. C. 23.... 536
Andrews v. Jordan....205 N. C. 618.... 409
Applicants for License, *In re*....143 N. C. 1.... 770
Armstrong v. Kinsell....164 N. C. 125.... 85
Arrington v. Arrington....114 N. C. 116.... 172
Arrington v. Pinetops....197 N. C. 433.... 690
Arrington v. R. R.... 51 N. C. 68.... 580
Artis v. Artis....228 N. C. 754.... 159
Atkins v. Durham....210 N. C. 295.... 139
Atkins v. Transportation Co....224 N. C. 688....354, 711, 776
Atkinson v. Ricks....140 N. C. 418.... 551
Austin v. Overton....222 N. C. 89.... 353
Auto Co. v. Rudd....176 N. C. 497.... 579
Ayers v. Banks....201 N. C. 811.... 333

B

Bagley v. Bank....222 N. C. 97.... 51
Bailey v. Hayman....218 N. C. 175.... 545
Bailey v. Hayman....222 N. C. 58.... 342
Bailey v. McLain....215 N. C. 150....487, 488
Bailey v. R. R....223 N. C. 244.... 710
Baird v. Baird....223 N. C. 730.... 781
Baker v. Edge....174 N. C. 100.... 446
Baker v. Ins. Co....168 N. C. 87.... 312
Baker v. R. R....205 N. C. 329.... 717
Balcum v. Johnson....177 N. C. 213.... 30
Balentine v. Gill....218 N. C. 496.... 426
Ball, *In re* Will of....225 N. C. 91.... 332
Ballinger v. Thomas....195 N. C. 517....460, 717
Bank v. Angelo....193 N. C. 576.... 716

Bank v. Bridgers..... 98 N. C. 67..... 791
Bank v. Construction Co.....203 N. C. 100..... 544
Bank v. Crowder.....194 N. C. 312..... 172
Bank v. Furniture Co.....120 N. C. 475..... 691
Bank v. Gahagan.....210 N. C. 464..... 405
Bank v. Griffin.....207 N. C. 265.....546, 610
Bank v. Ins. Co.....223 N. C. 390..... 384
Bank v. Jackson.....214 N. C. 582..... 372
Bank v. Johnson.....205 N. C. 180..... 67
Bank v. Kerr.....206 N. C. 610..... 729
Bank v. Land Co.....128 N. C. 193..... 536
Bank v. McArthur.....168 N. C. 48..... 481
Bank v. Motor Co.....216 N. C. 432..... 234
Bank v. Trust Co.....168 N. C. 605..... 107
Bank v. Trust Co.....199 N. C. 582..... 45
Bank v. Whitehurst.....202 N. C. 363..... 240
Bank v. Yelverton.....185 N. C. 314..... 265
Bar Association v. Strickland.....200 N. C. 630..... 472
Barbee v. Bumpass.....191 N. C. 521..... 425
Barbee v. Davis.....187 N. C. 78..... 652
Barbee v. Scoggins.....121 N. C. 135..... 45
Barefoot, *Ex Parte*.....201 N. C. 393..... 656
Barham v. Sawyer.....201 N. C. 498.....195, 196
Barker v. Dowdy.....224 N. C. 742..... 481
Barker v. R. R.....137 N. C. 214..... 698
Barlow v. Bus Lines.....229 N. C. 382..... 440
Barnes v. Best.....196 N. C. 668..... 121
Barnes v. Brown..... 79 N. C. 401..... 551
Barnes v. Saleeby.....177 N. C. 256..... 91
Barrett v. Brewer.....153 N. C. 547..... 273
Barrett v. Williams.....217 N. C. 175..... 694
Barron v. Cain.....216 N. C. 282.....426, 790
Barwick v. Barwick.....228 N. C. 109..... 599
Battle v. Cleave.....179 N. C. 112..... 711
Battle, *In re* Estate of.....158 N. C. 388..... 551
Battle v. Mercer.....187 N. C. 437..... 119
Batts v. Telephone Co. .....186 N. C. 120..... 443
Baugert v. Blades.....117 N. C. 221..... 322
Bazemore v. Bridgers.....105 N. C. 191.....54, 56
Beach v. Gladstone.....207 N. C. 876..... 154
Beach v. Patton.....208 N. C. 134.....30, 717
Beam v. Wright.....222 N. C. 174.....228, 321, 404, 405
Bean v. Detective Co.....206 N. C. 125..... 135
Bearden v. Fullam.....129 N. C. 477..... 140
Beattie v. R. R.....108 N. C. 425..... 700
Beck v. Hooks.....218 N. C. 105.....354, 711
Becton v. Dunn.....137 N. C. 559..... 200
Becton v. Goodman.....181 N. C. 475.....269, 270
Beddard v. Harrington.....124 N. C. 51..... 215
Belk v. Belk.....175 N. C. 69..... 546
Bell v. Lumber Co. .....227 N. C. 173..... 745
Bennett, *In re* Will of.....180 N. C. 5..... 14
Benson v. Johnston County.....209 N. C. 751..... 605
Benton v. Alexander.....224 N. C. 800..... 159
Berry v. Berry.....215 N. C. 339..... 250

Best v. Best....228 N. C. 9.... 197
Best v. Garris....211 N. C. 305.... 610
Best v. Kinston....106 N. C. 205.... 59
Best v. Utley....189 N. C. 356....425, 545, 546, 611
Betchler v. Bracken....218 N. C. 515.... 28
Biggers, *In re*....228 N. C. 743....84, 85
Bitting v. Thaxton.... 72 N. C. 541.... 54
Bizzell v. Mitchell....195 N. C. 484....328, 329
Black v. Comrs. of Buncombe....129 N. C. 121....461, 462, 463, 465
Blackstock v. Cole.... 51 N. C. 560.... 273
Blair v. Coakley....136 N. C. 405.... 91
Blake, *In re*....184 N. C. 278....431, 631, 632
Blue v. Wilmington....186 N. C. 321.... 424
Board of Education v. Comrs.....189 N. C. 650.... 192
Board of Education v. Forrest....190 N. C. 753.... 757
Board of Education v. Henderson....126 N. C. 689.... 140
Board of Education v. High Point....213 N. C. 636.... 140
Board of Education v. Makely....139 N. C. 31.... 426
Board of Education v. Pegram....197 N. C. 33.... 757
Bobbitt v. Stanton....120 N. C. 253.... 322
Bohannon v. Trotman....214 N. C. 706.... 434
Boing v. R. R.... 88 N. C. 62....89, 91
Booker v. Highlands....198 N. C. 282.... 336
Bolick v. R. R....138 N. C. 370.... 59
Boone v. Boone....217 N. C. 722.... 247
Bost v. Metcalfe....219 N. C. 607....715, 716
Bowden v. Kress....198 N. C. 559....639, 731
Bowen v. Pollard....173 N. C. 129.... 560
Bowling, *In re* Will of....150 N. C. 507.... 282
Bowman v. Greensboro....190 N. C. 611.... 322
Boyce v. White....227 N. C. 640.... 273
Boyd v. Latham.... 44 N. C. 365.... 445
Boyd v. Small.... 56 N. C. 39.... 153
Braddy v. Ins. Co. ....115 N. C. 354.... 385
Bradsher v. Cannady.... 76 N. C. 445.... 656
Bradsher v. Cheek....112 N. C. 838.... 693
Brady v. R. R. ....222 N. C. 367.... 30
Bramham v. Durham....171 N. C. 196.... 150
Branch v. Chappell....119 N. C. 81.... 54
Brandis v. Trustees of Davidson College....227 N. C. 329.... 412
Bray v. Ins. Co....139 N. C. 390.... 520
Brewer v. Valk....204 N. C. 186.... 769
Brewer v. Wynne....163 N. C. 319.... 113
Briggs v. Raleigh....195 N. C. 223.... 456
Briley v. Roberson....214 N. C 295.... 424
Brinkley v. R. R. ....126 N. C. 88.... 712
Britt v. Board of Canvassers.....172 N. C. 797.... 194
Broadnax v. Groom.... 64 N. C. 244....460, 461, 463
Brooks v. Austin.... 94 N. C. 222.... 628
Brooks v. Britt.... 15 N. C. 481.... 335
Brooks v. Brooks....226 N. C. 280.... 197
Broom v. Broom....130 N. C. 562.... 396

Brown v. Aluminum Co. ....224 N. C. 766.... 662
Brown v. Brown ....213 N. C. 347.... 135
Brown v. Clement Co. ....217 N. C. 47.... 336
Brown v. Coble .... 76 N. C. 391....321, 404
Brown v. Costen ....176 N. C. 63.... 194
Brown v. Hall ....226 N. C. 732.... 248
Brown v. Hillsboro ....185 N. C. 368.... 459
Brown v. Kress & Co. ....207 N. C. 722.... 435
Brown v. Mitchell ....207 N. C. 132.... 121
Brown v. Mobley ....192 N. C. 470.... 660
Brown v. Montgomery Ward & Co. ....217 N. C. 368.... 177
Brown v. Osteen ....197 N. C. 305.... 45
Brown v. Truck Lines ....227 N. C. 65.... 356
Brown v. Truck Lines ....227 N. C. 299.... 122
Bruce v. Nicholson ....109 N. C. 202.... 159
Brumley v. Baxter ....225 N. C. 691....454, 456
Bryan v. Canady ....169 N. C. 579.... 577
Bryant v. Bryant ....193 N. C. 372....161, 162, 163
Bryant v. Reedy ....214 N. C. 748.... 523
Buchanan v. Clark ....164 N. C. 56....546, 610
Buckner v. Maynard ....198 N. C. 802.... 158
Buckner v. Wheeldon ....225 N. C. 62....438, 711, 776
Building Co. v. Jones ....227 N. C. 282.... 248
Building & Loan Assn. v. Black ....215 N. C. 400.... 429
Bullard v. Ins. Co. ....189 N. C. 34.... 569
Bunn v. Holliday ....209 N. C. 351.... 567
Burgin v. Board of Elections ....214 N. C. 140....187, 194
Burleson v. Burleson ....217 N. C. 336.... 405
Burns v. Charlotte ....210 N. C. 48.... 639
Burns v. Williams .... 88 N. C. 159....321, 404
Burrowes v. Burrowes ....210 N. C. 788....84, 85
Burton v. Peace ....206 N. C. 99.... 546
Bus Co. v. Products Co. ....229 N. C. 352.... 384
Butler v. Butler ....169 N. C. 584.... 425
Butler v. Fertilizer Works ....193 N. C. 632.... 97
Butner v. Spease ....217 N. C. 82....30, 31, 717
Byerly v. Humphrey .... 95 N. C. 151.... 545
Byers v. Byers ....223 N. C. 85.... 86

C

Calaway v. Harris ....229 N. C. 117.... 280
Calhoun v. Light Co. ....216 N. C. 256.... 690
Caldwell v. Blount ....193 N. C. 560.... 425
Caldwell v. Caldwell ....189 N. C. 805.... 200
Caldwell v. R. R. ....218 N. C. 63.... 712
Campbell v. R. R. ....201 N. C. 102.... 443
Campbell v. Sigmon....170 N. C. 348.... 424
Candler v. Lunsford .... 20 N. C. 542.... 316
Capehart v. Dettrick .... 91 N. C. 344.... 45
Capehart v. Stewart .... 80 N. C. 101.... 70
Carlisle v. Carlisle ....225 N. C. 462....172, 173
Carpenter v. Carpenter ....213 N. C. 36.... 228

Carpenter v. R. R. ....184 N. C. 400.... 35
Carter v. Bryant ....199 N. C. 704.... 7
Carter v. Motor Lines ....227 N. C. 193.... 51
Carter v. Oxendine ....193 N. C. 478.... 172
Carter v. R. R. ....126 N. C. 437.... 140
Carter v. White ....101 N. C. 30.... 275
Cashatt v. Brown ....211 N. C. 367....710, 712
Casualty Co. v. Guaranty Co. ....211 N. C. 13.... 402
Cathey v. Construction Co. ....218 N. C. 525.... 457
Cato v. Hospital Care Association ....220 N. C. 479.... 258
Caudle v. Benbow ....228 N. C. 282.... 50
Caudle v. Morris ....160 N. C. 168.... 426
Cavenaugh v. Jarman ....164 N. C. 372.... 172
Cecil v. High Point ....165 N. C. 431.... 150
Chadwick v. Department of Conservation ....219 N. C. 766.... 358
Charlotte v. Kavanaugh ....221 N. C. 259.... 150
Charnock v. Taylor ....223 N. C. 360.... 442
Chemical Co. v. McNair ....139 N. C. 326.... 790
Cherry v. Cherry ....179 N. C. 4.... 240
Cheshire v. Drake ....223 N. C. 577.... 428
Childress v. Lawrence ....220 N. C. 195.... 243
Childs v. Martin .... 69 N. C. 126.... 431
Chilton v. Smith ....180 N. C. 472.... 424
Chinnis v. R. R. ....219 N. C. 528....30, 31
Chisman, *In re* Will of ....175 N. C. 420.... 14
Chozen Confections, Inc. v. Johnson ....220 N. C. 432.... 6
Christian v. R. R. ....136 N. C. 321....59, 61
Clark v. Dill ....208 N. C. 421.... 280
Clark v. Henrietta Mills ....219 N. C. 1.... 547
Clark v. Laurel Park Estates ....196 N. C. 624.... 265
Clark v. Statesville ....139 N. C. 490.... 185
Clarke v. Martin ....215 N. C. 405....354, 384, 440
Clegg v. Clegg ....186 N. C. 28.... 86
Clinton v. Ross ....226 N. C. 682.... 769
Coach Co. v. Transit Co. ....227 N. C. 391....35, 36
Cody v. Hovey ....219 N. C. 369....200, 248
Coe v. Surry County ....226 N. C. 125.... 629
Coker v. Coker ....224 N. C. 450.... 214
Cole v. Koonce ....214 N. C. 188....354, 440, 711
Cole v. R. R. ....211 N. C. 591....251, 296, 671, 712
Cole v. Wagner ....197 N. C. 692.... 443
Coley v. Dalrymple ....225 N. C. 67.... 550
Collie v. Comrs. ....145 N. C. 170.... 767
Collins v. Ins. Co. .... 79 N. C. 279.... 79
Collins v. Lamb ....215 N. C. 719.... 738
Colt v. Kimball ....190 N. C. 169....95, 228
Combes v. Adams ....150 N. C. 64.... 64
Comm. v. Epley ....190 N. C. 672.... 636
Comrs. of Brunswick County v. Inman ....203 N. C. 542.... 564
Committee on Grievances of Bar Assn. v. Strickland ....200 N. C. 630.... 472

Conrad v. Foundry Co. .....198 N. C. 723.....469, 470
Conrad v. Goss .....227 N. C. 470.....224, 240
Cook v. Guirkin .....119 N. C. 13.....544
Cooper v. Express Co. .....165 N. C. 538.....580
Cooper, *In re* Will of .....196 N. C. 418.....12
Cooper v. Warlick .....109 N. C. 672.....200
Copland v. Telegraph Co. .....136 N. C. 11.....526
Copney v. Parks .....212 N. C. 217.....385, 409
Cordell v. Brotherhood .....208 N. C. 632.....385
Corporation Com. v. Inter-
racial Com. .....198 N. C. 317.....705
Corp. Comm. v. R. R. .....185 N. C. 435.....628
Cotten v. Moseley .....159 N. C. 1.....121
Cotton v. Transportation Co. .....197 N. C. 709.....115
Coulter v. Wilson .....171 N. C. 537.....322, 404, 405
Coward v. Coward .....216 N. C. 506.....426
Cowles v. Coffey .....88 N. C. 340.....429
Cowles v. Hardin .....79 N. C. 577.....119
Cowles v. Reavis .....109 N. C. 417.....270
Cox v. Brown .....218 N. C. 350.....150
Cox v. Heath .....198 N. C. 503.....121
Cox v. Johnson .....227 N. C. 69.....95
Cox v. Kinston .....217 N. C. 391.....459
Cox v. McGowan .....116 N. C. 131.....275
Crane v. Carswell.....204 N. C. 571.....70
Craver v. Spaugh .....227 N. C. 129.....599
Creech v. Linen Service Corp. ....219 N. C. 457.....513
Creed v. Marshall .....160 N. C. 394.....376
Creighton v. Snipes .....227 N. C. 90.....662
Cressler v. Asheville .....138 N. C. 482.....72
Crisp v. Biggs .....176 N. C. 1.....121
Cromartie v. Comrs. of Bladen .... 87 N. C. 134.....460
Crone v. Fisher .....223 N. C. 635.....711
Crowell v. Bradsher .....203 N. C. 492.....11
Cullens v. Cullens .....161 N. C. 344.....158
Cummins v. Fruit Co. .....225 N. C. 625.....354, 384, 440
Curlee v. Power Co. .....205 N. C. 644.....59
Cuthrell v. Greene .....229 N. C. 475.....737

D

Dale v. Lumber Co.....152 N. C. 651.....792
Daly v. Pate .....210 N. C. 222.....241
Daniel v. Harrison .....175 N. C. 120.....121
Daniel v. R. R. .....136 N. C. 517.....51
Darden v. Timberlake .....139 N. C. 181.....158
Dargan v. R. R. .....131 N. C. 623.....698
Daughtry v. Cline .....224 N. C. 381.....443, 711
Davis v. Bass .....188 N. C. 200.....159, 425
Davis v. Board of Education .....186 N. C. 227.....801
Davis v. Burnett .....49 N. C. 71.....789
Davis v. Cockman .....211 N. C. 630.....426
Davis v. Crump .....219 N. C. 625.....545
Davis v. Davis .....223 N. C. 36.....172
Davis v. Davis .....228 N. C. 48.....523

Davis v. Doggett ....212 N. C. 589.... 566
Davis v. Jeffreys ....197 N. C. 712.... 711
Davis v. Land Bank ....217 N. C. 145.... 214
DeBerry v. Nicholson ....102 N. C. 465.... 801
DeFord, *In re* ....226 N. C. 189.... 85
Dennison v. Spivey ....180 N. C. 220.... 54
Dependents of Poole v. Sigmon ....202 N. C. 172.... 369
Dependents of Thompson v. Funeral Home ....205 N. C. 801.... 358
Derr v. Dellinger .... 75 N. C. 300.... 65
DeVine v. Steel Co. ....227 N. C. 684.... 358
Dewey v. Margolis ....195 N. C. 307.... 528
Diamond v. Service Stores ....211 N. C. 632.... 712
Dibbrell v. Ins. Co. ....110 N. C. 193.... 570
Dickens v. Perkins ....134 N. C. 220.... 426
Dickerson v. Refining Co. ....201 N. C. 90....51, 116, 220
Discount Co. v. Baker ....176 N. C. 546.... 54
Dobson v. Murphy.... 18 N. C. 586.... 429
Door Co. v. Joyner ....182 N. C. 518.... 67
Dorman v. Goodman ....213 N. C. 406.... 66
Dowling v. R. R. ....194 N. C. 488.... 698
Drainage Comm. v. Epley ....190 N. C. 672.... 636
Drainage Dist. v. Huffstetler ....173 N. C. 523.... 636
Drake v. Howell ....133 N. C. 162.... 64
Drumwright v. Theatres, Inc. ....228 N. C. 325.... 639
Dry v. Bottling Co. ....204 N. C. 222.... 258
Dry-Kiln Co. v. Ellington....172 N. C. 481.... 45
Duckett v. Lyda ....223 N. C. 356.... 276
Duke v. Children's Comm....214 N. C. 570.... 402
Durham v. Pollard ....219 N. C. 750.... 427

E

Earnhardt v. R. R. ....157 N. C. 358....699, 700
Ebbs v. Trust Co. ....199 N. C. 242.... 95
Eborn v. Ellis ....225 N. C. 386.... 214
Edmunds v. Allen ....229 N. C. 250.... 297
Edwards v. Cobb .... 95 N. C. 4.... 551
Edwards v. McLawhorn ....218 N. C. 543.... 551
Edwards v. R. R. ....228 N. C. 590....322, 404
Edwards v. White ....180 N. C. 55....11, 13
Efird v. Comrs. of Forsyth ....217 N. C. 691.... 359
Elder v. R. R. ....194 N. C. 617.... 711
Eldridge v. Mangum ....216 N. C. 532.... 449
Eley v. R. R. ....165 N. C. 78....269, 610
Elizabeth City v. Aydlett ....201 N. C. 602.... 769
Eller v. R. R. ....140 N. C. 140.... 405
Eller v. Wall ....229 N. C. 359....450, 733
Ellett v. Ellett ....157 N. C. 161.... 342
Elmore v. Byrd ....180 N. C. 120.... 159
Emery v. Ins. Co. ....228 N. C. 532.... 384
Enloe v. Ragle ....195 N. C. 38.... 460
Evans v. Comrs. of Cumberland .... 89 N. C. 154.... 460

Ex Parte Barefoot ..... 201 N. C. 393 656
Exterminating Co. v. Wilson ..... 227 N. C. 96 745
Exum v. Lynch ..... 188 N. C. 392 612
Exum v. R. R. ..... 222 N. C. 222 428

F

Faggart v. Bost ..... 122 N. C. 517 172
Fain, *In re* ..... 172 N. C. 790 632
Faircloth v. Johnson ..... 189 N. C. 429 ..... 546, 611
Fairmont School v. Bevis ..... 210 N. C. 50 426
Faison v. Middleton ..... 171 N. C. 170 155
Farfour v. Fahad ..... 214 N. C. 281 785
Farmer v. Lumber Co. ..... 217 N. C. 158 369
Farnell v. Dongan ..... 207 N. C. 611 154
Fawcett v. Mt. Airy ..... 134 N. C. 125 ..... 458, 461, 463
Felmet v. Commissioners ..... 186 N. C. 251 150
Ferguson v. Asheville ..... 213 N. C. 569 ..... 440, 711
Ferguson v. Ferguson ..... 225 N. C. 375 155
Ferrell v. Worthington ..... 226 N. C. 609 603
Fields v. Brown ..... 160 N. C. 295 266
Fields v. Rollins ..... 186 N. C. 221 121
Finance Corp. v. Lane ..... 221 N. C. 189 55
Fish v. Hanson ..... 223 N. C. 143 ..... 269, 434
Fisher v. Fisher ..... 217 N. C. 70 425
Flanner v. Butler ..... 131 N. C. 155 172
Fleming v. Holleman ..... 190 N. C. 449 322
Ford v. McBrayer ..... 171 N. C. 420 121
Ford v. Manning ..... 152 N. C. 151 659
Forysth v. Oil Mill ..... 167 N. C. 179 694
Fort v. Allen ..... 110 N. C. 183 19
Fortune v. Hunt ..... 149 N. C. 358 ..... 546, 611
Foster v. Williams ..... 182 N. C. 632 425
Fowler v. Fowler ..... 190 N. C. 536 214
Fox v. Barlow ..... 206 N. C. 66 776
Fox v. Mills, Inc. ..... 225 N. C. 580 ..... 72, 662
Francis v. Francis ..... 223 N. C. 401 ..... 269, 352
Frederick v. Insurance Co. ..... 221 N. C. 409 228
Fry v. Utilities Co. ..... 183 N. C. 281 506
Fulcher v. Lumber Co. ..... 191 N. C. 408 547
Funeral Home v. Ins. Co. ..... 216 N. C. 562 711
Furst v. Merritt ..... 190 N. C. 397 ..... 95, 96, 97

G

Gabriel v. Newton ..... 227 N. C. 314 234
Gaither v. Carpenter ..... 143 N. C. 240 6
Gardiner v. May ..... 172 N. C. 192 ..... 375, 376
Garner v. Horner ..... 191 N. C. 539 425
Garris v. Garris ..... 188 N. C. 321 599
Garsed v. Garsed ..... 170 N. C. 672 198
Gay v. Baker ..... 58 N. C. 344 158
Gaylord v. Gaylord ..... 150 N. C. 222 ..... 172, 425
Gennett v. Lyerly ..... 207 N. C. 201 791
Gentry v. Hot Springs ..... 227 N. C. 665 356
George v. R. R. ..... 210 N. C. 58 691

Gerringer v. Gerringer....223 N. C. 818....332, 333
Gibson v. Barbour....100 N. C. 192....322
Gibson, *In re*....222 N. C. 350....631
Gill v. Charlotte....213 N. C. 160....629
Gill v. Commissioners....160 N. C. 176....185
Gill v. Porter....174 N. C. 569....200
Gillis v. Transit Corp.....193 N. C. 346....440
Gilmore v. Board of Education....222 N. C. 358....234
Gilmore v. Ins. Co.....214 N. C. 674....435
Glenn v. Board of Education.....210 N. C. 525....141
Glenn v. Comrs. of Durham.....201 N. C. 233....461
Glenn v. Express Co.....170 N. C. 286....770
Godwin v. Bank....145 N. C. 320....372
Godwin v. R. R.....220 N. C. 281....177, 710, 711
Gofforth v. R. R.....144 N. C. 569....712
Gold v. Kiker....216 N. C. 511....717
Gold Mining Co. v. Lumber Co.....170 N. C. 273....158
Goldsmith v. Samet....201 N. C. 574....163
Goodman v. Goodman....201 N. C. 808....178, 251
Goodman v. Sapp....102 N. C. 477....481, 482
Gore v. Davis....124 N. C. 234....45
Gorham v. Ins. Co.....214 N. C. 526....569
Gorham v. R. R.....158 N. C. 504....659
Gorrell v. Water Supply Co.....124 N. C. 328....247
Goss v. Williams....196 N. C. 213....776
Gower v. Carter....195 N. C. 697....800
Grace v. Johnson....192 N. C. 734....240
Grant v. McGraw....228 N. C. 745....323
Green v. Biggs....167 N. C. 417....426
Greene v. Ins. Co.....196 N. C. 335....569
Gregory v. Ins. Co.....223 N. C. 124....221, 711
Grier v. Grier....192 N. C. 760....115, 514
Grier v. Weldon....205 N. C. 575....612
Griffith v. R. R.....191 N. C. 84....698, 700
Griggs v. Griggs....213 N. C. 624....228
Grocery Co. v. Hoyle....204 N. C. 109....236
Groome v. Davis....215 N. C. 510....448
Growers Exchange, Inc. v. Hartman....220 N. C. 30....258
Guano Co. v. Colwell....177 N. C. 218....557
Gulley v. Smith....203 N. C. 274....546, 610
Gunter v. Sanford....186 N. C. 452....769

H

Hahn v. Guilford....87 N. C. 172....89, 91
Hahn v. Perkins....228 N. C. 727....639
Hale v. Hale....219 N. C. 191....781, 782, 783
Hall v. R. R.....146 N. C. 345....59, 61
Hall v. Rhinehart....191 N. C. 685....443
Hallyburton v. Board of Education....213 N. C. 9....629
Hamilton, *In re*....182 N. C. 44....633
Hammond v. Eckerd's....220 N. C. 596....51

Hampton v. Griggs .....184 N. C. 13..... 121
Hampton v. Hawkins .....219 N. C. 205..... 711
Hancammon v. Carr ....229 N. C. 52..... 415
Hancock v. Wooten .....107 N. C. 9..... 227
Hanes v. Utilities Co. .....191 N. C. 13.....59, 61
Haney v. Lincolnton .....207 N. C. 282.....31, 717
Hanna v. Timberlake .....203 N. C. 556..... 435
Hannon v. Grizzard..... 89 N. C. 115..... 799
Harding v. Ins. Co. .....218 N. C. 129..... 95
Hare v. Hare .....228 N. C. 740..... 493
Hargrove v. Adcock.....111 N. C. 166..... 64
Harper v. Harper ..... 92 N. C. 300.....656, 657
Harper v. Harper .....225 N. C. 260..... 781
Harper v. Pinkston .....112 N. C. 293..... 405
Harrill v. Refining Co. .....225 N. C. 421..... 243
Harrington v. Lowrie .....215 N. C. 706..... 106
Harrington v. Rawls .....136 N. C. 65..... 691
Harris, *In re* Will of .....218 N. C. 459..... 332
Hart v. Commissioners .....192 N. C. 161..... 85
Hartman v. Flynn .....189 N. C. 452..... 121
Harton v. Telephone Co. .....141 N. C. 455.....30, 717
Hatch v. Cohen ..... 84 N. C. 602.....560, 561
Hawes v. Haynes .....219 N. C. 535.....115, 514
Hawley v. Powell .....222 N. C. 713..... 251
Hayes v. Benton .....193 N. C. 379..... 193
Hayes v. Creamery .....195 N. C. 113..... 506
Hayes v. Telegraph Co. .....211 N. C. 192..... 711
Haygood, *In re* Will of .....101 N. C. 574..... 487
Haywood v. Haywood ..... 79 N. C. 42..... 431
Haywood v. Morton .....209 N. C. 235..... 265
Hayworth v. Ins. Co. .....190 N. C. 757..... 528
Hedgecock v. Ins. Co. .....212 N. C. 638.....312, 411
Hege, *In re* .....205 N. C. 625..... 250
Hegler v. Mills Co. .....224 N. C. 669..... 662
Helms v. Austin .....116 N. C. 751.....158, 546, 611
Helms v. Power Co. .....192 N. C. 784..... 690
Helmstetler v. Power Co. .....224 N. C. 821..... 443
Henderson v. Gill, Comr. of
Revenue .....229 N. C. 313..... 605
Henderson v. Powell .....221 N. C. 239..... 717
Henderson v. Wilmington .....191 N. C. 269.....461, 463
Hennis v. Hennis .....180 N. C. 606..... 599
Henry v. Henry ..... 31 N. C. 278..... 153
Hensley v. Furniture Co. .....164 N. C. 148..... 248
Hewitt v. Ulrich .....210 N. C. 835..... 322
Heyer v. Bulluck .....210 N. C. 321.....166, 381
Hicks v. Kearney .....189 N. C. 316..... 236
Hicks v. Nivens .....210 N. C. 44..... 220
Higgins v. Higgins .....223 N. C. 453..... 333
Hill v. Bell ..... 61 N. C. 122..... 446
Hill v. Lopez .....228 N. C. 433..... 448
Hill v. R. R. .....143 N. C. 539..... 767
Hill v. R. R. .....180 N. C. 490..... 444
Hill v. Stansbury .....223 N. C. 193..... 460
Hine, *In re* Will of .....228 N. C. 405.....11, 13, 14

Hines v. Foundation Co. .....196 N. C. 322..... 59
Hinnant v. R. R. .....202 N. C. 489..... 30
Hinson v. Shugart .....224 N. C. 207..... 729
Hinton, *In re* Will of .....180 N. C. 206..... 481
Hinton v. Lacy .....193 N. C. 496..... 456
Hobbs v. Coach Co. .....225 N. C. 323..... 354
Hobbs v. Drewer .....226 N. C. 146..... 354
Hobbs v. Mann .....199 N. C. 532..... 384
Hobgood v. Hobgood .....169 N. C. 485..... 240
Hoft v. Lighterage Co. .....215 N. C. 690..... 329
Hoke v. Greyhound Corp.....226 N. C. 332..... 255
Hoke v. Whisnant .....174 N. C. 658..... 653
Holland v. Strader.....216 N. C. 436.....28, 29
Holland v. Whittington .....215 N. C. 330..... 228
Holloman v. Holloman .....127 N. C. 15..... 119
Holloway v. R. R. ..... 85 N. C. 452..... 700
Holly v. Holly ..... 94 N. C. 96..... 170
Holton v. Holton .....186 N. C. 355..... 159
Honeycutt v. Watkins .....151 N. C. 652..... 435
Hood, Comr. of Banks v. Cobb ....207 N. C. 128..... 544
Hooper v. Hooper .....165 N. C. 605.....394, 396
Horne v. Edwards .....215 N. C. 622..... 214
Hornthal v. R. R. .....167 N. C. 627..... 258
Horton v. Ins. Co. .....122 N. C. 498..... 569
Hospital v. R. R. .....157 N. C. 460..... 691
Howell, *In re* Will of .....204 N. C. 437..... 536
Howell v. Jones .....109 N. C. 102..... 628
Hoyle v. Carter .....215 N. C. 90.....55, 56
Hudson v. Greensboro .....185 N. C. 502..... 459
Hudson v. Jordan .....108 N. C. 10..... 481
Hudson v. Silk Co. .....185 N. C. 342..... 243
Hughes v. Oliver .....228 N. C. 680..... 72
Hulbert v. Douglas ..... 94 N. C. 128.....322, 323, 404, 405
Humphrey v. Stephens .....191 N. C. 101.....45, 236
Humphries v. Coach Co. .....228 N. C. 399..... 711
Huneycutt v. Brooks .....116 N. C. 788..... 545
Hunt v. Eure .....188 N. C. 716..... 367
Hussey v. Kidd .....209 N. C. 232..... 458
Hussey v. R. R. ..... 98 N. C. 34..... 261
Hyatt v. Hyatt .....187 N. C. 113..... 12
Hyman v. Jones .....205 N. C. 266..... 428

I

Ice Co. v. Construction Co. .....194 N. C. 407..... 652
Ingle v. Board of Elections .....226 N. C. 454..... 193
Ingram v. Easley .....227 N. C. 442.....159, 425
In re Albertson .....205 N. C. 742.....431, 631, 632
In re Applicants for License ....143 N. C. 1..... 770
In re Biggers .....228 N. C. 743.....84, 85
In re Blake .....184 N. C. 278.....431, 631, 632
In re DeFord .....226 N. C. 189..... 85
In re Estate of Battle .....158 N. C. 388..... 551
In re Estate of Poindexter .....221 N. C. 246..... 606
In re Estate of Styers .....202 N. C. 715..... 551

In re Estate of Suskin ....214 N. C. 219.... 13
In re Estate of Wright ....200 N. C. 620.... 551
In re Estate of Wright ....204 N. C. 465.... 434
In re Fain ....172 N. C. 790.... 632
In re Gibson ....222 N. C. 350.... 631
In re Hamilton ....182 N. C. 44.... 633
In re Hege ....205 N. C. 625.... 250
In re McGraw ....228 N. C. 46.... 633
In re McKnight ....229 N. C. 303.... 302
In re Means ....176 N. C. 307.... 86
In re Ogden ....211 N. C. 100....431, 631
In re Parker ....144 N. C. 170....85, 631
In re Reynolds ....206 N. C. 276.... 434
In re Schenck .... 74 N. C. 607.... 303
In re Shelton ....203 N. C. 75.... 633
In re Steele ....220 N. C. 685....303, 305
In re Steelman ....219 N. C. 306.... 572
In re Taylor ....229 N. C. 297.... 305
In re Tenhoopen ....202 N. C. 223.... 633
In re Thompson ....228 N. C. 74....85, 632
In re Wiggins ....171 N. C. 372.... 140
In re Will of Ball ....225 N. C. 91.... 332
In re Will of Bennett ....180 N. C. 5.... 14
In re Will of Bowling....150 N. C. 507.... 282
In re Will of Chisman ....175 N. C. 420.... 14
In re Will of Cooper ....196 N. C. 418.... 12
In re Will of Harris ....218 N. C. 459.... 332
In re Will of Haygood ....101 N. C. 574.... 487
In re Will of Hine ....228 N. C. 405....11, 13, 14
In re Will of Hinton ....180 N. C. 206.... 481
In re Will of Howell ....204 N. C. 437.... 536
In re Will of Johnson ....182 N. C. 522.... 11
In re Will of Little ....187 N. C. 177.... 11
In re Will of Love....186 N. C. 714....445, 446
In re Will of Lowrance ....199 N. C. 782.... 446
In re Will of Meadows ....185 N. C. 99....11, 12
In re Will of Neal ....227 N. C. 136....11, 12
In re Will of Parsons....207 N. C. 584.... 446
In re Will of Roediger ....209 N. C. 470....445, 447
In re Will of Rowland ....202 N. C. 373....11, 14
In re Will of Smith ....218 N. C. 161....11, 12, 446
In re Will of Thompson ....196 N. C. 271.... 446
In re Will of Turnage ....208 N. C. 130.... 332
In re Will of Wallace ....227 N. C. 459.... 446
In re Will of Westfeldt ....188 N. C. 702....487, 488
In re Young ....222 N. C. 708.... 631
Institute v. Mebane ....165 N. C. 644....142, 612
Ins. Co. v. Cates ....193 N. C. 456.... 547
Ins. Co. v. Guilford County ....225 N. C. 293....460, 463
Ins. Co. v. Lawrence ....204 N. C. 707.... 729
Ins. Co. v. Morehead ....209 N. C. 174.... 172
Ins. Co. v. Motor Lines ....225 N. C. 588.... 405
Ins. Co. v. Stadiem ....223 N. C. 49....30, 31, 460, 717
Ins. Co. v. Wells ....226 N. C. 574.... 569
Irby v. Wilson .... 21 N. C. 568.... 84

J

Jeffrey v. Mfg. Co. ....197 N. C. 724.... 116
Jeffries v. Powell ....221 N. C. 415.... 710
Jenkins v. Board of Elections ....180 N. C. 169.... 799
Jenkins v. Henderson ....214 N. C. 244.... 564
Jennings v. White ....139 N. C. 23.... 273
Jerkins v. Mitchell .... 57 N. C. 207.... 656
Johnson v. Hosiery Co. ....199 N. C. 38.... 358
Johnson, *In re* Will of ....182 N. C. 522.... 11
Johnson v. Leavitt ....188 N. C. 682.... 159
Johnson v. Marrow ....228 N. C. 58.... 757
Johnson v. R. R. ....163 N. C. 431.... 671
Johnson v. Smith ....215 N. C. 322.... 55
Johnston v. Board of Elections ...172 N. C. 162.... 194
Johnston v. Case ....131 N. C. 491.... 273
Johnston v. Johnston ....213 N. C. 255.... 251
Johnston County v. Ellis ....226 N. C. 268.... 214
Jones v. Bagwell ....207 N. C. 378.... 711
Jones v. Bland ....182 N. C. 70.... 731
Jones v. Casstevens ....222 N. C. 411....520, 694
Jones v. Casualty Co. ....140 N. C. 262.... 520
Jones v. Coleman....188 N. C. 631.... 546
Jones v. Flynt ....159 N. C. 87.... 800
Jones v. Jones ....164 N. C. 320....172, 425
Jones v. Jones ....227 N. C. 424.... 166
Jones v. Myatt ....153 N. C. 225.... 153
Jones v. Palmer ....215 N. C. 696.... 551
Jones v. R. R. ....194 N. C. 227.... 342
Jones v. Realty Co. ....226 N. C. 303.... 520
Jordan v. Miller ....179 N. C. 73.... 243
Justice v. Carroll .... 57 N. C. 429.... 65

K

Kearney v. R. R. ....228 N. C. 590....322, 404
Keel v. Bailey ....214 N. C. 159.... 427
Keen v. Parker ....217 N. C. 378....228, 376
Kelly v. Shoe Co. ....190 N. C. 406.... 561
Kelly v. Trimont Lodge ....154 N. C. 97.... 385
Kemp v. Funderburk ....224 N. C. 353....95, 265, 603
Kennerly v. Dallas ....215 N. C. 532.... 454
Kerr v. Hicks ....154 N. C. 265....8, 288, 289
Kesler v. Smith .... 66 N. C. 154.... 59
Ketchie v. Hedrick ....186 N. C. 392.... 455
Kiger v. Terry ....119 N. C. 456.... 656
Killingsworth v. R. R. ....171 N. C. 47.... 579
King v. King ....225 N. C. 639....214, 376
King v. Rudd ....226 N. C. 156.... 356
King v. Stokes ....125 N. C. 514.... 158
Kinsland v. Mackey ....219 N. C. 139.... 404
Kluttz v. Allison ....214 N. C. 379.... 67
Knight v. Houghtalling .... 85 N. C. 17.... 577
Kramer v. Electric Light Co. ..... 95 N. C. 277.... 329
Kramer v. R. R. ....128 N. C. 269.... 693
Krites v. Plott ....222 N. C. 679.... 276

L

Lackey v. R. R. ....219 N. C. 195.... 403
Lambert v. Caronna ....206 N. C. 616.... 354
Lamm v. Charles Stores Co. ....201 N. C. 134.... 51
Lamont v. Hospital ....206 N. C. 111.... 443
Land v. R. R. ....107 N. C. 72.... 699
Land Bank v. Cherry ....227 N. C. 105.... 628
Landreth v. Morris ....214 N. C. 619.... 352
Lassiter v. Harper .... 32 N. C. 392.... 300
Latham v. Ellis ....116 N. C. 30.... 632
Latta v. Jenkins ....200 N. C. 255.... 605
Laundry Machinery Co. v. Skinner ....225 N. C. 285.... 95
Lawrence v. Lawrence ....226 N. C. 624.... 198
Lawrence v. Power Co. ....190 N. C. 664.... 690
Lea v. Bridgeman....228 N. C. 565.... 356
Leach v. Varley ....211 N. C. 207.... 777
Leathers v. Gray ....101 N. C. 162.... 121
Ledford v. Lumber Co. ....183 N. C. 614.... 443
Lee v. Board of Adjustment ....226 N. C. 107.... 517
Lee v. Enka Corp. ....212 N. C. 455....469, 470
Lee v. Parker ....171 N. C. 144....546, 611
Lee v. Penland ....200 N. C. 340.... 563
Lee v. Rhodes ....227 N. C. 240.... 376
Lee v. Upholstery Co. ....227 N. C. 88.... 514
Lentz v. Hinson ....146 N. C. 31.... 91
Leonard v. Ins. Co....212 N. C. 151.... 523
Leonard v. Maxwell, Comr. of Revenue ....216 N. C. 89....317, 460
Lester v. Harward ....173 N. C. 83.... 545
Lewis v. Furr ....228 N. C. 89.... 275
Lewis v. Watson ....229 N. C. 20....231, 266, 343, 646
License, *In re* Applicants for ....143 N. C. 1.... 770
Light Co. v. Bowman ....228 N. C. 319.... 686
Light Co. v. Rogers ....207 N. C. 751.... 657
Lightner v. Boone ....222 N. C. 205.... 60
Likas v. Lackey ....186 N. C. 398.... 14
Lilly v. Belk Bros. ....210 N. C. 735.... 662
Lincoln v. R. R. ....207 N. C. 787....384, 711
Lindsey v. Speight....224 N. C. 453....438, 711
Lineberry v. Mebane ....218 N. C. 737.... 662
Linker v. Linker ....167 N. C. 651....546, 611
Little, *In re* Will of ....187 N. C. 177.... 11
Liverman v. Cline ....212 N. C. 43.... 513
Liverman v. R. R. ....109 N. C. 52.... 700
Liverman v. R. R. ....114 N. C. 692.... 700
Livingston v. Investment Co. ....219 N. C. 416.... 243
Lloyd v. R. R....151 N. C. 536.... 135
Lockhart v. Lockhart ....223 N. C. 123.... 373
Loftin v. Kornegay ....225 N. C. 490....172, 424
Lofton v. Barber....226 N. C. 481.... 276
Logan v. Johnson ....218 N. C. 200....234, 369
Logan v. Wallis .... 76 N. C. 416....321, 404
Love v. Huffines ....151 N. C. 378.... 91

Love, *In re* Will of.....186 N. C. 714.....445, 446
Lowdermilk v. Butler .....182 N. C. 502.....392
Lowe v. Fidelity Co. .....170 N. C. 445.....536
Lowe v. Weatherley ..... 20 N. C. 353.....790
Lowrance, *In re* Will of .....199 N. C. 782.....446
Lucas v. R. R. .....121 N. C. 506.....248
Lumber Co. v. Askew .....185 N. C. 87.....209
Lumber Co. v. Cottingham .....173 N. C. 323.....376
Lumber Co. v. Hayworth .....205 N. C. 585.....528
Lumber Co. v. Hines Bros. .....126 N. C. 254.....701
Lunsford v. Mfg. Co. .....196 N. C. 510.....711
Lunsford v. Yarbrough .....189 N. C. 476.....166, 656
Lupton v. Edmundson .....220 N. C. 188.....428
Lupton v. Hawkins.....210 N. C. 658.....435
Luttrell v. Mineral Co. .....220 N. C. 782.....31
Lykes v. Grove .....201 N. C. 254.....265
Lynch v. Veneer Co. .....169 N. C. 169.....890

Mc

McAllister v. Purcell .....124 N. C. 262.....66
McCabe v. Assurance Corp. .....212 N. C. 18.....536
McCall v. Clayton ..... 44 N. C. 422.....789
McCall v. Tanning Co. .....152 N. C. 648.....97
McClamroch v. Ice Co. .....217 N. C. 106.....523
McCless v. Meekins .....117 N. C. 34.....464
MacClure v. Casualty Co. .....229 N. C. 305.....411
McClure v. Spivey .....123 N. C. 678.....13
McCollum v. Chisholm..... .....146 N. C. 18.....426, 790
McCorkle v. Beatty.....226 N. C. 338.....173
McCoy v. Lassiter..... 94 N. C. 131.....628
McCrimmon v. Powell.....221 N. C. 216.....710
McCullers v. Cheatham.....163 N. C. 61.....579
McCune v. Mfg. Co. .....217 N. C. 351.....599
McDowell v. Construction Co. ..... 96 N. C. 514.....185
McEachern v. McEachern.....210 N. C. 98.....631, 632
McEwan v. Brown .....176 N. C. 249.....14
McFarland v. Cornwell.....151 N. C. 428.....426
McGill v. Lumberton.....215 N. C. 752.....120, 550
McGraw, *In re* .....228 N. C. 46.....633
McIntire v. McIntire .....203 N. C. 631.....435
McIntyre v. R. R. ..... 67 N. C. 278.....698
McIver v. McKinney .....184 N. C. 393.....154
McKay v. Bullard ..... 219 N. C. 589.....270
MacKenzie v. Development Co. ....151 N. C. 276.....91
McKinnon v. Morrison .....104 N. C. 354.....54
McKinnon v. Motor Lines .....228 N. C. 132.....354
McKnight, *In re* .....229 N. C. 303.....302
McLamb v. Beasley .....218 N. C. 308.....513
McLamb v. McPhail.....126 N. C. 218.....19, 20
McLamb v. R. R. .....122 N. C. 862.....481, 643
McLaurin v. Cronly ..... 90 N. C. 50.....260, 262
McMahan v. Hensley .....178 N. C. 587.....546, 611
McMahan v. Spruce Co. .....180 N. C. 636.....652
McMillan v. Baker ..... 92 N. C. 111.....119, 200

McNeill v. Hodges .....105 N. C. 52..... 577
McNeill v. McNeill .....223 N. C. 178.....266, 481
McPhail v. Comrs. .....119 N. C. 330..... 564
McRary v. McRary.....228 N. C. 714.....85, 86, 214, 376

M

Machine Co. v. Burger .....181 N. C. 241..... 55
Machinery Co. v. Skinner .....225 N. C. 285..... 95
Mack v. Marshall Field & Co. .....218 N. C. 697..... 23
Madry v. Scotland Neck.....214 N. C. 461..... 455
Mahoney v. Tyler.....136 N. C. 40..... 329
Mangum v. R. R. .....188 N. C. 689..... 443
Mangum v. R. R. .....210 N. C. 134..... 403
Manheim v. Taxi Corp. .....214 N. C. 689.....711, 777
Mfg. Co. v. Bray .....193 N. C. 350..... 209
Mfg. Co. v. Comrs. of McDowell....189 N. C. 99..... 36
Mfg. Co. v. Comrs. of Pender ....196 N. C. 744..... 36
Mfg. Co. v. Simmons ..... 97 N. C. 89..... 628
Mfg. Co. v. Kornegay .....195 N. C. 373..... 200
Mfg. Co. v. R. R. .....128 N. C. 280..... 694
Mfg. Co. v. R. R. .....222 N. C. 330..... 721
Mfg. Co. v. Summers .....143 N. C. 102..... 106
Martin v. Bus Line .....197 N. C. 720..... 513
Martin v. Houck .....141 N. C. 317..... 219
Martin v. Martin .....130 N. C. 27..... 119
Martin v. Knowles .....195 N. C. 427..... 121
Martin v. Raleigh .....208 N. C. 369..... 457
Mason v. Comrs. of Moore .....229 N. C. 626..... 729
Mason v. R. R. .....208 N. C. 842..... 711
Mason v. White ..... 53 N. C. 422..... 762
Massey v. Massey .....208 N. C. 818..... 599
Mauney v. Coit ..... 80 N. C. 300..... 106
Maxwell, Comr. of Revenue
v. Hinsdale .....207 N. C. 37..... 472
Maynard v. Holder .....219 N. C. 470..... 258
Meadows Co. v. Bryan .....195 N. C. 398..... 45
Meadows, *In re* Will of .....185 N. C. 99.....11, 12
Meadows v. Smith ..... 34 N. C. 18..... 789
Means, *In re* .....176 N. C. 307..... 86
Mears v. Board of Education ....214 N. C. 89..... 195
Melton v. Rickman .....225 N. C. 700.....219, 560
Melvin v. Bullard ..... 82 N. C. 33..... 656
Melvin v. Easley..... 46 N. C. 386..... 643
Melvin v. Robinson ..... 42 N. C. 80.....427, 790
Mercantile Co. v. Ins. Co. .....176 N. C. 545..... 569
Mercer v. Williams .....210 N. C. 456..... 243
Merchant v. Lassiter .....224 N. C. 343..... 174
Meredith v. R. R. .....137 N. C. 478..... 174
Metcalf v. Ratcliff .....216 N. C. 216..... 269
Midgett v. Twiford .....120 N. C. 4..... 275
Midgett v. Vann .....158 N. C. 128..... 536
Midkiff v. Ins. Co. .....197 N. C. 139..... 569
Miles Co. v. Powell .....205 N. C. 30..... 88
Millar v. Wilson .....222 N. C. 340..... 457

Miller v. Greenwood ....218 N. C. 146....220, 560
Miller v. Harding ....167 N. C. 53.... 121
Miller v. Marriner ....187 N. C. 449.... 45
Miller v. Wood ....210 N. C. 520.... 258
Milling Co. v. Finlay ....110 N. C. 411.... 55
Mills v. Building & Loan Assn. ....216 N. C. 664.... 567
Mills v. Mills ....195 N. C. 595.... 11
Mitchell v. Mitchell .... 96 N. C. 14.... 321
Mitchell v. Tedder ....107 N. C. 358.... 6
Mitchell v. Trustees .... 71 N. C. 400.... 461
Mitchem v. Weaving Co. ....210 N. C. 732....219, 561
Modlin v. R. R. ....145 N. C. 218.... 275
Monroe v. Niven ....221 N. C. 362....85, 86, 214
Montgomery v. Blades ....217 N. C. 654....321, 322, 323, 404, 405
Montgomery v. Blades ....222 N. C. 463....30, 711, 717
Moody v. State Prison ....128 N. C. 12.... 35
Moore v. Jordan ....117 N. C. 86.... 427
Moore v. Lambeth ....207 N. C. 23.... 564
Moore v. Powell ....205 N. C. 636.... 776
Moore v. R. R. ....183 N. C. 213.... 174
Moore v. R. R. ....201 N. C. 26....710, 712
Moore v. State ....200 N. C. 300.... 358
Moore v. Vandenburg .... 90 N. C. 10.... 628
Moore County v. Burns ....224 N. C. 700.... 716
Morgan v. Coach Co. ....228 N. C. 280.... 777
Morgan v. Spruill ....214 N. C. 255.... 106
Morris v. Basnight ....179 N. C. 298.... 65
Morris v. Express Co. ....183 N. C. 144.... 174
Morris v. Johnson ....214 N. C. 402.... 711
Mortgage Co. v. Long ....205 N. C. 533.... 729
Mortgage Co. v. Winston-Salem ..216 N. C. 726.... 454
Motley v. Whitemore .... 19 N. C. 537.... 158
Mullen v. Louisburg ....225 N. C. 53.... 625
Murphy v. Ins. Co. ....167 N. C. 334.... 531
Murphy v. Lumber Co. ....186 N. C. 746.... 443
Murray v. R. R. ....218 N. C. 392....31, 117, 717
Muse v. Assurance Co. ....108 N. C. 240.... 569
Myatt v. Myatt .... 149 N. C. 137.... 332

N

Narron v. R. R. ....122 N. C. 856.... 699
Nash v. Royster ....189 N. C. 408.... 296
Nash v. Tarboro....227 N. C. 283....139, 455
Neal, *In re* Will of ....227 N. C. 136....11, 12
Neely v. Statesville ....212 N. C. 365.... 234
Nelson v. Nelson ....176 N. C. 191.... 172
Nesbitt v. Donoho ....198 N. C. 147.... 352
Nesbit v. Kafer ....222 N. C. 48.... 637
Newbern v. Telegraph Co. ....196 N. C. 14.... 693
Newberry v. Fertilizer Co. ....203 N. C. 330.... 495
Newell v. Darnell ....209 N. C. 254.... 30
Nichols v. Fibre Co. ....190 N. C. 1.... 23
Nichols v. Gladden....117 N. C. 497.... 121
Nickols v. Goldston....228 N. C. 514.... 448

Nobles v. Davenport ..... 183 N. C. 207 656
Nobles v. Nobles ..... 177 N. C. 243 121
Norman v. Ausbon ..... 193 N. C. 791 606
Nowell v. Basnight ..... 185 N. C. 142 711
Nutt Corp. v. R. R. ..... 214 N. C. 19 729

O

Oates v. Gray ..... 66 N. C. 442 260
Ogden, *In re* ..... 211 N. C. 100 ..... 431, 631
Oil Co. v. Hunt ..... 187 N. C. 157 297
Oldham v. Ross ..... 214 N. C. 696 373
Osborne v. Canton ..... 219 N. C. 139 ..... 228, 404
Osborne v. Coal Co. ..... 207 N. C. 545 30
Osborne v. Wilkes ..... 108 N. C. 651 557
Overton v. Highsmith ..... 191 N. C. 376 547
Owens v. Owens ..... 100 N. C. 240 162
Owens v. Rothrock ..... 198 N. C. 594 332

P

Page v. McLamb ..... 215 N. C. 789 440
Palmer v. Haywood County ..... 212 N. C. 284 ..... 457, 461, 463
Pappas v. Crist ..... 223 N. C. 265 712
Pardue v. Absher ..... 174 N. C. 676 526
Parker v. Eason ..... 213 N. C. 115 656
Parker, *In re* ..... 144 N. C. 170 ..... 85, 631
Parker v. Ins. Co. ..... 188 N. C. 403 312
Parker v. Porter ..... 208 N. C. 31 552
Parker v. Potter ..... 200 N. C. 348 162
Parker v. Realty Co. ..... 195 N. C. 644 536
Parker v. Tea Co. ..... 201 N. C. 691 ..... 731, 732
Parks v. R. R. ..... 143 N. C. 289 700
Parish v. Cedar Co. ..... 133 N. C. 478 769
Parrish v. Hewitt ..... 220 N. C. 708 220
Parrish v. Mfg. Co. ..... 211 N. C. 7 ..... 51, 394
Parrish v. R. R. ..... 221 N. C. 292 402
Parrott v. Kantor ..... 216 N. C. 584 513
Parsons, *In re* Will of ..... 207 N. C. 584 446
Paschal v. Paschal ..... 197 N. C. 40 656
Pass v. Rubber Co. ..... 198 N. C. 123 94
Patrick v. Bryan ..... 202 N. C. 62 443
Patrick v. Springs ..... 154 N. C. 270 731
Patterson v. McCormick ..... 177 N. C. 448 767
Patterson v. McCormick ..... 181 N. C. 311 381
Paul v. Davenport ..... 217 N. C. 154 447
Peace v. Edwards ..... 170 N. C. 64 447
Peace v. Jones ..... 7 N. C. 256 495
Pearson v. Pearson ..... 227 N. C. 31 310
Pearson v. Stores Corp. ..... 219 N. C. 717 ..... 162, 711
Peele v. Powell ..... 156 N. C. 553 791
Peeler v. Casualty Co. ..... 197 N. C. 286 309
Peeples v. R. R. ..... 228 N. C. 590 ..... 322, 404
Pemberton v. Greensboro ..... 203 N. C. 514 402
Pender v. Ins. Co. ..... 163 N. C. 98 531
Penland v. Gowan ..... 229 N. C. 449 733

Penland v. R. R. ....228 N. C. 528.... 710
Penland v. Wells....201 N. C. 173.... 424
Peoples v. Fulk ....220 N. C. 635.... 353
Perry v. Hackney ....142 N. C. 368.... 121
Perry v. Hurdle ....229 N. C. 216.... 560
Perry v. R. R. ....128 N. C. 471....481, 643
Perry v. R. R. ....171 N. C. 158.... 174
Perry v. Surety Co. ....190 N. C. 284.... 424
Person v. Doughton, Comr. of Revenue ....186 N. C. 723....193, 195
Petty v. Insurance Co. ....210 N. C. 500.... 373
Petway v. Powell .... 22 N. C. 308.... 762
Phillips v. Nessmith ....226 N. C. 173.... 384
Pickens v. Whitton ....182 N. C. 779.... 91
Pickett v. Southerland .... 60 N. C. 615.... 762
Pigford v. R. R. ....160 N. C. 93.... 93
Pike v. Seymour....222 N. C. 42.... 354
Pinchback v. Mining Co. ....137 N. C. 171.... 743
Pinnix v. Griffin ....221 N. C. 348.... 691
Pipe & Foundry Co. v. Woltman ....114 N. C. 178.... 801
Plott v. Ferguson ....202 N. C. 446.... 769
Poindexter, *In re* Estate of ....221 N. C. 246.... 606
Pollard v. Pollard ....221 N. C. 46.... 198
Poole, Dependents of v. Sigmon ..202 N. C. 172.... 369
Porter v. Alexander ....195 N. C. 5.... 528
Poston v. Bowen ....228 N. C. 202.... 424
Potato Co. v. Jenette ....172 N. C. 1.... 95
Potter v. Bonner ....174 N. C. 20.... 275
Potts v. Ins. Co. ....206 N. C. 257.... 729
Powell v. Moore ....204 N. C. 654.... 435
Powell v. Strickland ....163 N. C. 393....392, 481, 482
Powell v. Turpin ....224 N. C. 67.... 214
Powell v. Water Co. ....171 N. C. 290.... 405
Power Co. v. Casualty Co. ....153 N. C. 275.... 536
Power Co. v. Clay County ....213 N. C. 698....461, 463
Power Co. v. Wissler ....160 N. C. 269.... 688
Powers v. Service Co. ....202 N. C. 13.... 209
Powers v. Sternberg ....213 N. C. 41....31, 354, 595, 712
Pratt v. Tea Co. ....218 N. C. 732....732, 796
Presnell v. Liner ....218 N. C. 152.... 95
Pressley v. Tea Co. ....226 N. C. 518....55, 56
Presson v. Boone ....108 N. C. 79.... 577
Pretzfelder v. Ins. Co. ....123 N. C. 164.... 693
Price v. Griffin ....150 N. C. 523.... 121
Pridgen v. Coach Co. ....229 N. C. 46.... 707
Pridgen v. Pridgen ....203 N. C. 533....84, 85
Provision Co. v. Daves ....190 N. C. 7.... 187
Pue v. Hood, Comr. of Banks ....222 N. C. 310.... 196

Q

Query v. Ins. Co. ....218 N. C. 386....356, 599

R

Rabil v. Farris ....213 N. C. 414.... 441
Radar v. Coach Co. ....225 N. C. 537....72, 356, 599, 662
Ragan v. Ragan ....212 N. C. 753.... 628
Ragan v. Ragan ....214 N. C. 36.... 599
R. R. v. Armfield ....189 N. C. 581.... 579
R. R. v. Brunswick County ....198 N. C. 549.... 628
R. R. v. Bunting ....168 N. C. 579.... 701
R. R. v. Cobb ....190 N. C. 375.... 526
R. R. v. Hardware Co. ....138 N. C. 175.... 560
R. R. v. Lissenbee ....219 N. C. 318....698, 699, 701
R. R. v. McCaskill .... 94 N. C. 746....699, 700
R. R. v. McLean ....158 N. C. 498....687, 701
R. R. v. Nichols ....187 N. C. 153.... 56
R. R. v. Olive ....142 N. C. 257....691, 699, 701
R. R. v. Sturgeon ....120 N. C. 225.... 699
R. R. v. Ziegler Bros. ....200 N. C. 396.... 612
Ramsey v. Furniture Co. ....209 N. C. 165.... 711
Randall v. R. R. ....107 N. C. 748.... 606
Randolph v. Edwards ....191 N. C. 334.... 159
Rattley v. Powell ....223 N. C. 134....31, 717
Rawls v. Bennett ....221 N. C. 127....220, 221, 560
Rawls v. Roebuck ....228 N. C. 537.... 121
Raynor v. Comrs. of Louisburg ..220 N. C. 348.... 564
Realty Co. v. Charlotte ....198 N. C. 564.... 564
Reddick v. Jones .... 28 N. C. 107.... 106
Redwine v. Clodfelter ....226 N. C. 366.... 434
Reeves v. Staley ....220 N. C. 573.... 717
Reich v. Cone ....180 N. C. 267.... 514
Rental Co. v. Justice ....211 N. C. 54.... 563
Reynolds, *In re* ....206 N. C. 276.... 434
Reynolds v. Reynolds ....208 N. C. 578.... 434
Reynolds Foundation v. Trustees Wake Forest College ....227 N. C. 500.... 412
Rhodes v. Collins ....198 N. C. 23.... 220
Rice v. Panel Co. ....199 N. C. 154.... 606
Richardson v. Richardson ....207 N. C. 314.... 458
Richmond County v. Simmons ....209 N. C. 250.... 429
Ricks v. Wilson ....154 N. C. 282....172, 424
Riddle v. Ledbetter ....216 N. C. 491....454, 459
Riddle v. Whisnant ....220 N. C. 131.... 115
Riggan v. Harrison ....203 N. C. 191.... 435
Riggs v. Oil Corp. ....228 N. C. 774.... 354
Rigsbee v. Brogden ....209 N. C. 510.... 472
Roach v. Pritchett ....228 N. C. 747.... 72
Roane v. McCoy ....182 N. C. 727.... 269
Robbins v. Robbins ....229 N. C. 430.... 632
Roberts v. Ins. Co. ....212 N. C. 1.... 520
Robertson v. Aldridge ....185 N. C. 292.... 514
Robertson v. Power Co. ....204 N. C. 359.... 116
Robinson v. McAlhaney ....216 N. C. 674.... 691
Robinson v. McDiarmid .... 87 N. C. 455.... 762
Robinson v. Robinson ....227 N. C. 155.... 166

Robinson v. Transportation Co. ....214 N. C. 489..... 322
Rodriguez v. Rodriguez .....224 N. C. 275..... 376
Roediger, *In re* Will of .....209 N. C. 470.....445, 447
Rogers v. Black Mountain .....224 N. C. 119.....115, 513
Rogers v. Jones .....172 N. C. 156.....546, 611
Roland v. Express Co. .....201 N. C. 815..... 51
Roper v. Roper ..... 58 N. C. 16..... 762
Rose v. Warehouse Co. .....182 N. C. 107..... 322
Ross v. Greyhound Corp. .....223 N. C. 239..... 439
Rosser v. Matthews .....217 N. C. 132..... 214
Rotan v. State .....195 N. C. 291..... 35
Roughton v. Brown ..... 53 N. C. 393..... 300
Rousseau v. Bullis .....201 N. C. 12..... 359
Rowe v. Lumber Co. .....133 N. C. 433..... 335
Rowland v. Board of Elections ....184 N. C. 78..... 194
Rowland, *In re* Will of .....202 N. C. 373.....11, 14
Russell v. Cutshall .....223 N. C. 353.....115, 506
Russos v. Bailey .....228 N. C. 783.....6, 7, 72
Ryals v. Contracting Co. .....219 N. C. 479..... 23

S

St. George v. Hardie .....147 N. C. 88..... 770
Sams v. Hotel Raleigh .....205 N. C. 758.....731, 732
Sanders v. Griffin .....191 N. C. 447..... 209
Sanders v. Ragan .....172 N. C. 612..... 352
Sanitary District v. Prudden ....195 N. C. 722..... 769
Satterthwaite v. Comrs. of Beaufort ..... 76 N. C. 153..... 460
Sawrey v. Murrell ..... 3 N. C. 397..... 798
Sawyer v. Toxey .....194 N. C. 341.....760, 762
Schaeffer v. Haseltine .....228 N. C. 484..... 155
Schenck, *In re* ..... 74 N. C. 607..... 303
Schnepp v. Richardson .....222 N. C. 228.....55, 404
School Com. v. Kesler ..... 67 N. C. 443..... 95
School Comrs. v. Aldermen .....158 N. C. 191.....150, 757
Schwingle v. Kellenberger .....217 N. C. 577..... 731
Sears v. Casualty Co. .....220 N. C. 9..... 309
Sebastian v. Motor Lines .....213 N. C. 770..... 448
Sessions v. Columbus County ....214 N. C. 634..... 629
Sessoms v. Sessoms.....144 N. C. 121..... 121
Sever v. McLaughlin ..... 79 N. C. 153..... 528
Sharpe v. Isley .....219 N. C. 753..... 166
Shell v. Roseman .....155 N. C. 90..... 384
Shelton, *In re* .....203 N. C. 75..... 633
Shepherd v. Shepherd .....179 N. C. 121..... 200
Shinn v. Motley ..... 56 N. C. 490..... 762
Shipp v. Stage Lines .....192 N. C. 475.....440, 441
Shober v. Wheeler.....144 N. C. 403..... 13
Shorter v. Cotton Mills .....198 N. C. 27..... 514
Shull v. Johnson ..... 55 N. C. 202..... 762
Silver v. Silver .....220 N. C. 191..... 119
Silver v. Skidmore .....213 N. C. 231..... 265
Simpson v. Simpson.....107 N. C. 552.....427, 790
Simmons v. Simmons .....228 N. C. 233..... 214

Simms v. Sampson ....221 N. C. 379.... 426
Simms v. Vick ....151 N. C. 78.... 106
Simons v. Lebrun....219 N. C. 42.... 729
Sing v. Charlotte ....213 N. C. 60....457, 461, 463
Singleton v. Cherry ....168 N. C. 402.... 172
Skinner v. Thomas ....171 N. C. 98.... 770
Slade v. Hosiery Mills ....209 N. C. 823.... 234
Sloan v. R. R. ....126 N. C. 487.... 579
Small v. Morrison ....185 N. C. 577.... 507
Smith v. Bank ....223 N. C. 249.... 625
Smith v. Bonney ....215 N. C. 183.... 729
Smith v. Building & Loan Assn. ....119 N. C. 257.... 54
Smith v. Coach Co. ....214 N. C. 314....28, 29
Smth v. Davis ....228 N. C. 172.... 236
Smith v. French ....141 N. C. 1.... 55
Smith v. Furniture Co. ....220 N. C. 155.... 716
Smith, *In re* Will of ....218 N. C. 161....11, 12, 446
Smith v. Ins. Co. ....193 N. C. 446.... 569
Smith v. Johnson ....137 N. C. 43.... 280
Smith v. Kappas ....219 N. C. 850.... 23
Smith v. Land Bank ....213 N. C. 343.... 228
Smith v. Mears ....218 N. C. 193.... 155
Smith v. Miller ....209 N. C. 170.... 777
Smith v. Paper Co. ....226 N. C. 47.... 358
Smith v. Sink ....211 N. C. 725....31, 354, 711
Smith v. Smith ....173 N. C. 124.... 121
Smith v. Smith ....225 N. C. 189....55, 603
Smith v. Thompson ....210 N. C. 672.... 443
Smith-Douglass Co. v. Honeycutt ....204 N. C. 219.... 729
Smithwick v. Moore ....145 N. C. 110....546, 611
Smithwick v. Smithwick ....218 N. C. 503.... 250
Smyth v. McKissick ....222 N. C. 644.... 166
Snow v. DeButts....212 N. C. 120.... 51
Snyder v. Maxwell, Comr. of Revenue ....217 N. C. 617.... 317
Sondley v. Asheville ....110 N. C. 84....90, 91
South v. Sisk ....205 N. C. 655.... 528
Southerland v. Goldsboro .... 96 N. C. 49.... 185
Southern v. Freeman ....211 N. C. 121.... 269
Southern Mills v. Yarn Co. ....223 N. C. 479.... 716
Sparks v. Willis ....228 N. C. 25.... 776
Sparrow v. Morrell & Co. ....215 N. C. 452.... 106
Speas v. Bank ....188 N. C. 524.... 801
Speight v. Trust Co. ....209 N. C. 563.... 163
Spence v. Pottery Co. ....185 N. C. 218.... 66
Spence v. Tapscott .... 92 N. C. 576.... 628
Spencer v. Brown ....214 N. C. 114....23, 266
Spencer v. McCleneghan ....202 N. C. 662.... 434
Spitzer v. Comrs. of Franklin County ....188 N. C. 30....392, 767
Spruill v. Ins. Co. ....120 N. C. 141.... 312
Stallings v. Stallings .... 16 N. C. 298.... 656
Stanback v. Haywood ....213 N. C. 535.... 691

Stanley v. Hyman-Michaels Co.....222 N. C. 257..... 550
Stanly v. Hendricks ..... 35 N. C. 86..... 791
Starmount Co. v. Hamilton Lakes .....205 N. C. 514.....458, 461, 463
Starnes v. Hill .....112 N. C. 1..... 121
S. v. Abernethy .....220 N. C. 226..... 390
S. v. Adams .....115 N. C. 775..... 101
S. v. Adams .....133 N. C. 667..... 127
S. v. Adams .....193 N. C. 581..... 720
S. v. Adams .....214 N. C. 501..... 680
S. v. Allen .....186 N. C. 302.....673, 679, 680
S. v. Allen .....222 N. C. 145.....669, 670
S. v. Alston .....210 N. C. 258.....208, 673, 679
S. v. Alston .....214 N. C. 93..... 673
S. v. Alston .....215 N. C. 713..... 673
S. v. Anderson .....222 N. C. 148..... 721
S. v. Anderson .....228 N. C. 720..... 208
S. v. Andrew ..... 61 N. C. 205..... 111
S. v. Arnold ..... 35 N. C. 184..... 706
S. v. Artis .....227 N. C. 371..... 208
S. v. Austin .....108 N. C. 780..... 393
S. v. Ballangee .....191 N. C. 700..... 413
S. v. Ballard ..... 79 N. C. 627.....393, 394, 395, 396
S. v. Banks .....204 N. C. 233..... 501
S. v. Batson .....220 N. C. 411..... 650
S. v. Beal .....199 N. C. 278.....278, 500, 671, 738
S. v. Beal .....202 N. C. 266..... 642
S. v. Bell .....205 N. C. 225..... 416
S. v. Bell .....228 N. C. 659.....231, 232
S. v. Bentley .....223 N. C. 563..... 538
S. v. Best ..... 202 N. C. 9..... 127
S. v. Bevers ..... 86 N. C. 588..... 316
S. v. Biggs .....224 N. C. 23..... 111
S. v. Blackwelder .....182 N. C. 899..... 220
S. v. Boyd .....223 N. C. 79.....534, 649
S. v. Boynton .....155 N. C. 456..... 103
S. v. Bracy .....215 N. C. 248.....125, 673
S. v. Brandon ..... 53 N. C. 463.....125, 598, 674
S. v. Bridgers ..... 87 N. C. 562..... 642
S. v. Bright .....215 N. C. 537..... 338
S. v. Britt .....225 N. C. 364..... 721
S. v. Brittain ..... 89 N. C. 481..... 673
S. v. Brooks .....225 N. C. 662..... 111
S. v. Brown .....204 N. C. 392..... 208
S. v. Brown .....207 N. C. 156..... 649
S. v. Brown .....225 N. C. 22.....50, 706
S. v. Brown .....226 N. C. 681..... 208
S. v. Bryant .....213 N. C. 752..... 721
S. v. Buchanan .....130 N. C. 660..... 706
S. v. Bullins .....226 N. C. 142..... 500
S. v. Burke ..... 73 N. C. 83..... 231
S. v. Burnett .....184 N. C. 783..... 500
S. v. Burnette .....173 N. C. 734.....299, 303
S. v. Burnette .....213 N. C. 153..... 378
S. v. Burrage .....223 N. C. 129..... 539

S. v. Burton ..... 138 N. C. 576 706
S. v. Calcutt ..... 219 N. C. 545 550
S. v. Call ..... 121 N. C. 643 ..... 770, 772
S. v. Callett ..... 211 N. C. 563 414
S. v. Campbell ..... 182 N. C. 911 220
S. v. Capps ..... 134 N. C. 622 670
S. v. Carland ..... 90 N. C. 668 673
S. v. Carmon ..... 145 N. C. 481 210
S. v. Carroll ..... 226 N. C. 237 ..... 533, 534, 593, 594
S. v. Casey ..... 201 N. C. 185 210
S. v. Casey ..... 201 N. C. 620 503
S. v. Casey ..... 212 N. C. 352 207
S. v. Chaffin ..... 125 N. C. 660 649
S. v. Childress ..... 228 N. C. 208 ..... 378, 673
S. v. Clark ..... 225 N. C. 52 338
S. v. Clemmons ..... 207 N. C. 276 416
S. v. Cloninger ..... 149 N. C. 567 125
S. v. Coffey ..... 228 N. C. 119 ..... 588, 649
S. v. Cogdale ..... 227 N. C. 59 500
S. v. Cohoon ..... 206 N. C. 388 ..... 649, 798
S. v. Collins ..... 93 N. C. 564 208
S. v. Collins ..... 169 N. C. 323 70
S. v. Colson ..... 193 N. C. 236 278
S. v. Connor ..... 142 N. C. 700 ..... 544, 706
S. v. Cooper ..... 170 N. C. 719 125
S. v. Cope ..... 204 N. C. 28 595
S. v. Correll ..... 228 N. C. 28 641
S. v. Craine ..... 120 N. C. 601 642
S. v. Crane ..... 110 N. C. 530 208
S. v. Craton ..... 28 N. C. 164 673
S. v. Culberson ..... 228 N. C. 615 207
S. v. Cureton ..... 218 N. C. 491 ..... 125, 673
S. v. Cutshall ..... 109 N. C. 764 392
S. v. Dale ..... 218 N. C. 625 208
S. v. Daniels ..... 134 N. C. 641 70
S. v. Davenport ..... 156 N. C. 596 169
S. v. Davenport ..... 225 N. C. 13 391
S. v. Davenport ..... 227 N. C. 475 ..... 208, 594
S. v. Davis ..... 214 N. C. 787 ..... 681, 706
S. v. Davis ..... 223 N. C. 54 416
S. v. Davis ..... 223 N. C. 381 673
S. v. Davis ..... 225 N. C. 117 ..... 339, 722
S. v. Davis ..... 229 N. C. 386 ..... 462, 656, 738
S. v. Debnam ..... 98 N. C. 712 649
S. v. Debnam ..... 222 N. C. 266 ..... 378, 539, 673
S. v. Dee ..... 214 N. C. 509 ..... 650, 729
S. v. DeMai ..... 227 N. C. 657 722
S. v. Dickens ..... 215 N. C. 303 81
S. v. Dickerson ..... 189 N. C. 327 208
S. v. Dilliard ..... 223 N. C. 446 523
S. v. Dixon ..... 215 N. C. 161 767
S. v. Dowell ..... 195 N. C. 523 706
S. v. Dunheen ..... 224 N. C. 738 503
S. v. Dunn ..... 159 N. C. 470 ..... 299, 303
S. v. Dunning ..... 177 N. C. 559 646

S. v. Earnhardt ....170 N. C. 725.... 367
S. v. Edwards ....110 N. C. 511.... 90
S. v. Edwards ....205 N. C. 661.... 503
S. v. Edwards ....211 N. C. 555....648, 649, 673
S. v. Edwards ....224 N. C. 527.... 390
S. v. Efler .... 85 N. C. 585.... 278
S. v. Ellick .... 60 N. C. 450.... 673
S. v. Ellison ....226 N. C. 628.... 539
S. v. English ....164 N. C. 497....125, 673, 679, 680
S. v. Estes ....185 N. C. 752.... 81
S. v. Evans ....189 N. C. 233.... 393
S. v. Evans ....198 N. C. 82.... 672
S. v. Ewing ....227 N. C. 535.... 210
S. v. Fain ....216 N. C. 157.... 111
S. v. Farrell ....223 N. C. 321....299, 301, 302, 500, 501, 669, 677
S. v. Farrell ....223 N. C. 804.... 393
S. v. Finch ....177 N. C. 599....316, 647
S. v. Fleming ....204 N. C. 40.... 91
S. v. Flinchem ....228 N. C. 149.... 534
S. v. Floyd ....226 N. C. 571.... 672
S. v. Foster ....172 N. C. 960....674, 679, 680
S. v. Foster ....185 N. C. 674.... 706
S. v. Freeman ....122 N. C.1012.... 642
S. v. Freeman ....213 N. C. 378....648, 726, 799
S. v. Freeman ....216 N. C. 161.... 414
S. v. Freshwater ....183 N. C. 762.... 449
S. v. Fulcher ....184 N. C. 663.... 43
S. v. Gardner ....226 N. C. 310.... 210
S. v. Gardner ....227 N. C. 37.... 209
S. v. Gardner ....228 N. C. 567....208, 652
S. v. Garland ....138 N. C. 675.... 722
S. v. Gause ....227 N. C. 26....550, 650
S. v. Gay ....224 N. C. 141.... 541
S. v. Gee .... 92 N. C. 756.... 396
S. v. Gentry ....125 N. C. 733.... 642
S. v. Gentry ....228 N. C. 643.... 594
S. v. Gibson ....229 N. C. 497.... 669
S. v. Godwin ....216 N. C. 49....254, 257, 500, 669
S. v. Godwin ....227 N. C. 449.... 101
S. v. Goff ....205 N. C. 545.... 649
S. v. Gordon ....225 N. C. 757.... 649
S. v. Gore ....207 N. C. 618.... 390
S. v. Goss ....201 N. C. 373.... 670
S. v. Goulden ....134 N. C. 743.... 706
S. v. Grady .... 83 N. C. 643.... 642
S. v. Grass ....223 N. C. 31.... 672
S. v. Gray ....180 N. C. 697....209, 776
S. v. Gregory ....203 N. C. 528.... 539
S. v. Green ....85 N. C. 600....300, 304
S. v. Griffice .... 74 N. C. 316.... 71
S. v. Griffith ....185 N. C. 756.... 210
S. v. Griggs ....197 N. C. 352.... 649
S. v. Groves ....121 N. C. 563.... 642
S. v. Guest ....100 N. C. 410....389, 392

S. v. Gulledge ....208 N. C. 204.... 454
S. v. Guthrie ....145 N. C. 492.... 208
S. v. Hairston ....222 N. C. 455....111, 125, 673, 680
S. v. Hammonds ....216 N. C. 67.... 673
S. v. Hancock ....151 N. C. 699.... 673
S. v. Hankins ....136 N. C. 621.... 416
S. v. Harris .... 53 N. C. 136....253, 255
S. v. Harris ....213 N. C. 758.... 705
S. v. Harris ....216 N. C. 746....615, 616, 767, 770, 771
S. v. Harris ....223 N. C. 697....125, 390, 598, 672, 674, 680, 681
S. v. Hart ....186 N. C. 582.... 674
S. v. Hart ....226 N. C. 200....500, 745
S. v. Harvey ....228 N. C. 62....588, 672
S. v. Hauser ....202 N. C. 738.... 680
S. v. Hawkins ....214 N. C. 326....338, 721
S. v. Hawley ....229 N. C. 167.... 481
S. v. Haywood .... 61 N. C. 376....125, 674
S. v. Haywood .... 94 N. C. 847....253, 255, 256, 257
S. v. Heaton .... 81 N. C. 543.... 706
S. v. Hedgebeth ....228 N. C. 259....302, 303, 500
S. v. Hege ....194 N. C. 526.... 706
S. v. Henderson ....216 N. C. 99....39, 70, 500
S. v. Hicks ....143 N. C. 689.... 770
S. v. Hightower ....226 N. C. 62.... 339
S. v. Hill ....181 N. C. 558.... 541
S. v. Holly ....155 N. C. 485.... 720
S. v. Hopkins ....154 N. C. 622.... 101
S. v. Horne ....209 N. C. 725.... 379
S. v. Hough ....227 N. C. 596.... 339
S. v. Howell ....218 N. C. 280....676, 681
S. v. Howley ....220 N. C. 113....481, 643
S. v. Ice Co. ....166 N. C. 366.... 101
S. v. Jackson ....228 N. C. 656.... 727
S. v. Jeffreys ....117 N. C. 743.... 541
S. v. Jenkins ....195 N. C. 747.... 647
S. v. Jenkins ....208 N. C. 740.... 674
S. v. Johnson .... 48 N. C. 266.... 670
S. v. Johnson ....170 N. C. 685.... 150
S. v. Johnson ....188 N. C. 591.... 706
S. v. Johnson ....193 N. C. 701.... 347
S. v. Johnson ....219 N. C. 757.... 721
S. v. Johnson ....226 N. C. 266.... 413
S. v. Jones ....191 N. C. 753....126, 673
S. v. Jones ....203 N. C. 374.... 125
S. v. Jones ....206 N. C. 812.... 500
S. v. Jones ....218 N. C. 734....413, 414
S. v. Jones ....227 N. C. 561.... 37
S. v. Journegan ....185 N. C. 700.... 597
S. v. Kale ....124 N. C. 816.... 673
S. v. Keaton ....206 N. C. 682.... 681
S. v. Keever ....177 N. C. 114.... 673
S. v. Kennedy ....169 N. C. 326.... 722
S. v. Kennerly .... 98 N. C. 657.... 318
S. v. Khoury ....149 N. C. 454....253, 256

S. v. Kiger ..... 115 N. C. 746 210
S. v. Killian ..... 173 N. C. 792 720
S. v. Kincaid ..... 183 N. C. 709 670
S. v. King ..... 162 N. C. 580 210
S. v. King ..... 219 N. C. 667 208
S. v. King ..... 225 N. C. 236 ..... 391, 672
S. v. Kirkland ..... 178 N. C. 810 231
S. v. Koritz ..... 227 N. C. 552 ..... 37, 39
S. v. Lampkin ..... 227 N. C. 620 418
S. v. Langford ..... 44 N. C. 436 670
S. v. Langley ..... 209 N. C. 178 81
S. v. Lassiter ..... 191 N. C. 210 ..... 394, 727
S. v. Lawrence ..... 81 N. C. 522 ..... 300, 304
S. v. Lawrence ..... 213 N. C. 674 ..... 765, 767, 768, 771, 772
S. v. Lawson ..... 123 N. C. 740 393
S. v. Lea ..... 203 N. C. 13 ..... 297, 669
S. v. Lee ..... 193 N. C. 321 339
S. v. Lee ..... 206 N. C. 472 378
S. v. Lee ..... 211 N. C. 326 720
S. v. Lee ..... 213 N. C. 319 210
S. v. Levy ..... 187 N. C. 581 207
S. v. Limerick ..... 146 N. C. 649 539
S. v. Little ..... 228 N. C. 417 ..... 169, 170, 481
S. v. Lockey ..... 198 N. C. 551 ..... 615, 769
S. v. Lowe ..... 204 N. C. 572 127
S. v. Lowery ..... 223 N. C. 598 596
S. v. Lueders ..... 214 N. C. 558 773
S. v. Lunsford ..... 177 N. C. 117 208
S. v. Luquire ..... 191 N. C. 479 103
S. v. McDowell ..... 101 N. C. 734 393
S. v. McKeithan ..... 203 N. C. 494 390
S. v. McKinnon ..... 223 N. C. 160 278
S. v. McKnight ..... 131 N. C. 717 ..... 77, 770
S. v. McKnight ..... 226 N. C. 766 ..... 304, 305
S. v. McLeod ..... 196 N. C. 542 210
S. v. McManus ..... 217 N. C. 445 679
S. v. McNair ..... 93 N. C. 628 ..... 208, 706
S. v. McNeill ..... 229 N. C. 377 ..... 394, 673
S. v. McNinch ..... 90 N. C. 695 220
S. v. McWhirter ..... 193 N. C. 845 649
S. v. Mace ..... 118 N. C. 1244 ..... 648, 649
S. v. Malpass ..... 189 N. C. 349 ..... 395, 416
S. v. Manning ..... 221 N. C. 70 ..... 111, 126
S. v. Marsh ..... 132 N. C. 1000 413
S. v. Martin ..... 188 N. C. 119 392
S. v. Massey ..... 86 N. C. 658 541
S. v. Matthews ..... 142 N. C. 621 642
S. v. Matthews ..... 226 N. C. 639 125
S. v. Maultsby ..... 139 N. C. 583 140
S. v. Melton ..... 120 N. C. 591 393
S. v. Melvin ..... 194 N. C. 394 ..... 726, 727
S. v. Merrick ..... 171 N. C. 788 378
S. v. Midgett ..... 214 N. C. 107 416
S. v. Miller ..... 197 N. C. 445 646
S. v. Miller ..... 214 N. C. 317 650

S. v. Miller ....220 N. C. 660....595, 596
S. v. Minton ....228 N. C. 15.... 721
S. v. Mitchell ....151 N. C. 716.... 494
S. v. Mitchell ....217 N. C. 244.... 769
S. v. Moore ....113 N. C. 697.... 769
S. v. Moore ....210 N. C. 686.... 111
S. v. Moore ....227 N. C. 326.... 541
S. v. Morgan ....226 N. C. 414.... 413
S. v. Mosley ....213 N. C. 304....339, 721
S. v. Murphrey ....186 N. C. 113.... 81
S. v. Murphy ....157 N. C. 614....673, 679
S. v. Murphy ....225 N. C. 115.... 534
S. v. Nance ....195 N. C. 47.... 720
S. v. Nash .... 86 N. C. 650.... 416
S. v. Neville ....157 N. C. 591.... 347
S. v. Noland .... 85 N. C. 576.... 170
S. v. Norman .... 13 N. C. 222.... 706
S. v. Norris ....206 N. C. 191.... 81
S. v. O'Neal .... 29 N. C. 251.... 643
S. v. Oxendine ....223 N. C. 659.... 128
S. v. Oxendine ....224 N. C. 825.... 208
S. v. Penry ....220 N. C. 248.... 649
S. v. Peoples ....131 N. C. 784.... 70
S. v. Perry ....226 N. C. 530....500, 672
S. v. Peterson ....225 N. C. 540.... 681
S. v. Phillips ....227 N. C. 277.... 500
S. v. Phipps .... 76 N. C. 203....389, 391, 392
S. v. Plummer ....186 N. C. 261.... 81
S. v. Portee ....200 N. C. 142.... 393
S. v. Potter ....221 N. C. 153.... 349
S. v. Potts ....100 N. C. 457....125, 126, 598, 674, 681
S. v. Price ....175 N. C. 804.... 649
S. v. Prince ....182 N. C. 788.... 649
S. v. Pritchard ....227 N. C. 168.... 302
S. v. Quick ....150 N. C. 820.... 720
S. v. Randolph ....228 N. C. 228.... 538
S. v. Rash .... 34 N. C. 382.... 670
S. v. Redman ....217 N. C. 483....680, 681
S. v. Revis ....193 N. C. 192.... 773
S. v. Rice ....158 N. C. 635.... 459
S. v. Riddle ....228 N. C. 251.... 721
S. v. Rinehart ....106 N. C. 787....388, 389, 392, 394
S. v. Rising ....223 N. C. 747....207, 669
S. v. Roberson ....215 N. C. 784.... 278
S. v. Roberts ....188 N. C. 460....389, 393, 394
S. v. Robinson ....188 N. C. 784.... 378
S. v. Robinson ....213 N. C. 273.... 722
S. v. Robinson ....226 N. C. 95.... 720
S. v. Robinson ....229 N. C. 647.... 629
S. v. Rogers ....216 N. C. 731.... 111
S. v. Rollins ....113 N. C. 722.... 673
S. v. Rose .... 61 N. C. 406....392, 393
S. v. Ross ....193 N. C. 25....669, 673, 679
S. v. Sandlin ....156 N. C. 624....253, 256, 257
S. v. Sasseen ....206 N. C. 644.... 449

S. v. Sauls .....190 N. C. 810..... 500
S. v. Sheffield .....206 N. C. 374..... 649
S. v. Shelton .....164 N. C. 513.....673, 679
S. v. Shepherd .....220 N. C. 377..... 720
S. v. Siler .....169 N. C. 314..... 77
S. v. Simpson .....133 N. C. 676.....392, 393, 395, 396
S. v. Singleton .....183 N. C. 738..... 672
S. v. Sloan ..... 97 N. C. 499..... 70
S. v. Smith ..... 77 N. C. 488..... 674
S. v. Smith .....136 N. C. 684..... 541
S. v. Smith .....152 N. C. 798..... 101
S. v. Smith .....157 N. C. 578..... 706
S. v. Smith .....218 N. C. 334..... 208
S. v. Smith .....221 N. C. 400..... 339
S. v. Smith .....223 N. C. 457.....209, 597
S. v. Smith .....225 N. C. 78..... 721
S. v. Smith .....226 N. C. 738..... 500
S. v. Smoak .....213 N. C. 79..... 209
S. v. Snead .....228 N. C. 37..... 673
S. v. Sowls ..... 61 N. C. 151..... 231
S. v. Spivey .....132 N. C. 989..... 125
S. v. Stafford .....203 N. C. 601.....125, 435
S. v. Stallings .....189 N. C. 104..... 449
S. v. Stansberry .....197 N. C. 350..... 649
S. v. Stanton ..... 23 N. C. 424..... 642
S. v. Staples .....157 N. C. 637..... 459
S. v. Starling ..... 51 N. C. 366.....125, 126
S. v. Starnes .....220 N. C. 384..... 650
S. v. Steelman .....228 N. C. 634..... 594
S. v. Stewart .....189 N. C. 340..... 208
S. v. Stone .....226 N. C. 97..... 278
S. v. Strickland .....192 N. C. 253..... 81
S. v. Strickland .....229 N. C. 201..... 669
S. v. Suggs ..... 89 N. C. 527..... 170
S. v. Sutton .....225 N. C. 332..... 347
S. v. Swink .....229 N. C. 123.....342, 673
S. v. Taylor ..... 88 N. C. 694..... 799
S. v. Taylor .....133 N. C. 755..... 416
S. v. Terrell .....212 N. C. 145..... 339
S. v. Terry .....173 N. C. 761.....125, 126
S. v. Thomas .....184 N. C. 757..... 378
S. v. Thomas .....220 N. C. 34..... 597
S. v. Todd .....222 N. C. 346.....534, 649, 798
S. v. Tucker .....190 N. C. 708..... 643
S. v. Tuttle .....207 N. C. 649..... 721
S. v. Tyson .....133 N. C. 692.....170, 643
S. v. Utley .....223 N. C. 39.....207, 597, 673
S. v. Vanderlip .....225 N. C. 610..... 413
S. v. Van Doran .....109 N. C. 864.....80, 770
S. v. Vann ..... 84 N. C. 722.....253, 257
S. v. Vaughn .....129 N. C. 502..... 210
S. v. Wagstaff .....219 N. C. 15..... 721
S. v. Walker .....193 N. C. 489.....126, 673
S. v. Wall .....218 N. C. 566..... 347
S. v. Walls .....211 N. C. 487.....39, 70, 500

S. v. Warren ..... 228 N. C. 22 347
S. v. Watson ..... 208 N. C. 70 417
S. v. Watts ..... 224 N. C. 771 ..... 43, 649
S. v. Webb ..... 228 N. C. 304 597
S. v. Weddington ..... 188 N. C. 643 459
S. v. Wellmon ..... 222 N. C. 215 669
S. v. West ..... 152 N. C. 832 347
S. v. White ..... 164 N. C. 408 494
S. v. Whitehurst ..... 212 N. C. 300 606
S. v. Whitener ..... 191 N. C. 659 111
S. v. Whitfield ..... 206 N. C. 696 ..... 500, 501, 669
S. v. Wilcox ..... 132 N. C. 1120 597
S. v. Williams ..... 129 N. C. 581 ..... 388, 390
S. v. Williams ..... 158 N. C. 610 317
S. v. Williams ..... 189 N. C. 616 ..... 679, 681
S. v. Williams ..... 224 N. C. 183 ..... 84, 550, 799
S. v. Willis ..... 63 N. C. 26 673
S. v. Wilson ..... 197 N. C. 547 126
S. v. Wilson ..... 205 N. C. 376 ..... 393, 394
S. v. Wolfe ..... 227 N. C. 461 650
S. v. Wooten ..... 228 N. C. 628 258
Steele, *In re* ..... 220 N. C. 685 ..... 303, 305
Steelman, *In re* ..... 219 N. C. 306 572
Stephens v. Johnson ..... 215 N. C. 133 448
Stephens Co. v. Charlotte ..... 201 N. C. 258 564
Stone v. Milling Co. ..... 192 N. C. 585 95
Stone v. R. R. ..... 197 N. C. 429 712
Storm v. Wrightsville Beach ..... 189 N. C. 679 ..... 461, 463
Story v. Story ..... 221 N. C. 114 632
Strause v. Ins. Co. ..... 128 N. C. 64 570
Street v. Andrews ..... 115 N. C. 417 ..... 54, 56
Street v. Tuck ..... 84 N. C. 605 ..... 321, 404
Strider v. Lewey ..... 176 N. C. 448 135
Styers, *In re* Estate of ..... 202 N. C. 715 551
Suddreth v. Charlotte ..... 223 N. C. 630 35
Summerell v. Sales Corp. ..... 218 N. C. 451 90
Supply Co. v. Conoly ..... 204 N. C. 677 342
Supply Co. v. Watt ..... 181 N. C. 432 94
Suskin, *In re* Estate of ..... 214 N. C. 219 13
Swicegood v. Swift & Co. ..... 212 N. C. 396 115
Swink v. Horn ..... 226 N. C. 713 776
Swinson v. Nance ..... 219 N. C. 772 ..... 448, 449
Sydnor v. Boyd ..... 119 N. C. 481 ..... 19, 20

T

Talley v. Murchison ..... 212 N. C. 205 545
Tarpley v. Arnold ..... 226 N. C. 679 409
Tarrant v. Bottling Co. ..... 221 N. C. 390 177
Tatham v. Ins. Co. ..... 181 N. C. 434 570
Taylor v. Addington ..... 222 N. C. 393 172
Taylor v. Caudle ..... 210 N. C. 60 514
Taylor v. Construction Co. ..... 193 N. C. 775 443
Taylor, *In re* ..... 229 N. C. 297 305
Taylor v. Iron Co. ..... 94 N. C. 525 59

Taylor v. R. R. ....145 N. C. 400.... 261
Taylor v. Shufford .... 11 N. C. 116.... 316
TenHoopen, *In re* ....202 N. C. 223.... 633
Temple v. Hawkins ....220 N. C. 26.... 710
Temple v. Stafford ....227 N. C. 630.... 115
Templeton v. Kelley ....215 N. C. 577.... 711
Thaxton v. Ins. Co. ....143 N. C. 34.... 312
Thomas v. Morris ....190 N. C. 244.... 426
Thomason v. R. R. ....142 N. C. 318.... 260
Thompson v. Avery County ....216 N. C. 405.... 427
Thommpson v. Buchanan ....195 N. C. 155.... 55
Thompson v. Funeral Home....205 N. C. 801.... 358
Thompson, *In re* ....228 N. C. 74....85, 632
Thompson, *In re* Will of ....196 N. C. 271.... 446
Thrift Corp. v. Guthrie ....227 N. C. 431.... 729
Thurber v. LaRoque ....105 N. C. 301.... 172
Tighe v. R. R. ....176 N. C. 239....698, 700, 701
Timber Co. v. Butler ....134 N. C. 50....119, 280
Timber Co. v. Cozad ....192 N. C. 40.... 426
Tire Co. v. Lester ....190 N. C. 411.... 172
Tise v. Hicks ....191 N. C. 609.... 434
Tocci v. Nowfall....220 N. C. 550.... 66
Tremaine v. Williams ....144 N. C. 114.... 66
Triplett v. Lail ....227 N. C. 274.... 345
Triplett v. Williams....149 N. C. 394.... 276
Troitino v. Goodman....225 N. C. 406....245, 550
Trull v. R. R. ....151 N. C. 545.... 59
Trust Co. v. Bank ....166 N. C. 112.... 481
Trust Co. v. Board of National Missions ....226 N. C. 546....155, 224
Trust Co. v. Construction Co. ....191 N. C. 664.... 372
Trust Co. v. Dunlop ....214 N. C. 196.... 402
Trust Co. v. Frazelle ....226 N. C. 724.... 552
Trust Co. v. Pumpelly....191 N. C. 675.... 200
Trust Co. v. Sterchie ....169 N. C. 21.... 427
Tucker v. Raleigh .... 75 N. C. 267.... 457
Tucker v. Yarn Mill Co. ....194 N. C. 756.... 243
Turlington v. Lucas ....186 N. C. 283.... 159
Turnage, *In re* Will of ....208 N. C. 130.... 332
Turner v. Glenn ....220 N. C. 620.... 65
Twining v. Wilmington ....214 N. C. 655.... 629
Tyler v. Morris .... 20 N. C. 625.... 300
Tyner v. Tyner ....206 N. C. 776.... 632
Tyree v. Tudor ....183 N. C. 340.... 514
Tyson v. Ford ....228 N. C. 778....177, 354, 384, 440
Tyson v. Sinclair ....138 N. C. 23.... 121
Tyson v. Tyson ....219 N. C. 617.... 86

U

Umstead v. Board of Elections ....192 N. C. 139.... 194
Underwood v. Ins. Co. ....185 N. C. 538....520, 531
Unemployment Compensation Comm. v. Martin ....228 N. C. 277....571, 572

V

Valentine v. Gill, Comr. of Revenue ....223 N. C. 396.... 605
Vance v. Guy ....224 N. C. 607.... 652
Vanderbilt v. Chapman ....172 N. C. 809.... 273
Van Winkle v. Missionary Union ....192 N. C. 131.... 155
Vaughan v. Vaughan ....211 N. C. 354.... 14
Vaughan v. Vaughan ....213 N. C. 189.... 250
Venable v. School Committee ....149 N. C. 120.... 757
Vick v. Wooten ....171 N. C. 121.... 579
Vinson v. R. R. .... 74 N. C. 510.... 700
Vollers Co. v. Todd....212 N. C. 677.... 228

W

Waddell v. Aycock ....195 N. C. 268.... 424
Wagner v. Realty Corp. ....210 N. C. 1.... 65
Wake Forest v. Medlin ....199 N. C. 83.... 769
Walker v. Butner ....187 N. C. 535.... 240
Walker v. Carpenter ....144 N. C. 674.... 310
Walker v. Johnson.... 70 N. C. 576.... 762
Walker v. Long ....109 N. C. 510.... 19
Walker v. Manson ....222 N. C. 527.... 513
Walker v. Walker ....201 N. C. 183.... 481
Walker v. Wilson ....222 N. C. 66.... 639
Wall v. Bain ....222 N. C. 375.... 712
Wallace v. Bellamy ....199 N. C. 759.... 273
Wallace, *In re* Will of ....227 N. C. 459.... 446
Waller v. Dudley ....193 N. C. 749.... 6
Wallin v. Rice ....170 N. C. 417.... 425
Walsh v. Hall .... 66 N. C. 233.... 54
Walter v. Kilpatrick ....191 N. C. 458.... 45
Walters v. Walters ....172 N. C. 328.... 425
Walton v. McKesson ....101 N. C. 428.... 628
Ward v. Gay....137 N. C. 397.... 64
Ward v. Heath ....222 N. C. 470....95, 265
Warlick v. Lowman....103 N. C. 122.... 658
Warlick v. Reynolds ....151 N. C. 606.... 85
Warner v. R. R. .... 94 N. C. 250.... 59
Warren v. R. R. ....223 N. C. 843.... 36
Watkins v. Furnishing Co. ....224 N. C. 674.... 639
Watkins v. Grier ....224 N. C. 339.... 376
Watson v. Hinson ....162 N. C. 72.... 282
Way v. Ramsey ....192 N. C. 549.... 789
Weatherman v. Ramsey....207 N. C. 270.... 547
Webb v. Hicks ....116 N. C. 598.... 260
Webb v. Rosemond ....172 N. C. 848.... 269
Webster v. Webster ....213 N. C. 135.... 228
Weiner v. Style Shop ....210 N. C. 705.... 55
Wellons v. Sherrin ....217 N. C. 534.... 243
Wells v. Odum ....205 N. C. 110.... 11
West v. Baking Co. ....208 N. C. 526.... 116
West v. West ....199 N. C. 12.... 250

Western N. C. Conference
v. Talley ....229 N. C. 1....72, 288, 289
Westfeldt, *In re* Will of ....188 N. C. 702....487, 488
Wetherington v. Williams ....134 N. C. 276.... 611
Wharton v. Ins. Co. ....178 N. C. 135....312, 411
Wheeler v. Bank ....209 N. C. 258.... 135
White v. Comrs. of Johnston ....217 N. C. 329.... 195
Whitehead v. Morrill....108 N. C. 65.... 45
Whitehead & Anderson, Inc.
v. Branch ....220 N. C. 507.... 59
Whitehurst v. Abbott ....225 N. C. 1....11, 66
Whitehurst v. Hinton ....209 N. C. 392.... 11
Whitley v. Arenson ....219 N. C. 121....166, 224, 694
Whitted v. Palmer-Bee Co. ....228 N. C. 447....475, 551, 662
Whitten v. Peace ....188 N. C. 298.... 172
Wickham v. Harper ....225 N. C. 260.... 781
Wiggins, *In re* ....171 N. C. 372.... 140
Wilkie v. Ins. Co. ....146 N. C. 513.... 521
Wilkinson v. Board of
Education ....199 N. C. 669.... 195
Wilkinson v. Boomer ....217 N. C. 217....472, 636
Wilkinson v. Wilkinson ....159 N. C. 265....219, 560
Williams v. Best ....195 N. C. 324.... 166
Williams v. Building &
Loan Asso., ...207 N. C. 362.... 342
Williams v. Coach Co. ....197 N. C. 12.... 23
Williams v. Commissioners ....176 N. C. 554.... 185
Williams v. Elson ....218 N. C. 157.... 262
Williams v. Express Lines ....198 N. C. 193....354, 384, 440
Williams v. Ins. Co. ....212 N. C. 516.... 310
Williams v. Mfg. Co. ....153 N. C. 7.... 409
Williams v. Mfg. Co. ....154 N. C. 205.... 385
Williams v. McLean....221 N. C. 228.... 695
Williams v. R. R. ....200 N. C. 771.... 240
Williams v. Rand ....223 N. C. 734.... 381
Williams v. Stores Co., Inc. ....209 N. C. 591.... 639
Williams v. Williams ....175 N. C. 160.... 159
Williams v. Williams ....220 N. C. 806.... 97
Williamson v. Rabon ....177 N. C. 302.... 767
Williamson v. Williamson ....224 N. C. 474.... 376
Willis v. Branch .... 94 N. C. 142....427, 790
Wilson v. Casualty Co. ....210 N. C. 585....310, 342
Wilson v. Charlotte .... 74 N. C. 748.... 461
Wilson v. Charlotte ....206 N. C. 856....355, 461, 464
Wilson v. Clement Co. ....207 N. C. 541.... 662
Wilson v. Comrs. ....183 N. C. 638.... 150
Wilson v. Dowlin ....215 N. C. 547.... 243
Wilson v. Hughes .... 94 N. C. 182.... 54
Wilson v. Massagee ....224 N. C. 705.... 442
Wilson v. Mooresville ....222 N. C. 283.... 220
Wilson v. R. R. ....223 N. C. 407.... 710
Wilson v. Robinson ....224 N. C. 851.... 72
Wilson v. Williams ....215 N. C. 407.... 154
Wilson v. Wilson ....190 N. C. 819.... 23
Winders v. Southerland ....174 N. C. 235.... 405

Wingate v. Causey ....196 N. C. 71.... 560
Wingler v. Miller ....221 N. C. 137....228, 321, 404, 405
Wingler v. Miller ....223 N. C. 15.... 439
Winner v. Winner ....222 N. C. 414.... 172
Winslow v. Carolina Conference Asso. ....211 N. C. 571....469, 662
Wise v. Hollowell ....205 N. C. 286....780, 786
Wise v. Leonhardt ....128 N. C. 289....760, 762
Wise v. Texas Co. ....166 N. C. 610.... 54
Wissler v. Power Co. ....158 N. C. 465.... 690
Wolf v. Goldstein ....192 N. C. 818.... 248
Wood v. Tel. Co. ....228 N. C. 605.... 717
Woodbury v. Nu-Enamel Corp. ....215 N. C. 790.... 528
Woodruff v. Woodruff ....215 N. C. 685.... 214
Woodward v. Trust Co. ....178 N. C. 184.... 107
Woody v. Cates ....213 N. C. 792.... 67
Woody v. Fountain....143 N. C. 66....118, 280
Wooten v. Wooten ....123 N. C. 219.... 154
Worley v. Pipes ....229 N. C. 465....473, 474, 475
Worth v. Trust Co. ....152 N. C. 242.... 405
Wright v. Ball ....200 N. C. 620.... 551
Wright v. Grocery Co. ....210 N. C. 462.... 177
Wright, *In re* Estate of....200 N. C. 620.... 551
Wright, *In re* Estate of ....204 N. C. 465.... 434

Y

Yancey v. Highway Com. ....222 N. C. 106.... 769
Yarborough v. Park Com. ....196 N. C. 284....472, 769
Yarn Co. v. Mauney ....228 N. C. 99.... 266
Yates v. Ins. Co. ....166 N. C. 134.... 86
Yokeley v. Kearns ....223 N. C. 196.... 776
York v. York ....212 N. C. 695....481, 482
Young v. Hardwood Co. ....200 N. C. 310....48, 561
Young v. Herman .... 97 N. C. 280.... 352
Young, *In re*....222 N. C. 708.... 631
Young v. Young ....225 N. C. 340.... 214

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1948

WESTERN NORTH CAROLINA CONFERENCE AND H. V. COX, B. J. EARPE, GEORGE T. GUNTER, CYRUS SHOFFNER AND EARL FARRELL, OFFICERS OF THE SAID CONFERENCE, G. O. LANFORD, T. J. GREEN, M. A. POLLARD, H. V. COX, CYRUS SHOFFNER, GEORGE T. GUNTER AND W. H. FREEMAN, THE EXECUTIVE COMMITTEE OF THE SAID CONFERENCE, AND MR. AND MRS. J. Q. PUGH, MRS. H. B. KINNEY, MRS. HELEN K. RICH, FRANK WILSON, MURIEL PUGH COX, FRANCES PUGH SMITH, VIRGINIA PUGH AND MRS. RUTH WILSON DAVIS, MR. AND MRS. J. W. WILSON, MRS. ODELL WRIGHT, SARAH ELLISON, FANNIE ELLISON, RUTH CHEEK KIVETT, D. G. CRAVEN, BEULAH DAVIS, RALPH WILSON, TIFFANY WILSON, MRS. ETTA HENDRICKS, BESSIE L. STOUT, TABITHE KELLING, LOLA PUGH GADDIS, JOHN PUGH, JR., ANNIE E. CRAVEN, WM. CHEEK, MACIE CHEEK, CARRIE PUGH, JOE PUGH, NORDIE ALLRED HOLDER, G. H. KINNEY, MAXINE CRAVEN LEWIS, ON BEHALF OF THEMSELVES AND ALL OTHER MEMBERS OF PLEASANT CROSS CHRISTIAN CHURCH, v. GEORGE M. TALLY, J. H. MALONE, TED TROGDON, A. M. BURNS, ED WRIGHT, MILDRED MALONE AND CLARENCE MALONE, AND ALL SUCH OTHER PERSONS WHOSE NAMES AND ADDRESSES ARE UNKNOWN, WHO ARE AFFILIATED WITH AND CLAIM TO BE MEMBERS OF AN ORGANIZATION KNOWN AND DESIGNATED AS THE INDEPENDENT CHRISTIAN CHURCH, A MOVEMENT FOSTERED AND ORGANIZED SINCE NOVEMBER 14, 1943, BY THE SAID GEORGE M. TALLY.

(Filed 28 April, 1948.)

1. Appeal and Error § 10e—

Where the trial court adopts appellant's statement of case with modifications, appellant is under duty to have the statement of case as modified redrafted and submitted to the judge for signature, and upon failure to do so there is no "case on appeal." G. S., 1-282; G. S., 1-283.

2. Appeal and Error §§ 10a, 40a—

Where there is no proper statement of case on appeal the Supreme Court can determine only whether there is error on the face of the record proper.

3. Charities § 2: Trusts § 11—

A conveyance of land to trustees for the erection of a church to belong to a denomination, to have and to hold to them and their successors in office forever in trust for the erection of a place of worship for the use of members of the denomination, takes the title in trust for the use of the denomination, G. S., 61-3, and therefore members of the congregation of the church so erected who withdraw affiliation from the denomination, even though they be a majority of the congregation, are not entitled to the control and use of the property as against the denomination, irrespective of whether the particular church is congregational or connectional.

APPEAL by defendants from *Pittman, J.*, at July Term, 1947, of RANDOLPH.

Civil action to recover land as church property allegedly wrongfully withheld by defendants.

Plaintiffs in their complaint and amended complaint allege among other things, in brief, these facts pertinent to this appeal:

(1) The Christian Church is a Protestant denomination organized by the Reverend James O'Kelly and his associates in the early days of the colonization of the United States, and is recognized as such among American churches. It has been active in certain sections of North Carolina. In 1864 Deep River Conference of the Christian Church was organized and since has been and is a religious organization maintained under the principles of the Christian Church and "in accordance with its code of rules and regulations of the government of said church as prescribed by it,"—its name being changed in 1894, by due process, to the Western North Carolina Conference or Western North Carolina Christian Conference. And among other active churches organized and maintained by said church is the Pleasant Cross Christian Church which has been in existence for many years,—even prior to 21 January, 1880;

(2) On 21 January, 1880, Lucinda Trogdon conveyed to W. J. Coward, and four others, naming them, Trustees, a certain lot or parcel of land, the pertinent clauses of the deed being as follows: (1) The premises and granting clause: "For and in consideration of the love we bear for the cause of Christ, and from an earnest desire to promote his heritage on earth we give and grant and presents convey to the said Trustees aforesaid the following lot or parcel of land on which to erect a church building to belong to the Christian Church and to be used for Sabbath School purposes also"; (2) Description of the lot; (3) *Habendum:* "To have and to hold all and singular the above mentioned and described lot or piece of land situated, lying and being as aforesaid

together with all and singular the houses, woods, waters, ways and privileges thereunto belonging or in any wise appertaining unto them W. J. Coward (and four others, naming them), and their successors in office forever in trust that they shall erect and build or cause to be erected and built thereon a house or place of worship for the use of the members of the Christian Church of Deep River Conference, and also use of spring north of said church"; and (4) Warranty: "Unto them the said Trustees and their successors, chosen and appointed as aforesaid." And the church building, known as the Pleasant Cross Christian Church, was erected, and is now located and maintained upon the lot described in said deed; and under and pursuant to Chapter 61 of the General Statutes of North Carolina, the title thereto has been at all times and is now vested in the said Deep River Conference, now Western North Carolina Christian Conference of said Christian Church, for the uses and purposes for which it was conveyed, and is subject to the control of the said Conference by and through its proper officers and representatives.

(3) Plaintiffs, Conference, and present officers and executive committee of the Conference, and others, loyal members of Pleasant Cross Christian Church, are entitled to said property, and to the exclusive use and benefit thereof for church purposes to the exclusion of all such persons as have left the said Pleasant Cross Christian Church and organized or undertaken to organize through defendant George M. Tally and others what they have seen fit to designate as an Independent Christian Church.

(4) Defendants and their associates, who were in sympathy with George M. Tally, in matters of difference between him and the Conference, and George M. Tally undertook to withdraw the membership of said Pleasant Cross Christian Church from said Western North Carolina Conference, and to dismiss from said church all members thereof, including individual plaintiffs, who did not co-operate with him, and have undertaken to organize a new and independent church under the name of Independent Christian Church, promulgating and subscribing to a new creed, exclusively their own, and no part of the Christian Church or its creed or denominational doctrine, and as such have taken possession of the said Pleasant Cross Christian Church, and have forbidden plaintiffs and other duly constituted members of said church to enter for the purposes of public worship, etc.

Thereupon, plaintiffs pray, among other things, that they be adjudged to be the owners in fee and entitled to the possession of said church property, and that defendants be required to surrender possession thereof to plaintiffs, etc.

Defendants, answering, briefly stated, deny in material aspects the allegations of the complaint, particularly the legal effect of said deed

from Lucinda Trogdon, as plaintiffs allege, and assert that the fact that the name "Deep River Conference" is referred to in said deed does not give any title, as a matter of law, to the Deep River Conference, Western North Carolina Conference or any other conference,—that the title is vested in the Trustees of the Pleasant Cross Christian Church, and their successors; and that the Pleasant Cross Christian Church is congregational, and not connectional, and the property is owned by the Trustees, duly elected by the church; that the Conference has no control over it; and that the action taken by defendants and those in agreement with them, was taken as majority members of the church. And defendants further aver "that said church, of its own free will and accord, and which it had a right to do, voted itself out of said Conference"; and "that said church thereupon, using the same members of Pleasant Cross Christian Church, voted to change the name of Pleasant Cross Christian Church, to the name of Independent Christian Church, which it had the right to do under the congregational system, that the membership of the former Pleasant Cross Christian Church remained exactly the same, that it has the same officers and is still a Christian Church and belongs to the Christian denomination, and an overwhelming majority of those who attend said church voted such action after they had withdrawn from said Conference, which they had a right to do under the laws," etc.

Upon the trial in Superior Court, the case was submitted to the jury upon these issues, which the jury answered as shown:

"1. Was pleasant Cross Christian Church a member of the Western North Carolina Christian Conference? Answer: Yes.

"2. Was Pleasant Cross Christian Church a connectional form of church within the Western North Carolina Christian Conference? Answer: Yes.

"3. Was the Pleasant Cross Christian Church a congregational form of church? Answer: No.

"4. If so, did the defendants and those united in interest with them violate the customs, practices, usages, rules or regulations of the Christian denomination? Answer: .....

"5. Did the defendants and those united in interest with them withdraw their affiliation from the Western North Carolina Christian Conference? Answer: Yes.

"6. If so, are the individual plaintiffs and those united in interest with them the sole and only members of Pleasant Cross Christian Church? Answer: Yes.

"7. If not, are the defendants and those united in interest with them, except George M. Tally, the sole and only members of the Pleasant Cross Christian Church? Answer: No.

"8. Are the individual plaintiffs and those united in interest with them entitled to the use, enjoyment and possession of the real property re-

ferred to in the complaint as the Pleasant Cross Christian Church? Answer: Yes.

"9. Are the defendants and those united in interest with them, except George M. Tally, entitled to the use, enjoyment and possession of the real property referred to in the complaint as the Pleasant Cross Christian Church? Answer: No."

Thereupon, the court signed judgment in which it is adjudged in pertinent part (1) that individual plaintiffs and those united in interest with them are the sole and only members of Pleasant Cross Christian Church, and are entitled to the possession, use and enjoyment of the real property referred to in the complaint as the Pleasant Cross Christian Church; and (2) that defendants and those united in interest with them (a) immediately surrender to the individual plaintiffs and those united in interest with them the possession of the said real estate, to the end that same may be used for church purposes in accordance with the rules, principles, customs, usages and faith of the Christian denomination as adopted and approved by the Western North Carolina Christian Conference, and (b) be now and forever enjoined, from interfering with individual plaintiffs and those united in interest with them in the use, control and enjoyment of said real estate, or from preventing individual plaintiffs and those united in interest with them from using same for public worship and for church purposes in accordance with the rules, principles, customs, usages and faith of the Christian denomination as adopted and approved by the Western North Carolina Christian Conference, and (3) that the Clerk of Superior Court, in the event defendants and those united in interest with them, or any other person, fail to surrender possession of the property, as so ordered, issue a writ of assistance, etc.

Defendants appeal therefrom to Supreme Court.

H. M. Robins, W. D. Barrett, and Long & Long for plaintiffs, appellees.

Walter Siler, John G. Prevette, and H. F. Seawell, Jr., for defendants, appellants.

WINBORNE, J. At the threshold of consideration of this appeal, we find that the record contains no proper transcript of case on appeal agreed upon by the parties, or settled by the judge, as required by statutes relating to appeals.

The record does contain what is called "Statement of Case on Appeal," served on counsel for appellee by the Sheriff of Randolph County on 14 November, 1947. And while the record does not show exceptions thereto or countercase filed by appellee, it does show an order signed by the presiding judge, in Chambers, at Rockingham, on 30 January, 1948,

after due notice to the counsel, and in the presence of counsel for plaintiffs and for defendants, "all in pursuance of the provision made by statute," reading as follows:

"The hereto attached statement of case on appeal is ordered and constituted the correct statement of case on appeal upon the addition to said statement of pages 3, 6, 7, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21, with the evidence of Dr. L. E. Smith, on page 28 and the statement of the court on page 30, also pages 32, 33 and that portion of 34 beginning with the cross-examination of Mr. Tally to the end of page 36, also the evidence of Dr. W. T. Scott, being on page 46, to the bottom of page 49, and beginning again following defendants' Exception 27 on page 50 to the bottom of page 51."

But there is nothing in the record to show that the order modifying the statement of case on appeal was carried out, or that the purported transcript of "Statement of Case on Appeal" appearing in the record is the statement of the case referred to in the above order.

In this connection statute G. S., 1-282, formerly C. S., 643, provides that appellant shall cause to be prepared a concise statement of case on appeal and prescribes what it shall embody, and that a copy shall be served on respondent, appellee, within time given by statute or extended by order of court. It further provides that within time given in like manner respondent shall return the copy with his approval or with specific amendments endorsed or attached. And the provisions of G. S., 1-283, formerly C. S., 644, specify that if the case on appeal be returned by the respondent, with objections as prescribed, the appellant shall immediately request the judge to fix a time and place for settling the case before him. If the request be made by appellant, the statute further provides that "the judge shall forthwith notify the attorneys of the parties to appear before him for that purpose at a certain time and place, within the judicial district" (if he is still in the district), and "at the time and place stated, the judge shall settle and sign the case . . ." *Chozen Confections, Inc., v. Johnson,* 220 N. C., 432, 17 S. E. (2d), 505.

Where, as stated in *Waller v. Dudley,* 193 N. C., 749, 138 S. E., 128, the trial court adopts the appellant's statement of case with modifications as indicated in the order in the present case, it is the duty of the appellant to have the statement of case on appeal as thus modified, redrafted and submitted to the judge for his signature. *Gaither v. Carpenter,* 143 N. C., 240, 55 S. E., 625. Moreover, when he fails to do this, there is no "Case on Appeal." *Mitchell v. Tedder,* 107 N. C., 358, 12 S. E., 193; *Waller v. Dudley, supra.*

In the case of *Russos v. Bailey,* 228 N. C., 783, in opinion by *Barnhill, J.,* it is said: "Exceptions which point out alleged errors occurring during the progress of a trial in which oral testimony is offered can be

presented only through a 'case on appeal' or 'case agreed' . . . This is the sole statutory means of vesting this Court with jurisdiction to hear the appeal, G. S., 1-282, 283; *Carter v. Bryant,* 199 N. C., 704, 155 S. E., 602. Unless so presented, they are mere surplusage without force or effect . . . and 'must be treated as a nullity,'" citing authorities. And, continuing in the *Russos case,* it is stated that "When oral evidence is offered, the judge cannot settle the case on appeal by an anticipatory order."

Applying this principle, the assignments of error arising upon the evidence offered at the trial and upon the charge of the court, which is made to appear in the purported transcript, may not be considered by this Court. The only question presented by the appeal is whether there is error on the face of the record proper,—pleadings, verdict and judgment. The judgment appears to follow the verdict of the jury.

Indeed, it may be appropriately stated that extraneous matters and side issues appear in the pleadings. The deed, upon which plaintiffs base their complaint, expressly manifests clear intention that the "church building" to be erected on the lot of land conveyed is "to belong to the Christian Church," and that the Trustees shall hold the lot "forever in trust that they shall erect and build or cause to be erected and built thereon a house or place of worship for the use of the members of the Christian Church of the Deep River Conference." And it is provided by statute, G. S., 61-3, that "All glebes, lands and tenements, heretofore purchased, given, or devised for the support of any particular ministry, or mode of worship, and all churches and other houses built for the purpose of public worship, and all lands and donations of any kind of property or estate that have been or may be given, granted or devised to any church or religious denomination, religious society or congregation within the state for their respective use, shall be and remain forever to the use and occupancy of that church or denomination, society or congregation for which the glebes, lands, tenements, property and estate were so purchased, given, granted, or devised, or for which such churches, chapels, or other houses of public worship were built; and the estate therein shall be deemed and held to be absolutely vested, as between the parties thereto, in the trustees respectively of such churches, denominations, societies and congregations, for their several use, according to the intent expressed in the conveyance, gift, grant or will; and in case there shall be no trustees, then in such churches, denominations, societies and congregations, respectively according to such intent."

Moreover, it not being controverted that the name of Deep River Conference of the Christian Church was changed in 1894 to Western North Carolina Christian Conference,—and the jury having found in answer to the first issue that Pleasant Cross Christian Church was a

member of the Western North Carolina Christian Conference, and, in answer to the fifth issue, that the defendants and those united in interest with them withdrew their affiliation from the Western North Carolina Conference, it is immaterial whether Pleasant Cross Christian Church is congregational or connectional, and decision thereon is unnecessary on this record.

Nevertheless, it may not be amiss to call attention to the principle enunciated and applied by this Court in *Kerr v. Hicks,* 154 N. C., 265, 70 S. E., 468, in opinion by *Clark, C. J.,* that "in church organizations, those who adhere and submit to the regular order of the church, local and general, though a minority, are the true congregation," citing *Roshie's Appeal,* 69 Pa., 462, 8 Am. Rep., 280; *Gable v. Miller* (N. Y. Chancery Court), 10 Paige, 627.

In the judgment, there is

No error.

IN RE WILL OF MRS. MINNIE STOWE PUETT.

(Filed 28 April, 1948.)

1. Wills § 15a—

A paper-writing must be executed and proven in strict compliance with the statutory requirements in order to be effective as a testamentary disposition of property. G. S., 31-3; G. S., 31-18.

2. Wills § 16—

The probate of a will in common form in accordance with statutory requirements, G. S., 31-19, may be set aside upon motion after notice where it is clearly made to appear that the court was imposed upon or misled, but otherwise the probate is conclusive and cannot be collaterally attacked, G. S., 31-19, and the paper-writing stands as the last will and testament until declared void in a direct proceeding in the nature of a caveat. G. S., 31-32.

3. Same: Clerks of Court § 4—

Where a paper-writing has been duly probated in common form, offer of proof of a will alleged to have been subsequently executed by the testatrix is a collateral attack, and the clerk is without jurisdiction to set aside the probate upon such proof.

4. Same—

G. S., 28-31, empowering the clerk to revoke letters of administration or testamentary upon proof of a will, does not empower the clerk to set aside probate in common form upon proffer of proof of a later will.

5. Appeal and Error § 14: Clerks of Court § 4: Courts § 4c—

An appeal suspends further proceedings in the cause in the court from which the appeal is taken, but where appeal is taken from order of the

clerk probating a second will and thereafter the clerk enters an order revoking the order appealed from, the contention that the clerk was without jurisdiction to enter the order of revocation is untenable when the judge of the Superior Court determines the appeal from the original order of probate, and reverses the action of the clerk thereon.

6. Wills § 15a—

Notice to interested parties is not necessary to the probate of a will in common form.

7. Wills § 16—

Language in a judgment susceptible to an interpretation that a probate of a will in common form could be attacked by proffered proof of a later will, will be stricken on appeal upon exception.

APPEAL by Lelia Wilson, and by American Trust Company, Executor, and George W. Stowe, and others, from *Pless, J.*, at December Term, 1947, of GASTON.

This was a proceeding to probate a paper-writing propounded by Lelia Wilson as a later will of Minnie Stowe Puett, alleged to have been executed subsequent to one theretofore probated as the last will and testament of the decedent, heard below on appeal from orders of the Clerk of the Superior Court of Gaston County.

The procedural steps by which this matter has come to this Court for decision may be stated in chronological order as follows: Minnie Stowe Puett (widow of W. B. Puett) having died, on 29 May, 1945, a paper-writing purporting to be her last will and testament was duly admitted to probate in the manner prescribed by the statute. By this will the testatrix devised the bulk of her considerable estate in trust to the American Trust Company, Trustee, for the charitable purposes therein fully set out. The will was dated 12 May, 1944.

On 2 May, 1947, Lelia Wilson offered for probate as the last will and testament of Mrs. Puett the following paper-writing: "Feb. 23, 1945. I will and bequeath everything I have to Lelia Wilson. (Signed) Minnie Stowe Puett. Mrs. W. B. Puett." On 7 July, 1947, after hearing the evidence, the Clerk found that this paper was entirely in the handwriting of Mrs. Puett, and "that the said will was found in a book belonging to the said Minnie Stowe Puett, and which said book was handed or given to Lelia Wilson by Minnie Stowe Puett, and the said will was found in said book by Lelia Wilson after the death of Minnie Stowe Puett." Thereupon the Clerk adjudged that the said paper-writing was the last will and testament of Minnie Stowe Puett, and further declared that the purported last will and testament of decedent probated 29 May, 1945, was "null and void." The American Trust Company, Executor and Trustee, excepted to this order and appealed to the Superior Court in term.

IN RE WILL OF PUETT.

On 21 November, 1947, George W. Stowe and others, representatives of the beneficiaries under the will probated 29 May, 1945, filed a petition before the Clerk that the proceeding be reopened, and that the Clerk's order of 7 July, 1947, admitting the alleged second will to probate, be revoked, for that the order was improvidently entered, and without notice to petitioners, and further that the probate of the will of 29 May, 1945, not having been vacated on appeal or declared void by competent tribunal was conclusive as to the validity of said will. The executor, after notice, joined in the petition and prayed that the order referred to be set aside. On 29 November, 1947, the Clerk entered order allowing the petition, and revoking the order of 7 July, 1947. Lelia Wilson excepted and appealed to the Superior Court.

At December Term, 1947, of Gaston Superior Court Judge Pless rendered judgment as follows:

"The court hereby affirms said order of the Clerk dated November 29th, (1947), but in doing so is of the opinion that this order does not preclude the appellant Lelia Wilson from seeking the probate by her at proper proceedings before the Clerk and after notice to all parties, heirs and legatees, and an opportunity to each of them to be heard.

"To the extent that the order of the Clerk dated July 7, 1947, to which the American Trust Company, Executor and Trustee, noted exception dated July 12, 1947, is in conflict with the ruling in the paragraph above, the said order of July 7th is reversed."

From this judgment Lelia Wilson appealed, and from so much of the judgment as expressed the court's opinion "that this order does not preclude the appellant Lelia Wilson from seeking the probate of the paper-writing sought to be propounded by her in proper proceedings before the Clerk," the American Trust Company, Executor, and George W. Stowe and others appealed.

Basil L. Whitener and Ernest R. Warren for Lelia Wilson, Propounder, appellant.

Taliaferro, Clarkson & Grier for appellee, American Trust Company, Executor.

Tillett & Campbell, Harley B. Gaston, and James B. Craighill for George W. Stowe, et al.

APPEAL OF LEILA WILSON.

DEVIN, J. The testamentary disposition of property is governed by statute. In order that a paper-writing, so designed, may effectuate this purpose it must have been executed and proven in strict compliance with the statutory requirements. G. S., 31-3, 31-18. When executed, proven

and recorded in manner and form as prescribed, it is given conclusive legal effect as the last will and testament of the decedent, subject only to be vacated on appeal or declared void by a court of competent jurisdiction in a proceeding instituted for that purpose. *Crowell v. Bradsher,* 203 N. C., 492, 166 S. E., 331. "Until so set aside it is presumed to be the will of the testator." *In re Neal,* 227 N. C., 136, 41 S. E. (2d), 90. The statute, G. S., 31-19, prescribes 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." This language of the statute has been given effect by numerous decisions of this Court. *In re Hine,* 228 N. C., 405, 45 S. E. (2d), 526; *In re Neal,* 227 N. C., 136, 41 S. E. (2d), 90; *In re Smith,* 218 N. C., 161, 10 S. E. (2d), 676; *Whitehurst v. Hinton,* 209 N. C., 392, 184 S. E., 66; *Wells v. Odum,* 205 N. C., 110, 170 S. E., 145; *Crowell v. Bradsher,* 203 N. C., 492, 166 S. E., 331; *In re Rowland,* 202 N. C., 373, 162 S. E., 897. The will thus probated and recorded may not be collaterally attacked. *Edwards v. White,* 180 N. C., 55, 103 S. E., 901; *Wells v. Odum,* 205 N. C., 110, 170 S. E., 145; *In re Rowland,* 202 N. C., 373, 162 S. E., 897. It constitutes a muniment of title. *Whitehurst v. Abbott,* 225 N. C., 1, 33 S. E. (2d), 129.

But the conclusive effect of probate and record thus declared does not deprive probate courts of the power, in proper instances and on motion and due notice, to set aside proof of a will in common form, "where it is clearly made to appear that their adjudications and orders have been improvidently granted, or the court has been imposed upon or misled." *In re Meadows,* 185 N. C., 99, 116 S. E., 257; *In re Johnson,* 182 N. C., 522, 109 S. E., 373; *Mills v. Mills,* 195 N. C., 595, 143 S. E., 130; *In re Smith,* 218 N. C., 161, 10 S. E. (2d), 676; *In re Hine,* 228 N. C., 405, 45 S. E. (2d), 526.

However, in the case at bar, there is no allegation that the probate of the will of Mrs. Puett on 29 May, 1945, was otherwise than in strict accord with the statute, nor is there suggestion that the court was imposed upon or misled. Hence the validity of the will may be attacked only by direct proceeding in the nature of a caveat. G. S., 31-32. *In re Little,* 187 N. C., 177, 121 S. E., 453. In such case, as was said by *Chief Justice Stacy* in *In re Rowland,* 202 N. C., 373, 162 S. E., 897, "It is immaterial whether those appearing and protesting call themselves interveners, objectors, or caveators" if they place themselves in opposition to the propounders. By a caveat legal rights are put in stake. *Whitehurst v. Abbott,* 225 N. C., 1, 33 S. E. (2d), 129.

It follows that the will of Mrs. Puett probated 29 May, 1945, may not be declared null and void on motion before the Clerk. May this be done

solely upon proffered proof of a later will? We think not. The decisions of this Court on the subject support this view.

In *In re Cooper,* 196 N. C., 418, 145 S. E., 782, it appeared that a will, devising the estate to one person, was duly probated, and that subsequently another purported will, of later date, giving the estate to another, was also probated. No caveat was filed to the first will, but a caveat to the second was filed. The jury decided the second will was a forgery. This Court found no error in the trial, but in the opinion written by *Justice Connor,* it was said that in view of the verdict the Court did not discuss whether or not this proceeding was a collateral attack upon the probate and record of the first will. The opinion concluded with this statement: "Whether a will which has been duly probated in common form and recorded as the last will and testament of the testator can be vacated and rendered void by the probate of another paper-writing, subsequently executed, by the testator, as his last will and testament, is not presented by this appeal." Repeated reference to a question not raised in the appeal indicates its seriousness in the minds of the Court.

In *In re Smith,* 218 N. C., 161, 10 S. E. (2d), 676, Smith's will, dated 1921, was probated in 1938. In 1939 a supplemental will or codicil was propounded as a holographic will, and was probated as such. Thereafter beneficiaries under the first will moved to set aside the probate of the second will because the paper was not entirely in the handwriting of testator, and had been erroneously and improvidently probated. The Clerk allowed the motion, but on appeal the Judge of the Superior Court reversed, on the ground that the Clerk was without authority after having probated the paper. This Court reversed the judge, citing *In re Meadows,* 185 N. C., 99, 116 S. E., 257. In *Hyatt v. Hyatt,* 187 N. C., 113, 120 S. E., 830, in the trial of an issue of *devisavit vel non* there was some evidence of a later will, and the court's charge to the jury that the burden was on the caveators to show that there was another will which revoked the former one, was approved on appeal. In the case of *In re Neal,* 227 N. C., 136, 41 S. E. (2d), 90, four paper-writings were offered for probate, designated as Exhibits A, B, C, and D, in inverse order of date. The Clerk held Exhibit A revoked all prior wills and probated it, and declined to probate the others. Propounders appealed to the Judge. Pending appeal caveat was filed to Exhibit A. Later, caveators moved to amend caveat to include B, C, and D. The cause was by the Judge remanded to the clerk to probate B, C, and D, and to permit amendment of caveat as prayed. This Court said that the paper-writing Exhibit A, having been admitted to probate in common form, such record was conclusive evidence of its validity, until vacated or declared void, and though not conclusive against a caveat, as between the probated instrument and the other purported wills the former stood

until declared void by a court of competent jurisdiction. Until set aside it was presumed to be the last will of the testator.

In the recent case of *In re Hine,* 228 N. C., 405, 45 S. E. (2d), 526, Hine's will, designated A, and two codicils B and C were all three admitted to probate in common form. Subsequently caveat was filed to the second codicil C, and the cause transferred to the Superior Court. Later, motion was made before the Clerk by those claiming under C that the entire record be expunged and the original will A and codicil C be re-probated as the testator's last will and testament. The clerk finding the original probate had been erroneously and improvidently entered, set it aside and probated the will and second codicil *nunc pro tunc.* On appeal to the Superior Court the order of the Clerk was affirmed. This Court held that the will and codicils having been originally probated in the manner prescribed by statute, the record and probate were conclusive evidence of the validity of the will until vacated on appeal or declared void by competent tribunal. G. S., 31-19. It was also held that a caveat having been filed, which constituted a direct attack on the validity of the will, and the cause having been transferred to the Superior Court in term for trial before a jury, all proceedings were suspended, and neither the Clerk nor the Judge on appeal had power to set aside the probate in common form. It was said in the opinion by *Justice Winborne* that while the Clerk had power in proper case to set aside a probate in common form, this power "does not extend to the setting aside of a probate of a will in common form upon grounds which should be, and in this case are, raised by caveat."

We think the authorities cited support the view that where a will has been duly probated, the record affords conclusive evidence of its validity, until vacated by appeal, or declared void by a court of competent jurisdiction in a proceeding instituted for that purpose, and that the offer of proof of a will alleged to have been subsequently executed, without more, is not a direct but a collateral attack on the validity of the will. It is only by a caveat or proceeding in that nature that the validity of a properly probated will, and one without "inherent or fatal defect appearing on its face" (*Edwards v. White,* 180 N. C., 55, 103 S. E., 901), may be brought in question. To hold otherwise would be productive of confusion and uncertainty. *McClure v. Spivey,* 123 N. C., 678, 31 S. E., 857.

The contention that the procedure the appellant Lelia Wilson has here pursued is authorized by G. S., 28-31, cannot be sustained. That section appears in the chapter in the General Statutes on Administration, and is primarily directed to the settlement of estates, specifically empowering the Clerk to revoke letters of administration or testamentary upon proof of a will, and does not purport to outline the procedure in the probate of a will, or determine its effect. See *Shober v. Wheeler,* 144 N. C., 403, 57 S. E., 152; *In re Suskin,* 214 N. C., 219, 198 S. E., 661.

It is also contended that, since the appeal of the American Trust Company, Executor, from the Clerk's order of 7 July, 1947, was pending in the Superior Court at the time the Clerk undertook to enter the subsequent order of 29 November, 1947, the Clerk was *functus officio* and without power to make the order, citing *In re Hine,* 228 N. C., 405. Undoubtedly it is a rule of appellate procedure that an appeal suspends further proceedings in the cause in the court from which the appeal is taken. *Vaughan v. Vaughan,* 211 N. C., 354 (361), 190 S. E., 492; *Likas v. Lackey,* 186 N. C., 398, 119 S. E., 763. But we do not think this rule can help the appellant here, for the reason that Judge Pless in his judgment considered the appeal of the American Trust Company from the order of 7 July, 1947, and reversed the action of the Clerk, to the extent said order was in conflict with the Judge's affirmance of the order of 29 November, 1947.

Since we think the court below ruled correctly on both appeals from the Clerk which he considered, it is unnecessary to determine the question whether, as contended by the appellees on this appeal, the evidence and findings of the Clerk were insufficient to support the probate in common form of the paper-writing dated 23 February, 1945, as a holographic will. G. S., 31-18; *In re Bennett,* 180 N. C., 5, 103 S. E., 917; *McEwan v. Brown,* 176 N. C., 249, 97 S. E., 20. The fact that the beneficiaries under the first will were not given notice of the probate of the paper-writing dated 23 February, 1945, affords no ground of complaint (*In re Rowland,* 202 N. C., 373, 162 S. E., 897; *In re Chisman,* 175 N. C., 420, 95 S. E., 769), but that the order was erroneously and improvidently entered, as herein pointed out, justified its revocation.

After careful consideration of all the questions presented by the appeal of Lelia Wilson, we conclude that the judgment below in the respects of which she complains, should be upheld.

APPEAL OF AMERICAN TRUST COMPANY, EXECUTOR, AND GEORGE W. STOWE AND OTHERS.

The appeal of these appellants is based upon their exception to the incorporation in the judgment of Judge Pless of his opinion that his ruling against Lelia Wilson on her appeal from the Clerk's order of 29 November, 1947, "does not preclude the appellant Lelia Wilson from seeking the probate of the paper-writing sought to be propounded by her at (by) proper proceedings before the Clerk."

Doubtless Judge Pless, by including this clause in his judgment, merely desired to express the opinion that Lelia Wilson was not precluded by his judgment from hereafter attempting to set up in proper proceedings the paper-writing under which she claims. But the language used is susceptible of the interpretation, which might be regarded as

binding by other judges, that the procedure she had undertaken to pursue was proper, and that a collateral attack on the probated will was authorized. For that reason we think the judgment should be modified by striking therefrom the expression of opinion to which exception was noted.

On appeal of Lelia Wilson: Affirmed.

On appeal of American Trust Company, Executor, and George W. Stowe and others: Reversed.

LINDA B. PERRY HENDLEY v. PERCY BUFFALOE PERRY, MINOR, WILLIAM DEAN PERRY, MINOR, BESSIE BARNETT PERRY, MINOR, FRANCES LANE PERRY WILSON AND HUSBAND, HAROLD D. WILSON, MARGARET WILSON, MINOR, EVELYN WILSON, MINOR, HAROLD D. WILSON, JR., MINOR, LENA UPCHURCH PERRY TILLEY AND HUSBAND, E. H. TILLEY, FRANCES HOLT TILLEY TODD, MINOR, AND HUSBAND, DONALD TODD, MINOR, MANCY CLYDE PERRY STROTHER AND HUSBAND, GEORGE C. STROTHER, ALTON OWEN PERRY AND WIFE, ANNE BRYAN PERRY, ALTON OWEN PERRY, JR., MINOR, MILEY ABBOTT PERRY, MINOR, ANTHONY BRYAN PERRY, MINOR, PERCY BARRETT PERRY AND WIFE, LOTTIE DEAN PERRY, MRS. BESSIE E. PERRY, WIDOW, AND J. B. HENDLEY, ALL PERSONS IN BEING WHOSE NAMES AND RESIDENCES ARE UNKNOWN WHO MAY HAVE OR EVER CLAIM TO HAVE AN INTEREST IN THE LANDS INVOLVED IN THIS PROCEEDING, AND ALL PERSONS NOT NOW IN BEING WHO MAY HAVE OR EVER CLAIM TO HAVE AN INTEREST IN THE LAND INVOLVED IN THIS PROCEEDING.

(Filed 28 April, 1948.)

1. Wills §§ 33g, 33i—

A devise to testator's son "to be held and owned by my said son . . . during the term of his natural life . . ." grants an alienable life estate to the son, the word "held" and the word "owned" as there used being merely definitive of the extent of the ownership and not a restraint upon alienation.

2. Husband and Wife § 12c—

A husband may convey to his wife any right, title or interest in real estate which he possesses.

3. Appeal and Error § 6c (3)—

Where no exception is taken by appellants to the failure of the trial judge to find facts and state conclusions of law in respect to a matter argued by appellants in their brief, the question is not presented for decision on appeal.

APPEAL by "all of the defendants, except J. B. Hendley and Arthur A. Aronson, Guardian *ad litem* and attorney," from *Harris, J.*, at January Civil Term, 1948, of WAKE.

Civil action instituted under the provisions of G. S., 41-11, to sell at private sale land in which it is alleged that there is a vested interest, and a contingent remainder over to persons who are not in being or the contingency has not yet happened which will determine who the remaindermen are, for purpose of re-investment.

Facts pertinent to the question presented on this appeal appear to be uncontroverted, and are these:

I. Miley Perry, late of Wake County, North Carolina, died leaving a last will and testament, dated 24 January, 1925, and probated 31 October, 1929, and recorded in the will record of said County, in which the paragraph numbered "Fourth," reads: "I give and devise to my son, Percy Barrett Perry, the following described tract of land conveyed to me by S. H. Averitt and wife, containing fifty-five acres"—(Description follows)—"This tract of land is to be held and owned by my said son, Percy Barrett Perry, during his natural life, and after his death by his children, if any, and in case of the death of any child to the issue of such child, the child to take *per stirpes.* And if there are no children or issue of my said son, then said land shall revert and become part of my estate."

II. Percy Barrett Perry and plaintiff were married on 27 September, 1929. Thereafter, on 16 June, 1943, the bonds of matrimony existing between them were dissolved by absolute divorce. Each has since remarried,—she to J. B. Hendley, and he to Lottie Dean.

III. Percy Barrett Perry, as party of the first part, executed to plaintiff, as party of the second part, Linda B. Perry, a deed dated 15 June, 1943, in which these clauses appear: (1) Preamble: "That whereas the said party of the first part was originally seized and possessed of a life estate in the lands hereinafter described under and by virtue of the will of his father Miley Perry, and said will is recorded in Will Book K, page 202, in the office of the Clerk of the Superior Court of Wake County; and whereas said party of the first part is further seized of said lands under a deed conveying the below described property to him and his wife by L. S. Brassfield, Commissioner, same is recorded in Book 606, page 163, in the Register of Deeds office of Wake County, and whereas, said party of first part has agreed to convey the same to the party of the second part"; (2) granting clause: "does bargain, sell and convey to the said party of the second part and her heirs and assigns, all right, title and interest to said party of the second part, including the life estate as set out in the will as mentioned above, and all interest that he acquired under that deed from L. S. Brassfield, Commissioner, as mentioned above, in and to a certain tract or parcel of land"; (Description follows—the same as in "Fourth" paragraph of Miley Perry will); and (3) *habendum:* "To have and to hold said land and premises . . .

to her, the said party of the second part, and her heirs and assigns, for and during the life of the said party of the second part, and in fee simple absolutely." This deed was acknowledged by Percy B. Perry, probated and filed for registration 16 June, 1943.

Plaintiff alleges in her complaint, among other things, that under the provisions of the will of Miley Perry, Percy Barrett Perry was "vested, seized, and possessed of a life estate in said lands with the remainder over to other persons"; that Percy Barrett Perry "executed a deed to plaintiff intending to convey and thereby did convey to her all of his right, title, interest, and estate in and to the aforesaid lands . . . and in consequence thereof plaintiff became vested with and is now seized and possessed of the life estate in said lands devised to said Percy Barrett Perry under the aforesaid will of his father, Miley Perry, and plaintiff is now the owner of said life estate of Percy Barrett Perry in said lands and as such is in possession of the aforesaid land, and neither said Percy Barrett Perry nor his wife, Lottie Dean Perry, own any interest therein, present or contingent"; that Percy Barrett Perry has three children, Percy Buffaloe Perry, minor, born of his marriage to plaintiff, and William Dean Perry and Bessie Barrett Perry, minors, born of his marriage to Lottie Dean Perry; and that certain other named persons, parties defendant, are children and grandchildren of Miley Perry.

Defendant Percy Barrett Perry, in his answer to the complaint of plaintiff, admits that under the provisions of his father's will, hereinabove quoted, he acquired a life estate in the lands in question. But as to his deed to plaintiff, he avers that he undertook in good faith to convey his life interest therein to his former wife, the plaintiff, but that he is now advised, verily believes and now says that according to the provisions of his father's said will under which he took an estate for his life in said lands, he had no right whatsoever to convey said life estate in said land,—that he is "to hold and own" said land for the period of his natural life without any authority whatever to convey same, and that, hence, the purported deed is invalid and void, and moved the court to so adjudge, and accordingly prays judgment that plaintiff take nothing by this action and that he be adjudged the owner and holder of said land for his life, with the remainder or reversion as provided by said will.

The guardian *ad litem* and attorney appointed by the court for minor remaindermen in being, and unknown remaindermen in being, and unknown remaindermen, filed answer, admitting each and every allegation of the petition.

The only other answer appearing in the record is that of Alton Owen Perry. This was stricken from the record by order of the trial judge as hereinafter appears.

The case on appeal shows that when the cause came on for hearing in Superior Court, the presiding judge denied motion made in answer of defendant Percy Barrett Perry, as shown hereinabove that "the purported deed of conveyance" from him to plaintiff, "be declared, decreed and adjudged null and void" for the reasons set forth in said answer. This is defendants' Exception No. 1.

And the presiding judge found as facts, (1) "That Alton Owen Perry attempted to file an answer on December 17, 1947, but his time for answering had expired on November 11, 1947, and no order of agreement extending time had been made and no order was applied for or made allowing said answer to be filed." And, thereupon, the judge held that Alton Owen Perry has not answered. It is further found that no answer was filed or attempted to be filed by any of the other defendants except the guardian *ad litem* and Percy Barrett Perry, and it is held that the time therefor allowed by law has expired; (2) that defendant, Percy Barrett Perry, filed an answer on 30 October, 1947, "in which he admits that the will of his father, Miley Perry, devised to him a life estate in said lands but did not empower him to convey it," and requested the court to declare the deed from him to the plaintiff void and invalid, and also requested the court to pass upon the matter before this cause proceeds further; and . . . also moved the court to appoint him or some other proper person as guardian *ad litem* for his minor children named in the complaint.

And, thereupon, the court, after hearing argument of counsel upon the motions of defendant Percy Barrett Perry, concluded as matters of law "that the language of said will is clear and unambiguous and does not support the contention that Percy Barrett Perry did not take a life estate in said land, or taking it that it was not alienable." The court overruled the contention, and denied the motion based thereon, and adjudged (1) that said will of Miley Perry devised to and vested in Percy Barrett Perry a valid and alienable life estate in said land, and (2) "that said deed executed by him to Linda B. Perry (now the plaintiff Linda B. Perry Hendley) . . . is a valid conveyance to her of the entire life estate and any and all other interests of the said Percy Barrett Perry in said land, and (3) that she was at the time of the commencement of this action and now is vested with a good and alienable title to the said life estate and any other interests of Percy Barrett Perry in said land, with limitation of the fee over to other persons upon contingencies which will prevent the ascertainment of the ultimate remaindermen until the death of Percy Barrett Perry, and that the entire interest, vested and contingent, of all persons in said land are subject to sale in this proceeding under the provisions of Section 41-11 of the General Statutes of North Carolina.

The court denied the motion of defendant Percy Barrett Perry for appointment of guardian *ad litem* of his minor children, upon finding that another, Arthur A. Aronson, had been appointed guardian *ad litem* and attorney for them and others and he had filed answer, etc.

And, after finding other facts, not necessary to be recited here, the court ordered the property sold "for better investment as provided in G. S., 41-11 . . . at private sale," and that the cause be held open for such further orders as may from time to time be found necessary and proper in the premises.

"All of the defendants, except J. B. Hendley and Arthur A. Aronson, guardian *ad litem* and attorney, appealed to the Supreme Court."

William T. Hatch for plaintiff, appellee.
Douglass & McMillan for defendants, appellants.

WINBORNE, J. The exceptions of appellants, grouped as assignments of error, as we read them, present only this basic question: Did defendant, Percy Barrett Perry, acquire under the will of his father, Miley Perry, an alienable life estate in and to the lands sought to be sold in this action?

The trial judge held that he did acquire such life estate, and with the ruling this Court is in agreement.

The contention that the clause reading: "This tract of land is to be held and owned by my said son, Percy Barrett Perry, during his natural life . . ." grants a life estate with no power to sell for his life, is untenable. The words "to be held and owned" are synonymous with the clause "to have and to hold" common in conveyancing,—that is, the *habendum* which defines the extent of the ownership in the thing conveyed to be held and enjoyed by the grantee. The word "hold," as here used and as defined in Black's Law Dictionary, 3rd Edition, means "to possess in virtue of a lawful title, as in the expression, common in grants, 'to have and to hold.'" And the word "own" as here used and as defined by the same author, means to "have a good title; to hold as property; to have a legal or rightful title to; to have; to possess." Thus the clause "to be held and owned" as used in the Miley Perry will merely defines the extent of the ownership in the land devised to be held and enjoyed by devisee, Percy Barrett Perry. It is not a restraint upon alienation of the life estate.

Thus, holding that Percy Barrett Perry acquired, under his father's will, an alienable life estate, the challenge to the sufficiency of his deed to convey to his then wife, the plaintiff, his life estate, must fail as a matter of law. *Walker v. Long,* 109 N. C., 510, 14 S. E., 299; *Fort v. Allen,* 110 N. C., 183, 14 S. E., 685; *Sydnor v. Boyd,* 119 N. C., 481, 26 S. E., 92; *McLamb v. McPhail,* 126 N. C., 218, 35 S. E., 426.

In the *Sydnor case, supra,* it is stated that while at common law the husband and wife, being deemed one person, were incapable of contracting with each other, and it was necessary to convey to a third person, as a conduit, in order to pass the title to property from one to the other, the wife is now allowed to acquire title to property conveyed to her by the husband. And in the *McLamb case, supra, Clark, J.,* stated that "Now, by virtue of the constitutional provision (Art. X, Sec. 6) it is held that a deed from the husband to the wife is valid."

It may be noted that appellants, in their brief under heading "The petitioner received no vested conveyable interest in the land by said purported deed," say that "the grantor and the grantee (the petitioner) in this instrument were husband and wife at the time the instrument was executed, having taken the lands as tenants by the entirety under a conveyance from L. S. Brassfield, Commissioner." However, as the record on this appeal does not show that the trial judge made any finding of fact as to the authority of the commissioner to make the conveyance or as to what estate it purports to convey, or that he made any conclusion of law in respect thereto, and the appellants not having offered any evidence in respect to it, nor taken exception to the failure of the trial judge to find the facts and state his conclusions of law on facts found, the question as to the legal effect of this conveyance is not presented on this record for decision.

Hence, on the questions presented, the judgment below is

Affirmed.

JOHN P. LEWIS, ADMINISTRATOR OF THE ESTATE OF HENRY GORDON LAW, DECEASED, v. GARRIEL WATSON, AND TROY WHITEHEAD MACHINERY COMPANY, INCORPORATED.

(Filed 28 April, 1948.)

1. Trial § 31b—

G. S., 1-180, requires the trial court to instruct the jury as to the law upon all substantial features of the case without request for special instructions, and a general statement of the law is not sufficient, but the court must explain the law as it relates to the various aspects of the evidence adduced and to the particular issues involved.

2. Automobiles § 18i—

A charge which fails to define careless and reckless driving or explain what constitutes a proper lookout in relation to the evidence adduced at the trial is insufficient to meet the requirements of G. S., 1-180.

3. Same—

The mere reading of the statutory speed regulations, G. S., 20-141, without separating the irrelevant provisions from those pertinent to the evi-

dence and without application of the relevant provisions to the evidence adduced, *is held* insufficient to meet the requirements of G. S., 1-180.

4. Same—

The evidence disclosed that intestate was pushing a handcart on the right side of the highway, and that he was struck from the rear by defendant's vehicle traveling in the same direction. Plaintiff contended that the handcart was a vehicle and that G. S., 20-146, and G. S., 20-149, applied. Defendant contended that intestate was a pedestrian and was required by G. S., 20-174 (d), to push the handcart along the extreme left-hand side of the highway. *Held:* An instruction failing to define intestate's *status* and explain the law arising upon the evidence fails to meet the requirements of G. S., 1-180.

5. Automobiles § 16—

A person pushing a handcart along the highway is a pedestrian, since a handcart, being propelled solely by human power, is not a vehicle as defined by G. S., 20-38 (ff).

6. Same: Automobiles § 18h (3)—Motorist is under duty to use due care to avoid striking pedestrian even though pedestrian is on wrong side of highway.

The evidence disclosed that intestate was pushing his handcart on the right-hand side of the highway in violation of G. S., 20-174 (d), and was struck from the rear by a vehicle traveling in the same direction. Plaintiff's evidence was to the effect that the operator of the vehicle was traveling at excessive speed and failed to keep a proper lookout. *Held:* The fact that intestate was traveling on the wrong side of the road did not render him guilty of contributory negligence as a matter of law upon the evidence, since the operator of a vehicle is under duty notwithstanding the provisions of G. S., 20-174 (d), to exercise due care to avoid colliding with any pedestrian upon the highway. G. S., 20-174 (e).

APPEAL by plaintiff from *Patton, Special Judge,* and a jury, at the October Term, 1947, of MECKLENBURG.

This is a civil action in which the plaintiff, John P. Lewis, Administrator, seeks to recover damages of the defendant for the death of his intestate, Henry Gordon Law, upon a complaint alleging that such death was proximately caused by the negligence of the defendant, Garriel Watson, while operating a truck tractor on the business of his employer, the corporate defendant, Troy Whitehead Machinery Company. The ownership of the truck tractor by Troy Whitehead Machinery Company and the agency of Garriel Watson for it were conceded by the defendants. They denied, however, that the plaintiff's intestate had suffered death on account of negligence on the part of Garriel Watson, and pleaded contributory negligence on the part of the deceased as an affirmative defense.

There was substantial disagreement in the evidence of the parties relating to the merits of the action. A few facts, however, were not in

dispute. United States Highway No. 29 runs westward from Charlotte to Gastonia. The plaintiff's intestate was walking westerly somewhere on his right-hand half of this road about a mile west of the limits of Charlotte on the afternoon of 25 November, 1946. Here he was overtaken and struck by the truck tractor owned by Troy Whitehead Machinery Company and driven by Garriel Watson. When the truck tractor came upon the decedent from the rear, it was proceeding west along its right side of the road. The highway was straight and practically level at this point, and was paved to a width of 36 feet. Before the collision in controversy, the State Highway and Public Works Commission had established four traffic lanes of equal widths upon this part of the highway by placing white lines on the pavement, and had assigned the two southern lanes to east-bound traffic and the two northern lanes to west-bound traffic.

When viewed most strongly in his favor, the plaintiff's evidence tended to establish the matters set out in this paragraph. The deceased was walking westerly along the extreme northern margin of the highway, pushing a handcart ahead. The truck tractor came up from his rear at a speed of 55 or 60 miles an hour. It was daylight, and there was nothing to prevent the driver of the truck tractor from seeing the intestate pushing his handcart in the same direction on the same side of the highway. Notwithstanding these facts, the driver of the truck tractor proceeded ahead without reducing his speed, or changing his course, or giving any warning of his approach, and ran down and killed the decedent.

The defendants introduced testimony, however, indicating that the truck tractor collided with the intestate under the conditions set forth in this paragraph. The accident happened about sunset when virtually a solid stream of motor vehicles was moving along each of the four traffic lanes on United States Highway No. 29. At that time the deceased was pushing his handcart westerly in the middle of the northern half of the highway between the two lines of motor vehicles proceeding westward along the two northern traffic lanes. The defendant, Garriel Watson, approached in the truck tractor, traveling west in the northernmost traffic lane at a speed not exceeding 25 miles an hour. He was following a passenger automobile. He had the truck tractor under control, and was keeping a diligent lookout ahead. But the plaintiff's intestate was hidden from his sight by intervening motor vehicles. When the truck tractor was a short distance away, the passenger car in its front unexpectedly swerved to the left and struck the deceased or his handcart, knocking the deceased into the path of the oncoming truck tractor and so close thereto that it was impossible for its driver to avoid hitting the deceased.

The court below submitted these three issues to the jury: (1) Was the plaintiff's intestate killed by the negligence of the defendants, as

alleged in the complaint? (2) If so, did the plaintiff's intestate, by his own negligence, contribute to his death, as alleged in the answer? (3) What amount, if any, is the plaintiff entitled to recover of the defendants?

The jury answered the first issue "No," and the court rendered judgment on this verdict exonerating the defendants from liability to the plaintiff. The plaintiff thereupon appealed.

Smathers, Smathers & Carpenter, Landon H. Roberts, and Smathers & Meekins for plaintiff, appellant.

Tillett & Campbell and James B. Craighill for defendants, appellees.

ERVIN, J. G. S., 1-180, provides that the trial judge shall "state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon." By exceptions duly reserved to the charge, the plaintiff asserts that the court below did not perform the function devolving upon it under this statute.

The chief purpose of a charge is to aid the jury clearly to comprehend the case, and to arrive at a correct verdict. For this reason, this Court has consistently ruled that this statute imposes upon the trial judge the positive duty of instructing the jury as to the law upon all of the substantial features of the case. *Smith v. Kappas,* 219 N. C., 850, 15 S. E. (2d), 375; *Ryals v. Contracting Co.,* 219 N. C., 479, 14 S. E. (2d), 531; *Williams v. Coach Co.,* 197 N. C., 12, 147 S. E., 435; *Wilson v. Wilson,* 190 N. C., 819, 130 S. E., 834. If the mandatory requirements of the statute are not observed, "there can be no assurance that the verdict represents a finding by the jury under the law and the evidence presented." *Smith v. Kappas, supra.* A litigant does not waive his statutory right to have the judge charge the jury as to the law upon all of the substantial features of the case by failing to present requests for special instructions. *Smith v. Kappas, supra; Spencer v. Brown,* 214 N. C., 114, 198 S. E., 630. Moreover, the mandate of the statute is not met by a "statement of the general principles of law, without application to the specific facts involved in the issue." *Ryals v. Contracting Co., supra; Mack v. Marshall Field & Co.,* 218 N. C., 697, 12 S. E. (2d), 235; *Nichols v. Fibre Co.,* 190 N. C., 1, 128 S. E., 471. The judge must declare and explain the law "as it relates to the various aspects of the testimony offered." *Smith v. Kappas, supra.* By this it is meant that the statute requires the judge "to explain the law of the case, to point out the essentials to be proved on the one side or the other, and to bring into view the relations of the particular evidence adduced to the particular issues involved." 53 Am. Jur., Trial, section 509.

When the instructions given to the jury in the court below are scrutinized in the light of these principles, it is indisputably clear that the

trial judge failed to declare and explain the law arising upon the evidence given in this case, and that the exceptions of the plaintiff to the charge must be sustained. After stating to the jury with commendable accuracy the testimony offered by the parties and the contentions made by them thereon, the trial court defined actionable negligence and contributory negligence in most general terms, gave the rules as to the burden of proof on the several issues, instructed the jury as to the measure of damages in actions for wrongful death, and read to the jury without comment or explanation various statutes regulating the operation of motor vehicles on the public roads of the State. But the court overlooked entirely the statute pertaining to the correlative duties of motorists and pedestrians with respect to each other when using the public highways. G. S., 20-174. We will confine our specific observations to the charge as it relates to the only issue answered by the jury.

The plaintiff insisted at the trial that the defendant, Garriel Watson, drove the truck tractor on the highway at an excessive speed, and without keeping it under proper control, and without maintaining a reasonably careful lookout ahead, and thereby proximately caused his intestate's death, and that by reason thereof the first issue ought to be answered in the affirmative. When the trial court undertook to apply the law to the facts upon the first issue, it charged the jury as follows: "If you find from the evidence and by its greater weight that the defendant, Garriel Watson, failed to keep a careful and proper lookout for persons, property, or obstructions on the highway, or operated the truck-tractor at an excessive rate of speed, or in a careless and reckless manner, and you further find from the evidence and by its greater weight that the acts, omissions, and conduct of the defendant, Garriel Watson, complained of, were the proximate cause of plaintiff's intestate's injuries, which resulted in his death, then it would be your duty to answer the first issue YES. If you fail to so find, it would be your duty to answer the first issue NO."

Upon its face, this instruction appears to embody a correct proposition. An analysis of the charge in its entirety, however, discloses that this is not true. The vice of this excerpt and of the charge as a whole as it relates to the first issue lies in the inadvertent omission of the court to call the attention of the twelve jurors unfamiliar with legal standards to what was necessary to guide them to a right decision on the issue. The charge gave no explanation as to what constitutes careless and reckless driving in the eyes of the law, or as to when a motorist is keeping a proper lookout in legal contemplation. The jury was left to decide these matters according to its own notions.

The trial court read to the jury *verbatim* and without any comment the first 41 lines of the highly complicated statute relating to speed restrictions on motor vehicles set out in G. S., 20-141. Outside of this, no

step was taken to explain to the jury what constitutes "excessive speed" in a legal sense. The mere reading of this statute was more likely to confuse the jury than to enlighten it. It is here suggested simply by way of illustration that it is not conceivable that the cursory reading of this statute in the hearing of the jurors gave them any idea whatever as to the meaning of the provision making speed in excess of a specified number of miles per hour in certain districts "*prima facie* evidence" of unreasonable and imprudent speed. Manifestly, the pertinent provisions of this intricate statute should have been separated from its irrelevant parts, and the jury should have been instructed as to the bearing such provisions had on the case.

We are constrained to hold that it is error for a trial court to read a statute to the jury without giving an explanation thereof in connection with the evidence where such explanation is patently necessary to inform the jury as to the meaning of the statute and as to its bearing on the case. *Presley v. Actus Coal Co.*, 172 Ark., 498, 289 S. W., 474; *Stansfield v. Wood*, 231 Ill. App., 586.

The legal battle between the parties in the court below centered chiefly around diverse contentions with respect to where the rules of the road required the plaintiff's intestate to push his handcart along the highway. The trial court gave the jury no instruction as to the law upon this question, but permitted it to determine the same according to its own ideas. In so doing, the court again failed to declare and explain the law as to a substantial feature of the case.

The conflicting contentions here considered had a direct relevancy to the first issue. The plaintiff insisted that the handcart was a vehicle within the purview of the statute governing the operation of motor vehicles on the public highways, and that by reason thereof his intestate was permitted and required by G. S., 20-146, to push it along the right side of the highway. The plaintiff further insisted that Watson, the driver of the truck tractor, overtook the intestate's handcart proceeding in the same direction along the highway; that Watson thereupon violated G. S., 20-149, by failing to drive the truck tractor at least two feet to the left of the handcart; that such violation of such statute by Watson proximately caused the death of the intestate, the operator of the handcart; and that by reason thereof the plaintiff was entitled to have the jury answer the first issue in the affirmative.

But the defendants contended that the plaintiff's intestate was traveling on foot; that his use of the handcart did not alter his status as a pedestrian; that he was required by G. S., 20-174 (d), to push his handcart along the extreme left-hand side of the highway; that he violated this statute by pushing his handcart along the right half of the highway; that such violation of the statute by the intestate was the sole proximate

cause of his death; and that by reason thereof the defendants were entitled to have the first issue answered in the negative.

The problem presented by these differing contentions finds a ready answer in that part of G. S., 20-38 (ff), which specifies that the word "vehicle" when used in the Motor Vehicle Act embraces "every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, excepting devices moved by human power." As the deceased's handcart was moved solely by human power, this statutory definition clearly excluded it from the category of vehicles.

We conclude that a person walking along a public highway pushing a handcart is a pedestrian within the purview of the statutes governing the conduct of pedestrians on public highways, and is not a driver of a vehicle within the meaning of the statutes regulating the conduct of drivers of vehicles on such highways. This holding harmonizes with the decisions in other states where the like question has been considered. *Flaumer v. Samuels,* 4 Wash. (2d), 609, 104 P. (2d), 484; *Gallardo v. Luke,* 33 Cal. App. (2d), 230, 91 P. (2d), 211.

It follows that it was the duty of the plaintiff's intestate to push his handcart along the extreme left-hand side of the highway facing the automobile traffic coming on that side when he elected to travel on foot on the highway. G. S., 20-174 (d). The fact, however, that he was proceeding unlawfully on the wrong side of the road at the time he was stricken did not render him guilty of contributory negligence as a matter of law upon the record in the case at bar. Both the common law and the statute provide that notwithstanding the provisions of G. S., 20-174 (d), "every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway." G. S., 20-174 (e); *Arnold v. Owens,* 78 F. (2d), 495. We hold that on the testimony adduced at the trial both the question of actionable negligence on the part of the defendants and the question of contributory negligence on the part of the deceased were for the jury. As the case must be tried anew, further discussion of the evidence is omitted.

For the reasons given in this opinion, the plaintiff is entitled to a new trial. It is so ordered.

New trial.

J. H. WARNER v. LEE M. LAZARUS, JOE LAZARUS AND JULIUS T. HANSEN.

(Filed 28 April, 1948.)

1. Negligence § 7—

Primary negligence is insulated by the independent negligence of another if such intervening negligence and resultant injury is not reasonably foreseeable by the person guilty of the primary negligence.

2. Negligence § 9—

The law requires only reasonable prevision, and foreseeability is a prerequisite of proximate cause.

3. Automobiles § 18h (4)—Intervening negligence held not reasonably foreseeable upon the evidence and therefore it insulated primary negligence.

Plaintiff's evidence tended to show that plaintiff was standing at the rear of a car parked completely off the hard surface on the right, that a car traveling at a speed of 45 to 50 miles per hour slowed down rapidly as it came near the parked car, that the driver of a truck following 250 feet behind the car, immediately he saw the brake light on the car, applied his brakes without effect and then applied his hand brake and skidded off the highway, striking the rear of the car and the plaintiff. Oncoming traffic prevented him from turning to the left. The driver of the truck testified that had his brakes been working properly he did not think he would have had any trouble stopping the truck. *Held:* Even conceding negligence on the part of the driver of the car in violating G. S., 20-154, the intervening negligence of the driver of the truck in driving at excessive speed or in operating the car with defective brakes, insulated any negligence of the driver of the car as a matter of law, since neither the intervening negligence nor the resulting injury could have been reasonably anticipated by the driver of the car from his act in rapidly decreasing speed.

APPEAL by plaintiff from *Hamilton, Special Judge,* at November Term, 1947, of WAKE.

Civil action to recover for personal injuries sustained in a motor vehicle collision.

The car in which the plaintiff had been riding was parked on the shoulder of U. S. Highway No. 1, about 3 miles south of Cary, approximately 2 feet from the edge of the paved portion thereof, on 18 October, 1946, about 10:30 a.m. The weather was fair and the highway dry. The right-hand rear tire on the Warner car was flat. At the time of the collision, the plaintiff was engaged in removing the spare tire from the trunk of the car. The car was headed north, the same direction the motor vehicles of the defendants were traveling. The car of the defendant Joe Lazarus, was being driven at the time of the collision by Lee M. Lazarus, his wife, and was proceeding along the highway at a rate of

speed "between 45 and 50 miles per hour." A truck operated by the defendant, Julius T. Hansen, was following the Lazarus car. Hansen was driving at substantially the same rate of speed the car of the defendant Joe Lazarus was being driven. Shortly before the Lazarus car reached the Warner car, the driver of the Lazarus car slowed down "fairly rapidly considering the speed they were traveling." "The Lazarus car was slowing down" when it was hit, then it speeded up a little and parked off the road, according to the defendant Hansen's evidence. The defendant Hansen was 250 feet or more behind the Lazarus car when he saw the brake light on the Lazarus car. He immediately applied his brakes, but with no effect. He then applied his hand brake and skidded. He struck the rear of the Lazarus car when it was slightly south of where the Warner car was parked. The rear of the truck skidded off the highway and hit the plaintiff and the Warner car, seriously and permanently injuring the plaintiff. The Lazarus car did not come into physical contact with the Warner car. There was oncoming traffic on the left of the highway, which prevented the defendant Hansen from passing the Lazarus car on its left. The road was slightly down grade. The parked car could be seen from the south for a distance of about 400 yards.

There was some evidence tending to show that the defendant Hansen knew his brakes were defective, although he testified this was the first time they had completely failed to hold.

At the close of plaintiff's evidence, the defendants Lee M. and Joe Lazarus, moved for judgment as of nonsuit. The motion was allowed and the plaintiff appealed, assigning error.

Howard E. Manning for plaintiff.

Bailey & Holding for defendants.

DENNY, J. The question presented is whether the evidence is sufficient to carry the case to the jury on the issue of negligence as to the defendants Lee M. and Joe Lazarus.

The appellant is relying on *Betchler v. Bracken,* 218 N. C., 515, 11 S. E. (2d), 721; *Holland v. Strader,* 216 N. C., 436, 5 S. E. (2d), 311; *Smith v. Coach Co.,* 214 N. C., 314, 199 S. E., 90, and similar cases. Those cases are not controlling in the instant case. There is a substantial difference in the facts in this case and the facts upon which those decisions rest.

In *Betchler v. Bracken, supra,* the defendant Bracken had been trailing a large truck. As the truck was entering a bridge it was stopped suddenly without any signal being given. Bracken was only 30 or 35 feet behind the truck when it stopped; he was too close to the truck to stop without hitting it, and rather than hit the back of the truck, he

pulled to the left and ran into an oncoming automobile. The court below held the evidence was insufficient to be submitted to the jury as to the negligence of the owner of the truck. The ruling was reversed on appeal.

In the case of *Holland v. Strader, supra,* the Strader car was being operated at a distance of two or three car lengths ahead of the plaintiff's car. The parties were en route to Chapel Hill to witness a football game. Both cars were traveling 30 to 40 miles an hour; the defendant's car stopped suddenly without any signal or warning being given, and, in spite of the plaintiff's effort to stop or turn his car, he was unable to do so, and collided with the defendant's car, causing injury to plaintiff.

In *Smith v. Coach Co., supra,* the plaintiff attempted to pass a bus, but upon pulling her automobile to the left, for the purpose of passing the bus, she saw a car approaching from the opposite direction. She then pulled her automobile behind the bus, and while driving at a speed of approximately 40 miles per hour, the bus was suddenly stopped without any signal being given by the driver of the bus of his intention to stop. The plaintiff was unable to stop her car in time to avoid a rear-end collision with the bus.

Likewise, the appellant herein contends that the driver of the Lazarus car stopped the car rapidly, without first ascertaining whether such movement could be made in safety, and without giving any signal, as required by G. S., 20-154. The pertinent parts of which statute reads as follows: "The driver of any vehicle . . . before stopping . . . shall first see that such movement can be made in safety, . . . and whenever the operation of any other vehicle may be affected by such movement, shall give a signal as required in this section, plainly visible to the driver of such other vehicle, of the intention to make such movement. The signal herein required shall be given by means of the hand and arm in the manner herein specified, or by any approved mechanical or electrical signal device. . . . All signals to be given from the left side of the vehicle during the last fifty feet traveled."

Did the Lazarus car travel less than fifty feet after the defendant Hansen saw it was slowing down? It does not appear from the evidence how far south of the Warner car the Lazarus car was when the driver of the Lazarus car applied the brakes. It does appear, however, that at the moment the brakes were applied on the Lazarus car, the defendant Hansen, who was driving about 250 feet or more behind the Lazarus car, saw the brake light and immediately applied his brakes. He certainly considered the flash of the brake light on the Lazarus car as a signal that the driver of the car intended to stop or at least to slow down. But his brakes would not hold; they had no effect on his speed; he kept going. He applied his hand brake, collided with the rear end of the Lazarus

car, and skidded into the rear end of the Warner car, which was parked on the right-hand shoulder of the highway.

Where is the causal connection between the failure of the driver of the Lazarus car to give a signal as required by the statute of her intention to decrease her speed, if she did so fail, and the injury to the plaintiff? The defendant Hansen testified that if his brakes had been working adequately, he did not think he would have had any trouble stopping his truck. *Insurance Co. v. Stadiem,* 223 N. C., 49, 25 S. E. (2d), 202; *Chinnis v. R. R.,* 219 N. C., 528, 14 S. E. (2d), 500. Furthermore, the evidence does not support the contention that the Lazarus car stopped on the highway, but only that it slowed down "fairly rapidly."

The mere fact that a motorist may decrease the speed of his car when approaching oncoming traffic, when he observes a parked car just off the pavement on his side of the road, is not within itself evidence of negligence. On the contrary, it would seem to be a precautionary measure. Moreover, where it appears, as it does here, that the defendant Hansen was traveling behind the Lazarus car a distance of 250 feet or more and saw the Lazarus car slowing down, and was unable to get his truck under control and avoid a collision, by reason of his speed or the defective condition of his brakes, it would seem to be unreasonable to assume that the driver of the Lazarus car should have foreseen that the plaintiff or some other person was likely to be injured as a result of decreasing her speed.

Nevertheless, if it be conceded the appellees were negligent, we think the doctrine of insulating negligence, as laid down in *Butner v. Spease,* 217 N. C., 82, 6 S. E. (2d), 808, would apply. There it is said: "The test by which the negligent conduct of one is to be insulated as a matter of law by the independent negligent act of another, is reasonable unforeseeability on the part of the original actor of the subsequent intervening act and resultant injury. *Newell v. Darnell, supra* (209 N. C., 254, 183 S. E., 374); *Beach v. Patton, supra* (208 N. C., 134, 179 S. E., 446); *Hinnant v. R. R., supra* (202 N. C., 489, 163 S. E., 555); *Balcum v. Johnson,* 177 N. C., 213, 98 S. E., 532. 'The test . . . is whether the intervening act and the resultant injury is one that the author of the primary negligence could have reasonably foreseen and expected.' *Harton v. Tel. Co.,* 141 N. C., 455, 54 S. E., 299. 'The law only requires reasonable foresight, and when the injury complained of is not reasonably foreseeable, in the exercise of due care, the party whose conduct is under investigation is not answerable therefor. Foreseeable injury is a requisite of proximate cause, and proximate cause is a requisite of actionable negligence, and actionable negligence is a requisite for recovery in an action for personal injury negligently inflicted.' *Osborne v. Coal Co.,* 207 N. C., 545, 177 S. E., 796; *Beach v. Patton, supra.*" See also *Montgomery v. Blades,* 222 N. C., 463, 23 S. E. (2d), 844; *Brady v. R. R.,*

222 N. C., 367, 23 S. E. (2d), 334; *Luttrell v. Mineral Co.*, 220 N. C., 782, 18 S. E. (2d), 412; *Chinnis v. R. R., supra; Murray v. R. R.*, 218 N. C., 392, 11 S. E. (2d), 326; *Powers v. Sternberg*, 213 N. C., 41, 195 S. E., 88; *Smith v. Sink*, 211 N. C., 725, 192 S. E., 108; and *Haney v. Lincolnton*, 207 N. C., 282, 176 S. E., 573.

"The definition of proximate cause requires a continuous and unbroken sequence of events, and where the original wrong only becomes injurious in consequence of the intervention of some distinct wrongful act or omission on the part of another or others, the injury is to be imputed to the second wrong as the proximate cause, and not to the first or more remote cause. Cooley on Torts, sec. 50." *Insurance Co. v. Stadiem, supra; Rattley v. Powell*, 223 N. C., 134, 25 S. E. (2d), 448.

A careful examination of the evidence adduced on the trial below, when considered in its most favorable light for the plaintiff, as it must be on demurrer to such evidence, fails to disclose actionable negligence on the part of the appellees.

The plaintiff received a serious injury, but we think the negligence of the appellees, if any, was insulated by the negligence of the defendant Hansen. It does not appear that the plaintiff would have been injured as a probable consequence of the decreased speed of the Lazarus car, had it not been for the intervention of Hansen's negligence. In light of the circumstances disclosed by this record, we do not think the driver of the Lazarus car "ought to have foreseen in the exercise of reasonable prevision," that the plaintiff or some other person might be injured as a result and probable consequence of her act in slowing down her car. *Butner v. Spease, supra.*

The ruling of the court below will be upheld.

Affirmed.

ATLANTIC GREYHOUND CORPORATION AND CAROLINA COACH COMPANY v. NORTH CAROLINA UTILITIES COMMISSION

and

ATLANTIC GREYHOUND CORPORATION AND CAROLINA COACH COMPANY v. SEASHORE TRANSPORTATION COMPANY.

(Filed 28 April, 1948.)

1. Injunctions § 4i—

A carrier may not maintain a suit for a mandatory injunction directing the Utilities Commission to expunge from its records orders amending the franchise of a competing carrier on the ground that such orders were entirely beyond the power and jurisdiction of the Commission, since if the orders were void they did not change the *status quo* and no mandatory writ to wipe them from the docket is necessary.

2. Same—

The exercise by a competing carrier of rights granted it by the Utilities Commission by amendments to its franchise may not be enjoined by a carrier by suit against the Utilities Commission for a mandatory injunction to expunge from its records the amendatory orders, but the exercise of such rights by the competing carrier must be challenged in a proper proceeding to which the competing carrier is a party and has an opportunity to defend.

3. Utilities Commission § 1—

The Utilities Commission is an administrative agency of the State with *quasi*-judicial powers.

4. Utilities Commission § 5—

Judicial determinations by the Utilities Commission are subject to review in accordance with the procedure provided by statute, and an independent action for mandatory injunction against the Utilities Commission in regard to its orders affecting a franchise will not lie as a substitute for appeal.

5. Courts § 3a: Injunctions § 4i—

An independent suit against the Utilities Commission for a mandatory injunction relating to its orders affecting a franchise cannot be maintained, since the Superior Court will not take original jurisdiction of matters within the exclusive jurisdiction of the Commission.

6. Carriers § 5—

The right to transport freight or passengers over the highways of the State is a privilege and a franchise granted by the State through the Utilities Commission for this purpose does not vest the holder with an interest in the highways but merely grants permission for their use.

7. Same—

While a franchise creates rights which the law will protect in the interest of the public, a franchise is not an exclusive right, and whether other carriers shall be let in is a question for the determination of the Utilities Commission in the public interest, with statutory right of existing franchise holders to come in and defend against a new application for the privilege of using the same highways and serving the same communities.

8. Utilities Commission § 5—

The statutory procedure for appeal from orders of the Utilities Commission is exclusive, and must be exhausted before resort to the courts.

9. Injunctions § 4i—

Plaintiffs instituted action against a competing carrier to restrain it from exercising rights given it by orders of the Utilities Commission amending its franchise. The orders were entered in proceedings to which plaintiffs were parties. *Held:* Plaintiffs had adequate remedy for the protection of their rights by appeal, G. S., 62-19; G. S., 62-20, and judgment sustaining defendant's demurrer in the independent action was proper.

GREYHOUND CORP. *v.* UTILITIES COM.; GREYHOUND CORP. *v.* TRANSPORTATION CO.

PLAINTIFFS' appeal from *Nimocks, J.*, 13 October, 1947, WAKE Superior Court.

Bailey & Holding and Ehringhaus & Ehringhaus for Atlantic Greyhound Corporation, plaintiff, appellant.

Arch T. Allen and L. P. McClendon for Carolina Coach Company, plaintiff, appellant.

Attorney-General McMullan and Assistant Attorneys-General Bruton and Paylor for the State.

D. L. Ward, W. Frank Taylor, and Norman C. Shepard for Seashore Transportation Company, defendant, appellee.

SEAWELL, J. These appeals, embracing much the same subject matter, were argued together, and will be here discussed as companion cases, avoiding, as far as possible, repetition in factual statement and history of the cases.

The controversy resulting in the appeals grew out of an application of the Seashore Company for a franchise that would permit it to operate a through bus service from coastal communities to Raleigh, beginning at Atlantic and Beaufort via Goldsboro, its western terminus, without the necessity of transfer to busses operated under franchise by the Greyhound Company or other franchise carriers at that point or resort to other means of transportation. Since portions of the route designated in the application were being used in bus service by Greyhound and the Coach Company under State franchises, and covered towns or communities served by these carriers, both were made parties to the proceeding, protested and resisted the application, were present and participated in the hearing in Dockets 3809 and 4072, in which applications were made, and excepted to the orders granting the Seashore Company certificate of convenience and necessity, and restricting Seashore to closed door operation at such points and between such points as was deemed best to serve the public interest, protect the existing franchises, and to hold the Seashore Company to through transportation in such territory. The orders also fixed schedules and limited operation to two return trips daily.

Later the Seashore Company applied for a temporary detour permit to operate over a portion of the highway in use by Greyhound and the Coach Company, in order to avoid travel over a part of its route, known as the Brogden road, which was being prepared for hard surfacing; and this was allowed, the plaintiffs claim, without notice to them.

Both Greyhound Corporation and the Coach Company requested the Commission not to put its order into operation or issue the certificate of convenience and necessity, or franchise, until their appeals upon the orders granting the franchise could be heard. It does not appear from the record whether the appeals were perfected; but both companies con-

tend that the orders were put into effect before the time to allow them to file exceptions, and the overruling thereof, which, as they construe the statute, must occur before appeal can be taken. The orders were put into effect and the Seashore Company began to exercise the franchise privileges and continues to do so.

The Greyhound Corporation and the Coach Company, jointly, brought two separate actions, one against the Utilities Commission and one against the Seashore Company, for injunctive relief.

Since the appellants, which are the same in both cases appealed, do not admit the pending of an appeal from the Commission, and the time to perfect such appeal has long expired, we must consider the actions in which the appeals under review are taken as proceedings for independent relief.

No. 449. Greyhound Corporation and Coach Company *v.* Utilities Commission.

The appellants, basing their right to the remedy on the theory that the Commission acted entirely beyond its jurisdiction and the power given it under the creative statute, seek, in this action, to subject the Commission to a mandatory injunction, compelling it to expunge from its records the orders made as "amendments" to the certificate, or franchise of the Seashore Transportation Company, the detour permission thereafter granted, the tariff and schedules approved for operation under the certificate given it under Dockets Nos. 3809 and 4072, "and all other attempted implementations thereof; and that the Commission be restrained from any additional acts in furtherance of said void orders, certificates, and permits of the Commission or in the violation of the statutes of the State until, under the laws of the State the right to issue certificate and make other orders shall be approved as by law directed."

If, as alleged, the acts of the Commission in the premises were entirely beyond the power and jurisdiction given it by the statute, and as contended, utterly void, no injunctive relief is required to protect the plaintiffs' right against a mere interloper, and no mandatory writ to wipe the questioned orders from the docket is needed, since, in that event, the *status quo* had not been changed. It is not necessary to say what might be applicable procedure, assuming the Commission acted arbitrarily, capriciously or corruptly, since that is not suggested. The thing against which the injunction is concerned is an accomplished fact, and moot.

If it is sought to preclude a company from the exercise of franchise rights which it holds under orders of the Commission, which are colorable or otherwise, the approach to that end must be made through other adequate procedure available to the objector in which the holder of the challenged certificate may have an opportunity to defend, rather than by attempting to turn back the clock, or cut off at the source water already

over the dam. The appellants seem to have recognized this in bringing the companion suit.

The Utilities Commission is an administrative agency of the State with *quasi*-judicial powers; it is made a court of record, primarily for the purpose of preserving its records and facilitating review. It is not a court in the judicial sense, but its judicial determinations are subject to review on appeal. Injunction, as a substitute for appeal, cannot be made an instrument for review. Nor will the courts take original jurisdiction of matters confided to the exclusive jurisdiction of the Utilities Commission. *Coach Co. v. Transit Co.,* 227 N. C., 391, 42 S. E. (2d), 398.

While the suit, as brought, may be regarded as a suit against the State, since the relief sought directly affects the exercise of governmental powers exclusively within its sovereignty, and without constitutional or statutory consent (*Rotan v. State,* 195 N. C., 291, 141 S. E., 733; *Carpenter v. R. R.,* 184 N. C., 400, 114 S. E., 693; *Moody v. State Prison,* 128 N. C., 12, 38 S. E., 131; *U. S. v. Lee,* 106 U. S., 196, 25 R. C. L., 412), it is not necessary to enter a discussion of that matter. Review of the matters complained of come within the purview of the appeal procedure provided in the statute, which is adequate in law.

The propriety of requiring at least first resort to the remedies provided in the statute is bottomed on the nature of the rights with which we are dealing and the primary purpose of the law. The Utilities Commission is not empowered to give an applicant any interest in the highways of the State for commercial transportation of freight or passengers, but only to permit their use; the franchise may be sole, never exclusive, except in the sense that the privilege has not, as yet, been extended to another concern. When the public convenience or necessity requires, the privilege may be recaptured, modified or restricted, or the like privilege extended to another carrier. And this is expressly reserved in the statute or implied in the franchise transaction viewed as a contract, if it is ever of that nature.

The right to use the highway as a facility for carrying on private business for profit in the commercial transportation of freight or passengers is not inherent, or a constitutional right; Elliott, Roads and Streets, sec. 1171-4; and under appropriate regulatory statutes it may be granted or withheld; *Suddreth v. City of Charlotte,* 223 N. C., 630, 27 S. E. (2d), 650; Blashfield, Auto Law, p. 227, sec. 105; Am. Jur., 492, sec. 192. If consistent with regulatory law the State agency might grant the privilege to many or deny it to all. It is by grace of the statute only that existing franchise holders are let in to protect and defend against a new application for the privilege of using the same highway and serving the same communities, and the merit of the application, and its ultimate

fate, depend upon the question of the public interest. There are rights, of course, incidental to the privilege bestowed, and it is to the public interest that they be protected so that competent and adequate public service may be maintained. These rights rest upon the creative statute for their interpretation, and primarily so for their protection.

When application was made here to advance the argument in this case the motion was denied, in respect to the authority of *Warren v. Atlantic Coast Line R. R. Co.*, 223 N. C., 843, 28 S. E. (2d), 505, in which *Chief Justice Stacy,* speaking for the Court, said:

> "As a general rule, where a matter is committed to an administrative agency, one who fails to exhaust the remedies provided before such agency will not be heard in equity to challenge the validity of its orders. *Garysburg Mfg. Co. v. Commrs. of Pender County,* 196 N. C., 744, 147 S. E., 284; *Mfg. Co. v. Commrs.,* 189 N. C., 99, 126 S. E., 114; *Sykes v. Jenny Wren Co.,* 64 App. D. C., 379, 78 F. (2d), 729; *Switchman's Union of N. A. v. Nat. Mediation Bd.,* 320 U. S., 297, 88 Law Ed., Adv. Op. 89."

And in *Coach Co. v. Transit Co., supra,* we find similar expression of the rule.

We think the principle thus announced is controlling in the instant case.

The judgment sustaining the demurrer and dismissing the action is affirmed.

Atlantic Greyhound Corporation and Carolina Coach Company *v.* Seashore Transportation Co.

In this case, as in the foregoing, the plaintiffs sought injunctive relief in an independent action against the Seashore Company, setting up in its complaint substantially the facts alleged in 449. The only difference in the two cases is that the absolute nullity of the transactions and orders of the transactions of the Utilities Commission would put the Seashore Company in the position of an interloper invading franchise rights of each of the plaintiffs without authority or warrant of law. We are unable to agree that the facts alleged in plaintiffs' pleading are sufficient to put the defendant in that class so as to avoid the necessity of appeal. We are satisfied that the objections made to the proceedings before the Commission, and the challenges made to its orders, are such as could be adequately presented and reviewed on the appeal provided in the statute, G. S., 62-19, 62-20, and that this remedy must be pursued. *Warren v. R. R., supra; Coach Co. v. Transit Co., supra.* In this case, since the injunction was sought by action in a court other than that in which an appeal could be pending, we are not troubled with the question whether

it could be sustained as necessary to preserve the subject matter of the appeal.

The judgment sustaining the demurrer is

Affirmed.

In 449—Judgment Affirmed.

In 450—Judgment Affirmed.

No. 724—STATE v. JOHN HENRY BRUNSON.
No. 725—STATE v. ESSIE KING.
No. 726—STATE v. MARTHA JONES.
No. 727—STATE v. LOUISE JAMES ET AL.
No. 728—STATE v. LIDA MAE WATKINS ET AL.

(Filed 28 April, 1948.)

Appeal and Error § 51c: Criminal Law § 85a: Jury § 8—

In these cases involving exceptions to the overruling of motions to quash the warrants and to denial of challenge to the array, the judgment of the Supreme Court of North Carolina was reversed by the Supreme Court of the United States in memorandum decision citing authorities dealing with the administrative practices in the selection of juries. *Held:* The mandate of the Supreme Court of the United States does not require the quashal of the warrants nor adjudicate that the North Carolina statutes on the subject of jurors are invalid.

ON mandates from Supreme Court of the United States.

Criminal prosecutions on separate warrants charging the defendants with malicious injury to property, assaults, disorderly conduct and disturbing the peace, tried originally in the Municipal Court of the City of Winston-Salem and again on appeal at the November Term, 1946, Forsyth Superior Court. Verdict of guilty, judgment and appeal in each case.

The leading case, No. 723, *S. v. Koritz et al.,* involving kindred offenses (resisting and obstructing officer), proceeded in like manner at the October Term, 1946, Forsyth Superior Court, and on appeal here was regarded as controlling and determinative of the others. It was the only case argued before us. The others, the ones now involved, were made to rest on the opinion filed in that case, which was based on similar findings of fact and determinations of the trial court. See 227 N. C., 552-561.

In the principal case, the *Koritz case,* application for writ of *certiorari* was made to the Supreme Court of the United States on 31 July, and denied 13 October, 1947; while in these five companion cases, application

for *certiorari* was made to the Supreme Court of the United States on 23 August and granted 15 December, 1947.

Thereafter, on 15 March, 1948, the Supreme Court of the United States filed the following memorandum in the cases:

"*Per Curiam:* Reversed. *Strauder v. West Virginia,* 100 U. S., 303; *Ex parte Virginia,* 100 U. S., 339; *Neal v. Delaware,* 103 U. S., 370; *Carter v. Texas,* 177 U. S., 442; *Rogers v. Alabama,* 192 U. S., 226; *Norris v. Alabama,* 294 U. S., 587; *Hollins v. Oklahoma,* 295 U. S., 394; *Hale v. Kentucky,* 303 U. S., 613; *Pierre v. Louisiana,* 306 U. S., 354; *Smith v. Texas,* 311 U. S., 128; *Hill v. Texas,* 316 U. S., 400; *Patton v. Mississippi,* 332 U. S., 463."

Mandates received 16 April, 1948.

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

William Reid Dalton for defendants.

STACY, C. J. To permit our opinion to stand in the principal case and reverse it here on similar exceptions would seem to leave the two rulings somewhat in conflict; and as precedents they will be difficult to follow. Three of the defendants in the principal case were Negroes, as are all the defendants here. The regular jury panel at the November Term was selected by the same administrative machinery as that at the October Term. Both panels were drawn in the same manner and from the same box. For all practical purposes, therefore, the several challenges to the array presented but a single question for decision.

No suggestion is given as to just what facts should be regarded as controlling here which were not operative in the principal case. The trial court made similar findings in all the cases. It will not do to say the infirmity in the original panel was cured by the special venire in the *Koritz case,* on the principle that "a little leaven leaveneth the whole," for the challenge to the original array necessarily came before it was known, or could be known, that a special venire would be needed. The mere presence on the jury of members of different groups or races is no assurance that they were selected as the law commands. Such was the holding in *Thiel v. Southern Pacific Co.,* 328 U. S., 217, 90 L. Ed., 1181: "It is immaterial that at least five members of the excluded class were on the jury which actually decided the factual issue in the case." As a matter of logic, the Negro defendants in the principal case stand on a parity with the defendants here. For us to have reached different conclusions in the cases would have been to decide two ways on practically identical exceptions.

Moreover, it was sought to have the same authorities applied in the principal case as are cited here, except the case of *Patton v. Mississippi,* 332 U. S., 463, which was not decided until 8 December, 1947. They are all fully considered and distinguished from the present cases in the State's brief, just as they were on petition for *certiorari* in the principal case which then apparently met with approval. The Negro defendants in the *Koritz case* challenged the regular panel array as did the defendants here, and upon the same grounds. We denied the challenge in both instances, relying in part on the cases of *S. v. Walls,* 211 N. C., 487, 191 S. E., 232, 203 U. S., 635, and *S. v. Henderson,* 216 N. C., 99, 3 S. E. (2d), 357, both of which, in turn, were predicated in large measure, on the teachings of *Thomas v. Texas,* 212 U. S., 278, 53 L. Ed., 512: "It may be that the jury commissioners did not give the negro race a full *pro rata* with the white race in the selection of the grand and petit jurors in this case; still this would not be evidence of discrimination. If they fairly and honestly endeavored to discharge their duty, and did not in fact discriminate against the negro race in the selection of the jury lists, then the Constitution of the United States has not been violated."

In the only case which was argued before us and in which an opinion was written, *certiorari* was denied. *Koritz Et Al. v. North Carolina,* 332 U. S., 768, denied 13 October, 1947. In the companion cases it was allowed, and thereupon the judgments were reversed. *Brunson, Et Al. v. North Carolina,* 333 U. S., 851, decided 15 March, 1948. It is true that "whether there has been systematic racial discrimination by administrative officials in the selection of jurors is a question to be determined from the facts in each particular case." *Patton v. Mississippi, supra.* It is also true that in appellate courts where precedents are established similar fact situations usually produce like results. Indeed, it has been thought that the equal protection of the laws required as much. It certainly "prohibits prejudicial disparities before the law." *Fay v. New York,* 332 U. S., 261. But what of the consideration given the Negro defendants in the principal case?

Further adding to the difficulty of reconciliation here, is the 5-to-4 decision of the court of last resort on 29 March, 1948, upholding the selection of a "blue ribbon" jury in New York from a panel of one hundred and fifty which contained the names of no Negroes. There, as here, was testimony to the effect that no "intentional or systematic exclusion" was practiced or intended. *Moore v. New York,* 333 U. S., 565, decided 29 March, 1948. The decision accords with the result in the *Koritz case,* albeit the opinion makes reference to the instant cases.

Nevertheless, the question now is how to proceed in these cases from here on.

Two principal exceptions were presented in the cases, the one to the overruling of the motions to quash the warrants, and the other to the denial of the challenges to the array. Our opinion dealt with both of these exceptions.

While the cases are "Reversed" by the court of last resort, it is not to be assumed the warrants are to be quashed. None of the cases cited deal with this question. Most of them speak to indictments by grand juries, but the warrants here were not passed upon by the grand jury. The composition of the grand jury is not germane to any exception in the cases. The defendants are charged with misdemeanors which, under our practice, may be tried on warrants requiring no grand-jury action. Nor is it to be assumed that the North Carolina statutes on the subject of Jurors are to be regarded as invalid, though this was argued by the defendants. The cases cited are primarily concerned with "the administrative practices of state jury selection officials."

The ambiguity or uncertainty left by the bare reversal appears to call for a word of direction from us to the trial court. Otherwise, arguments will ensue there as to whether the defendants are to be discharged or tried again.

The judgments heretofore entered in these five cases will be set aside, and the causes remanded for new jury trials in accordance with the mandates of the Supreme Court of the United States. Accordingly, the defendants will recover their costs incurred in the Supreme Court of the United States; and the costs heretofore assessed in this Court will be retaxed.

Judgments vacated.

New trials ordered.

STATE v. ALLIE FLETCHER RAY.

(Filed 28 April, 1948.)

1. Automobiles § 31a—

Knowledge of the driver that his vehicle had been involved in an accident resulting in injury to a person is an essential element of the offense of "hit and run driving." G. S., 20-166; G. S., 20-182.

2. Criminal Law § 42f—

The State is bound by an exculpatory statement of the defendant introduced in evidence by the State when such statement is not contradicted or shown to be false by any other facts or circumstances in evidence.

3. Automobiles § 31b—

In this prosecution under G. S., 20-166, the State introduced testimony of a statement by defendant that he had just driven the highway in question

but that he had no knowledge or notice that he had struck any vehicle or injured any person during the trip. This statement was not contradicted or shown to be false by any other fact or circumstance in evidence. *Held:* The statement is binding upon the State, and defendant's motion for judgment of nonsuit is sustained in the Supreme Court, G. S., 15-173, for want of evidence that defendant knew he had been involved in an accident resulting in injury to a person.

APPEAL by defendant, Allie Fletcher Ray, from *Burgwyn, Special Judge,* and a jury, at the January Term, 1948, of VANCE.

The accused was tried upon an indictment which alleged that he was the driver of a motor vehicle involved in an accident resulting in personal injury to Miss Sarah Ellington, and which charged that after the accident he committed the felony denounced by the statute commonly known as the Hit and Run Drivers' Law by failing immediately to stop his vehicle at the scene of the accident, by failing to give his name and his address and the registration number of his vehicle to Miss Ellington, and by failing to carry Miss Ellington to a physician or surgeon for medical or surgical treatment when it was apparent that such treatment was necessary for Miss Ellington. The defendant pleaded not guilty. The only testimony at the trial was that of the State.

Direct evidence was adduced by the State tending to show the facts set out in this paragraph. On 17 May, 1947, the prosecuting witness, Miss Ellington, was riding in a westerly direction on the Henderson-Oxford Highway in a Ford automobile owned and operated by Miss Mertie Hight. As they reached a point some three miles west of Henderson, they met a large truck, consisting of a truck tractor and a trailer, proceeding eastward on the highway. Here the rear-end of the truck swerved across the center of the road and struck the left side of the Ford car, causing personal injury to Miss Ellington. The truck continued its eastward movement along the highway without stopping or reducing its speed. Neither the truck nor its driver was identified by any witness. A few minutes later the defendant was arrested at a service station in or near Henderson. At that time he was in possession of a truck tractor with trailer attached.

The State undertook to prove by circumstantial evidence that this particular truck was the vehicle which struck the Ford car on the Henderson-Oxford Highway. This testimony was somewhat inconclusive in nature, but this Court proceeds here upon the assumption that it was of sufficient probative strength to warrant a reasonable inference that the truck in charge of the accused at the time of his arrest was the identical motor vehicle involved in the accident under review.

For the purpose of identifying the defendant as the operator of the truck at the time of the injury to the prosecuting witness, the State introduced a declaration made by the defendant at the time of his arrest

in which he stated, in substance, that he had just driven the truck then in his charge from Oxford to Henderson over the Henderson-Oxford Highway, but that he had no knowledge or notice that he had struck any motor vehicle or injured any person during the trip.

The jury found the accused "guilty as charged in the bill of indictment," and he appealed from the judgment pronounced on the verdict.

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

Gholson & Gholson for the defendant, appellant.

ERVIN, J. The chief error assigned by the accused on this appeal is the refusal of the trial court to dismiss the prosecution on a judgment of nonsuit.

When the Legislature enacted the statutes now embodied in G. S., 20-166, it imposed upon the driver of a motor vehicle involved in an accident resulting in injury to a person the following affirmative, positive, and specific duties: (1) To stop his motor vehicle immediately at the scene of the accident; (2) to give his name and address and the registration number of his motor vehicle to the person injured, or to the driver or occupants of any other vehicle collided with; (3) to render reasonable assistance to the person injured, including the carrying of such person to a physician or surgeon for medical or surgical treatment, if such treatment is requested by such person, or if it is apparent that such treatment is necessary for such person; and (4) to report the accident within twenty-four hours to the department of motor vehicles if it occurs outside a city, or to the police department of the city if it happens within a city.

It would be a manifest absurdity to expect or require the driver of a motor vehicle to perform the acts specified in the statute in the absence of knowledge that his vehicle has been involved in an accident resulting in injury to some person. Hence, both reason and authority declare that such knowledge is an essential element of the crime created by the statute now under consideration. *Herchenbach v. Commonwealth,* 185 Va., 217, 38 S. E. (2d), 328; Blashfield's Cyclopedia of Automobile Law and Procedure (Perm. Ed.), section 781; 16 A. L. R., Annotation, 1425-1429; 66 A. L. R., Annotation, 1228-1238; 101 A. L. R., Annotation, 911-919. This position is expressly sustained by our statute prescribing the punishment for persons "convicted of willfully violating G. S., 20-166, relative to the duties to stop in the event of accidents . . . involving injury or death to a person." G. S., 20-182.

In this case, the State itself introduced a statement of the accused to the effect that he had no knowledge or notice that he had struck any

motor vehicle or injured any person while driving his truck upon the Henderson-Oxford Highway. If true, this declaration plainly negatived the existence of an essential element of the crime charged in the indictment, to wit, that the defendant knew that the truck driven by him had been involved in an accident resulting in injury to a person. The exculpatory statement of the defendant is not contradicted or shown to be false by any other fact or circumstance in evidence. Consequently, we are constrained to hold upon the record here presented that this exculpatory statement is binding upon the State, and that the motion of the defendant for judgment of nonsuit ought to have been sustained in the court below. *S. v. Fulcher,* 184 N. C., 663, 113 S. E., 769; *S. v. Watts,* 224 N. C., 771, 32 S. E. (2d), 348.

For the reasons given, the judgment entered in the trial court is reversed, and the defendant's motion for judgment of nonsuit is sustained in this Court pursuant to G. S., 15-173.

Reversed.

R. M. SANDERS v. J. B. HAMILTON ET AL.

(Filed 28 April, 1948.)

1. Bills and Notes § 24b: Mortgages § 30c (1)—

An acceleration clause in a mortgage or deed of trust securing bonds or notes containing no such stipulation, operates on the secured bonds or notes to the extent of rendering the debt due for the purpose of foreclosing on default.

2. Bills and Notes § 24b: Limitation of Actions § 6d—

Where bonds or notes secured by mortgage or deed of trust are unconditional on their face and do not contain the acceleration clause set forth in the mortgage or deed of trust, the institution of foreclosure proceedings does not advance the maturity dates of the bonds or notes so as to affect the running of the statute of limitations against an action on the bonds or notes.

3. Bills and Notes § 24b: Mortgages § 30c (1)—

The *cestui,* upon default in the payment of one of a series of notes, instructed the trustee to foreclose. Purported sale was had but thereafter abandoned, and the *cestui* instructed the trustor to remain on the land, which he did. *Held:* This was an abandonment of the election to foreclose and restored the *status quo ante* in regard to the acceleration clause of the deed of trust.

APPEAL by defendants from *Pless, J.,* at November Term, 1947, of MECKLENBURG.

Civil action to recover on sealed promissory note.

On 24 December, 1926, the plaintiff conveyed to the defendants by warranty deed 228 acres of land in Pender County at an agreed price of $3,700. On the same day, the defendants, J. B. Hamilton and wife, Effie Hamilton, executed to the plaintiff their promissory notes, under seal, six of $500 each payable annually, in succession, on the first day of November thereafter, and one for $700 payable 1 November, 1933—all secured by purchase-money deed of trust on the land.

The tenor of the notes was that "On November 1 (each year from 1927 to 1933) we promise to pay to the order of R. M. Sanders ($500 the first six years and $700 the last) with interest thereon at the rate of 6% per annum, payable annually from date of this note until paid," duly signed and sealed by the makers.

In the deed of trust, given to secure the payment of the notes, is an acceleration clause to the effect that if default should occur in the payment of any note or interest thereon at the due date thereof, "then all of said bonds shall immediately become due and payable, and on application of the holder of any bond hereby secured or his or her assigns or other person who may be entitled to the money due on said bonds or any one of them, it shall be lawful for and the duty of the said J. R. Sanders, as Trustee, to advertise the land described in said Deed of Trust and sell same at public auction, for the payment of the notes secured by the same."

In the summer of 1928, nothing having been paid on the note due 1 November, 1927, the plaintiff instructed his attorney to foreclose the deed of trust. An attempted sale by "R. M. Sanders, Mortgagee"—not by J. R. Sanders, Trustee—was had on 27 August, 1928, but appears to have been abandoned as nothing more was done in the matter so far as the record discloses. The defendant, J. B. Hamilton, says he wrote the plaintiff, "and told him that I would move out, but he knew the condition I was in when I went there, and he advised me not to leave, but to stay on." This the defendants did, and they are still in possession of the land.

Thereafter, on 30 October, 1943, the plaintiff instituted this action to recover on the last sealed, promissory note of $700, due 1 November, 1933.

The defendants plead the ten-year statute of limitations, contending that plaintiff's attempted foreclosure in 1928, brought into play the acceleration clause in the deed of trust and started the running of the statute on the note in suit at that time.

There was a directed verdict in favor of the plaintiff, from which the defendants appeal, assigning errors.

J. C. Sedberry and W. I. Gatling for plaintiff, appellee.

McRae & McRae for defendants, appellants.

STACY, C. J. The question for decision is whether the due date of the note in suit was accelerated by plaintiff's instruction to foreclose the deed of trust, not only for the purpose of enforcing the lien, but also as affecting the statute of limitations in respect of the note.

It should be borne in mind that the acceleration clause appears only in the deed of trust, and not in the notes. Indeed, the notes are negotiable on their face with nothing to show they were secured by lien of any kind. A negotiable instrument in the course of trade is supposed to be a "courier without luggage"—Mordecai. Nevertheless, it is established by the decisions on the subject that an acceleration clause in a mortgage or deed of trust securing bonds or notes containing no such stipulation, operates on the secured bonds or notes, at least to the extent of rendering the debt due for the purpose of foreclosing on default. *Brown v. Osteen,* 197 N. C., 305, 148 S. E., 434; *Meadows Co. v. Bryan,* 195 N. C., 398, 142 S. E., 487; *Walter v. Kilpatrick,* 191 N. C., 458, 132 S. E., 148; *Miller v. Marriner,* 187 N. C., 449, 121 S. E., 770; *Barbee v. Scoggins,* 121 N. C., 136, 28 S. E., 259; *Whitehead v. Morrill,* 108 N. C., 65, 12 S. E., 894; *Capehart v. Dettrick,* 91 N. C., 344. Of course, if the acceleration clause appear on the face of the bonds or notes, the question presently presented would not arise. *Humphrey v. Stephens,* 191 N. C., 101, 131 S. E., 383.

The out-of-state cases on the subject are inharmonious. They divide on whether the debt evidenced by the bonds or notes is matured for purposes other than foreclosure. Annos. 34 A. L. R., 848; 34 A. L. R., 897; 161 A. L. R., 1211. Indeed, in our own decisions may be found some expressions difficult of reconciliation. *Bank v. Trust Co.,* 199 N. C., 582, 155 S. E., 261; *Gore v. Davis,* 124 N. C., 234, 32 S. E., 554; 34 A. L. R., 858.

The rationale of the North Carolina cases seems to be that where the bonds or notes are unconditional on their face, the acceleration clause in the mortgage or deed of trust given to secure their payment will operate to advance the maturity of the debt for the purpose of foreclosing on default, but not as affecting the running of the statute of limitations on the bonds or notes. *Brown v. Osteen, supra; Meadows Co. v. Bryan, supra; Walter v. Kilpatrick, supra; Dry-Kiln Co. v. Ellington,* 172 N. C., 481, 90 S. E., 564; 34 A. L. R., 897.

Moreover, it appears that following plaintiff's abortive attempt at foreclosure he advised the defendants "not to leave, but to stay on." This was an abandonment of the election to foreclose, and restored the *status quo ante.* 34 A. L. R., 899-900; 161 A. L. R., 1219.

In this view of the matter it would seem that the correct result was reached in the court below.

No error.

JAMES LEON PRIDGEN v. CAROLINA COACH COMPANY.

(Filed 5 May, 1948.)

1. Carriers § 18b—

Motor carriers of passengers are required by law to adopt "reasonable regulations and practices" relating to the "transportation of passengers in interstate or foreign commerce." 49 U.S.C.A., 316 (a). And while it is held in *Morgan v. Virginia*, 328 U. S., 373, that a state statute which requires segregation of interstate passengers is beyond the state's power to make, the decision does not purport to invalidate reasonable rules and regulations of interstate carriers, which require segregation of the white and Negro races.

2. Malicious Prosecution § 10—

A holding by the trial court that the warrant on which plaintiff was arrested is void, to which ruling no exception was taken, and that therefore plaintiff has no cause of action for malicious prosecution, is tantamount to a dismissal of that cause of action and such ruling is not subject to review on appeal.

3. Carriers § 18b: False Imprisonment § 1½—Removal of passenger from bus for refusal to comply with carrier's reasonable regulations held not false imprisonment.

The evidence disclosed that a Negro took a seat midway defendant's bus, that defendant's driver and dispatcher in turn requested him to move to the rear of the bus, as required by the rules of the company and the law of North Carolina, and upon refusal, got a police officer who renewed the request, and who arrested plaintiff after he again refused to comply. There was no evidence that the seat offered plaintiff to the rear of the bus was not equal in every respect to any other seat on the bus, or that if he had taken the seat offered he would have been later required to move at any time before reaching his destination in another state. The evidence further disclosed that after being removed from the bus, plaintiff was advised, up to the time the bus departed, that he could re-enter the bus if he would comply with the regulations of the carrier in regard to segregation. *Held:* The removal of plaintiff from the bus, under the circumstances shown by the evidence, does not constitute false imprisonment.

4. Principal and Agent § 13c—

The agent's authority to bind his principal cannot be shown by the acts or declarations of the agent.

5. Carriers § 18b: False Imprisonment § 1½: Principal and Agent § 10—Act of agent in swearing out warrant for purpose of punishment and not to enforce principal's regulations is beyond scope of authority.

After plaintiff, because of his refusal to abide by the carrier's regulations relating to the segregation of the races, had been removed from defendant's bus by a police officer at the instance of defendant's dispatcher, the dispatcher, after the bus had departed, accompanied plaintiff and the officer to the city hall where the dispatcher signed a warrant charging plaintiff with disorderly conduct in refusing to comply with the carrier's

regulations. There was no evidence that the carrier authorized or ratified the acts of its dispatcher in having plaintiff held in custody until he could obtain a warrant or in swearing out the warrant for his arrest. *Held:* The carrier's motion to nonsuit plaintiff's action for false imprisonment was properly allowed, since the dispatcher's acts were not for the purpose of enforcing the carrier's regulations, but were solely in an effort to punish plaintiff for an act already committed, and were therefore beyond the scope of his authority.

APPEAL by plaintiff from *Grady, Emergency Judge,* at the January Term, 1948, of WAKE.

This is a civil action for false imprisonment and malicious prosecution.

On 28 September, 1946, the plaintiff purchased a ticket from a ticket agent at the Raleigh Union Bus Depot, for transportation from Raleigh, N. C., to Norfolk, Va. The ticket was sold subject to the rules and regulations of the defendant carrier. The plaintiff boarded one of the buses operated by the defendant, which was scheduled to leave immediately for Norfolk. Upon entering the bus, he took a seat at or near the middle of the bus. The driver of the bus requested the plaintiff to move to the rear, stating to him that he being a Negro, the rules and regulations of the company and the law of the State of North Carolina required him to sit in the back of the bus. The bus was crowded; white people were sitting behind the plaintiff, and the only vacant seats were in the rear. Plaintiff refused to move, on the ground that he was an interstate passenger, and was not amenable to such rules or to the law of North Carolina, requiring segregation of passengers on the basis of race, in vehicles of public carriage. Whereupon, the driver called one W. A. Green, a dispatcher for the defendant, who likewise requested the plaintiff to move to the rear of the bus. The plaintiff again refused to move. Mr. Green requested him to get off the bus if he would not move to the rear as requested; he refused to do so. Mr. Green then got off the bus and sent Sgt. W. J. Horton, a Raleigh policeman, on the bus. Sgt. Horton requested plaintiff to sit in the back of the bus. The plaintiff stated to him that he was an interstate passenger and held a ticket to Norfolk, Va., and was within his rights to sit in any available space during interstate travel, and Sgt. Horton left. He re-entered the bus later and told plaintiff that he was under arrest. Both the driver and Mr. Green were present at the time the plaintiff was arrested. Sgt. Horton and Mr. Green informed the plaintiff he could get back on the bus if he would sit in the rear. He refused to go back, and the bus left. The plaintiff, according to his evidence, was treated courteously by Mr. Green and the bus driver. He also testified that he was thoroughly "versed with all the rules and regulations of the company," and knew if he did not comply with them he was subject to removal.

After the Norfolk bus left, Mr. Green accompanied the plaintiff and the officer to the City Hall, where Mr. Green signed a warrant charging the plaintiff with disorderly conduct for refusing to comply with the rules and regulations of the Carolina Coach Company, as ordered by its driver, A. F. Collier. The plaintiff was released on bond. When the case was called for trial, no one appeared as a witness against the plaintiff, and the State took a *nolle prosequi.*

At the close of plaintiff's evidence the court held the warrant signed by Mr. Green did not charge a crime, and was void; therefore the plaintiff had no cause of action for malicious prosecution. *Young v. Hardwood Co.,* 200 N. C., 310, 156 S. E., 501. No exception was taken to this ruling.

The defendant then moved for judgment as of nonsuit, and the motion was allowed on the ground that the evidence is insufficient to show that the defendant was responsible for plaintiff's arrest. Judgment was entered accordingly, and the plaintiff appealed, assigning error.

Herman L. Taylor for plaintiff.

Arch T. Allen and I. E. Johnson for defendant.

DENNY, J. This appeal is not predicated on the unreasonableness of the rules and regulations of the defendant, nor upon its lack of authority to enforce such rules by having a passenger removed from one of its buses, who refuses to comply therewith. Moreover, we know of nothing that makes segregation *per se* unconstitutional or violative of any act of Congress. The discrimination forbidden by the Interstate Commerce Act, "is not one of segregation, but one of equality of treatment." *Mitchell v. U. S.,* 313 U. S., 80, 85 Law Ed., 1201. In *Hall v. DeCuir,* 95 U. S., 485, 24 Law Ed., 547, and *Chiles v. Chesapeake & Ohio Railway Co.,* 218 U. S., 71, 54 Law Ed., 936, the Supreme Court of the United States held in effect that in the absence of legislation by Congress, a common carrier is at liberty to adopt such reasonable rules and regulations for the separation of the white and Negro races as seems to it to be for the best interest of all concerned.

In *Plessy v. Ferguson,* 163 U. S., 537, 41 Law Ed., 256, in passing upon the constitutionality of a statute enacted by the Legislature of Louisiana, requiring segregation of the white and Negro races in public conveyances, the Court said: "In determining the question of reasonableness it (the legislature) is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in

public conveyances is unreasonable or more obnoxious to the 14th Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures." And in the case of *Chiles v. Chesapeake & Ohio Railway Co., supra,* the Court, in passing upon a rule requiring segregation, which had been adopted by a carrier of interstate passengers, laid down these same considerations as the test in determining the reasonableness of such rule, and said further: "We must keep in mind that we are not dealing with the law of a state attempting a regulation of interstate commerce beyond its power to make. We are dealing with the act of a private person, to wit, the railroad company; and the distinction between state and interstate commerce we think is unimportant. . . . The interstate commerce clause of the Constitution does not constrain the action of carriers, but, on the contrary, leaves them to adopt rules and regulations for the government of their business, free from any interference except by Congress. Such rules and regulations, of course, must be reasonable, but whether they be such cannot depend upon a passenger being state or interstate. . . . Regulations which are induced by the general sentiment of the community for whom they are made and upon whom they operate cannot be said to be unreasonable."

There is no evidence on this record tending to show that the seat offered the plaintiff on defendant's bus was not equal in every respect to any other seat on the bus. Furthermore, there is no evidence which tends to show that if the plaintiff had taken a seat in the rear of the bus he would have been required to move his seat from time to time between Raleigh and Norfolk, which the Supreme Court of the United States held in *Morgan v. Virginia,* 328 U. S., 373, 90 Law Ed., 1317, would constitute a burden on interstate commerce. Surely segregation, in the absence of any discrimination in favor of or against the white or Negro race, does not constitute a burden on interstate commerce.

Evidently the plaintiff is under the impression that the recent decision of the Supreme Court of the United States, in *Morgan v. Virginia, supra,* is a judicial determination that any law enacted by a State or any regulation adopted by a common carrier, which requires the separation of the white and Negro races, in public conveyances, is illegal and may be ignored by interstate passengers. We do not so interpret the opinion. In the *Morgan case,* the Court simply denied the right of a State to interfere with or impose an undue burden upon interstate commerce. However, it did not deny a motor carrier the right to adopt reasonable rules and regulations for the government of its business. *Plessy v. Ferguson, supra; Chiles v. Chesapeake & Ohio Railway Co., supra; Simmons v. Atlantic Greyhound Corporation,* 75 Fed. Supp., 166. Moreover, the

Motor Carrier Act, by which the regulation of motor carriers was committed to the Interstate Commerce Commission, makes it the duty of interstate carriers to establish "just and reasonable regulations and practices" relating to the "transportation of passengers in interstate or foreign commerce." 49 U.S.C.A., 316 (a). And thus far the Supreme Court of the United States has held that rules and regulations requiring the segregation of interstate passengers in public conveyances, are reasonable when such rules have been adopted by the carrier, and are in accord with "the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order." *Plessy v. Ferguson, supra.*

Furthermore, we know of no decision of the Supreme Court of the United States which holds that an interstate motor carrier may not adopt rules and regulations reserving full control and discretion as to the seating of passengers, and may not further reserve the right to require passengers to change seats at any time during a trip. *Simmons v. Atlantic Greyhound Corporation, supra.*

The plaintiff says he knew the rules and regulations of the defendant and knew if he did not comply with them he was subject to removal; but he did not offer them in evidence in the trial below, nor attack them as being unreasonable or discriminatory. Therefore, we do not think the action of the agents of the defendant, in having the plaintiff removed from the defendant's bus can be challenged on this appeal. The plaintiff does not complain of the conduct of the agents of the defendant, in removing him from its bus, but only of false imprisonment and malicious prosecution. However, he took no exception to the ruling of the court below in holding the warrant signed by Mr. Green charged no criminal offense, and was, therefore, null and void. Consequently, we are not called upon to determine whether or not that ruling was correct. See G. S., 60-136, and *S. v. Brown,* 225 N. C., 22, 33 S. E. (2d), 121. Nevertheless, it was tantamount to a dismissal of the plaintiff's alleged cause of action for malicious prosecution. *Caudle v. Benbow,* 228 N. C., 282, 45 S. E. (2d), 361.

On the evidence disclosed by the record, we do not think plaintiff can successfully contend that removal from defendant's bus constituted false imprisonment, so long as he was free to re-enter the bus and proceed on his journey, provided he would abide by the rules and regulations of the company. And according to his evidence he was given that privilege up to the very moment the defendant's bus left for Norfolk. But, when the plaintiff declined to take passage on defendant's bus, subject to its rules and regulations, he should not have been required to go to the City Hall and post bail, unless his conduct had been such as to violate some criminal statute. Whether or not there had been such a violation on the part of the plaintiff, is not before us.

Therefore, the sole question presented for determination on this appeal is whether or not Mr. Green was acting within the scope of his authority, when he left the premises of his employer and undertook to obtain a warrant for the arrest of the plaintiff.

Ordinarily, the criminal prosecution of an offender is not within the scope of an agent's authority, unless such criminal prosecution was instituted to protect the property of his employer or to recover property belonging to him. And when the act of the agent could have no effect other than the punishment of the offender, such act will not be construed as an effort to punish the offender because he had wronged his employer, but because he had wronged the State. *Dickerson v. Refining Co.*, 201 N. C., 90, 159 S. E., 446, and cases cited therein. "There is a marked distinction between a false imprisonment or arrest caused by an agent for the purpose of protecting the rights or interests of his master—that is, to protect property to prevent its theft, or to recover it back—and an arrest or imprisonment caused for the purpose of punishing an offender for an act already done." 22 Amer. Jur. (False Imprisonment), Sec 38, p. 380.

It was said in *Daniel v. R. R.*, 136 N. C., 517, 67 L. R. A., 455, 48 S. E., 816: "A servant entrusted with his master's goods may do what is necessaary to preserve and protect them, because his authority to do so is clearly implied by the nature of the service, but when the property has been taken from his custody or stolen and the crime has already been committed, it cannot be said that a criminal prosecution is necessary for its preservation or protection. This may lead to the punishment of the thief or the trespasser, but it certainly will not restore the property or tend in any degree to preserve or protect it. It is an act clearly without the scope of the agency and cannot possibly be brought within the limits of the implied authority of the agent."

In *Lamm v. Charles Stores Co.*, 201 N. C., 134, 159 S. E., 144, this Court said: "All the authorities are in agreement that if the agent, of his own notion, undertakes to set in motion the machinery of the criminal law to avenge an imagined wrong against his employer, that such act does not impose liability upon the employer unless such employer authorized or ratified the conduct of the employee. It is immaterial that the employee intended by such act to secure a benefit for the employer." *Roland v. Express Co.*, 201 N. C., 815, 161 S. E., 483; *Parrish v. Manufacturing Co.*, 211 N. C., 7, 188 S. E., 817; *Snow v. DeButts*, 212 N. C., 120, 193 S. E., 224; *Hammond v. Eckerd's*, 220 N. C., 596, 18 S. E. (2d), 151; *Bagley v. Bank*, 222 N. C., 97, 21 S. E. (2d), 889. Likewise, the agent's authority to bind his principal cannot be shown by the acts or declarations of the agent. *Daniel v. R. R., supra; Carter v. Thurston Motor Lines*, 227 N. C., 193, 41 S. E. (2d), 586.

In the instant case the enforcement of the rules and regulations of the defendant were no longer involved. They had been enforced, and the plaintiff does not challenge the defendant's right to enforce them. But there is no evidence on this record tending to show that the defendant had authorized any of its agents or employees to swear out a warrant for the arrest of a passenger who might refuse to comply with its rules and regulations; nor is there any evidence that would tend to show a ratification of Mr. Green's conduct in this respect.

We do not think the evidence adduced in the trial below is sufficient to show the defendant authorized or ratified the action of Mr. Green in having the plaintiff held in custody until he could obtain a warrant for his arrest.

The judgment of the court below will be upheld.

Affirmed.

W. H. HANCAMMON, JR., AND J. W. LOUGHLIN, CO-PARTNERS, TRADING AS CAROLINA CAMERA, v. E. W. CARR, TRADING AS "SHOEMAKERS."

(Filed 5 May, 1948.)

1. Bills and Notes § 31: Pleadings § 31—

In an action on a note, answer alleging want of consideration, fraud in the procurement, and notice to plaintiffs, holders, of the defects in the instrument at the time it was acquired by them, *held* improperly stricken on plaintiffs' motion.

2. Bills and Notes §§ 29, 32—

Upon proof of fraud in the inception of the contract, the burden shifts to the holder of a negotiable instrument to show that he is a holder in due course for value and without notice of the infirmity.

3. Pleadings § 10—

The purpose and intent of G. S., 1-123 (1), relating to causes which may be joined, and G. S., 1-137 (1), relating to causes which may be pleaded as counterclaims, are substantially the same, *i.e.*, to permit the trial in one action of all causes of action arising out of one contract or transaction connected with the same subject of action, and therefore decisions on one of the statutes is authority on the other.

4. Same—

Under G. S., 1-137 (1), a cause of action *ex delicto* may be pleaded as a counterclaim to an action *ex contractu* provided it arises out of the same transaction or is connected with the same subject of action.

5. Same—

While a cause of action may be pleaded as a counterclaim if it arises out of the transaction or series of transactions constituting the basis of

the cause alleged in the complaint, it is necessary that there be but one subject of controversy and that the counterclaim be so related to plaintiffs' claim that adjustment of both is necessary to a full and final determination of the controversy, and mere historical sequence or the fact that a connected story may be told of the whole, is not alone sufficient.

6. Same—

A cause of action in tort may be pleaded as a counterclaim to an action on contract only if it rests upon some wrong or breach of duty committed by plaintiffs in making or performing the contract.

7. Same—

Plaintiffs cashed a check for the payee upon his endorsement and gave the payee in exchange merchandise and money. The maker of the check stopped payment on it, and plaintiffs procured a warrant charging the maker with issuing a worthless check. The prosecution was *nol prossed* on appeal from the recorder's court. Plaintiffs then instituted this action to recover on the check. *Held:* Defendant maker is not entitled to set up a cross action for abuse of process.

APPEAL by plaintiffs from *Carr, J.*, December Term, 1947, NEW HANOVER.

Civil action to recover on a dishonored check, heard on motion to strike the answer and demurrer to the cross action pleaded by defendant.

On 5 July 1947, defendant executed and delivered to one Malcolm E. Thomas a check for $377.13, drawn on Peoples Savings Bank & Trust Company. Thomas purchased certain merchandise from plaintiffs and tendered said check in payment. Plaintiffs accepted the check duly endorsed and payed Thomas the difference in cash. The check was returned by the bank endorsed "PAYMENT STOPPED." Thereupon, plaintiffs procured a warrant against the defendant, charging him with the violation of our worthless check statute. On the trial in the county recorder's court he was convicted and appealed. When the cause came on for hearing in the Superior Court, a *nol-pros* was entered. Plaintiffs instituted this action to recover the amount paid on said check. Defendant, in his answer, sets up and pleads a cross action for damages for abuse of process in prosecuting the criminal action against the defendant on the charge of uttering a worthless check in violation of the provisions of G. S., 14-106.

Plaintiffs, after notice to defendant, appeared and moved to strike the answer of defendant and for judgment upon the complaint "as if no answer had been filed" for that the answer is sham and irrelevant and presents no defense to the matters and things alleged in the complaint. They likewise demurred to the cross action pleaded by defendant for that the cause of action therein alleged is not properly pleadable in this action and in any event states no cause of action.

When the cause came on to be heard on the motion and demurrer, the court below, in separate orders, denied the motion and overruled the demurrer. The plaintiffs excepted to each order and appealed.

G. C. McIntire for plaintiff appellants.

E. L. Yow and Poisson, Campbell & Marshall for defendant appellee.

BARNHILL, J. The defendant, in his answer, denies the debt, pleads want of consideration, fraud in the procurement, and notice to plaintiffs of the defects in the check at the time it was acquired by them. These allegations are sufficient to repel the motion to strike the answer. Whether defendant may be able to offer competent evidence in support thereof is another matter.

Upon proof of fraud in the inception of the contract, the burden shifts to the holder of a negotiable instrument to show that he is a holder in due course for value and without notice of the infirmity. G. S. 25-65; *Discount Co. v. Baker,* 176 N. C., 546; *Wise v. Texas Co.,* 166 N. C., 610, 82 S. E., 974; *Dennison v. Spivey,* 180 N. C., 220, 104 S. E., 370; Anno. 18 A. L. R., 25.

The language of G. S. 1-123 (1), relating to causes which may be joined in the same action, and G. S. 1-137 (1), defining causes of action which may be pleaded as counterclaims, is substantially the same. The purpose and intent of each is to permit the trial in one action of all causes of action arising out of any one contract or transaction.

Whether joined in the complaint with another cause of action or pleaded as a cross action, the claim must arise out of the contract or transaction sued upon by plaintiff or it must be connected with the same subject of action. Hence, decision on the one is authority on the other.

Prior to the enactment of the statute, a cause of action in tort was not pleadable as a counterclaim to an action on contract. This is now permitted by the language of G. S. 1-137 (1). But even now an action *ex delicto* may be pleaded as a counterclaim to an action *ex contractu* only in the event it arose out of the same transaction or is connected with the same subject of action.

As the purpose of the two sections (G. S. 1-123 (1), G. S. 1-137 (1)) is to authorize the litigation of all questions arising out of any one transaction, or series of transactions concerning the same subject matter, in one and the same action, and not to permit multifariousness, it must appear that there is but one subject of controversy. McIntosh, P. & P., 491; *Street v. Andrews,* 115 N. C., 417; *McKinnon v. Morrison,* 104 N. C., 354; *Bitting v. Thaxton,* 72 N. C., 541; *Walsh v. Hall,* 66 N. C., 233; *Wilson v. Hughes,* 94 N. C., 182; *Smith v. Building & Loan Assn.,* 119 N. C., 257; *Branch v. Chappell,* 119 N. C., 81; *Bazemore v. Bridgers,*

105 N. C., 191; *Smith v. French,* 141 N. C., 1; *Smith v. Smith,* 225 N. C., 189, 34 S. E. (2d), 148; *Pressley v. Tea Co.,* 226 N. C., 518, 39 S. E. (2d), 382.

While the statute is designed "to enable parties litigant to settle well-nigh any and every phase of a given controversy in one and the same action," *Smith v. French, supra; Sewing Machine Co. v. Burger,* 181 N. C., 241, 107 S. E., 14, that a connected story may be told is not alone sufficient. *Pressley v. Tea Co., supra.* Nor is mere historical sequence—"one thing led to another" order of occurrences—all that is required. *Finance Corp. v. Lane,* 221 N. C., 189, 19 S. E. (2d), 849; *Weiner v. Style Shop,* 210 N. C., 705, 188 S. E., 331; *Milling Co. v. Finlay,* 110 N. C., 411; *Thompson v. Buchanan,* 195 N. C., 155, 141 S. E., 580; *Hoyle v. Carter,* 215 N. C., 90, 1 S. E. (2d), 93.

The cross action must have such relation to the plaintiffs' claim that the adjustment of both is necessary to a full and final determination of the controversy. *Schnepp v. Richardson,* 222 N. C., 228, 22 S. E. (2d), 555. This means that it must be so interwoven in plaintiffs' cause of action that a full and complete story as to the one cannot be told without relating the essential facts as to the other.

"The 'subject of the action' means, in this connection, the thing in respect to which the plaintiff's right of action is asserted, whether it be specific property, a contract, a threatened or violated right, or other thing concerning which an action may be brought and litigation had." To be connected with the subject of action "the connection of the case asserted in the counterclaim and the subject of the action must be immediate and direct, and presumably contemplated by the parties." Phillips, Code Pleading, 2d ed., sec. 377, p. 423.

"In respect to the phrase 'connected with' the subject of the action, one rule may be regarded as settled by the decisions, and it is recommended by its good sense, and its convenience in practice. The connection must be immediate and direct. A remote, uncertain, partial connection is not enough to satisfy the requirements of the statute . . . the connection must be such that the parties could be supposed to have foreseen and contemplated it in their mutual acts; in other words, that the parties must be assumed to have had this connection and its consequences in view when they dealt with each other." Pomeroy, Code Remedies, 5th ed., sec. 652, p. 1059, sec. 670, p. 1085; *Schnepp v. Richardson, supra; Johnson v. Smith,* 215 N. C., 322, 1 S. E. (2d), 834; *Le Clare v. Thibault,* 69 P., 552; *Lamming v. Galusha,* 31 N. E., 1024; *Ins. Co. v. R. Co.,* 109 A., 743; *Thresher Co. v. Klein,* 133 N. W., 51; *Bush v. Froelick,* 66 N. W., 939.

If, in an action on contract, the cross action is cast in tort, it must rest upon some wrong or breach of duty committed by plaintiff in the

making or performance of the contract which is the grounds of the cause of action stated in the complaint. That is, it must rest upon some obligation of the contract upon which plaintiff sues or upon some breach of duty resting upon him by virtue of the transaction which is the grounds of his action.

The uttering of a check, payment of which was refused by the bank on which it was drawn, is the gist of plaintiffs' action. The subsequent alleged wrongful abuse of criminal process is the taproot of defendant's counterclaim. Plaintiffs were not parties to the transaction which is the subject of their action. They are entitled to sue merely because they acquired the check in the course of trade. Nor was Thomas, a principal in the check transaction, a party to the alleged abuse of process which occurred after plaintiffs' cause of action accrued. Hence there is no mutuality of parties or subject matter. *Hoyle v. Carter, supra.*

While there is a casual relation between the two incidents or "transactions," there is no causal or interdependent connection. They are not so connected that the circumstances surrounding both must be detailed in order to tell a complete story as to either. Recital of the facts on which plaintiffs' cause of action rests does not require or permit the inclusion of those forming the basis of defendant's cross action. Instead, his claim begins where theirs ends. *Pressley v. Tea Co., supra.*

While the check is involved in both, they constitute two separate and distinct transactions. The collection of the debt evidenced by the check is merely the alleged motive for the commission of the tort, *Price v. Furniture Co.,* 152 N. E., 301, which gave rise to a distinct and independent cause of action not pleadable as a counterclaim in this suit. *R. R. v. Nichols,* 187 N. C., 153, 120 S. E., 819; *Street v. Andrews, supra; Bazemore v. Bridgers, supra.*

Damron v. Sowards, 261 S. W., 1093, is directly in point. There the action was for merchandise sold and delivered. The cross action was for damages growing out of an attachment proceeding wrongfully prosecuted by plaintiff for the purpose of collecting his debt. The Court said: "It (the counterclaim) did not arise out of the contract or transaction stated in the petition as a foundation of plaintiffs' claim. It was not connected in any way with the subject of the action. It did not affect, nor was it affected by, the original cause of action. On the contrary, it arose long after the occurrence of the transaction by which the original debt was created, and was based entirely upon subsequent wrongs alleged to have been committed by the plaintiff in the enforcement of the collection of the debt." *Conner v. Winton,* 7 Ind., 523; *International Harvester Co. v. Nelson,* 231 N. W., 938; *People v. Dennison,* 84 N. Y., 272; *Konick v. Champneys,* 183 P., 75, 6 A. L. R., 459; *Pacific Express Co. v. Malin & Colvin,* 132 U. S., 531, 33 L. Ed., 450.

As plaintiffs win on their appeal from one order and lose on the other, the costs will be divided.

The order denying the motion to strike the answer is

Affirmed.

The order overruling the demurrer is

Reversed.

CHARLES W. McCOY, ADMINISTRATOR OF THE ESTATE OF GEORGE WASHINGTON McCOY, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 5 May, 1948.)

1. Death § 4—

Right of action for wrongful death rests solely upon statute, and the requirement of the statute that the action be instituted in one year after the death must be strictly construed and is not a simple statute of limitations but a condition annexed to the cause of action, and failure of appointment of an administrator does not affect the bar of the statute.

2. Death § 5—

Only the personal representative may institute action for wrongful death, which he maintains in his official capacity as a representative of the estate and not as representative of the distributees of the recovery.

3. Death § 9—

Under our statute, the distribution of recovery in an action for wrongful death is not made to a designated class but in accordance with the canons of descent and distribution, and the existence or number of possible distributees is immaterial to the right of action and is inadmissible to be shown in evidence.

4. Death § 4—

At the time of intestate's death plaintiff administrator was in the armed forces. Plaintiff was appointed administrator within one year after discharge from the army and instituted this suit for wrongful death. Intestate had other adult children not in the armed forces. *Held:* The Soldiers' and Sailors' Civil Relief Act, Title 50, U.S.C.A., sec. 525, does not justify the maintenance of the action more than one year after intestate's death, G. S., 28-173, since plaintiff in an action for wrongful death, even though a distributee, does not maintain the action as in his own right but solely in his official capacity as a representative of the estate.

DEFENDANT'S appeal from *Carr, J.*, December 1947 Civil Term, NEW HANOVER Superior Court.

This action was brought under G. S., 28-173, to recover for the injury and death of George W. McCoy through the alleged negligence of the

defendant. The evidence of plaintiff discloses that the intestate, George W. McCoy, died around the 19th of August, 1943. At that time plaintiff, who sues here as administrator, a son of the deceased, was in the military service of the United States, in the 282 Engineers, stationed in the New Georgia Islands. He was discharged from the army in December, 1945, qualified as administrator on the 21st day of December, 1945, and brought this action by issue of summons dated 21 March, 1946. From plaintiff's evidence it also appears that there were other adult children of the intestate, and a number of other relatives, in the vicinage who might have qualified in administration of the estate.

On the trial evidence relating to the manner of the injury, negligence of defendant, contributory negligence of the intestate, damages and other matters, was introduced by plaintiff and exceptions taken by defendant, which, in view of the rationale of the decision, it is not necessary to set out.

Evidence in behalf of the defense was also introduced.

At the conclusion of the plaintiff's evidence and again at the conclusion of all the evidence the defendant demurred and moved for judgment of nonsuit. The motions were overruled and defendant excepted.

The evidence was submitted to the jury on issues of negligence, contributory negligence and damages; and each was answered in favor of the plaintiff. Damages were awarded in the sum of $2,000.

Thereupon the plaintiff tendered a judgment in accordance with the issues answered for the sum awarded.

The court declined to sign the tendered judgment but, finding that upon the submission of the issues the defendant and the plaintiff had agreed that in lieu of the submission of an issue respecting the military service of the plaintiff and relating to the number and character of the distributees in case of recovery, the judge might find the pertinent facts, the trial judge thereafter found that Charles W. McCoy was in the military service of the United States at the time of the death of his father and continued therein until the 21st day of December, 1945, when he was discharged; and, upon admission of counsel of plaintiff and defendant, found as a fact that there were three adult children of the said George W. McCoy at his death, two sons and one daughter, who were the only distributees entitled to share in the personal estate of the deceased; and being of the opinion that only those of the said distributees who had shown they were in military service and entitled to the benefits of the Soldiers' and Sailors' Civil Relief Act were entitled to shares as distributees in the recovery, and it appearing that said Charles W. McCoy is the only one who has made such showing, reduced the recovery to his proportionate share, the same being $666.67, and costs of the action.

The defendant, having preserved its objections taken upon the trial by motion to set aside the verdict for errors committed, which was overruled, objected to the signing of the judgment, excepted and appealed.

The plaintiff, excepting to the reduction of the recovery as above noted, also appealed.

The assignment of error by defendant which is pertinent to this decision is directed to the overruling of its demurrer and motion for judgment of nonsuit made on the ground that plaintiff's action was not brought within one year following the alleged wrongful death as required in G. S., 28-173.

W. L. Farmer, Cicero P. Yow, and Rountree & Rountree for plaintiff, appellee, and as appellant.

Poisson, Campbell & Marshall, By: Wm. B. Campbell, for defendant, appellant.

SEAWELL, J. Our version of "Lord Campbell's Act," G. S., 28-173, creates a cause of action for the recovery of damages for wrongful death to be brought within one year after such death by the "executor, administrator or collector of the decedent." It is a newly created right of action: *Bolick v. R. R.*, 138 N. C., 370, 50 S. E., 689; and the provision that the action must be brought in one year after the death is held not to be a simple statute of limitations on the institution of actions, but that it is a condition annexed to the cause of action; *Trull v. R. R.*, 151 N. C., 545, 66 S. E., 586; *Curlee v. Duke Power Co.*, 205 N. C., 644, 647, 172 S. E., 329; the provision as to time is to be strictly construed: *Taylor v. Cranberry Iron Co.*, 94 N. C., 525; *Whitehead v. Branch*, 220 N. C., 507, 17 S. E. (2d), 637; and the fact that no administrator was appointed is immaterial to its lapse: *Best v. Kinston*, 106 N. C., 205, 10 S. E., 997.

The personal representative alone can maintain the action: *Hanes v. So. Public Utilities Co.*, 191 N. C., 13, 16, 131 S. E., 402, only in his official capacity: *Hall v. Southern R. R. Co.*, 146 N. C., 345, 348, 59 S. E., 879; and he sues in his own right and not *en autre droit: Christian v. R. R.*, 136 N. C., 321, 322, 48 S. E., 743.

The North Carolina law is materially different from that of most states in that distribution is made, not to designated classes, but in accordance with the canons of descent and distribution: *Hines v. Foundation Co.*, 196 N. C., 322, 145 S. E., 612; and the existence or nonexistence of possible distributees or beneficiaries is immaterial: *Warner v. Western N. C. R. R. Co.*, 94 N. C., 250, 255, 259, or not necessary to recovery; and evidence as to the number of children left is inadmissible: *Kesler v. Smith*, 66 N. C., 154.

We are called upon to decide whether, under the facts of this case, the plaintiff administrator can call to his aid the Soldiers' and Sailors' Civil Relief Act, Title 50, U.S.C.A., sec. 525, so as to legally justify the maintenance of this action, brought more than one year after the death, but within one year after the discharge of the soldier from military service.

The pertinent provisions of the cited section of the Federal Act is as follows:

> "The period of military service shall not be included in computing any period now or hereafter to be limited by any law, regulation, or order for the bringing of any action or proceeding in any court, board, bureau, commission, department, or other agency of government by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action or the right or privilege to institute such action or proceeding shall have accrued prior to or during the period of such service, nor shall any part of such period which occurs after the date of enactment of the Soldiers' and Sailors' Civil Relief Act Amendments of 1942 (Oct. 6, 1942) be included in computing any period now or hereafter provided by any law for the redemption of real property sold or forfeited to enforce any obligation, tax, or assessment."

The more familiar cases involving stay of proceedings against soldiers and sailors, and especially those which turn on the discretion of the trial court, of which *Lightner v. Boone,* 222 N. C., 205, 22 S. E. (2d), 426, 319 U. S., 561, 87 L. Ed., 1587, is pre-eminently an outstanding example, are of little aid to us in the instant case which is concerned with the right of a *prospective plaintiff,* or a petitioner, or at least an actor, under the cited statute.

It is questionable whether the statute was intended to apply to probate proceedings and estates of decedents at all. See 42 Michigan Law Review, pp. 480, 482, *et seq.* But in deference to the liberality with which the Act must be construed, conceding that it may be so applied to qualified situations, we have only removed the outer shell of the Chinese egg laid upon our table. We may remove another by assuming, but not deciding, that the act affects not only ordinary statutes of limitation and those providing a condition precedent for their institution, but also those, like ours, where the period in which suit may be brought is affixed to the cause of action. Still, the phraseology, carefully chosen, marks the limit to which Congress thought it best to go. It seems to us that it was not the intention of the Act to hold up administration until one of many

eligible persons might administer; or, if such a person has administered and brought suit in his official capacity, that it should be regarded as a suit brought by the Sailor or Soldier designated in the Act in his individual right, merely because of his interest in a contingent recovery of damages in a suit brought in behalf of decedent's estate, however it might be if the distribution, in case of recovery, was in dispute. Here that is fixed by law.

Section 525, on which the appellee relies, omitting matter not pertinent to this case, merely provides that "the period of military service shall not be included in computing any period . . . limited by any law . . . for the beginning of any action . . . *by* or *against* any person in military service. . . ." If such an action were brought by a representative of the soldier or sailor in such a manner that the action in reality, though not in form, is an action brought *by* such soldier or sailor, then the purpose of the statute could only be served by looking through the form to the substance. But our courts have distinctly held that the administrator bringing his action under G. S., 28-173, brings it as a representative of the estate in an official capacity; and neither by statute nor by precedent of the courts has the potential distributee of any recovery, as such, any right to bring the action. Nor has the administrator bringing it as a representative of any such person any such right. *Hanes v. Southern Pub. Utilities Co., supra; Hall v. Southern R. R., supra; Christian v. R. R., supra; Halle v. Cavanaugh,* 111 Atl., 76.

The evidence discloses that there were two sons and a daughter, and probably other relatives, in a position to know of the occurrence on which an action might be founded, certainly eligible for appointment to the administration. In fact, there is evidence tending to show that one of them did, in an action now pending, to which we have not found it necessary to advert.

At any rate, we are constrained to hold that the most liberal construction of the Soldiers' and Sailors' Act does not warrant us in holding that it has such application to the present proceeding as to justify its maintenance.

The case should have been nonsuited, and the order to the contrary is Reversed.

GEORGE T. CHANDLER v. H. C. CAMERON, CARL CAMERON, EUGENE McLEOD, LEWIS McLEOD, AND EDWARD McLEOD.

(Filed 5 May, 1948.)

1. Deeds § 21—

The conveyancing of standing timber is governed by the rules applicable to the conveyancing of any other realty.

2. Specific Performance § 1a: Vendor and Purchaser § 23—

A written contract to convey standing timber is specifically enforceable as between the parties without registration, and after registration is specifically enforceable even against subsequent purchasers for value. G. S., 47-18.

3. Registration § 1—

Contracts to convey realty, including contracts to convey standing timber, are required to be registered, G. S., 47-18, but the statute does not require or authorize the registration of a mere personal contract.

4. Registration § 4—

Registration is constructive notice as to all instruments authorized to be registered, but is not constructive notice of provisions not coming within the registration laws, even though embodied in an instrument required to be recorded.

5. Vendor and Purchaser § 23: Specific Performance § 1c—

Where a tenant in common, without knowledge or authorization of his co-tenants, executes a written contract to convey standing timber on the whole tract, and later acquires title to an additional interest in the land, he is estopped, as against his vendee, from asserting the after-acquired title which is inconsistent with that which he had contracted to convey, and the vendee is entitled to specific performance under the contract as against the vendor not only as to the vendor's original interest, but as to the after-acquired interest as well.

6. Registration § 4—

The written contract executed by a tenant in common without the knowledge or authorization of his co-tenants, to sell the timber on the entire tract, was recorded. The tenant in common later acquired an additional interest in the land. *Held:* Registration is constructive notice to all subsequent purchasers as to the tenant's original interest, but the vendee's right to demand conveyance of the timber as to the after-acquired interest rests upon the personal contract of the vendor, which is not required to be recorded by G. S., 47-18, and therefore registration is not notice to subsequent purchasers as to such after-acquired title.

7. Same: Estoppel § 2: Vendor and Purchaser § 23: Specific Performance § 2—

A tenant in common, without authorization or knowledge by his co-tenants, executed a written contract to convey standing timber upon the entire land. This contract was registered. Thereafter the tenant acquired an additional interest in the land, and he and his co-tenants exe-

cuted to another party deed for the timber. The grantee in the timber deed had no actual knowledge of the prior contract to convey. *Held:* As to the tenant's original interest, his vendee is entitled to specific performance as against the grantee in the timber deed, but as to the after-acquired title, the vendee is not entitled to specific performance as against the grantee.

8. Partition § 1c (1)—

A tenant in common, without the knowledge or authorization of his co-tenants, contracted to sell the timber on the entire tract. Thereafter he joined his co-tenants in a timber deed to another person. *Held:* Provision of the judgment that if the vendee elected to purchase the timber covered by the contract, there should be actual partition of the timber between the vendee and the grantee, is upheld. G. S., 46-25.

9. Costs § 4d—

Where, in a suit for injunction, one of defendants seeks affirmative relief by way of specific performance, the taxing of costs is in the discretion of the trial court since the controversy is of an equitable nature, G. S., 6-20, and the order of the court apportioning the costs will not ordinarily be disturbed on appeal upon affirmance of the judgment.

APPEAL by defendants, H. C. Cameron and Carl Cameron, from *Grady, Emergency Judge,* and a jury, at October Term, 1947, of HARNETT.

This action had its origin in a controversy between the plaintiff, George T. Chandler, and the defendant, H. C. Cameron, with respect to the ownership of the timber standing on a tract of land in Barbecue Township in Harnett County. The salient facts were established on the trial by the judicial admissions of the parties and the verdict of the jury, and are set out below.

Eugene McLeod, Lewis McLeod, Edward McLeod, Hazel McLeod, Margaret Jones, and Edna Lovett owned the tract of land in equal shares as tenants in common, subject to the unassigned dower right of their mother, Lena McLeod Gales. On 15 November, 1946, Eugene McLeod executed an unsealed contract reciting that "we do hereby sell and convey all of the timber" upon the land "to H. C. Cameron for the sum of $1,500, receipt of $1 is hereby acknowledged, the balance of $1,499 will be due and payable by H. C. Cameron upon delivery of the timber deed." This document was registered on 16 December, 1946. Its execution by Eugene McLeod was neither authorized nor ratified by Lewis McLeod, Edward McLeod, Hazel McLeod, Margaret Jones, Edna Lovett, or Lena McLeod Gales.

On 27 November, 1946, Hazel McLeod, Margaret Jones, Edna Lovett, and Lena McLeod Gales conveyed their respective interests in the land in fee simple to Eugene McLeod, Lewis McLeod, and Edward McLeod by a warranty deed, which was not registered until 15 January, 1947.

On 14 December, 1946, Eugene McLeod, Lewis McLeod, and Edward McLeod executed and delivered to the plaintiff, George T. Chandler, for a cash consideration of $1,800, a timber deed sufficient in form to vest title to all of the timber in controversy in the plaintiff, who had no personal or actual notice of the previous agreement between Eugene McLeod and the defendant, H. C. Cameron. This timber deed was registered on 18 December, 1946.

Upon the admissions and the verdict, the court below concluded that the plaintiff, George T. Chandler, owned the timber in controversy, subject, however, to the right of the defendant, H. C. Cameron, at his own election, to purchase within a specified time for the sum of $250 the undivided one-sixth interest which Eugene McLeod owned in the timber on 14 November, 1946. From judgment accordingly, the defendants, H. C. Cameron and Carl Cameron, appealed.

Charles Ross for plaintiff, and the defendants Eugene McLeod, Lewis McLeod, and Edward McLeod, appellees.

M. O. Lee for defendants, H. C. Cameron and Carl Cameron, appellants.

ERVIN, J. For convenience of narration, the defendant, H. C. Cameron, is hereinafter called Cameron, and the defendant, Eugene McLeod, is hereinafter designated as McLeod.

Standing trees are a part of the realty, and can be conveyed only by such an instrument as is sufficient to convey any other realty. *Ward v. Gay,* 137 N. C., 397, 49 S. E., 884; *Drake v. Howell,* 133 N. C., 163, 45 S. E., 539.

When he entered into the contract with McLeod, Cameron acquired the right as between himself and McLeod to compel McLeod to convey to him the undivided one-sixth interest in the timber in controversy which McLeod then owned. This is true because contracts in writing to convey interests in land are good between the parties thereto without registration. *Hargrove v. Adcock,* 111 N. C., 166, 16 S. E., 16. The Connor Act expressly provides for the registration of contracts to convey land. G. S., 47-18. When Cameron registered his contract with McLeod, he thereby established his right to receive a conveyance of the one-sixth undivided interest in the timber in controversy originally owned by McLeod even against a person thereafter purchasing such interest from McLeod for a valuable consideration. *Combes v. Adams,* 150 N. C., 64, 63 S. E., 186.

Cameron insists, however, that he is also entitled to receive a conveyance of the additional one-sixth interest in the timber in controversy subsequently acquired by McLeod under the deed from Hazel McLeod,

Margaret Jones, Edna Lovett, and Lena McLeod Gales. The basis of his claim to this after-acquired title is as follows: His contract with McLeod did not apply simply to the interest which McLeod had in the timber when the agreement was made. McLeod expressly bound himself to sell the entire timber to Cameron. As the purchaser in the contract, Cameron can demand the benefit of McLeod's after-acquired title to the additional one-sixth interest.

This position would undoubtedly be sound if this were a contest solely between Cameron and McLeod because "a vendor is estopped to acquire and assert as against his purchaser a title inconsistent with that which he has contracted to convey, and . . . a title acquired by the vendor subsequently to the contract of sale will inure to the benefit of the purchaser, the vendor being considered as holding such title as trustee for the purchaser." 66 C. J., Vendor and Purchaser, section 1031.

The question here, however, is whether or not the plaintiff, Chandler, who purchased the additional one-sixth undivided interest in the timber in controversy for a valuable consideration from McLeod, can be compelled to convey it to Cameron.

The answer to this problem hinges upon whether or not Chandler bought McLeod's after-acquired title to the additional one-sixth undivided interest with notice of the contract obligating McLeod to convey the after-acquired timber to Cameron. This is true because one purchasing property with notice that his grantor has previously "contracted to convey it to another may be compelled to perform the contract in the same manner and to the same extent as his grantor would have been liable to do had he not transferred the legal title." 49 Am. Jur., Specific Performance, section 148. See, also, *Wagner v. Realty Corporation,* 210 N. C., 1, 185 S. E., 421; *Morris v. Basnight,* 179 N. C., 298, 102 S. E., 389; *Derr v. Dellinger,* 75 N. C., 300; *Justice v. Carroll,* 57 N. C., 429.

Chandler had no personal or actual notice of the contract between Cameron and McLeod. This fact renders it unnecessary for us to consider whether or not Cameron would be precluded from relying upon actual notice to Chandler *dehors* the public record as to the existence and terms of the agreement between Cameron and McLeod under the principle that "no notice, however full or formal, will take the place of registration." *Turner v. Glenn,* 220 N. C., 620, 18 S. E. (2d), 197.

When all is said, our problem on the present record comes to this: Did Chandler take title to McLeod's after-acquired interest in the timber in controversy with constructive notice of the previous contract between Cameron and McLeod because of the record of the contract in the office of the Register of Deeds? In our judgment, a proper regard for our recording laws requires that this question be answered in the negative.

The pertinent recording act provides that "no conveyance of land, or contract to convey, or lease of land for more than three years shall be valid to pass any property, as against creditors or purchasers for a valuable consideration, from the donor, bargainor or lessor, but from the registration thereof within the county where the land lies." G. S., 47-18. The statute was enacted "for the purpose of providing a plan and a method by which an intending purchaser or encumbrancer can safely determine just what kind of a title he is in fact obtaining." 45 Am. Jur., Records and Recording Laws, section 29. Hence, the act requires recordation of all deeds, contracts to convey, and leases for more than three years affecting the title to real property. Thompson on Real Property (Perm. Ed.), Vol. 8, section 4272; *Whitehurst v. Abbott,* 225 N. C., 1, 33 S. E. (2d), 129, 159 A. L. R., 380; *Dorman v. Goodman,* 213 N. C., 406, 196 S. E., 352; *Spence v. Pottery Co.,* 185 N. C., 218, 117 S. E., 32. But the recording law neither requires nor authorizes the registration of a mere personal contract. *Tremaine v. Williams,* 144 N. C., 114, 56 S. E., 694.

The agreement between McLeod and Cameron was double-barreled. Inasmuch as it obligated McLeod to convey to Cameron the undivided one-sixth interest in the timber originally owned by McLeod, it constituted a contract to convey land within the meaning of the recording statute. G. S., 47-18. Consequently, the record gave Chandler, the subsequent purchaser, constructive notice that Cameron was entitled to receive a conveyance of the undivided one-sixth interest in the timber originally owned by McLeod. See 45 Am. Jur., Records and Recording Laws, section 87; *Tocci v. Nowfall,* 220 N. C., 550, 18 S. E. (2d), 225.

But in so far as the agreement between McLeod and Cameron purported to bind McLeod to convey the interests in the timber which he did not own, it was a mere personal contract between McLeod and Cameron not affecting the title to land, and its recordation was neither required nor authorized by the recording law. We conclude, therefore, that the registration of the agreement did not give Chandler constructive notice of the existence or terms of the purely personal contract on the part of McLeod to convey Cameron the interest in the timber which McLeod did not originally own. This is true because the record of an instrument "does not constitute constructive notice, if it is not of a class which is authorized or required by law to be recorded." 45 Am. Jur., Records and Recording Laws, section 107. See, also, in this connection: *Tremaine v. Williams, supra; McAllister v. Purcell,* 124 N. C., 262, 32 S. E., 715; *Starz v. Kirsch,* 78 Ind. App., 431, 136 N. E., 36; *Black v. Solano Co.,* 114 Cal. App., 170, 299 P., 843; *Sjoblom v. Mark,* 103 Minn., 193, 114 N. W., 746, 15 L. R. A. (N. S.), 1129. Our conclusion is not affected in any way by the fact that the contract to convey, and

the personal contract were both embodied in the same instrument because the registration of an instrument "operates as constructive notice only when the statute authorizes its registration; and then only to the extent of those provisions which are within the registration statutes." 66 C. J., Vendor and Purchaser, section 996; *Monroe v. Hamilton,* 60 Ala., 226.

The trial court properly adjudged that McLeod's after-acquired title to the additional undivided one-sixth interest inured to Chandler's benefit when the deed under which this interest passed to McLeod was registered. *Woody v. Cates,* 213 N. C., 792, 197 S. E., 561; *Bank v. Johnson,* 205 N. C., 180, 170 S. E., 658; *Door Co. v. Joyner,* 182 N. C., 518, 109 S. E., 259, 25 A. L. R., 81.

Manifestly, the statute authorizing partition sale of standing timber is permissive rather than mandatory. G. S., 46-25. The provision of the judgment for actual partition of the timber in dispute between the plaintiff and the defendant, H. C. Cameron, in the event H. C. Cameron elects to purchase the undivided one-sixth interest therein owned by Eugene McLeod on 14 November, 1946, takes into account the existing situation and protects the equities and rights of all of the parties on the present record and is upheld here.

Since the plaintiff sued herein to obtain injunctive relief against the defendants, H. C. Cameron and Carl Cameron, and since the defendant, H. C. Cameron, sought affirmative relief herein against the plaintiff and the defendants, Eugene McLeod, Lewis McLeod, and Edward McLeod, by way of specific performance, this action was of an equitable nature, and the taxation of the costs was committed by the statute to the discretion of the trial court. Consequently, the order of the court below apportioning the costs will not be disturbed. G. S., 6-20; *Kluttz v. Allison,* 214 N. C., 379, 199 S. E., 395.

For the reasons given, we find no error in the trial below.

No error.

STATE v. RALEIGH SPELLER.

(Filed 5 May, 1948.)

1. Jury § 8: Grand Jury § 1—

Rejection of prospective jurors for want of good moral character and sufficient intelligence is available to the County Commissioners as a general objection only when the jury list is being prepared, G. S., 9-1, and not after the names are in the box, G. S., 9-2, G. S., 9-7.

2. Criminal Law § 81 (h): Appeal and Error § 40d—

Where the evidence does not support the findings of fact upon which the conclusions of the trial court are based, the rulings are subject to review on appeal.

3. Jury § 10: Grand Jury § 1—

The law permits no distinction in the selection of prospective jurors from names rightly in the jury box.

4. Grand Jury § 1: Indictment § 13: Constitutional Law § 33—

The evidence disclosed that the names of Negroes were printed in red and the names of white persons were printed in black in preparing names for the jury box, and that in drawing the names from the box the names of Negroes were without exception rejected. *Held:* The motion of defendant, a Negro, to quash the indictment found by a grand jury so selected, should have been allowed, since such systematic and arbitrary exclusion of Negroes from the grand jury deprived him of his constitutional rights. Constitution of N. C., Art. I, sec. 17. Fourteenth Amendment to the Constitution of the U. S.

5. Indictment § 14—

Upon quashal of an indictment because returned by an improperly selected grand jury, defendant is not entitled to his discharge, but should be held for action by a duly constituted grand jury.

APPEAL by defendant from *Edmundson, Special Judge,* at November Term, 1947, of BERTIE.

Criminal prosecution on indictment charging the defendant with felonious assault and rape.

At the August Term, 1947, Bertie Superior Court, Frizzelle, J., presiding, the grand jury returned a true bill against the defendant charging him with felonious assault and rape.

Upon arraignment and before plea, the defendant moved to quash the indictment because of systematic, arbitrary and intentional exclusion of members of his race, the Negro race, from jury service in Bertie County by the administrative officers in charge of jury selection. Upon the hearing of the motion, there was evidence addressed to the matter, both from the defendant and the prosecution.

The Register of Deeds of the County testified that he had been Clerk of the Board of County Commissioners for 17 years; that Negroes comprise approximately 60% of the population of the County, and about 35% or 40% of the taxpayers; that the names of Negroes in jury box No. 1 are printed in red, while those of whites are printed in black; that the Commissioners pass upon the person whose name is drawn, and either accept or reject such person when called; that in his 17 years as Clerk to the Board of County Commissioners he had never seen the name of a Negro placed on the approved list of prospective jurors; that it is

"common knowledge, and generally known, that Negroes do not serve and have not served on grand or petit juries in Bertie County"; that he knows some of the Negroes whose names have been drawn and rejected and he would say they are average citizens; that "whenever the name of a colored person was called at a drawing of the County Commissioners nobody said anything," or they would say: "Strike him out" or "Let him go"; that according to his records no Negro has ever been summoned for jury duty by the County Commissioners.

This witness further said, when questioned by the court, that the Commissioners had followed the statutes on the subject of jury selection, and that there had been no intentional or purposeful discrimination against the colored race solely or on account of race or color. He explained that the red and black scrolls were for the convenience of the sheriff in summoning the prospective jurors, as they would indicate whether to look for a white or colored person.

The Chairman of the Board of County Commissioners testified that there had been "no discrimination at all" in the selection of persons to serve on juries; that he had never "known a Negro's name to be on the list of persons chosen for service on a grand or petit jury," but that all rejections were for want of good moral character and sufficient intelligence.

The Clerk of the Superior Court, two members of the bar, and others testified that they had never known a Negro to serve on the grand jury in Bertie County.

The court found that there had been no intentional or purposeful discrimination against the colored race in the selection of jurors for the August Term, 1947, Bertie Superior Court, and overruled the motion to quash the bill of indictment. Exception by the defendant.

At the November Term, 1947, Bertie Superior Court, Edmundson, S. J., presiding, the case came on for trial. The defendant again moved to quash the bill of indictment upon the same ground as urged at the August Term, and by consent the evidence previously taken on the motion was used upon its renewal. The motion was again overruled on findings similar to those made at the August Term. Exception by the defendant.

The case then proceeded to trial and resulted in a conviction of rape and sentence of death.

The prisoner appeals, assigning errors.

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

Herman L. Taylor and C. J. Gates for defendant.

STACY, C. J. The question for decision is the correctness of the rulings on the motion to quash.

A careful perusal of the record leaves us with the impression that the findings and rulings of the trial court on the defendant's motion to quash the indictment are without support in the factual evidence. True, it is stated by at least two of the witnesses that the Commissioners intended and practiced "no discrimination" in the drawing of jurors, but these are conclusional statements which run counter to the facts. For instance, the Clerk of the Board of County Commissioners says the red and black scrolls were for the convenience of the Sheriff in summoning prospective jurors, albeit his own testimony shows that the red scrolls never reached the Sheriff or got beyond the Commissioners. And the Chairman of the Board of County Commissioners says that all rejections were made for "want of good moral character and sufficient intelligence." This cause was available to the Commissioners as a general objection only when the jury list was being prepared, G. S., 9-1, and not after the names were in the box. G. S., 9-2; 9-7.

The conclusions reached in the court below are not supported by the record. Hence, the rulings are subject to review on appeal. *S. v. Walls,* 211 N. C., 487, 191 S. E., 232 (*certiorari* denied, 302 U. S., 635); *S. v. Henderson,* 216 N. C., 99, 3 S. E. (2d), 357; *S. v. Daniels,* 134 N. C., 641, 46 S. E., 743; *S. v. Peoples,* 131 N. C., 784, 42 S. E., 814. Even in some discretionary matters an appeal may lie for deficiency in the record. *Crane v. Carswell,* 204 N. C., 571, 169 S. E., 160.

In *S. v. Peoples, supra,* it was held by this Court that "the exclusion of all persons of the Negro race from a grand jury, which finds an indictment against a Negro, where they are excluded solely because of their race or color, denies him the equal protection of the laws" in violation of his constitutional rights, and that a motion to quash the indictment would properly lie in such case. A like conclusion is reached here by virtue of our decisions on the "'law-of-the-land" clause in the Declaration of Rights, Art. I, Sec. 17. *S. v. Collins,* 169 N. C., 323, 84 S. E., 1049.

It has long been the holding in this jurisdiction that the law knows no distinction among those whose names are rightly in the jury box, and none should be recognized by the administrative officials. *S. v. Sloan,* 97 N. C., 499, 2 S. E., 666; *Capehart v. Stewart,* 80 N. C., 101.

Then, when we turn to the Federal cases on the subject, no doubt is left as to the invalidity of the indictment appearing on the present record. *Patton v. Mississippi,* 332 U. S., 463; *Smith v. Texas,* 311 U. S., 128, 85 L. Ed., 84; *Pierre v. Louisiana,* 306 U. S., 354, 83 L. Ed., 757; *Hollins v. Oklahoma,* 295 U. S., 394, 79 L. Ed., 1500; *Norris v. Alabama,* 294 U. S., 587, 79 L. Ed., 1074; *Rogers v. Alabama,* 192 U. S., 226, 48 L. Ed., 417; *Carter v. Texas,* 177 U. S., 442, 44 L. Ed., 839; *Neal v. Delaware,* 103 U. S., 370, 26 L. Ed., 567. "A systematic and arbitrary exclusion of negroes from grand and petit jury lists because of

their race and color constitutes a denial to a negro charged with crime of the equal protection of the laws guaranteed by the Fourteenth Amendment." *Hale v. Kentucky,* 303 U. S., 613, 82 L. Ed., 1050. See Annotation following this case in 82 L. Ed., 1053, for collection of authorities and valuable note.

Upon the showing here made, the trial court might well have directed the Commissioners to proceed, as the law commands, with the drawing of a proper jury panel to be summoned for service at a later term, from which a lawful grand jury could be drawn and unexceptionable petit juries selected. G. S., 9-3; 9-25. Perhaps this may now be done without an order of court.

The defendant is not to be discharged. He will be held until the accusation against him can be performed by an unexceptionable grand jury, and, even after the present bill is quashed, the court may still order his detention for like purpose, if need be, in manner similar to that approved in *S. v. Griffice,* 74 N. C., 316.

The exceptions to the rulings on the motion to quash must be sustained.

Reversed.

W. T. HARNEY, J. S. LOWRY AND J. P. McLAURIN, PETITIONERS, v. THE MAYOR AND THE BOARD OF COMMISSIONERS OF THE TOWN OF McFARLAN, CLEVE NORTHCOTT, MAYOR, AND A. B. MOORE, FLAY CANIPE, J. T. MOORE, BRYANT TEAL, AND EUGENE BRASWELL, MEMBERS OF THE BOARD OF COMMISSIONERS OF THE TOWN OF McFARLAN, RESPONDENTS.

(Filed 5 May, 1948.)

1. Appeal and Error § 10a—

Where it does not appear of record that purported case on appeal was served on appellees, or that it was settled by agreement or otherwise, exceptions based on alleged errors occurring during the progress of the trial in which oral testimony was offered, are not presented for review.

2. Appeal and Error § 40a—

Where the sole exception properly presented is to the judgment, and the judgment is supported by the findings of fact, the exception must fail.

APPEAL by petitioners from *Rousseau, J.,* at September Term, 1947, of ANSON.

This was a hearing before his Honor on the return of respondents to a *writ of certiorari,* issued by Pittman, J., on 9 August, 1947, requiring the respondents to certify to the Superior Court of Anson County, N. C., a transcript of the proceedings in which the Mayor and Board of Com-

missioners of the Town of McFarlan revoked the beer and wine licenses of each of the petitioners, on 17 July, 1947.

The petitioners challenged the correctness of the certified transcript on the ground that it was incomplete and erroneous. However, they did not lodge a motion for a new writ in order that a complete and accurate transcript of the proceedings before the Mayor and Board of Commissioners of the Town of McFarlan might be obtained. Instead, it appears that the trial Judge permitted them to supplement the certified transcript by oral testimony.

Whereupon, at the close of the hearing, the Court found the following facts: "That the record as certified by the Secretary to the Board of Commissioners of the Town of McFarlan, North Carolina, shows that the said Board had ample authority and evidence for the revocation of the beer and wine licenses issued to each of the petitioners and that each of the petitioners has violated the provisions of Section 514 of the Beverage Control Act; and the Court further finds that said *writ of certiorari* should be dismissed," and entered judgment accordingly.

Petitioners appealed to the Supreme Court, and were allowed sixty days in which to make up and serve case on appeal, and the respondents were allowed forty days thereafter to serve countercase or exceptions.

A. Paul Kitchen and George S. Steele, Jr., for petitioners.

Barrington T. Hill for respondents.

DENNY, J. It does not appear on this record that the purported case on appeal was served on the appellees, or that it was settled by agreement or otherwise.

"Exceptions which point out alleged errors occurring during the progress of a trial in which oral testimony is offered can be presented only through a 'case on appeal' or 'case agreed.' *Cressler v. Asheville, supra* (138 N. C., 482, 51 S. E., 53)." *Russos v. Bailey,* 228 N. C., 783, 47 S. E. (2d), 22.

Hence, the exception to the judgment presents the only question for consideration on the appeal. The judgment is supported by the findings of fact, and must, therefore, be upheld. *Wilson v. Robinson,* 224 N. C., 851, 32 S. E. (2d), 601; *Rader v. Coach Co.,* 225 N. C., 537, 35 S. E. (2d), 609; *Fox v. Mills, Inc.,* 225 N. C., 580, 35 S. E. (2d), 869; *Hughes v. Oliver,* 228 N. C., 680, 47 S. E. (2d), 6; *Roach v. Pritchett,* 228 N. C., 747, 47 S. E. (2d), 20; *Russos v. Bailey, supra; Western N. C. Conference v. Tally, ante,* 1.

The judgment below is

Affirmed.

STATE v. RICHARD C. BAKER.

(Filed 19 May, 1948.)

1. Physicians and Surgeons § 1—

The statutes recognize the distinction between the practice of osteopathy and the practice of medicine and surgery. G. S., 90, art. 1; G. S., 90, art. 7.

2. Statutes § 5—

In construing a statute it will be assumed that the Legislature comprehended the import of the words employed by it to express its intent.

3. Physicians and Surgeons § 1—

Osteopathy is a system of healing without the use of medicine, drugs or surgery. G. S., 90-129.

4. Same: Physicians and Surgeons § 8—

In a prosecution of an osteopath for practicing medicine without a license, the State does not have the burden of showing that the administration or prescription of medicines with which defendant is charged was not taught in the recognized colleges of osteopathy. The statutory definition of osteopathy as "the science of healing without the use of drugs" is not enlarged by the words, "as taught by the various colleges of osteopathy," since the limitation perforce relates to the study of that particular system of healing and could not include any other system regardless of the curricula of such colleges. G. S., 90-129.

5. Physicians and Surgeons § 8—

A licensed osteopathic physician exceeds the limits of his certificate and is guilty of practicing medicine without being licensed and registered if he administers or prescribes drugs in treating the ailments of his patients. G. S., 90-18; G. S., 90-19.

6. Physicians and Surgeons § 1—

A "drug" within the meaning of the rule that an osteopath may not administer or prescribe drugs in treating his patients, is any substance used as a medicine or in the composition of medicines for internal or external use, irrespective of whether it contains poisonous ingredients or is purchasable without a physician's prescription, and the definition includes patent or proprietary remedies. The Narcotic Drug Act deals with a different subject and does not furnish the criterion for determining the meaning of "drugs" in relation to the practice of medicine without a license.

7. Physicians and Surgeons §§ 1, 8—

An osteopath does not practice medicine in advising a client to feed her baby a designated brand of canned milk, since milk is a food and not a drug.

8. Same—

Whether a vitamin preparation is a drug or a food depends upon whether or not it is administered or employed as a medicine, which is ordinarily a question of fact.

9. Physicians and Surgeons § 8—

Laxatives and tonics are "drugs" within the meaning of the law prohibiting an osteopath from prescribing or administering drugs.

10. Same—

An osteopath is not guilty of practicing medicine without a license in administering violet ray treatments to his patients suffering with skin diseases. G. S., 90-18 (13).

11. Same—

The giving of a hypodermic injection is administering a drug.

12. Same—

The giving of oral directions to the patient directly or indirectly by telephone directions to the druggist for the use or application by the patient of recommended remedies is prescribing drugs.

13. Same—

A person who holds himself out as an expert in medical affairs and who prescribes drugs for his patients and charges fees for so doing practices medicine notwithstanding the drugs are patent or proprietary remedies purchasable without a prescription, and notwithstanding the fact that the recommendation of such remedies to acquaintances without the charge of a fee would not be unlawful.

14. Criminal Law § 52b—

Where defendant introduces no evidence and intent is not an element of the offense, the court may charge upon the State's unambiguous and uncontradicted evidence of guilt that the jury should convict defendant if they find beyond a reasonable doubt that all the evidence in the case is true and that otherwise they should return a verdict of not guilty.

APPEAL by defendant, Richard C. Baker, from *Rousseau, J.*, and a jury, at the September Term, 1947, of RICHMOND.

The defendant was prosecuted upon an indictment charging that he practiced medicine in Richmond County between 7 April, 1944, and 7 April, 1946, by administering and prescribing drugs in treating the ailments of others without being licensed and registered so to do contrary to the provisions of G. S., 90-18, and G. S., 90-19. He entered a plea of not guilty.

It was judicially admitted by both the State and the accused on the trial in the court below that the defendant held a certificate from the North Carolina State Board of Osteopathic Examination and Registration entitling him to practice osteopathy at the times named in the indictment, but that he had never received a license to practice medicine and surgery from the North Carolina State Board of Medical Examiners and had never registered as a physician or surgeon with the Clerk of the Superior Court of Richmond County. The only testimony at the trial

was that of the State. This evidence tended to show that the matters set out below occurred in Richmond County during the period specified in the indictment.

The accused engaged in the practice of the healing art for compensation. By means of a printed professional card, he represented himself to be a "physician and surgeon." He examined his patients, diagnosed their ailments, and determined the remedies to be applied.

As a general rule, he confined his practice to treating the parts and tissues of the bodies of his patients by manipulations with his hands without the use of medicines. He administered violet ray treatments to those suffering with skin diseases, and relied upon hypodermic injections of alcohol and "liver extracts" for the alleviation of certain other ailments. Upon at least two occasions, he gave a patient afflicted with low blood pressure injections of a liquid which he represented to be a "heart stimulant." He advised one mother to put her nursing baby upon a brand of canned milk known as Carnation Milk.

On numerous occasions, the accused directed his patients to procure from druggists and to use either internally or externally in the treatment of their ailments various patent or proprietary preparations possessing or reputed to possess curative or remedial properties. He said that he "couldn't write prescriptions," and did not issue any written prescriptions covering any of these substances. But he gave oral orders therefor to the druggists, and the druggists delivered the preparations to his patients in bottles or other containers bearing statements of his directions with respect to their mode of administration. A few of these patent or proprietary remedies were laxatives or tonics.

The preparations were delivered to the defendant's patients in the identical form in which they had been received by the druggists from the manufacturers, contained no poisonous ingredients in harmful quantities, and could have been bought by any person without any order from a physician. Some of them could even have been obtained at ordinary grocery stores. The accused required some of his patients to buy and use certain patent or proprietary vitamin preparations.

The jury found the defendant guilty "in manner and form as charged in the bill of indictment," the court sentenced him to pay a fine of $100.00 and the costs, and he appealed to this Court, assigning many errors.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody, and Smith, Leach & Anderson for the State.

Jones & Jones, F. W. Bynum, and Ehringhaus & Ehringhaus for defendant, appellant.

ERVIN, J. The accused insists at the outset that he was entitled to a judgment of nonsuit or to a directed acquittal pursuant to his requests for instruction in the court below upon the specific ground that his certificate as an osteopathic physician gave him a right to use drugs in the treatment of his patients similar to that enjoyed by licensed practitioners of medicine and surgery, and that by reason thereof the evidence of the State was legally insufficient to support his conviction, even if it be taken for granted that he had actually administered and prescribed drugs in the course of his practice. Consequently, this appeal presents this fundamental question: Is an osteopathic physician duly licensed by the North Carolina State Board of Osteopathic Examination and Registration entitled under the law to administer or prescribe drugs in treating the ailments of his patients?

Licenses to practice medicine and surgery are granted by the State Board of Medical Examiners under article 1 of chapter 90 of the General Statutes, and certificates to practice osteopathy are issued by the State Board of Osteopathic Examination and Registration under article 7 of chapter 90 of the General Statutes.

An inspection of these statutes makes it evident that the Legislature regarded the practice of medicine and surgery as one thing, and the practice of osteopathy as another. But it considered that both of these schools of healing had merit in that they were seeking the common objective of alleviating or curing the ills that afflict the flesh. So it authorized the practice of both systems. In so doing, however, it recognized that these schools of healing were founded upon radically different ideas, and it undertook to protect the public against incompetency at the hands of either group by insuring that the practitioners of each school should be qualified to pursue the particular system that they professed to practice. With this object in view, the Legislature enacted statutes requiring applicants for licenses to practice medicine and surgery to attend medical schools, to take courses calculated to equip them to administer and prescribe drugs and use surgical instruments, and to undergo examination as to proficiency to practice medicine and surgery by a licensing board composed of regularly graduated physicians appointed by the North Carolina Medical Society. G. S., c. 90, art. 1. In like manner, the Legislature decreed that applicants for certificates to practice osteopathy should attend colleges of osteopathy, pursue studies designed to qualify them to treat diseases without the use of drugs, and to undergo examination as to competency to practice osteopathy by a licensing board composed of practitioners of osteopathy appointed by the Governor upon the recommendation of the North Carolina Osteopathic Society. G. S., c. 90, art. 7. It is significant that the Legislature specifies that applicants for licenses to practice medicine and surgery shall study the subjects of materia

medica and therapeutics, but makes no such requirement with respect to applicants for certificates to practice osteopathy. G. S., 90-10; G. S., 90-131. It is also significant that a licensed osteopath is designated as an osteopathic physician by the Legislature. G. S., 90-134.

It is reasonable to assume that the Legislature comprehended the import of the words it employed to express its intent when it enacted the statutes relating to osteopathy. There is no lack of clarity in the meaning of "osteopathy" either in language or in law. It is the very antithesis of any science of medicine involving the use of drugs. *Georgia Ass'n of Osteopathic Physicians and Surgeons v. Allen,* 112 F. (2d), 52. Dictionaries and judicial decisions uniformly declare that osteopathy is a system of treating diseases of the human body without drugs or surgery. *S. v. McKnight,* 131 N. C., 717, 42 S. E., 580, 59 L. R. A., 187; *S. v. Siler,* 169 N. C., 314, 84 S. E., 1015; Funk & Wagnalls' New Standard Dictionary; 41 Am. Jur., Physicians and Surgeons, sec. 2; 46 C. J., 1142; 86 A. L. R., 626-630; *Burke v. State Osteopathic Ass'n,* 111 F. (2d), 250; *Waldo v. Poe,* 14 F. (2d), 749; *In re Rust,* 181 Cal., 73, 183 P., 548; *Mabry v. State Board of Examiners in Optometry,* 190 Ga., 751, 10 S. E. (2d), 740; *State v. Sawyer,* 36 Ida., 814, 214 P., 222; *State v. Stoddard,* 215 Iowa, 534, 245 N. W., 273, 86 A. L. R., 616; *State v. Moore,* 154 Kan., 193, 117 P. (2d), 598; *State v. Johnson,* 84 Kan., 411, 114 P., 390, 41 L. R. A. (N. S.), 539; *State v. Hopkins,* 54 Mont., 52, 166 P., 304, Ann. Cas. 1918D, 956; *State v. Wagner,* 139 Neb., 471, 297 N. W., 906; *State v. Chase,* 76 N. H., 553, 86 A., 144; *State v. Bonham,* 93 Wash., 489, 161 P., 377, L. R. A., 1917D, 996; *Arnold v. Schmidt,* 155 Wis., 55, 143 N. W., 1055. The osteopath "heals by means of a system of rubbing and kneading the body, applying hot or cold baths, and prescribing diet and exercise for the treatment, relief, and cure of bodily infirmity or disease, without the use of medicine, drugs, or surgery." 21 R. C. L., Physicians and Surgeons, sec. 2. See, also, *S. v. McKnight, supra.*

In all probability, the General Assembly of 1907 enacted the statutes relating to the practice of osteopathy now embodied in article 7 of chapter 90 of the General Statutes because of the decision in *S. v. McKnight, supra,* in which this Court recognized that osteopathy is a "mode of treatment which absolutely excludes medicines and surgery from its pathology" and held that by reason thereof the statutes requiring examination and license "before beginning the practice of medicine or surgery" did not apply to osteopaths. Be this as it may, the Legislature has expressly defined osteopathy "to be the science of healing without the use of drugs, as taught by the various colleges of osteopathy recognized by the North Carolina Osteopathic Society." G. S., 90-129. Other statutes manifest the legislative recognition of osteopathy as a non-drug-giving

system of healing. P. L. 1913, c. 92; C. S., 6701; C. S., 6704; P. L. 1937, c. 301.

But the defendant contends that G. S., 90-129, imposes upon the State the burden of showing beyond a reasonable doubt "that the action or practice with which the defendant, a duly licensed osteopathic physician, is charged was *not taught* in the recognized colleges of osteopathy." This contention is interesting, but not convincing. The statutes clearly contemplate that osteopathic physicians shall diagnose and treat diseases by employing osteopathy. The words "as taught by the various colleges of osteopathy recognized by the North Carolina Osteopathic Society" do not set at large the signification of "osteopathy," permitting the colleges to give it any meaning they choose. The thing to be taught is osteopathy—"the science of healing without the use of drugs." The Legislature merely authorizes the colleges to determine, select, and teach the most desirable methods of doing what is comprehended within the term "osteopathy." The colleges cannot change the law of North Carolina, or widen the scope of the osteopath's certificate so as to permit him to practice other systems of healing by the simple expedient of varying their curricula. See *State v. Gleason,* 148 Kan., 1, 79 P. (2d), 911; *Commonwealth v. Daily,* 75 Pa. Sup. Ct., 510.

The conclusion is inescapable that the Legislature has denied to licensed osteopaths the privilege of using drugs in their practice. It necessarily follows that a licensed osteopathic physician exceeds the limits of his certificate and is guilty of practicing medicine without being licensed and registered so to do within the purview of G. S., 90-18, and G. S., 90-19, if he administers or prescribes drugs in treating the ailments of his patients. Whether the law in this respect should be modified in any degree is a matter for the lawmakers and not for the judges.

The defendant further insists, however, that he was entitled to a judgment of nonsuit or to a directed acquittal in conformity to his prayers for instruction in the court below for the independent reason that the testimony of the prosecution did not indicate that any of the substances mentioned in the evidence constituted drugs in a legal sense. His argument here is based upon the proposition that no substance is a drug within the meaning of the laws governing the practice of osteopathy unless it is compounded pursuant to some individual formula, or unless it is poisonous, or unless it is habit forming in nature. To sustain his position in this regard, he cites the Narcotic Drug Act embodied in article 5 of chapter 90 of the General Statutes, and the provisions of the statutes regulating the practice of pharmacy which permit retailers of general commodities to sell "nonpoisonous domestic remedies . . . and patent or proprietary preparations which do not contain poisonous ingredients." G. S., 90-71.

When the Legislature undertook to regulate the calling of the pharmacist and to place safeguards around the handling of narcotics, it was not dealing with the practice of osteopathy—"the science of healing without the use of drugs." So the cited statutes do not furnish the criterion for determining the meaning of the word "drugs" in the laws relating to osteopaths. We hold that in so far as the practice of osteopathy is concerned, a "drug" is any substance used as a medicine or in the composition of medicines for internal or external use, and a "medicine" is any substance or preparation used in treating disease. *Collins v. Insurance Co.,* 79 N. C., 279, 28 Am. R., 322; *People v. Garcia,* 1 Cal. App. (2d) Supp., 761, 32 P. (2d), 445; *Territory v. Takamine,* 21 Haw., 465; *Carroll Perfumers v. State,* 212 Ind., 455, 7 N. E. (2d), 970; *Department of State v. Kroger Grocery & Baking Co.,* Ind. App., 40 N. E. (2d), 375; *Larsen v. Paine Drug Co.,* 169 App. Div., 838, 155 N. Y. S., 759; 28 C. J., 496-497; 16 C. J., 766-767; 40 C. J., 626-627; 17 Am Jur., Drugs and Druggists, sec. 3; 41 Am. Jur., Physicians and Surgeons, sec. 2. Hence, the term "drugs" embraces patent or proprietary remedies possessing or reputed to possess curative or remedial properties sold and used for medicines. This is true irrespective of whether such remedies contain poisonous ingredients, or whether they may be purchased without any direction from a physician, or whether they can be obtained at retail stores generally. Calling drugs domestic or family remedies does not rob them of their character as medicines. *State Board of Pharmacy v. Matthews,* 197 N. Y., 353, 90 N. E., 966, 26 L. R. A. (N. S.), 1013. It has been judicially determined that a tonic is a medicinal preparation. *United States v. J. D. Iler Brewing Co.,* 121 F., 41, 57 C. C. A., 381. The lexicographers declare that a laxative is a medicine. Webster's Twentieth Century Dictionary; Funk & Wagnalls' New Standard Dictionary. Milk, however, is a food. *Merle v. Beifeld,* 194 Ill. App., 364. So the accused did not exceed the bounds of his osteopathic certificate when he advised the nursing mother with respect to her baby's diet. Whether a vitamin preparation is a drug or a food is ordinarily a question of fact. The same substance may be a drug under one set of circumstances, and not a drug under another. The test is whether it is administered or employed as a medicine. *Stewart v. Robertson,* 45 Ariz., 143, 40 P. (2d), 979; 40 C. J., 625. For the purpose of this particular case, however, it is assumed that the vitamin preparations at issue were used solely for nourishment, and that the defendant did not transgress the scope of his osteopathic certificate in urging their use by his patients.

When the testimony is viewed in the light of the authorities and reasons set out above, it is plain that the State has presented evidence tending to show that many of the substances in controversy were drugs within the meaning of the law.

The defendant further insists, however, that, in any event, he was entitled to a judgment of nonsuit or to a directed acquittal in conformity to his requests for instruction in the court below upon the ground that the testimony of the prosecution did not indicate that he had administered or prescribed any of the substances in question in treating the ailments of his patients. It is undoubtedly true that he did not exceed the limits of his osteopathic certificate in his treatment of patients suffering with skin diseases for the statute specifically confers upon a licensed osteopath the privilege of practicing radiology. G. S., 90-18, subsection 13. But the testimony tending to show that he had given hypodermic injections of various substances to his patients in treating their ailments was sufficient to overcome any claim to a nonsuit or a directed acquittal in so far as the charge set forth in the indictment is based upon the administering of drugs. A person administers drugs when he gives or applies drugs to a patient. *Barfield v. State,* 71 Okl. Cr., 195, 110 P. (2d), 316; *Chandler v. State,* 3 Okl. Cr., 254, 105 P., 375.

The accused asserts that it must be ruled as a matter of law that he did not prescribe drugs because he did not issue any written prescriptions. We are unwilling to hold that the law permits an osteopath to do by word of mouth what it forbids him to do with pen or pencil. The giving of any direction to a patient for the use or application by him of any drugs for the cure of any bodily disease is prescribing drugs. *State v. Lawson,* 22 Del., 395, 65 A., 593, 69 A., 1066; *People v. Kabana,* 321 Ill. App., 158, 52 N. E. (2d), 320; *State v. Hueser,* 205 Iowa, 132, 215 N. W., 643. And this is so even though the direction may be given orally. *State v. Lawson, supra; People v. Mash,* 235 Ill. App., 314. It is undoubtedly true, as the accused contends, that "the defendant cannot be convicted in this case for doing as an osteopathic physician what he would have a perfect legal right to do as a private citizen," and that a private citizen can suggest to friends the advisability of taking some medicine without running afoul of the law. But the evidence in this case does not intimate that the accused confined himself to recommending the use of some remedy by some acquaintances. It tends to show that he held himself out as an expert in medical affairs, and in determining the proper remedies for ailments diagnosed by himself on the examination of his patients, and that he gave oral directions through the medium of druggists to his patients with respect to the mode of administering medicines which he told them to take for their ailments, and that he charged his patients fees for so doing. Manifestly, this testimony was sufficient to overcome any claim to a nonsuit or a directed acquittal upon the charge embraced in the indictment in so far as such charge is founded upon the prescribing of drugs in the treatment of the ailments of others. *S. v. Van Doran,* 109 N. C., 864, 14 S. E., 32.

After instructing the jurors that they were the sole judges of the credibility of the witnesses and of the weight to be given to the testimony, the trial judge charged the jury, in substance, that if the jury found beyond a reasonable doubt that all of the evidence in the case was true, it would be the jury's duty to convict the defendant; but that otherwise it would be the jury's duty to return a verdict of not guilty. The defendant excepted to the instructions upon the ground that they constituted an improper direction of the verdict.

It is to be remembered that this is not a case where it was incumbent on the State to establish a particular intent on the part of the accused as a necessary element of the crime. The only testimony presented to the jury was that of the State. It tended to show that the defendant had exceeded the scope of his osteopathic certificate and had administered and prescribed drugs for fees in treating the ailments of his patients. This evidence was unambiguous in nature, and susceptible of only one construction. If it was true, the defendant was clearly guilty of practicing medicine without being licensed and registered so to do as charged in the indictment. It was not contradicted or weakened in any degree by any fact or circumstance—not even by the testimony indicating that the defendant usually confined his ministrations to his patients to osteopathic procedures. Hence, we conclude that on the record here it was permissible for the trial judge to instruct the jury to return a verdict of guilty if they found all of the evidence in the case to be true beyond a reasonable doubt. *S. v. Dickens,* 215 N. C., 303, 1 S. E. (2d), 837; *S. v. Langley,* 209 N. C., 178, 183 S. E., 526; *S. v. Norris,* 206 N. C., 191, 173 S. E., 14; *S. v. Strickland,* 192 N. C., 253, 134 S. E., 850; *S. v. Plummer,* 186 N. C., 261, 119 S. E., 488; *S. v. Estes,* 185 N. C., 752, 117 S. E., 581; *S. v. Murphrey,* 186 N. C., 113, 118 S. E., 894.

A careful examination of the other assignments of error relied on by the accused reveals nothing of which he can justly complain.

Our conclusion is that no reversible error has been made to appear, and that the judgment entered below should be upheld.

No error.

H. L. COBLE v. MARGARET S. COBLE.

(Filed 19 May, 1948.)

1. Divorce § 17: Appeal and Error § 40d—

A finding that defendant in a divorce action was about to remove herself and minor children from the State, which finding is in direct conflict with the affirmative allegations of the complaint and is unsupported by evidence, is not binding on appeal.

2. Divorce § 17: Husband and Wife § 4—

Where the husband in his divorce action alleges that he had notified his wife that he would no longer live with her as husband and wife, he may not assert the fictional unity of persons for the purpose of maintaining that his domicile was the domicile of his wife and children.

3. Courts § 2: Constitutional Law § 21—

Domicile alone cannot confer jurisdiction of the person, but there must be service of process so that there is notice and an opportunity to be heard in order to constitute due process of law.

4. Divorce § 17—

The awarding of the custody of the children in an action for divorce is *in rem*, and the court must have jurisdiction over the children, who are the *res*, or must have jurisdiction of the person of their custodian who is given notice and an opportunity to be heard in order to have authority to enforce its decree by coercive action.

5. Same—

A decree in a divorce action awarding the custody of the children to plaintiff, entered without service of process on defendant and while defendant and the children are out of the State, is void.

6. Divorce § 17—

A divorce action is not instituted so as to give the court jurisdiction to award the custody of the children of the marriage until the court acquires jurisdiction of the person of defendant so as to meet the fundamental requirement of notice and opportunity to be heard, and a decree awarding custody of the children to plaintiff, entered while defendant and the children are out of the State, and without service of process on defendant, cannot be upheld on the ground that it is a temporary remedial decree authorized by G. S., 50-13, since the statute, in so far as it undertakes to vest the court with authority without service of process and without notice, is unconstitutional.

7. Constitutional Law § 21—

The contention that an order awarding the custody of the children in a divorce action, entered without jurisdiction over the person of defendant, does not violate due process of law because it affects no substantial right, is untenable, since, although defendant may thereafter apply for a hearing, the burden of proof at such hearing would be upon her and not upon the plaintiff.

8. Divorce § 17: Judgments § 27b—

While injunction will not lie to restrain an act which has already been accomplished, this principle is inapplicable to a motion to set aside a void order under which plaintiff has obtained custody of the children of the marriage.

9. Same: Courts § 2—

Where the court enters an order without jurisdiction, the court's denial of defendant's motion to vacate the order does not constitute an implied ratification of the original order.

COBLE *v.* COBLE.

APPEAL by defendant from *Armstrong, J.*, at Chambers, in Greensboro, N. C., 18 March, 1948, GUILFORD. Reversed.

Civil action for divorce on the grounds of adultery and for the custody of the children born of the marriage, heard upon special appearance and motion to vacate an order awarding the custody of the children to plaintiff.

Plaintiff and defendant are man and wife, living in a state of separation. On 9 December 1947, plaintiff instituted a proceeding in the juvenile court of Greensboro for the purpose of obtaining custody of the two children born of the marriage. As notice of the hearing thereon could not be served on defendant, the proceeding was dismissed on motion of plaintiff.

The plaintiff then, on 26 January 1948, instituted this action. The summons was returned 27 January, unserved for the reason defendant could not be found in Guilford County. Thereupon, the court, upon motion of plaintiff, entered an order committing the custody of said children to plaintiff. This order was likewise returned unserved.

Complaint was filed 26 January in which plaintiff alleges, in respect to the proceedings in the juvenile court, "that the defendant removed said minor children and herself from the State of North Carolina and beyond the jurisdiction of this Court for the purpose of escaping the jurisdiction of the courts of North Carolina and to avoid the service of lawful process upon her; that, process having failed, said proceedings in the Juvenile Court were, at the request of the petitioner therein (the plaintiff herein) dismissed."

Order for the service of summons by publication was duly entered 30 January and service thereof was duly made by publication as required by law.

On 14 February, defendant, through counsel, entered a special appearance and moved the court to vacate and set aside the order awarding custody of the children to plaintiff and directing defendant to surrender custody thereof immediately to the plaintiff.

On 15 March, between the date the motion was made and the hearing thereon, plaintiff, in some undisclosed manner, acquired custody and possession of his children near Greenville, S. C.

On 18 March, the court below, after hearing, denied the motion to vacate and defendant excepted and appealed.

Hines & Boren and Brooks, McLendon, Brim & Holderness for plaintiff appellee.

Shuping & Shuping, H. L. Koontz, and Bryce R. Holt for defendant appellant.

BARNHILL, J. The primary and determinative question presented on this appeal is appropriately stated in appellant's brief as follows:

"Is an order of a Judge of the Superior Court awarding custody of minor children to a plaintiff under G. S. 50-13, made without jurisdiction and in denial of due process of law, when at the time such order was made there had been neither service of summons upon nor notice to the defendant, and when both the defendant and the minor children were without the State?"

In the order awarding custody of the children to plaintiff the court finds "that said defendant is about to remove herself and said minor children from the State of North Carolina and beyond the jurisdiction of the courts of North Carolina." This finding is unsupported by evidence and is in direct conflict with the positive, affirmative allegations in the complaint.

The plaintiff further contends that the domicile of the husband is the domicile of his wife and children, and so, legally, they were within the State at the time. Here, too, he is met by his own allegations. He asserts that after she had been away from his home for some time, flitting from place to place, in and out of the State, in questionable company, she returned to his home; that he declined to live with her; and that she lived in separate quarters in his home, over his protest, until 8 August 1947, when she left. Even before then he had made a trip to Florida just to notify her "that he would no longer live with her as her husband." He is not now in position to insist upon any fictional unity of domicile. If any such unity ever existed, for the purpose here invoked, he severed it by his own acts. *Irby v. Wilson,* 21 N. C., 568.

Hence, we must consider the validity of the order in the light of the fact it was entered without the service of any notice or other process and at a time when both defendant and the children were outside the State of North Carolina.

It takes more than domicile to confer jurisdiction over the person of a party. He must be served with process within the jurisdictional limits of the court and thus subjected to its orders and decrees, entered after notice and an opportunity to be heard. If the custody of children is the issue, they must be within the bounds of the State. *Pridgen v. Pridgen,* 203 N. C., 533, 166 S. E., 591; *Burrowes v. Burrowes,* 210 N. C., 788, 188 S. E., 648; *In re Biggers,* 228 N. C., 743; *Pennoyer v. Neff,* 95 U. S., 714, 24 L. Ed., 565.

The action, as it relates to the custody of the children, is in the nature of an *in rem* proceeding. The children are the *res* over which the court must have jurisdiction before it may enter a valid and enforceable order. Indeed, a divorce action is so considered, the status being the *res.* S. v. *Williams,* 224 N. C., 183, 29 S. E. (2d), 744. It is for this reason service of summons by publication is permitted.

At the time the order was issued, the *res* was not within the jurisdiction of the court. The defendant—the custodian—was not served with notice and was not accorded an opportunity to be heard. This runs counter to the genius of a free people and will not be permitted. The order is void. *In re Samuel Parker,* 144 N. C., 170; *Warlick v. Reynolds,* 151 N. C., 606, 66 S. E., 657; *Armstrong v. Kinsell,* 164 N. C., 125, 80 S. E., 235; *Hart v. Commissioners,* 192 N. C., 161, 134 S. E., 403; *Monroe v. Niven,* 221 N. C., 362, 20 S. E. (2d), 311; *In re Thompson,* 228 N. C., 74; *In re Biggers, supra.*

"It lies at the foundation of justice that every person who is to be affected by an adjudication should have the opportunity of being heard in defense, both in repelling the allegations of fact, and upon the matter of law . . ." *Pridgen v. Pridgen, supra.*

But the plaintiff insists that the order, as a temporary remedial writ or decree, is authorized by G. S. 50-13 and should be so recognized.

Of course, where a parent is about to abscond and take her children beyond the jurisdiction of the court for the purpose of avoiding the service of process, the court may act and act promptly. But even then its order becomes effective and binding only upon service. Any provisional writ, whether attachment, claim and delivery, restraining order, or what not, must find either property or person within the State to which it can attach by seizure or service before it becomes effective.

We unhesitatingly say that in so far as the statute undertakes to vest a judge with authority, without the service of process and without notice, to enter an effective binding order awarding the custody of an infant beyond the confines of the State, it is invalid. *Burrowes v. Burrowes, supra; In re Biggers, supra; In re DeFord,* 226 N. C., 189, 37 S. E. (2d), 516; *McRary v. McRary,* 228 N. C., 714.

It is true that upon the institution of a divorce action the court is vested with jurisdiction of the children of the marriage for the purpose of entering orders respecting their care and custody. But the action is not instituted, within the meaning of this rule, until and unless the court acquires jurisdiction of the person of the defendant, and is subject to the fundamental requirement of notice and opportunity to be heard.

If both parents are in court and subject to its jurisdiction, an order may be entered, in proper instances, binding the parties and enforceable through its coercive jurisdiction. *McRary v. McRary, supra.* But such is not the case here. Neither the infants nor their mother was subject to the jurisdiction of the court at the time the order was entered.

"It is fundamental that a State 'has no power to enact laws to operate upon things or persons not within her own territory' . . . Notice and hearing are essential to due process of law under the Fourteenth Amendment of the Constitution of the United States. McGehee, Due Process of Law, 76; Honnold, Supreme Court Law, 847; *Scott v. McNeal,* 154

U. S., 34, 36, 38 L. Ed., 896, 901 . . ." *Tyson v. Tyson,* 219 N. C., 617, 14 S. E. (2d), 673; *McRary v. McRary, supra.*

The contention that the order affects no substantial right of the defendant cannot be sustained. She has been deprived of the right to be heard on the question of her fitness as well as upon the question of the best interest of her children. *In re Means,* 176 N. C., 307, 97 S. E., 39; *Clegg v. Clegg,* 186 N. C., 28, 38, 118 S. E., 824. To say that she now may be heard is no answer, for she would not meet plaintiff on an equal footing. She would come to bat with two strikes already called on her and could prevail only upon a showing of changed conditions. *Byers v. Byers,* 223 N. C., 85, 25 S. E. (2d), 466. When the action was instituted the children were in her custody and so the plaintiff was the movent, with the attendant burdens. Now he has them and she must carry the laboring oar.

Plaintiff, citing *Yates v. Ins. Co.,* 166 N. C., 134, 81 S. E., 1062, insists that the objective of the order has now been accomplished. Hence the question is moot. The cited case is distinguishable and his position is untenable. The court will not restrain an accomplished fact. Neither will it permit a plaintiff to seize children, outside the bounds of the State, under the guise of an unserved order granted without notice, and then plead *fait accompli.*

The order denying defendant's motion to vacate does not constitute an implied ratification of the original order. *Monroe v. Niven, supra.*

The parties have filed able and interesting briefs in which they discuss every phase of the question raised on this appeal. However, as defendant's motion strikes at the taproot of the controversy—the jurisdiction of the court—we need not trace out the "feeders."

The judgment below is

Reversed.

STARR ELECTRIC COMPANY, INC., v. LIPE MOTOR LINES, INC., AND M. J. JURNEY.

(Filed 19 May, 1948.)

Courts § 4b—

The statute prescribed that appeals from a municipal-county court should be governed by the rules governing appeals from justices of the peace. Through no fault of appellant, its appeal was not filed within ten days after notice of appeal in open court, but was filed during the next succeeding term of the Superior Court. If it had been filed within the ten-day period, it would not have been on the Superior Court docket for ten days prior to the beginning of the term. *Held:* Appellee is not entitled to dismissal of the appeal at such term of the Superior Court notwith-

standing appellant's failure to apply for *recordari*. G. S., 1-300; G. S., 1-299; G. S., 7-181; Rule of Practice in the Superior Courts, No. 24.

APPEAL by defendant, Lipe Motor Lines, Inc., from *Warlick, J.*, at 17 November, 1947, Civil Term of GUILFORD.

Civil action instituted in the civil division of the Greensboro Municipal-County Court for recovery of $500 as damage to personal property allegedly resulting from actionable negligence of defendants.

The record on this appeal shows these facts:

Upon trial in said court judgment was rendered on Monday, 13 October, 1947, in favor of plaintiff against defendant Lipe Motor Lines, Inc., but as against defendant M. J. Jurney the action was dismissed. Defendant Lipe Motor Lines, Inc., appealed from said judgment,—notice of appeal being given in open court and further notice being waived.

Thereafter, on 30 October, 1947, the clerk of the civil division of the Greensboro Municipal-County Court made return to the notice of appeal,—defendant Lipe Motor Lines, Inc., having paid the fee and filed the bond required, and, on said date, 30 October, 1947, the appeal was entered upon the trial docket in the office of the clerk of the Superior Court of Guilford County and numbered on the appearance and trial dockets.

At the time said appeal was so docketed a one-week criminal term of the Greensboro division of the Superior Court of Guilford County was in session, it having commenced on 27 October, 1947, and also a two-weeks civil term of the High Point division of the Superior Court of Guilford County was in session,—it too having commenced on 27 October, 1947. These were the first terms of the Guilford County Superior Court to commence more than ten days from the date of the judgment entered in this action, as aforesaid, in the Greensboro Municipal-County Court.

Thereafter, on 10 November, 1947, plaintiff, through its attorney, filed in the office of the clerk of Superior Court of Guilford County a motion to dismiss the appeal for that defendant Lipe Motor Lines, Inc., the appellant, "did not perfect said appeal and comply with the statutory requirements governing the same, in that a regular term of Superior Court for Guilford County commenced on the 27th day of October, 1947, and said appellant did not docket said appeal in this court until the 31st day of October, 1947."

At the next term of Superior Court of Guilford County, commencing on 17 November, 1947, this action appeared on both the motion calendar and the trial calendar for said term. And when it came on for hearing on the said motion of plaintiff to dismiss the appeal, the presiding judge, finding facts substantially as above set forth, and that "no *recordari* was applied for or other process other than the docketing used by the appel-

lant," held as a matter of law that the appeal docketed on 30 October came too late, and, hence, that the motion of plaintiff to docket and dismiss the appeal should be granted, and, in accordance therewith, entered judgment.

Defendant Lipe Motor Lines, Inc., appeals therefrom to Supreme Court, and assigns error.

E. M. Stanley for plaintiff, appellee.

Sapp & Moore for defendant, appellee.

Smith, Wharton & Jordan and McNeill Smith for defendant, appellant.

WINBORNE, J. It is appropriate, at the outset, as preliminary to, and basis for proper consideration of the principal question on this appeal, as hereinafter stated, to advert to the following certain provisions of the statutes pertaining to the court in which this action was commenced, and the procedure prescribed for appeals from its judgments in civil actions:

The Municipal Court of the city of Greensboro was established pusuant to an act of the General Assembly of North Carolina, Public Laws 1909, Chapter 651. (See *Miles Co. v. Powell,* 205 N. C., 30, 169 S. E., 828.) By amendment to the act, as amended in the meantime, the name of the court was changed in the year 1939 to "The Greensboro Municipal-County Court," Public Laws 1939, Chapter 300. Originally the court had limited criminal jurisdiction. Later limited civil jurisdiction was conferred by Section 1 of Chapter 126, Private Laws 1931, amending the original act, as amended, by adding thereto new sections 32 to 56, both inclusive.

In these sections provision for appeal is made, and procedure in respect to appeal is prescribed. Section 49 provides that "from any judgment rendered in said court any party may appeal to the Superior Court of Guilford County, where the trial shall be *de novo.*" Section 50 provides that "The giving of notice of the appeal, the return to the notice of appeal, the cash deposit, and the perfecting of the appeal shall be as is now or may hereafter be prescribed by law for appeals from courts of justices of the peace to the Superior Court"; and that "when the return is made the clerk of the Superior Court of Guilford County shall docket the case on his trial docket for a new trial of the whole matter at the ensuing term of said court as is provided by Section Six hundred and sixty-one of the Consolidated Statutes of North Carolina,"—now G. S., 1-300. And Section 54 provides that "Except as otherwise provided in this act, all laws relative to civil actions, matters and proceedings in courts of justices of the peace, including all laws relative to

process, rules of practice, procedure, orders, writs, decrees, judgments and appeals, but excluding none of such laws not specifically mentioned, shall be applicable to the civil division of the municipal court in the exercise of its jurisdiction as the same is set forth in this act . . ."

In summary, it may be stated that appeals and procedure in respect to appeals from civil division of The Greensboro Municipal-County Court to the Superior Court of Guilford County, shall be in accordance with law and procedure prescribed for appeals from judgments of justices of the peace to the Superior Court. This is conceded by counsel for all parties to the present action. Thus the statutes of this State and decisions of this Court pertaining to practice and procedure on appeals from judgments of justices of the peace are pertinent and applicable here.

In the light of these provisions, applied to the facts of case in hand, this is the question for decision here: Notice of appeal to Superior Court of Guilford County from judgment of The Greensboro Municipal-County Court having been given in open court on 13 October, 1947, and the clerk of The Greensboro Municipal-County Court, through no fault of appellant, having failed to make return to the Superior Court of Guilford County and to file with the clerk thereof the papers, etc., within ten days after the service of the notice of appeal on him, in accordance with the provisions of G. S., 1-181, but having on 30 October, 1947, made a return to Superior Court and filed with the clerk thereof the papers, etc., specified in said statute, and the clerk of Superior Court having thereupon on 30 October, 1947, docketed the case on the trial docket during the term of said Superior Court to which the appeal would go in orderly procedure, that is, a term commencing more than ten days next after service of notice of appeal, and at a time when appellant could have moved, but had not moved, for writ of *recordari* to require the clerk of The Greensboro Municipal-County Court to make the return and to file the papers, etc., should the appeal so docketed be dismissed, on motion of appellee?

In other words, when the return had been made and the case docketed at a time when appellant could have applied for a writ of *recordari,* was it required to apply for such writ to compel the clerk of The Greensboro Municipal-County Court to make a return? To so hold, would be to require the clerk to do that which he had already done. And to hold that the docketing so made is valid puts appellee to no greater disadvantage than he would have been if the return had been made and the papers sent up under compulsion of a writ of *recordari.* Hence we hold that the appeal was not subject to dismissal.

In accordance with practice and procedure in courts of justices of peace, applicable here, an appeal to the Superior Court means to the next term of the Superior Court to which an appeal in orderly and regular course would go. *Hahn v. Guilford,* 87 N. C., 172; *Boing v. R. R.,* 88

N. C., 62; *Sondley v. Asheville,* 110 N. C., 84, 14 S. E., 514; *Summerell v. Sales Corp.,* 218 N. C., 451, 11 S. E. (2d), 304, in the last of which numerous other cases are cited.

And under the facts of the present case, it is conceded on all hands that the term of the Superior Court of Guilford County, Greensboro division, commencing on 27 October, 1947, would be the term to which the appeal would go in orderly and regular course of practice.

Thus in accordance with the practice and procedure in courts of justices of the peace, a party desiring to appeal from a judgment of a justice of the peace, has ten days after judgment in which to serve notice of appeal. G. S., 7-179. But, if notice of appeal be given in open court, the adverse party being present in person or by attorney at the time appeal is prayed, no written notice is required. G. S., 7-180. The justice of the peace from whose judgment the appeal is taken, has ten days after service of the notice of appeal on him, within which to make a return to the Superior Court and to file with the clerk thereof the papers, proceedings and judgment in the case, with notice of appeal served on him, and he may be compelled to make such return by attachment. G. S., 7-181. And it is provided by statute, G. S., 1-300, formerly Code, 880, and C. S., 661, that when the return is made from a justice's court the clerk of the appellate court shall docket the case on his trial docket for a new trial of the whole matter at the ensuing term of said court. And it is also provided by statute, G. S., 1-299, formerly Code, 565, 881, and C. S., 660, that when an appeal is taken from the judgment of a justice of the peace to a Superior Court, it shall be therein reheard on the original papers, and that "an issue shall be made up and tried by a jury at the first term to which the case is returned, unless continued." However, Rule 24 of the Rules of Practice in the Superior Courts of North Carolina provides that "Appeals from justices of the peace in civil actions will not be called for trial unless the returns of such appeals have been docketed ten days previous to the term, but appeals docketed less than ten days before the term may be tried by consent of the parties."

Considering these statutes, G. S., 1-300, formerly Code, Section 800, and G. S., 1-299, formerly Code, Sections 565 and 881, and this rule of practice, in the case of *S. v. Edwards,* 110 N. C., 511, 14 S. E., 741, a bastardy proceeding treated as a civil action, this Court in opinion by *Clark, C. J.,* said: "The power of this Court to prescribe its own rules is conferred by the Constitution, and is not subject to legislative control. . . . But the power lodged here to prescribe rules for the lower courts being conferred by statute . . . is subject to legislative modification. We find, however, no statute in conflict with this rule, and, being authorized by law it has the force and effect of a statute. The rule is reasonable, that though, under the Code, Secs. 565 and 880, the appeal stands

ordinarily for trial at the first term, it must be docketed ten days before such term. *Sondley v. Asheville*" (110 N. C., 84).

Applying this rule to the case in hand, and allowing ten days for the clerk of The Greensboro Municipal-County Court to make return, etc., the case could not have been docketed ten days before the day on which the term to which the appeal was returnable began, to wit, 27 October, 1947. Hence, under Rule 24 the case would not have been tried at that term, except by consent.

The decisions of this Court also hold that upon failure of a justice of the peace to make a return to notice of appeal, appellant, if in no default, should move at the next ensuing term of the Superior Court for a writ of *recordari* to compel the justice of the peace to make the return and to file the papers, etc., as required by the statute, G. S., 7-181, formerly Code, 878, Revisal 1493, C. S., 1532. See among others *Hahn v. Guilford, supra; Boing v. R. R., supra; Blair v. Coakley,* 136 N. C., 405, 48 S. E., 804; *Lentz v. Hinson,* 146 N. C., 31, 59 S. E., 144; *MacKenzie v. Development Co.,* 151 N. C., 276, 65 S. E., 1003; *Abell v. Power Co.,* 159 N. C., 348, 74 S. E., 881; *Barnes v. Saleeby,* 177 N. C., 256, 98 S. E., 708; *Pickens v. Whitton,* 182 N. C., 779, 109 S. E., 836; *S. v. Fleming,* 204 N. C., 40, 167 S. E., 483.

Moreover, it is provided by statute, G. S., 1-299, that "if the appellant fails to have his appeal docketed as required by law, the appellee may, at the term of court next succeeding the term to which the appeal is taken, have the case placed upon the docket, and upon motion the judgment of the justice shall be affirmed . . ." but that "nothing herein prevents the granting the writ of *recordari* in cases now allowed by law."

Under this statute, this Court has considered numerous cases. And in all in which a dismissal was allowed, the appeal was not docketed until one or more terms of the Superior Court had passed.

The appellee cites the case of *Love v. Huffines,* 151 N. C., 378, 66 S. E., 304, as authority in support of the judgment in the present case. However, the portion of the opinion there which appellee relies upon is patently *dicta,* and not necessary to the decision made. Moreover, reference to the record on appeal in that case indicates some confusion in facts stated. And it is sufficient to say that the *dicta* there expressed is not in harmony with prior and subsequent decisions of this Court.

In the light of the statutes and decisions to which reference is made, as above treated, we hold that the case as docketed in Superior Court of Guilford County should not have been dismissed.

Hence the judgment below is

Reversed.

W. M. HARRISON v. SOUTHERN RAILWAY COMPANY.

(Filed 19 May, 1948.)

1. Fraud § 2: Cancellation of Instruments § 2: Torts § 8a—

Evidence of conversations by the parties subsequent to the execution of the release signed by plaintiff is impertinent to the issue of fraud in the procurment of the execution of the release, and is properly stricken upon motion.

2. Torts § 8a: Cancellation of Instruments § 2: Fraud § 5—

A person is under duty to read an instrument executed by him, and where he has the ability and opportunity to read the instrument he may not attack it for alleged misrepresentation as to its contents in the absence of fraud or oppression.

3. Same—Knowledge on the part of the representee forestalls deception.

Plaintiff was injured in the course of his employment by defendant. Plaintiff's evidence disclosed that defendant's agent stated that defendant would pay only hospital and medical expenses, that after debate over the matter for two or three weeks, plaintiff signed an instrument without reading it in reliance on the agent's representation that it was solely for the purpose of admitting him to the hospital. The instrument was a release from liability in consideration of defendant's agreement to pay all hospital and medical bills in connection with treating the injury. Defendant paid all hospital and medical expenses in accordance with the agreement. *Held:* The evidence discloses that plaintiff had knowledge of the nature of the instrument, and is insufficient to show fraud in the procurement of the release.

4. Cancellation of Instruments § 9: Torts § 8a—

Where plaintiff's reply alleges that defendant's agent represented that plaintiff would not be admitted to the hospital at defendant's expense unless "plaintiff executed a form which was the release mentioned in said answer," the allegation is tantamount to an averment that plaintiff knew the instrument was a release, and negates any fraud in the *factum*.

5. Torts § 8a—

Ordinarily a release may not be avoided on the ground that the injury did not yield to treatment as readily as was thought or anticipated at the time the release was executed.

BARNHILL, J., dissenting.

DEVIN and SEAWELL, JJ., concur in dissent.

APPEAL by plaintiff from *Nettles, J.*, at September Term, 1947, of ROWAN.

Civil action to recover damages for an alleged negligent injury.

On the night of 2 March, 1943, the plaintiff sustained a hernia while working for the defendant in its roundhouse at Spencer, N. C. He was

assisting the engine carpenter in installing a 400-pound coupler in the front of an engine. It is in evidence that ordinarily three men, and sometimes four, were used in the installation of such a coupler, and that on this particular occasion, the engine was not flush with the roundhouse floor, as was customary, making it necessary to place a board over the repair pit in front of the engine to give the plaintiff a footing while assisting in the work. Plaintiff states that his foot or the board slipped and he felt a sharp pain "shoot up" through his side. On examination, the defendant's surgeon, Dr. McKenzie, pronounced it hernia.

It is alleged that defendant's negligence consists in failing to exercise due care to furnish the plaintiff a safe place to work and sufficient help to do the work. *Pigford v. R. R.*, 160 N. C., 93, 75 S. E., 860.

In a few days the plaintiff gave the defendant's claim agent a written statement concerning his injury. About ten days thereafter the claim agent again saw the plaintiff, who was still at work, and told him the Company agreed with Dr. McKenzie that he needed an operation and that they would bear the expense as was their custom in such cases, but that they would not pay for any loss of time. Plaintiff protested that he could not afford to lose the time necessary for an operation.

Later in the month, on 29 March, 1943, the defendant's claim agent had another conversation with the plaintiff, at which time he signed a paper-writing agreeing to release the defendant from all liability, in consideration of which, it was stipulated: "The Southern Railway Company will pay all doctor and hospital bills in connection with a hernia operation growing out of the above mentioned personal injuries." . . . (Signed) "W. M. Harrison (Seal)."

Before signing the release, however, plaintiff says he was led by defendant's agent to believe that he was only signing a paper which would admit him to the hospital, and that he was deceived and misled in the matter. "I signed the paper believing it was a form to get me in the hospital. I can read but I didn't read it. I didn't have the opportunity. Mr. Barnett told me what he was fixing."

On several occasions thereafter, plaintiff says the defendant's agent renewed his luring statements and misleading promises, and agreed with him that he was entitled to compensation. The plaintiff has had four operations for hernia but is still suffering from his injury.

The pleadings join issue on negligence, the foregoing release, and the statute of limitations.

At the close of plaintiff's evidence, there was a judgment of nonsuit, from which this appeal is prosecuted.

Nelson Woodson for plaintiff, appellant.

W. T. Joyner and Linn & Shuford for defendant, appellee.

STACY, C. J. The question for decision is the correctness of the nonsuit.

The record discloses that the plaintiff is a man of business experience, 32 years of age and literate. He says that prior to entering the employ of the defendant, he was "in the fish and oyster business for 10 or 12 years in a big way. . . . I have had experience in making out sales tickets and collecting money in business." He is now in the wholesale oyster business at Salisbury.

Plaintiff began work with the defendant as an engine-carpenter helper in its repair shops at Spencer around the first of the year 1942. On 2 March, 1943, he suffered an injury. Thereafter, on 29 March, 1943, he signed a release and remained in the employ of the defendant until 3 March, 1946. This suit was instituted 28 February, 1946, three years, lacking one day, from date of accident.

The plaintiff, on his examination in chief, states that before signing the release, the defendant's agent, after receiving instructions from Washington, told him "that where a man gets ruptured on the job," the Railroad "would just pay the doctor and hospital bills—that they would not pay any loss of time." Plaintiff protested that he could not afford to lose the time which an operation would entail, and after several interviews the agent finally said: "Well, like I told you before, this is just all that they will do and it is a practice they have been going through for 20 years and they are not going to change it in your case. Now, if you want to go in here and complete filling out the form, we will fix it."

With this knowledge and information, the plaintiff signed the release without reading it, and accepted its benefits for nearly three years thereafter. It is stipulated that the defendant "has paid a total of $680.70 for surgeon and hospital fees in connection with four operations on the plaintiff for hernia."

Before going to Richmond for the fourth operation on 24 August, 1945, the plaintiff consulted an attorney. He says: "I had legal advice . . . before I went through the fourth operation." *Pass v. Rubber Co.*, 198 N. C., 123, 150 S. E., 709.

The conversations between plaintiff and defendant's agent, subsequent to the signing of the release, were stricken as impertinent on the issue of fraud in the procurement of the release. Certainly the plaintiff understood when he signed the release that all he would get was his surgical and hospital bills in keeping with the general practice of the defendant, since the question of further compensation was at issue and debated at the time. *Supply Co. v. Watt,* 181 N. C., 432, 107 S. E., 451. This central fact, which the release confirms, was not changed or modified retroactively by subsequent conversations with the claim agent, whose limited authority in the premises was known to the plaintiff. Fraud is a matter of prior intent and present purpose, rather than subsequent

reflection or afterthought. *Laundry Machinery Co. v. Skinner,* 225 N. C., 285, 34 S. E. (2d), 190; *Kemp v. Funderburk,* 224 N. C., 353, 30 S. E. (2d), 155; *Ward v. Heath,* 222 N. C., 470, 24 S. E. (2d), 5; *Stone v. Milling Co.,* 192 N. C., 585, 135 S. E., 449; 23 Am. Jur., 771. It is the luring bait or that which induces or enters into the transaction as a corroding influence. *Furst v. Merritt,* 190 N. C., 397, 130 S. E., 40; *Ebbs v. Trust Co.,* 199 N. C., 242, 153 S. E., 858; 37 C. J. S., 204. "Fraud is the egg that spoils the omelet"—MacRae.

Speaking to a like situation and a similar release in *Presnell v. Liner,* 218 N. C., 152, 10 S. E. (2d), 639, it was said: "If the plaintiff did not read the release before he signed it, this fact cannot avail him unless prevented from so doing by the defendants. He could read; it was his duty to read the instrument before executing it, *Aderholt v. R. R.,* 152 N. C., 411, 67 S. E., 978, unless prevented." It is not contended that plaintiff was prevented from reading the release before he signed it. "He is charged, therefore, with knowledge of its contents." *Aderholt v. R. R., supra.* The duty to read an instrument or to have it read before signing it, is a positive one, and the failure to do so, in the absence of any mistake, fraud or oppression, is a circumstance against which no relief may be had, either at law or in equity. *Colt v. Kimball,* 190 N. C., 169, 129 S. E., 406; *Potato Co. v. Jenette,* 172 N. C., 1, 89 S. E., 791.

It is established by the decisions on the subject that one who signs a written instrument, without being induced thereto through fraud or deception, cannot avoid its effect on the ground that at the time he signed the paper he did not read it or know its contents, but relied upon what another said about it. *School Com. v. Kesler,* 67 N. C., 448; 45 Am. Jur., 683; Anno. 55 Am. St. Rep., 509. It is the duty of one signing a written instrument to inform himself of its contents before executing it, if he have the ability and opportunity to do so, and in the absence of fraud or overreaching he will not be allowed to impeach the effect of the instrument by showing that he was ignorant of its contents or failed to read it. 96 A. L. R., 995. He cannot invoke his own heedlessness to discredit his solemn release, and then call that heedlessness someone else's fraud. *Shaffer v. Cowden,* 88 Md., 394, 41 Atl., 786.

It is true, the plaintiff says he "didn't have the opportunity" to read the instrument. He had the opportunity to sign it, to see that it was a sealed instrument, and a like opportunity to read it, or have it read, so far as the record discloses. But what is equally important, the plaintiff got what he understood he was to get, and no more, at the time. In this, he was not deceived or misled. *Harding v. Ins. Co.,* 218 N. C., 129, 10 S. E. (2d), 599. Knowledge on the part of the representee forestalls deception. *Cox v. Johnson,* 227 N. C., 69, 40 S. E. (2d), 418; 23 Am. Jur., 943; 12 Am. Jur., 630. One cannot be deceived by that which he knows. *Cox v. Johnson, supra.*

Moreover, there is no evidence that the description of the instrument by the defendant's agent as "a paper which would admit him to the hospital" was either false or misleading within the meaning and understanding of the parties. They had been debating for two or three weeks whether plaintiff would sign the paper in order to obtain a herniotomy and hospitalization at the defendant's expense. He knew that this was all he was to get and that such was the purpose in executing the paper. It did admit the plaintiff to the hospital, not once but four times, at the expense of the defendant.

The plaintiff does not allege that he signed the release under any misapprehension as to its contents. The representation as alleged in the reply is, that plaintiff "would only be admitted to the hospital at defendant's expense unless plaintiff executed a form which was the release mentioned in said answer." So it is alleged that plaintiff signed the very paper which he intended to sign, and he knew it was "the release mentioned in said (defendant's) answer." This dispenses with any fraud in the *factum*. *Furst v. Merritt, supra*. There is no allegation of any fraud in the treaty. Indeed, it may be doubted whether the allegation of fraud is sufficient to raise an issue in respect thereof.

The evidence is insufficient to avoid the release on the ground that plaintiff's hernia did not yield to treatment as readily as was thought or anticipated at the time. Annotations 48 A. L. R., 1464, and 117 A. L. R., 1022, *et seq.*

There is no debate over the law of the case, but only as to the proper interpretation of the record.

The record supports the judgment of nonsuit.

Affirmed.

BARNHILL, J., dissenting: As the majority opinion is made to turn on the validity of the release signed by plaintiff, it is not necessary to discuss the evidence of negligence further than to say that, in my opinion, there is evidence of the failure of the defendant to furnish sufficient help and a safe place to work.

The defendant's agent stated to plaintiff shortly after his injury "he had a form to complete and fill out before I could be admitted to the hospital as a Railroad patient." Shortly thereafter he told plaintiff he wanted to complete his records and "that in case of strangulation of a hernia that it would put me in right much of a fix if I didn't have this form completed which would admit me in the hospital as a railroad patient. . . . He said in case it would get strangulated around 2 or 3 o'clock at night it would be inconvenient to get in touch with him or someone else that could fix the papers that could admit me in the hospital," and asked plaintiff to come by his office the next day "to complete the form." The next day the statement was repeated and plaintiff signed

the instrument. At the time Barnett, the agent, in soliciting a witness, stated to others in the presence of plaintiff "that he wanted to fix me up to go to the hospital." He also told G. C. Kepley, who signed as a witness to plaintiff's signature, that "he had some papers he wanted Mr. Harrison to sign to get him in the hospital" and a Mr. Holshouser said in Barnett's presence when Kepley demurred, "it wasn't nothing."

The ungrammatical statement proved to be prophetic. It was indeed something. Plaintiff, thinking he was signing hospital admission papers released all claims he had against the defendant arising out of his injuries, save and except the hospitalization costs. *McCall v. Tanning Co.*, 152 N. C., 648, 68 S. E., 136; *Butler v. Fertilizer Works,* 193 N. C., 632, 137 S. E., 813; 23 A. J., 874. Thus he signed one instrument thinking he was signing another. He was induced so to do by the false representation it was a paper to admit him to the hospital. This, in my opinion, constitutes fraud in the *factum,* or at least evidence thereof sufficient to be submitted to the jury.

Plaintiff did not read the instrument before signing. Even so, if there was fraud in the *factum,* then plaintiff's failure to read is no defense. He signed the paper "believing it was a form to get me in the hospital." Thus he never signed the paper he intended to sign and never intended to sign the instrument to which his signature is attached. He was induced to sign by false representations as to the nature and content of the instrument. See 23 A. J., 874, and authorities cited in notes.

The representations of Barnett as to the character of the paper plaintiff was requested to sign were sufficient to throw him off his guard and excuse his negligence, if any, in not reading the instrument. *Butler v. Fertilizer Works, supra; Engle v. American Car & Foundry Co.,* 287 S. W., 801; *Union Pac. Ry. Co. v. Harris,* 158 U. S., 326, 39 L. Ed., 1003; *St. Louis I. M. & S. Ry. Co. v. Smith,* 100 S. W., 884; *Armstrong v. Steel Co.,* 268 S. W., 386; *Hot Springs Ry. Co. v. McMillan,* 88 S. W., 846; Anno. 134 A. L. R., 61.

In the absence of a showing that he was fraudulently misled or misinformed as to its nature or contents, or they are kept from him in fraudulent opposition to his request, a party to a written contract is deemed to have signed with full knowledge and is bound by the terms of the instrument he has executed. *Williams v. Williams,* 220 N. C., 806, 18 S. E. (2d), 364. But a party who is guilty of fraud in the procurement of the execution of a contract "shall not be allowed to cry 'negligence' as against his own deliberate fraud." *Linington v. Strong,* 107 Ill., 295 (p. 302); *Furst v. Merritt,* 190 N. C., 397, and cases cited.

On this record Barnett, after the "release" was executed, continued to "string him along" and lull him into a false sense of security. Plaintiff repeatedly interviewed him after his first operation relative to pay for

loss of time and Barnett told him ". . . just carry out his (Dr. McKenzie's) orders. I will get you some money . . . that it took time—that they were a big Company and busy, and were not as hasty as we might think they ought to be but just rest assured that he would take care of that part of it for me . . . one thing that was slowing them up was the fact that the injury wasn't well . . . I was under Dr. McKenzie's orders, go right ahead, and that I would get pay for additional loss of time . . . I was needing money, wanting money and he promised me money. Mr. Barnett agreed with me. . . . He said he was just waiting for the officials to send it." Just before the fourth operation "I told him that I had to have money—that my family did. He said he would write them immediately and was sure he would get action . . . he would mail the check to me or take it out to the house so my family would have some money to get by on while I was in the hospital. Mr. Barnett said surely this operation would cure me and make it possible so that they could settle up—*maybe they didn't want to settle in part.*" (Italics supplied.)

It was not until after the fourth operation that a release was mentioned. Barnett then said he agreed with plaintiff about the loss of time "but that the officials in Washington were of another opinion because of the fact that I had signed a release before the first operation. Then I did blow up. I said, you mean to say that form I signed to get in the hospital was a release and he said well, yes, sir, in a round-about way it was, that it released the Company from all except doctor and hospital bills and that they didn't feel that they should do any more because you signed the release . . . it wasn't his decision, it was theirs."

He declined any further hospitalization after he was thus advised the paper writing was a release.

All this testimony respecting conversations between plaintiff and Barnett after the execution of the release, in my opinion, was admissible not only in corroboration of plaintiff's testimony concerning the circumstances under which the instrument was executed, but also as tending to establish Barnett's fraudulent intent.

It is true plaintiff had legal advice before his fourth operation, but he "was assured (by counsel) that everything was all right; that Mr. Barnett was handling the matter for me, and he readily agreed I had money coming." Surely this did not put plaintiff on guard to the extent that his acceptance of hospitalization thereafter constitutes a ratification of the release as actually signed by him.

While this evidence concerning legal advice, except the bare statement that he had legal advice before he went through the fourth operation, was excluded, I am of the opinion this was error. Surely, if proof of the fact he consulted counsel is admissible as tending to show notice and ratification, he was entitled to give evidence as to the advice received so as to rebut the adverse implications.

As I am of the opinion the record discloses evidence of negligence and of fraud in the *factum* sufficient to vitiate the release, I vote to reverse.

DEVIN and SEAWELL, JJ., concur in dissent.

STATE v. JIM LOVE
and
STATE v. CLAUDE WEST.

(Filed 19 May, 1948.)

1. Criminal Law § 6a—

Mere initiation, instigation, invitation or exposure to temptation by enforcement officers is not sufficient to establish the defense of entrapment, it being necessary that the defendants would not have committed the offense except for misrepresentation, trickery, persuasion or fraud.

2. Criminal Law § 53f—

No assumption of fact or opinion expressed or fairly inferable from the charge respecting the credibility of the testimony can be made by the trial court without violating G. S., 1-180.

3. Criminal Law § 6b—

G. S., 18-8, grants immunity from prosecution under the prohibition laws only to a witness who is required to testify under compulsion.

4. Criminal Law § 41g—

The testimony of an officer of the law who purchases whiskey for the purpose of obtaining evidence against a suspect and who therefore participates in the offense and receives remuneration therefor, should be scrutinized as to its credibility.

5. Criminal Law §§ 53f, 53j—

An officer of the law purchased intoxicating liquor in order to obtain evidence against a suspect, and voluntarily testified for the prosecution. *Held:* An instruction which leaves the impression that the officer's credibility was enhanced by the fact that he was an officer in the performance of his duty and that he was protected from prosecution by G. S., 18-8, must be held for error as an expression of opinion on the credibility of the testimony. G. S., 1-180.

DEFENDANTS' appeals from *Carr, J.*, January Term, 1948, ROBESON Superior Court.

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

J. H. Barrington, Jr., T. A. McNeill, and McLean and Stacy for defendant, appellant, Love.

J. S. Butler, T. A. McNeil, and McLean & Stacy for defendant, appellant, West.

SEAWELL, J. These defendants, because of their reputation, having been suspected of the illegal possession and sale of whiskey, were both brought to book in the following manner: On request made by local authorities, agent Bradshaw of the State Bureau of Investigation was assigned to the task of assisting them. He repaired to Robeson County and after a conference with the principal enforcement officers, in which a plan of operation was adopted, Bradshaw, being at the time dressed in plain clothes, set out to the places of residence, or business, of each of the defendants and, separately, contacted them, without disclosing his identity and official character. He asked each defendant to sell him some whiskey; and, without further inducement, each sold to him a quantity of liquor for which he paid, tagging the purchase for use as evidence. He was afterwards reimbursed for the sum thus spent. Upon his report the indictments were brought, and in each case the defendant was convicted on his testimony. Each appealed. The exceptions discussed in this opinion were to the action of the court in overruling defendants' demurrers to the evidence and motions for judgment of nonsuit, and to the specific instructions to the jury hereinafter noted.

The cases, involving practically identical features as to fact and law, were argued together in this Court, and it has been considered proper to review them together and embrace them in a single opinion. We shall, perhaps, sometimes refer to the "defendants" collectively, meaning the defendant in each case,—leaving segregation of cases, defendants, and exceptions to the reader for separate application. There is no substantial difference between the two cases in history or the incidents of trial.

1. In this Court counsel for the appealing parties renewed the argument made in the court below that defendants were made the victims of entrapment on the part of State officers concerned in the prosecution, and that this, clearly appearing in the evidence, entitles them to a nonsuit as a matter of law; and on that ground press their exceptions to the overruling of the demurrers.

The trial court instructed the jury that if they should find that the defendants were induced to violate the law by some misrepresentations of fact, by some trickery and scheme, and that they would not have done so except for the misrepresentation and trickery and chicanery practiced upon them, the evidence would not be sufficient to convict, and submitted the evidence. Counsel for the appellants consider the implied definition of entrapment inadequate and misleading since, as they contend, it is not essential to that defense that the subject should be induced to violate the prohibition law through a humanitarian appeal or false or fraudulent

deception calculated to lead an innocent person into the invited violation of law, and that the evidence of instigation and procurement by the State is sufficient to justify a nonsuit.

The State questions whether the appellants' approach to this position does not more properly challenge the wisdom and fairness of the proceeding rather than its validity; presenting a moral rather than a judicial problem, which, albeit debatable, must yield to judicially approved practice.

The judicial definitions of entrapment as used by different courts dealing with the subject afford a choice between two main classifications: Some authorities would consider the definition of entrapment as a valid defense essentially complete where the officers or agents of the State have instigated or procured a violation of law for the purpose of punishing the act thus brought about, without the presence of fraud or persuasion. See Words & Phrases, Perm. Ed., "Entrapment." A decided majority would superadd persuasion, trickery, fraud, practiced upon a person who was not inclined to violate the law, and who otherwise would not have done so. Typical of the latter is *Sorrell v. United States,* 287 U. S., 435, 77 L. Ed., 413, 86 A. L. R., 249, 259, in which we find: "Entrapment is a conception and planning of an offense by an officer and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, fraud of the officer." See also dissenting opinion and annotation in A. L. R.

Our own Court has not found it exigent in any cited case we can find to give a formal definition of the defense as presented here. In *S. v. Adams,* 115 N. C., 775, 20 S. E., 722, the charge was larceny, and since the question of consent was involved, whatever appears by way of *dictum* is of little help. But see *S. v. Godwin,* 227 N. C., 449, in which it was observed that the case of the prosecution depended "upon a broken reed" upon the facts of that case, because of the "persistent entreaty and duplicity" of the expectant purchaser. *Cp. State v. Smith,* 152 N. C., 798, 67 S. E., 508; *S. v. Hopkins,* 154 N. C., 622, 70 S. E., 394; *S. v. Ice Co.,* 166 N. C., 366, 81 S. E., 737.

Considerations of the purity and fairness of the courts and the agencies created for the administration of justice gravely challenge the propriety of a procedure wherein the officers of the State envisage, plan and instigate the commission of a crime and proceed to punish it on the theory that a facile compliance with the officer's invitation confirms the accuracy of the suspicion of an unproved criminal practice,—for which the defendant is in reality punished.

The Federal courts dealing with prohibition laws, from which our own laws have been derived, as we have seen, hold that trickery, fraud, deception practiced upon one who entertained no prior criminal intent,

is necessary to a complete defense; and this, ordinarily, is for the jury. The Federal conception of entrapment is not necessarily binding upon us, for the question is much broader than the cited application in the *Sorrell case,* from which the appellants quote. But the appellants in their contention that mere initiation, instigation, invitation, or the exposure to temptation by the enforcement officers without fraud or persuasion is a sufficient defense, if not juridically out-argued, are at least judicially out-voted. See annotation, 18 A. L. R., 146; 66 A. L. R., 478; 148 A. L. R., 1467.

Motions for nonsuit were properly refused.

2. The procedure adopted in these cases led to the following instruction given by the court:

> "The Court instructs you that it is unlawful in this County to sell intoxicating liquor, and it is also unlawful to purchase intoxicating liquor in this County. There is, however, a provision in the law that when a person who, in any way, is involved in a violation of the prohibition law, is willing to testify and is subpoenaed by the State to testify on behalf of the State, that the State will not permit him to be prosecuted, whether he be an officer or any other person, and notwithstanding that fact, the defendant contends that you should find that the witness in the case violated the law in purchasing the intoxicating liquor, and contends that for that reason you ought not to accept his testimony."

The above quotation is from the charge in *S. v. Love.* A similar instruction was given in *S. v. West.*

Our courts have been very careful to see that the minds of the jurors are not influenced by opinions emanating from the bench, either directly or inadvertently given. No assumption of fact or opinion expressed or fairly inferable from the charge respecting the credibility of the testimony can be made by the court without violation of G. S., 1-180, under the interpretations so frequently given them. See annotations under this section.

In the instant cases it might be true that if the fact had been established that the officer was only a "feigned accomplice" without intention to become a criminal, the argument that his credibility could not be assailed or challenged by the circumstance of his complicity in the crime might rest upon more plausible but still somewhat paradoxical grounds.

In the cases at bar both the defendants, as sellers, and Bradshaw, as purchaser, violated the criminal law—committed an offense, *malum prohibitum,* where the only intent essential is the intent to do the prohibited act. The statute, G. S., 18-8, and the immunity granted by it, does not contemplate changing the inherent nature of an act which is accom-

plished, that is to deprive it of its character as an offense against the law, nor could it subsequently have that effect, since the immunity granted is merely from prosecution, applicable only to a witness who is required to testify under compulsion. *S. v. Luquire,* 191 N. C., 479, 481, 132 S. E., 162. In the former statute it was a legislative pardon; under existing law it may be regarded as a condonation. G. S., 18-8—C. S., 3406. The conditions under which immunity may be claimed and given are clearly set forth in *S. v. Luquire, supra.*

It does not appear in the evidence here that Mr. Bradshaw had been subpoenaed as contemplated by the statute and was compelled to give evidence, which is a condition to the immunity which the law extends. He acted voluntarily throughout the whole procedure, both in helping to furnish the *corpus delicti,* securing the evidence and giving his testimony; that was the purpose of the undertaking. Therefore, he could not claim the immunity afforded by the statute and the trial judge was in error in instructing the jury to the contrary. No doubt Mr. Bradshaw acted in the full consciousness that he was discharging his duty and with the purest of motives, but that is not the point. We think the defendants were entitled to such instruction as the facts might warrant respecting the consideration the jury should give to the fact of his participation in the transaction as bearing on the credibility of his testimony. At the same time, as a matter of fairness to the witness and to the prosecution, the jury should have been instructed to consider the manner of that participation as disclosed by the evidence. It is not our purpose to suggest any formula since that must depend upon the evidence as it develops.

We are not so much concerned with labels as we are with what they cover. It is universally recognized, we think, that the testimony of witnesses employed in detective work of this character and who participate in the offense and receive remuneration therefor should be scrutinized as to its credibility. 14 Am. Jur., 843, sec. 113; 23 C. J. S., 139, sec. 905 (citing *S. v. Boynton,* 155 N. C., 456, 71 S. E., 341). From *S. v. Boynton, supra,* we quote:

> "The general rule is that the jury should be directed to scrutinize the evidence of a paid detective and make proper allowances for the bias likely to exist in one having such an interest in the outcome of the prosecution and in reference to any other relevant facts calculated to influence the testimony of the witness; but where this is done, the exact terms in which the rule may be expressed are left, by our decisions, very largely in the discretion of the trial judge."

The State's whole case rested on fact,—the official capacity of agent Bradshaw, his attitude, his approach to the transaction, his motives and intent, and procurement and participation in the offense, were mat-

ters which could not be assumed. The trial judge, of course, could not extend the supposed immunity provided in the statute to this officer; but, in his instructions, he presented the immunizing provisions of the statute and the official character of the witness in such a way as to strongly fortify his testimony and to make an impression on the minds of the jury that its credibility was enhanced by the fact that he was an officer in the performance of his duty. G. S., 1-180. Immunity is a shield, not a halo.

For the errors pointed out there must be a

New trial.

No. 651—*S. v. Love*—New trial.

No. 653—*S. v. West*—New trial.

NATIONAL BANK OF SANFORD v. JAMES MARSHBURN, AND C. H. COBB, TRUSTEE.

(Filed 19 May, 1948.)

1. Bills and Notes § 18—

A person who accepts a check for a pre-existing debt owed him by the maker is a purchaser for value. G. S., 25-30; G. S., 25-192.

2. Same—

The fact that the payee of a check knows that the maker has no funds on deposit with the drawee bank for payment at the time of its execution, and accepts it upon representations of the maker that he would have funds in the bank for payment at a later date certain, does not alter the payee's *status* as a *bona fide* holder.

3. Banks and Banking § 8a: Money Received § 1—Bank paying check under mistake as to identity of drawer may not recover from payee without fault.

The drawee bank paid a check under a mistake of fact that the maker was its depositor having a large amount of money to his credit, whereas in fact the maker was another person of the same name without funds on deposit. The payee, a holder in due course, acted in good faith in taking, presenting, and collecting the check and was without fault in causing or contributing to the drawee bank's mistake, and was without knowledge that its payment was made under a mistake. *Held:* The maker being insolvent, the drawee bank is not entitled to recover the amount from the payee upon the theory of unjust enrichment, but the bank must suffer the loss for the same reasons that it would be liable if the signature to the check had been a forgery.

APPEAL by the defendant, C. H. Cobb, Trustee, from *Burgwin, Special Judge,* at the December Term, 1947, of LEE.

The action reached the Superior Court on an appeal from a judgment of a justice of the peace, and was submitted to the judge in the Superior Court upon a case agreed. The determinative facts are set forth below.

On 16 February, 1947, James Marshburn drew a check for $155 on the plaintiff, National Bank of Sanford, payable to the order of the defendant, C. H. Cobb, Trustee, who accepted it in satisfaction of a pre-existing debt of Marshburn. At the time of its delivery, Marshburn informed the defendant, C. H. Cobb, Trustee, that he did not have funds on deposit with the plaintiff to meet the check, but that he would have funds on deposit with the plaintiff to pay it on and after 1 March, 1947. Pursuant to this information, the defendant, C. H. Cobb, Trustee, held the check until on or about 17 March, 1947, when he presented it to the plaintiff for payment through the agency of other banks. The plaintiff thereupon paid the amount of the check through such banks to the defendant, C. H. Cobb, Trustee, who received the payment without reason to know that it was made by the plaintiff under the mistake hereafter specified. The defendant, C. H. Cobb, Trustee, still has the money in his custody.

James Marshburn, the drawer of the check, never had any funds on deposit with the plaintiff at any time. But another person bearing exactly the same name had substantial funds on deposit with the plaintiff when the check was presented to it for payment. The plaintiff paid the check to the defendant, C. H. Cobb, Trustee, because of a mistaken belief on its part that the signature of James Marshburn, the drawer of the check, was that of James Marshburn, its depositor, and charged the amount of the check against the account of the latter. At the end of the month, however, the plaintiff discovered its mistake, credited the account of James Marshburn, its customer, with the amount of the check, and made immediate demand upon James Marshburn, the drawer of the check, and upon the defendant, C. H. Cobb, Trustee, for restitution of the sum paid by it to the latter on account of the check.

As the demand for restitution proved unavailing, the plaintiff brought this action against James Marshburn, the drawer of the check, and the defendant, C. H. Cobb, Trustee, before a justice of the peace, and obtained judgment against them for the $155 with interest from 17 March, 1947. The defendant, C. H. Cobb, Trustee, appealed from this judgment to the Superior Court. James Marshburn, the drawer of the check, did not join in the appeal. But he has since died insolvent, and the judgment rendered against him by the magistrate is uncollectible.

The trial judge concluded upon the case agreed that the defendant, C. H. Cobb, Trustee, had been unjustly enriched at the expense of the plaintiff to the extent of the payment made on the check, and entered judgment accordingly. The defendant, C. H. Cobb, Trustee, thereupon appealed to this Court.

J. G. Edwards for plaintiff, appellee.
E. C. Bryson for defendant, C. H. Cobb, Trustee, appellant.

ERVIN, J. The case at bar is somewhat novel in origin. Fundamentally, however, it presents for decision the perplexing problem constantly recurring in various guises as to which one of two innocent parties must bear a loss occasioned by some third person.

It is well to note here the circumstances under which the defendant, C. H. Cobb, Trustee, acquired and collected the check. Since the paper was a negotiable instrument, and since he took it in payment of an antecedent or pre-existing debt, he purchased it for value within the meaning of the negotiable instruments law. G. S., 25-30; G. S., 25-192; *Manufacturing Co. v. Summers,* 143 N. C., 102, 55 S. E., 522; *Mauney v. Coit,* 80 N. C., 300, 30 Am. Rep., 80; *Reddick v. Jones,* 28 N. C., 107, 44 Am. Dec., 68. He acted in the utmost good faith in taking, presenting, and collecting the check. His status as a *bona fide* holder was not altered in any way by his knowledge that there were no funds on deposit with the plaintiff to meet the check at the time he accepted it. The check was to be presented for payment at a time when it was represented that such funds would be available in the plaintiff bank. *Johnson v. Harrison,* 177 Ind., 240, 97 N. E., 930; 10 C. J. S., Bills and Notes, section 331; 8 C. J., Bills and Notes, section 720. The case agreed shows that the defendant, C. H. Cobb, Trustee, was not guilty of any fault causing or contributing to the plaintiff's mistaken belief as to the identity of the drawer of the check. And, finally, he received the money in suit without any reason to know that its payment was made by the plaintiff bank under a mistake.

When all is said, our case comes to this: Should a drawee bank be permitted to recover back from an innocent holder for value money paid by it to such holder upon a check because of its mistaken belief that the signature of the drawer on the check was that of a depositor bearing the same name?

The plaintiff insists that this question should be answered in the affirmative because of the general principle of law that money paid under a mistake of fact may be recovered from the payee by a payer who was under no legal obligation to make the payment. *Harrington v. Lowrie,* 215 N. C., 706, 2 S. E. (2d), 872; *Sparrow v. Morrell & Co.,* 215 N. C., 452, 2 S. E. (2d), 365; *Morgan v. Spruill,* 214 N. C., 255, 199 S. E., 17; *Simms v. Vick,* 151 N. C., 78, 65 S. E., 621, 24 L. R. A. (N. S.), 517, 18 Ann. Cas., 669.

The plaintiff's position finds support in cogent arguments. Nevertheless, our study of the conflicting considerations involved leads us to the opposite conclusion. Consequently, we hold that the question at issue ought to be answered in the negative.

The case agreed contains no intimation that the debtor, James Marshburn, drew the check giving rise to this litigation with any intent other than the honest one of having funds on deposit with the plaintiff bank to cover the check on its presentation for payment on or after 1 March, 1947. Yet, the factual situation is in essence the same as it would have been if the drawer, James Marshburn, had deliberately forged the signature of the depositor, the other James Marshburn, upon the check. This is true because the plaintiff bank paid the money in suit to the defendant, C. H. Cobb, Trustee, on account of its mistaken belief that the signature of the drawer, James Marshburn, appearing on the check was the genuine signature of its depositor, the other James Marshburn. Hence, it seems that in the absence of an exact precedent to guide us this case ought to be governed by the rule regulating the right of a drawee bank to recover back money paid by it upon a forged check to a *bona fide* holder for value and without fault.

As the textwriter in 7 Am. Jur., Banks, section 576, has so well said, it "has been established beyond dispute that a drawee of a check upon which the signature of the drawer is forged cannot recover the amount paid thereon to a *bona fide* holder for a valuable consideration who is without fault in taking or negotiating the paper." See, also, the following authorities to the same effect: 12 A. L. R., 1089-1116; 14 A. L. R., 496; 71 A. L. R., 337-345; 121 A. L. R., 1056-1062; 9 C. J. S., Banks and Banking, section 357; 7 C. J., Banks and Banking, section 417; Restatement of the Law of Restitution, section 33. This Court has recognized the soundness of this rule. *Bank v. Trust Co.,* 168 N. C., 605, 85 S. E., 5, L. R. A. 1915D, 1138; *Woodward v. Trust Co.,* 178 N. C., 184, 100 S. E., 304, 5 A. L. R., 1561.

It has been said that the rule here considered is an exception to the general principle allowing recovery of money paid under mistake, and that it is "eminently fair and just, in the absence of fault or neglect on the part of the holder of a check to require the bank on which it is drawn to determine at its peril whether the signature of the maker is genuine, for it always has, or is supposed to have, knowledge on that subject and means of determining the question with reasonable certainty and safety, while the holder . . . may be, and often is, an entire stranger to the maker, having no knowledge or information as to the genuineness of the signature, and no convenient means of obtaining it." *Williamson Bank v. McDowell County Bank,* 66 W. Va., 545, 66 S. E., 761, 36 L. R. A. (N. S.), 605. Often the "suggestion is made that the rule arises out of considerations of convenience as well as of commercial necessity; for it is said, throughout the entire business world bills of exchange and checks in large part serve as currency in each day's business transactions, and it is not only convenient but necessary that there shall be a definite time and a fixed place for final settlement, and that

the best time and most appropriate place for such final settlement is the time and place when and where an instrument is presented to the drawee for payment." *First Nat. Bank v. United States Nat. Bank of Portland,* 100 Or., 264, 197 P., 547, 14 A. L. R., 479. As the writer of the annotated article in 12 A. L. R., 1089-1116, has aptly declared, this rule "is absolutely necessary to the circulation of drafts and checks, and is based upon the presumed negligence of the drawee in failing to meet its obligation to know the signature of its correspondent. Conditions would be intolerable if the retiring of commercial paper through its payment by the drawee did not close the transaction, but it was possible at an indefinite time in the future to reopen the matter, and recover the money, if the paper proved to have been forged. No one would dare handle it, and it would pass out of use regardless of its convenience or necessity as a part of the life of business."

These reasons apply with equal compulsion to the payment of a check by the drawee bank under the circumstances disclosed by the record here presented. The judgment of the Superior Court is reversed and the cause is remanded to such court for judgment in accordance with this opinion.

Reversed.

STATE v. GEORGE HAMMOND AND HENDERSON WILSON.

(Filed 19 May, 1948.)

1. Criminal Law § 33—

The competency of a confession is a preliminary question for the trial court, and while its rulings in regard to the competency of evidence upon the question and as to what facts render a confession competent, are questions of law and are reviewable, its findings of fact are conclusive on appeal when supported by evidence.

2. Same—

The trial court's findings upon conflicting evidence that the confessions admitted in evidence were voluntary and made without threats, promises, or inducements are conclusive, and defendants' exceptions to the admission of the confessions in evidence cannot be sustained.

APPEAL by defendants from *Armstrong, J.,* at January Term, 1948, of DAVIDSON.

Criminal prosecution tried upon indictment charging the defendants with the felonious and premeditated murder of one Robert B. Hayes.

The evidence for the State discloses that Robert B. Hayes was the owner and operator of a store and filling station, near the village of Southmont, about eight miles from the City of Lexington, in Davidson County, N. C.; and that he was killed on the night of 31 October, 1947.

About 8:00 o'clock on the night of 31 October, 1947, a maroon four-door Ford automobile was parked in the road leading to the Hayes filling station. The car was examined by two of the State's witnesses. It was unoccupied; they took a telegram which was lying on the back seat of the car, and examined the license number. Thereafter the car was driven rapidly by the service station of the deceased, Robert B. Hayes. Around 10:40 o'clock that same evening, the defendant Wilson purchased a gallon of gasoline at the Hayes filling station. The gas was delivered to him in a five-quart can, by Theodore Holmes, an employee of the deceased. The defendant Wilson left and was last seen with the gas sixty or seventy feet south of the filling station. Later that night the body of the deceased was found in his store. His skull had been crushed and the nature of the wound was sufficient to cause almost instant death. The cash register had been robbed, a box containing cash and checks had been taken, and a pistol which belonged to Cliff Mock was missing. The can of gasoline which had been delivered to the defendant Wilson was found about six or eight feet south of the store of the deceased.

The defendants were seen together at Walser's Cafe in Lexington about 11:40 o'clock that night. The 1947 maroon four-door Ford automobile was parked near the cafe. The automobile was found next morning in Candor, N. C., where the defendants had hired a taxicab, about 2:30 a.m., to take them to Wendblow, where the defendant Wilson's mother lived. On 1 November, 1947, the defendants were seen together in Rockingham and in Laurinburg.

It is further disclosed by the evidence that the Ford automobile referred to herein belonged to the Gordon Motor Company, of Lexington, N. C., and had been stolen around 6:00 o'clock on the afternoon of 31 October, 1947. There was a telegram from a Mr. Chambers, in Dallas, Texas, in the car at the time. This telegram was identified as being the one found in the car while it was parked near the Hayes filling station. Cliff Mock's pistol was given to a party in Winston-Salem during the first or second week in November, 1947, by the defendant George Hammond, and was identified at the trial as being the pistol taken from the Hayes filling station on the night of 31 October, 1947. One of the checks missing from the Hayes cash register on 31 October, 1947, was found in the possession of the defendant Wilson, who told the officers he found it on the street in Thomasville, N. C.

The defendant, George Hammond, was arrested in Winston-Salem, N. C., on 15 November, 1947, and the defendant, Henderson Wilson, was arrested later in New York City.

The defendants confessed to the crime and told in detail about their plan to rob the deceased, about stealing the Ford car in Lexington, parking it in the driveway of the filling station, buying the gallon of gasoline,

taking the jack from the car, how Wilson used it in killing the deceased and to break open the cash box. The jack was missing from the car when it was recovered in Candor, but was found about two blocks from the Hayes filling station, near where the defendants said in their confessions they had parked the car while they went to rob the filling station. The empty cash box was also found near there. They said they planned to rob Mr. Hayes when Wilson bought the gasoline, at which time Hammond was in the rear of the filling station with the automobile jack, but they did not find him alone. The fingerprints of the defendant Hammond were found on the Ford car.

When the case came on for trial, the defendants denied that their confessions had been voluntary. Whereupon, in the absence of the jury, the court heard the evidence bearing on the voluntariness of the confessions, and held that they had been freely and voluntarily made. To this ruling, the defendants excepted.

The defendants offered no evidence in their behalf before the jury.

Verdict as to each defendant: Guilty of murder in the first degree, as charged in the bill of indictment. Judgment: Death by asphyxiation. The defendants appealed, assigning error.

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

Beamer Barnes and Joe H. Leonard for defendants.

DENNY, J. The defendants assign as error the ruling of the court below admitting in evidence, over objection, the testimony of the officers as to confessions made to them by the defendants.

On the *voir dire* the defendants testified they were not put in fear, but that on some occasions when the officers talked to them they were not warned of their rights, while at other times they were told by the officers, "You just as well come on and tell us and we will help you out," or "There's nothing much to it if you tell the truth because we can help you out a whole lot." The defendants did not repudiate their confessions, but relied solely upon their inadmissibility in evidence because of the promises of help they testified the officers made to them as an inducement to make the confessions. On the other hand, each officer who talked with the defendants, or either of them, testified that each defendant was informed of the charge against him and advised each time the officers talked with him, that he did not have to make any statement relative to the murder of Robert Hayes; and was further warned that any statement he might make could be used against him in court. According to the testimony of the officers, no threats were made against the defendants, or either of them, and no promises whatsoever were given as an induce-

ment to obtain the confessions. Whereupon, the court found as a fact that the several statements made to the officers by the defendants "were free and voluntary," and were "admissible in evidence, the weight and credibility, if any, being matters for the jury."

The defendants in their confessions, according to the testimony of the officers (and there were five of them, including one member of the State Bureau of Investigation), corroborated in detail the evidence which the State had obtained prior to the arrest of the defendants.

The competency of a confession is a preliminary question for the trial court, and is not ordinarily subject to review. *S. v. Whitener,* 191 N. C., 659, 132 S. E., 603; *S. v. Fain,* 216 N. C., 157, 4 S. E. (2d), 319; *S. v. Rogers,* 216 N. C., 731, 6 S. E. (2d), 499; *S. v. Manning,* 221 N. C., 70, 18 S. E. (2d), 821; *S. v. Hairston,* 222 N. C., 455, 23 S. E. (2d), 885. If a confession depends primarily on the determination of facts, the court's ruling will not be disturbed if supported by any competent evidence. *S. v. Moore,* 210 N. C., 686, 188 S. E., 421; *S. v. Brooks,* 225 N. C., 662, 36 S. E. (2d), 238. Likewise, where the evidence is merely in conflict on the question as to whether or not a confession was voluntary, the ruling of the court is conclusive on appeal. *S. v. Biggs,* 224 N. C., 23, 29 S. E. (2d), 121. However, as said in *S. v. Andrew,* 61 N. C., 205: "What facts amount to such threats or promises as make confessions not voluntary and admissible in evidence is a question of law, and the decision of the judge in the court below can be reviewed by this Court; so, what evidence the judge should allow to be offered to him to establish these facts is a question of law." *S. v. Biggs, supra; S. v. Manning, supra.*

Applying the principles of law laid down in the decisions cited herein, to the facts disclosed on this record, the exception to the admission of evidence relating to the confessions made to the officers by the defendants, cannot be sustained.

We have carefully examined the remaining exceptions and assignments of error, and they are without merit.

In the trial below, we find

No error.

IN THE MATTER OF: FRANK WALTERS.

(Filed 19 May, 1948)

1. Constitutional Law § 19a—

Ordinarily an officer may not invade a person's home except under authority of a search warrant issued in accord with pertinent statutory provisions. G. S., 15-25, *et seq.;* Constitution of N. C., Art. I, sec. 15; Fourth Amendment to the Constitution of the U. S.

2. Same: Contempt § 2c—

Officers of the law sought entrance into respondent's home for the purpose of serving civil process on a third person. Respondent refused to permit the officers to enter. There was no evidence that the person sought was an inmate of or was actually in respondent's home at the time. *Held:* Respondent was within his rights in refusing admittance to the officers, and his act in so doing cannot be held for contempt of court on the ground that it tended to obstruct or embarrass the administration of justice.

3. Process § 2—

Where more than ten days has elapsed since the issuance of summons, officers have no authority to serve summons or any process in the action issued without notice. G. S., 1-89.

APPEAL by respondent from *Morris, J.,* December Term, 1947, ROBESON. Reversed.

Proceeding heard on notice to respondent to appear and show cause why he should not be adjudged in contempt of court.

In a civil action pending in the Robeson County Superior Court to determine the custody of an infant, a temporary restraining order against the defendant therein, one Carlton Walters, son of respondent, was issued 14 November 1947, restraining him from interfering with the plaintiff therein in respect to the custody of said infant.

On 1 December, about 11:00 p.m., officers, having said restraining order and the summons and complaint in hand for service on Carlton Walters, went to the home of respondent for the purpose of serving same. Respondent and his wife declined to admit them without a search warrant and they left. While it appears the officers had information the defendant was at the home of respondent, there is no evidence tending to show that he was in fact an inmate of or was at respondent's home when the officers arrived.

On 2 December, Katie Sealey, one of the plaintiffs in the civil action, filed an affidavit setting forth that respondent had "interfered with and resisted the officers in the performance of their duties, wilfully, in that he positively forbade that the officers enter his home to serve the orders herein entered" and praying that a citation for contempt issue against respondent. Thereupon, the court issued its order citing respondent to appear and show cause why he should not be adjudged in contempt "for his wilful resistance of the officers of this Court, in the performance of their duties in this cause" and authorizing the officers, in serving or attempting to serve the citation and other process or orders in the case, "to enter homes, notwithstanding resistance, for the purpose of serving the process of this Court."

At the hearing on the citation the foregoing facts were made to appear. In addition, much testimony concerning extraneous matters was tendered and admitted. As such testimony in no wise affects the question here

presented, it is not here summarized. The court adjudged that "respondent has committed a contempt of this Court in the interference aforesaid in the matter of the obstructing, hindering and delaying the service of process in said civil action" and sentenced respondent to a term in jail. Respondent excepted and appealed.

L. J. Britt and McLean & Stacy for respondent.

BARNHILL, J. This case is not one to call forth any extended discussion of the law of contempt. It is charged that respondent committed an indirect or constructive contempt which is an act tending "to degrade the court or obstruct, interrupt, prevent, or embarrass the administration of justice." 12 A. J., 391.

There are circumstances under which the wilful interference with, or hindrance of, an officer in his attempt to serve process constitutes a contempt of the court issuing the process. 12 A. J., 407; Anno. 39 A. L. R., 1354. But no such circumstances appear in this record. All that respondent did was to decline to permit officers of the law to enter his home in the nighttime, without a search warrant, to search for a third party upon whom they desired to serve civil process, when it is not made to appear that the third party was either an inmate of or was present in his home at the time.

Ordinarily even the strong arm of the law may not reach across the threshold of one's dwelling and invade the sacred precinct of his home except under authority of a search warrant issued in accord with pertinent statutory provisions. G. S., 15-25 *et seq.* N. C. Const., Art. I, sec. 15; U. S. Const., Amend. IV. While there are exceptions to the rule, this is not one of them. Hence the officers wisely refrained from forcing their way into respondent's abiding place over his protest and objection. *Johnson v. U. S.,* L. Ed., Advance Opinions, Vol. 92, No. 8, decided 2 February 1948.

> "The world has nothing to bestow;
> From our own selves our joys must flow,
> And that dear hut, our home."

The respondent, in exercising a privilege vested in every citizen to choose those who shall come, or be forbidden to enter, within the confines of his dwelling, violated no law. Nor did his conduct constitute an unlawful or unwarranted interference with the administration of justice. In no sense was it contumacious. He may not now be punished therefor through the extraordinary prerogative writ of contempt. N. C. Const., Art. I, sec. 15; *Brewer v. Wynne,* 163 N. C., 319, 79 S. E., 629.

Furthermore, the summons was issued 14 November. The officers were attempting to serve it on 1 December, more than 10 days after its issuance and at a time when it should have been returned to the clerk with notation of nonservice. G. S., 1-89. The nature of the order dated 1 December, which the officer testified he had in hand for service, is not disclosed. In any event, it was issued without notice in a cause where summons had not been served and after the time for service thereof had expired.

The judgment below is

Reversed.

MRS NELLIE DONIVANT v. J. H. SWAIM, TRADING AS J. H. SWAIM LUMBER COMPANY AND SLOCUM S. SILER.

(Filed 19 May, 1948.)

1. Automobiles § 24c—

Admissions in the answer that the driver of the truck involved in a collision was in defendant's employ and was driving defendant's truck at the time, with testimony by defendant to the effect that when the accident occurred the driver was engaged in making a trip for defendant's father, which defendant had authorized, *is held* sufficient to overrule nonsuit upon the issue of whether the driver was defendant's employee engaged in the scope of his employment at the time of the collision.

2. Automobiles § 8i—

It is negligence *per se* for a motorist to overtake and pass another vehicle proceeding in the same direction at an intersection of a highway, unless permitted to do so by a traffic officer. G. S., 20-150 (c).

3. Same: Automobiles § 18i—

The evidence tended to show that the driver of an automobile overtook and attempted to pass a truck proceeding in the same direction at an intersection of streets in a municipality at which no traffic officer was stationed, and that the vehicles collided when the driver of the truck made a left turn at the intersection. *Held:* It was error for the court to instruct the jury that the provisions of G. S., 20-150 (c), did not apply.

APPEAL by defendant, J. H. Swaim, from *Warlick, J.*, at September Term, 1947, of GUILFORD (Greensboro Division).

Civil action to recover for personal injuries alleged to have been sustained by plaintiff as a result of the negligence of the defendants.

On 5 April, 1946, about 8:30 a.m., the plaintiff was standing on the sidewalk at the intersection of West Lee Street and Highland Avenue, in the City of Greensboro, N. C., waiting for the trackless trolley to take her into town, when she was struck and seriously injured by an automobile driven by the defendant Slocum S. Siler.

The appellant's truck, driven by Hubert Ring, was proceeding west on West Lee Street, and the defendant Siler was proceeding in the same direction. The driver of the appellant's truck testified that he gave the required signal to indicate his intention to turn left at the intersection of West Lee Street and Highland Avenue. The defendant Siler denied that any signal was given by the driver of the appellant's truck, but Siler testified he undertook to pass the truck in the intersection without sounding his horn or giving any signal of his intention to pass the truck. The evidence tends to show that when the appellant's truck started to turn left, the defendant Siler's car came in contact with the left front fender of the truck and Siler lost control of his car and ran on the sidewalk, at the southwestern intersection of the streets, and hit the plaintiff.

The jury returned a verdict against both defendants, and judgment was duly entered thereon.

The defendant J. H. Swaim appealed to the Supreme Court, assigning error.

Frazier & Frazier and J. A. Cannon, Jr., for plaintiff.

Smith, Wharton & Jordan and McNeill Smith for defendant, appellant.

DENNY, J. The appellant assigns as error the refusal of the court below to allow his motion for judgment as of nonsuit, made at the close of plaintiff's evidence and renewed at the close of all the evidence.

The appellant contends the evidence adduced in the trial below is insufficient to show that the driver of his truck was his agent, and engaged in the scope of his employment at the time plaintiff sustained her injury, citing *Temple v. Stafford,* 227 N. C., 630, 43 S. E. (2d), 845; *Rogers v. Black Mountain,* 224 N. C., 119, 29 S. E. (2d), 203; *Russell v. Cutshall,* 223 N. C., 353, 26 S. E. (2d), 866; *Riddle v. Whisnant,* 220 N. C., 131, 16 S. E. (2d), 698; *Hawes v. Haynes,* 219 N. C., 535, 14 S. E. (2d), 503; *Swicegood v. Swift & Co.,* 212 N. C., 396, 193 S. E., 277; *Cotton v. Transportation Co.,* 197 N. C., 709, 150 S. E., 505; and *Grier v. Grier,* 192 N. C., 760, 130 S. E., 617.

The plaintiff alleges in paragraph 3 of her complaint: "That at the times herein complained of, Hubert Ring was in the employ of the defendant and such agent was at such time engaged within the scope of his employment in the furtherance of the business of said defendant, and was at such time engaged in the very transaction out of which the personal injury to the plaintiff arose." The defendant Swaim says in his answer: "That as to the allegations contained in Article 3 of the complaint, it is admitted that Hubert Ring was in the employ of the defendant on 5 April, 1946," and in his further answer he says: "That

on 5 April, 1946, at about 8:30 a.m., Hubert Ring, an employee of the defendant J. H. Swaim, was operating the defendant J. H. Swaim's Ford pick-up truck in a westerly direction along West Lee Street in the City of Greensboro at a careful, prudent and lawful rate of speed not in excess of 25 miles per hour," etc.

The appellant introduced evidence tending to show that at the time of plaintiff's injury, Hubert Ring was driving his truck on a trip for the appellant's father, C. M. Swaim. The evidence is conflicting as to who paid Ring for his work on 5 April, 1946. It does appear, however, the appellant had employed him for two or three months prior to the time in question to do whatever he was told to do. The appellant operated four or five farms. He had two trucks at the time, and Hubert Ring had driven both of them. He had collected money, and on such trips he had driven the same truck that was involved in the accident on 5 April, 1946. The appellant testified: "He (my father) told me he wanted to use my truck the morning this accident happened. . . . My father and Ring were there and I told my father it was all right with me for him to use my truck and as long as I did not have anything else for Ring to do, that Ring could go with him. . . . When he worked for me I usually paid Ring about 30c an hour. . . . When my father asked me about the truck I told him Ring was there and not doing anything and might go with him."

We think the admissions in the appellant's pleadings, together with the evidence introduced in the trial below, are sufficient to carry the case to the jury. *Jeffrey v. Mfg. Co.,* 197 N. C., 724, 150 S. E., 503; *Dickerson v. Refining Co.,* 201 N. C., 90, 159 S. E., 446; *Robertson v. Power Co.,* 204 N. C., 359, 168 S. E., 415; *West v. Baking Co.,* 208 N. C., 526, 181 S. E., 551. Each case cited by the appellant is based upon facts which are distinguishable from the record before us.

The ruling of the court below, in refusing to grant the appellant's motion for judgment as of nonsuit, will be upheld.

We now come to a more serious assignment of error. His Honor read subsection (c) of G. S., 20-150, to the jury, which is as follows: "The driver of a vehicle shall not overtake and pass any other vehicle proceeding in the same direction at any steam or electric railway grade crossing nor at any intersection of highway unless permitted so to do by a traffic or police officer," and then the Court said: "That does not apply in this case but is read for the purpose of its intendment since there does not appear to be in this case any evidence of the establishment of a traffic light or placing of a police officer by the City of Greensboro."

The court was in error in charging the jury that the statute was not applicable to this case, since there was no evidence of the establishment of a traffic light or the placing of a police officer at the intersection by

the City of Greensboro. The statute clearly prohibits the driver of a vehicle from overtaking and passing any other vehicle proceeding in the same direction "at any intersection of a highway unless permitted so to do by a traffic or police officer." In the absence of the permission of such officer, it is negligence *per se* to overtake and pass any other vehicle proceeding in the same direction at an intersection of a highway. *Murray v. R. R.*, 218 N. C., 392, 11 S. E. (2d), 326.

We think the appellant is entitled to a new trial for the error pointed out in the above instruction, and it is so ordered. Therefore, we deem it unnecessary to discuss the remaining assignments of error.

New trial.

C. J. CALAWAY ET AL. v. C. W. HARRIS ET AL.

(Filed 19 May, 1948.)

1. Pleadings § 12—

Where a verified complaint is filed and defendants file a verified answer, the fact that an amended answer, which merely amplifies the defense of the original answer, is not verified, does not justify the court in disregarding the defense. G. S., 1-144.

2. Same—

Plaintiff, filing verified complaint in an action in the nature of an action to quiet title, waives verification of the answer by filing reply and allowing the matter to go to two hearings before the referee and failing to interpose objection until after an adverse referee's report. G. S., 1-144.

3. Same—

The statutory provision that when one pleading is verified every subsequent pleading, except a demurrer, must also be verified, G. S., 1-144, may be waived except in those cases where the form and substance of the verification is made an essential part of the pleading, G. S., 50-8; G. S., 98-14; G. S., 153-64.

4. Waiver § 1—

Statutory provisions enacted for the benefit of a party litigant, as distinguished from those for the protection of the public, may be waived, expressly or by implication.

5. Appeal and Error § 50—

Where rulings are made under a misapprehension of the law or the facts, the rulings will be vacated and the cause remanded for such further proceedings as to justice appertains and the rights of the parties may require.

APPEAL by respondents from *Morris, J.*, at August Term, 1947, of HOKE.

Special proceeding to establish dividing line between adjoining landowners.

The substance of the petition is, that respondents are the owners of land in Hoke County, Tract No. 1, as shown on map, and the petitioners are the owners of an adjacent Tract No. 2, as shown thereon, and that a dispute exists as to the true location of the dividing line between the two tracts.

The respondents answered and claimed title to both tracts. The proceeding was thereupon converted into a civil action to quiet title, *Woody v. Fountain,* 143 N. C., 66, 55 S. E., 425, and was accordingly transferred to the civil issue docket for trial.

On 7 May, 1946, respondents were allowed, by order of court, "to file (2d) amended answer as served on counsel for petitioners." In this second amended answer, the respondents specified that their claim to Tract No. 2 was by virtue of adverse possession. This pleading was not verified; the others were, including the petitioners' reply.

Thereafter, a compulsory reference was ordered under the statute. The referee concluded, upon the facts found, that the respondents were the owners of Tract No. 1 "by reason of title, color of title and adverse possession since 1917," and that C. W. Harris, one of the respondents, was the owner of Tract No. 2, "by reason of adverse possession for more than twenty years."

Exceptions to the referee's report were filed by both sides.

Upon hearing the exceptions to the referee's report, the respondents asked to be permitted to verify their second amended answer. Motion denied.

The court thereupon concluded, *inter alia:*

"2. That the question of the ownership of the defendants by adverse possession of tract No. 2 as shown upon the map or plat, does not arise upon the pleadings for that defendants' Amended Answer No. 2 should be stricken out and not considered by the Court, the same not having been verified, for that the verification of said amended answer goes to the substance of and not to the form of the pleading and that said failure to have said amended answer verified is jurisdictional and this Court is without authority to consider said answer."

This would seem to give the respondents title to Tract No. 1, as shown on the map, and the petitioners title to Tract No. 2, as shown thereon, without establishing the dividing line between them as was originally contemplated or sought at the institution of the proceeding.

From the modification of the referee's report, the respondents appeal, assigning errors.

Arthur D. Gore and Oscar O. Efird for petitioners, appellees.

H. W. B. Whitley and H. F. Seawell, Jr., for respondents, appellants.

STACY, C. J. The question for decision is the correctness of rulings on exceptions to the referee's report.

The trial court's second conclusion, above set out, would seem to be an inadvertence which was perhaps occasioned by a misapprehension of the record. No doubt the respondents omitted to point out that their first amended answer, which was verified, alleged ownership and possession of Tract No. 2 (as well as Tract No. 1); that the second unverified amended answer simply amplified this allegation by stating how title was acquired, to wit, by adverse possession; that the respondents were allowed, by order of court, to file this second amended answer, which was before the court, unverified, at the time of the order; that the petitioners waived the verification by filing reply and allowing the matter to go to two hearings before the referee, *McMillan v. Baker,* 92 N. C., 111, and that only after an adverse referee's report did they interpose any objection. In fact, it does not appear that a motion was made at any time to strike this unverified pleading from the record, although the respondents in the end asked to be allowed to verify it, which was denied.

True it is, the statute provides that when one pleading in a court of record is verified, every subsequent pleading in the same proceeding, except a demurrer, "must be verified also." G. S., 1-144. The requirement is one which may be waived, however, except in those cases where the form and substance of the verification is made an essential part of the pleading; as in an action for divorce in which a special form of affidavit is required, G. S., 50-8; *Silver v. Silver,* 220 N. C., 191, 16 S. E. (2d), 834; *Martin v. Martin,* 130 N. C., 27, 40 S. E., 822; in a proceeding to restore a lost record, G. S., 98-14; *Cowles v. Hardin,* 79 N. C., 577, and in an action against a county or municipal corporation, G. S., 153-64. McIntosh on Procedure, 369.

Statutory provisions enacted for the benefit of a party litigant, as distinguished from those for the protection of the public, may be waived, expressly or by implication. *Battle v. Mercer,* 187 N. C., 437, 122 S. E., 4; *Holloman v. Holloman,* 127 N. C., 15, 37 S. E., 68. For instance, it is provided by G. S., 1-111, that in actions for the recovery of the possession of real property, the defendant, before he is permitted to plead, "must execute and file" a defense bond, or in lieu thereof certificate and affidavit as provided by G. S., 1-112. While this requirement is in practically the same language as that respecting the verification of subsequent pleadings where one is verified, it is subject to be waived, unless seasonably insisted upon by the plaintiff. *Timber Co. v. Butler,* 134 N. C., 50, 45 S. E., 956.

Where rulings are made under a misapprehension of the law or the facts, the practice is to vacate such rulings and remand the cause for

further proceedings as to justice appertains and the rights of the parties may require. *McGill v. Lumberton,* 215 N. C., 752, 3 S. E. (2d), 324.

Error and remanded.

WARREN A. RATLEY AND WIFE, GLADYS RATLEY, v. JOHN M. OLIVER, JR., AND WIFE, DORIS R. OLIVER.

(Filed 19 May, 1948.)

1. Wills § 33b—

The rule in *Shelley's case* is a rule of law and of property.

2. Same—

A devise to a person and his heirs takes a fee simple to the devisee under the rule in *Shelley's case* unless it is apparent from the language of the instrument that the word "heirs" is used to describe particular persons or a particular class rather than heirs general.

3. Same—

A devise to R "for his natural life, and at his death to his nearest heirs" takes a fee simple to R under the rule in *Shelley's case,* since "nearest heirs," standing alone, denote an indefinite succession of lineal descendants who are to take by inheritance.

APPEAL by defendants from *Carr, J.,* at April Term, 1948, of ROBESON. Affirmed.

This was an action to recover on a contract for the purchase of land. Payment was resisted on the ground of defect in plaintiffs' title. From judgment holding plaintiffs' title good, defendants appealed.

David M. Britt for plaintiffs, appellees.
McKinnon & Seawell for defendants, appellants.

DEVIN, J. The land which defendants contracted to purchase from the plaintiffs was devised to plaintiff W. A. Ratley "for his natural life, and at his death to his nearest heirs."

Under the rule in *Shelley's case* the language in which this devise was expressed must be given the effect of vesting a fee simple title to the land in the plaintiff Ratley. It is suggested by the defendants that the word "nearest" used by the testator limits the scope and meaning of the word heirs and prevents the application of the rule. It is argued that the phrase "nearest heirs," instead of describing the extent and quality of the estate conveyed to the first taker, and denoting those to take in indefinite succession, should be regarded as designation or description of the persons who are to take otherwise than by descent. But defendants' contention on this point seems to have been determined against them by the

adjudications of this Court in *Crisp v. Biggs,* 176 N. C., 1, 96 S. E., 662, and *Cox v. Heath,* 198 N. C., 503, 152 S. E., 388.

In *Crisp v. Biggs, supra,* it was held that "The words 'nearest heirs' means simply heirs and do not take the case out of the rule"; and in *Cox v. Heath, supra,* it was said, "The 'nearest heirs' are all those persons upon whom the law would cast the inheritance—Those who are heirs are therefore necessarily nearest heirs."

The cases cited by defendants wherein the words "nearest blood relative" (*Miller v. Harding,* 167 N. C., 53, 83 S. E., 25), "nearest relatives" (*Fields v. Rollins,* 186 N. C., 221, 119 S. E., 207), and "nearest blood kindred" (*Brown v. Mitchell,* 207 N. C., 132, 176 S. E., 258), were held to be *designatio personarum* rather than as denoting heirs generally, may not be held controlling here. The distinction is apparent.

The rule in *Shelley's case* is a rule of law and of property. *Rawls v. Roebuck,* 228 N. C., 537, 46 S. E. (2d), 323; *Hartman v. Flynn,* 189 N. C., 452, 127 S. E., 517; *Hampton v. Griggs,* 184 N. C., 13, 113 S. E., 501; *Daniel v. Harrison,* 175 N. C., 120, 95 S. E., 37; *Starnes v. Hill,* 112 N. C., 1, 16 S. E., 1011. It is only when the devisor uses in connection with the word heirs such explanatory and descriptive words or phrases as make it clear that the word heirs refers to certain particular individuals and that the devisor intended to change the rule of descent and to limit or confine the ultimate takers to a particular class or description, rather than to those who should take indefinitely in succession, that the rule does not apply. *Nichols v. Gladden,* 117 N. C., 497, 23 S. E., 459; *Nobles v. Nobles,* 177 N. C., 243, 98 S. E., 715; *Martin v. Knowles,* 195 N. C., 427, 142 S. E., 313; *Barnes v. Best,* 196 N. C., 668, 146 S. E., 710. And the principle seems to have been established by the adjudications of this Court that the words "nearest heirs," standing alone, should be understood in their technical sense as denoting an indefinite succession of lineal descendants who are to take by inheritance (*Ford v. McBrayer,* 171 N. C., 420, 88 S. E., 736; *Crisp v. Biggs, supra; Cox v. Heath, supra; Cotten v. Moseley,* 159 N. C., 1, 74 S. E., 454; 20 N. C. L., 63), and that the rule in *Shelley's case* applies as a rule of law and of property, vesting fee simple title in the first taker.

As illustrating this principle, it was pointed out by *Justice Brown* in *Daniel v. Harrison,* 175 N. C., 120, 95 S. E., 37, that "right heirs" (*Tyson v. Sinclair,* 138 N. C., 23); "lawful heirs" (*Perry v. Hackney,* 142 N. C., 368); "begotten heirs" (*Leathers v. Gray,* 101 N. C., 162); "surviving heirs" (*Price v. Griffin,* 150 N. C., 523); "lawful heirs of his body forever" (*Sessoms v. Sessoms,* 144 N. C., 121); "bodily heirs" (*Smith v. Smith,* 173 N. C., 124), were all held words of inheritance denoting a fee simple estate.

The ruling of the court below is correct and the judgment is

Affirmed.

MONTROSE BROWN, ADMINISTRATRIX OF THE ESTATE OF JAMES F. BROWN, DECEASED, v. L. H. BOTTOMS TRUCK LINES, INC.

(Filed 19 May, 1948.)

Automobiles § 18h (2)—

The accident in suit occurred in the State of Virginia. Evidence tending to show that defendant's truck had been driven to its left of the center of the highway, but that it had been brought back on its right side of the highway and had traveled some distance thereon when the collision between it and the truck operated by plaintiff's intestate, approaching from the opposite direction, occurred, without evidence that defendant's truck was being operated at excessive speed or of any other act of negligence, *is held* insufficient to overrule defendant's motion to nonsuit. Michie's Virginia Code, sec. 2154 (112).

APPEAL by plaintiff from *Warlick, J.*, at September Term, 1947, of GUILFORD. Affirmed.

Wm. E. Comer for plaintiff, appellant.

Roberson, Haworth & Reese for defendant, appellee.

DEVIN, J. Plaintiff instituted her action to recover damages for the wrongful death of her intestate and the destruction of his motor truck, alleging that these injuries to person and property were proximately caused by the negligence of the defendant in the operation of one of its trucks.

It appears that after the award of compensation by the North Carolina Industrial Commission for the death of plaintiff's intestate, an employee of the defendant, was affirmed by this Court (*Brown v. Truck Lines,* 227 N. C., 299, 42 S. E. (2d), 71), a voluntary nonsuit was entered as to the cause of action for wrongful death, but plaintiff continued to prosecute her action for the destruction of the truck.

The injury complained of resulted from a collision between the truck owned and being driven at the time by plaintiff's intestate, and a truck of defendant Bottoms Truck Lines, Inc., on a highway in the State of Virginia. The Bottoms truck, southbound, about 9 p.m., had crossed a small bridge and had traveled 40 yards beyond when it collided with the Brown truck proceeding in the opposite direction. The road at this place was straight for three or four hundred yards. The paved surface was 18 feet wide, and on the bridge somewhat less. Following the collision Brown's truck struck the concrete abutment of the bridge, was set on fire and destroyed, and Brown lost his life.

On the trial plaintiff offered, without objection, the declaration of W. E. Harris, driver of defendant's truck, from which it appeared that in crossing the bridge he drove near the center, but after crossing he was

pulling over to the right and straightening up when the rear of the trailer of the Brown truck struck the side of his cab. The debris indicating the place of contact was slightly on the left of the center of the road looking north. The plaintiff's witness Bell testified from an examination of the tire marks on the road shortly after the collision "the marks of the Brown truck were possibly a little to the left of the center of the road on Brown's left," and that the only markings he saw would indicate the impact took place "on Harris' side of the road."

At the conclusion of plaintiff's evidence, defendant's motion for judgment of nonsuit was allowed by the trial judge, and in this ruling we concur.

While there was evidence that in crossing the narrow bridge defendant's truck was being driven near the center of the roadway, it also appears that defendant's driver immediately afterward pulled over or was pulling over on his proper side of the road, and that it was after he had traveled a distance of 40 yards from the bridge that he was struck by the Brown truck which was then slightly to the left of the center of the road, indicating that at the time of the injury the Bottoms truck was on its right of the center of the road. The evidence fails to show negligence on the part of defendant's driver proximately causing the injury complained of.

The Virginia statutes establishing rules of the road for motor vehicles, and particularly requiring drivers of vehicles proceeding in opposite directions to yield one-half of the traveled portion of the road in passing, are substantially the same as those generally in force throughout the county, and in this State. Michie's Virginia Code, 1936, sec. 2154 (112); *Smith v. Turner,* 178 Virginia, 172, 16 S. E. (2d), 370; *Huffman v. Jackson,* 175 Virginia, 564, 9 S. E. (2d), 295.

There was no evidence of unusual or unlawful speed on the part of defendant's truck, or of negligence in any of the respects alleged in the complaint.

The judgment of nonsuit was properly entered.

Affirmed.

STATE v. JOHN THOMAS SWINK.

(Filed 19 May, 1948.)

1. Criminal Law § 5a—

A person who commits a criminal act but who is mentally incapable of knowing the nature and quality of his act or incapable of distinguishing between right and wrong in relation to such act, is exempt from criminal responsibility.

2. Same—

The presumption of sanity applies to persons charged with crime, but the presumption is rebuttable.

3. Criminal Law § 5c, 5d—

A defendant has the burden of proving his defense of insanity to the satisfaction of the jury, and an instruction that the defense must be "clearly established" must be held for reversible error in placing upon the accused a higher degree of proof than that required by law.

APPEAL by the prisoner, John Thomas Swink, from *Clement, J.*, and a jury, at the October Term, 1947, of GUILFORD.

The prisoner, a boy of the age of eighteen years, was tried upon a bill of indictment alleging that he perpetrated the capital felony of rape upon a girl of the age of nine years. G. S., 14-21. Answering the charge preferred against him by the State, the accused entered two pleas, namely: first, a general plea of not guilty upon the ground that he did not commit the capital felony of rape or any of the lesser offenses included in the charge set forth in the indictment; and, second, a special plea of not guilty upon the ground that he was insane at the time specified in the indictment.

The evidence of the State and that of the prisoner were in sharp conflict with respect to the issue raised by the general plea of not guilty. The State adduced testimony tending to show that the accused raped the prosecuting witness in manner and form as charged in the bill of indictment, and the prisoner replied thereto with evidence indicating that this could not have been so because he was not at the place where the alleged crime was committed at the time of its alleged commission.

The evidence of the State and that of the accused were likewise in substantial conflict in respect to the issue arising upon the prisoner's special plea of not guilty upon the ground of insanity. We refrain from setting forth the conflicting testimony relating to the prisoner's mental condition with particularity because a detailed statement of such evidence is not necessary to an understanding of the only question involved on this appeal. For present purposes, it is sufficient to say that the prisoner presented testimony tending to show that he was mentally irresponsible at the time named in the indictment, and that the State countered with evidence indicating that the accused was mentally accountable at such time.

The jury returned a verdict finding the prisoner "guilty of rape as charged in the bill of indictment," but recommended "that the State of North Carolina not take his life." The trial judge thereupon pronounced sentence of death against the accused, and he appealed.

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

Lyon & Johnson and T. W. Albertson for prisoner, appellant.

ERVIN, J. It is a well settled rule in the administration of criminal justice in this State that an accused is legally insane and exempt from criminal responsibility by reason thereof if he commits an act which would otherwise be punishable as a crime, and at the time of so doing is laboring under such a defect of reason, from disease of the mind, as to be incapable of knowing the nature and quality of the act he is doing, or, if he does know this, incapable of distinguishing between right and wrong in relation to such act. *S. v. Matthews,* 226 N. C., 639, 39 S. E. (2d), 819; *S. v. Harris,* 223 N. C., 697, 28 S. E. (2d), 232; *S. v. Hairston,* 222 N. C., 455, 23 S. E. (2d), 885; *S. v. Terry,* 173 N. C., 761, 92 S. E., 154; *S. v. Cooper,* 170 N. C., 719, 87 S. E., 50; *S. v. English,* 164 N. C., 497, 80 S. E., 72; *S. v. Cloninger,* 149 N. C., 567, 63 S. E., 154; *S. v. Spivey,* 132 N. C., 989, 43 S. E., 475; *S. v. Potts,* 100 N. C., 457, 6 S. E., 657; *S. v. Haywood,* 61 N. C., 376; *S. v. Brandon,* 53 N. C., 463.

By his special plea of not guilty upon the ground of insanity, the prisoner invoked this principle for his protection, and put directly in issue for the determination of the jury the question of fact as to whether he was sane or insane in a legal sense at the time mentioned in the indictment. It has already been pointed out that the testimony of the State and that of the accused concerning this matter were in sharp conflict. The trial judge charged the jury, in substance, that to establish the prisoner's plea of insanity it must be "clearly established" that he did "not know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong." The accused duly preserved an exception to this instruction on the theory that it imposed too high a degree of proof upon him in respect to the defense of insanity.

Since soundness of mind is the natural and normal condition of men, everyone is presumed to be sane until the contrary is made to appear. This presumption of sanity applies to persons charged with crime, but it is rebuttable. *S. v. Harris, supra; S. v. Cureton,* 218 N. C., 491, 11 S. E. (2d), 469; *S. v. Bracy,* 215 N. C., 248, 1 S. E. (2d), 891; *S. v. English, supra; S. v. Cloninger, supra; S. v. Potts, supra; S. v. Starling,* 51 N. C., 366. These considerations give rise to the firmly established rule that the burden of proof upon a plea of insanity in a criminal case rests upon the accused who sets it up. But he is not obliged to establish such plea beyond a reasonable doubt. He is merely required to prove his insanity to the satisfaction of the jury. *S. v. Harris, supra; S. v. Stafford,* 203 N. C., 601, 166 S. E., 734; *S. v. Jones,* 203 N. C., 374, 166

S. E., 163; *S. v. Wilson,* 197 N. C., 547, 149 S. E., 845; *S. v. Walker,* 193 N. C., 489, 137 S. E., 429; *S. v. Jones,* 191 N. C., 753, 133 S. E., 1; *S. v. Terry, supra; S. v. Potts, supra; S. v. Starling, supra.*

When the trial judge instructed the jury, in effect, that the prisoner's plea of insanity must be "clearly established," he imposed upon the accused the burden of proving his insanity by a higher degree of proof than that required by law. 14 C. J. S., 1200; 11 C. J., 837; *Beeler v. People,* 58 Colo., 451, 146 P., 762; *McEvony v. Rowland,* 43 Neb., 97, 61 N. W., 124; *People v. Wreden,* 59 Cal., 392.

Undoubtedly, the learned judge in the court below fell into this error because of a too literal reliance upon the language used by *Lord Chief Justice Tindal* in the celebrated English decision known as *MacNaughten's case.* See 16 C. J., 100. The present action is distinguishable from *S. v. Manning,* 221 N. C., 70, 18 S. E. (2d), 821, where a similar erroneous instruction was given. In *Manning's case,* however, the trial judge recalled the jury after it had been out a short while and corrected his error. Nothing of this sort happened here.

For the reason given, the prisoner is entitled to a new trial. It is so ordered.

New trial.

STATE v. T. D. LARKIN.

(Filed 19 May, 1948.)

1. Receiving Stolen Goods § 6—

Evidence in this case *held* sufficient to be submitted to the jury upon the charge of receiving stolen property with knowledge that it had been feloniously stolen.

2. Receiving Stolen Goods § 4—

Recent possession of stolen property, without more, raises no presumption in a prosecution for receiving stolen goods with knowledge that they had been feloniously stolen, G. S., 14-71, and an instruction that recent possession raised no presumption of guilt but raised a presumption of fact to be considered by the jury in passing upon the guilt or innocence of defendant, must be held for reversible error.

APPEAL by defendant from *Harris, J.,* at November Term, 1947, of ROBESON.

Criminal prosecution upon indictment charging in two counts, substantially, that defendant (1) did on 14 March, 1947, feloniously steal, take and carry away a certain Mercury motor vehicle, an automobile, of the value of $1,000, property of one H. B. Wentz, and (2) on same date did feloniously receive and have said automobile, knowing it to have been

feloniously stolen, taken and carried away, contrary to the form of the statute in such case made and provided.

The defendant pleaded not guilty.

And upon the trial below motion of defendant for judgment as of nonsuit as to the first count, entered when the State first rested its case, was granted by the court. But like motion entered at same time as to the second count, was overruled, and the trial proceeded on this count only. Defendant, reserving exception to the denial of his latter motion, offered evidence, and renewed the motion at the close of all the evidence,—to the denial of which he excepted.

Verdict: Guilty of receiving stolen goods knowing them to be stolen.

Judgment: Imprisonment in jail, and assigned to work under the supervision of the State Highway and Public Works Commission for a term of twelve months.

Defendant appeals therefrom to Supreme Court and assigns error.

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

McKinnon & Seawell for defendant, appellant.

WINBORNE, J. The evidence shown in the record, considered in the light most favorable to the State, is sufficient to take the case to the jury on the charge, under G. S., 14-71, of receiving the automobile in question, knowing it to have been feloniously stolen or taken. Hence the assignment of error based upon exception to denial of defendant's motion for judgment as of nonsuit entered at close of all the evidence is held to be untenable.

However, defendant properly assigns as error the portion of the charge in which the court instructed the jury as follows: "There is no presumption of guilt because he had this car in his possession; that is a presumption of fact for you to consider, but not a presumption of guilt."

The effect of this instruction is that while in the trial of a person on a charge of receiving property knowing it to have been feloniously stolen or taken, recent possession of the stolen property raises no presumption of guilt, it is a presumption of fact for the jury to consider in passing upon the guilt or innocence of defendant. This runs counter to the established rule of law in this State, and entitled defendant to a new trial.

It is the holding of this Court that the inference or presumption arising from the recent possession of stolen property, without more, does not extend to the statutory charge (G. S., 14-71) of receiving such property knowing it to have been feloniously stolen or taken. *S. v. Adams,* 133 N. C., 667, 45 S. E., 553; *S. v. Best,* 202 N. C., 9, 161 S. E., 535; *S. v.*

Lowe, 204 N. C., 572, 169 S. E., 180. See also *S. v. Oxendine,* 223 N. C., 659, 27 S. E. (2d), 814.

For error indicated above, let there be a

New trial.

T. B. BLEDSOE, MAUD G. BLEDSOE, MARGARET G. BLEDSOE, AND JEANETTE BLEDSOE, PARTNERS, TRADING AND DOING BUSINESS AS BROWN-BLEDSOE LUMBER COMPANY, v. COXE LUMBER COMPANY, INCORPORATED, AND T. C. COXE, INDIVIDUALLY AND DOING BUSINESS AS COXE LUMBER COMPANY, COXE BROS. LUMBER COMPANY, AND WATEREE LUMBER COMPANY.

(Filed 4 June, 1948.)

1. Emergency Price Control § 2—

A party who buys goods and resells them at cost plus his lawful commisssion at a price which violates the Emergency Price Control Act is *in pari delicto* with his seller, 50 U.S.C.A., Appendix, 904 (a), 925 (e), and he may not maintain an action against his seller for the statutory penalty under the Emergency Price Control Act.

2. Same—

Under the Emergency Price Control Act the good faith of the seller is not a defense to an action to recover the penalty for violation of a regulation, but is to be considered solely in ascertaining the statutory damages. 50 U.S.C.A., Appendix, 925 (e).

3. Same: Indemnity § 1: Actions § 3c—Commission merchant not entitled to indemnity against his seller for penalty under Emergency Price Control Act.

Commission merchants, after paying a judgment obtained against them by the Price Administrator for violating price regulations in the resale of timber, instituted this action against their seller, alleging that their violation of the regulations was due to the negligent or tortious failure of the seller to properly grade the timber in accordance with the regulations, and that therefore they were entitled to indemnity against their seller for the amount of the judgment. *Held:* The seller's demurrer to the complaint should have been sustained, since to permit recovery would exempt plaintiffs from the consequences of their own wrong in contravention of public policy as expressed in the Act, and would permit plaintiffs to maintain an action based upon their own unlawful act.

APPEAL by defendants from *Warlick, J.,* at the September Term, 1947, of GUILFORD.

The plaintiffs filed the following complaint:

The plaintiffs, complaining of the defendants, allege:

1. That the plaintiffs are partners trading and doing business under the firm name and style of Brown-Bledsoe Lumber Company, and at all

times hereinafter mentioned have been, and are now engaged in the City of Greensboro, County and State aforesaid, in the business of buying and selling lumber for direct-mill shipment, and at the times hereinafter mentioned were wholesale direct-mill distributors of lumber.

2. That the defendant T. C. Coxe is a citizen and resident of Anson County, North Carolina, and at all times hereinafter mentioned was engaged in the business of manufacturing and selling lumber, with his principal office at Wadesboro, North Carolina, and operating a mill for that purpose at Lilesville, North Carolina, under the trade name and style of Coxe Lumber Company, a mill for that purpose at Mont Clare, South Carolina, under the trade name and style of Coxe Lumber Company, and a mill for that purpose at Camden, South Carolina, under the trade name and style of Wateree Lumber Company.

3. That the defendant Coxe Lumber Company, Inc., is a corporation duly created, organized and existing under the laws of the State of North Carolina, with its principal office and place of business at Wadesboro, Anson County, North Carolina.

4. That the plaintiffs are informed and believe and, upon such information and belief, allege that the defendant Coxe Lumber Company, Inc., during the year 1946, took over the lumber business theretofore conducted by the defendant T. C. Coxe, including the assets thereof, and also became liable for the debts and obligations of said T. C. Coxe in and about said lumber business.

5. That from 3 November, 1943, to 14 June, 1944, the plaintiffs received orders from various customers for Southern Pine Lumber which they placed with the defendant T. C. Coxe, trading as Coxe Lumber Company, to be filled by him, and that the defendant T. C. Coxe shipped the lumber to consignees designated by the plaintiffs, billing the same to plaintiffs and receiving payment therefor from plaintiffs in accordance with invoices furnished by said Coxe to the plaintiffs, and that thereupon the plaintiffs invoiced the shipments to its customers in accordance with the invoices received from said Coxe, as to quantities and grades of lumber contained in said shipments, at proper maximum prices for said quantities and grades.

6. That at all times herein mentioned prior to 4 February, 1944, there was in effect Revised Maximum Price Regulation No. 19 (8 F. R. 5536), issued by the Price Administrator of the Office of the Price Administration pursuant to 50 U. S. C.A. App., 901, *et seq.*, establishing maximum prices for the purchases, sales and deliveries of Southern Pine Lumber for direct-mill shipment.

7. That at all times herein mentioned since 4 February, 1944, there was in effect Second Revised Maximum Price Regulation No. 19 (9 F. R. 1162), issued by the Price Administrator of the Office of Price Administration pursuant to 50 U. S. C. A. App. 901, *et seq.*, establishing maxi-

mum prices for the purchases, sales and deliveries of Southern Pine Lumber for direct-mill shipment.

8. That under said regulations all shipments of Southern Pine lumber made by said Coxe during the period above alleged were required to be graded by a competent inspector and the applicable maximum prices charged by him for the quantities and grades contained in said shipments, and that under said regulations a shipment of lumber containing more than one grade of lumber, or a combination of grades, could not be sold at prices higher than the maximum price for the lowest grade of lumber contained in said shipment unless lumber of each grade was actually graded and tallied on a board foot basis and invoiced separately at prices not in excess of ceiling prices for the respective grades.

9. That the aforesaid shipments of lumber by the defendant T. C. Coxe to the customers of the plaintiffs were invoiced to the plaintiffs by said Coxe, with quantities and grades shown on the invoices and with proper maximum prices for the quantities and grades shown thereon, and were invoiced by plaintiffs to their customers in the same manner with proper maximum prices for the quantities and grades shown on the invoices, with a 6% commission added as provided by said regulations.

10. That the plaintiffs never saw or inspected any of the lumber shipped by Coxe to their customers aforesaid, and relied upon invoices and inspection certificates received by them from said Coxe in selling and invoicing said lumber to their customers.

11. That the shipments of Southern Pine Lumber made by the defendant T. C. Coxe to the customers of the plaintiffs during the period above alleged which contained more than one grade of lumber, or were combination grade shipments, were either not actually graded by said Coxe, or if graded they were invoiced by him without regard to the different grades of lumber in said shipments on an arbitrary percentage basis in violation of said regulations.

12. That on 2 November, 1944, an action was instituted in the District Court of the United States for the Middle District of North Carolina, Greensboro Division, entitled "Chester Bowles, Administrator, Office of Price Administration, Plaintiff, *vs.* T. B. Bledsoe, Greensboro, North Carolina; Mrs. Maud G. Bledsoe, Greensboro, North Carolina; Margaret G. Bledsoe, Washington, D. C.; Jeanette B. Bledsoe, Greensboro, North Carolina; Individually and Doing Business as Brown-Bledsoe Lumber Company, Greensboro, North Carolina, Defendants," and that in said action on 24 January, 1946, judgment was rendered against these plaintiffs for the sum of $19,289.55, and costs, solely by reason of the unlawful and wrongful failure of the defendant T. C. Coxe to grade or properly grade the combination grade shipments of lumber above alleged. That cross-appeals were taken from said judgment and on 8 January, 1947, the United States Circuit Court of Appeals for the Fourth Circuit

affirmed the judgment of the District Court assessing damages of $19,289.55 and costs against these plaintiffs as aforesaid, and remanded the case to the District Court to enter judgment against the plaintiffs for the amount of overcharges in respect to ten cars of combination grade Southern Pine Lumber shipped by the said T. C. Coxe to D. Ginsberg & Sons, Corona, New York, in January and February, 1944, on orders of these plaintiffs, in the manner above alleged, in respect to which shipments the said T. C. Coxe furnished to these plaintiffs invoices and certificates of inspection, and which said shipments were either not actually graded by said Coxe or if graded they were invoiced by him and certificates of inspection furnished by him without regard to the different grades of lumber in said shipments on an arbitrary or fictitious percentage basis in violation of said regulations, and that in said action, pursuant to the mandate of the United States Circuit Court of Appeals for the Fourth Circuit, judgment was entered against these plaintiffs in the said United States District Court on 19 February, 1947, for the sum of $3,605.53, for overcharges in respect to said ten cars of lumber, solely by reason of the aforesaid wrongful and unlawful violation of said regulations by the defendant T. C. Coxe.

13. That the defendant T. C. Coxe had full notice and knowledge of said action and testified as a witness during the trial thereof.

14. That on 14 January, 1947, these plaintiffs paid the first judgment aforesaid and interest therein in the sum of $20,446.92, and that on 21 February, 1947, they paid the second judgment aforesaid and the costs of said action in the sum of $3,738.23.

15. That plaintiffs have also paid attorney's fees and other reasonable and necessary expenses in making their defense in said action in the sum of $4,252.43, all of said payments having been made on or before 21 February, 1947.

16. That by reason of the matters and things above alleged the defendants are indebted to the plaintiffs in the sum of $28,437.58, with interest on $20,446.92 at the rate of 6% per annum from 14 January, 1947, and with interest on $7,990.66 at the rate of 6% per annum from 21 February, 1947.

Wherefore, plaintiffs pray that they recover of and from the defendants, jointly and severally, the sum of $28,437.58, with interest on $20,446.92 at the rate of 6% per annum from 14 January, 1947, and with interest on $7,990.66 at the rate of 6% per annum from 21 February, 1947, together with the costs of this action.

The defendants interposed a written demurrer to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action. G. S., 1-127. The court below overruled the demurrer, and the defendants appealed, assigning such ruling as error.

Hines & Boren and R. M. Robinson for plaintiffs, appellees.
Fred J. Coxe and J. C. Sedberry for defendants, appellants.

ERVIN, J. This appeal calls to mind the ancient admonition that hard cases form the quicksands of the law.

Congress adopted the Emergency Price Control Act of 1942 as a temporary wartime measure "to stabilize prices and to prevent speculative, unwarranted and abnormal increases in prices and rents" because the stabilization of the national economy was "in the interest of the national defense and security and necessary to the effective prosecution of the . . . war." Emergency Price Control Act of 1942, sec. 1 (a); 50 U. S. C. A., Appendix, 901 (a); *Yakus v. United States,* 321 U. S., 414, 64 S. Ct., 660, 88 L. Ed., 834. The Act established the Office of Price Administration under the direction of a Price Administrator appointed by the President, and set up a comprehensive plan for the promulgation by the Administrator of regulations or orders fixing the maximum prices of commodities and rents in conformity with the standards prescribed in the Act. 50 U. S. C. A., Appendix, 901-946.

As an aid to the enforcement of the Emergency Price Control Act, Congress provided certain civil and criminal sanctions. It limited criminal prosecutions to willful violations. 50 U. S. C. A., Appendix, 925 (b); *Bowles v. American Stores,* 139 F. (2d), 377. But it incorporated in the Act a section imposing civil liability upon persons selling commodities in violation of regulations, orders, or price schedules prescribing maximum prices. As subsequently amended on 30 June, 1944, this section was as follows: "If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: Provided, however, That such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may

be; and the word 'overcharge' shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action in behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered." Emergency Price Control Act of 1942, sec. 205 (e); 50 U. S. C. A., Appendix, 925 (e).

Pursuant to the authority conferred upon him by the Act, the Price Administrator issued Revised and Second Revised Maximum Price Regulation No. 19 establishing maximum prices for "purchases, sales, and deliveries of Southern pine lumber for direct mill-shipment." 8 Federal Register, 5536; 9 Federal Register, 1162.

The plaintiffs bought the lumber mentioned in the complaint in the course of their trade or business as wholesale lumber dealers. When they purchased this timber from the defendant, T. C. Coxe, for prices in excess of the ceiling prices fixed by Revised and Second Revised Maximum Price Regulation No. 19, the plaintiffs violated the provisions of section 4 (a) of the Act making it "unlawful for any person . . . in the course of trade or business to buy or receive any commodity . . . in violation of any regulation or order . . . or of any price schedule" prescribing maximum prices. 50 U. S. C. A., Appendix, 904 (a). As the plaintiffs bought the lumber at prices exceeding the applicable maximum prices in the course of trade or business for resale to others, the Emergency Price Control Act deemed them to be *in pari delicto* with the seller, T. C. Coxe, denied them any right to sue the seller, T. C. Coxe, for damages for the overcharge, and vested in the Price Administrator alone the right to bring an action against the seller, T. C. Coxe, to recover the statutory damages for the benefit of the nation as a whole. Emergency Price Control Act of 1942, secs. 4 (a), 205 (e); 50 U. S. C. A., Appendix, 904 (a), 925 (e); *Bowles v. Glick Bros. Lumber Co.,* 146 F. (2), 566; *Armour & Co. v. Blindman,* 73 F. Supp., 609.

When they resold the lumber to their customers at prices in excess of the maximum prices fixed by Revised and Second Revised Maximum

Price Regulation No. 19, the plaintiffs violated the provisions of section 4 (a) of the Act making it "unlawful . . . for any person to sell or deliver any commodity . . . in violation of any regulation or order . . . or of any price schedule" prescribing maximum prices, and thereby rendered themselves liable to the statutory damages mentioned in section 205 (e) of the Act. 50 U. S. C. A., Appendix, 904 (a), 925 (e).

The Price Administrator sued the plaintiffs for the statutory damages, and secured a judgment against them for the total amount of their overcharge to their customers. Having satisfied this judgment, the plaintiffs seek in this action to recover of the defendants the amount of such overcharge, and the expenses incurred by the plaintiffs in defending the Price Administrator's suit. They concede that they have no right to maintain an action for these items under the Emergency Price Control Act, but say that their complaint states a good cause of action under the common law rule that "one compelled to pay damages on account of the negligent or tortious act of another has a right of action against the latter for indemnity." 42 C. J. S., Indemnity, sec. 21.

At first blush, the complaint seems to make a just appeal to the judicial conscience. Like Adam, the plaintiffs have offended through the fault of another. It may even be plausibly asserted that the law must afford the plaintiffs the relief they ask if it is to approach close enough to justice to touch the hem of her garment. But we think that this argument gazes at the comparatively unimportant affairs of the parties litigant, and blinks at the vastly important principle of public policy involved in the Emergency Price Control Act.

When all is said, the plaintiffs are attempting to transfer from themselves to the defendants a punishment visited upon the plaintiffs on account of their own violation of a general statute enacted by the lawmakers of the nation to aid the country in effectively prosecuting the Second World War against her armed enemies. The plaintiffs were not assessed treble damages in the Administrator's suit. They were held liable for their overcharge alone. Congress clearly intended that the plaintiffs should not escape the payment of this overcharge in spite of the fact that they relied on invoices and certificates of inspection furnished by the defendant, T. C. Coxe, and that they acted in good faith and without any intention to violate any existing maximum price schedule when they resold the lumber to their customers at prices in excess of the ceiling prices established by Revised and Second Revised Maximum Price Regulation No. 19. This is true because section 205 (e) of the Emergency Price Control Act imposed upon sellers absolute liability for the amounts of their overcharges regardless of their good faith. Under the Act, good faith on the part of a person selling a commodity at a price above the established ceiling was immaterial, except as a partial defense under the provision reducing the statutory damages from three times the amount

of the overcharge to the amount of the overcharge if he proved "that the violation of the regulation, order, or price schedule in question was neither wilful nor the result of failure to take practicable precautions against the occurrence of the violation." 50 U. S. C. A., Appendix, 925 (e); *Star Steel Supply Co. v. Bowles,* 159 F. (2d), 812; *Crary v. Porter,* 157 F. (2d), 410; *Bowles v. Indianapolis Glove Co.,* 150 F. (2d), 597; *Bowles v. Hasting,* 146 F. (2d), 94; *Bowles v. Franeschini,* 145 F. (2d), 510; *Brown v. Cummins Distilleries Corporation,* 53 F. Supp., 659.

Congress decreed that well intentioned sellers of commodities should act at their peril in so far as liability for their overcharges was concerned because it realized that such course was essential to the accomplishment of the purposes of the Emergency Price Control Act. It knew that "innocent non-conformity with the Price Control Act was as inflationary and as damaging to competitors and the public as guilty non-conformity." *Brown v. Hecht Co.,* 137 F. (2d), 689. It considered that occasional hardship to one who honestly and intelligently endeavored to comply with the Act was not too high a price to pay for the protection of the whole nation against inflation. *Bowles v. American Stores, supra* (139 F. (2d), 379).

If the Court should permit the plaintiffs to recover of the defendants upon the complaint here questioned, it would, in final result, exempt the plaintiffs from the consequences of their own noneonformity with the Emergency Price Control Act, and impose upon the defendants responsibility for both their own offending and that of the plaintiffs. Thus the plaintiffs would go unwhipped of justice, and the defendants would suffer double penalties, notwithstanding the plainly expressed intent of Congress to the contrary. Moreover, the court could not uphold the right of the plaintiffs to maintain the action set forth in their complaint without setting at naught the salutary rule that the law will not lend its aid to those who found their claim for relief upon their own unlawful acts. *Brown v. Brown,* 213 N. C., 347, 196 S. E., 333; *Wheeler v. Bank,* 209 N. C., 258, 183 S. E., 269; *Bean v. Detective Co.,* 206 N. C., 125, 173 S. E., 5; *Strider v. Lewey,* 176 N. C., 448, 97 S. E., 398; *Lloyd v. R. R.,* 151 N. C., 536, 66 S. E., 604, 45 L. R. A. (N. S.), 378.

We conclude, therefore, that the complaint fails to state facts sufficient to constitute a good cause of action, and that the court below ought to have sustained the demurrer.

We prefer to rest our decision upon the Emergency Price Control Act itself, and the well settled principle of law mentioned above. But the same result might well be reached by applying to the facts alleged the interpretation put upon the relevant regulation of the Price Administrator by the Circuit Court of Appeals for the Fourth Circuit when it decided the appeals in the action of the Administrator against the plaintiffs. *Porter v. Bledsoe,* 159 F. (2d), 495.

For the reasons given, the judgment of the court below overruling the demurrer is

Reversed.

W. E. BONEY, ON BEHALF OF HIMSELF AND ALL OTHER CITIZENS AND TAXPAYERS OF THE CITY OF KINSTON, NORTH CAROLINA, v. BOARD OF TRUSTEES OF KINSTON GRADED SCHOOLS, A BODY POLITIC AND CORPORATE AND CREATED UNDER THE PROVISIONS OF CHAPTER 96 OF THE PUBLIC LAWS OF NORTH CAROLINA OF 1899; THE CITY OF KINSTON, A MUNICIPAL CORPORATION; THE BOARD OF ALDERMEN OF THE CITY OF KINSTON; AND GUY ELLIOTT, MAYOR.

(Filed 4 June, 1948.)

1. Schools § 9e—

Article IX, sec. 5, of the N. C. Constitution sets apart school property and revenue for the support of the public school system and proscribes the diversion of such property and revenue to any other purpose.

2. Same—

The maintenance of an athletic field and playground is a proper use of school funds, since physical training is a legitimate function of education.

3. Constitutional Law § 10b—

Reasonable doubt as to the constitutionality of a legislative enactment is to be resolved in favor of the lawful exercise of their power by the representatives of the people.

4. Schools § 9e—Transfer of school property to coterminous municipality held not diversion in view of statutory and contractual obligation that property be used for school athletics.

Under legislative sanction (Chap. 544, Session Laws of 1947) a graded school district entered into an agreement with a municipality whose boundaries were practically coterminous, under which the district, without monetary consideration, was to transfer in fee to the municipality a tract of school property used as a playground, and the municipality was to construct thereon an athletic stadium and grant the graded schools of the district free and unlimited use of the stadium and grounds during the school term except when required for regularly scheduled games of a professional baseball association. *Held:* The transfer of the property by the district is based upon a valuable consideration, and since the rights of school children to use the stadium are superior to those of the citizens of the municipality in general, and school use is unlimited except for the unimportant restriction, the transfer does not constitute a diversion of school property in contravention of Article IX, sec. 5, of the N. C. Constitution. Further, provision of the act that rules and regulations governing the time and use of the stadium should be promulgated by joint resolution of the municipal and the school board does not alter this result, since the right of the graded schools to use the property can be safeguarded by the school board, and such use is protected by the agreement, the statute and the right to resort to the courts.

BONEY *v.* KINSTON GRADED SCHOOLS.

APPEAL by plaintiff from *Stevens, J.*, in Chambers, 9 February, 1948, in action in the Superior Court of Lenoir County.

The Board of Trustees of the Kinston Graded Schools is a body politic and corporate charged with the public duty of providing an adequate public school system for children residing in the Kinston Graded School District, a political subdivision of the State. The boundaries of this school district are practically conterminable with those of the City of Kinston, a municipal corporation of Lenoir County.

The Board of Trustees of the Kinston Graded Schools is the owner in fee simple of a tract of land situated near the Kinston High School in the City of Kinston, which it bought in 1937 from Mrs. Sadie Grainger Pierce for $8,500. For convenience of narration this land is hereafter called the Pierce property. The Board of Trustees purchased this property for an athletic field and playground for the children attending the Kinston Graded Schools. Ever since its acquisition, it has been used for such purpose. But during these times, the Board of Trustees of the Kinston Graded Schools has been, and still is, without funds with which to construct on this land an athletic stadium required to meet the reasonable athletic and recreational needs of the Kinston Graded Schools. Consequently, the property is virtually unimproved. It will not be expedient for some years for the Kinston Graded Schools to undertake to borrow money for the erection of the needed stadium because "such course would hamper the construction of necessary additional school buildings."

The General Assembly of 1947 enacted two statutes bearing directly upon the matter in controversy. By chapter 397 of the Session Laws of 1947, the Legislature authorized the City of Kinston to erect and maintain an athletic stadium "upon lands owned by it and forming a part of its system of public parks," and to issue its bonds in a principal amount not exceeding $150,000 to defray the cost of constructing such stadium, and to levy a tax for paying the principal and interest on such bonds, in case such action on its part was first "approved by a majority of the qualified voters of the City of Kinston at a special election" called by its Council. By chapter 544 of the Session Laws of 1947, the General Assembly empowered the Board of Trustees of the Kinston Graded Schools to convey the Pierce property to the City of Kinston in fee simple and without monetary consideration as "a part of the system of parks of the City of Kinston" and as the site for the projected athletic stadium in the event the proposal to issue bonds for the erection of the stadium was first approved by the qualified voters of the City of Kinston at the special election held under chapter 397 of the Session Laws of 1947, and in the further event that a written agreement was first entered into between the Board of Trustees of the Kinston Graded Schools and the City of Kinston making the athletic stadium and the Pierce land

available without charge "for all reasonable use by the Kinston Graded Schools for athletic and recreational purposes."

On 28 October, 1947, the special election was conducted in the City of Kinston in conformity to chapter 397 of the Session Laws of 1947. At this election, an overwhelming majority of the qualified voters of the City of Kinston cast their ballots in favor of the proposition to authorize the City of Kinston to erect and maintain an athletic stadium "upon lands owned by it and forming a part of its system of public parks," and to issue its bonds in a principal amount not exceeding $150,000 to defray the cost of erecting such stadium, and to levy a tax for paying the principal and interest on such bonds.

After the result of the special election had been duly determined and declared, the Board of Trustees of the Kinston Graded Schools and the City of Kinston undertook to carry out a written agreement made by them in pursuance of the provisions of chapter 544 of the Session Laws of 1947 to effectuate the statutory purpose of making the contemplated stadium and the Pierce property available without charge "for all reasonable use by the Kinston Graded Schools for athletic and recreational purposes." By this contract, the Board of Trustees of the Kinston Graded Schools bound itself to convey the Pierce land to the City of Kinston in fee simple and without monetary consideration to the end that it might become a part of the system of public parks of the City of Kinston and to the further end that it might be used as the site of the proposed athletic stadium. The City of Kinston obligated itself by this agreement to build and maintain the projected stadium on the Pierce property at its own expense, and to permit the Kinston Graded Schools to use such stadium and its site "without rent or other charge therefor, during the time from the beginning until the end of each respective school term, for athletic, instructional, and recreational purposes, when such use shall not conflict or interfere with regularly scheduled games of professional baseball played in connection with the activities of a professional baseball association holding a lease upon said stadium and grounds" from the City of Kinston. The City of Kinston further bound itself by its contract with the Board of Trustees of the Kinston Graded Schools to reconvey the Pierce land to such Board of Trustees in fee simple and without monetary consideration in case the proposed stadium is destroyed by fire or other casualty and the City of Kinston fails for a period of five years to make a new stadium "available for the use of the Kinston Graded Schools as provided in this agreement."

W. E. Boney, a taxpaying resident of the City of Kinston and of the Kinston Graded School District, brought this action against the Board of Trustees of the Kinston Graded Schools, the City of Kinston, the Board of Aldermen of the City of Kinston, and Guy Elliott, the Mayor of the City of Kinston, alleging that the written agreement between the

city and the school trustees is void in law because chapter 544 of the Session Laws of 1947 contravenes Article IX, Section 5, of the North Carolina Constitution, and asking a perpetual injunction against the defendants to prevent the proposed conveyance of the Pierce property to the City of Kinston and to prevent the City of Kinston from constructing the contemplated athletic stadium on such property.

Upon application of the plaintiff, a temporary restraining order was issued, and a notice to show cause why an injunction should not be granted as prayed was served on the defendants. On the return day, Judge Stevens heard the testimony of the parties, found that the right of the Kinston Graded Schools to use the proposed stadium without charge constituted "full and adequate value for the conveyance of the land," concluded that chapter 544 of the Session Laws of 1947 is a valid exercise of legislative power, and rendered judgment dissolving the restraining order and dismissing the action. The plaintiff thereupon appealed.

H. P. Whitehurst and R. E. Whitehurst for plaintiff, appellant.

R. A. Whitaker, F. E. Wallace, and George B. Greene for defendants, appellees.

ERVIN, J. It will conduce to clarity of understanding to note and emphasize at the outset that the issuance of the bonds and the imposition of the tax mentioned in chapter 397 of the Session Laws of 1947 will not impinge upon the inhibition of Article VII, Section 7, of our Constitution because they have been expressly sanctioned by a vote of the majority of the qualified voters of the City of Kinston. Moreover, the plaintiff properly concedes that the establishment and maintenance of an athletic stadium for use "in connection with the athletic activities of the city's public park system" constitutes a public purpose within the meaning of Article V, Section 3, of our organic law prescribing that "taxes shall be levied only for public purposes." *Nash v. Tarboro,* 227 N. C., 283, 42 S. E. (2d), 209; *Atkins v. Durham,* 210 N. C., 295, 186 S. E., 330; *Adams v. Durham,* 189 N. C., 232, 126 S. E., 611; 173 A. L. R., 415. Since the validity of the proposed lease of the projected athletic stadium by the City of Kinston to some professional baseball association is not put directly in issue in this action, we resist the temptation to consider that matter, and refrain from expressing any opinion in regard to it.

The case at bar presents this precise problem for solution: Does chapter 544 of the Session Laws of 1947 authorizing the Board of Trustees of the Kinston Graded Schools to convey the Pierce property to the City of Kinston in fee simple and without monetary consideration for use as a part of the system of public parks of the City of Kinston and as the site for the contemplated athletic stadium conflict

with the provision of Article IX, Section 5, of the North Carolina Constitution that "all moneys, stocks, bonds, and other property belonging to a county school fund . . . shall be faithfully appropriated for establishing and maintaining free public schools in the several counties" of the State?

None of the former decisions of this Court interpreting this constitutional provision involved any question similar to that raised by the present record. *Carter v. R. R.,* 126 N. C., 437, 36 S. E., 14; *Board of Education v. Henderson,* 126 N. C., 689, 36 S. E., 158; *Bearden v. Fullam,* 129 N. C., 477, 40 S. E., 204; *S. v. Maultsby,* 139 N. C., 583, 51 S. E., 956; *In re Wiggins,* 171 N. C., 372, 88 S. E., 508; *Board of Education v. High Point,* 213 N. C., 636, 197 S. E., 191. So we must glean its meaning from the words in which it is couched.

It is manifest that Article IX, Section 5, of the Constitution was designed in its entirety to secure two wise ends, namely: (1) To set apart the property and revenue specified therein for the support of the public school system; and (2) to prevent the diversion of public school property and revenue from their intended use to other purposes.

The Pierce property was bought by the public school authorities with public school funds. It has hitherto been set apart by these authorities for the use of the children attending the Kinston Graded Schools as an athletic field and playground. Without doubt, this is a proper public school use, for physical training is a legitimate function of education. We affirm the soundness of the concept of education expressed by the Montana Supreme Court in this language: "By its voluntary act, the state has assumed the function of education primarily resting upon the parents, and by laws on compulsory education has decreed that the custody of children be yielded to the state during the major portion of their waking hours for five days a week, and, usually, nine months in the year. In doing so, the state is not actuated by motives of philanthropy or charity, but for the good of the state, and, for what it expends on education, it expects substantial returns in good citizenship. With this fact in mind, it is clear that the solemn mandate of the Constitution is not discharged by the mere training of the mind; mentality without physical well-being does not make for good citizenship—the good citizen, the man or woman who is of the greatest value to the state, is the one whose every faculty is developed and alert. Education may be particularly directed to either mental, moral, or physical powers or faculties, but in its broadest and best sense it embraces them all." *McNair v. School District No. 1 of Cascade County,* 87 Mont., 423, 288 P., 188, 69 A. L. R., 866.

This case provokes a judicial regret that practical considerations sometimes prevent the lawmakers from legislating upon the theory that a straight line is the shortest distance between two points in law as well

as in geometry. Assuredly, nothing in our Constitution denies to the General Assembly power to enact appropriate statutes authorizing a legally established public school district to issue bonds or to levy taxes for the establishment and maintenance of an athletic stadium for its students upon land owned and controlled by it when authorized so to do by a vote of the majority of the qualified voters in the school district. N. C. Const., Art. VII, sec. 7; 47 Am. Jur., Schools, sec. 75.

Here, however, the Legislature shunned any attempt to satisfy the needs of the Kinston Graded Schools for an adequate athletic stadium for the use of its students by direct means because of a desire to "serve the needs of both the City of Kinston and the Kinston Graded Schools" and because of a fear that imposing a debt for such purpose upon the taxpayers and property of the school district might later "hamper the construction of necessary additional school buildings" in the school district. But it has authorized virtually the same voters in approximately the same territory to impose such a debt upon practically the same taxpayers and property by issuing bonds and levying taxes for substantially the same purpose in the name of the City of Kinston, another political subdivision of the State. The consummation of the legislative plan contemplates that the Board of Trustees of the Kinston Graded Schools shall convey its athletic field and playground to the City of Kinston in fee simple and without monetary consideration, and that the City of Kinston shall devote such property to use as a part of its system of public parks and as the site of the proposed athletic stadium.

This indirect approach to the problem has given rise to the somewhat perplexing question as to whether chapter 544 of the Session Laws of 1947 authorizing the Board of Trustees to convey the land at issue to the City of Kinston for these purposes infringes upon Article IX, Section 5, of the Constitution by permitting school property to be diverted from its intended use to other objects.

The task of judging the validity of this statute must be performed in the light of the established principle that any reasonable doubt as to the constitutionality of a legislative enactment is to be resolved in favor of the lawful exercise of their power by the representatives of the people. *Glenn v. Board of Education,* 210 N. C., 525, 187 S. E., 781; *Albertson v. Albertson,* 207 N. C., 547, 178 S. E., 352. When chapter 544 of the Session Laws of 1947 is tested by this cardinal rule of construction, it can be said that the supposed diversion of the school property is apparent rather than real, and that the statute harmonizes with the constitutional provision here considered.

The proposed conveyance will divest the Board of Trustees of the Kinston Graded Schools of its legal title to the Pierce property, but it will not result in any substantial diversion of the land from its intended use for athletic purposes by the children attending the Kinston Graded

Schools. This is so because the statute stipulates that the proposed stadium and its site shall be subject to "all reasonable use by the Kinston Graded Schools for athletic and recreational purposes," and because the written agreement between the school trustees and the City of Kinston provides that the Kinston Graded Schools shall have free and unlimited use of the projected stadium and the grounds during the school term, except when the same are required for use by a professional baseball association in connection with the playing of its regularly scheduled games. As most of these baseball games will be played during school vacation, this restriction upon the use of the stadium and grounds by the Kinston Graded Schools seems unimportant.

When all is said, the Kinston Graded Schools are exchanging a practically unimproved $8,500 tract of land for the right to the substantial use of a $150,000 stadium. Hence, the contemplated conveyance is based upon a valuable consideration. *Institute v. Mebane,* 165 N. C., 644, 81 S. E., 1020. The correctness of this observation is not affected by the fact that virtually all of the school children in question are citizens of the City of Kinston for the statute and the contract confer upon such children rights superior to those enjoyed by the citizens of the municipality in general.

In conclusion, we wish to observe that the right of the Kinston Graded Schools to use the Pierce property and the stadium to be erected by the City of Kinston thereon is not rendered illusory in a legal sense because section 2 of chapter 544 of the Session Laws of 1947 provides that "the rules and regulations governing the time and use of such athletic stadium and grounds by the Kinston Graded Schools" shall be promulgated and enforced "by a joint resolution passed by a majority in number of the members of each board." This is true because the statute makes it plain that the right of the Kinston Graded Schools to the reasonable use of the projected stadium and its site shall be unlimited in time, and because the written agreement between the school trustees and the City of Kinston given legislative efficacy by the statute spells out in detail the right of the Kinston Graded Schools to the free use of the stadium and its site. Certainly, this agreement cannot be altered, and rules and regulations inconsistent with it cannot be promulgated without the consent of a majority of the members of the Board of Trustees of the Kinston Graded Schools. It necessarily follows that plenary power rests in the school trustees to protect their rights in the premises. Moreover, the written agreement specifies that the land is to be reconveyed to the school trustees in the eventuality that the proposed stadium is destroyed by fire or other casualty and another stadium is not made available to the Kinston Graded Schools by the City of Kinston. Besides, the courts will always be open to prevent any unconstitutional diversion of the right of the Kinston Graded Schools to the use of the property in question.

For the reasons given, the judgment rendered in the court below is Affirmed.

DUKE POWER COMPANY v. HARGROVE BOWLES, TREASURER OF THE CITY OF GREENSBORO.

(Filed 4 June, 1948.)

1. Taxation § 14—

While the term "privilege tax" includes franchise taxes as well as license taxes, a franchise is a special kind of privilege constituting a property right, which is ordinarily transferable and exclusive, and involves the use of public facilities.

2. Same—

The word "privilege" is too broad, *per se*, as a classification for taxation, but is usually particularized into licenses and franchises in classifying businesses for taxation, and as used in our taxing statutes, the term "privilege tax" does not ordinarily include franchise taxes.

3. Taxation § 27: Municipal Corporations § 42—

The power granted the City of Greensboro by Sec. 50, Chap. 37, Private Laws of 1923, to impose franchise taxes is not limited by Sec. 203 (5), Chap. 445, Public Laws of 1933 (G. S., 105-116 (6)), to the amount of municipal franchise taxes levied at the time of the enactment of the general statute, since the general statute imposes the limitation upon "privilege or license" taxes, which in its context does not include franchise taxes, it being apparent that the Legislature would have used the term "franchise" *eo nomine* if it had intended to include franchise taxes within the limitation.

4. Statutes § 13—

Repeal by implication is not favored, and a general statute which has no repealing clause will not repeal a prior local statute unless the legislative intent to supersede the prior statute is clear.

DEFENDANT'S appeal from *Armstrong, J.*, 12 April, 1948, Civil Term, GUILFORD Superior Court.

This suit arose out of a controversy between the plaintiff Company and the City of Greensboro over the imposition of a franchise tax for the fiscal year 1947-1948, greatly exceeding the franchise tax theretofore imposed. The plaintiff, contending that the tax imposed was in excess of the maximum limit established by the Public Laws, paid the tax under protest and sued for refund of the excess. The parties having waived jury trial, the case was submitted to Armstrong, J., at the 12 April, 1948, Civil Term of Guilford upon the pleadings and admissions, and stipulated facts appearing in the record.

Decision must rest upon the construction of pertinent, possibly interdependent statutory laws in force at the time the tax was imposed, particularly the private statutes authorizing the City of Greensboro to levy a franchise tax upon the plaintiff with respect to the privilege granted and the Public Laws which plaintiff claims modify and limit that authority. Therefore, an attempt will be made to set out these laws in the chronological order of their enactment, along with the history of the imposition of the tax from year to year, in parallel statement.

Such bearing as the nature and extent of the chartered or franchised activities and operations of the plaintiff and the facilities of the municipality utilized may have upon the question will be summarized from the record where important, and stated in the proper connection.

The defendant municipality derives its authority for the imposition of the tax from Chapter 37, Private Laws of 1923, particularly Section 50. Section 50 is too long for reproduction in its entirety, but pertinent provisions are summarized:

It provides in substance (and in phraseology where that is important), that no franchise shall be granted by the City until the question has been submitted to a vote of the qualified electors of the City and approved by the majority vote; that the franchise shall not exceed 50 years in duration; reserves the right to compel performance with full superintendence, regulation and control within the police powers given the City; provides that the specific grant shall be put in the form of an ordinance and that certain specified rights and obligations shall be therein expressed; and further provides:

> ". . . that any and all rights, privileges and franchises that have been heretofore, or that may be hereafter, granted to or held by any person, firm or corporation, in the streets, alleys, sidewalks, public grounds or places in said city, shall be subject to a tax by said city in such amount as the council may think to be just, separate from and in addition to the other assets of such person, firm or corporation, and in addition to a license tax, and the council may require the rendition and assessment thereof accordingly: . . ."

Under this authority the City, having come to terms with plaintiff's predecessor, entered into an agreement taking the form of a contract and incorporated in the City ordinance and in compliance with the statute the question was submitted to the qualified voters and the issuing of the franchise was approved; and on 30 January, 1929, the franchise was granted to plaintiff's predecessor, or to put it technically, the proposed franchise, through the approval by referendum, became effective. Subsequently the separate franchised activities became merged; and by contract with the City, trackless trolleys have become substituted for street railways.

The plaintiff, successor in title to the franchise rights of the former corporation, to whom the franchise was given 30 January, 1929, is engaged in the business of furnishing and selling electricity, electric light, current, power and gas, and operating trackless trolleys and busses in the City of Greensboro and other territory.

Under the 1923 law, above cited, the City of Greensboro levied and assessed on the plaintiff and its predecessors in title a franchise tax of $5,000 per annum from 1929 to 1935, inclusive. In 1936 the franchise tax was increased to $7,500 by appropriate ordinance. The plaintiff paid to the City the franchise tax of $7,500 down to the year 1946; and on 26 June, 1947, paid $7,500 of the franchise tax levied for the fiscal year 1947-1948. On 15 July, 1947, after notice, an ordinance was passed further increasing the franchise tax to $15,000 a year. On 24 July, 1947, the plaintiff, under written protest, paid to the defendant the remaining sum of $7,500 imposed for the fiscal year 1947-1948 and promptly made a written demand for its refund; and sought judgment for that amount with interest; G. S., 105-406.

At the time the 1923 statute, authorizing the municipal tax, was passed the State did not impose a separate franchise or privilege tax upon companies furnishing electricity, gas and transportation. Section 83a, Chapter 101, Public Laws 1925, for the first time imposed an annual tax of one per cent on the gross revenues from such business and put these corporations in a separate classification. Section 203, Chapter 345, Public Laws 1929, increased the tax to two per cent, without any provision of the law affecting the Private Laws of 1923, containing the City's authority to tax. By Section 203, Chapter 427, Public Laws 1931, the State tax was again increased to five per cent. In Section 203, Chapter 445, Public Laws 1933, the tax was increased to six per cent; and a limitation was placed on the amount of *privilege* or *license* tax which a municipality might impose on such corporations. The pertinent section, 203 (5), is as follows:

> "(5) Companies taxed under this section shall not be required to pay the franchise tax imposed by section two hundred ten or two hundred eleven of this article, and no county shall impose a franchise or privilege tax upon the business taxed under this section, and no city or town shall impose a greater privilege or license tax upon such companies than that which is now imposed by any such city or town."

This limitation remained the same in Chapter 371, Public Laws 1935, but was modified in Section 203 (6), Chapter 127, Public Laws 1937, and made to read as follows:

> "(6) Companies taxed under this section shall not be required to pay the franchise tax imposed by section two hundred ten or two

hundred eleven of this article, unless the tax levied by sections two hundred ten and two hundred eleven of this article exceed the tax levied in this section, and no county shall impose a franchise or privilege tax upon the business taxed under this section, and no city or town shall impose a greater privilege or license tax upon such companies than the aggregate privilege or license tax which is now imposed by such city or town."

It is thus incorporated in Section 203 (6), Chapter 158, Public Laws of 1939,—the Permanent Revenue Act,—and is now codified as G. S., 105-116 (6).

The contention of the plaintiff is that the several Public Laws cited above operated to repeal or modify the Private Laws of 1923 so as to limit the authority of the City to impose a greater franchise tax than that imposed prior to their enactment. It is necessary to compare the 1939 Act with the previously existing Private Laws of 1923, critically in point, to settle that question.

In making up the case on appeal it was agreed between the parties that "the sole question involved in this action is whether the City of Greensboro was authorized under existing laws to levy the tax upon the plaintiff that the plaintiff now seeks to have refunded."

Judge Armstrong, being of the opinion that upon the facts presented the plaintiff was entitled to the refund demanded, entered a judgment to that effect, from which the defendant appealed.

W. S. O'B. Robinson, Jr., and R. M. Robinson for plaintiff, appellee.

Herman C. Wilson and Brooks, McLendon, Brim & Holderness for defendant, appellant.

SEAWELL, J. Section 50 of Chapter 37, Private Laws of 1923, confers on the City of Greensboro the power to grant a franchise of the sort concerned in this controversy, and provides that it "shall be subject to a tax by said City in such amount as the council may think to be just" and "in addition to a license tax."

The plaintiff is operating under a franchise granted under this authority to a predecessor in title. Prior to 1933 the tax rate was advanced from $5,000 to $7,500 for the fiscal year; and in 1947 the city council, by appropriate ordinance, further increased the tax rate to $15,000. There is no question raised as to whether the tax is excessive or unjust. The appellee contends that the authority of the municipality to increase the tax beyond the prior amount is divested by operation of Section 203 (5), Chapter 445, Public Laws of 1933, and successive statutes of similar import (the legislative history of which is above set out), finally incorporated in the Permanent Revenue Act of 1939, and now appearing

in that Act, as codified in the General Statutes, as Section 105-116, Subsection 6. For convenience of comparison we requote the pertinent part of this subsection:

> ". . . no county shall impose a franchise or privilege tax upon the business taxed under this section, and no city or town shall impose a greater privilege or license tax upon such companies than the aggregate privilege or license tax which is now imposed by any such city or town."

Note that the prohibition against the franchise tax is against the county, and not against the municipality.

The applicability of this statute as a limitation on the authority given under the 1923 law, either by modification or partial repeal of that statute, is the sole question before us.

It may be said that decision turns upon the meaning and content to be assigned to the word "privilege," twice used in the subsection invoked in support of the contention that the City of Greensboro has no longer power to tax the plaintiff's franchise as attempted. Had the Legislature used the word "franchise," which appellee asks us to find implied in the term "privilege," the grammatical sense would not be ambiguous.

We quite agree that the result should not be made to depend on a play upon words, but doubt whether observance of that propriety works to appellee's advantage.

The franchise tax is a privilege tax, and so is the license tax,—both are so recognized in our revenue laws. Compare G. S., 105-114 (franchise tax) and G. S., 105-33 (license tax). But the word "privilege" as so applied is too broad, *per se,* to yield the distinctions necessary to support a practical system of levy. In our system the tax is not levied on the simple classification of the subjects as a "privilege tax," nor does that sort of classification obtain as a basis of levy in any other system of which we are aware. Necessary regard for the nature and magnitude of the privilege taxed, the relative financial returns to be expected of the business or activities under franchise, and the burden put on government in regulating, protecting and fostering the enterprise demands and receives a finer classification as essential to a fair apportionment of the tax burden and the propriety of the rate imposed. There could scarcely be conceived a wider difference within any such general classification than exists between an ordinary occupational license and a franchise and the range of activities which the latter usually includes. That fact must be borne in mind in any attempt to find the legislative intent in using the word "privilege" within the classification.

The generic term "privilege" as applied to the tax, contextually unaided, cannot be arbitrarily construed to mean or to include, *ex vi termini,*

a franchise tax on every occasion of its use in the scheduled divisions of taxable subjects; and to assign the word such an office would lead to confusion.

Subsection 6, *supra,* comprises a single sentence. Grammatically construed, even without comparison with other sections of the same schedule which are presently cited, it is not favorable to appellee's contention. We find that counties are prohibited from levying "a franchise or privilege tax" upon the subject of the State tax; but in the clause relating to municipalities the reference is to "privilege or license tax" without a like specific reference to "franchise tax." The contrast in the use of the more definitive term franchise in the one connection and its omission in the other is of substantial significance.

There are other contextual indications supporting the view that the omission was advisedly made. Examination of the limitations imposed on county and municipal taxation of franchises taxed by the State in Schedule C discloses that elsewhere where the power to levy tax on the franchise is taken away from the municipality, or in any way limited, the term "franchise" is expressly used. In Subsection 105-115 (f), the section immediately preceding, we find: "No county, city or town shall levy a license, franchise or privilege tax on the business taxed under this section;" in Sec. 105-117 (3), immediately following, "No county, city or town shall impose any franchise or privilege tax on the business taxed under this subject;" in Section 105-119 (5) (b); "Counties shall not levy a franchise, privilege, or license tax on the business taxable under this section and municipalities may levy the following license tax;" in Section 105-121 (5), "Companies paying the tax levied in this section shall not be liable for franchise tax on their capital stock, and no county, city, or town shall be allowed to impose any additional tax, license, or fee, other than *ad valorem* taxes." Section 105-122 (5), "Counties, cities and towns shall not levy a franchise tax on corporations taxed under this section."

There is a special significance attached to the character and placement of these prohibitions, the express use of the word franchise in them, and its omission in the limitation provided in Subsection 105-116 (6), since, while counties and cities do offer some facilities with respect to carrying on the business described and taxed by the State, in other sections, their part in it is comparatively small; whereas, as to the business covered by the franchise in Section 105-116, completely localized and catering to business and traffic built up within the town, and using facilities provided by the municipality at the expense of the taxpayers in that community alone, the municipal contribution to the growth, prosperity and financial success of the franchised enterprise, and therefore, the value of the franchise, is vastly larger than that of the State.

There is another reason perhaps as compelling why the simpler term privilege tax is inadequate to imply a franchise tax in the connection used, and this lies in the nature of the franchise as distinguished from simpler privilege or license taxes in legal usage.

As a privilege, a franchise is a special kind of privilege,—and it is more. A franchise tax of this sort when granted is of itself a property right and ordinarily is transferable. It runs for a definite period, usually with mutual obligations and appropriate sanctions. Its activities are on a major scale; and basic privileges going with the grant involve the use of facilities furnished by the municipality through taxation of the inhabitants and often in derogation of their privileges. When all the normal services to the town and its inhabitants and those who frequent it are merged in one franchise, as here, it usually becomes in fact, if not in law, exclusive.

It is not one thing only but the omnibus of incident constituting the franchise, important and distinguishing, that calls for adequate terms of reference or designation *ad rem ipsam pertinens.*

It may be further said that the frequency with which "privilege or license tax" has been used to designate a mere license tax has given the term "privilege" a secondary meaning in derogation of its general significance, in which sense it was probably used in the text. At any rate, when the power to tax was given the municipality the subject was defined without ambiguity as a "franchise,"—*eo nomine.* The necessity of better correlation than that used in the subsection,—that is, a like certainty in pointing to the subject from which the power to tax was withdrawn as that originally observed in granting it,—was not beyond the intelligence of the legislative body, and could hardly have escaped attention if the limitation had been aimed at the franchise tax.

Under these conditions we are unable to accept the hypothesis that the State, in currently advancing the State-imposed franchise tax from five per cent to six per cent on gross income, limited the municipal franchise tax as a means of compensating or adjusting the taxpayer burden. The basis of the implication is not sufficiently supported to justify the assumption that the State intended to practically take over a source of revenue peculiarly and equitably belonging to the field of municipal taxation and, by final inclusion in the Permanent Revenue Act, to adopt it as a State policy. We must assume that the State is not antagonistic to the growth and expansion of its municipalities, or without appreciation of their contribution to its cultural and economic life, or unaware of the increasing burden placed upon them and the necessity of preserving to them a due proportion of the tax revenues necessary to their support.

We do not find it necessary to pass on the question whether the franchise under review contains contractual obligations constitutionally pro-

tected against impairment by statute. In the absence of legislative intent to interfere with the franchise, that question does not at present arise.

Because of the difference in the nature of the tax involved, we do not find *Cox v. Brown,* 218 N. C., 350, 11 S. E. (2d), 152, cited by the appellee, applicable authority.

The General Statute relied on to toll the taxing power of the municipality has no applicable repealing clause. In that situation the rule of construction is as stated in *Charlotte v. Kavanaugh,* 221 N. C., 259, 263, 20 S. E. (2d), 97:

> "The rule as to the effect of a subsequent general statute on a local statute is stated in *Felmet v. Commissioners,* 186 N. C., 251, 119 S. E., 353: 'A local statute enacted for a particular municipality is intended to be exceptional and for the benefit of such municipality, and is not repealed by an enactment of a subsequent general law. *Rogers v. U. S.,* 185 U. S., 83; *Wilson v. Comrs.,* 183 N. C., 638; *Alexander v. Lowrance,* 182 N. C., 642; *Bramham v. Durham,* 171 N. C., 196; *S. v. Johnson,* 170 N. C., 688; *Cecil v. High Point,* 165 N. C., 431; *School Comrs. v. Aldermen,* 158 N. C., 197.'"

Certainly if the legislative intent were sufficiently clear the general statute would prevail without a repealing clause; but repeal by implication is not favored and we do not find that the legislative intent justifies that construction.

For the reasons above stated, the judgment of the court below is in error and upon the facts considered must be reversed. The cause is remanded to Guilford Superior Court for judgment in accordance with this opinion.

Reversed.

WACHOVIA BANK & TRUST COMPANY, WILLIAM N. REYNOLDS, JOHN C. WHITAKER AND L. D. LONG, EXECUTORS AND TRUSTEES UNDER THE WILL OF MRS. KATE G. BITTING REYNOLDS, DECEASED, v. BITTING SHELTON, LOUISA SHELTON PEARSON AND HARRY McMULLAN, ATTORNEY-GENERAL OF THE STATE OF NORTH CAROLINA.

(Filed 4 June, 1948.)

1. Descent and Distribution § 3—

A distributee is a person who takes a share in the surplus estate of an intestate under our statute of distributions. G. S., 28-149.

2. Same: Descent and Distribution § 5—

Where a wife dies leaving her surviving a husband but no issue, he is her sole distributee, and her collateral kin are not entitled to share in the estate and are not "distributees." G. S., 28-7; G. S., 28-149 (9).

3. Same—

The contention that a surviving husband takes by virtue of the *lex mariti* and not as a distributee of his wife's estate is untenable, since C. S., 7 (G. S., 28-7), and C. S., 137 (G. S., 28-149), must be construed *in pari materia* as separate parts of a single scheme of devolution, and this intent is clarified by the codification of the two sections in the General Statutes as subsections of the same statute.

4. Descent and Distribution § 3—

Who would have been distributees of the estate had the testatrix died intestate must be determined as of the date of her death and not as of the date of the execution of her will.

5. Wills § 42—

Testatrix left her surviving a husband but no issue. A legatee, a sister of testatrix, predeceased testatrix. *Held:* Since the legatee would not have been a distributee had testatrix died intestate, the legacy lapsed unless the will expresses a contrary intent or such intent can be gathered therefrom construing it from its four corners. G. S., 31-42.

6. Same—

Construing the will in suit from its four corners, it *is held* no intent that the legacy to testatrix' sister should not lapse upon the prior death of the sister is apparent, testatrix having made separate provision for her sister's children, and having provided in regard to other legacies for disposition of the property to specified persons in the event the legatee predeceased her, and having provided that the residuary estate should include bequests which should for any reason become inoperative or lapse. G. S., 31-42.

DEVIN, J., took no part in the consideration or decision of this case.

APPEAL by defendants Bitting Shelton and Louisa Shelton Pearson from *Armstrong, J.,* November Term, 1947, FORSYTH.

Petition for advice and instruction in the settlement of the estate of plaintiffs' testatrix.

Kate G. Bitting Reynolds died testate in the year 1946. She had no children, but left surviving her husband, W. N. Reynolds, and certain collateral kin. In 1934 she executed her last will and testament in which she disposed of a large estate and named many legatees, including her sister Susie Bitting Shelton, to whom she bequeathed $100,000.

At the time the will was executed, Susie Bitting Shelton had three living children, the two defendants and one Don D. Shelton. The testatrix established trusts in the sum of $25,000 each for Bitting Shelton and Don D. Shelton, with provision that if either should die during the lifetime of the testatrix, the principal of his share should be paid to the surviving children, and if there were no survivors at the time of the death of the testatrix, the total of said sum thus given should fall in and become a part of the residue of her estate. She established a trust in the

sum of $50,000 for Louisa Shelton Pearson for life, with remainder to the residuary estate. She also bequeathed to Agnes Shelton, wife of defendant Bitting Shelton, "if she survive me," $10,000.

The will also included the following provision:

"All the Rest, Residue and Remainder of my estate of every nature . . . including also any bequests herein made which shall for any reason fail to take effect or which shall at any time after my death become ineffective or lapse because of deaths or failure of purposes for which intended or for any other reason, I give devise and bequeath:

"To my trustees hereinafter named, in trust . . ." for the uses and persons therein stipulated.

Susie Bitting Shelton died 24 August 1935, leaving surviving three children, Don D. Shelton, who died 9 March 1938 without living issue surviving, and the defendants Bitting Shelton and Louisa Shelton Pearson.

The plaintiffs, as trustees under said will, contend that upon the death of Susie Bitting Shelton prior to the death of the testatrix, the legacy to her lapsed and became a part of the residuary estate as provided in the residuary clause of the will and is therefore payable to them. On the other hand, the defendants contend the legacy did not lapse and should be paid to them as the sole lineal descendants of the legatee. The executors, desiring to discharge their duties according to the true intent of their testatrix, as expressed in her will, pray the court to advise and instruct them as to the proper disposition of said legacy in the final settlement of the estate entrusted to them.

The court below found and concluded (1) that said legacy of $100,000 to Susie Bitting Shelton lapsed "by reason of the death of Susie Bitting Shelton during the lifetime of the testatrix and because the testatrix died without issue and was survived by her husband, William N. Reynolds," and (2) "that no contrary intent does so appear, and that said bequest passes under the residuary clause of said will, being Section Five thereof." It thereupon decreed that (1) said legacy lapsed; (2) defendants Bitting Shelton and Louisa Shelton Pearson "have no right thereto and no title or interest therein"; and (3) the executors pay said sum to the trustees named in the will "to be held and administered by said trustees and their successors in trust as therein provided." Said defendants excepted and appealed.

Womble, Carlyle, Martin & Sandridge for plaintiff, appellees.

Francis C. Brooke, R. M. Weaver, William S. Mitchell, and Hastings & Booe for defendants Bitting Shelton and Louisa Shelton Pearson, appellants.

BARNHILL, J. The immediate question for decision is: Who is entitled to the legacy bequeathed to Mrs. Shelton? The answer thereto, however, is dependent upon (1) whether Mrs. Shelton would have been entitled, as distributee, to a share of Mrs. Reynolds' personal estate had she survived Mrs. Reynolds and in the event Mrs. Reynolds died intestate, and, if not, (2) whether the will of Mrs. Reynolds discloses an intent that in the event the legatee predeceased her the legacy should not lapse but should go to the lineal descendants of the legatee.

These questions arise on the admitted facts, and the answers are to be found in the terms of G. S., 31-42, as interpreted and applied by the Court. The pertinent provisions of that Act are as follows:

"Unless a contrary intention shall appear by the will . . . any devise in such will contained which shall fail or be void by reason of the death of the devisee in the lifetime of the testator . . . shall be included in the residuary devise (if any) contained in such will; Provided, there shall be no lapse of the . . . legacy by reason of the death of the . . . legatee during the life of the testator, if such . . . legatee would have been . . . (a) distributee of such testator had he died intestate, and if such . . . legatee shall leave issue surviving him; and if there is issue surviving, then the said issue shall have the . . . bequest named in the will."

In his dissent in *Henry v. Henry,* 31 N. C., 278, *Ruffin, C. J.,* paid his respects to the term "distributees" as "a newly invented barbarism, and without any settled sense . . . that, up to this day it has not obtained admission into any American dictionary, though at least one of them has been supposed to have taken in every word which could possibly be tolerated." Even so, in that very case the Court defined the term to mean "the persons who are entitled under the statute of distributions to the personal estate of one who is dead intestate." Since that date it has come to be recognized by lexicographers and now has a definite and well-recognized meaning.

A distributee is a person who has the right under the statute of distribution to a share in the surplus estate of an intestate; one entitled to take a share of an estate of a decedent, under the statute of distribution; one to whom something has to be distributed in the division of an estate; a person upon whom personal property devolves by act of law in cases of intestacy. *Henry v. Henry, supra; Boyd v. Small,* 56 N. C., 39; *Jones v. Myatt,* 153 N. C., 225, 69 S. E., 135; Callaghan, Cyc. Law Dic., 2d Ed.; Webster, New Int. Dic., 2d Ed.; 26 C. J. S., 993. For other definitions of marked similarity see 13 Words and Phrases, 12, *et seq.*

The determinative criterion is *the right to share in the distribution* of the personal estate of the intestate.

Whatever the rules of devolution at common law may have been, those who take by succession the estate of a person who dies intestate are named and defined in our statute of distribution, G. S., 28-149.

Under this statute, collateral relatives do not share in the distribution of the personal estate of a married woman who dies intestate, leaving husband or child, or both, surviving. If she leaves a husband and a child or children surviving, they share alike in the distribution of the personality. G. S., 28-149 (8). If there is no child, the husband takes the whole personal estate. G. S., 28-7; G. S., 28-149 (9); *Wilson v. Williams,* 215 N. C., 407, 2 S. E. (2d), 19; *McIver v. McKinney,* 184 N. C., 393, 114 S. E., 399; *Wooten v. Wooten,* 123 N. C., 219.

Susie Bitting Shelton, a sister, died during the lifetime of the testatrix. The testatrix died without issue, leaving a husband surviving. Had Mrs. Reynolds died intestate, Mrs. Shelton, if living, would have been possessed of no right to any part of her personal estate. Instead, it would have gone to her husband as her sole distributee. Hence, in no sense would Mrs. Shelton have been a distributee of her estate. *Farnell v. Dongan,* 207 N. C., 611, 178 S. E., 77; *Beach v. Gladstone,* 207 N. C., 876, 178 S. E., 546.

The defendants contend, however, that the husband of a woman who dies intestate without issue surviving is not the distributee of his wife's estate but takes by virtue of the *lex mariti.* Be that as it may, that is not the question here. The rights of defendants depend, in the first instance, upon whether Mrs. Shelton, if living, would have been a distributee of the unbequeathed personal estate of Mrs. Reynolds.

Prior to the 1943 codification of our statutes, the husband of a woman who died intestate without issue is not named in the then prevailing statute of distribution (C. S. 137, now G. S. 28-149) as a distributee of his wife's estate. His rights were defined by C. S. 7 (now G. S. 28-7). Even so, the two sections were separate parts of the same statute and related to the same subject matter—the distribution of the estate of an intestate. They must be construed *in pari materia.* If they are not so construed, then there is a direct and irreconcilable conflict between the terms of the two. Under C. S. 7 (now G. S. 28-7) the husband took all the personal estate of his wife in the event she died intestate. Under C. S. 137 (8), now G. S. 28-149 (8), he shared with the child or children of the deceased.

Considered as separate parts of the whole scheme of devolution, C. S. 7 provided for one eventuality, and C. S. 137, for another. Recognizing this, the Legislature, in 1943, brought C. S. 7 forward and made it subsection 9 of G. S. 28-149. Its meaning and purpose as thus codified is unambiguous. If there was any doubt respecting the intent of the Legislature prior thereto, this rearrangement of these sections makes that intent crystal clear. This was the law at the time Mrs. Reynolds died. Who would have been her distributees had she died intestate is to be ascertained under the law as it existed on that date. Hence, the statute of distribution as codified in G. S. 28-149 is controlling here.

What the law may have been at the time the will was executed is of no moment. *Ferguson v. Ferguson,* 225 N. C., 375, 35 S. E. (2d), 231.

But the fact Mrs. Shelton, if living, would not have been a distributee of the unbequeathed personal estate of Mrs. Reynolds does not, in and of itself, necessarily defeat the rights of defendants.

Under the express language of the statute, G. S. 31-42, if the testatrix, in her will, expressed an intent that the legacy should not lapse in the event the legatee predeceased her, the statutory provision for lapse does not apply. It lapses only in the event no contrary intent is expressed in the will. Such intent, if expressed in the will, is controlling.

This intent need not be stated in exact terms for "it is an axiomatic rule of construction that the intent of the testator, as expressed by him, is to be ascertained from the four corners of the will, *Trust Co. v. Board of National Missions,* 226 N. C., 546, 39 S. E. (2d), 621, and cited cases, and that this intent is the guiding star which must lead to the ascertainment of the meaning and purpose of the language used. *Smith v. Mears,* 218 N. C., 193, 10 S. E. (2d), 659, and cited cases." *Schaeffer v. Haseltine,* 228 N. C., 484.

But a careful examination of the will leads us to the conclusion there is no intent that the legacy to Mrs. Shelton should not lapse, in the event she predeceased the testatrix, expressed in the will. Instead, it would seem that the testatrix intended that, in that event, the legacy should pass to and become a part of her residuary estate as the law provides. *Faison v. Middleton,* 171 N. C., 170, 88 S. E., 141; *Van Winkle v. Missionary Union,* 192 N. C., 131, 133 S. E., 431.

It is quite apparent she acted upon expert advice. She, or her adviser, was well versed in the law of succession. She was disposing of her estate in large measure to kinspeople who would take nothing in the event she died intestate and whose legacies would lapse in the event they predeceased her. She recognized that a lapse would occur in the event the legatee was not living at the time of her death. When she desired the legacy, in case of lapse, to go to others and not to her residuary estate, she so provided. Then she stipulated that lapsed legacies not otherwise guarded against would accrue to and become a part of her residuary estate. Thus she left nothing to conjecture, but instead provided for every possible eventuality.

She did not make the gift to Mrs. Shelton as a representative of one line of collateral relatives. She made provision for her children. She knew she could provide against lapse, but she made no such provision with respect to the gift to Mrs. Shelton. Instead, we find language which clearly indicates that she intended it to pass to her residuary estate in the event Mrs. Shelton predeceased her. The gift was personal.

As Mrs. Shelton, if living, would not have been a distributee of Mrs. Reynolds' estate had she died intestate, and as no intent that the legacy should not lapse is expressed in the will, the court below correctly concluded that the defendants take nothing under subsection 5 of Section One of the will.

In presenting the contrary view, defendants have filed an interesting brief. Their argument is astucious but not convincing. The judgment below must be

Affirmed.

DEVIN, J., took no part in the consideration or decision of this case.

WILLIAM C. BYRD AND WIFE, RENA BYRD, PETITIONERS, v. CORA ALLEN PATTERSON AND HUSBAND, ABE PATTERSON, RESPONDENTS.

(Filed 4 June, 1948.)

1. Deeds § 2b—

In order to be operative as a conveyance, a deed must designate as grantee a person capable of taking the land either by name or by description sufficiently definite for identification, and extrinsic evidence is admissible for the purpose of fitting the description to the person or persons intended.

2. Same: Husband and Wife § 14—

Where the premises and granting clause in a deed is to a person named "and wife" the deed conveys an estate by entireties notwithstanding the fact that the name of the wife nowhere appears therein, since the description is sufficiently definite to permit evidence of identity *aliunde*, established in this case by stipulation of the parties.

3. Husband and Wife § 14—

A deed to husband and wife conveys an estate by entireties notwithstanding the deed fails to characterize the estate conveyed.

4. Same: Deeds § 13a—

Where the premises and granting clause of a deed is to a man and his wife, the fact that the *habendum* and warranty clauses fail to designate the wife does not affect the nature of the estate conveyed, since the granting clause prevails where there is any repugnancy between it and preceding or succeeding recitals.

5. Wills § 44—

Where the husband devises a life estate to his wife in lands held by them by entireties and also bequeaths to her all of his personal estate, the doctrine of election does not apply, and her heirs are not estopped from claiming the realty by her acts in qualifying as executrix and accepting the personal property.

BYRD *v.* PATTERSON.

APPEAL by defendants from *Carr, J.*, November Term, 1947, ALAMANCE. Affirmed.

Special proceedings for the sale of real property for partition in which the defendant Cora Allen Patterson pleads sole seizin.

Upon plea of sole seizin, the cause was transferred to the civil issue docket of the Superior Court for trial of the issue thus raised. When the cause came on to be heard, the parties waived trial by jury and submitted the cause to the judge to find the facts and render judgment upon the facts found. Thereupon, the court found the facts in substance as follows:

In 1901 Thomas Crumpton and wife conveyed the *locus* to "Thomas N. Allen and wife." The determinative provisions of the deed read: the premises, "to Thomas N. Allen & wife"; the granting clause, "to said Thomas Allen and wife theirs and assigns"; the *habendum* clause, "to the said Thomas N. Allen and wife, his heirs and assigns, to their only use and behoof forever"; and the warranty clause, "covenant with said Thomas N. Allen his heirs and assigns."

The name of the grantee "wife" nowhere appears in the deed, but it is stipulated as a fact that at the time said deed was executed and delivered, Catherine Allen was the wife of Thomas N. Allen, living with him as such.

The land was paid for through the joint efforts of Allen and his wife.

T. N. Allen died testate in the year 1931, leaving surviving his widow and one child by a former marriage, the defendant, Cora Allen Patterson. He devised the *locus* to his wife, Catherine Allen, for her natural life, but made no testamentary disposition of any remainder therein. He also bequeathed to his wife all his household and kitchen furniture, stock, poultry, crops, and provisions on hand. His widow qualified as executrix of the will and continued in possession of the real property until her death in 1945. She left no child or children surviving. Her nephew, plaintiff William C. Byrd, purchased from her heirs at law a two-thirds interest in said land, and one sister of deceased conveyed a one-third interest therein to defendant Cora Allen Patterson.

Upon finding the facts in substance as stated, the court concluded that the deed from Crumpton and wife to Allen and wife conveyed an estate by entirety and that those claiming under her are not estopped to claim title to the property in controversy by virtue of any election made by her when she qualified as executrix under the will of her husband and took the personal property therein devised to her. It thereupon adjudged that the plaintiff is the owner of a two-thirds undivided interest and the *feme* defendant of a one-third undivided interest in and to the *locus*, and ordered a sale thereof for partition. Defendants excepted and appealed.

W. Henry Hunter and Thomas Turner for plaintiff appellees.
Thos. C. Carter for defendant appellants.

BARNHILL, J. The record presents this situation: Land is conveyed to T. N. Allen and wife without naming the *feme* grantee. Allen dies testate, leaving surviving his widow and one child by a former marriage. In his will he devises his personal property and a life estate in the land to his widow. The widow qualifies as executrix, takes the personal property, and remains in possession of the land until her death. After her death, a collateral relative acquired a two-thirds interest in such estate as she owned in the land, and the *feme* defendant acquired the other one-third. The *feme* defendant, sole surviving heir of T. N. Allen, now claims the whole estate.

This state of facts raises two questions for decision: (1) Did the deed from Crumpton and wife to Allen and wife convey an estate by entirety; and if so, (2) Did Mrs. Allen, by qualifying as executrix of Allen's will and accepting the personal property therein bequeathed to her, make an election which estopped her and those claiming under her from asserting title to the *locus?*

The court below answered the first in the affirmative and the second in the negative. We concur.

A deed, to be operative as a conveyance, must in some manner designate as grantee an existing person who is capable of taking title to the land. 16 A. J., 482. While the correct name of the grantee affords a ready means of identification of the person intended, its use is not a prerequisite to the validity of the instrument. 16 A. J., 483. If a living or legal person is intended as the grantee and is identifiable by the description used, the deed is valid, however he may be named in the deed. 16 A. J., 483.

Thus a conveyance, *Ballard v. Farley,* 226 S. W., 544, or a devise, *Motley v. Whitemore,* 19 N. C., 537, to a named man "and wife" or a deed to a designated person "and children" conveys an estate to the "wife" or "children" living at the time of the execution and delivery of the deed, or, in the case of a will, at the death of the testator. *Darden v. Timberlake,* 139 N. C., 181; *Buckner v. Maynard,* 198 N. C., 802, 153 S. E., 458; *Cullens v. Cullens,* 161 N. C., 344, 77 S. E., 228; *King v. Stokes,* 125 N. C., 514; *Helms v. Austin,* 116 N. C., 751; *Gay v. Baker,* 58 N. C., 344. It is just as effectual as if the name of the wife or child or children had been given in full, 6 Thompson, Real Property, 322, 325, and extrinsic evidence is admissible for the purpose of fitting the description to the person or persons intended. 16 A. J., 482; 6 Thompson, Real Property, 322, 325; *Gold Mining Co. v. Lumber Co.,* 170 N. C., 273, 87 S. E., 40.

A wife is a woman who has a husband. *Davis v. Bass,* 188 N. C., 200, 124 S. E., 566. The name of the husband appears in the face of the deed. This is sufficient to permit evidence *aliunde* the record to identify the other grantee, the "wife," and her identity is made to appear by stipulation. 41 C. J. S., 447; *Ballard v. Farley, supra;* 6 Thompson, Real Property, 322, 325.

The deed need not characterize the estate conveyed. If it is to husband and wife, nothing else appearing, they take by the entireties. *Randolph v. Edwards,* 191 N. C., 334, 132 S. E., 17; *Johnson v. Leavitt,* 188 N. C., 682, 125 S. E., 490; *Davis v. Bass, supra; Turlington v. Lucas,* 186 N. C., 283, 119 S. E., 366; *Holton v. Holton,* 186 N. C., 355, 119 S. E., 751; *Bruce v. Nicholson,* 109 N. C., 202.

The slight inconsistencies in the designation of the grantees in the several provisions of the deed do not affect the nature of the estate conveyed for "in the event of any repugnancy between the granting clause and preceding or succeeding recitals, the granting clause will prevail." *Ingram v. Easley,* 227 N. C., 442, 42 S. E. (2d), 624; *Artis v. Artis,* 228 N. C., 754; *Williams v. Williams,* 175 N. C., 160, 95 S. E., 157; 16 A. J., 575.

Clearly then, the Crumpton deed conveyed an estate by entirety to T. N. Allen and his wife, Catherine Allen.

The facts found by the court below are not such as to invoke the application of the doctrine of election. Her property was not devised to another so as to compel her to decide whether she would stand on her rights or abide by the terms of the will.

"The doctrine of election is not applicable to cases where the testator, erroneously thinking certain property is his own, gives it to a donee to whom in fact it belongs, and also gives him other property which is really the testator's own; for in such cases the testator intends that the devisee shall have *both,* though he is mistaken as to his own title to one." 2 Pomeroy, Eq. Jur., 5th Ed., 358; *Elmore v. Byrd,* 180 N. C., 120, (125), 104 S. E., 162; *Benton v. Alexander,* 224 N. C., 800, 32 S. E. (2d), 584, and cited cases.

Allen devised to his wife a life estate in the land held by entirety which she already owned. He made no disposition of the remainder which was hers as surviving tenant by entirety. The fact that he also gave her other property and she qualified as executrix of his will does not work an estoppel against those claiming under her.

It follows that the judgment below must be

Affirmed.

MRS. LEOLA PHILLIPS GARNER (WIDOW), MISS LENA ROZELLE PHILLIPS (SINGLE), MRS. INA M. PHILLIPS AND HUSBAND, J. E. PHILLIPS; MRS. ORA JUANITA DAVIS AND HUSBAND, J. S. DAVIS; MRS. BERNICE P. SIMMONS AND HUSBAND, WHEELER W. SIMMONS; ASTOR VANCE PHILLIPS AND WIFE, LILLIAN SMITHERMAN PHILLIPS; CHARLES W. PHILLIPS AND WIFE, ERNESTINE W. PHILLIPS; KERMIT ORVILLE PHILLIPS AND WIFE, INEZ D. PHILLIPS; MARSHALL WILSON PHILLIPS AND WIFE, PEARL G. PHILLIPS; TROY GEORGE PHILLIPS AND WIFE, FRANCES H. PHILLIPS; MRS. MYRTLE GREENE CLARK AND HUSBAND, SAMUEL T. CLARK; MRS. MAEOLA G. HONEYCUTT AND HUSBAND, GEORGE GROCIE HONEYCUTT; MRS. JUANITA BEATRICE SULLIVAN AND HUSBAND, WAYMAN JACKSON SULLIVAN; MRS. MILDRED REVONDA MOONEYHAN AND HUSBAND, ERNEST LEVI MOONEYHAN; GROVER CLEVELAND GREENE AND WIFE, VERA CORNS GREENE; OSCAR WILLIAM GREENE AND WIFE, DORA TAYLOR GREENE; FORD FARRELL GREENE AND WIFE, EVELYN GREER GREENE; MRS. INA M. PHILLIPS, ADMINISTRATRIX OF THE ESTATE OF THOMAS EVERETT PHILLIPS, DECEASED; AND MRS. MAEOLA G. HONEYCUTT, ADMINISTRATRIX OF THE ESTATE OF MRS. MARGARET GREENE PHILLIPS, DECEASED, v. MRS. SARAH ROSE PHILLIPS (WIDOW), ROBERT LEE GREENE, MRS. DOSHIA DANIEL GREENE AND THOMAS LEE PHILLIPS, AND HARVEY LUPTON, GUARDIAN AD LITEM FOR THOMAS LEE PHILLIPS.

(Filed 4 June, 1948.)

1. Actions § 3c: Equity § 2d—

It is a basic principle of law and equity that no man shall be permitted to take advantage of his own wrong, or acquire property as the result of his own crime.

2. Descent and Distribution § 3: Trusts § 5b—

A son who murders his parents acquires legal title to property of which they die intestate, but equity will impress upon the legal title a constructive trust in favor of those who would have taken if the murderer had predeceased his parents in order that he may not receive any benefit as a result of his own crime.

3. Same—

The fact that statutory provision that a murderer forfeits all interest in the estate of his victim is applicable only to the relation of husband and wife, G. S., 28-10; G. S., 30-4; G. S., 52-19; does not deprive equity of the power of declaring an heir who has murdered his ancestor a constructive trustee for the benefit of those who would have taken if the murderer had predeceased the intestate.

4. Infants § 13—

Defendant guardian's exception that judgment was rendered against his minor ward before sufficient time had elapsed after notice as prescribed by G. S., 1-65, *held* not supported by the record.

GARNER *v.* PHILLIPS.

APPEAL by defendant guardian *ad litem* from *Bobbitt, J.,* at April Term, 1948, of FORSYTH. No error.

This was a special proceeding for the sale of land for partition among tenants in common.

It was alleged that Thomas Everett Phillips and Margaret Greene Phillips, his wife, were tenants by the entirety of the lands described, and that both died intestate, simultaneously, 31 December, 1947, having been willfully and feloniously slain by the defendant Thomas Lee Phillips, their only surviving child, a minor of sixteen years. It was alleged that Thomas Lee Phillips has been duly convicted of both murders and sentenced to terms in State's Prison, and that by reason of these wrongful acts he has forfeited all right, title and interest in the property of his parents as heir at law or next of kin, and that the described lands thereupon vested in the petitioners who are next in succession, as tenants in common. By amendment it was alleged if Thomas Lee Phillips took as heir, he held only the naked legal title as trustee for the petitioners.

The guardian *ad litem,* duly appointed for the defendant Thomas Lee Phillips, filed answer in which he admitted the material allegations of fact set out in the petition, but denied that the slaying of his parents by Thomas Lee Phillips was either willful or felonious for the reason that he was at the time insane, and denied that he had lost his rights as heir or should be declared constructive trustee.

Issues having been raised by the pleadings, the cause was transferred to the civil issue docket of the Superior Court for trial in term. G. S., 1-276. On the trial in the Superior Court the jury by their verdict, upon the evidence offered, found that defendant Thomas Lee Phillips had willfully and feloniously murdered both his father and mother, and that he had no beneficial interest in the lands described, but held the naked legal title thereto as trustee for the benefit of the petitioners, in the proportions set out in the petition.

From judgment on the verdict the guardian *ad litem,* for and on behalf of the minor Thomas Lee Phillips, appealed.

Deal & Hutchins for plaintiffs appellees.

Harvey Lupton for defendant, appellant.

DEVIN, J. By the judgment appealed from the youthful defendant Thomas Lee Phillips has been denied beneficial inheritance from his deceased parents for the reason that it was found he had murdered both his father and his mother. Upon reason and authority we think the case has been correctly determined.

It is a basic principle of law and equity that no man shall be permitted to take advantage of his own wrong, or acquire property as the result of his own crime. *Bryant v. Bryant,* 193 N. C., 372, 137 S. E., 188;

Parker v. Potter, 200 N. C., 348, 157 S. E., 68; *Pearson v. Stores Corp.,* 219 N. C., 717 (722), 14 S. E. (2d), 811; *New York Mutual Life Ins. Co. v. Armstrong,* 117 U. S., 591; *Slocum v. Ins. Co.,* 245 Mass., 565; *Price v. Hitaffer,* 164 Md., 505; *Eisenhardt v. Siegel,* 343 Mo., 22; *Weaver v. Hollis,* 247 Ala., 57; *In re Tyler,* 140 Wash., 679; *Rex v. Lanier,* 112 Tenn., 393; *Garwols v. Trust Co.,* 251 Mich., 420; *Smith v. Todd,* 155 S. C., 323; *Anderson v. Ins. Co.,* 152 N. C., 1, 67 S. E., 53.

True, we have no statute in North Carolina which in express terms destroys the right of inheritance under the canons of descent, or bars the devolution of title as heir to one who has murdered the ancestor from whom derived, but the rule seems to have been established in this jurisdiction that in such case equity will impress upon the legal title so acquired a constructive trust in favor of those next entitled and will exclude the murderer from all beneficial interest in the lands descending to him from his victim. This is the holding in *Bryant v. Bryant,* 193 N. C., 372, 137 S. E., 188, and the case at bar was tried and judgment rendered in accord with the ruling in that case.

Following the decision of this Court, in 1888, in *Owens v. Owens,* 100 N. C., 240, 6 S. E., 794, where it was held that a wife who had murdered her husband was not thereby deprived of dower, statutes were enacted declaring that in case husband or wife murdered the other, the survivor should lose every right and estate in the property of the murdered spouse. G. S., 28-10; G. S., 30-4; G. S., 52-19. It is suggested that provision for the forfeiture of the murderer's interest in the property of his victim having been made applicable by these statutes only to the relationship of husband and wife, this should be regarded as significant of the legislative intent not to extend the forfeiture for this cause to the heir. But that omission, we think, would not prevent a court of equity from attaining an end so manifestly just by declaring, upon sufficient findings of fact, the wrongdoer a constructive trustee, holding only the naked legal title for the benefit of those next entitled. The legal title passes to the murderer, but equity prevents him from enjoying the fruits of his crime. Ames Lectures on Legal History, 310-12; *Ellison v. Westcott,* 148 N. Y., 149; *Van Alstyne v. Tuffy,* 169 N. Y. Supp., 173; *Whitney v. Lott,* 134 N. J. Eq., 586; *Sherman v. Weber,* 113 N. J. Eq., 451; 5 N. C. L., 372; 26 N. C. L., 232. "This position seems most satisfactory on principle." 3 Bogert Trusts & Trustees, 52.

In Restatement Law of Restitution, sec. 187 (pg. 764), it is said, "Where a person is murdered by his heir or next of kin, and dies intestate, the heir or next of kin holds the property thus acquired by him upon a constructive trust for the person or persons who would have been heirs or next of kin if he had predeceased the intestate."

Some of the courts in other jurisdictions have reached different conclusions in the consideration of the question here presented. In *Crumley*

v. Hall, 43 S. E. (2d), 646 (Ga.), it was thought that since the statutes of descent and distribution made no exception the court was not justified in reading into the statutes a condition not reasonably deducible therefrom. A similar view was expressed in *Eversole v. Eversole,* 169 Ky., 993; *Wall v. Pjanschmidt,* 265 Ill., 180; *Hogan v. Cone,* 21 Ga. App., 416; *Murchison v. Murchison,* 203 S. W., 423 (Tex. Civ. App.); *Wilson v. Randolph,* 50 Nev., 371; *In re Carpenter's Estate,* 170 Pa., 203; *McAllister v. Fair,* 72 Kansas, 533; *Shellenberger v. Ransom,* 41 Neb., 631; *Wenker v. Landon,* 161 Oregon, 265; *Ofell v. Hodapp,* 129 Ohio St., 432; *Re Kirby,* 162 Cal., 91; 16 A. J., 847; 26 C. J. S., 1055.

In other jurisdictions it has been held that one who murdered his ancestor was debarred from inheriting the property of his victim in accord with the rule against the acquisition of property by the wrongdoer as result of his crime, on the ground that a public policy is expressed by this maxim, and that the statutes of descent should be interpreted in the light of this principle. *Slocum v. Ins. Co.,* 245 Mass., 565; *Garwold v. Trust Co.,* 251 Mich., 420; *Eisenhardt v. Siegel,* 343 Mo., 22, 119 S. W. (2d), 810; *Price v. Hitaffer,* 164 Md., 505; *Perry v. Strawbridge,* 209 Mo., 621; *Box v. Lanier,* 112 Tenn., 393; *In re Tyler,* 140 Wash., 679; *Bierbrauer v. Moran,* 279 N. Y. S., 176; *De Zotell v. Ins. Co.,* 60 S. D., 532; *Protective Ins. Co. v. Linson,* 245 Ala., 493; *Weaver v. Hollis,* 247 Ala., 57; *In re Eckardt,* 54 N. Y. S. (2d), 484; 16 A. J., 849; Wharton on Homicide (3rd Ed.), sec. 665. The civil law debarred one who procured the death of another from succeeding to his estate as heir and the Code Napoleon so declared. *Re Wilkins,* 192 Wis., 111. In many states statutes to this effect have been enacted. *In re Norton,* 175 Oregon, 115, 151 Pac. (2d), 719; *Estate of Lipsholm,* 79 Cal. App. (2d), 467. However, in the absence of a definite statute, we prefer to adhere to the principle stated in *Bryant v. Bryant, supra.* The equitable principle there stated has been frequently approved. *Speight v. Trust Co.,* 209 N. C., 563, 183 S. E., 734; *Goldsmith v. Samet,* 201 N. C., 574, 160 S. E., 835.

The defendant's exception that the judgment here was rendered before sufficient time had elapsed after notice as prescribed by G. S., 1-65, is not borne out by the record. The other exceptions noted at the trial and brought forward in defendant's assignments of error on examination we find untenable.

In view of the importance of the questions presented, the guardian *ad litem* properly brought the case here for review.

In the trial and judgment we find

No error.

SWANNIE HORNADAY, JULIA HORNADAY ROSS AND HUSBAND, S. D. ROSS, AND S. D. ROSS AND M. A. COBLE, EXECUTORS OF THE ESTATE OF R. G. HORNADAY, AND SUE J. HORNADAY, v. THOMAS L. HORNADAY AND WIFE, BESSIE HORNADAY, ROBERT L. HORNADAY AND WIFE, MYRLL HORNADAY, WILLIAM HOWARD HORNADAY AND WIFE, MRS. WM. HOWARD HORNADAY, AND D. C. BRYAN, EXECUTOR OF VICTOR C. HORNADAY, DECEASED.

(Filed 4 June, 1948.)

1. Wills § 31—

In construing a will, the object is to ascertain the intent of the testator as gathered from his language, giving consideration to every part of the instrument.

2. Same—

In construing a will it is to be assumed that the testator understood the provisions of the instrument.

3. Wills § 45b—

Testator devised the remainder of his realty to two daughters and one son, with provision that at the election of the daughters they might purchase the son's share for a stipulated sum, with further provision that if they elected to exercise the option, the money should be paid the son part in cash and the balance to a trustee to be paid the son in ten annual installments. The son died prior to the exercise of the option. *Held:* The daughters are not entitled to exercise the option as against the son's executor.

APPEAL by defendants from *Bone, J.*, at the September Term, 1947, of ALAMANCE.

The controlling facts in this case have been established by admissions made by the parties in the pleadings and on the trial in the court below.

R. G. Hornaday died on 29 September, 1944, while domiciled in Alamance County, leaving a will in which he appointed S. D. Ross and M. A. Coble his executors, and named his widow, Sue J. Hornaday, and his sons, Victor C. Hornaday and Thomas L. Hornaday, and his daughters, Swannie Hornaday and Julia Hornaday Ross, his devisees and legatees. The only part of the will bearing on the present controversy is the seventh item, reading as follows:

"I give, devise, and bequeath all the rest and residue of my estate to my three children, Victor, Swannie and Julia, share and share alike. If my daughters, Swannie and Julia, elect to do so, they may pay to my son, Victor, the sum of seven thousand dollars ($7,000.00) in satisfaction of his share of the residue of my estate, but if such is done, it is my desire that payment be made as follows: two thousand dollars ($2,000.00) cash, with the balance of five thousand dollars ($5,000.00) to be placed in secure trust to be paid five hundred dollars ($500.00) per year for ten (10) years."

The will of R. G. Hornaday was admitted to probate in common form before the Clerk of the Superior Court of Alamance County on 5 December, 1944, and Thomas L. Hornaday entered a caveat to such probate on 30 March, 1945. The issue of *devisavit vel non* raised by this caveat was answered in favor of the propounders by a jury at the May Term, 1946, of the Superior Court of Alamance County, and a judgment was thereupon rendered establishing the will in solemn form.

As the personal estate of R. G. Hornaday is insufficient to pay all of his debts and the charges of administration of his estate, real property alone passes under the seventh item of his will. Nothing in the record discloses the value of this property. The administration of R. G. Hornaday's estate is not yet completed.

Victor C. Hornaday died unmarried on 28 September, 1946, domiciled in the State of Florida. He left a will, naming D. C. Bryan as his executor and giving all of his property to his brother, Thomas L. Hornaday, and his sister-in-law, Bessie Hornaday, and their two sons, Robert L. Hornaday and William Howard Hornaday, in equal shares. This will has been admitted to probate in the Superior Court of Alamance County, and D. C. Bryan has qualified as executor under it.

The plaintiffs, Swannie Hornaday and Julia Hornaday Ross, did not undertake to exercise the option to purchase the share of their brother, Victor C. Hornaday, in the residue of the estate of their father, R. G. Hornaday, under the seventh item of the will of the latter at any time during the life of Victor C. Hornaday. But subsequent to his death, to wit, on 22 January, 1947, they brought this proceeding against D. C. Bryan, the executor of Victor C. Hornaday, and Thomas L. Hornaday, Bessie Hornaday, Robert L. Hornaday, and William Howard Hornaday, the beneficiaries named in the will of Victor C. Hornaday, tendering the sum of $7,000.00 to such executor and beneficiaries for the share of Victor C. Hornaday in the residue of the estate of R. G. Hornaday, and seeking a decree enforcing the option mentioned in the seventh item of the will of R. G. Hornaday against such executor and beneficiaries. The defendants refused to accept the sum so tendered to them by the plaintiffs, Swannie Hornaday and Julia Hornaday Ross, upon the ground that the testamentary option could not be exercised against them.

The trial judge concluded upon the admissions of the parties that the plaintiffs, Swannie Hornaday and Julia Hornaday Ross, were entitled to exercise the testamentary option against the executor and beneficiaries named in the will of Victor C. Hornaday by paying to such executor and beneficiaries the sum of $7,000.00 with interest from the death of R. G. Hornaday, and entered judgment accordingly. The defendants thereupon appealed.

Long & Long for plaintiffs, appellees.

W. Bryan Bolich, L. C. Allen, J. Elmer Long, and Clarence Ross for defendants, appellants.

ERVIN, J. This appeal necessitates the interpretation of the seventh item of the will of R. G. Hornaday. It is elementary learning that the object of all construction is to ascertain the intent of the testator. *Jones v. Jones,* 227 N. C., 424, 42 S. E. (2d), 620; *Robinson v. Robinson,* 227 N. C., 155, 41 S. E. (2d), 282; *Heyer v. Bulluck,* 210 N. C., 321, 186 S. E., 356. This intent must be determined from the language used by the testator. *Smyth v. McKissick,* 222 N. C., 644, 24 S. E. (2d), 621; *Sharpe v. Isley,* 219 N. C., 753, 14 S. E. (2d), 814; *Whitley v. Arenson,* 219 N. C., 121, 12 S. E. (2d), 906. All of the provisions of the will must be considered in the light of the presumption "that every part of the will indicates an intelligent purpose." *Williams v. Best,* 195 N. C., 324, 142 S. E., 2. Moreover, it is to be assumed that the testator understood the provisions of his will. *Lunsford v. Yarbrough,* 189 N. C., 476, 127 S. E., 426.

When the seventh item of the will of R. G. Hornaday is read in the light of these principles, his intention as therein expressed is plain. He intended to give his son, Victor C. Hornaday, an undivided one-third part of the residue of his estate, subject to the option of his daughters, Swannie Hornaday and Julia Hornaday Ross, to purchase such undivided one-third part of such residue from Victor C. Hornaday for the sum specified, and he intended such option to be exercised by Swannie Hornaday and Julia Hornaday Ross, if at all, during the lifetime of Victor C. Hornaday.

Any other interpretation would set at naught the highly significant words of the testator to the effect that the testamentary option was to be exercised by his daughters by paying the specified sum to a named person, to wit, the testator's son, Victor, and that the property subject to the option was the share of a named person, to wit, the testator's son, Victor, in the residue of the testator's estate. Besides, any construction of the seventh item of the will of R. G. Hornaday extending the efficacy of the testamentary option beyond the lifetime of Victor C. Hornaday would deny any intelligent purpose to the expressed desire of the testator that the sum to be paid on the exercise of the option should be payable as follows: "Two thousand dollars ($2,000.00) cash, with the balance of five thousand dollars ($5,000.00) to be placed in secure trust to be paid five hundred dollars ($500.00) per year for ten (10) years." It seems reasonable to infer that the father put this provision in his will for the intelligent purpose of protecting his son against some familiar improvident trait in financial matters. Be this as it may, it is certainly not conceivable that R. G. Hornaday would have prescribed any such mode

of payment if he had intended for the testamentary option to be exercised against his son's personal representative, or heirs, or next of kin, or devisees, or legatees, whom he had no means of knowing or identifying when he made his will.

A painstaking examination of the authorities fails to reveal any precedent dealing with the exact factual situation here considered. But the conclusion here reached finds abundant support in sound decisions in other jurisdictions holding, in substance, that when a will gives an option to purchase to a named person, the option is personal to the optionee, and ends when the optionee dies without having exercised it. *In re Ludwick's Estate,* 269 Pa., 365, 112 A., 543; *Adams v. Adams,* 95 W. Va., 187, 120 S. E., 590; *Weitzmann v. Weitzmann,* 87 Ind. App., 236, 161 N. E., 385; *In re Hauser,* 50 N. Y. S. (2d), 709.

For the reasons given, we hold that the option given the plaintiffs, Swannie Hornaday and Julia Hornaday Ross, by the seventh item of the will of R. G. Hornaday did not extend beyond the lifetime of Victor C. Hornaday, and that the judgment of the court below to the contrary must be

Reversed.

STATE v. HAROLD HAWLEY.

(Filed 4 June, 1948.)

1. Criminal Law § 51—

The sole province and responsibility of the jury is to find the facts, and the consequences of the verdict on the facts is of no concern to the jury.

2. Criminal Law § 50f—

Argument of the solicitor in the trial of a capital offense that the jury has only a small part in determining the final punishment of defendant because in the event of conviction the case would be reviewed for errors by the Supreme Court even without appeal, and in the event no error was found by the Supreme Court, executive clemency would be sought, *is held* such gross impropriety that the harmful effects cannot be removed from the minds of the jurors even by full instructions from the court.

3. Same: Criminal Law § 78e—

While ordinarily objection to argument of the solicitor must be brought to the trial court's attention in time to afford opportunity to the court to correct the transgression by instructions to the jury, this rule does not apply when the impropriety is so gross that its prejudicial effect cannot be removed from the minds of the jurors by instructions from the court.

4. Criminal Law § 61b—

Upon appeal from sentence of death, it is necessary that the Supreme Court find that there was no error in the trial before the sentence can be carried out. G. S., 15-194.

5. Criminal Law § 78c—

Where the record shows that the solicitor agreed that statement of case on appeal, containing exception to his argument to the jury and assignment of error based thereon, should constitute the case on appeal, this is sufficient as an exceptive assignment of error even though defendant made no objection and took no exception at the time. Rule of Practice in the Supreme Court No. 21.

APPEAL by defendant from *Bone, J.*, at November Term, 1947, of GRANVILLE.

Criminal prosecution upon bill of indictment charging defendant with the offense of murder in the first degree of one Effie Hawley, at and in Granville County, on 29 September, 1947.

The record on this appeal shows that defendant, upon arraignment, pleaded not guilty. It contains also case on appeal served by defendant through his attorneys, to which the solicitor for the State agreed.

This case on appeal presents these salient facts: On the trial below the State offered evidence tending to support the charge of murder in the first degree with which defendant stands indicted. The defendant offered no evidence, and his counsel had and made the opening and concluding arguments to the jury. In the meantime, arguments were made by attorneys for private prosecution, followed by the solicitor for the State.

The substance of the concluding part of the solicitor's argument to the jury as shown in the case on appeal, to which the solicitor agrees and to which exception by defendant appears, is as follows:

"*In North Carolina there are four capital felonies, that is felonies for* which the punishment is death. Murder in the first degree is one of these felonies. The defendant is being tried under a bill of indictment which charges murder in the first degree, and the State is asking for a conviction. I know that juries as a rule are reluctant to find defendants guilty of an offense for which the punishment is death. You, gentlemen of the jury, are but a small cog in the final determination and conclusion of this case. If you find the defendant guilty as charged, and the defendant is sentenced by the Presiding Judge to be executed in the manner which the statute prescribes, that does not mean that the defendant will be put to death. Before the defendant will be put to death the Supreme Court will review his trial, whether or not the defendant appeals, and the Supreme Court will seek to find some error or errors entitling the defendant to a new trial. If the Supreme Court fails to find error, the Governor, through the Commissioner of Paroles, will be urged to extend executive clemency. Petitions and letters of recommendation, recommending clemency, will be filed, and the Commissioner of Paroles, and in all probability the Governor, personally, will carefully review and consider this case and all recommendations and petitions filed in the defendant's behalf, before the defendant is executed, and I argue to you, gentlemen of

the jury, that not all, but only a certain percentage of the defendants who are convicted in North Carolina of capital felonies finally suffer the death penalty. You can see, therefore, gentlemen of the jury, that you are only a small cog in the final determination of what may happen to this defendant, even if you find him guilty, as charged in the bill of indictment."

Counsel for defendant, who followed the solicitor, replied to the above argument. And it is stated that "while the solicitor was addressing the jury the presiding judge was on the bench, but was engaged in reviewing his notes on the evidence, preparatory to making the charge and was not following the argument of the solicitor to the jury. No objection to said argument was made by counsel for defendant at any time during the term, nor was it called to the attention of the court that the solicitor was making the argument to which exception is now being made."

Verdict: Guilty of murder in the first degree.

Judgment: Death by administration of lethal gas.

Defendant appeals therefrom to Supreme Court, and assigns error.

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

T. G. Stem and B. S. Royster, Jr., for defendant, appellant.

WINBORNE, J. The remarks of the solicitor for the State in concluding his address to the jury on the trial in Superior Court, to which alone exception is directed on this appeal, are to the same effect as those held by this Court in the case *S. v. Little,* 228 N. C., 417, 45 S. E. (2d), 542, to be calculated to prejudice unduly the defendant in the defense of the charge against him, and on account of which a new trial was ordered. There, as here, the defendant was on trial charged with murder in the first degree. Hence what is said there is appropriate here.

In the *Little case* the Court held that the gravity of the improper remarks of the solicitor called for a correction by instruction of the judge to the jury at some time during the trial regardless of attitude of counsel for defendant as to whether partial correction should or should not be made. And there doubt is expressed as to whether the harmful effects of the remarks could have been removed from the minds of the jury even by full instructions.

The remarks of the solicitor here under consideration are calculated even more than in the *Little case* to prejudice unduly the defendant in the minds of the jury. "The State does not ask for the conviction of a defendant except upon the facts and the law, stripped of all extraneous matter,—the naked facts," said *Walker, J.,* in *S. v. Davenport,* 156 N. C., 596, 72 S. E., 7. To find the facts is the sole province and responsibility of the jury. Moreover, what consequences the verdict on the

facts may bring to defendant is of no concern to the jury. Hence, the remarks here tend to disconcert the jury in fairly and freely deliberating upon the facts and in arriving at a just and true verdict.

Moreover, here as in the *Little case* it is doubted that the harmful effect of the remarks of the solicitor in appealing for a verdict of murder in the first degree could have been removed from the minds of the jury by full instruction of the trial judge. In *S. v. Noland,* 85 N. C., 576, speaking of a gross abuse of privilege by counsel, *Ruffin, J.,* said: "After its commission, under the circumstances, it admitted of no cure by anything that could be said in the charge." See also *Holly v. Holly,* 94 N. C., 96.

But the contention was made in the *Little case,* as it is here, that exception to the improper remarks not taken before verdict is not seasonable. Under the facts there as here the rule is inapplicable.

Ordinarily it is the duty of counsel to make timely objection so that the judge may correct the transgression by instructing the jury. *S. v. Suggs,* 89 N. C., 527. And, ordinarily, the failure to object before verdict is held to constitute waiver of objection. *S. v. Tyson,* 133 N. C., 692, 45 S. E., 838. But where, as here, the harmful effect of the remarks is such that it may not be removed from the minds of the jury by instruction of the judge, the reason for the rule requiring the objection to be made before the verdict does not exist.

Therefore, under the facts of this case, as in the *Little case,* the rule requiring exception before verdict is inapplicable. Moreover, the appeals in each of these cases is from a judgment sentencing defendant to death. G. S., 15-187. And it is provided by statute, G. S., 15-194, that "in case of an appeal" from such judgment, "should the Supreme Court find no error in the trial," "such condemned person shall be executed . . . upon the third Friday after the filing of the opinion or order of the Supreme Court . . . and it shall be the duty of the Clerk of the Supreme Court . . . to notify the warden of the penitentiary of the date of the filing of the opinion or order of such Court." Thus in case of appeal, it is only after the Supreme Court finds *"no error in the trial"* that the warden of the penitentiary may carry out the mandate of the trial court for the execution of the condemned person.

It is noted that the trial of this case in the Superior Court took place before the opinion in the *Little case* was handed down. And it is significant that though no objection to the remarks was made or exception taken at the time, the record shows that solicitor agrees that the statement of case on appeal, containing exception to his remarks and assignment of error based thereon, shall constitute the case on appeal. This meets the requirement of an exceptive assignment of error. Rule 21 of Rules of Practice in Supreme Court, 221 N. C., 544.

For error indicated, there must be a

New trial.

BANKS W. BASS v. LILLIE PATTERSON BASS.

(Filed 4 June, 1948.)

1. Frauds, Statute of, § 12: Husband and Wife § 12c—

Demurrer is properly sustained to a cause of action based on allegations that plaintiff conveyed to his wife certain lands pursuant to an agreement that she would hold the property for the benefit of both, since a grantor may not engraft a parol trust in his favor on his deed absolute in form.

2. Husband and Wife § 12c—

Where the husband pays the purchase price of land and has conveyance made to his wife, the law will presume a gift of the land to the wife, but the presumption is subject to rebuttal by clear, strong and convincing proof.

3. Husband and Wife §§ 6, 12c—

Where the husband pays the purchase price and has conveyance of land made to his wife, her agreement to hold title for the benefit of them both does not affect her separate estate, and it is not required that the agreement be executed in the manner set forth in G. S., 52-12.

4. Husband and Wife § 12c: Trusts § 4b—

A complaint alleging that plaintiff paid the purchase price for certain lands and had conveyance made to his wife under a parol agreement that she would hold title for the benefit of them both, states a cause of action and demurrer thereto is properly overruled, but plaintiff has the burden of establishing the resulting trust by clear, strong and convincing proof.

APPEAL by defendant from *Morris, J.*, at March Term, 1948, of ALAMANCE.

This is a civil action to establish a parol trust in favor of the plaintiff.

The plaintiff and defendant were married prior to 2 February, 1934, and lived together as man and wife until 3 February, 1946, when they separated and thereafter the defendant obtained a divorce from the plaintiff.

The plaintiff alleges that while he and the defendant were living together as man and wife he conveyed to the defendant certain real estate and caused other real property purchased by him to be conveyed to his wife, pursuant to an agreement with her that she would hold such property for the benefit of the plaintiff and the defendant.

The defendant demurred to the complaint on the ground that the facts alleged are insufficient to constitute a cause of action. The demurrer was overruled, and the defendant appealed, assigning error.

Thos. C. Carter and Long & Ross for plaintiff.

A. M. Carroll for defendant.

DENNY, J. The plaintiff conveyed certain property to the defendant and now seeks to establish a parol trust in his favor for a one-half interest in the property. A parol agreement in favor of a grantor, entered into at the time or prior to the execution of a deed, and at variance with the written conveyance, is unenforceable in the absence of fraud, mistake, or undue influence. *Loftin v. Kornegay,* 225 N. C., 490, 35 S. E. (2d), 607; *Carlisle v. Carlisle,* 225 N. C., 462, 35 S. E. (2d), 418; *Davis v. Davis,* 223 N. C., 36, 25 S. E. (2d), 181; *Winner v. Winner,* 222 N. C., 414, 23 S. E. (2d), 251; *Taylor v. Addington,* 222 N. C., 393, 23 S. E. (2d), 318; *Insurance Co. v. Morehead,* 209 N. C., 174, 183 S. E., 606; *Cavenaugh v. Jarman,* 164 N. C., 372, 79 S. E., 673; *Jones v. Jones,* 164 N. C., 320, 80 S. E., 430; *Gaylord v. Gaylord,* 150 N. C., 222, 63 S. E., 1028.

The complaint does not allege a cause of action in so far as the plaintiff seeks to engraft a parol trust in his favor in lands conveyed by him in an instrument which clearly indicates on its face that an absolute and unconditional estate was intended to pass.

The plaintiff alleges, however, that he purchased other properties and caused them to be placed in his wife's name pursuant to an agreement with her that she would hold such properties for their joint benefit.

The mere fact that a husband paid the purchase price for property and "caused title to be taken in his wife's name does not create a resulting trust in his favor, . . . but, on the contrary, where a husband pays the purchase money for land and has the deed made to his wife, the law presumes he intended it to be a gift to the wife," *Carlisle v. Carlisle, supra. Thurber v. LaRoque,* 105 N. C., 301, 11 S. E., 460; *Arrington v. Arrington,* 114 N. C., 116, 19 S. E., 351; *Ricks v. Wilson,* 154 N. C., 282, 70 S. E., 476; *Singleton v. Cherry,* 168 N. C., 402, 84 S. E., 402; *Nelson v. Nelson,* 176 N. C., 191, 96 S. E., 986; *Whitten v. Peace,* 188 N. C., 298, 124 S. E., 571; *Tire Co. v. Lester,* 190 N. C., 411, 130 S. E., 451; *Carter v. Oxendine,* 193 N. C., 478, 137 S. E., 424. This presumption, however, is one of fact and is rebuttable. *Faggart v. Bost,* 122 N. C., 517, 29 S. E., 833; *Flanner v. Butler,* 131 N. C., 155, 42 S. E., 547; *Carter v. Oxendine, supra; Bank v. Crowder,* 194 N. C., 312, 139 S. E., 604.

In *Flanner v. Butler, supra,* in considering whether or not a trust could be established between a husband and wife, since property purchased by the husband and conveyed to the wife is presumed to be a gift, the Court said: "But this is only the presumption of a fact the law makes, which may be rebutted by evidence, and, when this is done, the parties then stand as if they were not man and wife, that is, they stand as other parties, and the general rule prevails."

A married woman may enter into a parol agreement with her husband to hold title to real estate conveyed to her by a third party, for his benefit

or for their joint benefit. Such an agreement would not involve her separate estate. Consequently such contract is not required to be executed in the manner set forth in G. S., 52-12. Even so, a husband, in order to establish a parol trust in his favor, where his wife holds title to property purchased by him and placed in her name, must overcome the presumption that it was a gift. In order to overcome this presumption and establish a parol trust in his favor, in the absence of fraud, mistake or undue influence, the burden is on the husband to show by clear, cogent and convincing proof that it was the intention of the parties, at the time the property was purchased and conveyed to the wife, that such property was to be held for the benefit of the husband or for their joint benefit. 26 Am. Jur., 727; 41 C. J. S., 633; 30 C. J., 704; *Carlisle v. Carlisle, supra; Anderson v. Anderson,* 177 N. C., 401, 99 S. E., 106; *McCorkle v. Beatty,* 226 N. C., 338, 38 S. E. (2d), 102.

While the burden of making out his case before the jury rests on the plaintiff, and whether or not he can do so is no concern of ours, we do think the complaint is sufficient to survive the demurrer.

The judgment of the Court below is

Affirmed.

AMERICAN CIGARETTE AND CIGAR COMPANY, INC., v. M. C. GARNER, TRADING AND DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF M. C. GARNER TRUCK LINES.

(Filed 4 June, 1948.)

1. Carriers § 12—

The common law rule that a carrier, in the absence of special contract, is liable for loss of goods in transit unless the carrier can show that loss was attributable to act of God, the public enemy, fault of the shipper, or inherent defect in the goods shipped, applies to interstate shipments as well as intrastate shipments, since the rule has not been changed by decision of the Federal courts or by Federal statute, the reference to negligence in the Carmack and Cummins Amendments to the Hepburn Act applying only in case of failure to give required notice of claim.

2. Same—

Armed robbers are not "public enemies" within the meaning of the rule of liability of common carriers.

3. Carriers § 3—

The Federal statutes regulating transportation in interstate commerce by rail are made applicable to motor carriers. 49 U. S. C. A., 319.

4. Carriers § 12—

Allegations of delivery of goods to a carrier for shipment and nondelivery by the carrier are sufficient to state a cause of action, and the

fact that the complaint also alleges the loss was due to carelessness of the carrier in handling the goods does not require plaintiff to prove negligence or make the law of bailments applicable.

APPEAL by plaintiff from *Bone, J.*, at September Term, 1947, of DURHAM. Reversed.

Suit by the shipper for loss of goods delivered to defendant, a common carrier, for shipment interstate.

Jury trial was waived and under stipulation the trial judge found that the defendant, a common carrier, received from the plaintiff in Durham, N. C., a shipment of cigarettes for transportation by motor truck and trailer to a point in New Jersey. Plaintiff paid the freight and received bill of lading therefor. En route a major portion of the goods, in value $29,888.35, was stolen by persons unknown and was never delivered. The court found the loss was not caused by any act or negligence of the carrier or his agent, and adjudged that the plaintiff recover nothing.

Plaintiff excepted and appealed.

Fuller, Reade & Fuller for plaintiff, appellant.

Ruark & Ruark for defendant, appellee.

DEVIN, J. The plaintiff's appeal presents the question whether the finding by the court that the shipment of goods was received by a common carrier for transportation in interstate commerce, and bill of lading issued therefor, without limitation or exception, and that, due to robbery by unknown persons, the goods were lost en route and never delivered was alone sufficient to impose liability for the value thereof upon the defendant carrier.

The common law rule holds a common carrier, in the absence of special contract, liable for loss of goods in transit, unless the carrier can show that the loss was attributable to an act of God, the public enemy, the fault of the shipper, or inherent defect in the goods shipped. This rule obtains in this jurisdiction as to intrastate shipments. *Merchant v. Lassiter,* 224 N. C., 343, 30 S. E. (2d), 217. In that case it was said, "A carrier is an insurer against loss of goods received for shipment. . . . It is bound to safely carry and deliver merchandise received and accepted for transportation (*Meredith v. R. R.,* 137 N. C., 478, 50 S. E., 1), and in case of loss plaintiff need only prove delivery to and nondelivery by the carrier," citing *Morris v. Express Co.,* 183 N. C., 144, 110 S. E., 855; *Moore v. R. R.,* 183 N. C., 213, 111 S. E., 166; *Perry v. R. R.,* 171 N. C., 158, 88 S. E., 156.

In the case at bar the shipment was interstate; hence "rights and liabilities of the parties depend upon Acts of Congress, the bill of lading, and common law rules as accepted and applied in Federal tribunals."

Cincinnati, N. O. & T. P. R. Co. v. Rankin, 241 U. S., 319; *White v. Southern R. Co.,* 208 S. C., 319, 38 S. E. (2d), 111; 165 A. L. R., 988. Accordingly it is argued here that the language of the Carmack and Cummins Amendments to the Hepburn Act declaring the carrier liable for any loss of goods in transit "caused by it," and that if loss be due to "carelessness or negligence" of the carrier no notice of claim should be required as condition precedent to recovery, indicates a modification of the common law rule, but we think the reference to negligence as affecting the carrier's liability applies only in case of failure to give required notice of claim. *Cincinnati, N. O. & T. P. R. Co. v. Rankin,* 241 U. S., 319; *Adams Exp. Co. v.. Croninger,* 226 U. S., 491; *Missouri K. & T. R. Co. v. Harriman Bros.,* 227 U. S., 657 (672); *Chesapeake & O. R. Co. v. Thompson Mfg. Co.,* 270 U. S., 416; *Gillette Safety Razor Co. v. Davis,* 278 Fed., 864; *Lehigh Valley R. Co. v. Lysaght,* 271 Fed., 906. The rule of substantive law that the common carrier is liable for failure to transport safely goods received by him for shipment interstate, unless the loss be due to one of the causes herein referred to, has not been changed by statute or authoritative rule of the Federal courts. *Chesapeake & O. R. Co. v. Thompson Mfg. Co.,* 270 U. S., 416; *Cincinnati, N. O. & T. P. R. Co. v. Rankin,* 241 U. S., 319; *Chicago & E. Ill. R. Co. v. Collins Produce Co.,* 249 U. S., 186. Proof of delivery to carrier and failure to transport safely to consignee was sufficient to make out a case. "If the failure to deliver was due to the act of God, the public enemy, or some cause against which it might lawfully contract, it was for the carrier to bring itself within such exception. In the absence of such proof, the plaintiffs are entitled to recover." *Galveston H. & S. A. R. Co. v. Wallace,* 223 U. S., 481.

That the loss of the goods was due to robbery on the part of unknown persons does not relieve the carrier. While armed robbers may be in a sense enemies of society, the loss due to their depredations may not be held in law to come within the definition of "public enemies" as affecting the liability of a common carrier of goods (9 Am. Jur., 860, and cases cited; 20 A. L. R., 262 (Annotation)), in the absence of exemption therefor in the bill of lading, *Kesler v. S. Ry. Co.,* 200 Ky., 713. The Federal statutes regulating transportation in interstate commerce by rail are made applicable to motor carriers. 49 U. S. C. A., sec. 319.

While the plaintiff in its complaint referred to the loss of the goods as due to the carelessness of the defendant in handling the shipment, its allegations of delivery of the described goods to and receipt by defendant, a common carrier, for shipment, and loss of the goods and failure to deliver to the consignee, was sufficient to state a cause of action, without requiring proof of negligence, or applying the law of bailments.

For the reasons stated the court below was in error, and the judgment is

Reversed.

W. L. NOAH v. SOUTHERN RAILWAY CO. ET AL.

and

GLOVER B. REYNOLDS v. SOUTHERN RAILWAY CO. ET AL.

(Filed 4 June, 1948.)

1. Negligence § 20—

An instruction on the issue of contributory negligence that the burden is on defendant to satisfy the jury by the greater weight of the evidence not only that plaintiff was negligent but that his negligence was the proximate cause of the injury *is held* reversible error in omitting the question of concurring negligence.

2. Negligence § 11—

Contributory negligence imports contribution rather than independent or sole proximate cause, and bars recovery if it contributes to the injury as a proximate cause or one of them.

APPEAL by defendants from *Clement, J.*, at January Term, 1948, of FORSYTH.

Civil actions by owner of taxicab and its driver to recover damages for alleged negligent injuries to both cab and driver, by consent, consolidated and tried together as the two actions arose out of the same circumstances.

It is in evidence that on 5 November, 1946, there was a collision at the West Point Avenue grade crossing in High Point, N. C., between a Noah's Ark Taxicab, owned by W. L. Noah and operated at the time by Glover B. Reynolds, and the diesel-powered locomotive of a northbound fast passenger train No. 36, of the Southern Railway Company driven by engineer C. M. Rives.

The evidence is in sharp conflict on the issues of negligence, contributory negligence and damages, save perhaps the damage to the taxicab which seems to have received but little attention.

There was a verdict and judgment for the plaintiff in each case, from which the defendants appeal, assigning errors.

A. B. Cummings and Deal & Hutchins for plaintiffs, appellees.

Womble, Carlyle, Martin & Sandridge and W. T. Joyner for defendants, appellants.

STACY, C. J. A careful perusal of the record leaves us with the impression that a new trial must be awarded for error in the charge on the issue of contributory negligence.

"To constitute contributory negligence," the jury was instructed on several occasions, "the defendants must satisfy you on the second issue, by the greater weight of the evidence, that the plaintiff was negligent,

and that his negligence was the proximate cause of the injury. . . . The mere fact that plaintiff is negligent would not warrant you in answering the issue against the plaintiff. It would be necessary for the defendants to go further and satisfy you, by the greater weight of the evidence, not only that Reynolds was negligent in operating the taxi, but that his negligence was the proximate cause of the injury."

The objection to this instruction is, that it omits the essential elements of concurring negligence, as pointed out in *Brown v. Montgomery Ward,* 217 N. C., 368, 8 S. E. (2d), 199, and *Wright v. Grocery Co.,* 210 N. C., 462, 187 S. E., 564, where new trials were awarded on similar instructions.

The plaintiff's negligence need not be the sole proximate cause of the injury to bar recovery, for "contributory negligence," *ex vi termini,* signifies contribution rather than independent or sole proximate cause. *Tyson v. Ford,* 228 N. C., 778, 47 S. E. (2d), 251. It is enough if it contribute to the injury as a proximate cause, or one of them. *Godwin v. R. R.,* 220 N. C., 281, 17 S. E. (2d), 137. The plaintiff may not recover in an action like the present, when his negligence concurs with the negligence of the defendant in proximately producing the result. *Tarrant v. Bottling Co.,* 221 N. C., 390, 20 S. E. (2d), 565.

For error as indicated a new trial seems necessary. It is so ordered.

New trial.

H. L. KING v. F. L. BYRD ET AL.

(Filed 4 June, 1948.)

Trial § 49—

Motion to set aside the verdict on the ground that it is against the weight of the evidence is addressed to the sound discretion of the trial court. G. S., 1-207.

APPEAL by defendants from *Bone, J.,* at October-November Term, 1947, of DURHAM.

Civil action to dissolve alleged partnership and for an accounting.

Plaintiff alleges that on or about 1 January, 1946, he and the defendants entered into a business partnership under the firm name and style of B. & W. Electric Service, and operated the same at 810 Cleveland Street, Durham, N. C.; that plaintiff no longer desires to continue the association in the business as a partner, and has so notified the defendants; that no satisfactory basis of liquidation has been agreed upon; wherefore, plaintiff brings this action for dissolution of the partnership, for an accounting and for a division of the assets.

The defendants answered, denying the existence of any partnership with the plaintiff, and alleging that plaintiff was employed by the defendants on a salary basis as an electrical helper; that he was not a licensed electrician, and that he had never qualified himself to become a partner in the business, but defendants offer to form a partnership with the plaintiff upon his obtaining an electrician's license as required by the ordinance of the City of Durham.

Upon the issue thus joined, the jury returned the following verdict:

"Did the plaintiff and the defendants enter into a co-partnership as alleged in the complaint? Ans. Yes."

Judgment was thereupon entered on the verdict, declaring the existence of a partnership, and ordering a reference under the statute to hear and determine the remaining matters in controversy.

The defendants appeal, assigning as error the ruling on the demurrer to the evidence, and the refusal of the court to set aside the verdict as against the greater weight of the evidence.

A. W. Kennon, Jr., for plaintiff, appellee.

Fuller, Reade & Fuller for defendants, appellants.

STACY, C. J. The evidence was sufficient to carry the case to the jury on the issue submitted, and the refusal to set aside the verdict as against the weight of the evidence was a matter addressed to the sound discretion of the trial court. G. S., 1-207; *Goodman v. Goodman,* 201 N. C., 808, 161 S. E., 686.

On the record, as presented, 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, 1948

STATES' RIGHTS DEMOCRATIC PARTY, AN UNINCORPORATED, VOLUNTARY, POLITICAL ASSOCIATION, PHILIP S. FINN, JR., STATE CHAIRMAN OF STATES' RIGHTS DEMOCRATIC PARTY, AND DAVID CLARK AND PHILIP S. FINN, JR., ON BEHALF OF THEMSELVES AND MORE THAN 10,000 QUALIFIED VOTERS OF NORTH CAROLINA, PETITIONERS, v. NORTH CAROLINA STATE BOARD OF ELECTIONS, AND HUBERT OLIVE, CHAIRMAN, AND ADRIAN MITCHELL, WALTER H. WOODSON, J. R. MORGAN, AND THOMAS C. CARTER, MEMBERS CONSTITUTING THE N. C. STATE BOARD OF ELECTIONS, RESPONDENTS.

(Filed 8 September, 1948.)

1. Elections § 7—

Upon the filing of a petition under G. S., 163-1, for the creation of a new political party, it is the duty of the State Board of Elections, in the first instance, to determine whether the petition is in accordance with the statutory requirements.

2. Same—

In determining whether the petition for the creation of a new political party meets the statutory requirements, it is the duty of the State Board of Elections to determine whether the petition is signed by at least 10,000 registered voters, which it may do by resort to the registration books through the agency of the county boards of elections. G. S., 163-10. In the present case petitioners offered to bear the expense of checking the signatures against the registration books so that the adequacy of public funds expendable for this purpose did not arise.

3. Same—

The State Board of Elections is not under duty to determine the sufficiency of a petition for the creation of a new political party at the time

the petition is filed, but the Board is given approximately sixty days for this purpose between the time the petition is required to be filed, G. S., 163-1, and the time the ballots must be printed and delivered to the county boards of elections, G. S., 163-151.

4. Same: Constitutional Law § 21—

In order to meet the constitutional requirement of due process, the State Board of Elections must give petitioners for the creation of a new political party notice and an opportunity to be heard before rejecting the petition as insufficient.

5. Elections § 7—

The State Board of Elections has power to make reasonable rules and regulations for carrying into effect the law it was created to administer, but it cannot promulgate rules and regulations which conflict with any provisions of the statute. G. S., 163-10 (2) (15), G. S., 163-183.

6. Constitutional Law § 8c: Administrative Law § 3—

The General Assembly cannot delegate authority to make law, and an administrative agency has no power to promulgate rules and regulations which alter or add to the law it is set up to administer.

7. Administrative Law § 4—

A petition is a formal written request made to some official or body having authority to grant it; a certificate is a document in which the issuing officer states that a thing has or has not been done, or that an act has or has not been performed.

8. Elections § 7—

The State Board of Elections is without authority to add to the statutory requirements of a petition for the creation of a new political party under G. S., 163-1, an additional requirement that the petition be accompanied by certificates from the county boards of elections certifying that in the aggregate at least 10,000 of the signers of the petition are registered voters who have not voted in any primary election of any existing political party during the year in which the petition is signed.

9. Same—

The primary laws have no application to new political parties created under G. S., 163-1, and the State Board of Elections has no power to promulgate regulations making non-participation in a primary of an existing political party during the year a qualification of electors signing a petition for the creation of a new political party, there being no such qualification implicit or explicit in the statute.

10. Same—

A regulation of the State Board of Elections that petitioners for the creation of a new political party must show that the signers of the petition were registered voters who had not participated in the primary election of any existing political party during the year is void, and such regulation cannot be upheld by striking therefrom, under the guise of legal construction, that part of the regulation requiring that the certificate show

that the signers had not participated in a primary of any existing political party.

11. Administrative Law § 3—

In construing the regulation of an administrative agency it must be presumed that every part of the regulation was promulgated for a purpose and intended to be carried into effect, and the courts may not uphold such regulation by striking therefrom such portions as are beyond the authority of the agency.

12. Elections § 7: Mandamus § 2a—

Where a petition which meets all of the requirements of G. S., 163-1, is aptly filed, it is the statutory duty of the State Board of Elections to cause the names of the nominees of such new political party to be printed on the official ballot, and *mandamus* will lie to compel the performance of such duty.

STACY, C. J., dissenting.

APPEAL by respondents from *Harris, J.*, August 20, 1948, in proceeding in the Superior Court of WAKE County.

On March 20, 1948, the State Board of Elections, a political agency of North Carolina created and existing under chapter 163 of the General Statutes, adopted certain rules and regulations for the avowed purpose of implementing the provisions of G. S., 163-1, governing the creation of new political parties in North Carolina. These rules and regulations were filed with the Secretary of State on March 25, 1948, and are summarized below in so far as they are germane to the controversy resulting in this litigation.

Regulations Nos. 2 and 4 prescribed, in substance, that any group of voters desiring to create a new state political party under G. S., 163-1, must attach to and file with the petition required by the statute certificates from chairmen of county boards of elections in the several counties in which signatures to the petitions are obtained, certifying to the State Board of Elections in the aggregate that an examination of the registration and poll books discloses that at least 10,000 of the signers of the petition are registered voters who have not "voted in the primary election of any existing party during the year in which the petition is signed by the voters." Regulation No. 5 stipulates that upon request of any group of voters desirous of creating a new political party and upon payment by such group of a fee of ten cents for each name checked to the election officer doing the checking, the chairman of any county board of elections in any county in which signatures to the statutory petition are obtained shall cause the names of the electors of his county signing the petition to be checked against the registration and poll books of his county and shall issue and present to such group of voters for attachment to their petition the certificates required by Regulations Nos. 2 and 4.

At least ninety days before the general election scheduled for November 2, 1948, to wit, on August 3, 1948, the individual petitioners and other voters of the State undertook to organize the States' Rights Democratic Party as a state political party under G. S., 163-1, by filing with the State Board of Elections a petition signed by 18,681 persons representing themselves to be qualified voters in various counties of North Carolina. The contents of the petition other than the signatures of the signers and their voting precincts were as follows:

"We, the undersigned qualified voters of North Carolina, hereby declare our intention of organizing a state political party to be known and designated as States' Rights Democratic Party, and we also declare our intention of participating in the next succeeding election to be held on November 2, 1948; and ask to have the names of candidates of the party for president and vice president of the United States and/or electors for the same to appear on the ballot. The name and address of the State Chairman of the States' Rights Democratic Party is Col. Philip S. Finn, Jr., of 1325 Oakland Street, Hendersonville, North Carolina."

It is noted here that the State Board of Elections has never questioned the genuineness of the signatures appearing upon the petition.

The petition was not accompanied by any certificates from any chairmen of any county boards of elections as required by Regulations Nos. 2 and 4 of the State Board of Elections, but contemporaneously with the filing of the petition, the petitioners offered to pay the cost of checking the names of the signers of the petition against the registration books of their respective counties at the rate specified in Regulation No. 5.

On August 4, 1948, the State Board of Elections rejected the petition filed with it on the preceding day and refused to print the names of any of the nominees of the States' Rights Democratic Party on the ballot to be used in the general election on November 2, 1948, because the petitioners and their associates had not attached to and filed with the petition certificates from chairmen of any county boards of elections certifying the matters prescribed by Regulations Nos. 2 and 4. In making this ruling, the State Board of Elections did not challenge the genuineness of any of the signatures appearing on the petition, or the accuracy of the claim of the petitioners that at least 10,000 qualified voters had signed the petitions, and did not request the petitioners to submit any evidence relating to these matters.

Between the 10th and the 20th days of August, 1948, certain of the signatures upon the petition selected by petitioners were checked against the regular registration books by the chairmen of the county boards of elections in the counties in which such signatures had been obtained pursuant to an agreement between the petitioners and the State Board of Elections that the cost of such checking was to be borne by the peti-

tioners in the manner and at the rate specified in Regulation No. 5 and that such checking was not to constitute a waiver of the prior action of the State Board of Elections rejecting the petition or a waiver of any of the provisions of the rules and regulations adopted by the State Board of Elections on March 20, 1948. The checking of these selected signatures against the regular registration books under the circumstances stated revealed that 12,584 of the same were the signatures of duly registered and qualified voters, and this fact was certified to the State Board of Elections by the local election officers before the hearing in this proceeding in the Superior Court. But no effort was ever made by the petitioners to show whether the signers of the petition had or had not voted in the primary elections of the Democratic or Republican parties held in May and June, 1948.

On August 16, 1948, the petitioners brought this proceeding against the respondents, praying a declaration that the petitioners and the group of voters acting with them had duly qualified as a new political party under G. S., 163-1, under the name of States' Rights Democratic Party and were entitled as such to participate in the general election to be held on November 2, 1948, and asking that a writ of *mandamus* forthwith issue compelling the respondents to cause the names of J. Strom Thurmond and Fielding Wright, the nominees of the party for President and Vice-President, to be printed on the official ballot to be used in such general election.

Trial by jury was waived, and the proceeding was heard by the court below on August 20, 1948. The respondents "waived all questions as to the time and place of the hearing and stated that they raised no question as to the form of the action or matters of procedure" to the end that the claim of the petitioners and the group of voters acting with them to recognition as a new political party under the statute might be speedily decided on the merits. It was agreed by counsel both in the court below and here that this proceeding should be treated as an application for a writ of *mandamus* and it has been so regarded by the parties at all stages.

After hearing the admissions of the parties and the testimony adduced by them, the trial court made certain findings of fact. Among them were the following: "That on August 3, 1948, there were filed with respondent board petitions signed by more than 10,000 qualified registered voters, declaring their intention of organizing a state political party under the name of States' Rights Democratic Party, and stating the name and address of the State Chairman of such party, and also declaring their intention of participating in the next succeeding election and requesting to have the names of candidates of said political party for President and Vice-President of the United States and/or electors for the same to appear on the ballot, and contemporaneously with the filing of said

petitions, the petitioners offered to pay the cost of checking the names of said petitioners against the general election registration books in the several counties. That the petitioners at the time of filing said petitions did not file with the respondent Board of Elections any certificates of any chairmen of any county boards of elections as required by the rules and regulations of the said Board adopted on March 20, 1948."

The court below concluded, in effect, that Regulations Nos. 2 and 4 of the State Board of Elections were "unreasonable and invalid." Upon the admissions of the parties, its findings of fact, and its conclusions of law, the trial court rendered judgment declaring that the States' Rights Democratic Party had fully qualified as a new state political party under G. S., 163-1, and was entitled as such to participate in the general election to be held on November 2, 1948, and issuing a writ of *mandamus* ordering the respondent, the State Board of Elections, to cause the names of J. Strom Thurmond and Fielding Wright, the nominees of the party for President and Vice-President, to be printed on the official ballot for use in such general election as provided by law. From this judgment, the respondents appealed to this Court, assigning errors.

Edwin H. Malone and J. L. Emanuel for petitioners, appellees.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for respondents, appellants.

ERVIN, J. G. S., 163-1, authorizes and regulates the creation of new political parties in North Carolina. This statute defines such a party to be "any group of voters which shall have filed with the State Board of Elections, at least ninety days before a general state election, a petition signed by ten thousand qualified voters, declaring their intention of organizing a state political party, the name of which shall be stated in the petition together with the name and address of the state chairman thereof, and also declaring their intention of participating in the next succeeding election." The statute further provides that "when any new political party has qualified for participation in an election as herein required, and has furnished to the State Board of Elections the names of such of its nominees as is desired to be printed on the official ballots by the first day of September prior to the election, it shall be the duty of the State Board of Elections to cause to be printed on the official ballots furnished by it to the counties the names of such nominees. When any political party fails to cast three per cent of the total vote cast at an election for governor, or for presidential electors, it shall cease to be a political party within the meaning of this chapter."

Undoubtedly the duty of determining whether the petition in controversy was in accordance with the requirements of G. S., 163-1, devolved

in the first instance upon the State Board of Elections. *Gill v. Wake County,* 160 N. C., 176, 76 S. E., 203, 43 L. R. A. (N. S.), 293; *In re Murphy,* 189 App. Div., 135, 178 N. Y. S., 236; 9 R. C. L., Elections, section 18. The performance of this duty necessarily required the Board to ascertain whether the petition had been signed by at least 10,000 qualified voters. Since an elector must be registered to be qualified, it was incumbent upon the State Board of Elections to determine whether at least 10,000 of the signers of the petition were registered. G. S., 163-27; *Williams v. Commissioners,* 176 N. C., 554, 97 S. E., 478; *Clark v. Statesville,* 139 N. C., 490, 52 S. E., 52; *McDowell v. Construction Co.,* 96 N. C., 514, 2 S. E., 1; *Southerland v. Goldsboro,* 96 N. C., 49, 1 S. E., 760.

The Board has the authority to determine the registration or non-registration of the signers of a petition for the creation of a new political party by an examination of the registration books. *Wicksel v. Cohen,* 262 N. Y., 446, 187 N. E., 634. Indeed, the plenary power vested in the Board by the statutes to supervise elections and to require reports from local election officers affords a reasonable basis for the deduction that the Legislature intends the Board to resort to the registration books for this purpose through the agency of the county boards of elections in the several counties as a mere matter of administrative routine before calling upon the signers of the petition to prove that it has been signed by the requisite number of qualified voters. G. S., 163-10. The task of inspecting the registration books through the agency of local election officers to determine whether at least 10,000 of the signers of a petition for the creation of a new political party are registered voters is not an insuperable one. As a matter of fact, the record discloses that it was ascertained without difficulty in this way within a space not exceeding ten days that 12,584 of the signers of the petition in controversy were duly registered. Moreover, any suggestion of an inadequacy of public funds expendable for this purpose by the State Board of Elections or by the county boards of elections in the several counties is without merit in the case at bar because the petitioners here offered to bear the expense of any necessary inspection of the registration books by election officers at the time when the petition was filed with the State Board.

When it enacted the statute relating to the creation of new political parties, the Legislature did not impose upon the State Board of Elections any duty to make a determination as to the sufficiency of the petition at the time of its filing. The reverse is true. It prescribed that the petition must be filed with the State Board of Elections "at least ninety days before a general state election." G. S., 163-1. As G. S., 163-151, specifies that ballots for use in general elections shall be printed and delivered to the County Boards of Elections "at least thirty

days previous to the date of elections," the indisputable purpose of the provision of G. S., 163-1, concerning the time for filing a petition for the creation of a new political party was to afford the State Board of Elections approximately sixty days as the time in which to determine the sufficiency of the petition and to print ballots for use in the general election bearing the names of the nominees of the new political party in the event the petition for its creation is found to conform to the statute.

Manifestly the statutes creating the State Board of Elections and defining its duties contemplate that the Board shall give petitioners for the creation of a new political party under G. S., 163-1, notice and an opportunity to be heard in support of their petition before rejecting it or adjudging it insufficient. 42 Am. Jur., Public Administrative Law, section 135. Indeed, notice and hearing in such case are necessary to meet the constitutional requirement of due process of law—"a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial." *Dartmouth College v. Woodward,* 4 Wheat., 518, 4 U. S. (L. Ed.), 629; N. C. Const., Art. I, section 17.

Here, however, the State Board of Elections peremptorily rejected the petition of the group of voters desiring to create the States' Rights Democratic Party without notice or an opportunity to be heard upon the question as to whether their petition had been signed by 10,000 qualified voters.

G. S., 163-1, is so plain and unambiguous as to speak for itself. The record here establishes indisputably that the individual petitioners and the group of voters associated with them have performed with exactness and nicety every condition set out in this statute as a prerequisite to their existence as a new political party under the name of States' Rights Democratic Party. Despite this fact, however, the respondents most earnestly insist that the plain words of G. S., 163-1, must be set at naught and the manifest will of the 12,584 qualified voters signing the petition must be thwarted because the petitioners and those acting with them did not attach to the petition certificates from chairmen of county boards of elections in the several counties in which signatures to the petition were obtained certifying in the aggregate that an examination of the registration and poll books disclosed that at least 10,000 of the signers of the petition were registered electors who did not vote in the primary elections of either the Democratic or Republican parties in 1948 as required by Regulations Nos. 2 and 4 adopted by the State Board of Elections on March 20, 1948. Hence, it appears that this appeal necessitates a determination as to the validity of these regulations.

The General Assembly has conferred upon the State Board of Elections power to make reasonable rules and regulations for carrying into effect the law it was created to administer, but has annexed to the grant

of this power the express limitation that such rules and regulations must not conflict with any provisions of such law. G. S., 163-10, subsections 2 and 15; G. S., 163-183; *Burgin v. Board of Elections,* 214 N. C., 140, 198 S. E., 592. It seems clear that this specific restriction would have been inseparably wedded to the authority granted even if the statutes had been silent with respect to it. This is true because the Constitution forbids the Legislature to delegate the power to make law to any other body. *Provision Co. v. Daves,* 190 N. C., 7, 128 S. E., 593. As the text writer in 42 Am. Jur., Public Administrative Law, section 99, has so well said: "Administrative rules and regulations, to be valid, must be within the authority conferred upon the administrative agency. The power to make regulations is not the power to legislate in the true sense, and under the guise of regulation legislation may not be enacted. The statute which is being administered may not be altered or added to by the exercise of a power to make regulations thereunder."

It is to be observed that a "petition" is one thing, and a "certificate" is another. A petition is a formal written request made to some official or body having authority to grant it. *State ex rel. Jackson v. School Dist. No. 2,* 140 Kan., 171, 34 P. (2d), 102. But a certificate imports a document in which the issuing officer states "that a thing has or has not been done, that an act has or has not been performed." *Dolan v. United States,* 133 F., 441, 69 C. C. A., 274.

G. S., 163-1, requires a group of voters desirous of creating a new political party to file with the State Board of Elections "a petition" signed by at least 10,000 qualified voters with contents as specified in the statute. While professing to act by way of regulation, the State Board of Elections adds to the statutory requirements concerning the petition the additional mandatory condition that the petitioners must attach to and file with the petition the "certificates" described in Regulations Nos. 2 and 4. Consequently, the State Board of Elections has decreed, in substance, that a petition for the creation of a new political party complying strictly with G. S., 163-1, is legally inoperative unless the petitioners attach thereto and file therewith certificates conforming to such regulations. This is legislating rather than regulating, and vitiates these regulations.

The respondents urge, however, that the regulations here considered are not intended to add anything to the statutory requirements relating to petitions for the creation of new political parties. They assert that an elector is a qualified voter within the purview of G. S., 163-1, only if he meets these two conditions, namely: (1) He must be registered; and (2) he must not have voted in the primary election of any existing political party during the year in which the petition is signed. They maintain that Regulations Nos. 2 and 4 are designed merely to establish

an expeditious procedure for determining whether a petition for the creation of a new party has been signed by at least 10,000 registered voters who did not vote in the primary election of an existing party during the year in which the petition is signed, and are admirably adapted to secure this end, and should be upheld as a valid exercise of the rule making power of the State Board of Elections.

If this Court is permitted to follow the plain intent and meaning of the language employed by the Legislature in providing for the creation of new political parties, it must necessarily hold that G. S., 163-1, confers upon any qualified voter the legal right to sign a petition for the creation of a new political party irrespective of whether such voter has participated in the primary election of an existing political party during the year in which the petition is signed, and that Regulations Nos. 2 and 4 of the State Board of Elections are invalid in so far as they undertake to establish and enforce the rule that a qualified voter is ineligible to join in a petition for the creation of a new political party during a year in which he has voted in the primary election of an existing political party. The respondents assert, however, that this Court is not at liberty to give to G. S., 163-1, its seeming meaning because the statute is modified by the laws relative to primary elections set forth in sub-chapter II of Chapter 163 of the General Statutes. The respondents do not point out any specific provisions of the primary laws expressly modifying the apparent import of G. S., 163-1, in respect to the qualifications of signers of petitions for the creation of new parties. But they insist that the primary laws imply that a qualified voter is barred from signing such a petition during any year in which he has voted in the primary election of an existing political party because "the law does not intend to provide for the same voter the right to participate in the nomination of two or more sets of candidates who participate in the same election, by having their names officially placed upon the ballot."

We cannot agree with this contention. A painstaking study reveals that there is nothing explicit or implicit in the primary laws modifying the plain meaning of the unambiguous words of G. S., 163-1, conferring upon any qualified voter the legal right to sign a petition for the creation of a new political party without regard to whether he has or has not voted in the primary election of an existing party during the year in which such petition is signed and filed.

The primary laws have no application to new political parties created by petition under G. S., 163-1. By express legislative declaration, such laws apply only to existing political parties "which, at the last preceding general election, polled at least three per cent of the total vote cast therein for" governor, or for presidential electors. G. S., 163-144. The law permits a new political party created by statutory petition to select

its candidates in its own way, and merely requires it to furnish "to the state board of elections the names of such of its nominees as is desired to be printed on the official ballots by the first day of September prior to the election." G. S., 163-1.

Nevertheless, the respondents maintain that the primary laws impose upon qualified voters participating in primary elections of existing parties a moral and legal obligation to the party in whose primary they vote disabling them to sign a statutory petition for the creation of a new political party during the year in which such primary election is held. As we are not the arbiters of the political morals of electors, we are not concerned here with any moral obligations which participation in the primary election of an existing political party may put upon voters with respect to such existing political party in the future. As expounders of the law, however, it is our duty to decide whether participation in the primary election of an existing political party legally disables a qualified elector to sign a petition for the creation of a new political party during the year in which such primary election is conducted.

The manifest purposes of the primary system set up by our laws is to secure to the members of an existing political party freedom of choice of candidates, and to confine the right of qualified electors to vote in party primaries to the primary of the existing political party of which they are members at the time of the holding of such primary. The law does attempt to place upon a candidate who seeks nomination to public office in the primary election of an existing political party an obligation to adhere to such existing political party for at least a limited time in the future by exacting of him a pledge "to abide by the results of said primary, and to support in the next general election all candidates nominated," by such existing political party. G. S., 163-119.

We are concerned here, however, with voters rather than with candidates and must consider the provisions of the primary laws relating to the former. These laws secure to the member of an existing political party freedom of choice of candidates by providing that he may vote for candidates for all or any of the offices printed on the ballots of the political party with which he affiliates "as he shall elect and that he shall disclose the name of the political party printed thereon and no more." G. S., 163-126.

No person is "entitled to participate or vote in the primary election of any political party unless he . . . has first declared and had recorded on the registration book that he affiliates with the political party in whose primary he proposes to vote, and is in good faith a member thereof, meaning that he intends to affiliate with the political party in whose primary he proposes to vote and is in good faith a member thereof." G. S., 163-123. When an elector undertakes to vote at a

primary election, "he shall declare the political party with which he affiliates and in whose primary he desires to vote . . ., and he shall then be furnished by the registrar ballots, as desired by him, of the political party with which he affiliates, which he may vote, and he shall not in such primary be allowed to vote a ticket marked with the name of any political party of which he has not declared himself to be a member." G. S., 163-126. Moreover, "any one may at any time any elector proposes to vote challenge his right to vote in the primary of any party upon the ground that he does not affiliate with such party or does not in good faith intend to support the candidates nominated in the primary of such party, and it shall be the duty of the registrar and judges of election upon such challenge to determine whether or not the elector has a right to vote in said primary." G. S., 163-126.

Manifestly, the laws regulating primary elections are admirably adapted to accomplish the objects they were enacted to achieve. These laws guarantee to the member of an existing political party freedom of choice of candidates. Likewise, they confine the right of a qualified elector to vote in party primaries to the primary of the existing political party with which he affiliates *at the time of the holding of the primary.* But they do not undertake to deprive the voter of complete liberty of conscience or conduct in the future in the event he rightly or wrongly comes to the conclusion subsequent to the primary that it is no longer desirable for him to support the candidates of the party in whose primary he has voted. Besides, the Legislature has expressly declared that nothing contained in the laws governing primary elections "shall be construed to prevent any elector from casting at the general election a free and untrammeled ballot for the candidate or candidates of his choice." G. S., 163-126. It inevitably follows that Regulations Nos. 2 and 4 of the State Board of Elections conflict with the pertinent statutes and are void by reason thereof in so far as they attempt to set up and establish a rule that voting in the primary election of an existing political party disables qualified electors to sign a petition for the creation of a new political party during the year in which such primary election is held.

The respondents say, however, that Regulations Nos. 2 and 4 must be sustained as a proper exercise of the rule making power of the State Board of Elections even if an elector is not disqualified to sign a petition under G. S., 163-1, by voting in the primary election of an existing political party during the year in which the petition is signed. They repeat their assertion that these regulations are not intended to add anything to the statutory requirements relating to the petition for the creation of a new party, that they are merely designed to establish an expeditious procedure for determining whether the petition has been

signed by at least 10,000 registered voters, and are reasonably adapted to secure that end. But this argument is subject to a fatal defect. It is based upon the fallacy that the regulations require the chairman of the county board of elections in a county in which signatures to the petition are obtained to certify to the State Board of Elections the names of all signers of the petition in his county who are registered voters. Such meaning cannot be found in the language of the regulations. The chairman of a county board of elections in a county in which signatures to the petition are obtained is permitted to certify to the State Board of Elections the information appearing on the registration and poll books of his county with reference to the names of the electors in his county who sign the petition only in case such electors meet both requirements prescribed by the regulations, namely: (1) Registration; and (2) Nonparticipation in the primary election of any existing political party during the year in which the petition is signed.

The Court is not at liberty to remodel Regulations Nos. 2 and 4 under the guise of construction by making idle and nugatory the part of its language precluding the certification of registered voters participating in the primary election of an existing political party during the year in which the petition is signed. In the interpretation of a regulation, the adopting agency must be presumed to have inserted every part of the regulation for a purpose, and to have intended that every part of the regulation should be carried into effect. 42 Am. Jur., Public Administrative Law, section 101; 50 Am. Jur., Statutes, section 358.

Hence, we are constrained to hold that Regulations Nos. 2 and 4 are invalid in any event in that they are not reasonably adapted to enable the State Board of Elections to determine the registration or nonregistration of the signers of petitions for the creation of new political parties.

Nothing here stated, however, is to be construed to intimate any opinion that the State Board of Elections is without authority to make rules and regulations requiring petitioners for the creation of a new political party to procure at their own expense and present to the Board for consideration as evidence in determining whether the sufficiency of the statutory petition has been established certificates from election officers concerning the mere registration or nonregistration of the signers.

The parties waived all questions as to the form of the action and procedural matters and agreed that the proceeding should be regarded as an application for a writ of *mandamus*. As it appeared beyond doubt at the hearing that the petition was signed by at least 10,000 qualified voters and otherwise met every requirement of G. S., 163-1, the court below properly ordered the State Board of Elections to perform its statutory duty to cause the names of the nominees of the States' Rights

Democratic Party for President and Vice-President to be printed on the official ballot for the general election scheduled for November 2, 1948. What was said in *Board of Education v. Comrs.*, 189 N. C., 650, 127 S. E., 692, is relevant here. "It is conceded, and we think properly so, that the duty of the county commissioners in considering the petition for the first election is not discretionary, but only ministerial, and that C. S., 5640, is mandatory. The board of county commissioners, under C. S., 5640, has the power to determine whether the petition complies with C. S., 5639 and 5640, but when it is admitted that the petition for the first election does comply with these requirements, they have no discretion to refuse to order the election."

The judgment of the Superior Court must be

Affirmed.

STACY, C. J., dissenting: The petitioners here seek, by writ of *certiorari,* to review, as upon appeal, the action of the State Board of Elections in denying to their nominees for President and Vice-President a place on the official ballot to be used in the general election on 2 November, 1948; and, by writ of *mandamus,* to compel the defendant to comply with the prayer of their petition.

The Board of Elections denied the privilege sought on the ground that the petitioners had not complied "with the law and rules and regulations adopted by the State Board of Elections" for all petitioners desiring to form a new political party and to have the names of its candidates placed on the official ballot. The petitioners freely concede that they have not complied with the rules and regulations promulgated by the Board, and assert that they are under no obligation to do so.

The trial court held that the State Board of Elections was authorized by law to adopt reasonable rules and regulations for the conduct of primaries and elections, struck down two of its regulatory requirements as unreasonable and, without further inquiry, ordered that the writ of *mandamus* issue according to the prayer of the petition.

It is provided by G. S., 163-1, that any group of voters may organize a new state political party by filing with the State Board of Elections, "at least ninety days before a general state election, a petition signed by ten thousand qualified voters, declaring their intention of organizing a state political party, . . . and also declaring their intention of participating in the next succeeding election." The State Board of Elections—the agency charged with responsibility in the matter and clothed with authority to adopt reasonable rules and regulations for the conduct of primaries and elections (G. S., 163-10; 163-183)—promulgated certain rules and regulations requiring, *inter alia,* that such petitions be accompanied by certificates from the chairman of the county boards of elec-

tions, certifying (1) that the names of the voters appearing on the petition from their respective counties were duly qualified voters and registered on the general election registration books in the precincts indicated on the petition; and (2) that none of the electors who signed the petition "voted in the primary election of any political party during the year in which the petition is filed."

At the last moment, on 3 August, 1948, the petitioners filed with the State Board of Elections a number of petitions bearing more than 18,000 names, which were unaccompanied by any certificates to show that the signers were qualified voters.

What was the State Board of Elections to do with these petitions? Obviously the petitioners had failed to make manifest their right to the privilege sought. *Ingle v. Board of Elections,* 226 N. C., 454, 38 S. E. (2d), 566. After due consideration, the petitions were denied.

Thereafter, the petitioners asked the State Board of Elections to assist them in ascertaining from the county chairmen whether the petitions contained the names of the requisite number of qualified voters—without reference to whether they voted in the primary election of any political party during the current year—and stated in their request "that it will be understood that the action of the State Board in transmitting the petitions to the respective counties, as herein requested, will be without prejudice to any legal rights of the State Board of Elections with respect to the position which it has taken or may take in connection with these matters, and will not be considered as any waiver of any rules and regulations adopted by your Board or any action heretofore taken by your Board."

Why make this request and why show to the Superior Court the number of qualified voters on the petitions—unless regarded as necessary and reasonable—when no such showing had been made before the State Board of Elections? *Certiorari* is supposed to bring up the record as it appeared before the hearing body. Furthermore, *mandamus* lies only to enforce a present, clear legal right. "It confers no new authority. The party seeking the writ must have a clear legal right to demand it, and the party to be coerced must be under a legal obligation to perform the act sought to be enforced." *Person v. Doughton,* 186 N. C., 723, 120 S. E., 481; *Hayes v. Benton,* 193 N. C., 379, 137 S. E., 169. Had the matter been heard in the Superior Court on the record as it appeared before the State Board of Elections undoubtedly the results would have been the same rather than opposite. Notwithstanding the alleged unreasonableness of the rule, when the petitioners came to make out their case in court they offered the identical proof which the rule requires.

It is specious reasoning to say that the State Board of Elections must either deny the sufficiency of the petitions or else accept them at their

face value. No such obligation rests upon the Board. It is not a giver of gifts, but a protector of rights, and those who claim rights before it must establish them. There is nothing unreasonable in this requirement. How else could the Board proceed with assurance or safety? The General Assembly did not intend to open wide the door with no supervision or protection of any kind. Yet, this is the effect of today's decision. The terms under which the delayed proof was secured appear in the record, and conjure with them as we may, the fact remains that on the showing before the State Board of Elections no case for *mandamus* is made out. Take away this subsequent proof, which comes too late and was never before the Board, and what have we? It is no solution to strike down the rules. This leads to greater embarrassment. See *Britt v. Board of Canvassers,* 172 N. C., 797, 90 S. E., 1005; *Johnston v. Board of Elections,* 172 N. C., 162, 90 S. E., 143. The burden was on the petitioners to establish their right before the State Board of Elections. *Umstead v. Board of Elections,* 192 N. C., 139, 134 S. E., 409. They contented themselves by simply filing their unsupported petitions at a late hour on the last day.

It is further nominated in the regulation of the State Board of Elections that a petition to create a new political party must be signed by the requisite number of qualified voters, "none of whom voted in the primary election of any political party during the year in which the petition is filed."

No effort was made to comply with this provision of the rule in the instant case, and it was held by the trial court to be unreasonable; hence properly disregarded. The basis of the requirement is, that the law as it pertains to primaries, contemplates that no voter who participates in the primary of the political party with which he affiliates should be permitted to take part in the nomination of candidates of another and different party who are to be voted on in the same election. G. S., 163-123; 163-126; *Rowland v. Board of Elections,* 184 N. C., 78, 113 S. E., 629; *Brown v. Costen,* 176 N. C., 63, 96 S. E., 659; 18 Am. Jur., 282.

It is provided by G. S., 163-183, that the State Board of Elections shall have general supervision over "the primaries and elections provided for herein . . . and in case where sufficient provision may not appear to have been made herein may make such regulations and provisions as it may deem necessary; Provided, none of the same shall be in conflict with any of the provisions of this article." Thus the Board is supported by ample statutory authority for the regulation in question. *Burgin v. Board of Elections,* 214 N. C., 140, 198 S. E., 592; 18 Am. Jur., 290.

The claim of unreasonableness in respect of this requirement is predicated on the provisions of G. S., 163-1, without reference to other cognate provisions of the primary and election laws. Even if this position be sound, which the respondent does not concede, the requirement in respect of accompanying the petitions with certificates from the chairmen of the county boards of elections would still stand and quite suffice to render the present proceeding inapposite.

The court below held that the State Board of Elections was authorized to make reasonable rules and regulations and its judgment in this respect is unchallenged. It is not enough to point out imperfections in the rules or how they might have been better. They are valid if reasonable and not in conflict with any statutory provision. Reasonableness is the test, not perfection nor even wisdom.

This general supervision over primaries and elections has been given to the Board with no right of appeal to the courts from its decisions. 18 Am. Jur., 273; 29 C. J. S., 178. For this reason, no doubt, the General Assembly fixed the time limit for filing the new political party petition at the short space of "ninety days before a general state election." Manifestly no court action was contemplated during this period, as the present proceeding clearly demonstrates. Nevertheless, the petitioners win their objective, not on the showing made before the State Board of Elections, but on the showing later made in court, and then only by disregarding one of the rules and belatedly complying with the other—thus making manifest its practicality and reasonableness. "The function of the writ (*mandamus*) is to compel performance of a ministerial duty—not to establish a legal right, but to enforce one which has been established. The right sought to be enforced must be clear and complete." *Wilkinson v. Board of Education,* 199 N. C., 669, 155 S. E., 562. "*Mandamus* lies only to compel a party to do that which it is his duty to do without it." *White v. Comrs. of Johnston,* 217 N. C., 329, 7 S. E. (2d), 825.

It is rarely, if ever, permissible to award a *mandamus* when it can be done only by annulling an unconstitutional Act of Assembly or by avoiding administrative rules of procedure. *Person v. Doughton, supra.* The writ is never appropriate to enforce a doubtful right. *Mears v. Board of Education,* 214 N. C., 89, 197 S. E., 752; *Barham v. Sawyer,* 201 N. C., 498, 160 S. E., 582. When did the right here asserted lose its opaqueness and become luminous? Certainly not while it was before the State Board of Elections where the petitioners were required to make it shine. Its clarity was not then apparent and to some it has not yet been made to appear. To hold that a later initial showing in court suffices on *mandamus* is to take over the functions of the Board and allow the petitioners another opportunity to establish their claim.

A similar situation in principle appeared in the case of *Barham v. Sawyer, supra,* where *mandamus* was denied.

It should be kept steadily in mind that no one's right to vote in the general election is challenged or at issue in this proceeding. It is freely conceded that every registered elector or qualified voter is at liberty to cast his ballot in the general election for the candidate of his choice, subject to the limitation in respect of candidates in primaries. Here, however, an alleged new political party is seeking to place its nominees for President and Vice-President on the official ballot in the forthcoming general election. Having been denied this privilege by the State Board of Elections—the agency charged with responsibility in the matter—for failure to comply "with the law and rules" applicable, the petitioners sue out a writ of *mandamus* to compel compliance. If the writ be apposite, then much of the writing on the subject in our Reports becomes apocrypha. The petitioners are not asking to have the State Board of Elections carry out one of its determinations, but to reverse a determination already made. "The writ (*mandamus*) issues to compel action—not to direct a reversal of action." *Pue v. Hood,* 222 N. C., 310, 22 S. E. (2d), 896. It may be stated as a general rule that where an official board is required to examine evidence, and form its judgment before it acts, and whenever this is to be done, it is not a case for *mandamus. United States v. Seaman,* 58 U. S., 226, 17 How., 225. The writ is available, not to establish a right, but to enforce a right already established.

My vote is to reverse the judgment and dismiss the proceeding.

MYRTLE McGEE TRULL v. GLENN TRULL.

(Filed 8 September, 1948.)

1. Divorce § 5d—

The essential elements required to be alleged in an action for alimony without divorce, G. S., 50-16, are (1) separation of the husband from his wife, and (2) his failure to provide her with necessary subsistence according to his means and condition in life, and demurrer to the complaint on the ground that the acts of defendant husband of which plaintiff complains are not stated with definiteness and particularity, is properly overruled.

2. Same—

An allegation in an action for alimony without divorce that the separation of defendant from plaintiff wife was without fault or misconduct on her part, is a sufficient allegation that his acts were without provocation on her part.

TRULL *v.* TRULL.

APPEAL by defendant from *Moore, J.,* in Chambers at Sylva, N. C., 10 April, 1948, of HAYWOOD.

Civil action for alimony without divorce heard, (1) upon motion of plaintiff for an allowance for subsistence and counsel fees pending the trial and final determination of this cause, G. S., 50-16, formerly C. S., 1667, as amended, and (2) upon defendant's demurrer *ore tenus* to the complaint.

Plaintiff alleges in her complaint, in brief, these pertinent facts: That plaintiff and defendant, residents of Haywood County, North Carolina, were duly married to each other in the year 1931; that thereafter they lived together as husband and wife until on or about 8 August, 1946, when defendant, "without fault or misconduct on the part of the plaintiff, separated himself from and abandoned the plaintiff," and has since lived elsewhere than at the home of plaintiff and defendant in Canton, N. C."; that, though defendant is an able-bodied man, employed and earning approximately $75 per week, he has not contributed anything whatsoever since said date to her support and maintenance; and that she is not strong, but is under the care of a doctor a good part of the time, and is without funds to pay counsel fees to prosecute this action.

Defendant answering complaint of plaintiff admits the allegations as to residence of plaintiff, his marriage to plaintiff and his employment, but denies all other allegations, and by way of further answer sets out further facts not pertinent to this appeal.

When the motion of plaintiff came on to be heard and before it was heard, defendant through his counsel demurred *ore tenus* to the complaint on the ground that it does not state facts sufficient to constitute a cause of action. Demurrer was overruled and defendant excepted. The court entered and signed judgment requiring the defendant to make certain payments for subsistence and attorney's fees in accordance with the motion. Defendant excepted and appeals to the Supreme Court, and assigns error.

Morgan & Ward for plaintiff, appellee.

W. W. Candler and Cecil C. Jackson for defendant, appellant.

WINBORNE, J. This appeal presents this question only: Do the facts alleged in the complaint constitute a cause of action for alimony without divorce?

The court below ruled that it does state such cause of action, and this Court, testing the allegations of the complaint by pertinent portions of G. S., 50-16, and by decisions in the cases of *Brooks v. Brooks,* 226 N. C., 280, 37 S. E. (2d), 909, and *Best v. Best,* 228 N. C., 9, 44 S. E. (2d), 214, is in agreement with that ruling. The statute, G. S., 50-16, provides

in pertinent part that if any husband shall separate himself from his wife and fail to provide her with necessary subsistence according to his means and condition in life, the wife may institute an action in the Superior Court of the county in which the cause of action arose to have a reasonable subsistence and counsel fees allotted and paid or secured to her from the estate or earnings of her husband, and that pending the trial the wife may make application to a specified judge for an allowance for such subsistence and counsel fees *pendente lite.*

The essential elements required to be alleged in cases under this provision of the statute are (1) separation of the husband from his wife, and (2) his failure to provide her with the necessary subsistence according to his means and condition in life. These are alleged in the complaint in the present action.

However defendant contends that the complaint is fatally defective for the further reason that the acts of defendant of which plaintiff complains are not stated with definiteness and particularity. The principle of law on which this contention is made is inapplicable to the state of facts here alleged. Hence the cases *Garsed v. Garsed,* 170 N. C., 672, 87 S. E., 45; *Pollard v. Pollard,* 221 N. C., 46, 19 S. E. (2d), 1; and *Lawrence v. Lawrence,* 226 N. C., 624, 39 S. E. (2d), 807, upon which the defendant relies in this connection, are distinguishable.

Defendant also contends that there is an absence of allegation in the complaint that the conduct of the defendant was without provocation on her part. This contention is likewise without merit. It is alleged in the complaint that the separation of defendant from plaintiff was "without fault or misconduct on the part of the plaintiff." This would seem sufficient to meet this objection.

The judgment below is

Affirmed.

ANNIE MOODY AND HUSBAND, C. M. MOODY, v. SAMUEL LEE HOWELL AND WIFE, WILSIE ROSE HOWELL.

(Filed 8 September, 1948.)

1. Clerks of Court § 3: Courts § 3c: Judgments § 27a—

The Judge of a Superior Court has concurrent jurisdiction with the Clerk of the Court to enter judgments by default, G. S., 1-211; G. S., 1-212, and to vacate such judgments, and the jurisdiction of the Judge on motion to set aside a default judgment entered by the Clerk is original as well as appellate.

2. Courts § 4c: Judgments § 27a—

G. S., 1-272; G. S., 1-273; G. S., 1-274, regulating appeals from the Clerk of the Superior Court to the Judge have no application in regard to appeals from orders and decrees in proceedings over which the Judge of the Superior Court has concurrent jurisdiction.

3. Same—

The Clerk entered a default judgment in an action in ejectment for failure of defendants to file bond required by statute, G. S., 1-111; G. S., 1-211 (4). Defendants' motion to vacate the default judgment upon tender of bond, was denied by the Clerk, and defendants appealed. *Held:* Dismissal of the appeal for failure of defendants to perfect same in the manner prescribed by G. S., 1-272; G. S., 1-273; G. S., 1-274, was error, since these statutes are inapplicable to orders or judgments entered pursuant to G. S., 1-211, and G. S., 1-212.

APPEAL by defendants from *Alley, J.*, at February Term, 1948, of HAYWOOD.

This is an action in ejectment, instituted 11 December, 1947. It is alleged in the complaint that the defendants are in the wrongful and unlawful possession of one and one-half acres of land in Haywood County, which the plaintiffs own in fee simple. The defendants filed an answer on 29 December, 1947, pleading sole seizin, but did not file bond pursuant to the provisions of G. S., 1-111 and 1-211, subsection (4). Thereafter on 17 January, 1948, without moving to strike out the answer of the defendants, and without making demand on the defendants to file bond or show cause why judgment by default final should not be entered, the plaintiffs moved for such judgment before the Clerk of the Superior Court of Haywood County and judgment by default final was entered.

The defendants filed a motion to vacate and set aside the default judgment on 21 January, 1948, tendered bond, and gave notice of such motion to the plaintiffs. The motion was heard by the Clerk of the Superior Court of Haywood County, 28 January, 1948, and was denied. The defendants appealed to the Judge of the Superior Court; notice of such appeal having been given in open court, further notice was waived.

When this cause came on for hearing before his Honor, the plaintiffs entered a special appearance and made a motion to dismiss the appeal on the ground that the order and judgment from which the purported appeal had been taken was entered by the Clerk of the Superior Court pursuant to the provisions of G. S., Sections 1-272, 1-273 and 1-274, and that the appeal had not been perfected in the manner prescribed by these statutes. The motion was allowed and the appeal dismissed. The defendants appeal and assign error.

Grover C. Davis and M. G. Stamey for plaintiffs.

James H. Howell, Jr., and Morgan & Ward for defendants.

DENNY, J. This action was pending on the civil issue docket of the Superior Court in Haywood County when the judgment by default final was entered by the Clerk of the Superior Court. A motion to set aside a judgment by default final or by default and inquiry entered by the Clerk pursuant to the authority contained in G. S., 1-211 and 1-212, may be made either before the Clerk or the Judge of the Superior Court. *Caldwell v. Caldwell,* 189 N. C., 805, 128 S. E., 329. The authority of the Clerk to enter judgments pursuant to the provisions of the above statutes, as well as the power to vacate such judgments, is concurrent with and in addition to that of the Judge of the Superior Court, and the jurisdiction of the Judge on a motion to set aside a judgment so entered by the Clerk, is original as well as appellate. *Caldwell v. Caldwell, supra.*

Moreover, G. S., Sections 1-272, 1-273 and 1-274, regulating appeals from the Clerk to the Judge, are applicable to orders and decrees entered by the Clerk in the exercise of jurisdiction which is not concurrent with the jurisdiction of the Judge of the Superior Court. This Court held in *Caldwell v. Caldwell, supra,* that the above statutes do not apply to orders and judgments entered by the Clerk pursuant to the provisions of Chapter 92, Public Laws 1921, Extra Session (now substantially G. S., 1-211 and 1-212).

It follows, therefore, that the defendants' appeal was properly before his Honor and should have been heard on its merits. *Caldwell v. Caldwell, supra; Trust Co. v. Pumpelly,* 191 N. C., 675, 132 S. E., 594; *Acme Mfg. Co. v. Kornegay,* 195 N. C., 373, 142 S. E., 224; *Cody v. Hovey,* 219 N. C., 369, 14 S. E. (2d), 30. And while the appeal here involves only a question of procedure, it would seem that the respective rights of the parties herein have been clearly defined by this Court in similar cases. See *McMillan v. Baker,* 92 N. C., 110; *Cooper v. Warlick,* 109 N. C., 672, 14 S. E., 106; *Becton v. Dunn,* 137 N. C., 559, 50 S. E., 289; *Gill v. Porter,* 174 N. C., 569, 94 S. E., 108; and *Shepherd v. Shepherd,* 179 N. C., 121, 101 S. E., 489.

The judgment of the court below is reversed, and this cause remanded to the end that defendants' appeal may be heard on its merits.

Reversed and remanded.

STATE v. ROBERT JAMES STRICKLAND.

(Filed 22 September, 1948.)

1. Criminal Law §§ 44, 81a—

A motion for continuance is addressed to the sound discretion of the trial court, and denial of the motion is not reviewable except upon abuse of discretion.

2. Jury § 9: Criminal Law § 81a—

A motion for a special venire, both as a matter of practice and under the statute, G. S., 9-29; G. S., 9-30, is addressed to the sound discretion of the trial court, and denial of the motion is not reviewable except upon abuse of discretion.

3. Criminal Law §§ 48d, 81c (3)—

Ordinarily, error in the admission of evidence is cured by its withdrawal by the court, and it is only in instances where the serious character and gravity of the incompetent evidence make it obviously difficult to erase its prejudicial effect from the minds of the jurors that its subsequent withdrawal will not be held to cure the error.

4. Same: Blackmail § 2—

In this prosecution for blackmail, testimony of a telephone call to prosecuting witness directing him to look under the mat of his front door for the extortion letter was admitted without identification of the defendant as the person who had called. Subsequently, the trial court withdrew the conversation from the evidence, leaving only the fact that the prosecuting witness looked for and found the letter in consequence of the telephone call. *Held:* Any error in the admission of testimony of the telephone conversation was cured.

5. Criminal Law § 48a—

The order of proof rests in the sound discretion of the trial court.

6. Same: Criminal Law § 32½—

Testimony of a telephone conversation is competent if the identity of the person making the call is established, either directly or by circumstantial evidence, and it is not required that identity be established at the time of the admission of the testimony, it being necessary only that the identity be established either then or at a later time in the development of the case, the order of proof being in the discretion of the trial court.

7. Criminal Law § 31j—

A person found by the court upon the evidence to be an expert in documents and in the comparison of the writing of typewriters is competent to testify that the extortion note in question was written on the typewriter found in defendant's possession.

8. Criminal Law § 31c—

The competency of a witness as an expert is *imprimus* a question for the trial court.

9. Criminal Law § 53e—

The charge of the court upon the consideration and sufficiency of circumstantial evidence to sustain conviction *is held* without error.

10. Criminal Law § 52a—

Circumstantial evidence, direct evidence, or a mixture of both, must induce conviction beyond a reasonable doubt before the accused may be found guilty.

11. Same: Blackmail § 2—

Circumstantial evidence of defendant's guilt of blackmail, G. S., 14-118, and of transmitting a threatening letter, G. S., 14-394, *is held* sufficient to sustain conviction and overrule defendant's motions for judgment as of nonsuit.

DEFENDANT'S appeal from *Williams, J.*, Regular February Term, 1948, WILSON County Superior Court.

The defendant was tried on a charge embodied in the following two-count bill of indictment:

> "The Jurors for the State upon their oath present, That Robert Strickland, late of the County of Wilson, on the 29th day of December, in the year of our Lord one thousand nine hundred and forty-seven, with force and arms, at and in the County aforesaid, feloniously and infamously, and in secrecy and malice, and with deceit and intent to defraud, did write and transmit a letter, note and writing without signing his true name thereto threatening personal injury, violence and death to one Everett Blake, and using language and threats of a nature calculated to intimidate and place in fear as to his personal safety the said Everett Blake; against the form of the statute in such case made and provided and against the peace and dignity of the State.
>
> "And the Jurors for the State upon their oath do further present, that Robert Strickland, late of the County of Wilson on the date and year aforesaid, and with force and arms at and in the County aforesaid, feloniously and infamously and in secrecy and malice, and with deceit and intent to defraud, did knowingly send and deliver a letter and writing with menaces and without any reasonable or probable cause demanding of one Everett Blake the sum of $15,000 in cash money, with the intent to extort and gain $15,000 in cash money from the said Everett Blake, against the form of the statute in such case made and provided and against the peace and dignity of the State."

The counts in the indictment are respectively based on G. S., 14-118, denouncing blackmailing, and G. S., 14-394, denouncing the mailing or transmitting of anonymous or threatening letters.

When the case was called for trial the defense counsel moved for a continuance of the case on the ground that time was essential for the preparation of the defense. The motion was declined and defendant excepted.

Motion was then made for a special venire of 50 jurors, which was declined and defendant excepted.

Defendant pleaded "not guilty" and the trial proceeded.

A moderate number of exceptions were taken by defendant—36 in all. The record, however, is voluminous, and the statement is designed to present those challenges to the validity of the trial which seem to be most important to the appealing defendant.

THE EVIDENCE:

A narrative story of the case, as disclosed in the evidence, presents the following facts in substantive summary:

On the night of December 29, at about 10:45 o'clock, Everett Blake received a telephone call from a then unidentified person whose voice he recognized as a man's, in consequence of which he went to his front door and found upon the mat an envelope containing a letter and a clipping from a newspaper. At the top of the letter was typewritten the words "the spidder" and it reads as follows:

"Mr Blake if you wont to live you will do whot
this noat says tomarrow at 9 o'clock get
$ 15000 ddollors in small bills $ 0 and 100
put this money in a large flower pot then put
dirt on top of it then put flowers in it
take this money and the flower pot to your
wilson cemetery find the grave of luther barnes
died oct 22 18 74 feb 17 19 41
you will this grav at the lower end of the cemetery
put the money on the grave two oclock tomarrow
get in your car drive back to town and dontcome back
if you do whot i hav said you will get this money
back on the 15th. day of january in the place
if you dont you wont live long
you see whot this man got igave him anote hecall
the police now he is dead this is whot you will
get if you call the police my men well watch
every move you make so be careful watc youdo
be wise blake and live a long time if you dont
get this money you wont live to spend any more

the place the grave of luther barnes
rember oct. 22 . 18.74
15 000 dollors feb. 17. 19.41
i will be looking for you"

The enclosed clipping is a newspaper account of a murder and robbery recently committed in the nearby town of Smithfield.

The letter put Blake in great apprehension and fear, and he immediately called in the local police force, to whom he gave the letter and clipping, who thereafter took charge of the case; and co-operating with them in an effort to detect and apprehend the sender of the menacing letter, he made no immediate compliance with the letter.

On January 3 ensuing, while on his job as manager of J. C. Penny's local store, he was again called to the phone and the caller, being assured he was talking to Blake, inquired if he had gotten that letter. Blake told him he had; and the man said, "you had best follow out those instructions." Blake told him it would be impossible for him to raise $15,000 in cash, and asked him if he would settle for $5,000. The reply was "No. It is $15,000." Blake replied that he could not get up $15,000 that quickly, whereupon the caller said, "You have a child, haven't you?" And Blake said, "Yes." The caller said, "You had better get the $15,000 then," and broke the connection. Blake's fears were enhanced by this message. He immediately communicated with the police and in pursuance of their instructions Blake took a flower pot, with flowers in it, which was supplied by them, found the grave of Luther Barnes as described in the letter, and placed the pot upon it. From that time for a considerable period officers were at his house every evening and all night.

The officers, Privette, Chief of Police, Hartis and Fulghum, kept the grave of Luther Barnes under close and secret observation after the pot of flowers was placed upon it, night and day; part of the time concealed in an undertaker's tent, of the kind used to cover newly made graves.

On Tuesday morning, January 6, while it was yet dark, Hartis was concealed in the tent. The defendant Strickland entered the cemetery through the park, driving a metal-bodied Chevrolet dump truck, and stopped opposite the grave, within 10 feet. The pot had been placed at one end of the grave and he was at the other. He stayed there approximately four or five minutes and drove off in the direction of Pine Street, one of four roads converging near the Barnes grave. About 35 minutes later he returned through Pine Street, "pulled left handed" up to the curbing and stopped briefly; driving off to Hill Street. The same morning about 7:25 he came down Hill Street toward the city dump with a colored man in the car. He had passed through the cemetery.

The third time he appeared he stopped, got out of the truck, and had a conversation with the colored man behind the truck for three or four minutes. The colored boy went off behind the hedges out of sight. The truck turned behind the hedges, and Hartis said, "I couldn't see him after he got past the corner of those hedges, and the boy who was with him went over and got some old wire and came back and threw it in the truck and sat down, and in a few minutes he came and got in the truck and they drove off." Hartis said that Strickland did not go to the flower pot or pick it up.

Arthur Miller and Officer Little were concealed in the funeral tent on the night of January 6. Between 9 and 10 o'clock they observed an automobile drive into the cemetery. It did not stop on its first trip, but proceeded slowly on a right turn around the mound in the vicinity of the Barnes grave. It was gone five or ten minutes, came slowly past and to Pine Street. On a third trip the car came up Hill Street to the cemetery and on into the nearby city dump, stopping some 10 or 15 feet beyond the hedge.

Presently Miller saw someone with a flashlight standing by the car and flashing down by its side. He then started making signals with the light, and Miller then heard a woman talking. They came past the tent walking, but did not at that time come into the tent. They opened one side of it and flashed the light into it. The parties were Strickland and his wife. Miller couldn't tell if they had been drinking. Strickland just stood there until told to go, and they went off in the car. This time it was a Hudson. Jack Little, who was also in the tent, asked Strickland what he was doing out there, and he replied that he was just "walking his wife" to get her sobered. She had no appearance of being intoxicated.

The summary now turns to an expert examination of the alleged extortion letter in comparison with genuine writings on a typewriter which the evidence tends to show belonged to the defendant.

Strickland was arrested on January 18. There was found in a closet in his home a No. 10 Royal typewriter which he admitted was his but appears to have been the property of his wife when they were married. In the same place was a bundle of paid bills, amongst which was a bill to one Baltzegar, typewritten, and with the admitted signature of defendant, and concededly presented by him to Baltzegar. Also the defendant, at request of the officers, wrote at their dictation on the same typewriter, using the "hunt and peck" system, sentences, or matter, containing words misspelled in the extortion letter in which the same peculiar misspelling was duplicated, although, on a later test the same words, in several instances, were properly spelled. Other writings were made on this typewriter, and the lot was sent to the office of the Federal Bureau of

Investigation in Washington, where an expert examination was made, and report returned.

C. W. Brittain, special agent of the Federal Bureau of Investigation, employed in the laboratory as a document examiner, was adjudged to be an expert, and testified in detail as to the writings above described, illustrated his testimony by photographic enlargements, pointing out similar and identical defects of alignment, spacing, depth of impression, and other defects of various type-letters, common to all the specimens, including the extortion letter, and giving it as his opinion that they were written on the same machine, that is the one identified as being taken from the home of the defendant.

The nature and combination of the characteristics pointed out tended to identify the individual or particular machine used in the writings.

The witness also testified to the physical characteristics of the paper and expressed the opinion that the paper used in the extortion note and that used in State's Exhibit "K," the bill defendant presented to Baltzegar and marked "paid in full" and signed by him, were similar, pointing out the similarity in fibre, lining, and watermark.

The several documents mentioned, and the typewriter referred to, were introduced in evidence and exhibited to the jury.

The defendant, testifying in his own behalf, denied his guilt. He explained his presence in the cemetery, on the occasion unaccompanied by his wife, saying that he was going early to the light plant to ascertain if there was any cinder slag which he could use in his concrete business. He said they sold cinders for that purpose and one had to be vigilant to get served. He explained his erratic movements near the Barnes grave by saying he was thinking about something else, turned wrong, and had to stop his truck because the engine, or the shifting gear was cold and required time.

On the night he was accompanied by his wife, he said they both had had too much intoxicants and came there to sober up, so that his wife's people would not discover the condition of his wife when they returned to the apartment.

Mrs. Strickland testified to the same effect,—and stated they went to the tent under the impression that it covered a newly made grave and she wanted to see the flowers.

Several witnesses testified to Strickland's good character.

The defendant, in the order required by the statute, demurred to the evidence and moved for judgment as of nonsuit. The motions were denied and defendant excepted. The jury returned a verdict of guilty on both counts and defendant moved to set aside the verdict for errors of law. Motion overruled, and exception noted. Judgment on the first count that defendant be confined in State's Prison for ten years; on the

second count prayer for judgment continued subject to motion of the solicitor. The defendant excepted and appealed, assigning errors. (Assignments of error not noted in the statement are dealt with specifically in the opinion, where discussion is thought demanded.)

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

Sharpe & Pittman, Robert A. Farris, and Wiley L. Lane, Jr., for defendant, appellant.

SEAWELL, J. Two preliminary motions made by the defense demand attention: The motion for continuance; and the motion for a special venire. Both of these motions were in the sound discretion of the court. The first, according to the practice of the court, and the second by statute also. (a) *S. v. Culberson,* 228 N. C., 615, 46 S. E. (2d), 647; *S. v. Rising,* 223 N. C., 747, 28 S. E. (2d), 221; *S. v. Utley,* 223 N. C., 39, 25 S. E. (2d), 195; and (b) G. S., 9-29, G. S., 9-30; *S. v. Casey,* 212 N. C., 352, 193 S. E., 411; *S. v. Levy,* 187 N. C., 581, 122 S. E., 386. In neither instance is the action of the judge in denying the motion subject to review except upon abuse of discretion. The facts of record in the case at bar do not warrant such a finding.

The attempt at extortion opened up with the telephone call to Blake made by a person then unidentified. In the orderly development of the evidence Blake was permitted over defendant's objection to give the substance of this call. He testified that the party calling him told him there was a letter on his front door mat and said "Never mind" when asked who was calling; and when asked what it was all about, said, "Mr. Blake, the letter is very important; get it and follow instructions." The objection to its admission is on the ground that the person talking was not identified as the defendant. The trial judge subsequently withdrew the conversation from consideration of the jury, leaving only the bare statement in evidence that the witness went to the front door in consequence of a telephone call and there found the letter on the mat. The appellant argues that the prejudicial effect of the admitted conversation was not cured by this withdrawal.

In appraising the effect of incompetent evidence once admitted and afterwards withdrawn, the Court will look to the nature of the evidence and its probable influence upon the minds of the jury in reaching a verdict. In some instances because of the serious character and gravity of the incompetent evidence and the obvious difficulty in erasing it from the mind, the court has held to the opinion that a subsequent withdrawal did not cure the error. But in other cases the trial courts have freely exercised the privilege, which is not only a matter of custom but almost

a matter of necessity in the supervision of a lengthy trial. Ordinarily where the evidence is withdrawn no error is committed. *S. v. Davenport,* 227 N. C., 475, 42 S. E. (2d), 686; *S. v. Artis,* 227 N. C., 371, 42 S. E. (2d), 409; *S. v. King,* 219 N. C., 667, 14 S. E. (2d), 803; *S v. Stewart,* 189 N. C., 340, 127 S. E., 260; *S. v. Dickerson,* 189 N. C., 327, 127 S. E., 256; *S. v. Lunsford,* 177 N. C., 117, 97 S. E., 682; *S. v. Crane,* 110 N. C., 530, 97 S. E., 682; *S. v. McNair,* 93 N. C., 628; *S. v. Collins,* 93 N. C., 564.

We think this rule should apply in the instant case. Moreover, we note here that the evidence thought to be objectionable was substantially put in evidence without objection by the witness Hartis (R., p. 28).

Indeed, it was competent as originally offered. We must bear in mind that the evidence to which the State must resort to convict the defendant is almost wholly circumstantial. The conversation bore internal evidence that the man who called knew about the letter and its contents and was interested in having Blake carry out the instructions; and the inference is that he wrote it and put it where he said it could be found, whoever the caller might be. In cases of this kind, as indeed all cases, the order in which the evidence is developed is within the discretion of the court. When subsequent evidence tended to show the defendant as the writer of the letter that order became immaterial; Stansbury, North Carolina Evidence, Sec. 24, Notes 61, 65; *S. v. Smith,* 218 N. C., 334, 11 S. E. (2d), 165; *S. v. Guthrie,* 145 N. C., 492, 59 S. E., 562; and the manner and circumstances of its delivery became competent. (a) *S. v. Anderson,* 228 N. C., 720; *S. v. Gardner,* 228 N. C., 567; *S. v. Brown,* 226 N. C., 681, 40 S. E. (2d), 34; *S. v. Oxendine,* 224 N. C., 825, 32 S. E. (2d), 648; (b) *S. v. Smith,* 218 N. C., 334, 11 S. E. (2d), 165; *S. v. Alston,* 210 N. C., 258, 186 S. E., 354; *S. v. Brown,* 204 N. C., 392, 168 S. E., 532; *S. v. Dale,* 218 N. C., 625, 12 S. E. (2d), 556.

The subject of admission of anti-phonal telephone conversations is too broad for detailed treatment here and we are compelled to keep discussion within narrow pertinent limitations. The broad statement that the conversation of a person at the other end is never admissible until he is identified cannot be sustained by authority. It is particularly inapplicable in prosecution for crimes in which secrecy, anonymity and concealed identity are always resorted to as a means of safe accomplishment, and proof is largely circumstantial, especially when the conversation merely forms a part of the *res gestæ* and is offered objectively, as a part of the nefarious scheme. It is only necessary that identity of the person be shown directly or by circumstances somewhere in the development of the case, either then or later. *People v. Micelli,* 156 App. Div., 756, 142 N. Y. Supp., 102, 216 N. Y., 727, 111 N. E., 1094 (prosecution

for kidnapping); *State v. Twardus,* 105 N. J. L., 254, 143 Atl., 920, 6 N. J. Mis. R., 193, 140 Atl., 317 (prosecution for conspiracy); 1 R. C. L., p. 447, 71 A. L. R., anno. p. 6; Stansbury, North Carolina Evidence, sec. 96; 11 N. C. L. R. 344.

The cases cited in appellant's brief in support of the exception to the admission of this evidence may be easily distinguished from the case at bar. (a) *Powers v. Service Co.,* 202 N. C., 13, because the conversation stood alone and unaided in its hurtful effect upon the defendant's case, one of civil liability; *Sanders v. Griffin,* 191 N. C., 447, 451, 132 S. E., 157, because the conversation was offered to fix Sanders with the knowledge of the transfer of the note in litigation; in *Griffin Mfg. Co. v. Bray,* 193 N. C., 350, 137 S. E., 151, because there it was sought to bind Bray in a contract alleged to have been made in the phone conversation, which alone supported plaintiff's case. See *S. v. Gardner,* 227 N. C., 37, 40 S. E. (2d), 415. *Mfg. Co. v. Bray, supra,* on which appellant mainly relies, is not at variance with this rule. Speaking for the Court, *Justice Brogden* quotes with approval from *Atlantic Coast Realty Co. v. Robertson,* 135 Va., 247, ". . . the identity of the other party to the conversation may be established by direct or circumstantial evidence." *Lumber Co. v. Askew,* 185 N. C. 87, 116 S. E. 93.

As we have stated, *supra,* authorities are uniform in holding that the order in which proof may be presented is within the discretion of the court.

On our view of the case, however, the question becomes academic in view of the withdrawal of the offending matter.

The objections to the expert opinion testimony of C. W. Brittain, of the Federal Bureau of Investigation, are not tenable in view of the fact that he was found by the court to be an expert in the matters to which he testified, and the evidence does not disclose to the contrary. The qualification of the witness, *imprimis,* is a matter for the court, and the character of the testimony given here bears favorably on the discretion exercised by the court as to his qualification. *S. v. Smith,* 223 N. C., 457, 27 S. E. (2d), 114; *S. v. Smoak,* 213 N. C., 79, 195 S. E., 72; *S. v. Gray,* 180 N. C., 697, 104 S. E., 647.

On the demurrer to the evidence and motions to nonsuit, appellant's counsel strongly attack the circumstantial evidence upon which the defendant was convicted and urge also that there is error in the instruction which the judge gave the jury as to the character and effect of such evidence. After having instructed the jury that "circumstantial evidence is not sufficient to justify a conviction if the circumstances are simply consistent with the theory of innocence or guilt; they must be inconsist-

ent with every reasonable theory and hypothesis except that of guilt," the judge proceeded to charge the jury as follows:

> "The Court charges you that circumstantial evidence is not only a recognized and accepted instrumentality in the ascertainment of truth but that it is essential and highly satisfactory in matters of gravest moment. The facts, their relations, the combinations, connections, should be natural, reasonable, clear and satisfactory; when such evidence is relied upon for conviction it should be clear, convincing in its connections and combinations and should exclude all reasonable doubt of the defendant's guilt. In passing upon such evidence it is your duty to consider all the circumstances relied upon to convict, along with the direct evidence that has been offered in the case; that is to say, if the State produces a witness here and a witness there and offers evidence here and evidence there, you first determine in your mind the particular circumstance to which it relates has been established beyond a reasonable doubt and unless you so find you will not consider it any further, but if you do so find, then you take that circumstance which you find to be established beyond a reasonable doubt in connection with any and all other circumstances which you may find likewise established beyond a reasonable doubt and in the direct evidence offered by the State and put them all together and then if upon that consideration of the evidence as a whole you are satisfied beyond a reasonable doubt of the guilt of the defendant, it is your duty to return a verdict of guilty."

The challenged passage from the charge is entirely consistent with the opinions of this Court giving definitions, illustrations, and analyses of circumstantial evidence, and cannot be held for error. *S. v. Ewing,* 227 N. C., 535, 42 S. E. (2d), 676; *S. v. Gardner,* 226 N. C., 310, 37 S. E. (2d), 913; *S. v. Kiger,* 115 N. C., 746, 751, 20 S. E., 456; *S. v. Carmon,* 145 N. C., 481, 483, 59 S. E., 657; *S. v. Vaughn,* 129 N. C., 502, 39 S. E., 629; Wigmore on Evidence, 3d Ed., Vol. 9, sec. 2497, p. 316; Wharton's Criminal Evidence, Vol. 2, sec. 922, p. 1608; *S. v. McLeod,* 196 N. C., 542, 544, 146 S. E., 409; *S. v. Lee,* 213 N. C., 319, 195 S. E., 785; *S. v. King,* 162 N. C., 580, 77 S. E., 301; *S. v. Griffith,* 185 N. C., 756, 117 S. E., 586; *S. v. Casey,* 201 N. C., 185, 159 S. E., 337.

We can only reiterate the often repeated statement that the language used by the Court, varied as it may be in phraseology, to illustrate the force and effect of circumstantial evidence as an instrument of proof, is not intended to modify the degree or intensity of proof necessary to conviction. Circumstantial evidence, direct evidence, or a mixture of

both, must induce conviction beyond a reasonable doubt, before the accused may be found guilty.

Exceptions not here discussed have nevertheless been examined and do not merit a retrial of the case. No novel proposition of law is involved and we refrain from detailed discussion.

The evidence here is abundant to support the verdict, and the defendant's motion for nonsuit was properly declined.

We find

No error.

ROBERT B. BASS, IRENE B. LUCAS, ELIZABETH B. PAGE, MARY M. GREGORY, GEORGE H. MOBLEY, ERNEST W. MOBLEY, NATHAN W. MOBLEY AND LEE M. HOLLAND, A MINOR APPEARING BY HER NEXT FRIEND, JOSEPH HOLLAND, v. L. I. MOORE, JR., AND WIFE, GRACE T. MOORE, EVERETT R. BRIDGERS AND WIFE, HELEN P. BRIDGERS, LIZZIE L. DRIVER AND HUSBAND, WILLIAM DRIVER, LYDIA LAMM, ROSELLE BARNES AND WIFE, NETTIE BARNES, STELLA BULLOCK AND HUSBAND, PHAROAH BULLOCK, ELLA BOYKIN, A. J. BARNES, TRUSTEE, T. E. DILLON AND T. F. BRIDGERS.

(Filed 22 September, 1948.)

1. Judgments § 27b—

Where the court acquires jurisdiction of the parties and subject matter of an action its judgment cannot be treated as a nullity.

2. Judgments § 27e—

Judgment was entered in an action by a widow, vacating certain deeds which had been executed to destroy the estate by entirety in lands theretofore held by herself and husband and declaring that the husband's devisees took no interest in the land. Attack of the judgment on the ground that the infant contingent remaindermen were represented by a guardian *ad litem* who was a creditor of the widow, that he failed to assert valid defenses to the action existing in their favor, and that the widow thereafter mortgaged the lands to him to secure her debt to him, is an attack of the judgment for intrinsic fraud.

3. Judgments § 25—

The remedy to attack a judgment for intrinsic fraud is by motion in the cause.

4. Pleadings § 28—

Judgment on the pleadings may not be entered in an independent action attacking a judgment for intrinsic fraud, since the proper remedy to set aside the judgment is by motion in the cause.

5. Same: Ejectment §§ 16, 19—

While in an action in ejectment either party may attack any instrument relied on by his adversary as a muniment of title, where, even though the judgment under which defendants claim be set aside on plain-

tiffs' attack, plaintiffs nevertheless would not be presently entitled to possession of the *locus* as against defendants, the cause of action in ejectment must fail, and plaintiffs cannot be entitled to judgment on the pleadings.

6. Judgments § 28: Ejectment § 10: Wills § 33c—Contingent remaindermen cannot maintain ejectment against those owning interest of life tenant.

In an action by a widow, judgment was entered vacating certain deeds which had been executed to destroy the estate by entirety in lands theretofore held by herself and husband and declaring that the husband's devisees had no interest in the lands. Plaintiffs instituted this action against those claiming under *mesne* conveyances from the widow, attacking the judgment on the ground that minor contingent remaindermen were represented by a guardian *ad litem* who was a creditor of the widow, that he failed to assert valid defenses existing in their favor, and that she thereafter mortgaged the lands to secure her debt to him. *Held:* The judgment was nevertheless valid as against the adult life tenant and the adult contingent remaindermen who failed to file answer, and their interest passed to the widow under the judgment, and the life tenant being still alive, plaintiffs cannot be entitled to immediate possession even though the judgment be declared void as to the minor contingent remaindermen.

7. Wills § 33c: Estates § 9a—

Forfeiture of a life estate for waste cannot accelerate the vesting of contingent remainders, and therefore plaintiffs in ejectment claiming as contingent remaindermen cannot establish right to immediate possession by showing such forfeiture of the life estate.

APPEAL by plaintiffs from *Burgwyn, Special Judge,* May Term, 1948, WILSON. Affirmed.

Civil action (1) to vacate and annul a judgment of the Superior Court as a cloud upon the title of plaintiffs to the real estate described in the complaint, (2) in ejectment to recover possession of said land, and (3) for an accounting for rents and profits.

N. W. Lamm and wife, Martha E. Lamm, owned a farm in Wilson County and a lot in the Town of Wilson, known as the Riley lot, as tenants by the entirety. In 1911 they undertook to convey both tracts to O. P. Dickinson for the express purpose of having him reconvey the same to N. W. Lamm so as to destroy the estate by the entirety and vest him alone with title in fee. Dickinson simultaneously conveyed same to N. W. Lamm. The deed from Lamm and wife to Dickinson was not executed in conformity with the provisions of G. S., 52-12.

In 1915 N. W. Lamm died testate. In his will he made certain bequests to his wife and devised to her for life all his real property except the Riley lot in the Town of Wilson. He then devised the Riley lot and the farm to Lizzie Lamm Bass (now Lizzie Lamm Driver) for life

(subject to the life estate of Martha E. Lamm) "and upon her death, then to her children, or to the issue of those that may be dead, in fee simple, share and share alike. But in the event my said daughter should die without leaving any issue, or the children of such that may be dead, then I direct that said tract of land and the said town lot shall go to, and be held in fee by Lydia Lamm, wife of Robert Lamm, Roselle Barnes, Stella Bullock, wife of Pharoah Bullock, and Ella Boykin, wife of Hilliard Boykin, share and share alike." He then directed that none of the said land should be sold during the lifetime of Lizzie Lamm Bass.

In December 1929, Martha E. Lamm instituted an action in the Superior Court of Wilson County against Lizzie Lamm Bass Mobley, her children, and those named in the will as ultimate takers in the event the life tenant died without issue surviving, for the purpose of removing the cloud cast upon her title by the void deeds from Lamm and wife to Dickinson, and from Dickinson to N. W. Lamm. At the time, the children of the life tenant (Lizzie Lamm Bass Mobley) were all infants without guardian and the court appointed M. H. Lamm guardian *ad litem* to represent them. He filed answer in which he admitted the allegations of the complaint. The adult defendants, the life tenant and the ultimate takers under the limitation over, filed no answer. Judgment for plaintiff vacating said deeds and declaring plaintiff therein to be the owner of said farm and lot was duly entered. Martha Lamm, plaintiff therein, then executed a mortgage on the lot to M. H. Lamm, the guardian *ad litem* therein, to secure a debt to him.

Thereafter, defendant L. I. Moore acquired title to the farm tract and defendant Everett R. Bridgers acquired title to the town lot by *mesne* conveyances from Martha Lamm, the title of Bridgers resting on a deed in foreclosure of the mortgage deed from Martha Lamm to M. H. Lamm.

Lizzie Lamm Driver, the life tenant, is still living. On 23 October, 1947, the said infants, all of whom, save one, are now of age, instituted this action in part to vacate said judgment. They allege that the guardian *ad litem* was a large creditor of the plaintiff in that action, that he signed her cost bond, that counsel for plaintiff therein is also counsel of record for the guardian *ad litem,* that the guardian *ad litem* admitted all allegations of the complaint and knowingly and fraudulently suppressed and failed to plead a valid defense, to wit, that the plaintiff, Martha Lamm, by qualifying as executrix of the will of N. W. Lamm and accepting the benefits accruing to her thereunder, elected to ratify said will and is now estopped by such election to claim title to said land devised in said will to their mother, Lizzie (Lamm) Driver, for life, with remainder to them in fee. The action is also an action in ejectment in which they pray judgment that they are the owners of said land, entitled to immediate possession thereof and for an accounting of rents and profits.

The defendants filed answer to the complaint in which they admit certain allegations in respect to the former judgment and plead certain defenses. Thereupon, plaintiffs appeared and moved to strike various portions of the answer and "for judgment in full upon their complaint as if no answer had been filed."

When the cause came on for hearing on said motion, the court denied the same. Plaintiffs excepted and appealed.

F. L. Carr for plaintiff appellants.

Oliver G. Rand, Connor, Gardner & Connor, and Langston, Allen & Taylor for defendant appellees.

BARNHILL, J. The portions of the answer which plaintiffs seek to have stricken are not so irrelevant and immaterial as to require a reversal of the judgment below. Such questions as plaintiffs seek to present by their motion may be decided by objections to the evidence offered in support thereof at the trial. We enter into no detailed discussion thereof for the further reason that, even if stricken and not considered, plaintiffs are not entitled to judgment on the pleadings.

In the action to vacate the Lamm-Dickinson deeds, the court acquired jurisdiction of the parties and the subject matter of the action. The judgment therein is not one that may be treated as a nullity. *Monroe v. Niven,* 221 N. C., 362, 20 S. E. (2d), 311; *McRary v. McRary,* 228 N. C., 714; *Johnston County v. Ellis,* 226 N. C., 268, 38 S. E. (2d), 31. If the facts alleged by plaintiffs, upon which they bottom their prayer for judgment vacating the former judgment in the case of *Lamm v. Mobley et al.,* tend to establish fraud such as would vitiate the judgment, then that fraud is intrinsic. Their remedy is by motion in the cause. *Fowler v. Fowler,* 190 N. C., 536, 130 S. E., 315; *Horne v. Edwards,* 215 N. C., 622, 3 S. E. (2d), 1; *Woodruff v. Woodruff,* 215 N. C., 685, 3 S. E. (2d), 5; *Rosser v. Matthews,* 217 N. C., 132, 6 S. E. (2d), 849; *Davis v. Land Bank,* 217 N. C., 145, 7 S. E. (2d), 373; *Coker v. Coker,* 224 N. C., 450, 31 S. E. (2d), 364, and cases cited; *Young v. Young,* 225 N. C., 340, 34 S. E. (2d), 154; *King v. King,* 225 N. C., 639, 35 S. E. (2d), 893; *Simmons v. Simmons,* 228 N. C., 233. It follows that plaintiffs are not entitled to judgment on the pleadings vacating said former judgment.

In so holding we are not inadvertent to the rule that in an action in ejectment either party may attack any instrument relied on by his adversary as a muniment of title. *Powell v. Turpin,* 224 N. C., 67, 29 S. E. (2d), 26, and cases cited; *Eborn v. Ellis,* 225 N. C., 386, 35 S. E. (2d), 238. The rule has no application here for the reason plaintiffs are not,

in any event, presently entitled to the possession of the *locus*. Their right of enjoyment has not accrued.

It is admitted that Lizzie Lamm Driver, the life tenant under the will of N. W. Lamm, is still living. The judgment in the former action is valid, as against the adult defendants therein, if not the infants. Therefore, if Mrs. Lamm must rely on the judgment, then she recovered the Lizzie Lamm Driver life estate and the contingent right of the adults named in the limitation over in the event she should leave no issue surviving, if no more. She has, by *mesne* conveyances, transferred that interest—if not the fee—to the defendants herein.

But even if we should concede that the life tenant, by failing to file answer in the former action, committed waste and forfeited her life interest in the property, there could be no acceleration as contended by plaintiffs. They are the named remaindermen, but their right of enjoyment is contingent upon whether they survive the life tenant. The right of enjoyment accrues when the contingency is fulfilled, for only then can it be ascertained with certainty to whom such right belongs. Hence the plaintiffs are not entitled to the present possession and enjoyment of the *locus,* for that right has not yet accrued. To hold otherwise on this record would defeat the express intent of the testator who has directed that the roll be called at the death of the tenant for life.

Ordinarily there can be no acceleration of a contingent remainder. Claimants must await the happening of the event upon which their rights depend. *Beddard v. Harrington,* 124 N. C., 51; *Hill v. Hill,* 159 Tenn., 27, 16 S. W. (2d), 27; *Compton v. Barbour,* 5 A. L. R., 465 (Va.); *Swan v. Austell,* 261 F., 465 (*cert.* denied 252 U. S., 579, 64 L. Ed., 726); *Foreman Trust & Sav. Bank v. Seelenfreund,* 62 A. L. R., 201, Anno., *ibid.,* p. 207.

"The rule is general and well recognized that in the case of a contingent remainder, where it is dubious and uncertain as to what persons will be entitled to take the remainder, there can be no acceleration or vesting of the remainder by a renunciation of the particular estate by which the remainder is supported." *Schaffenacker v. Beil,* 320 Ill., 31, 150 N. E., 333.

In the light of what we have said, it is apparent that plaintiffs are not entitled to judgment on the pleadings. Hence the judgment below must be

Affirmed.

P. D. PERRY v. A. G. HURDLE AND H. H. LAYDEN.

(Filed 22 September, 1948.)

1. Arrest § 1b—

Within the limits of the city a police officer may summarily and without warrant arrest a person for a misdemeanor committed in his presence, but it is the duty of the officer to inform the person arrested of the charge against him and to immediately swear out a warrant before an authorized person, giving the person arrested opportunity to provide bail and communicate with counsel and friends. G. S., 160-21; G. S., 15-46.

2. Arrest § 11—Action for wrongful arrest will not lie where officers follow prescribed procedure in making arrest without warrant.

In this action for wrongful arrest and assault, the record disclosed that defendant police officers arrested plaintiff on the streets of their city, advised him he was under arrest and took him immediately to the police station where a warrant was sworn out by one of the officers and issued by the officer authorized by statute to do so. Plaintiff failed to provide bail and was committed to jail. The evidence tended to show that plaintiff was apparently committing a misdemeanor in their presence and there was no evidence that the officers used violence or undue force or acted from any improper motive. *Held:* Defendants' motion to nonsuit was properly allowed, it appearing that the officers acted in substantial conformity with prescribed procedure in making the arrest without a warrant.

3. Malicious Prosecution § 8—

In an action for malicious prosecution the burden is upon plaintiff to show termination of the criminal action in his favor and also that it had been instituted without probable cause and was prompted by malice, either actual or constructive, by a showing that the arresting officers acted without reasonable grounds to believe him guilty of an offense.

4. Malicious Prosecution § 5—

A *nolle prosequi* with leave upon failure of the jury to agree upon a verdict is a final determination of a criminal action for the purpose of an action for malicious prosecution.

5. Malicious Prosecution § 3—

A police officer acts with probable cause in making an arrest if the apparent facts are such as to lead a discreet and prudent person to believe that a criminal offense had been committed by the party charged, even though subsequently it be shown that the person arrested and prosecuted was not guilty of the offense.

6. Trial §§ 22a, 22b—

Upon motion to nonsuit, plaintiff's evidence must be considered in the light most favorable to him, but defendant's evidence may also be considered in so far as it tends to explain or make clear plaintiff's evidence.

7. Malicious Prosecution § 10—Evidence held to show that officers had probable cause for arresting plaintiff, and nonsuit in action for malicious prosecution was proper.

Plaintiff's testimony tended to show that late at night he stopped his car at an intersection of streets in a city with which he was familiar, and slept for more than an hour, that upon awakening he was confused as to where he was and drove along a street other than the one he intended, and that when accosted and questioned by officers as to where he was going he asked information as to a certain highway. One of plaintiff's witnesses testified that on the evening before, defendant had a quart bottle of eggnog, two-thirds empty, in his automobile. The officers testified that they found a bottle which had contained eggnog, not entirely empty, with the odor of alcohol about it, in plaintiff's car at the time of his arrest. *Held:* Plaintiff's evidence, together with the testimony of the officers tending to explain and clarify it, discloses that the officers had reasonable ground to believe that plaintiff was driving under the influence of intoxicating liquor, and therefore the evidence is insufficient to show want of probable cause or constructive malice, and defendant officers' motion to nonsuit in plaintiff's action for malicious prosecution was properly allowed.

APPEAL by plaintiff from *Burgwyn, Special Judge,* at May Term, 1948, of PASQUOTANK. Affirmed.

This was an action to recover damage for wrongful arrest and malicious prosecution of the plaintiff by the defendants who are police officers of Elizabeth City. Defendants admitted they arrested the plaintiff, but allege this was for a misdemeanor committed in their presence.

On the trial the plaintiff testified that he was a resident of Portsmouth, Virginia, 64 years of age, and that on 27 December, 1946, he drove to Elizabeth City for the purpose of calling on a lady with whom he had been keeping company. Arriving in the afternoon, he engaged a room at the Y. M. C. A., and between 7 and 8 o'clock called on the lady who lived on Parsonage Street. He remained there until 12 o'clock, then drove along Parsonage Street to Route 17, turned right and proceeded to the intersection of Main Street by the New Southern Hotel. He said, "I stopped there to decide where to park my car." The night was "warm and comfortable" and he went to sleep. "I kind of overslept myself. I reckon I slept an hour or maybe more." He had known Elizabeth City all his life. He woke up and drove across Main Street and along another street. "I thought I was on Main Street. I had been asleep, and I was on that route and I realized at that time (when accosted by the policemen) that I was not on Main Street where I was taking the car to park." The defendants, policemen in uniform patroling the streets, called plaintiff (they said he was on South Road Street traveling south), and asked him where he was going. Plaintiff testified he realized he was not on Main Street, and replied, "Can you give me a little information about Route 17?" The defendants then opened the

door of his automobile, asked to be shown his driver's license and searched his automobile. Then he was required to drive to where the police car was parked, and then they took him by the arm and put him in the police car. He asked, "What is the matter—anything wrong with my car?" and they said, "Officers have got you now and you have got to say nothing." He was taken to police station, and then to jail and locked up. No warrant was read to him until next morning when the warrant in the record was read to him. This had been sworn out by defendant Layden and issued by the City Warrant Officer Sergeant Pritchard, charging plaintiff with operating a motor vehicle while under the influence of intoxicating liquor or narcotic drugs. Plaintiff gave bond and was released. The case was transferred to the Superior Court for trial. At June Term, 1947, the case was heard and resulted in a mistrial, the jury failing to agree. The solicitor learning the jury stood 11 to 1 for acquittal, subsequently entered *nol. pros.* with leave. The present action was begun 1 August, 1947. Plaintiff testified he had had nothing to drink, was sober, and had violated no law. Two witnesses, who saw him that evening, testified they saw no indication of intoxication, though one testified, "I saw eggnog in his car down there at Perry's parking lot. That was at 6 o'clock in the evening. The bottle was over two-thirds empty." There was no evidence the defendants had ever seen the plaintiff before that night.

The defendants testified that while they were on patrol duty in the early hours of 28 December they observed the plaintiff driving on South Road Street, his automobile swerving from side to side. They stopped him and detected the odor of alcohol on his breath. They found under the seat beside him a small quantity of eggnog in a quart bottle. He was unsteady on his feet and talked thick-tongued. They arrested him for driving while under the influence of intoxicating liquor, took him to the police station and swore out warrant before the Warrant Officer Sergeant Pritchard. On plaintiff's failure to give bail he was committed to jail. Some hours later he gave bail and was released. The defendants testified as witnesses at the trial but took no other part in the prosecution.

At the conclusion of all the evidence defendants' renewed motion for judgment of nonsuit was allowed, and from judgment dismissing the action plaintiff appealed.

W. L. Whitley and W. L. Whitley, Jr., for plaintiff, appellant.

J. W. Jennette for defendants, appellees.

DEVIN, J. A police officer within the limits of the city which has clothed him with authority, like a sheriff or constable, may summarily

and without warrant arrest a person for a misdemeanor committed in his presence. This is a necessary concomitant of police power and essential for police protection. But in such case it is the duty of the officer to inform the person arrested of the charge against him and immediately take him before someone authorized to issue criminal warrants and have warrant issued, giving him opportunity to provide bail and communicate with counsel and friends. G. S., 160-21; G. S., 15-46; *Martin v. Houck,* 141 N. C., 317, 54 S. E., 291; 15 N. C. L., 101.

It sufficiently appears from the record in this case that the plaintiff was arrested on one of the streets of the city of Elizabeth City between the hours of 1 and 2 o'clock a.m., 28 December, by the defendants who were at the time regular police officers of the city; that the plaintiff was advised he was under arrest and was taken immediately to the police station where a warrant was sworn out by one of the defendants. The warrant was issued by the officer authorized by statute so to do, and upon the plaintiff's failure to provide bail he was committed to jail. Later in the morning he was released on bond. As the defendants on this occasion seem to have acted in substantial conformity to prescribed procedure in making an arrest without a warrant, and there was no evidence of violence or undue force, the causes of action, if sufficiently alleged, for assault and false imprisonment cannot be maintained. The plaintiff was a stranger to the officers and there was no evidence of improper motive. True, the plaintiff in his brief questions the constitutionality of the statute authorizing the appointment of a warrant officer to issue warrants, and argues the warrant was void. But we do not concur in this view or that the officers should be held liable in damages for having complied with the statute.

However, the plaintiff's complaint sufficiently alleges a cause of action for malicious prosecution. *Melton v. Rickman,* 225 N. C., 700, 36 S. E. (2d), 76. In order to maintain an action for damages on this ground it was incumbent upon the plaintiff not only to show termination of the criminal action in his favor, but also that it had been instituted without probable cause and prompted by malice. It appears that following the failure of the jury to agree on the trial of the criminal action, a *nolle prosequi* with leave had been entered. This would constitute a final determination of the case for the purposes of this action. *Wilkinson v. Wilkinson,* 159 N. C., 265, 74 S. E., 740. There was no evidence of express malice toward the plaintiff on the part of the defendants. But the plaintiff relies upon absence of probable cause for his arrest and prosecution as affording evidence of malice. *Mitchem v. Weaving Co.,* 210 N. C., 732, 188 S. E., 329. This brings us to the determinative question whether there was evidence of want of probable cause. The rule has been established and frequently stated in the decisions of this

Court that when one acts upon appearances in making an arrest and preferring a criminal charge, and the apparent facts are such as to lead a discreet and prudent person to believe that a criminal offense has been committed by the party charged, though it turns out he was mistaken and the party accused innocent, still he is justified. It is a case of apparent rather than actual guilt. *Dickerson v. Refining Co.,* 201 N. C., 90, 159 S. E., 446. The existence of circumstances and facts strong enough to excite in a reasonable mind the well-founded belief that the person charged is guilty would be sufficient to protect a police officer who acts in good faith, though it be subsequently shown the person arrested and prosecuted was not guilty of the offense. *Wilson v. Mooresville,* 222 N. C., 283, 22 S. E. (2d), 907; *Rawls v. Bennett,* 221 N. C., 127, 19 S. E. (2d), 126; *Parrish v. Hewitt,* 220 N. C., 708, 18 S. E. (2d), 41; *Miller v. Greenwood,* 218 N. C., 146, 10 S. E. (2d), 708; *Hicks v. Nivens,* 210 N. C., 44, 185 S. E., 469; *Rhodes v. Collins,* 198 N. C., 23, 150 S. E., 492; *S. v. Campbell,* 182 N. C., 911, 110 S. E., 86; *S. v. Blackwelder,* 182 N. C., 899, 109 S. E., 644; *S. v. McNinch,* 90 N. C., 699.

The burden of proof was upon the plaintiff to show that the defendants acted without reasonable grounds to believe him guilty of driving a motor vehicle while under the influence of intoxicating liquor or narcotic drugs, and that there was absence of probable cause for making the arrest and causing warrant therefor to issue. In determining the motion for nonsuit the plaintiff's evidence must be considered in the light most favorable for him.

Applying these rules, it appears from the plaintiff's testimony that at midnight on December 27th-28th he was driving along the streets of a city with which he was familiar, and stopped his automobile at a well-known intersection on Main Street near one of the city's hotels, and there went to sleep in his automobile and slept for more than an hour; that he then awoke and started his automobile and drove across Main Street and along another street, and was confused as to where he was or where he wished to go; and when the officers questioned him answered inconsequentially; that though he testified he had had nothing to drink that night and was sober, one of his witnesses testified that at 6:00 p.m. the evening before plaintiff had a quart bottle of eggnog, two-thirds empty, in his automobile. This testimony taken in connection with and as clarified by the testimony of the officers that a bottle which had contained eggnog, not entirely empty, with the odor of alcohol about it, was in plaintiff's automobile when he was arrested, tended to weaken plaintiff's denial that he had had nothing to drink, and to give point to the suspicion of intoxication.

We think the actions of the plaintiff under the circumstances as shown by his own evidence, and as explained and made clear by defendants' evidence (*Gregory v. Ins. Co.*, 223 N. C., 124, 25 S. E. (2d), 398), were such as to afford reasonable ground for suspicion and were such as "would lead a man of ordinary caution to believe, or to entertain an honest and strong suspicion" that the plaintiff was driving while under the influence of intoxicating liquor. *Stacey v. Emery*, 97 U. S., 642; *Rawls v. Bennett, supra.* The defendants were charged with the duty of suppressing crime and apprehending those who violate the law, and there is nothing in the testimony here to negative good faith on their part in the performance of this duty.

We conclude that the judgment of nonsuit was properly entered.

Affirmed.

A. T. WARD, ADMINISTRATOR OF THE ESTATE OF BURR E. COBURN, DECEASED LEGATEE/DEVISEE UNDER THE WILL OF J. E. COBURN, DECEASED; NINA M. SHARPE, LEGATEE/DEVISEE; AND MRS. LENA COBURN AND NINA M. SHARPE, SOLE HEIRS AT LAW AND DISTRIBUTEES OF THE ESTATE OF BURR E. COBURN, DECEASED, v. S. W. BLACK AND WILL W. WIGGINS, EXECUTORS, AND WILL W. WIGGINS, WALTER B. WIGGINS, MRS. CATHERINE SWANN AND MRS. GERTRUDE DUCKETT, LEGATEES UNDER THE WILL OF J. E. COBURN, DECEASED.

(Filed 22 September, 1948.)

1. Wills § 31—

While a will must be construed from its four corners or contextually, this rule of construction does not require courts to disregard the division of the instrument into sentences and paragraphs or to give a strained construction contrary to the grammatical sense of the words and form as ordinarily used by intelligent people for the expression of thought and intention.

2. Wills § 33c—Specific bequests vested at testator's death, and provision for vesting at time of distribution of estate applied only to residuary clause.

In one paragraph of the will in suit the testator specified certain bequests to named beneficiaries. By subsequent paragraph he stipulated that after the payment of the debts and expenses of the estate and the bequests to the legatees set forth in the prior paragraph, naming them, the residue of the estate should be equally divided among named beneficiaries, with further provision that in the event of the death of any of "the above named prior to the distribution of my estate" the share of the deceased legatee should be paid as stipulated. *Held:* The legacies set out in the first paragraph vested in the legatees at the time of the testator's death, and the provision that the legacy should lapse in the event a legatee died prior to the distribution of the estate applied only to those named in the residuary clause.

WARD *v.* BLACK.

PLAINTIFFS' appeal from *Alley, J.*, October-November Term, 1947, SWAIN Superior Court.

In this proceeding, brought under the provisions of G. S., 1-253, *et seq.*,—Uniform Declaratory Judgment Act—the parties seek to have construed the will of J. E. Coburn, deceased. The petitioners, or plaintiffs, are the administrator of the estate of Burr E. Coburn, a beneficiary under the will who died intestate, and certain of the latter's heirs at law or successors in title who claim as distributees of that estate; and the respondents, or defendants, are the executors under the Coburn will.

In the first paragraph of his will Coburn left all of his property of every description to his wife, but contingently, with further disposition in case of her death under certain conditions, which actually supervened. We find it necessary to reproduce only the 4th paragraph of the will, the provisions of which comprehend this controversy, with such reference to other parts of the will as may be pertinent.

"Fourth: In the event that my wife's death should occur at the same time as my own, or soon thereafter, and prior to her making any disposition by will or otherwise of the property accruing to her, under the terms of this will, then and in that event, I will, devise and bequeath all of my property, real and personal, as follows:

"(a) I will that my executors hereinafter appointed out of the first moneys coming into their hands out of my estate and after all debts are paid to pay Will W. Wiggins the sum of Ten Thousand ($10,000.00) Dollars; to my sister, Nina M. Sharpe of Lansing, Michigan, the sum of Ten Thousand ($10,000.00) Dollars; to my brother, Burr E. Coburn, of Lansing, Michigan, the sum of Ten Thousand ($10,000.00) Dollars, and to my mother, Mary A. Coburn, of Perry, Michigan, if she still be living, the sum of Ten Thousand ($10,000.00) Dollars.

"(b) I will that the residue of my estate, after the payment of all debts and expenses, and the bequests of $10,000.00 each to Will W. Wiggins, Nina M. Sharpe, Burr E. Coburn, and Mary A. Coburn, be divided equally share and share alike among the following:

"My brother, Burr E. Coburn of Lansing, Michigan, and my sister, Nina M. Sharpe of Lansing, Michigan, and the brothers and sisters of my wife, as follows: Will W. Wiggins, Walter B. Wiggins, Bettie Wiggins, Mrs. Catherine Swann, Mrs. Gertrude Duckett. *In the event of the death of any of the above named prior to the distribution of my estate his or her share shall be paid to their children if any, and if not, the estate shall be distributed share and share alike among the survivors of those above named.*"

That portion of paragraph 4 (b) giving rise to the controversy over the construction of the will is printed in italics for convenience of reference and discussion.

The record discloses that the testator, J. E. Coburn, his wife, Mrs. Bland W. Coburn, and Bettie Wiggins, a beneficiary, all died November 30, 1934—it is suggested simultaneously—but whether in a common disaster does not appear. Bettie Wiggins left no children.

Burr E. Coburn died intestate February 13, 1940, prior to any distribution of the estate and without child; testator's mother, Mrs. Mary A. Coburn, predeceased him.

The executors Black and Wiggins took charge of the estate, which consisted largely of mountain lands, for which it appears there was no immediate market, and undertook its conversion into distributable funds as soon as feasible. No sale was brought about until 1944 when a satisfactory sale was made to the T. V. A. in connection with the Fontana Dam Project, and the executors secured sufficient funds to pay the debts of the estate and have a surplus for distribution to those entitled under the will. Meantime, as noted, Burr E. Coburn had died.

The plaintiffs contended that the legacy of $10,000 bequeathed to Burr E. Coburn in paragraph 4 (a) of the will had vested at the time of his death and that Mrs. Lena Coburn and Nina M. Sharpe are now entitled to the same as sole heirs at law or successors to his estate. The defendants contended that the above italicized portions of paragraph 4 (b) is applicable to all the provisions and bequests of paragraph 4 (a); that the bequest in 4 (a) of $10,000 to Burr E. Coburn was contingent only, and dependent upon his being alive at the time of the distibution of the estate, which contingency had failed; and that now, as survivors under the modifying provisions of 4 (b) they were entitled to the legacy.

By agreement Judge Alley tried the case without the intervention of a jury, found the facts, made his conclusions of law, and rendered judgment, holding that the portion of 4 (b) above italicized should be applied to the provisions and bequests contained in paragraph 4 (a); and that Burr E. Coburn had only a contingent legacy and "due to the fact that Burr E. Coburn died before money came into the hands of the executors of said will with which to pay debts and before money came into the hands of said executors to pay the bequests set out in paragraph 4 (a) of testator's will, that said legacy of $10,000 to Burr E. Coburn lapsed," and that by reason of the death of Burr E. Coburn without children surviving and before the distribution of the estate of said testator, the legacy of $10,000 given him in paragraph 4 (a) "is not payable to the estate of Burr E. Coburn but properly belongs to and is a part of the estate of J. E. Coburn,"—the testator; and required the executors to distribute the same to the "surviving residuary legatees-devisees named

in said will, to wit: Nina M. Sharp, Will W. Wiggins, Walter B. Wiggins, Mrs. Catherine Swann, and Mrs. Gertrude Duckett, share and share alike."

From this judgment plaintiffs appealed.

Morgan & Ward for plaintiffs, appellants.

Edwards & Leatherwood for defendants, appellees.

SEAWELL, J. Since the devise or bequest to his wife became inoperative because of her death, we may say Coburn's entire estate is disposed of in two paragraphs,—4 (a) which includes the main disposition, and 4 (b) which passes the residue. The controversy grows out of the provision in 4 (b) above printed in italics. The decision here, as it did in the trial court, turns on the question whether this limitation should be applied to the provisions and bequests in 4 (a), or be confined to 4 (b) in which it occurs; or, to be more specific, whether the expression "above named" shall be held to apply only to the persons named in the list immediately preceding, or be extended also to the persons named as beneficiaries in 4 (a). The court below took the latter view; but we are unable to adopt that construction.

The appellees, with perfect propriety, urge that the will must be construed *contextually.* That is another way of putting the "four corners" rule to which we all agree; *Conrad v. Goss,* 227 N. C., 470, 42 S. E. (2d), 609; *Trust Co. v. Board of National Missions,* 226 N. C., 546, 39 S. E. (2d), 621; *Whitley v. Arenson,* 219 N. C., 121, 12 S. E. (2d), 906; but we dare not become so hopelessly contextual that "The forest takes from every tree, Its individuality."

The courts are not required to explore the will in order to discover nonapparent contradictions where the intent of the testator may be found from the grammatical sense.

Passing for the moment technical but sound rules of construction peculiar to the law, we must apply the broad assumption that the testator has used the devices common to intelligent people and the language itself for the expression of thought and intention. The will is made up of words, phrases, clauses, sentences,—and paragraphs. We are concerned with the grammatical sense and, where they appear, the rhetorical pauses, breaks and divisions intended to keep the flow of thought in reasonable unity and relation.

The grammatical connection seems to be reasonably plain. A list of the names of those to whom residuary legacies are given immediately precedes the reference "above named" in the same construction. It would be presumed, nothing else appearing, that the reference is to the contiguous list. The testator saw fit to embody this list of names, along

with the benefits to which they were entitled, in a separate paragraph. Webster defines "paragraph" as a "distinct section or subdivision of a discourse, chapter, or writing, whether of one or many sentences, that forms a rhetorical unit as dealing with a particular point of the subject." It may be regarded as a cubicle in which the testator placed a part of the subject matter for more specific treatment, to establish the finer interrelations. In this particular instance there is no apparent reason for extending it beyond the limitations of the paragraph. In our opinion the two paragraphs set up distinct categories of names and benefits, self-inclusive, and neither in fact nor intention does the expression "above named" have the effect of merging the two. By logic and custom, if not of necessity, the names of those receiving the main bequests occupy a precedent position to the names receiving the residue.

The contention of the appellees is repugnant to the general testamentary scheme and would reverse it in *medias res.* It is hardly probable that the testator, after disposing of the main estate to those who were by selection the primary objects of his bounty, and most of them blood kin, would declass these persons and degrade the nature of the bequests so as to open the succession to all of the second class, containing mostly persons unrelated to him, for no reason at all, or at least for no apparent or discoverable reason.

The $10,000 legacy given to Burr E. Coburn in paragraph 4 (a) was not contingent.

We find nothing in the will repugnant to the construction we have given it. In our opinion the legacy bequeathed Burr E. Coburn in paragraph 4 (a) vested in him at the time of the death of the testator, J. E. Coburn, and we so hold. The plaintiff, A. T. Ward, as administrator of Burr E. Coburn, and his coplaintiffs, Mrs. Lena Coburn and Nina M. Sharpe, as sole successors in title to Burr E. Coburn, are entitled to recover and receive the same. Distribution will be made accordingly.

The judgment of the lower court is reversed; and this cause is remanded to the Superior Court of Swain County for judgment in accordance with this opinion.

Reversed and remanded.

W. H. DAVIS, BILTMORE PRESS, THE INLAND PRESS OF ASHEVILLE, INC., BILTMORE DAIRY FARMS, FIVE POINTS TIRE EXCHANGE AND W. L. COLLINS v. A. W. WHITEHURST, E. R. TWEED, LEE ROY TWEED, C. L. RUDISILL AND A. C. WHEELER.

(Filed 22 September, 1948.)

1. Pleadings §§ 2, 19b—

An action by several creditors on independent claims against a common debtor, which is not in the nature of a creditors' bill, is properly dismissed upon demurrer for misjoinder of parties and causes of action.

2. Fraudulent Conveyances § 9—

In order to state a cause of action to set aside a contract as a fraud upon creditors, the complaint must allege the facts and circumstances constituting the fraud, and a mere allegation of fraud is insufficient.

3. Courts § 5: Injunctions § 4f—

Ordinarily injunction will not lie to enjoin the Superior Court of another county from proceeding in an action duly constituted and pending before it.

4. Pleadings § 18—

Where a demurrer points out a fatal defect in the complaint a motion to strike the demurrer on the ground that it is frivolous is without merit.

5. Judgments § 24: Execution § 22—

Since sale under execution can convey only the right, title and interest of the judgment debtor, title or interest in the property asserted by third persons is insufficient to entitle them to move to vacate the judgment.

6. Judgments § 4—

A consent judgment cannot be modified or set aside without the consent of the parties except by independent action based on fraud or mistake, and persons not parties to a consent judgment may not move to vacate it.

7. Execution § 3c—

As soon as it is made to appear that property against which execution is authorized is in the hands of a receiver appointed in another action, the clerk properly recalls the execution, since the judgment creditors cannot proceed against the property while it is *in custodia legis*.

APPEAL by plaintiffs from *Shuford, Special Judge*, February Term, 1948, BUNCOMBE. Modified and affirmed.

Civil action to recover judgments for the amounts alleged to be due the several plaintiffs on open account and to enjoin further proceedings in an action in Madison County, pending a final judgment herein, heard on demurrer and motion to vacate consent judgment against defendant A. C. Wheeler, entered by defendants other than Wheeler.

The defendant Wheeler is not a party to the demurrer or to the motion to vacate. "Defendants," as hereinafter used, refers only to those defendants who were parties thereto, the appellees therein.

The plaintiffs allege that the defendants own the Montaqua Hotel in Hot Springs, N. C., that they entered into a contract with A. C. Wheeler to operate the same on a 50-50 basis, that thereafter plaintiffs and others, each on his own behalf, sold to Wheeler "for and on behalf of said Hotel, and for the operation of said hotel by said owners through said operator" merchandise in the several amounts stated in the complaint, and that there is now pending in Madison County a civil action between said defendants and Wheeler concerning said contract and involving a number of charges and counter-charges.

They pray judgment that each plaintiff and such other creditors as may join herein, recover of defendants and Wheeler the amount alleged to be due him, and that further proceedings by defendants in the Madison County cause be enjoined, pending final determination of this action.

Thereafter a consent judgment was entered making additional parties plaintiff, adjudging that each plaintiff recover of A. C. Wheeler the amount therein specified, and directing execution against specified personal property. Defendants were not parties to this judgment.

The defendants moved the court to vacate the consent judgment and recall execution issued thereon. In their motion they make it appear that the property described in the judgment against which execution is outstanding is the property of said hotel and is now in the hands of a receiver appointed in the Madison County case.

The clerk granted the motion and entered judgment accordingly and plaintiffs appealed. Thereupon the defendants demurred to the complaint for misjoinder of parties and causes of action, and plaintiffs then moved to dismiss the demurrer for that it is frivolous and interposed only for the purpose of hindering and delaying plaintiffs in the prosecution of their action. The clerk denied the motion and plaintiffs appealed.

The cause came on for hearing in the court below on the demurrer and the motions interposed by defendants and plaintiffs. The court, after due hearing, (1) overruled plaintiffs' motion to dismiss the demurrer, (2) sustained the demurrer, and (3) affirmed the judgment of the clerk setting aside the consent judgment against A. C. Wheeler and recalling the execution thereon. Plaintiffs excepted and appealed.

L. E. Rudisill for plaintiff appellants.

J. M. Baley, Jr., and Jones & Ward for defendant appellees.

BARNHILL, J. This action is not in the nature of a creditors' bill. 14 A. J., 679; *Hancock v. Wooten,* 107 N. C., 9. It is an action at law

in which the cause of action of each plaintiff is several. Neither has any interest in the claim of the other. Hence, there is a misjoinder of parties and causes of action. *Beam v. Wright,* 222 N. C., 174, 22 S. E. (2d), 270; *Wingler v. Miller,* 221 N. C., 137, 19 S. E. (2d), 247; *Frederick v. Insurance Co.,* 221 N. C., 409, 20 S. E. (2d), 372; *Osborne v. Canton,* 219 N. C., 139, 13 S. E. (2d), 265; *Holland v. Whittington,* 215 N. C., 330, 1 S. E. (2d), 813; *Smith v. Land Bank,* 213 N. C., 343, 196 S. E., 481; *Vollers Co. v. Todd,* 212 N. C., 677, 194 S. E., 84.

It is true plaintiffs allege that the contract between defendants and A. C. Wheeler for the operation of the hotel was "tainted with fraud or constructive fraud, and is and was a fraud attempted to be perpetrated on the creditors of said hotel." Yet no fact or circumstance tending to sustain the allegation is alleged. *Colt v. Kimball,* 190 N. C., 169, 129 S. E., 406; *Griggs v. Griggs,* 213 N. C., 624, 197 S. E., 165. Furthermore, plaintiffs were not creditors at the time the contract was executed. Hence the complaint cannot be construed as an action in tort to annul the contract as a fraud upon creditors.

Likewise, it would be somewhat novel for the Court to hold that one Superior Court Judge can enjoin another Superior Court Judge from proceeding in an action duly constituted and pending before him. Certainly no facts are alleged which would warrant such action.

The motion to strike the demurrer was without merit. The judgment sustaining the same must be affirmed.

The judgment entered fixed the rights of the several plaintiffs against A. C. Wheeler only. Defendants are not bound thereby. Sale of the property therein inventoried, under execution, would convey nothing more than the right, title and interest of Wheeler. Hence defendants have no such interest as would entitle them to move to vacate.

Furthermore, the judgment is a judgment by consent. It is a contract between the parties thereto. *Carpenter v. Carpenter,* 213 N. C., 36, 195 S. E., 5; *Webster v. Webster,* 213 N. C., 135, 195 S. E., 362. It cannot be modified or set aside without the consent of the parties except for fraud or mistake, and this must be by independent action. *Keen v. Parker,* 217 N. C., 378, 8 S. E. (2d), 209. It follows that so much of the judgment of the court below as undertakes to vacate the same must be held for error.

Title to the personal property inventoried in the consent judgment against which execution is authorized is at issue in the Madison County cause and is *in custodia legis.* Execution against this specific property was improvidently issued. The clerk, so soon as the facts were called to his attention, properly and promptly recalled the same. Plaintiffs, before proceeding against this property must await the final determina-

tion of the Madison County case or at least until the receiver is discharged and the property released by that court.

The cause is remanded to the end that judgment may be entered in accordance with this opinion.

Modified and affirmed.

STATE v. PARIS LUNSFORD AND EARL SAWYER.

(Filed 22 September, 1948.)

1. **Robbery § 1a—**

Robbery is the taking, with intent to steal, of the personal property of another, from his person or in his presence, without his consent or against his will, by violence or intimidation.

2. **Robbery § 3: Criminal Law § 53d—**

In a prosecution for robbery the court should charge that the taking of the property must be with a specific intent on the part of the taker to deprive the owner of his property permanently and to convert it to his own use, and an instruction merely that the taking must be with felonious intent is insufficient. G. S., 1-180.

3. **Robbery § 3: Criminal Law § 53g—**

Testimony of defendants in a prosecution for robbery that they took the pistol from prosecuting witness to prevent him from harming them or some other person, requires the court to submit the question of each defendant's guilt of simple assault to the jury as a lesser offense included in the crime charged, G. S., 15-169; G. S., 15-170, since such verdict would be justified in the event the jury should find that defendants took the pistol without intent to steal it, but were not warranted in doing so on the principle of self-protection.

APPEAL by defendants, Paris Lunsford and Earl Sawyer, from *Clement, J.,* and a jury, at July Term, 1948, of the Superior Court of BUNCOMBE.

The defendants were charged with robbery.

It was made to appear at the trial by the evidence of the State and that of the defendants that the defendants met the prosecuting witness, Jack Maney, for the first time at the Amos and Andy Cafe on the Weaverville highway in Buncombe County about four o'clock on the afternoon of Saturday, 10 July, 1948; that Maney was armed with a pistol; that the defendant Lunsford seized and held Maney while the defendant Sawyer took the pistol from him; that Sawyer then delivered the pistol to Lunsford, who carried it away against the wishes of Maney; that Lunsford was arrested at his home on the following day on the

charge of robbing Maney of the pistol; and that Lunsford then and there surrendered the pistol to the arresting officers.

The testimony of the State and that of the defendants diverged radically, however, with respect to the events preceding and accompanying the taking of the pistol. The State's sole evidence on this phase of the case came from the prosecuting witness Maney. He said: "We had a friendly conversation, no hard words anyway. I had a German semi-automatic pistol and I showed it to some of the boys in the front part of the restaurant before I went in the rest room. I don't know whether I showed it direct to these defendants. I did not point it at anybody or anything. After that I went into the rest room at the back. The defendants were in there. One of them grabbed me from behind and the other took the gun out of my right-hand pocket. It was Lunsford that grabbed me from behind. Sawyer took the pistol from me."

The other version of the affair was given by the defendants and their witness, Waldo Davis. The defendant Lunsford testified as follows: "The first time I saw Jack Maney he got out of his car and came in front of the restaurant. He pulled a pistol out of his pocket and was pointing it at an empty can. He did not shoot, but he acted like he was going to. He was intoxicated. Later, inside the restaurant, Jack Maney was drinking beer and showing the pistol around. . . . Earl Sawyer and I went into the rest room, and Waldo Davis and someone was already in there. . . . Jack Maney came in and pushed me to one side. I told him not to push me, . . . He said something to me, and we had some words. He jerked this pistol out of his front pocket and pointed it at me. I grabbed his arm to keep him from shooting me and Earl Sawyer took the pistol out of his hand. He was mad about it and wanted his gun, but I told him he was in no condition to have the gun, and I did not want him to shoot me or anybody else. Earl Sawyer told him that we would leave the gun there at the restaurant and he could get it on Monday. . . . I did not want the pistol and did not intend to keep it, but only took it to keep him from shooting me." The testimony of the defendant Sawyer and the witness Davis coincided with that of Lunsford. Sawyer expressly stated that he took the pistol from Maney "for the sole purpose of preventing him from shooting Paris Lunsford."

The jury found both of the defendants guilty of robbery "as charged in the bill of indictment." From judgment based on this verdict, the defendants appealed, assigning errors.

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

Don C. Young for defendants, appellants.

ERVIN, J. The defendants emphasize their exceptions to the charge. They insist, among other things, that the trial judge erred in failing to instruct the jury as to the felonious intent essential to the crime of robbery, and in restricting the jury to the return of either a verdict of guilty of robbery or a verdict of not guilty. The record presently presented compels us to concede that the position of the defendants in these respects is well taken.

Writers upon criminal law often suggest that robbery is merely an aggravated form of larceny. 54 C. J., Robbery, section 11. It has been defined with accuracy and clarity as "the taking, with intent to steal, of the personal property of another, from his person or in his presence, without his consent or against his will, by violence or intimidation." Miller on Criminal Law, section 123. This definition clearly comports with that sanctioned by our cases. *S. v. Bell,* 228 N. C., 659, 46 S. E. (2d), 834; *S. v. Burke,* 73 N. C., 83.

In his charge in the case at bar, the trial judge told the jury with commendable correctness that a person cannot be guilty of robbery in forcibly taking property from the person or presence of another unless the taking is with felonious intent. But he inadvertently failed to explain to the jurors, who were unfamiliar with legal standards, what constitutes the requisite felonious intent in the law of robbery. In the absence of any instruction from the court on this aspect of the case, the jury was necessarily forced to resort to its own notions for the significance of this element of the offense when it passed upon the all-important issue as to whether the defendants acted with felonious intent in taking the pistol from the prosecuting witness.

Inasmuch as an intent to steal is an essential element of the crime of robbery, the judge ought to have told the jury that in robbery, as in larceny, the taking of the property must be with a specific intent on the part of the taker to deprive the owner of his property permanently and to convert it to his own use. *S. v. Sowls,* 61 N. C., 151; *S. v. Kirkland,* 178 N. C., 810, 101 S. E., 560; 54 C. J., Robbery, section 49. It is plain that the judge failed to perform his statutory duty to declare and explain the law as to this substantial feature of the case. G. S., 1-180; *Lewis v. Watson, ante,* 20, 47 S. E. (2d), 484.

The evidence at the trial required the submission of the case to the jury. But under the charge and the testimony the court should have instructed the jury to return a verdict of guilty of robbery, or a verdict of guilty of simple assault, or a verdict of not guilty as to each defendant, depending entirely upon which one of such verdicts it found to be warranted by the facts. This is true because the jury might well have found that the defendants took the pistol without any intent to steal it, but that they were not justified in so doing by the principle of self-

protection. In such event, the jury could have convicted the defendants of simple assault as an included or lesser offense. G. S., 15-169, 15-170; *S. v. Bell, supra.*

For the reasons set out above, the defendants are awarded a New trial.

MRS. GENEVIEVE HOLLEMAN WEST, WIDOW, GENEVIEVE ADELIA WEST AND JOSEPHINE MARIA WEST, DAUGHTERS OF RUPERT E. WEST, DECEASED, EMPLOYEE, v. NORTH CAROLINA DEPARTMENT OF CONSERVATION AND DEVELOPMENT, EMPLOYER, SELF-INSURER.

(Filed 22 September, 1948.)

1. Death § 7b—

Testimony of a statement by an officer shortly before his death from coronary occlusion that he "had had a time all the morning" arresting three men who resisted him, is incompetent as a dying declaration when not brought within the terms of G. S., 28-173.

2. Master and Servant § 40b—

A game warden died of coronary occlusion shortly after he had arrested three persons for fishing without a license. There was no competent evidence before the Industrial Commission as to the nature, extent or effect on the officer of their resistance to arrest. *Held:* There was no evidence from which the Industrial Commission could have found that the death resulted from an "accident."

3. Master and Servant § 40f—

Heart disease is not an occupational disease. G. S., 97-53.

4. Master and Servant § 40a—

Ordinarily, heart disease is not an injury and death therefrom is not ordinarily compensable.

APPEAL by plaintiff from *Bone, J.*, May Term, 1948, DARE.

Workmen's Compensation case instituted by dependents of Rupert E. West, deceased employee of defendant.

Rupert E. West was a district game warden. His duties required him to patrol his territory and apprehend persons found violating the game and fish laws and to take them before some justice of the peace or other judicial officer for trial.

On 18 May 1946, he made a trip from his home in Moyock approximately 2½ miles to the mouth of a creek, apprehended three persons fishing without license, took them before a magistrate in Moyock and procured warrants against them. The defendants pleaded guilty and were fined. Two paid their fines, but the other one was "kind of sar-

castic like" and did not pay his fine until later. After he had paid, deceased "took the names down from the warrants . . . got in his car and drove off." This was about 11:30, and about 12:15 or 12:30 he died as the result of a coronary occlusion. He had suffered for some time prior thereto from angina pectoris due to diseased coronary arteries.

On the day of his death, after his return trip, deceased "looked rather flushed, it was a mighty hot day and he seemed high strung and ready to go. He was always in a hurry."

A medical expert testified that the exertion or "excitement" of the arrest, the trial and the other incidents of the morning, "including the running of the boat up the creek . . . could easily have caused the coronary occlusion and the resulting death."

One witness testified that the deceased, after the trial, "had a terribly worried expression" and said to her: "I have had a time all the morning, up the creek with three men resisting me without a fishing license, three men who had no license, and I had to come in and get warrants for them."

The hearing commissioner found that deceased, on the day he died, was simply performing his usual duties and that "After a most careful analysis of all of the evidence, the Commission can find no unusual, unforeseen or unexpected event which could be construed as an accident or injury by accident." An award was denied. The full commission affirmed. On appeal to the Superior Court, the order of the full commission denying an award was affirmed and plaintiff appealed.

John B. McMullan and John H. Hall for plaintiff appellants.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody for employer appellee.

BARNHILL, J. The record is devoid of any evidence tending to show that the deceased died as the result of an injury by accident. Neither an accident nor an injury, as those terms are used in the Workmen's Compensation Act, is made to appear.

So far we have not held that mere resistance by one who is being taken into custody by an arresting officer constitutes an accident. The resulting exertion on the part of the officer, required in the performance of his duties, may be considered as an incident of his occupation. Be that as it may, the question does not arise on this record.

It is true that one witness stated that the deceased told her: "I have had a time all the morning, up the creek with three men resisting me without a fishing license, three men who had no license, and I had to come in and get warrants for them." Even so, the nature, extent, and effect of the resistance are not disclosed. Furthermore, this statement

of a deceased person was not brought within the terms of G. S. 28-173 and was inadmissible.

The finding of a material fact by the commission, to be sustained, must be supported by some competent evidence. *Logan v. Johnson,* 218 N. C., 200, 10 S. E. (2d), 653; *Gilmore v. Board of Education,* 222 N. C., 358, 23 S. E. (2d), 292; *Bank v. Motor Co.,* 216 N. C., 432, 5 S. E. (2d), 318.

Heart disease is not an occupational disease. Nor may it ordinarily be treated as an injury. G. S. 97-53. Hence death therefrom is not compensable. *Neely v. Statesville,* 212 N. C., 365, 193 S. E., 664; *Slade v. Hosiery Mills,* 209 N. C., 823, 184 S. E., 844; *Gilmore v. Board of Education, supra.*

Gabriel v. Newton, 227 N. C., 314, 42 S. E. (2d), 96, relied on by plaintiff, is not in conflict with this conclusion. There, more than the ordinary exertion incident to the discharge of the duties of an officer was made to appear. The elevator was out of order. As a result, the officer was required to carry a drunken prisoner up three flights of steps. This was the unusual and exceptional. As a result, the muscles of his heart and blood vessels were unduly strained and stretched, causing acute dilatation of the heart. This was the injury.

As the conclusion of the Industrial Commission was the only permissible inference to be drawn from the evidence, the order denying the award was without error. The judgment of the court below approving the same must be

Affirmed.

ALBERT THOMAS AND WIFE, MRS. ALBERT THOMAS, v. GROVER C. MYERS AND EMMA DAVIS PATTON, EXECUTRIX OF WARREN T. DAVIS, TRUSTEE, DECEASED.

(Filed 22 September, 1948.)

Mortgages § 30i (2): Quieting Title § 1—

Where a deed of trust is executed subsequent to the effective date of Chap. 192, Public Laws of 1923, and the note thereby secured falls due more than fifteen years prior to plaintiffs' purchase of the property, and no affidavit is filed or marginal entry is made on the record by the register of deeds as required by the statute, plaintiffs are entitled to have the deed of trust removed in so far as it constitutes a cloud on their title. G. S., 45-37 (5).

APPEAL by plaintiffs from *Alley, Emergency Judge,* at April Term, 1948, of MADISON.

This is a civil action instituted 30 April, 1946, by the plaintiffs to remove a cloud from their title, consisting of a deed of trust executed

24 December, 1925, securing a note of even date therewith, in the sum of $225.00, payable one year after date, which instrument is duly recorded in the office of the register of deeds of Madison County.

It is disclosed by the evidence offered in the trial below, that the plaintiff, Albert Thomas, for a valuable consideration, on 2 December, 1943, obtained a deed with full covenants and warranty to the premises upon which the above deed of trust purports to be a lien. This deed was duly recorded in Madison County 29 July, 1944. It also appears that no affidavit has ever been filed with the register of deeds of Madison County, or entry made on the margin of the record in his office, stating the amount still due on the note secured by the above deed of trust, as provided by G. S., 45-37 (5).

The defendant Myers offered evidence to the effect that he is the owner and holder of the deed of trust and note in question, that the note has not been paid in full and that payments have been made thereon within ten years from the date this action was instituted.

His Honor submitted issues to the jury to determine what balance, if any, is due on the note. The issues were answered in favor of the defendants. Accordingly the court entered judgment against the plaintiffs and appointed a commissioner to sell the lands described in the deed of trust. Plaintiffs appeal and assign error.

Calvin R. Edney for plaintiffs.
Carl R. Stuart for defendants.

DENNY, J. The plaintiffs except and assign as error the failure of the trial judge in his charge to the jury, to declare and explain the law arising upon the pleadings and the evidence relative to the conclusive presumption that the note secured by the above deed of trust has been paid as against creditors and purchasers for value, G. S., 45-37 (5). We think the exception is well taken and must be upheld.

The Public Laws of 1923, Chapter 192, now G. S., 45-37 (5), provides: "The conditions of every mortgage, deed of trust or other instrument securing the payment of money shall be conclusively presumed to have been complied with or the debts secured thereby paid as against creditors or purchasers for a valuable consideration . . . from and after the expiration of fifteen years from the date when the conditions of such instrument by the terms thereof are due to have been complied with, or the maturity of the last installment of debt or interest secured thereby, unless the holder of the indebtedness secured by such instrument or party secured by any provisions thereof shall file an affidavit with the register of deeds of the county where such instrument is registered, in which shall be specifically stated the amount of debt unpaid, which is secured

by said instrument, . . . whereupon the register of deeds shall record such affidavit and refer on the margin of the record of the instrument referred to therein the fact of the filing of such affidavit, and a reference to the book and page where it is recorded," etc.

It has been uniformly held by this Court that the above statute is prospective and does not apply to mortgages, deeds of trust or other instruments securing the payment of money which were executed prior to the enactment of the statute. *Hicks v. Kearney,* 189 N. C., 316, 127 S. E., 205; *Humphrey v. Stephens,* 191 N. C., 101, 131 S. E., 283; *Grocery Co. v. Hoyle,* 204 N. C., 109, 167 S. E., 469; *Smith v. Davis,* 228 N. C., 172, 45 S. E. (2d), 51.

Likewise, it is clearly held in *Smith v. Davis, supra,* that this statute was not enacted for the purpose of protecting parties who extend credit or purchase for a valuable consideration within the fifteen year period fixed by the statute, but only "from and after" its expiration.

The deed of trust involved herein was executed after the enactment of the above statute, and the note secured thereby fell due more than fifteen years prior to the date Albert Thomas obtained title to the property. Moreover, no affidavit was filed or marginal entry made on the record in the office of the register of deeds of Madison County, as required by law in order to preserve the lien of the deed of trust as against creditors and purchasers for value. Therefore, in view of the facts disclosed on the record before us, we hold the defendants are not entitled to recover anything from the plaintiffs. As to them the debt is conclusively presumed to have been paid. G. S., 45-37 (5). Consequently, the plaintiffs are entitled to have this deed of trust removed in so far as it may constitute a cloud on their title.

This cause is remanded for judgment in accord with this opinion.

Error and remanded.

E. A. HILL v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 22 September, 1948.)

1. Master and Servant § 26—

A brakeman, in the performance of his duties in interstate commerce, was proceeding from the engine to the caboose when he was struck by a crosstie thrown by workmen from the slowly moving train. The workmen were throwing the crossties from the car in the customary way for unloading them for use along the track. *Held:* The evidence fails to show any duty incumbent upon the workmen to anticipate the movements or position of plaintiff at the time of the injury, or to show negligent failure

on their part to perform a duty owed plaintiff which proximately caused the injury, and nonsuit was proper.

2. Master and Servant § 25a—

Under the construction of the Federal Employers' Liability Act by the Federal Courts, the employer is not an insurer of the safety of his employees, nor does the Act subject railroads to that degree of liability imposed by a workmen's compensation law, but the basis of liability under the Act is negligence on the part of the employer which constitutes in whole or in part the cause of the injury.

APPEAL by plaintiff from *Williams, J.*, at February Term, 1948, of NASH. Affirmed.

This was an action to recover damages for a personal injury alleged to have been caused by the negligence of the defendant. The plaintiff at the time of the injury complained of was a brakeman in the employ of the defendant Railroad Company, and it was admitted that the defendant was engaged in interstate commerce, and that plaintiff was so employed.

The plaintiff's evidence tended to show that on 5 December, 1945, he was on duty with a work train engaged in unloading crossties from gondola cars. The train was proceeding slowly as the ties were being thrown by workmen over the sides of the cars to fall along the west side of the track. As the plaintiff, in order to perform some duty, was proceeding from the engine to the caboose, he walked along on the ground parallel with the train, on the west side, and as he was passing a car, at a distance of 17 or 18 feet, a crosstie thrown out struck the plaintiff on the leg and inflicted a serious injury. There was no evidence the workmen engaged in throwing out crossties saw the plaintiff or had reason to anticipate his walking along near the track at the time. The place where plaintiff was walking was farther from the cars than where the ties being unloaded usually fell. The manner in which the ties were being unloaded was the customary way for placing ties along the track for use. The plaintiff testified, "On this particular occasion those men (in the cars) were doing what they were supposed to do."

At the close of plaintiff's evidence the defendant's motion for judgment of nonsuit was allowed, and plaintiff excepted and appealed.

Cooley & May for plaintiff, appellant.

F. S. Spruill and Thomas W. Davis for defendant, appellee.

DEVIN, J. Upon the evidence presented, as it appears of record, the judgment of nonsuit was properly entered. The evidence fails to show, under the circumstances here, any duty incumbent upon the workmen on the cars, in unloading crossties in the usual way, to anticipate the

movements and position of the plaintiff at the time of injury. Equally the evidence is wanting in probative value to show negligent failure on their part to perform a duty owed the plaintiff which proximately caused the injury complained of. Stated briefly, the evidence fails to make out a case of actionable negligence.

The plaintiff, however, insists that under the case of *Griswold v. Gardner,* 155 F. (2), 333, decided 15 May, 1946 (*certiorari* denied, 329 U. S., 725), this action coming within the provisions of the Federal Employers' Liability Act, and having been instituted for an injury to an employee of an interstate railroad, the court had no authority to grant a motion for nonsuit and take the case from the jury. In other words, it is suggested that the ruling of the Federal Courts has had the effect of converting the Federal Employers' Liability Act from a negligence statute into a workmen's compensation law, regardless of the question of negligence. But we cannot take this view. The Act itself, while depriving the defendant of certain common law defenses, bottoms the liability of the employer for injury to an employee upon negligence. In the case cited one Circuit Judge concurred in the result but disagreed with the statement that the Supreme Court had converted the Federal Employers' Liability Act into a compensation law, and the District Judge dissented.

In *Wolfe v. Henwood,* 162 F. (2), 998, decided 7 July, 1947 (*certiorari* denied), it was said: "But defendant's obligation was not such as to impose liability for injury regardless of due care and regardless of whether the injury was one reasonably to be anticipated or foreseen as a natural consequence of defendant's act. In order to recover under the Federal Employers' Liability Act, plaintiff had the burden of proving that defendant was negligent, and that such negligence in whole or in part caused Wolfe's injuries . . . The recent Supreme Court decisions do not hold that a jury question is presented in every Federal Employers' Liability Act case. The plaintiff must still establish negligence of defendant as a contributing cause of injury. . . . The Federal Employers' Liability Act does not subject a railroad to that degree of liability imposed by a workmen's compensation law, nor place the railroad in the position of an insurer of its employees." To the same effect is the holding in *Eckenrode v. Pennsylvania R. R. Co.,* 71 Fed. Sup., 764.

In *Ellis v. Union Pacific R. Co.,* 329 U. S., 649 (decided 3 February, 1947), the Court said: "The Act does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur. And that negligence must be in whole or in part the cause of the injury." See also *Brady v. Southern Ry. Co.,* 320 U. S., 476; *Tenant v. R. R.,* 321 U. S., 29; *Blair v. Baltimore & O. R. Co.,* 323 U. S., 600.

Plaintiff's exceptions to the ruling of the court on questions of evidence we find without substantial merit.

The judgment of nonsuit is

Affirmed.

MRS. NORA HALES, WIDOW OF R. H. HALES, DECEASED; THOMAS E. HALES AND WIFE, JOYCE H. HALES; ROSCOE H. HALES, UNMARRIED; AND LOUISE HALES PARKER AND HUSBAND, R. W. PARKER, v. MARVIN RENFROW AND WIFE, LANZIE S. RENFROW.

(Filed 22 September, 1948.)

1. Wills § 33c—

A devise to testator's son with proviso that should he die without children, his interest should revert to testator's other children, constitutes a fee simple, defeasible upon the death of the son without children him surviving.

2. Wills § 46—

A deed executed by the devisees owning the defeasible fee and the devisees owning the contingent limitation over, with joinder of their spouses and the testator's widow, conveys a good and indefeasible fee simple title to the property.

3. Same—

Where testator's widow and all of his children are named in the will to share alike in the residuary estate, a deed executed by all of them together with the spouses of the married children, conveys a fee simple to property acquired by testator after the execution of the will regardless of whether the residuary clause is sufficient to devise the property, since the grantors hold all right, title and interest to the property either under the residuary clause or as heirs at law.

APPEAL by defendants from *Bone, J.*, at Chambers, 29 July, 1948, NASH Superior Court.

Civil action for specific performance under a contract for the purchase of certain lots described in the last will and testament of R. H. Hales, deceased.

The defendants entered into a contract with the plaintiffs for the purchase of four lots. The original will of the testator devised three of the lots to Thomas Edwin Hales and Roscoe H. Hales, sons of the deceased, as tenants in common, subject to the following proviso: "If Edwin or Roscoe Hales should die without children, their wives, in case they are both married, shall have their interest so long as they remain a widow, and if Edwin and Roscoe Hales either should die without children after the above provisor, their interest shall revert to my other

children." The other lot was purchased by the testator after the execution of his will and was not devised, unless included in the residuary clause of the will, which provides that all the residue of testator's estate, including all personal properties, moneys, stocks, bonds, etc., after the payment of debts, expenses and legacies, the surplus, if any, shall be paid over to his wife and children in equal proportions, share and share alike. Thereafter the testator executed a codicil to his will and revoked the devise to his sons' wives and provided that should Thomas Edwin Hales or Roscoe H. Hales die without children the property devised to them should revert to his other children.

The plaintiffs tendered to the defendants a deed with full covenants and warranty executed by Mrs. Nora Hales, widow of R. H. Hales, deceased, Thomas Edwin Hales and wife, Joyce H. Hales, Roscoe H. Hales, unmarried, and Louise Hales Parker and husband, R. W. Parker, being all the heirs at law as well as all the devisees under the last will and testament of R. H. Hales, deceased. The defendants declined to accept the deed, contending that the devise to Thomas Edwin Hales and Roscoe H. Hales is only a contingent interest and that they cannot convey a good and indefeasible title to the property.

The court below held the deed tendered by plaintiffs conveys a good and indefeasible fee simple title to the property, and entered judgment accordingly. The defendants appeal and assign error.

L. L. Davenport for plaintiffs.
Cooley & May for defendants.

DENNY, J. After giving effect to the codicil to the will of the testator, the testator devised the three lots referred to herein to his sons, Thomas Edwin Hales and Roscoe H. Hales, as tenants in common, in fee simple, but in the event either son should die without children his interest will revert to the testator's other children. As to each devisee this constitutes a fee, defeasible upon his dying without children. *Conrad v. Goss,* 227 N. C., 470, 42 S. E. (2d), 609; *Cherry v. Cherry,* 179 N. C., 4, 101 S. E., 504; *Hobgood v. Hobgood,* 169 N. C., 485, 86 S. E., 189. The other children, as disclosed by the record, could only be the surviving son and his sister, Mrs. Louise Hales Parker. All the devisees, together with the widow of the testator, the husband of Mrs. Louise Hales Parker and the wife of Thomas Edwin Hales, having joined in the execution of the deed tendered to the defendants, we think the deed does convey a good and indefeasible fee simple title to the three lots referred to above. *Bank v. Whitehurst,* 202 N. C., 363, 162 S. E., 768; *Williams v. R. R.,* 200 N. C., 771, 158 S. E., 473; *Grace v. Johnson,* 192 N. C., 734, 135 S. E., 849; *Walker v. Butner,* 187 N. C., 535, 122

S. E., 301. The case of *Daly v. Pate,* 210 N. C., 222, 186 S. E., 348, cited in brief, is distinguishable from the case before us. There the testator provided for the reversion of the property to his own estate, in the event the first taker died without children, then to be "divided as best it may be between my *then living* nephews and nieces."

As to the other lot which was not specifically devised, we concur in the judgment of the court below to the effect that the residuary clause of the testator's will was sufficient to devise this lot to his widow and children, share and share alike. Conceding, however, but not deciding, that the residuary clause is insufficient to devise this lot, the purported devisees are the identical persons who would hold every right, title and interest in the property, had the testator died intestate. The widow and all the heirs at law and devisees of the testator, together with the wife and husband respectively of those who are married, having joined in the execution of the deed tendered to the defendants, the deed conveys a good and indefeasible fee simple title to this additional lot.

The judgment of the court below is

Affirmed.

J. R. ROGERS v. GULF OIL CORPORATION AND V. R. RECTOR.

(Filed 22 September, 1948.)

Landlord and Tenant § 11—

Evidence tending to show that lessee was under duty to maintain and repair the leased equipment, that it was in good condition when turned over to him by the former lessee, and that the lessor reserved no right to control the operation of the leased premises, justifies nonsuit as to the lessor in an action by a patron injured by alleged defective condition of the equipment some eleven months after the lessee had taken over control and operation of the property.

APPEAL by plaintiff from *Sink, J.,* at January Term, 1948, of BUNCOMBE. Affirmed.

This was an action to recover damages for a personal injury to the plaintiff alleged to have been caused by the tilting of a defective and unsafe automobile lift in the gasoline and motor service station belonging to defendant Oil Corporation and being operated under lease by defendant Rector.

It was alleged that the corporate defendant had turned over to defendant Rector the building and the motor service equipment therein, including an automatic hydraulic lift in said station, when the defendants knew the lift was in a broken, unsafe and dangerous condition, and that

defendant Oil Corporation had contracted to repair and keep the equipment and appliances in safe condition, which it had failed to do. Plaintiff testified that on 6 December, 1946, he drove his automobile into defendant's station to have a loose rod replaced and was directed by one of defendant's employees to drive his automobile upon the motor lift, which he did, and got out leaving the automobile braked and in gear. Thereupon defendant's employee caused the lift to be raised four or five feet, when, without warning, the automobile rolled or slipped off the lift and struck and injured the plaintiff. Plaintiff offered evidence tending to show that this was due to defective condition of the lift, and that one of the scotches on the end of the lift was broken off and the other had been broken and welded twice. The former lessee from whom defendant Rector took over the premises, however, testified the lift was in good condition when he turned it over to defendant Rector 14 January, 1946. The lease of the Oil Corporation to defendant Rector, introduced in evidence, contained provision that the lessor did not reserve any right to exercise control over the business and operations of the lessee conducted on the demised premises, and that neither lessee nor any of his employees should be deemed or considered employees of the Oil Corporation. The lessee stipulated in the lease signed by him that he received the equipment in good order and without warranty as to condition, and that it should be the duty of the lessee at his own cost to "maintain said equipment in good condition and repair." The rental was based upon the amount of gasoline sold, plus a stipulated monthly rental.

Defendants offered evidence tending to show that the lift was in good condition, and that an automobile would not roll off if properly balanced and in gear.

At the close of all the evidence the renewed motion of the corporate defendant for judgment of nonsuit was allowed. Thereupon plaintiff submitted to a voluntary nonsuit as to defendant Rector.

From judgment of nonsuit as to defendant Gulf Oil Corporation the plaintiff appealed.

C. C. Jackson, I. C. Crawford, and W. W. Candler for plaintiff, appellant.

Williams & Williams for defendant Gulf Oil Corporation, appellee.

DEVIN, J. In order to impose liability upon the lessor for injuries to a third person on leased premises or from contact with leased mechanical appliances, alleged to have been out of repair and defective, it must be made to appear that the lessor had either contracted to repair and maintain, or that "he knowingly demised premises in a ruinous condition or

in a state of nuisance," or that he "authorized the wrong." *Mercer v. Williams,* 210 N. C., 456, 187 S. E., 556; *Wilson v. Dowtin,* 215 N. C., 547, 2 S. E. (2d), 549; *Wellons v. Sherrin,* 217 N. C., 534, 8 S. E. (2d), 820; *Livingston v. Investment Co.,* 219 N. C., 416, 14 S. E. (2d), 489; *Childress v. Lawrence,* 220 N. C., 195, 16 S. E. (2d), 842; *Harrill v. Refining Co.,* 225 N. C., 421, 35 S. E. (2d), 240; *Jordan v. Miller,* 179 N. C., 73, 101 S. E., 550; *Hudson v. Silk Co.,* 185 N. C., 342, 117 S. E., 162; *Tucker v. Yarn Mills,* 194 N. C., 756, 140 S. E., 744.

Evidence to support either of these positions as basis of recovery against the defendant Oil Corporation seems to be lacking, and we think the judgment of nonsuit was properly entered.

Judgment affirmed.

HENRY MEIER v. NICHOLI MILLER ET AL.

(Filed 22 September, 1948.)

1. Contracts § 25c—

Plaintiff's contention that a certain sum borrowed by him for the operation of the business of corporate defendant should have been added to his recovery for breach by the individual defendant of the contract for the operation of the joint enterprise, is untenable when the finding of the referee was that the loan was made to the corporate defendant and that plaintiff had sustained no loss thereby, especially where plaintiff fails to make it appear that the amount borrowed was not taken into account in arriving at the amount of plaintiff's recovery.

2. Same—

Where plaintiff loses both money and services as a result of defendant's wrongful breach of the contract with plaintiff for the operation of a joint enterprise, both the money lost and the fair value of the services are recoverable as damages in his suit for breach of contract, and objection by defendant on the ground that recovery could not be had as upon *quantum meruit* is untenable, since *quantum meruit* of the services is used only as a measuring stick in ascertaining the damages.

APPEALS by plaintiff and defendants from *Bone, J.,* at January Term, 1948, of PASQUOTANK.

Civil action to recover for breach of contract or for money and services expended in joint enterprise.

In 1943, the defendant Miller owned a crab factory or plant at Manteo, Dare County, which had been out of use for sometime. It was originally operated under the name of Roanoke Island Products Company, Inc. On 7 April, 1943, H. Meier and N. Miller, plaintiff and defendant herein, undertook to re-establish the plant and operate it.

Plaintiff agreed to invest $2,000 in the business (which was to be repaid to him out of the net profits of the business) and to manage the operation of the plant.

Defendant agreed to lease the property to the corporate defendant for a period of five years at a nominal rental; to divide the stock of the corporation between plaintiff and defendant in the ratio of 40% to 60%, and to share equally with the plaintiff the profits of the corporation.

Plaintiff came from his home in New Jersey to Skyco, Roanoke Island, spent approximately two months in restoring the plant to an operating basis, advanced $1,543.48 for the purpose, and operated the plant at an expense of $1,142.73 for a week, during which time 1,800 pounds of crab meat was processed, frozen and shipped to National Frosted Foods, Inc., marketing agent. The plant was then closed for lack of funds to run it.

The court below found "that plaintiff, in good faith, entered upon the performance of his part of the contract, but was hindered by the defendant Miller, who interfered with plaintiff's management of the business . . . that the defendant Miller did nothing towards a performance of his part of the contract, but on the contrary, by his interference . . . prevented plaintiff from further performance; that such conduct upon the part of said defendant constituted a breach of the contract on his part."

This action is for breach of contract and accounting. The defendant set up a counterclaim.

There was a reference under the statute which resulted in findings and judgment in favor of the plaintiff for $1,467.71, and exculpation from any liability in respect of the matters set up in the counterclaim.

Both plaintiff and defendants appeal, assigning errors.

J. Henry LeRoy for plaintiff.

Martin Kellogg, Jr., and W. A. Worth for defendants.

STACY, C. J. A business undertaking by Henry Meier and Nicholi Miller failed at the end of a week's operation. Each blames the other for the failure. Both appeal from the outcome in the court below, each presenting a single question.

1. Plaintiff's appeal: Plaintiff contends that in addition to the amount of the judgment in his favor, there should be added the sum of $750, which was borrowed from the National Frosted Foods, Inc., marketing agent, and for the repayment of which the plaintiff rendered himself personally liable. The factual finding is that the loan of $750 was made to the corporate defendant and plaintiff has sustained no loss thereby. Moreover, the record permits the inference that this borrowed money was used in re-establishing the business and was taken into account in

arriving at the amount of plaintiff's recovery. No error has been made to appear in respect of this item.

2. Defendants' appeal: The defendants seek to present the question whether plaintiff, who sues for breach of contract, may recover as upon *quantum meruit*. The record hardly presents the question as stated. It is found that by reason of Miller's breach of the contract and interference with the operation of the business, plaintiff has lost his money and services and that the defendants have thereby obtained a reconditioned plant. In ascertaining the value of plaintiff's services, *quantum meruit* was used as the measuring stick. Where plaintiff loses both money and services as a result of defendant's wrongful conduct in breaching his contract, the damages recoverable are such as may reasonably be supposed to have been in the contemplation of the parties when the contract was made. This would include the money lost and a fair value of the services rendered. *Troitino v. Goodman,* 225 N. C., 406, 35 S. E. (2d), 277.

On both appeals, No error.

T. B. COLEMAN ET AL. v. J. D. MERCER ET AL.

(Filed 22 September, 1948.)

Contracts § 19: Partnership § 6—

Where the evidence tends to show that upon the formation of a partnership to carry on the construction business theretofore operated by one of the parties, the partners agreed to take over the assets of the old business and to continue the business in the new trade name and pay the accounts then outstanding, nonsuit is improperly entered in favor of the new member in an action to recover for material taken over by the partnership and subsequently used in construction projects of the partnership, since if the new partner is not liable on the theory of partnership, he is liable on his specific agreement, supported by valuable consideration, to assume liability for the outstanding accounts, upon which contract the material furnisher may sue as a third party beneficiary.

APPEAL by plaintiffs from *Edmundson, Special Judge,* at March-April Term, 1948, of EDGECOMBE.

Civil action to recover for building materials sold and delivered.

The complaint alleges that on 29 January, 11 and 14 February, 1947, the plaintiffs sold to J. D. Mercer, trading as Farmville Building Supply Company, 48,000 bricks valued at $1,118.00; that soon thereafter J. D. Mercer and his brother, W. H. Mercer, formed a copartnership under the firm name of Mercer Construction Company, which said partnership took

over the bricks sold by the plaintiffs, used them and assumed the indebtedness of the Farmville Building Supply Company.

J. D. Mercer testified that he was indebted to the plaintiffs for the bricks in question; that sometime in February, 1947, his brother, W. H. Mercer, came into his construction business on the basis that "I would own 60% of the business and he 40%. . . . It was a 60-40 interest in the business, and that is the way it continued until the folding up of the business. . . . The agreement was instead of giving him a salary. He stood to make 40% of the profits. . . . I had some materials on hand, including brick from Nash Brick Company, which had not been paid for. . . . It was agreed that we would continue the business and take care of these outstanding accounts. . . . We agreed to give to the business, after we formed a partnership, the name of Mercer Construction Company. The brick bought from Nash Brick Company went into three different jobs. . . . After I made the arrangement with my brother, I did not continue to carry my bank account in the name of J. D. Mercer. From that time on I carried it in the name of Mercer Construction Company. . . . My brother had authority to draw checks against the Mercer Construction Company account. . . . On or about May 15, 1947, the business folded up, dissolving the partnership or arrangement."

At the close of plaintiffs' evidence, there was a judgment of nonsuit as to the defendant, W. H. Mercer. From this ruling, the plaintiffs appeal, assigning error.

Battle, Winslow & Merrell for plaintiffs, appellants.

Leggett & Fountain for W. H. Mercer, defendant, appellee.

STACY, C. J. The question for decision is the sufficiency of the evidence to carry the case to the jury as against the defendant, W. H. Mercer.

Without elaborating or setting out in detail the different matters debated on brief, we think the liability of W. H. Mercer for plaintiffs' claim belongs to the jury on the evidence disclosed by the record—if not on the theory of partnership, then on his specific agreement.

The defendants agreed to take over the assets of the Farmville Building Supply Company, continue the business in their new trade name, and pay the accounts then outstanding. Plaintiffs' claim was among these outstanding accounts. Hence, there is shown W. H. Mercer's specific agreement to assume joint liability for the claim in suit, and this assumption is supported by a valuable consideration. "A third party may maintain an action on a contract made for his benefit."

Boone v. Boone (6th syllabus), 217 N. C., 722, 9 S. E. (2d), 383. See *Gorrell v. Water Supply Co.*, 124 N. C., 328, 32 S. E., 720.

There was error in exculpating W. H. Mercer from liability on the record.

Reversed.

FLORENCE E. LOWMAN, ADMINISTRATRIX OF THE ESTATE OF GAY REE LOWMAN, v. CITY OF ASHEVILLE, A MUNICIPAL CORPORATION.

(Filed 22 September, 1948.)

1. Pleadings § 27—

Ordinarily a motion to make a pleading more definite is addressed to the discretion of the court. G. S., 1-153.

2. Same—

In the absence of indication to the contrary, it will be presumed that the trial court's denial of a motion to make a pleading more definite was in the exercise of his discretion.

3. Same: Appeal and Error § 40b—

The discretionary denial of a motion to make a pleading more definite is not reviewable upon appeal.

4. Pleadings § 27—

The denial of a motion to make a pleading more definite does not preclude defendant from applying for a bill of particulars. G. S., 1-150.

APPEAL by defendant from *Sink, J.*, at January Term, 1948, of BUNCOMBE.

This is a civil action for damages for the alleged wrongful death of plaintiff's intestate, arising out of an automobile accident on a public street within the corporate limits of Asheville.

The plaintiff alleges in her complaint: "That (at) a point between the intersection of Biltmore Avenue to the city limits, as herebefore referred to, there existed in approximately the middle portion of said street or way a large hole some 18 to 20 inches across in a north-south direction and some 10 to 12 inches across in a east-west direction and approximately three to three and one-half inches deep." It is further alleged that the automobile in which the plaintiff's intestate was riding ran into said hole, causing the automobile to crash into a concrete block or wall, which resulted in the death of plaintiff's intestate, etc. No allegation in the complaint fixes the locale of the hole in the street, except that it existed in a street known as the "Old Black Mountain Highway" between where said highway intersects with Biltmore Avenue and the city limits of the City of Asheville.

The defendant made a motion in apt time, for an order to require the plaintiff to make the allegations of her complaint more definite and certain with respect to the point where the accident occurred. The defendant showed by affidavit that the distance from where the "Old Black Mountain Highway" enters Biltmore Avenue to the city limits of the City of Asheville is approximately one mile. The motion was denied, and the defendant appeals, assigning error.

No counsel contra.

Robt. W. Wells and J. Y. Jordan, Jr., for defendants.

DENNY, J. Ordinarily whether or not the trial judge grants a motion to make a pleading more definite, as provided in G. S., 1-153, is within his discretion. And where there is nothing on the record, as in the instant case, to indicate the motion was denied as a matter of law, it will be presumed the judge denied it in his discretion. *Brown v. Hall,* 226 N. C., 732, 40 S. E. (2d), 412; *Cody v. Hovey,* 219 N. C., 369, 14 S. E. (2d), 30; *Wolf v. Goldstein,* 192 N. C., 818, 135 S. E., 39; *Hensley v. Furniture Co.,* 164 N. C., 148, 80 S. E., 154. It would seem the motion had some merit, but such orders entered in the discretion of the trial judge are not reviewable upon appeal. *Cody v. Hovey, supra; Brown v. Hall, supra.* Even so, we know of no reason why the defendant, if it so desires, may not apply for a bill of particulars, as provided in G. S., 1-150. *Building Co. v. Jones,* 227 N. C., 282, 41 S. E. (2d), 747; *Lucas v. Railway Co.,* 121 N. C., 506, 28 S. E., 265.

The judgment below is

Affirmed.

RACHEL COOPER LAMM v. DELTON LAMM.

(Filed 22 September, 1948.)

1. Contempt of Court § 2b—

Failure to obey a court order cannot be punished for contempt unless the disobedience is willful, which imports knowledge and a stubborn purpose.

2. Same—

Where defendant testifies that his failure after knowledge to obey a court order for the payment of alimony *pendente lite* was due to his lack of financial means, and no evidence is presented at the hearing tending to negative the truth of defendant's explanation or to establish as an affirmative fact that he possessed the means wherewith to comply with the order, the court's finding that defendant willfully disobeyed the order

is not supported by the record, and judgment committing him to imprisonment for contempt must be set aside.

APPEAL by defendant from *Bone, J.*, 15 May, 1948, in action in the Superior Court of NASH County.

This is an action for alimony without divorce under G. S., 50-16. On 7 February, 1948, an order was entered in the cause after due notice to the defendant commanding him to pay to the plaintiff the sum of $50.00 per month, commencing 14 February, 1948, as alimony pending the trial, and $75.00 as attorney fees. The defendant did not appear before the court when the order was made. Thereafter, the court granted a rule on application of plaintiff requiring the defendant to appear and show cause on 15 May, 1948, why he should not be attached for contempt for failing to pay support money and counsel fees in conformity with the order.

The plaintiff offered no evidence on the hearing beyond testimony showing that the defendant had failed to pay the alimony and counsel fees ordered paid by the court. The defendant offered this explanation: "That he was out of the county when the order in this original action was made and was also out of the State and that he had no information of the order rendered in this cause February 7, 1948; that he was looking for work and that he does not have nor has he had the means to comply with said order; . . . that the first notice that he had about the order rendered February 7, 1948, was when this order to 'Show Cause' was served on him April 30, 1948; that at the present time he is working for the State Highway Commission and has only worked for them for two weeks and that he has only received $25.00 from said employment; that he does not own any property nor have any money with which to comply with said order and that he has not wilfully disobeyed the order of the Court."

Whereupon, the court found as a fact that the defendant had willfully disobeyed the order for the payment of alimony and counsel fees, adjudged him to be guilty of contempt by reason thereof, and ordered "that he be placed in the common jail of Nash County until he has complied with the order of February 7, 1948, or until he is otherwise discharged in the manner prescribed by law." From this ruling, the defendant appealed, assigning errors.

L. L. Davenport for plaintiff, appellee.

O. B. Moss for defendant, appellant.

ERVIN, J. A person cannot be punished for contempt in failing to obey an order issued by a court unless his disobedience is willful. G. S.,

5-1, subsection 4. One acts willfully when he acts knowingly and of stubborn purpose. *West v. West,* 199 N. C., 12, 153 S. E., 600; *In re Hege,* 205 N. C., 625, 172 S. E., 345. Manifestly, one does not act willfully in failing to comply with a judgment if it has not been within his power to do so since the judgment was rendered. As no testimony was presented at the hearing upon the rule to show cause tending to negative the truth of the explanation made by defendant, or to establish as an affirmative fact that he possessed the means wherewith to comply with the order for alimony and counsel fees at any time after the entry of such order, the finding that the defendant willfully disobeyed the order of the court is not supported by the record, and the judgment committing him to imprisonment for contempt must be set aside. *Smithwick v. Smithwick,* 218 N. C., 503, 11 S. E. (2d), 455; *Berry v. Berry,* 215 N. C., 339, 1 S. E. (2d), 871; *Vaughan v. Vaughan,* 213 N. C., 189, 195 S. E., 351; *West v. West, supra.* It is so ordered.

Error and remanded.

ELIZABETH EDMUNDS v. EDWIN ALLEN ET AL.

(Filed 22 September, 1948.)

Trial § 49½: Appeal and Error § 40b—

A motion to set aside the verdict for excessiveness is addressed to the sound discretion of the trial court and is not ordinarily reviewable on appeal.

APPEAL by defendant from *Clement, J.,* at July Term, 1948, of BUNCOMBE.

Civil action to recover damages for injury to Oriental rugs deposited in defendant's warehouse for storage.

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

"1. Did the defendants contract and agree to store the rugs of the plaintiff mentioned in the complaint in a moth-proof room, as alleged in the complaint? Answer: Yes.

"2. If so, did the defendants breach said contract? Answer: Yes.

"3. Were the rugs of plaintiff damaged while in the care and custody of the defendants as warehouseman, through the negligence of the defendants? Answer: Yes.

"4. What amount, if any, is the plaintiff entitled to recover on account of damage to her said rugs? Answer: $2,550.00."

From judgment on the verdict, the defendant appeals, assigning errors.

Williams & Williams for plaintiff, appellee.
Guy Weaver for defendant, appellant.

STACY, C. J. While there may have been some slight error in the trial, none appears on exceptive assignment of error which justifies another hearing. The controversy narrowed itself largely to issues of fact, determinable alone by the jury.

The motion to set aside the verdict for excessiveness was addressed to the sound discretion of the trial court, and is not reviewable on the showing here made. *Hawley v. Powell,* 222 N. C., 713, 24 S. E. (2d), 523; *Johnston v. Johnston,* 213 N. C., 255, 195 S. E., 807; *Cole v. R. R.,* 211 N. C., 591, 191 S. E., 353; *Goodman v. Goodman,* 201 N. C., 808, 161 S. E., 686.

The verdict and judgment will be upheld.

No error.

STATE v. CLAUDE SULLIVAN.

(Filed 29 September, 1948.)

1. Criminal Law § 17g—

G. S., 122-83, and G. S., 122-84, prescribe no procedure by which the question of whether an accused is mentally incapable of understanding the nature of the proceedings against him and to make a rational defense may be brought to the attention of the court, or the manner in which such inquiry shall be conducted, and therefore the procedure in each instance is controlled by the common law.

2. Common Law—

So much of the common law as had not been abrogated or repealed by statute is in full force and effect within this State. G. S., 4-1.

3. Criminal Law § 17g—

Whether the circumstances call for an inquiry as to the mental capacity of defendant to plead to the indictment and conduct a rational defense is for the determination of the trial court in the exercise of its discretion, and the question may be raised either before or during the trial upon suggestion of counsel or the court may act *ex mero motu* upon its own observation.

4. Same—

The manner and form of an inquiry to determine whether a person accused of crime has the mental capacity to plead to the indictment and prepare a rational defense is for the determination of the trial court in

the exercise of its discretion, and the court may submit an issue as to the present mental capacity of defendant and the issue of his guilt or innocence of the offense charged at the same time.

5. Same—

Where the court submits an issue of defendant's present mental capacity at the same time it submits issues arising upon the trial, and the charge of the court is not in the record, it will be assumed that the court properly charged that if the jury should find on the first issue that defendant is mentally deranged, the jury should not answer the other issues.

6. Criminal Law § 81b—

Where the judge's charge does not appear of record, it will be presumed that the court correctly instructed the jury on every principle of law applicable to the facts in evidence.

BARNHILL, J., dissents.

APPEAL by defendant from *Sink, J.,* at June Term, 1948, of BUNCOMBE.

Criminal prosecution upon a bill of indictment containing three counts charging that defendant on 6 March, 1948, with force and arms, unlawfully, willfully and feloniously (1) did break and enter a storehouse, shop, and building, dwelling, occupied by and in possession of Fritschy's Auto Service and James G. Fritschy, where merchandise, chattels, moneys and other valuable securities and personal property were being kept, with, intent to commit a felony, to wit: the crime of larceny therein, etc., (2) did take, steal and carry away the following personal property: "one office safe containing $3,100 and other personal property owned by and in the possession of Fritschy's Auto Service and James G. Fritschy of the value of $3,500"; and (3) did receive and have said property, etc., "well knowing the said property to have been theretofore feloniously stolen, taken and carried away,"—all contrary to the form of the statutes in such cases made and provided by law, etc.

When the case was called for trial in Superior Court, upon inquiry by the court as to the plea of defendant, counsel for defendant stated to the court that he desired to enter a plea of incapacity to plead to the bill of indictment, and, at the same time, submitted the following as the proper and only issue at this time: "Is the defendant, Claude Sullivan, sane and capable of conducting his defense in this indictment?"

Thereupon, the court announced to counsel for defendant that it would submit the issue tendered and would also submit an issue to the same jury as to the guilt or innocence of defendant upon the charges in the bill of indictment, and thereupon directed that a plea of not guilty on the charge of guilt or innocence be entered for defendant. To this ruling of the court defendant, through his counsel and in apt time, objected and excepted. Exception.

The State offered testimony bearing upon the issues as indicated above, and (1) as each witness came to testify, counsel for defendant objected to the introduction of any testimony on question of the guilt or innocence of defendant, and (2) at the close of the testimony of each witness, in respect to the guilt or innocence of defendant, moved to strike out all evidence relating thereto, and each time duly excepted. Exceptions.

While the charge of the court is not shown in the record and case on appeal, these issues were submitted to and answered by the jury as here shown:

1. Is the defendant at this time mentally incompetent to plead to the bill of indictment and to properly prepare his defense, as alleged by the defendant?

2. Was the defendant mentally incompetent to know right from wrong on the 6th day of March, 1948, as alleged by the defendant?

3. Is the defendant guilty, as charged in the bill of indictment?

The jury answered the first issue "No," the second issue "No," and the third issue "Yes."

Motion of defendant to set aside the verdict was overruled, to which exception was duly taken.

Judgment was entered: (1) Upon the charge of breaking and entering, imprisonment at hard labor in State's Prison at Raleigh for not less than 5 nor more than 10 years; (2) on the charge of larceny that prayer for judgment be continued for 10 years on specified condition; and (3) on charge of receiving stolen goods, knowing them to be stolen, that judgment be suspended. Defendant excepted and appeals to the Supreme Court and assigns error.

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

Don C. Young for defendant, appellant.

WINBORNE, J. The assignments of error on this appeal, as stated in brief of counsel for defendant, the appellant, bring into question only the ruling of the trial court in submitting the issue as to the then present mental disorder of defendant and the issue as to his guilt or innocence to the same jury and at the same time.

In this connection, considering pertinent statutes of this State, P. L. 1899, Chapter 1, now G. S., 122-83 and G. S., 122-84, as amended by Laws 1945, Chapter 952, Sections 53 and 54, applicable rules of the common law and decided cases of this Court, *S. v. Harris,* 53 N. C., 136; *S. v. Vann,* 84 N. C., 722; *S. v. Haywood,* 94 N. C., 847; *S. v. Khoury,* 149 N. C., 454, 62 S. E., 638; *S. v. Sandlin,* 156 N. C., 624, 72 S. E.,

203; *S. v. Godwin,* 216 N. C., 49, 3 S. E. (2d), 247, the challenge may not be sustained on the facts of this record.

The General Assembly of this State, by statute enacted in the year 1899, Public Laws 1899, Chapter 1, has provided (1) in Section 65, among other things, that "When a person accused of the crime of murder . . . or other crime . . . shall be found by the court to be without sufficient mental capacity to undertake his defense or to receive sentence after conviction, the court before which such proceedings are had shall detain such person in custody until an inquisition shall be had in regard to his mental condition . . .," and (2) in Section 63, among other things, that ". . . all persons who, being charged with crime, are adjudged to be insane at the time of their arraignment, and for that reason cannot be put on trial for the crimes alleged against them, shall be sent by the court before whom they are or may be arraigned for trial, when it shall be ascertained by due course of law, that such person is insane and cannot plead, to the state hospital . . . and they shall be confined therein . . . and . . . treated, etc."

These statutes are now G. S., 122-84 and G. S., 122-83, respectively, as amended by Laws 1945, Chapter 952, Sections 54 and 53, respectively. (And it may be noted in passing, that the 1945 amendment strikes out the word "insane" where it appears and inserts in lieu thereof the words "mentally disordered," and also strikes out the word "insanity" where it appears and inserts in lieu thereof the words "mental disorder.")

Thus it is seen that these statutes, in so far as they relate to a person accused of crime presently insane or mentally disordered, take hold only when such person "shall be found by the court to be without mental capacity to undertake his defense" under one statute, and is "adjudged to be insane at the time of" his "arraignment, etc.," under the other. But the General Assembly has prescribed no procedure by which the question of the present insanity or mental disorder of the person so accused of crime may be brought to the attention of the court, or for the investigation by the court preliminarily to adjudicating the question as to whether accused is so mentally disordered as to be incapable of making a rational defense, that is, whether the accused has capacity to understand the nature and object of the proceedings against him, to comprehend his own conduct in reference to such proceedings, and to make a rational defense,—the test generally adopted to determine whether the person should be put on trial. See Weihofen on "Insanity as a Defense in Criminal Law," 333.

Hence, in the absence of an applicable statute, the investigation of the present insanity or mental disorder to determine whether the accused shall be put on trial, and the form of the investigation ordered, are controlled by the common law. So much of the common law as has not

been abrogated or repealed by statute is in full force and effect within this State. G. S., 4-1, formerly C. S., 970. *Hoke v. Greyhound Corporation,* 226 N. C., 332, 38 S. E. (2d), 105.

And the rule at common law is that an accused cannot be tried while insane, for the obvious reason that his insanity may render him incapable of making a rational defense, and at common law, if at any time while criminal proceedings are pending, the trial court, before or during the trial, either from observation or upon suggestion of counsel, has facts brought to its attention which raise a doubt of the then sanity of the accused, it should, before putting him upon trial or continuing his trial initiate an investigation of such by any method, generally, that seems to it best. 14 Am. Jur., 801, Criminal Law, Section 44. That is, the method that shall be ordered of determining the present sanity of the accused before the beginning of the trial generally rests in the discretion of the trial judge, with or without the aid of a jury. He may inquire into the facts himself, or he may impanel a jury for the purpose if he sees fit, or he may submit the question as an issue to the trial jury. See 142 A. L. R., 961—Annotation, subject "Investigation of present sanity to determine whether accused should be put, or continue, on trial," for full treatment of the subject.

Moreover, the subject of present incapacity of one accused of crime to plead to indictment therefor first came to this Court for consideration under the rules of the common law in the case of *S. v. Harris* (1860), 53 N. C., 136. The headnote there epitomizes the decision of the Court: "Where, upon the arraignment of one for murder, it was suggested that the accused was a deaf-mute, and was incapable of understanding the nature of a trial and its incidents and his rights under it, it was held, proper for a jury to be impaneled to try the truth of these suggestions, and on such jury responding in the affirmative to these suggestions, for the court to decline putting the prisoner on his trial."

The subject was under consideration next in the case of *S. v. Haywood* (1886), 94 N. C., 847. In this case when defendant was arraigned and called upon to answer the charges of forgery and the uttering of a forged order, counsel appearing in his behalf suggested to the court his present insanity and inability to plead or make defense, and asked that a preliminary inquiry as to his mental condition be made before a jury. The request was granted, but verdict favorable to him was set aside as being against the weight of the evidence. Then the trial judge gave notice to his counsel that when the case should be called for trial on a day certain, two issues, one as to the defendant's mental capacity to manage his defense, and the other as to his guilt or innocence, would be submitted to one and the same jury at the same time. Accordingly, the issues were submitted to the jury, and verdict was against the defendant on both

issues. Judgment was pronounced, and defendant appealed to this Court. And, the Court, *Smith, C. J.*, writing the opinion and finding error in other respects, had this to say: "While we do not mean to decide that there was error in law, which enters into and vitiates the verdict in submitting the double issue, as was done in this case, of present insanity and guilt, to the same jury, for this course has been pursued in other trials, *Rex v. Little,* Russ & R., 430, *Regina v. Southey,* 4 Foster and Fin., 864, cited in Buswell on Insanity, Sec. 461, and these furnish a precedent, it is most obviously fitting and proper that the inquiries should have been separated, and that the defendant's capacity to enter upon a trial, should be determined before he is put upon the trial; for the trial would amount to nothing if the defendant had not the required capacity to defend himself against the charge. The very requirement to answer prejudges the case adversely to the prisoner, and must have an unfavorable influence upon the jury, in passing upon the issue. Besides, the blending of the inquiries by allowing evidence pertinent to one, and incompetent to the other, notwithstanding the caution the judge may give as to its consideration, may tend to confuse the minds of the jury, and to do injustice to the defendant."

On the other hand, since the enactment of the statute of 1899, now G. S., 122-84 and G. S. 122-83, this Court has had the subject under consideration in two cases, *S. v. Khoury* (1908), *supra,* and *S. v. Sandlin* (1911), *supra.* It may be noted, however, that the statute of 1899 is not referred to in either of these cases.

In the *Khoury case,* while it was held that the motion of the defendant to be permitted to withdraw his plea of not guilty, and submit the issue of his insanity at the time of the trial, was a matter resting in the sound discretion of the court, and while the decision turned on that point, the Court, in an opinion by *Connor, J.*, went on to say that "Whether, at the time defendant was put upon his trial, the court should have suspended proceedings and impaneled a jury to ascertain whether he was then insane, is a matter resting in the sound discretion of the court." Then the Court, after referring to the case of *S. v. Haywood, supra,* continued: "While, as suggested by *Smith, C. J.*, it would have been more fitting that the suggestion of present insanity be first tried, he said that to try the question together with the issue of traverse was not error in law which would vitiate the verdict." The Court then quotes with approval this statement of the rule from Buswell on Insanity, Sec. 461: " 'Although, if there be a doubt as to the prisoner's insanity at the time of his arraignment, he is not to be put upon trial until the preliminary question is tried by a jury, the question of the existence of such a doubt seems to be exclusively for the determination of the court; and counsel for the defendant can neither waive an inquiry as to the

question of defendant's sanity, nor compel the court to enter upon such an inquiry when no ground for doubting it appears . . . And the question whether an inquiry is called for by the circumstances of the case, is for the determination of the court, who may also direct the manner in which such inquiry shall be conducted. Error will not lie to review the proceedings upon such an inquiry, whether the allegation of insanity be made before or after the conviction of the prisoner.' "

And in the *Sandlin case,* the prisoner was permitted to amend his plea upon trial for murder and set up insanity as a defense, and without objection a double issue as to defendant's insanity at the trial and as to his guilt were submitted to the jury. *Clark, C. J.,* speaking for the Court, disposes of the appeal by saying: "The double issue was submitted without exception at the time, and was therefore waived unless it was inherently prejudicial." And, continuing, "In *S. v. Haywood,* 94 N. C., 847, the Court while not approving such practice, held that it was not error in law, stating that this practice has been pursued in other trials, citing *Rex v. Little,* . . ., *Regina v. Southey,* . . ., Buswell on Insanity, Sec. 461"; and concluding, "We do not see how any prejudice could have arisen to the prisoner on this occasion."

Furthermore, in the cases *S. v. Vann, supra,* and *S. v. Godwin, supra,* the suggestion of present insanity of defendants was made after conviction and before judgment. In the *Vann case,* tried in 1880 under the common law, and before the enactment of statute of 1899 to which reference is hereinabove made, the trial court held that the defendant was entitled to a jury to inquire into the fact, and on appeal hereto, this Court concurred in the ruling. But in *S. v. Godwin,* tried in 1938, and after the enactment of the above statute, this Court held that the case of *S. v. Vann* was not controlling; that it fits the common law rule; and that after 1899 the matter was controlled by statute. The Court quotes this pertinent part of the statute: "When a person accused of the crime of murder . . . shall be found by the court to be without sufficient mental capacity . . . to receive the sentence after conviction," and then states that "The statute requires that an inquiry shall be had when a person 'shall be found by the court' to be without sufficient mental capacity, a finding by the court implies a discretion of the trial court."

By the same reasoning, the requirement of the statute that an inquisition shall be had when a person charged with crime "shall be found by the court" to be "without sufficient mental capacity to undertake his defense," implies a discretion in the trial judge as to how he shall make the finding. Yet the statute is silent with respect to the preliminary procedure for finding the facts upon which the court may make the determination.

Hence, in the light of the common law as interpreted and applied by this Court in decided cases, the question of the existence of a doubt as to prisoner's sanity at the time of his arraignment seems to be exclusively for the determination of the court. And whether an inquiry is called for by the circumstances of the case, as well as the manner in which such inquiry shall be conducted, is for the determination of the trial court in the exercise of its discretion.

Furthermore, in the present case the charge of the court not being brought up in the record and case on appeal, it will be assumed that in presenting the issues to the jury the court properly instructed the jury that if the jury in answer to the first issue as to the sanity of defendant should find that he was at the time mentally incompetent to plead to the bill of indictment and to properly prepare his defense, as alleged by him, the jury should not answer the other issues.

When the judge's charge is not shown in the record of case on appeal, it will be presumed that the court correctly instructed the jury on every principle of law applicable to the facts in evidence. *Growers Exchange, Inc., v. Hartman,* 220 N. C., 30, 16 S. E. (2d), 398; *Cato v. Hospital Care Association,* 220 N. C., 479, 17 S. E. (2d), 671; *Hornthal v. R. R.,* 167 N. C., 627, 82 S. E., 830; *Dry v. Bottling Co.,* 204 N. C., 222, 167 S. E., 801; *Miller v. Wood,* 210 N. C., 520, 187 S. E., 767; *Maynard v. Holder,* 219 N. C., 470, 14 S. E. (2d), 415; *S. v. Wooten and Ward,* 228 N. C., 628, 46 S. E. (2d), 868.

For reasons above stated, error is not made to appear in the trial below. Hence, in the judgment from which appeal is taken, we find

No error.

BARNHILL, J., dissents.

MRS. IRENE BAILEY KING v. ROGER COLEY, ET AL.

HERMAN H. KING v. ROGER COLEY, ET AL.

HERMAN H. KING, ADMR., v. ROGER COLEY, ET AL.

(Filed 29 September, 1948.)

1. Pleadings § 3a—

The rule that a complaint must be liberally construed upon a demurrer does not mean that the pleader may dispense with the certainty required at common law, since defendants have the right to know the grounds upon which they are charged with liability in order to prepare their defense, of which right they may not be deprived under the guise of liberal construction.

2. Same—

When plaintiff seeks to recover in one action on two or more causes of action, he must state each cause of action separately, setting out in each the facts upon which that cause of action rests. G. S., 1-123; Rule of Practice in the Supreme Court, No. 20 (2).

3. Pleadings § 24a—

The complaints allege causes of action in favor of the several plaintiffs based upon negligence of defendants in serving plaintiffs poisonous and contaminated food. Upon failure of plaintiffs to make out a case of negligence, the court submitted the actions to the jury on the theory of breach of implied warranty. *Held:* Defendants should not be held liable in damages on a cause of action of which they had not been given prior notice and an opportunity to prepare their defense, and the verdict and judgment is vacated upon appeal.

APPEAL by defendants from *Grady, Emergency Judge,* October Term, 1947, DURHAM.

Civil actions in tort consolidated for trial. The plaintiffs each separately sued to recover damages of the defendants as follows: (1) for the injury allegedly sustained by Irene Bailey King caused by poisonous and contaminated food served by defendants' employee at their restaurant in Durham; (2) for the death of the intestate of plaintiff Herman H. King, administrator, caused by eating said food; and (3) for damages sustained by Herman H. King individually by reason of expenses incurred by him for hospital and physician's bills and burial expenses as husband of Mrs. King and father of the infant intestate.

At the conclusion of the evidence for plaintiffs, the defendants moved in each case separately for judgment as in case of nonsuit. The court sustained the motions as to the causes of actions bottomed on allegations of negligence, "but overruled the motion in so far as the allegations of implied warranty were concerned." To the refusal of the court to dismiss the causes in their entirety defendants excepted.

At the conclusion of all the evidence the defendants renewed their motions to dismiss. The motions were overruled and defendants excepted.

Thereupon issues were submitted to and answered by the jury as follows:

"1. At the times referred to in the pleadings was Mrs. Roger Coley a co-partner with her husband in the AAA Restaurant, as alleged in the complaint?

"Answer: Yes.

"2. Did the defendants, or either one of them, sell to the plaintiffs food containing poisonous and deleterious substances, as alleged in the complaint?

"Answer: Yes.

"3. If so, was the death of Katherine Mae King caused by eating said food or any part thereof?

"Answer: Yes.

"4. If so, was Mrs. Irene Bailey King injured in her person by eating said food or any part thereof?

"Answer: Yes.

"5. What damages, if anything, is Herman H. King, Administrator of Katherine Mae King, entitled to recover of the defendants, or either one of them?

"Answer: $3,000.00.

"6. What damages, if anything, is Mrs. Irene Bailey King entitled to recover of the defendants, or either one of them?

"Answer: $250.00.

"7. What damages, if anything, is Herman H. King entitled to recover of the defendants, or either of them, on account of monies expended by him as a direct result of the injuries to and death of Katherine Mae King?

"Answer: $707.99."

The court entered judgment on the verdict and defendants excepted and appealed.

William H. Murdock, Victor S. Bryant, and Robert I. Lipton for plaintiff appellees.

Robert M. Gantt for defendant appellants.

BARNHILL, J. That a complaint must be liberally construed is axiomatic with us and requires no citation of authority. The rule is ordinarily invoked and is consistently applied when the sufficiency of a pleading is challenged by demurrer. But this does not mean that the pleader may dispense with the certainty, regularity, and uniformity which is essential in every system adopted for the administration of justice. The plaintiff must state his cause of action with the same substantial certainty as was required at common law. *Oates v. Gray,* 66 N. C., 442.

The notion that the code of civil procedure is without order or certainty and that any pleading, however loose or irregular, may be upheld is erroneous. *Webb v. Hicks,* 116 N. C., 598.

While the pleadings are to be construed liberally they are to be so construed as to give the defendant an opportunity to know the grounds upon which he is charged with liability. *Thomason v. R. R.,* 142 N. C., 318; *McLaurin v. Cronly,* 90 N. C., 50.

"The facts should be so stated as to leave the defendant in no doubt as to the alleged cause of action against him, so that he may know how

to answer, and what defense to make." *Hussey v. R. R.*, 98 N. C., 34; *Taylor v. R. R.*, 145 N. C., 400.

When the plaintiff seeks to recover in one action on two or more causes of action, he must state each cause of action separately, setting out in each the facts upon which that cause of action rests. G. S. 1-123; Rule 20 (2), Rules of Practice in the Supreme Court, 221 N. C., 557. See also Rule 19, *ibid.*, 553; McIntosh, P. & P., 442.

It is to be noted that while the provision of the statute requiring each cause of action to be stated separately, as printed in G. S., 1-123, is so arranged as to make it appear that it relates only to subsection 7, the history of the statute, as well as the language used, indicates that it applies to each and every case in which two or more causes of action are joined in the same complaint. The last sentence in G. S. 1-123 (7), to wit: "But the causes of action so united must all belong to one of these classes, and, except in actions for the foreclosure of mortgages, must affect all the parties to the action, and not require different places of trial, and must be separately stated.", appears in a separate and distinct paragraph following subsection 7 in the original Code of Civil Procedure and in all other codifications of the Act. The error in printing first occurred in Michie's unofficial codes. The codifiers of the General Statutes apparently followed the unofficial rather than the official codes. Revisal, sec. 469; Code, sec. 267; C.C.P., sec. 126; C. S., 507. See also Clark, Code of Civil Procedure Annotated, p. 286, and the Code with Notes and Decisions, by Tourgee, p. 115.

Here the complaints are cast in tort to recover damages resulting from the alleged negligence of the defendants. It is apparent they were prepared with that theory of defendants' liability in mind. There is no second cause of action stated. No reference is made to any implied warranty or to any breach thereof. In the Irene Bailey King complaint she does allege:

"13. That as a result of the defendants' negligence and breach of warranty as hereinbefore set forth, this plaintiff was damaged . . ."

This is the only reference she makes to any warranty and this allegation is not contained in the other complaints. In all, the proximate cause of the injuries received is repeatedly alleged to have been the negligence of the defendants.

It was upon this theory the evidence was offered. But when plaintiffs failed to make out a case of negligence, the court below submitted the issues which appear of record. Thus the defendants went into court to defend an action in tort for negligence and, although they won that action, they came out of court with a judgment against them for breach of warranty.

Whether the issues submitted are sufficient to sustain a judgment on a cause of action for breach of an implied warranty we need not now decide, for we are of the opinion that the complaints, on this record, do not state any cause of action *ex contractu* and did not serve to put the defendants on notice that they were charged with liability for breach of implied warranty. They should not be compelled to answer in damages upon any cause of action of which they had not been given prior notice and an opportunity to prepare their defense.

In applying the rule of liberal construction, due regard must be had to the right of defendants to this notice and opportunity. It is a right to which they are entitled and of which they may not be deprived under the guise of any rule of construction.

It is not sufficient that the plaintiffs have a cause of action and can prove it; they must first plead it, then prove it. *McLaurin v. Cronly, supra.*

Williams v. Elson, 218 N. C., 157, 10 S. E. (2d), 668, upon which plaintiffs rely, is distinguishable. There, breach of warranty was clearly and definitely alleged.

For the reasons stated the verdict and judgment must be vacated. This leaves the plaintiffs at liberty to seek redress for breach of implied warranty if so advised.

The judgment below is

Reversed.

WILLIAM H. KEE AND WIFE, SARAH KEE, v. SCOTT DILLINGHAM AND J. W. GIBBS.

(Filed 29 September, 1948.)

1. Fraud § 3: Cancellation and Rescission of Instruments § 2—

While ordinarily, promissory representations are insufficient predicate for an action for fraud or rescission, allegation and evidence to the effect that defendants represented that they had talked to city officials and that the city would fill a large gully on the lot in a matter of days, that this representation was material and false, and that the house extended four inches over the street line in violation of defendants representation that the house was built on the lot described, are sufficient to overrule defendants' demurrer to the complaint and demurrer to the evidence.

2. Cancellation and Rescission of Instruments § 15—

While ordinarily, damages for breach of contract or for fraud cannot be recovered in an action for rescission, plaintiffs in an action for rescission are nevertheless entitled to recover special damages sustained as a result of the fraud which cancellation of the contract does not repair.

3. Same—

Upon rescission of the contract of sale at the instance of vendee, the vendee is entitled to recover expenditures for permanent improvements less rental value of the property while in vendee's possession, but not expenditures for personal property which vendee is entitled to remove nor expenditures made for improvements after knowledge of all the facts or after discovery of the fraud, nor for money paid defendants for other lots.

4. Same: Trial § 31b—

In this action by vendees to rescind the contract of sale for fraud, the charge of the court *is held* not to contain sufficiently definite instructions on the issue of damages to guide the jury to an intelligent determination of the issue, and a new trial is awarded.

APPEAL by defendants from *Sink, J.*, June Term, 1948, of BUNCOMBE. New trial.

This was a suit to rescind a contract and for damages on account of fraud whereby plaintiffs were induced to contract for the purchase of an unfinished house in Asheville.

According to the terms of the written contract signed by the parties, the plaintiffs agreed to purchase an unfinished house belonging to defendants for $5,500.00, and to give a lien on furniture and an automobile as security for a down payment of $1,000, to be paid in 60 days. Plaintiffs were to complete the house at their own expense and occupy same; full warranty deed to be executed when terms complied with.

Plaintiffs alleged that for the purpose of inducing them to sign this contract the defendants falsely and fraudulently represented (a) that the property would finance for $5,500; (b) that the back-line of the lot extended to a culvert; (c) that the house was built on the lot described; (d) that the house could be finished for $500; (e) that the lumber used in construction was well-seasoned; and (f) that a large gully 15 feet deep and 30 to 40 feet across, adjoining the premises and on property of defendant Dillingham, would be filled in a few days by the City of Asheville, this being as alleged a promissory representation falsely and knowingly made to induce the execution of the contract.

Plaintiffs alleged the falsity of these representations in that the property could not be financed for more than $2,000; the back-line of the lot did not extend to the culvert; a portion of the house was built about 4 inches over the street line; the plaintiffs have been compelled to expend $2,500 on the property; lumber in the house was green and is now warped; and the gully has not been filled, and the City had not been requested or made any commitment to have this done. Plaintiffs allege that relying upon these fraudulent representations they have expended $2,500 in effort to finish the house and improve the property, and they

ask that their contract to purchase the property be rescinded, and that they recover the amounts so expended.

The defendants denied there was any fraud in the transaction; that plaintiffs executed the contract after an examination of the premises and agreed to take the house "as is" for $5,500; that the dimensions of the lot were set out, and plaintiffs knew the location of the back-line; that the line of the street on the west was not defined, no sidewalk had been laid, and that defendants knew no more than plaintiffs of any encroachment. Defendants alleged that the house if completed could have been financed for $5,500, and defendants had offered to accept deed of trust for the amount due and allow plaintiffs to pay at rate of $60 per month. Defendants denied they represented the house could be completed for $500, or that the plaintiffs expended $2,500 for that purpose. Defendants denied the allegations as to green lumber or that any representations were made as to the gully. Defendants set up cross-action for damages for breach of contract.

Plaintiffs offered evidence tending to show, among other things, that the house as built by defendants extended 4 inches over the street line; and that defendants represented "the gully would be filled; that they had seen the City and the City was going to fill the gully back of the house; that they had talked to the city officials about it, and the gully would be filled in two or three days"; that this was material, as the then condition of the gully was dangerous for plaintiffs' children; that these statements were false and designedly made to induce plaintiffs to buy. Plaintiffs also offered evidence in support of other allegations, and as to certain items of expenditures made subsequent to date of contract September 9, 1947, and prior to date of suit November 7, 1947.

Defendants offered evidence in rebuttal in support of the matters pleaded in their answer.

Upon issues submitted the jury found that plaintiffs were induced to execute the contract by false and fraudulent representations of the defendants, and that plaintiffs were entitled to recover of the defendants $1,600. No recovery was allowed on defendants' cross-action.

From judgment on the verdict, defendants appealed.

William J. Cocke for plaintiffs, appellees.

James E. Rector for defendants, appellants.

DEVIN, J. The defendants' demurrer *ore tenus,* interposed in the court below, on the ground that the plaintiffs' complaint did not state facts sufficient to constitute a cause of action was properly overruled, as was their demurrer to the plaintiffs' evidence. While some of the matters complained of as grounds for the relief sought would seem to

involve mere expressions of opinion or promissory representations, we think there are allegations and evidence in support which under the principle stated in *Bank v. Yelverton,* 185 N. C., 314, 117 S. E., 299, are sufficient to withstand a demurrer and to carry the case to the jury. *Kemp v. Funderburk,* 224 N. C., 353, 36 S. E. (2d), 155; *Ward v. Heath,* 222 N. C., 470, 24 S. E. (2d), 5; *Silver v. Skidmore,* 213 N. C., 231, 195 S. E., 775; *Haywood v. Morton,* 209 N. C., 235, 183 S. E., 280; *Clark v. Laurel Park Estates,* 196 N. C., 624 (635), 146 S. E., 584; *Blackman v. Howes,* 185 P. (2), 1019, 174 A. L. R., 1004; Annotation 1010.

The defendants excepted to the instructions given the jury on the issue of damages and to the court's failure definitely to point out the matters to be taken into consideration in determining this issue.

The court charged the jury as follows: "If these defendants were induced by false and fraudulent representations to sign this contract then they would be entitled to recover at your hands, for such improvements as they placed upon the property less a reasonable rental for the use thereof since the time that they entered it, the 10th day of September, 1947. The court has and does charge you that certain items are not real estate. A floor heating plant, cupboards in the kitchen, the Venetian blinds are household and linoleum is household furniture and no realty. Such additions as the plaintiffs, if you come to consider the third issue, made to the premises less a reasonable rental they would be entitled to recover, and these items held to be personal property they would be entitled to remove from the premises if the contract is held, as plaintiffs insist upon in the second issue, and the defendants insist that it should not be. The plaintiffs ask you to answer that issue in the sum of $2,000 less a reasonable amount of rentals for the period that they have occupied the premises. What that rental should be is a matter for you to determine in the light of all the facts that have been developed."

This appears to be the only instruction given the jury on this issue.

The plaintiffs' suit is for rescission of the contract to pay $5,500 for the property on the ground of fraud, and also for the recovery as damages for expenditures made for permanent improvements on the house contracted for in order to complete it. Ordinarily a suit for rescission of a contract may not be joined with an action for its breach or damages for fraud, but where special damages have been sustained as the result of the fraud practiced, rescission of the contract will not bar a recovery for damages. *Lykes v. Grove,* 201 N. C., 254, 159 S. E., 360. The rule is, if rescission of the contract does not place the injured party *in statu quo,* as where he has suffered damages which cancellation of the contract cannot repair, there is no principle of law which prevents him from maintaining his action for damages caused by the other party's fraud.

Fields v. Brown, 160 N. C., 295, 76 S. E., 8. The rule is well stated in 9 Am. Jur., 385, as follows: "A vendee in possession who rescinds a contract for the sale of land because of the misrepresentation of the vendor is entitled to the purchase money paid, the value of permanent improvements erected in good faith, the amount of taxes paid, and interest on these several sums, deducting from the aggregate the value of the rent while the vendee remained in possession." Under this rule it was permissible for the plaintiffs to seek to strike down the contract *ab initio,* if procured by fraud, and, for the purpose of restoring the *status quo ante,* to recover such expenditures as they were induced by the fraud to make for permanent improvements on the real property of the defendants, less rental value while in possession. This, however, would not include money paid for personal property which plaintiffs would have right to remove, nor for expenditures voluntarily made for improvements with knowledge of all the facts or after discovery of the fraud alleged, nor money paid defendants for other lots as claimed. An examination of the charge on this issue leads to the conclusion that the trial judge inadvertently omitted to give the jury sufficiently definite instructions to guide them to an intelligent determination of the question (*Lewis v. Watson, ante,* 20, 47 S. E. (2d), 484; *Yarn Co. v. Mauney,* 228 N. C., 99, 44 S. E. (2d), 601; *McNeill v. McNeill,* 223 N. C., 178 (182), 25 S. E. (2d), 615; *Spencer v. Brown,* 214 N. C., 114, 198 S. E., 630), and that the defendants are entitled to a new trial. In this view it is unnecessary to consider other exceptions noted during the trial brought forward in defendants' assignments of error.

New trial.

C. W. POOLE AND WIFE, SARILDA POOLE, v. BEN GENTRY AND WIFE, PEARL GENTRY.

(Filed 29 September, 1948.)

1. Trial § 55—

Where the parties consent to trial by the court without a jury, G. S., 1-184, the findings of the court are as conclusive as a verdict of the jury if supported by competent evidence.

2. Appeal and Error § 6c (3)—

Where evidence is admitted without objection, exceptions to the findings of the court on the ground that they were based upon incompetent evidence are untenable.

3. Appeal and Error § 39c—

Exceptions to the exclusion of testimony will not be considered on appeal where the record fails to disclose what the witnesses would have testified had they been permitted to answer the questions.

4. Trial § 16½—

Exceptions to the exclusion of competent testimony become immaterial when it appears that the court subsequently revised his rulings and admitted the testimony.

5. Boundaries § 5b—

A person present at the survey of lands for partition and who saw the commissioners mark natural monuments called for in their report and in the deeds for partition, is competent to testify as to the location of the natural monuments and that he saw defendants' surveyor run the line to such monuments.

6. Same—

It is competent for a surveyor to testify that certain persons, who were present at the time of the original survey for partition and who testified at the trial as to the location of the monuments, pointed out to him a natural monument called for as a corner in the report of the commissioners and the muniments of title.

7. Boundaries § 3c—

Where a natural monument has disappeared, it is competent for the surveyor to testify that he located the corner by reversing the line from another corner.

8. Boundaries § 5e—

A map prepared by a surveyor, who, together with another surveyor who had made an independent survey, vouches for its accuracy, is competent for the purpose of explaining their testimony with respect to their surveys of the *locus*.

APPEAL by plaintiffs from *Sink, J.*, at the March Term, 1948, of the Superior Court of MADISON County.

The plaintiffs, C. W. Poole and wife, Sarilda Poole, sued the defendants, Ben Gentry and wife, Pearl Gentry, to recover certain land and damages for its alleged wrongful detention. The plaintiffs and the defendants made conflicting claims to title and right to possession of the property in controversy through a common source, to wit, Gilliard Tweed, who died testate while seized in fee of a large tract of land lying north of Shelton Laurel Creek in Madison County and embracing the *locus in quo*.

Subsequent to the death of Gilliard Tweed, namely, in 1929, his land was partitioned among his devisees in a special proceeding in conformity with article 1 of chapter 46 of the General Statutes. Tract No. 3 was allotted to Ethel Tweed and was described as beginning on a hemlock near the north bank of Shelton Laurel Creek and running thence "north 7 degrees east 60 poles to a stake in east line; then with said line 33 poles more or less to Tract No. 2; thence south 32 degrees west 69 poles to a white oak; thence west with creek 6 poles to the beginning." Tract

No. 4 was allotted to Love Tweed under this description: "Beginning on a red oak at bank of Shelton Laurel Creek (and runs) thence north 7 degrees east 62 poles to east line; thence with said line south 86 degrees east 14 poles more or less to corner of Tract No. 3; thence south 7 degrees west 60 poles to a hemlock, corner of Tract No. 3; thence west with the creek 11 poles to the beginning." It thus appears that the western boundary of Tract No. 3, which was described in its first call, and the eastern boundary of Tract No. 4, which was defined in its third call, were identical.

On December 30, 1930, Ethel Tweed deeded the southern part of Tract No. 3 to Ella Franklin, and on June 21, 1944, Ella Franklin, with the joinder of her husband, A. J. Franklin, conveyed such portion of Tract No. 3 to the defendants. On December 17, 1936, Love Tweed transferred Tract No. 4 in its entirety to the plaintiffs.

By consent of the parties entered in the minutes, the action was tried by Judge Sink without a jury under G. S., 1-184. The defendants presented virtually uncontradicted testimony indicating that they and their grantors, A. J. Franklin and Ella Franklin, had resided upon and cultivated the *locus in quo* during the fourteen years next preceding the issuance of the summons.

The plaintiffs bottomed their case upon the theory that the property in dispute lay inside Tract No. 4 owned by them, and the defendants based their claim upon the proposition that such property was situated within the portion of Tract No. 3 belonging to them. Hence, the decision was properly made to hinge upon the determinative question as to the location of the *locus in quo*. The plaintiffs and the defendants produced diametrically conflicting evidence in support of their respective contentions as to the location of the real property in controversy. After hearing such testimony and the argument of counsel for the parties, Judge Sink found as facts that the *locus in quo* lay within the portion of Tract No. 3 owned by the defendants and concluded that it belonged to the defendants and entered judgment accordingly. From this judgment, the plaintiffs appealed, making twenty assignments of error.

Calvin R. Edney and George M. Pritchard for plaintiffs, appellants.
Carl R. Stuart for defendants, appellees.

ERVIN, J. Exceptions 19 and 20 challenge the validity of the findings of fact and conclusions of law of the trial judge and the judgment entered thereon upon the ground that the findings of fact were "based upon incompetent evidence and contrary to the weight of all the evidence." These exceptions are unavailing. The parties waived trial by jury to the issues of fact in compliance with the provisions of the perti-

nent statute. G. S., 1-184. This being the case, the findings of fact of the trial judge are as conclusive as the verdict of a jury if there was evidence to support them. *Eley v. R. R.*, 165 N. C., 78, 80 S. E., 1064. The record contains abundant testimony to justify the findings of fact in question, and the facts found are sufficient to sustain the judgment entered. *Fish v. Hanson*, 223 N. C., 143, 25 S. E. (2d), 461. Even if there were a foundation for the reason assigned for it, the objection that the findings of fact were "based upon incompetent evidence" comes too late. The plaintiffs permitted practically all of the evidence of the defendants to be introduced without objection. *Webb v. Rosemond*, 172 N. C., 848, 90 S. E., 306; 53 Am. Jur., Trial, section 135. Moreover, the record discloses indisputably that the testimony of the defendants supporting the findings of fact of the trial judge was competent. It came from witnesses who assisted in partitioning the lands of Gilliard Tweed among his devisees in 1929, and from surveyors who subsequently surveyed Tracts Nos. 3 and 4 on the basis of information derived from such witnesses and the muniments of title of the parties. *Southern v. Freeman*, 211 N. C., 121, 189 S. E., 190; *Roane v. McCoy*, 182 N. C., 727, 109 S. E., 842; *Becton v. Goodman*, 181 N. C., 475, 105 S. E., 875.

Exceptions 1 and 11 are addressed to rulings of the trial court sustaining objections to questions propounded to witnesses by the plaintiffs. These exceptions will not be considered here because the record does not show what evidence the witnesses would have given if they had been permitted to answer the questions. *Francis v. Francis*, 223 N. C., 401, 26 S. E. (2d), 907. Exceptions 3, 4, and 15 relate to the rejection of the testimony of the plaintiff, Sarilda Poole, concerning extra-judicial declarations of her husband, C. W. Poole, and of A. J. Franklin, the deceased husband of the defendants' predecessor in title, Ella Franklin. These exceptions are immaterial for the reason that the court subsequently corrected and revised these rulings and permitted this witness to testify to these matters. *Metcalf v. Ratcliff*, 216 N. C., 216, 4 S. E. (2d), 515.

Exceptions 5, 6 and 7 are clearly untenable. The defendants' witness, E. L. Cutshall, was present at the survey in 1929 when the land of Gilliard Tweed was partitioned among his devisees by the commissioners in the special proceeding, and saw the commissioners mark the hemlock, white oak, and red oak trees called for in their report and in the deeds of the parties as corners of Tracts Nos. 3 and 4. Hence, he was competent to testify as to these matters and as to the location of these natural monuments. Likewise, the court rightly allowed this witness to state that he was present at a survey made by the defendants' surveyor, Robert Reagan, a short time before the trial, and saw Reagan run a line from

the red oak corner to the spot where the hemlock tree stood at the time of the partition in 1929. 11 C. J. S., Boundaries, section 114.

Exceptions 8, 9 and 10 must be overruled. The evidence of the surveyor Reagan that at the time of his survey of the premises E. L. Cutshall and Sylvester Johnson pointed out to him the white oak corner called for in the report of the commissioners and in the defendants' chain of title was plainly admissible. Both Cutshall and Johnson were present at the original survey in 1929 when the white oak was marked as a corner, and testified as to its location at the trial. Indeed, Johnson was one of the commissioners in the partition proceeding. *Becton v. Goodman, supra.* The hemlock called for as a corner of Tracts Nos. 3 and 4 disappeared before the Reagan survey. Consequently, it was competent for Reagan to testify that he undertook to establish the location of this lost corner by extending the line from the white oak and by reversing the line from the red oak until they met, and that these lines intersected within one foot of the spot which the witness Cutshall had pointed out to him as the place where the hemlock had stood. In so doing, Reagan followed an approved method for relocating lost corners. 11 C. J. S., Boundaries, section 13; 8 Am. Jur., Boundaries, section 69. See, also, *Cowles v. Reavis,* 109 N. C., 417, 13 S. E., 930.

Exceptions 12, 14, and 18 relate to the reception and use of the map of Tracts Nos. 3 and 4 designated as defendants' Exhibit No. 1. This map was prepared by the surveyor Reagan, and both he and the defendants' witness, George Sprinkle, who had made an independent survey of these lands, vouched for its accuracy. Consequently, the court properly admitted the map to enable Reagan and Sprinkle to explain their testimony with respect to their surveys of the premises in question. *McKay v. Bullard,* 219 N. C., 589, 14 S. E. (2d), 657; 32 C. J. S., Evidence, section 730.

We have carefully considered Exceptions 2, 13, 16, and 17, and have concluded that none of them are of sufficient merit to justify a new trial.

As no harmful error has been made to appear, the judgment of the court below is

Affirmed.

J. E. RAMSEY AND WIFE, EFFIE RAMSEY, v. S. T. RAMSEY AND WIFE, ADDIE RAMSEY; WINIFRED RAMSEY AND WIFE, ELLIE RAMSEY.

(Filed 29 September, 1948.)

1. Adverse Possession § 7—

A grantee is not entitled to tack the adverse possession of his predecessor in title as to a parcel of land not embraced within the description in his deed, and therefore where he has been in possession for less than

twenty years, he cannot establish title by adverse possession to land lying outside the boundaries of his deed.

2. Appeal and Error § 39c—

Where appellant, as a matter of law, is not entitled to the relief sought, alleged errors committed by the lower court cannot be prejudicial to him, and the verdict and judgment against him will be sustained.

APPEAL by defendants from *Alley, Emergency Judge,* April Term, 1948, MADISON.

Civil action in ejectment in which defendants plead title by adverse possession.

Plaintiff J. E. Ramsey and defendant S. T. Ramsey own adjoining tracts of land. They are the real parties in interest and will be so treated, "plaintiff" being used to designate J. E. Ramsey, and "defendant" to designate S. T. Ramsey. They claim from a common source. Plaintiff has the senior title, and the deeds in defendant's chain of title call for the plaintiff's line as the eastern boundary line of defendant's tract. The dividing line under the calls in the plaintiff's deed begins "at a beech on the South bank of the creek below where the said J. C. Ramsey, deceased, used to live; thence S. 16 poles to a stake on a ridge." the location of the beginning corner in this call is admitted.

During the "no stock law" era, each owner built a fence around his arable land. Plaintiff's fence extends westerly along the public road to a point near a spring, thence at an angle southwesterly to the dividing line, and thence south approximately along the dividing line. Defendant's fence also extends along the public road easterly to a point on the opposite side of the spring, thence at an angle southeasterly to the common fence along the dividing line. This leaves a small triangular tract outside the fence, facing on the road, on which is located a spring on plaintiff's side of the dividing line. Defendant and those under whom he claims have for years used this spring for general purposes. They have built a spring house and have kept the spring in usable condition for more than 50 years.

Originally in his answer defendant asserted that his line extended considerably to the east of the line as contended for by plaintiff and embraced the spring tract. He pleaded ownership of the lappage by adverse possession for 20 years and also adverse possession under color. But during the trial the parties entered into the following stipulation:

"In this case the plaintiffs, and those under whom they claim, admit that the defendants are the owners of all the lands embraced within the boundaries of their deed when properly located, and the defendants, and those under whom they claim, on the other hand, admit that the plaintiffs are the owners of all the lands embraced in their deed when prop-

erly located. But these admissions shall not prejudice the rights of the defendants to contest their right of adverse possession."

This stipulation narrowed the case to a controversy over the small triangular tract outside the fences upon which the spring is located. This, of course, involved the location of the true dividing line as well as defendant's claim of ownership by adverse possession.

The court submitted the issues which appear of record. The jury answered the issues bottomed on plaintiff's cause of action in favor of plaintiff but did not answer those directed to defendant's affirmative plea. The verdict as thus rendered was accepted by the court without objection on the part of defendant. The court rendered judgment on the verdict and defendants appealed.

Smathers & Meekins and Carl R. Stuart for plaintiff appellees.

J. M. Baley, Jr., and George M. Pritchard for defendant appellants.

BARNHILL, J. The uncontroverted evidence locates the boundary line from the beech to a point on the ridge as contended by plaintiff and as shown on the court map. This places the triangular tract on which the spring is located within the bounds of the deeds relied on by plaintiff. Plaintiff's line, as thus located, is the eastern line of the tract claimed by defendant under the express call in his deed. Thus defendant's claim to this small tract must rest on proof of adverse possession for 20 years.

Whether defendant has offered any evidence of open, notorious, exclusive, and continuous adverse possession under known and visible boundary lines is questionable. The spring has been used by defendant and his predecessors in title as the source of their water supply for many years, yet he did not deny that it has been used by consent of those who own the record title. It has also been used by plaintiff, by the children at a nearby school, and the workmen at a nearby sawmill, by other persons living in the neighborhood and by those who passed along the road. Defendant himself testified that it "has been open to the public for fifty years until he (plaintiff) built that fence across the road. . . . People all along the highway use water out of that spring." There is very little, if any, indication of adverse and exclusive possession here. Defendant used the spring more regularly and more extensively than others. Nonetheless, others used it as he did.

But there is a more vital defect in defendant's claim—a defect which clearly discloses a want of the requisite possession for the statutory period of 20 years.

Defendant purchased and went into possession of his tract in March 1928. This action was instituted 11 December 1945. However exclusive

and adverse his possession may have been, it has not continued for the requisite period and is therefore unavailing.

It is true there is evidence tending to show that his predecessor in title used the spring as he used it. But his deed did not convey or purport to convey the spring or the triangular tract upon which it is located. The description contained in defendant's deed does not embrace it. Hence there is no privity between him and his predecessors in title as to this land which lies outside the boundary of the land conveyed by them. Therefore, he is not permitted to tack their possession, even if adverse within the meaning of the law, to his possession so as to show adverse possession for the requisite statutory period. *Boyce v. White,* 227 N. C., 640; *Jennings v. White,* 139 N. C., 23; *Blackstock v. Cole,* 51 N. C., 560; *Johnston v. Case,* 131 N. C., 491; *Barrett v. Brewer,* 153 N. C., 547, 69 S. E., 614, 42 L. R. A. (N.S.), 403; *Vanderbilt v. Chapman,* 172 N. C., 809, 90 S. E., 993, L. R. A., 1917 C, 143; *Wallace v. Bellamy,* 199 N. C., 759, 155 S. E., 856; 1 A. J., 882.

"To show privity of possession, the latter occupant must enter under the prior one; *must obtain his possession* either by purchase or descent from him." *Barrett v. Brewer, supra,* and authorities cited.

The privity necessary to warrant the tacking of the possession of successive claimants by adverse possession must be created by grant, devise, purchase, or descent. *Vanderbilt v. Chapman, supra.*

It follows that defendant has failed to offer any evidence sufficient to warrant a finding that he is the owner and entitled to the possession of the triangular tract which, in the final analysis, is the only land in controversy. Hence the alleged errors committed by the court below upon which he relies are not prejudicial or harmful to him. The verdict and judgment must be sustained.

No error.

BERTA GULBRANSON HUDSON v. GERTIE C. UNDERWOOD AND WILLIAM UNDERWOOD, HER HUSBAND, AND ROLAND CASHWELL AND NORA CASHWELL, HIS WIFE.

(Filed 29 September, 1948.)

1. Deeds § 12: Boundaries § 2—

Where there is repugnancy between a general and a particular description in a deed, the particular description must prevail, but this rule has no application where the particular and the general descriptions are not an attempt to describe the same lands but relate to different parcels, in which instance there is no repugnancy and the deed will convey both tracts.

2. Same—

Grantor was the devisee of the remainder of two parcels of land. The deed executed by grantor to the life tenant described one of the lots by particular description and by subsequent paragraph "also . . . together with any and all other property, real, personal or mixed of which the said" testator died seized. *Held:* The description is sufficient to convey grantor's remainder in both tracts of land.

3. Deeds § 11—

The main purpose of rules of construction is to find from the four corners of the instrument the intention of the grantor.

DEFENDANTS' appeal from *Williams, J.,* June Term, 1948, HALIFAX Superior Court.

This action is brought to remove the claim of defendants to the land involved in the controversy as constituting a cloud on plaintiff's title thereto. The question involved is the sufficiency of the complaint to survive defendants' demurrer on the ground that it does not state a cause of action. The demurrer is grounded on the contention that upon its face the deed under which plaintiff claims does not convey the land in question because of a defect in the description.

Succinctly stated the complaint presents the following factual situation:

M. Gulbranson died seized of certain real estate in Halifax County, leaving a will devising and bequeathing to his wife a life estate therein with remainder to Mrs. A. B. Cashwell, otherwise known as Eska Mae Cashwell. M. Gulbranson owned a parcel of land in Hornertown, particularly described in the questioned deed, and a lot in the City of Roanoke Rapids, described in the complaint, which is the land in controversy.

Mrs. A. B. (Eska Mae) Cashwell, owner of the remainder in the estate of M. Gulbranson, her husband joining, made a deed to the life tenant, now Berta Gulbranson Hudson, the plaintiff, in which the property conveyed is described as follows:

> "All that certain lot or parcel of land in Hornertown, Roanoke Rapids Township, Halifax County, North Carolina, shown as Lot No. 14 in Block 14 on map of record in book 226, at pages 536 and 537, Halifax Public Registry.
>
> "Also, one (1) 1928 Ford Coupe of which the said M. Gulbranson died seized and possessed, together with any and all other property, real, personal or mixed, of which the said M. Gulbranson died seized and possessed, or in which he had or owned any interest.
>
> "The remainder interest in and to the above described property being devised and bequeathed unto the said Mrs. A. B. Cashwell by

will of M. Gulbranson, of record in the office of the Clerk of the Superior Court for Halifax County, North Carolina."

Mrs. Cashwell died intestate, leaving five children surviving her, including the defendants, Gertie Underwood, Roland Cashwell and Nora Cashwell, who claim an interest in the disputed land by inheritance.

The demurrer to the complaint was overruled and defendants excepted and appealed.

Allsbrook & Benton and George C. Green—By: Julian R. Allsbrook—for plaintiff, appellee.

Wilson & Holleman and J. C. Woodall for defendants, appellants.

SEAWELL, J. The only question presented on review is whether the title to lot 923 passed to the plaintiff, Berta Gulbranson, now Hudson, under the description and pertinent references in the deed.

The appellants particularly attack the description reading "together with any and all other property, real, personal and mixed, of which the said M. Gulbranson died seized and possessed, or in which he had owned any interest," the clause under which plaintiff claims title to Lot 923. They find in it a conflict between a "general description" and a "particular description" in which the latter must prevail; citing *Carter v. White,* 101 N. C., 30, 7 S. E., 473; *Cox v. McGowan,* 116 N. C., 131, 21 S. E., 108; *Modlin v. R. R.,* 145 N. C., 218, 230, 58 S. E., 1075; *Potter v. Bonner,* 174 N. C., 20, 93 S. E., 370; *Lewis v. Furr,* 228 N. C., 89; and quoting *Midgett v. Twiford,* 120 N. C., 4, 26 S. E., 626; *Lewis v. Furr, supra.*

Abstractly speaking, the validity and the soundness of the rule cited by appellants might be supported by a generous array of authority, both in text and opinion, but the propriety of its application to the facts before us is the marrow of the case. The rule cannot be invoked where it is manifest that the particular or specific description and the general description were not an attempt to describe the same lands, but related to different parcels.

There cannot be any conflict or repugnance between a general description and a particular description unless they refer in whole or in part to the same land; 26 C. J. S., "Deeds," p. 364, 16 Am. Jur., "Deeds," s. 288.

There is no legal objection, of course, to the conveyance of one parcel of land by specific description and another by general description in the same deed; and unfortunately for the position taken by the appealing defendants the challenged description opens with an "also," indicating something altogether different, and refers to "any and all other

property, real, personal and mixed . . ." This is sufficient to make a clean break with any logical or legal connection with the rule.

The reference to the Gulbranson will follows the general description—not the particular, and does not seem to be a mere statement of a source of title. The reference to the "remainder" interest as an aid to the description cannot be altogether ignored. The deed indicates a knowledge on the part of the grantor that by virtue of the will of Gulbranson she owned lands other than the lot conveyed by metes and bounds; and the description by which she conveyed it is as definite as the description by which she held it, and both are capable of easy ascertainment; *Duckett v. Lyda,* 223 N. C., 356, 26 S. E. (2d), 918.

The question of the sufficiency of the general description to convey the property is not assailed except in the respect mentioned, and does not call for discussion.

After all the main purpose of rules of construction is to find from its four corners the intention of the grantor in the conveyance; *Lofton v. Barber,* 226 N. C., 481, 482, 39 S. E. (2d), 263; *Krites v. Plott,* 222 N. C., 679, 24 S. E. (2d), 531; *Triplett v. Williams,* 149 N. C., 394, 63 S. E., 79. The phraseology of the descriptive clauses, in their ordinary meaning, includes the lot conveyed by metes and bounds and "also" the property in controversy; and we are constrained to hold that to be the intent of the grantor.

The demurrer was properly overruled.

The judgment is

Affirmed.

STATE v. ROBERT JONES.

(Filed 29 September, 1948.)

1. Criminal Law § 40d—

Where defendant does not put his character in issue as substantive evidence and does not testify as a witness, the prosecution may not introduce evidence of his bad character; when defendant testifies but does not put his character in issue, impeaching evidence affects only his credibility as a witness and not the question of his guilt or innocence.

2. Same: Criminal Law § 42e—

Defendant did not put his character in issue and did not testify. On cross-examination of his wife as a witness in his behalf objection was sustained to the solicitor's question as to how many times she had been in the courts of North Carolina to testify on his behalf. After she had been recalled as a witness, the solicitor was permitted to ask her on cross-examination how many times she had appeared as a witness in the courts

of named counties. *Held:* The question was permissible to impeach the witness or to show her interest and bias, and any inferential or oblique reflection on the character of defendant was incidental, and exception thereto cannot be sustained.

APPEAL by defendant from *Williams, J.*, May-June Term, 1948, of HALIFAX.

Criminal prosecution on indictment charging the defendant with assault with a deadly weapon with intent to kill, inflicting serious injury not resulting in death. G. S., 14-32.

The record discloses that on the night of 26 October, 1947, Claudius Mercer went to the home of the defendant, Robert Jones, to get his work clothes and trunk which he had left there when he quit the employment of the defendant the day before.

The evidence is in sharp conflict as to what transpired. Mercer says he was shot in the back by the defendant while he was bending over putting his clothes in the trunk. The defendant "was in a very drunken condition" when later arrested that night, according to the testimony of the arresting officer.

The defendant's evidence, on the other hand, tends to show that the prosecuting witness was shot while trying to break into the defendant's home "to get him or his clothes"; that the prosecuting witness was drinking and cursing at the time. The officer who saw Mercer soon thereafter says "he was not under the influence of any intoxicating stimulant."

Verdict: Guilty of an assault with a deadly weapon.

Judgment: Not less than 20 nor more than 24 months on the roads.

Defendant appeals, assigning errors.

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

Cameron S. Weeks and Allsbrook & Benton for defendant.

STACY, C. J. In a warmly contested prosecution with the witnesses differing widely on the facts, the jury has found the defendant guilty of a "less degree of the same crime" charged (G. S., 15-170), *i.e.*, guilty of an assault with a deadly weapon. The verdict finds support in the evidence.

The principal exception, debated on argument and in brief, is addressed to the cross-examination of the defendant's wife. The defendant did not put his character in issue, nor did he take the stand as a witness. His wife did. On cross-examination, the solicitor asked her to state the number of times she had been in the courts of North Carolina to testify

on behalf of her husband. The defendant objected to the question, and the objection was sustained. The jury was instructed to disregard the question. Later the defendant recalled his wife as a witness, and on cross-examination, the solicitor, over objection, was permitted to inquire as to the number of times she had appeared as a witness in the courts of Bertie, Northampton and Halifax Counties.

It is the contention of the defendant that the prosecution was thus allowed to put his character before the jury when he had not testified in the case and had refrained from putting his character in issue. "Unless willing to become a witness," a defendant in a criminal prosecution "is invested with a presumption of innocence such as the law makes in favor of every person accused of crime, and evidence cannot be offered to impeach his character unless he voluntarily puts it in issue." *S. v. Efler,* 85 N. C., 585.

In criminal prosecutions, certainly those involving moral turpitude, the accused may elect to put his character in issue as a substantive matter, and thus produce evidence of his good reputation and standing in the community; but in the absence of such election on the part of the defendant, the prosecution may not offer evidence of his bad character, unless and until he has been examined as a witness in his own behalf, and even then—the defendant not electing to put his character in issue—the impeaching testimony is permitted to affect his credibility as a witness, and not the question of his guilt or innocence. *S. v. Colson,* 193 N. C., 236, 136 S. E., 740.

Here, however, the court sustained the objection to the question which involved the defendant, and the jury was instructed to disregard the inquiry. The later cross-examination was permissible to impeach the witness or to show her interest and bias. *S. v. Beal,* 199 N. C., 278, 154 S. E., 604; *S. v. McKinnon,* 223 N. C., 160, 25 S. E. (2d), 606. If this inferentially or obliquely affected the defendant, it was only incidental. We cannot say as a matter of law there was error in the cross-examination. *S. v. Stone,* 226 N. C., 97, 36 S. E. (2d), 704; *S. v. Roberson,* 215 N. C., 784, 3 S. E. (2d), 277.

The remaining exceptions are without substantial merit. They present no new question or one not heretofore settled by the decisions. The validity of the trial will be upheld.

No error.

J. WILL ROBERTS ET AL. v. CLAUDE SAWYER ET AL.

(Filed 29 September, 1948.)

1. Boundaries § 6—

Where the clerk, upon the filing of amended petition and amended answer in a processioning proceeding, finds that title to real estate had become involved, and transfers the cause to the civil issue docket, it is error for the trial court to strike respondent's answer from the record for want of defense bond and to enter judgment by default on the petition.

2. Same—

In a processioning proceeding there is no denial of petitioners' title except as to the true boundary line, and title is not really in dispute.

3. Same—

A defense bond is not required in a special proceeding to establish boundaries. G. S., 38-1 to 38-4.

4. Same: Quieting Title § 1—

If title becomes involved in a processioning proceeding, the proceeding becomes in effect an action to quiet title, and no defense bond is required in such action. G. S., 41-10.

5. Ejectment § 14—

Before striking answer from the record because of the failure of defendants to file defense bond, the court should consider whether the right to move to strike had been waived or lost by laches when it appears that objection had not been aptly made.

APPEAL by respondents from *Sink, J.,* June Term, 1948, of MADISON.

Special proceeding to procession, locate and establish the dividing line between the lands of the petitioners and the respondents, adjoining landowners.

The proceeding was instituted before the Clerk of the Superior Court of Madison County on 21 February, 1935. Verified petition and verified answer were duly filed. More than ten years later, on 22 September, 1945, an order making new parties was entered in the cause. Amended petition and answer to amended petition were then duly filed.

Thereafter, on 2 June, 1947, the cause was transferred to the civil issue docket, it appearing to the Clerk that "title to real estate has become involved."

At the June Term, 1948, on motion of petitioners, the answer filed by the respondents was stricken from the record because no defense bond had been filed, and judgment on the petition was entered establishing the "boundary line between the plaintiff and defendants" according to the prayer of the petition.

From this ruling and judgment, the respondents appeal, assigning errors.

John H. McElroy for petitioners, appellees.
Carl R. Stuart for respondents, appellants.

STACY, C. J. We think there was error in striking the respondents' answer from the record for want of a defense bond, and entering judgment by default on the petition.

In the first place, there is no denial of petitioners' title except as to the true boundary line. *Clark v. Dill,* 208 N. C., 421, 181 S. E., 281. The title is not really in dispute. *Woody v. Fountain,* 143 N. C., 66, 55 S. E., 425.

Secondly, a defense bond is not required in a special proceeding to establish boundaries. G. S., 38-1 to 38-4.

Thirdly, even if title were involved, *Smith v. Johnson,* 137 N. C., 43, 49 S. E., 62, the proceeding would in effect be assimilated to an action to quiet title, *Woody v. Fountain, supra,* G. S., 41-10, and no bond is required in such an action. *Timber Co. v. Butler,* 134 N. C., 50, 45 S. E., 956.

Furthermore, it seems not to have been considered whether the petitioners had waived their right to interpose the motion or had lost it by laches, even if it had been apposite. *Calaway v. Harris,* 229 N. C., 117.

The judgment will be vacated and the cause remanded for further proceedings as to justice appertains and the rights of the parties may require.

Error and remanded.

IN RE WILL OF AMANDA ETHERIDGE.

(Filed 29 September, 1948.)

1. Wills § 6—

It is not required that testator sign the will in the presence of the attesting witnesses. G. S., 31-3.

2. Wills § 25: Appeal and Error § 39f—

In this caveat proceeding the court charged the jury that it was necessary for testator to have signed the will in the presence of the attesting witnesses. *Held:* The instruction must be held for reversible error notwithstanding the court's instruction to answer the issue as to the formal execution of the will in the affirmative if the jury believed the evidence,

since the erroneous instruction may have influenced the jury in answering the issue in the negative.

PROPOUNDERS' appeal from *Bone, J.*, May Term, 1948, DARE Superior Court.

Martin Kellogg, Jr., John H. Hall, and Ehringhaus & Ehringhaus for propounders, appellants.

W. A. Worth for caveator, appellee.

SEAWELL, J. Amanda Etheridge died in April, 1945, leaving a will which was probated in common form in Dare County, where she lived. Disappointed relatives in the line of inheritance caveated the will and it was propounded for probate in solemn form. Four issues were submitted to the jury and answered as follows:

"1. Was the paper writing, now offered for probate, bearing date of the 22nd day of March 1945, executed in manner and form as required by law?

"Answer: No.

"2. Was the execution of said paper writing procured by undue influence as alleged by the caveator?

"Answer: Yes.

"3. At the time of the execution of said paper writing did Amanda Etheridge have sufficient mental capacity to make a will?

"Answer: No.

"4. Is the said paper writing, and every part thereof, the last will and testament of Amanda Etheridge?

"Answer: No."

Witnesses to the will, persons of unimpeached character, testified as to the formal execution of the will as required by law, their testimony amply tending to confirm that fact, and the trial judge instructed the jury that if they believed the evidence and found the facts to be as all the evidence tended to show they would answer the first issue "yes." But the jury answered it "no," and as above seen, answered all other issues against the will.

The negative answer, if allowed to stand, defeats the will.

However, the propounders, for the purpose of this appeal, have bracketed as objectionable the following instruction to the jury:

"The law requires that a will of this kind be witnessed by two persons at the request of the testator, that it be signed by the testator in their presence, and that they sign it in her presence. It is not

necessary to go any further into explanation of the law as to that or any further recital of the evidence."

In *Watson v. Hinson,* 162 N. C., 72, 77 S. E., 1089, it is said in substance, and quoting authority, that in order to be a valid will, that will should be signed by the testator or by some other person in his presence, or the signature should be acknowledged by the testator; and that it is not required that the testator sign in the presence of the witnesses. *In re Will of Bowling,* 150 N. C., 507, 64 S. E., 368.

While the judge directed the jury to answer the issue as to the execution of the will "yes,"—predicated on their belief of the evidence,—this did not withdraw from the jury the erroneous statement of the legal requirements under G. S., 31-3. And it may have entered into their consideration as the basis of their disbelief. As to this we cannot, of course, say; but the evidence should have been submitted to the jury with an exact statement of the law relating to the subject, particularly since the formal execution of the will was a matter in issue.

The propounders are entitled to a trial *de novo,* and it is so ordered.

New trial.

GEORGE D. WHEELESS, MRS. W. H. FOUNTAIN, MRS. C. C. SIMPSON, MRS. J. F. WEAVER, OTIS MOORE, D. E. COLLINS, S. E. SYKES, TRUSTEES OF THE CITY MISSION OF ROCKY MOUNT N. C., v. MRS. O. W. BARRETT, MARTIN L. HUX.

(Filed 13 October, 1948.)

1. Charities § 2—

Where land is conveyed to the officers and trustees of a non-denominational religious organization for the purposes of the organization, its officers and trustees have title to the property in trust and are entitled to hold it for the use and occupancy of the organization as against members of the organization, even though they are in the large majority, who seek possession of the property for use and occupancy by a denominational church. G. S., 61-2; G. S., 61-3.

2. Same—

Where deed to the officers and trustees of a non-denominational religious organization does not appear of record, it will be presumed that the deed conveyed the land in trust for the purposes for which the organization was formed.

APPEAL by defendants from *Edmundson, Special Judge,* at March-April Term, 1948, of EDGECOMBE.

Civil action to recover land allegedly wrongfully withheld by defendants, and for an accounting for rents, etc.

When the case came on for hearing in the Superior Court, and after the pleadings were read, plaintiffs moved the court "for judgment of ownership and possession of the premises described in the amended complaint, upon the admissions contained in defendants' answer to amended complaint," and tendered an issue of damages as the only issue of fact raised by the pleadings, and to be submitted to the jury. The court, being of opinion that defendants' pleadings constitute an admission: (1) of ownership by the plaintiffs; and (2) that defendants are in possession wrongfully; and that, therefore, plaintiffs are entitled to recover possession; and that the issue of damages is the only issue of fact left in the case to be submitted to the jury, allowed the motion. In this connection the amended complaint alleges: In paragraph One: That plaintiffs, naming them, other than S. E. Sykes, with defendant, Mrs. O. W. Barrett, on 24 May, 1940, were "the officers and trustees of the City Mission of Rocky Mount, North Carolina, which was and is an unincorporated non-denominational religious and social service organization formed for the purpose of promoting fraternal intercourse, religious training and education, Christian unity, and spreading the Gospel, all to the glory of God and for the benefit of mankind for charitable and benevolent purposes including the accumulation of funds for the relief of the sick and needy; to provide for the visitation of the sick and such other worthy purposes and objects as affect the members of the City Mission and the people of the communities in which it has offices; to cultivate social intercourse among its members and other persons, and assist in maintaining a high standard of moral and social conditions in the community; for the purposes above specified, to receive donations and to receive, manage, take and hold real and personal property by gift, grant, devise or bequest; to do any and all things intended and calculated to improve the social, physical, intellectual, spiritual and moral condition and standing of persons living, residing and staying, permanently or temporarily, in the city of Rocky Mount."

Defendants, answering the foregoing allegations of the complaint, admit (1) that the persons named therein were on or about the 24th day of May, 1940, designated by the members of the City Mission of Rocky Mount, which was an unincorporated religious organization, and (2) that the purpose of said organization was and is as substantially set forth in said paragraph.

Plaintiffs further allege in paragraphs 2 and 3:

That on 24 May, 1940, J. M. Gregory and wife, in consideration of $8,000 paid or secured to be paid, conveyed to "the officers and trustees of the City Mission of Rocky Mount, North Carolina, a certain lot of land specifically described and a three-story brick business building in the business district of the city of Rocky Mount; and on same date

plaintiffs, other than S. E. Sykes, together with defendant Mrs. O. W. Barrett, as officers and trustees of the City Mission of Rocky Mount, North Carolina, executed and delivered (a) to J. M. Gregory a note of said City Mission for the sum of $6,000.00, balance due on purchase price of said land and building, and (b) a certain deed of trust to D. C. May, Trustee, conveying said land as security for the payment of said note, which deed of trust was registered as set forth.

Defendants, answering the paragraphs containing these allegations, say that they are not denied.

Plaintiffs further allege in paragraph 4: That on 24 March, 1942, the said plaintiffs, other than S. E. Sykes, with defendant Mrs. O. W. Barrett, in their capacity as officers and trustees of said City Mission, executed and delivered (c) to G. D. Wheeless nine promissory notes, aggregating the sum of $4,900.00 for money borrowed, and (d) a deed of trust to Elizabeth M. Wheeless, Trustee, conveying said land as security for the payment of said notes,—the money being used to pay the balance due on the Gregory note, above described, and to obtain cancellation of said deed of trust to D. C. May, Trustee, on 30 March, 1942; and that there is now a balance of $3,000 principal in addition to interest due on the notes so executed to G. D. Wheeless, secured as aforesaid.

Defendants, in answer to these allegations, admit the execution and delivery of the notes and deed of trust referred to in said paragraph and further allege that a large part of the indebtedness represented by said notes has been paid and there is now approximately $3,000 due on said indebtedness.

Plaintiffs further allege in paragraph 5: That on 25 June, 1945, a certificate of incorporation of the City Mission of Rocky Mount, North Carolina, Inc., was issued by the Secretary of State of North Carolina and recorded in office of Clerk of Superior Court of Edgecombe County; and that the corporation was formed by George D. Wheeless, K. E. Hawkins and Mrs. Katherine Barrett,—she being the same person as the defendant Mrs. O. W. Barrett, in pursuance of the expressed wishes of the members of the City Mission, and for the purposes, *ipsissimis verbis,* as set out in the first paragraph of the amended complaint, and has no capital stock,—"the general welfare of society and not individual profit being the object for which the corporation is created."

Defendants, answering, say that paragraph 5 does not contain a full, true and correct statement of the facts and that said paragraph is therefore denied. But in this connection the defendant Mrs. O. W. Barrett avers that a certificate of incorporation was issued as alleged in said paragraph and a tentative arrangement was thereby made for the operation of the said City Mission of Rocky Mount as a corporation, but that said charter was not accepted by the membership thereof or approved

by a majority thereof, and that said certificate was not filed in the office of the Clerk of Superior Court of Edgecombe County until sometime during the year 1947, and that these defendants aver on information and belief that it was filed at the instance of the plaintiffs or some of them and "was not done by a majority of the members of the City Mission of Rocky Mount, now known and designated as Central Baptist Church."

Plaintiffs further allege in paragraph 6: That at a meeting of seven members of the City Mission on 7 January, 1946, the defendant Mrs. O. W. Barrett presented the said certificate of incorporation and a resolution directing the officers and trustees of the City Mission of Rocky Mount, an unincorporated association, to execute and deliver to the City Mission of Rocky Mount, N. C., Inc., a good and sufficient deed conveying to it in fee simple the property hereinabove described, subject to the lien of the Wheeless deed of trust hereinabove referred to, which resolution is recorded as having been unanimously adopted.

Defendants, answering, say that paragraph 6 does not contain a full, true and correct statement of the facts, and as alleged is, therefore, denied. And in this connection defendants reiterate the averments that a majority of the members of said City Mission of Rocky Mount did not accept or approve of the incorporation thereof and that the certificate of incorporation was not filed in the office of Clerk of Superior Court of Edgecombe County until during the year 1947, and, that it was filed by the plaintiffs or some of them who were not acting pursuant to the direction of the majority of the congregation or members of said organization.

Plaintiffs further allege in paragraph 7, among other things, that two of the three incorporators of the City Mission of Rocky Mount, N. C., Inc., held a meeting,—the defendant Mrs. O. W. Barrett refusing to attend after notice,—and accepted the charter and elected directors and trustees and officers, naming them; but the trustees of the City Mission of Rocky Mount, an unincorporated association, have never conveyed the land to the corporation, or anyone else, and the title remains as it was conveyed in the officers and trustees of the City Mission, an unincorporated association, to wit, the plaintiffs in this action, who hold the title and are entitled to the possession for the purposes for which the City Mission of Rocky Mount, N. C., was originally organized, etc., and who stand ready to surrender it to any person authorized to demand it; and that in the meantime they are required by statute to hold the same for said religious society and are accountable to the society for the use and management of such property, and bring this action to protect it.

Defendants, answering paragraph 7, say that it does not contain a full, true and correct statement of the facts and is, therefore, denied.

But further answering the defendants "admit that said property has not been conveyed to said alleged corporation."

Plaintiffs further allege in paragraph 8 that on or about 1 May, 1946, defendants wrongfully and unlawfully entered into, and took possession of the real property herein referred to, and wrongfully and unlawfully ousted and deprived plaintiffs of their lawful and legal right of possession, and since said date have remained and are now in the wrongful and unlawful possession of said premises,—wrongfully claiming title under the deed from Gregory to the officers and trustees of the City Mission of Rocky Mount under which plaintiffs claim; and that said defendants are interlopers, and have seized property worth now about $35,000 and call themselves "The Central Baptist Church," a denominational organization unfitted to carry out the non-denominational purposes of the City Mission, for which purposes it was originally conveyed.

Defendants, answering, say that these last allegations are untrue and are, therefore, denied.

Plaintiffs further allege in paragraphs 9, 10 and 11, matters pertaining to the issue of damages, all of which defendants, answering, say are untrue and are denied, except that the Clerk of Superior Court holds certain funds as alleged by plaintiffs.

Defendants, further answering the amended complaint, aver and say substantially, among other things: That on Friday evening, 19 April, 1946, the City Mission of Rocky Mount, North Carolina, "met in conference" and "a session of open discussion followed concerning the advisability of organizing the Mission into a church," and "it was agreed that the following Sunday afternoon would be the best time to complete the proceedings to bring the Mission into a duly organized church"; that on the following Sunday afternoon, 21 April, 1946, the City Mission of Rocky Mount, N. C., "met in conference for the express purpose of completing proceedings to establish itself as a duly organized church, and it was so established and organized as a church with 21 charter members, including George D. Wheeless, and at said organization meeting the name of the City Mission of Rocky Mount, N. C., was unanimously changed to Peoples Church,"—a copy of the minutes of the meetings attached show that it was decided that the charter be left open for three weeks; that shortly thereafter nine additional members became charter members,—a copy of the charter being attached as an exhibit; and reads as follows: "We the people of the City Mission of Rocky Mount, N. C., desiring to become and establish ourselves as a duly organized church, with malice toward none and with charity for all, do therefore covenant with one another and agree to support our church both with our prayers and means, to attend its services regularly, as far as possible, to seek the salvation of the Lost and to carry out, in the Spirit of Christ, the rules

and regulations upon which our church shall function"; that the Peoples Church, so organized, continued to function under the name of Peoples Church until 14 July, 1946, when the church extended a unanimous call to the defendant M. L. Hux to serve as its pastor, and he accepted,—the minutes of the meeting, a copy of which is attached as an exhibit, saying that "Mr. Hux has warned the church that if he was called to the pastorate many changes were going to be made," and that "upon accepting the call, he immediately suggested the changing of the name of the church from Peoples Church to Central Baptist Church, which suggestion all received with delight and for which the vote was unanimous"; that "the said church organization now known as Central Baptist Church has been in continuous possession of said property, using it as a church since April 1946"; that "a majority of the individuals, in fact practically all who actually participated in the activities of the City Mission are now members of the present church organization"; and that the plaintiffs, who are now trustees of said church, are the mere holders of the title to said property for the membership of said church, and the membership of said church has the right of possession and use of said property.

Upon the trial in Superior Court, the plaintiff offered evidence pertaining to the issue of damages. The judgment shows that "At the conclusion of the evidence plaintiffs by stipulation of their counsel reduce their claim for damages based on rental value of the unrented portion of the premises, to a period of time beginning July 15, 1946, and running to April 8, 1948, the date of the trial, and to the amount of $240 for rents collected." And the issue of damages was submitted to and answered by the jury. Thereupon, the court signed judgment adjudging that plaintiffs are the owners and are entitled to immediate possession of the premises described in the amended complaint, and that defendants are required to surrender and turn over to plaintiffs the immediate possession thereof, etc., and further that plaintiffs recover of defendants the sum of $3,352.50, together with the costs, etc.

Defendants appeal therefrom to Supreme Court and assign error.

Henry C. Bourne and Battle, Winslow & Merrell for plaintiffs, appellees.

Cooley & May and Leggett & Fountain for defendants, appellants.

WINBORNE, J. Appellants, in the main, challenge the ruling of the court that defendants' pleadings constitute an admission of ownership in plaintiffs, and of wrongful possession by defendants, of the lands in controversy. A careful consideration of the pleadings, in the light of applicable statutes, G. S., 61-2, and G. S., 61-3, and decisions of this

Court, *Kerr v. Hicks,* 154 N. C., 265, 70 S. E., 468, and *Western North Carolina Conference v. Tally, ante,* 1, 47 S. E. (2d), 467, indicates that this ruling of the trial court is correct.

The statute relating to religious societies, G. S., 61-2, provides in pertinent part that "the trustees and their successors have power . . . to purchase, take and hold property, real and personal, in trust for such church or denomination, religious society or congregation . . ." And G. S., 61-3, provides in pertinent part that "all glebes, lands and tenements, heretofore purchased, . . . for the support of any particular ministry, or mode of public worship . . . shall be and remain forever to the use and occupancy of that church or denomination, society or congregation for which the glebes, lands, tenements, property and estate were so purchased . . . and the estate therein shall be deemed and held to be absolutely vested, as between the parties thereto, in the trustees respectively of such churches, denomination, societies and congregations, for their several use, according to the intent expressed in the conveyance, . . ." See *Western North Carolina Conference v. Tally, supra.* And in *Kerr v. Hicks, supra,* this Court, quoting from *Roshi's Appeal,* 69 Pa., 462, 8 Am. Rep., 280, applied the principle that "in church organizations, those who adhere and submit to the regular order of the church, local and general, though a minority, are the true congregation." Moreover, in *Western North Carolina Conference v. Tally, supra,* attention was called to this principle.

In the light of these statutes and principles, when the pleadings are tested, it is seen:

1. That defendants admit that the City Mission of Rocky Mount, North Carolina, is an unincorporated religious organization, and that the purpose of it was and is as substantially set forth in paragraph one of the amended complaint. It is there alleged that "it was and is an unincorporated non-denominational religious and social service organization formed for the purpose of promoting fraternal intercourse, religious training and education, Christian unity, and spreading the Gospel, all to the glory of God and for the benefit of mankind; for charitable and benevolent purposes, etc."

2. That defendants further admit that plaintiffs, other than S. E. Sykes, were on 24 May, 1940, the officers and trustees of the City Mission of Rocky Mount, North Carolina, and they do not deny the allegation of plaintiffs, and expressly aver in their further answer, that on 24 May, 1940, J. M. Gregory and wife conveyed to the officers and trustees of the City Mission of Rocky Mount, North Carolina, the land here involved.

3. Defendants aver in their further answer that on 21 April, 1946, twenty-one members of the City Mission met and organized a church,

under special charter, and changed the name to Peoples Church, and, as so organized, continued to function until 14 July, 1946, when the church called defendant Hux to serve as its pastor, and, then, the name was changed to "Central Baptist Church" which "has been in continuous possession of said property, using it as a church."

4. That "a majority of the individuals, in fact practically all who actually participated in the activities of the City Mission, are now members of the present church organization."

5. That defendants aver that the plaintiffs, who are now trustees of said church, are mere holders of the title to said property for the membership of the church which has the right of possession and use of said property.

And applying the provisions of the statutes, G. S., 61-2, and G. S., 61-3, and the principles of law enunciated in *Kerr v. Hicks, supra,* and referred to in *Western North Carolina Conference v. Tally, supra,* as above quoted, to these admissions and averments of defendants, the title to the land in question was taken in the name of the officers and trustees of, and in trust for the City Mission of Rocky Mount, North Carolina, a non-denominational religious organization, and as so taken, shall be and remain forever for the use and occupancy of that organization for which it was so purchased, and the estate therein shall be deemed and held to be absolutely vested, as between the parties thereto, in the trustees of such organization for use according to the intent expressed in the conveyance. And while the deed is not shown in the record on this appeal, it may be assumed that, being made to the officers and trustees of the City Mission of Rocky Mount, North Carolina, it conveyed the land in trust for the purposes for which the organization was formed. Therefore, the attempt to divert the property to use and occupancy by a church under special charter, and later by a denominational church was without authority in law.

All other assignments of error, brought forward by appellants, have been given due consideration, and prejudicial error is not made to appear.

Hence, in the judgment below there is

No error.

WILMA T. GARRETT v. FELTON F. GARRETT AND LOIS FESLER.

(Filed 13 October, 1948.)

1. Trial §§ 22a, 30—

Upon defendants' demurrer to the evidence and defendants' motion for a peremptory instruction, the evidence is to be considered in the light most favorable to plaintiff and she is entitled to every fact and every inference of fact reasonably deducible therefrom.

2. Cancellation of Instruments § 12: Torts § 8a—Evidence that release was executed under mistake induced by fraud held sufficient.

Plaintiff's evidence in support of her allegations to the effect that defendants employed agents who, by the use of flattery and attentions to her and by plying her with intoxicants, procured plaintiff to sign a release from liability by misrepresenting it to be an advantageous settlement of her suit against defendant, and that she did not know, or her mental condition was such that she could not comprehend at the time the nature of the instrument, and that she actually received no consideration for the release, *is held* sufficient to be submitted to the jury and upon its affirmative finding to vitiate the release for mistake induced by fraud.

3. Fraud § 1—

Equity will not define fraud lest crafty men circumvent it.

4. Fraud § 12—

Fraud may be established by circumstantial evidence without the aid of direct evidence of fraud, and even in the teeth of positive testimony to the contrary.

5. Husband and Wife § 12b—

Where the jury finds that a release signed by the wife in favor of the husband was procured by fraud, the husband's contention that the fact that the acknowledgment of the release taken in conformity with G. S., 52-12, precludes attack of the release for want of consideration, is untenable, since in such instance there is no contract to which the provisions of the statute could apply.

6. Trial § 49½: Appeal and Error § 40b—

A motion to set aside the verdict for excessiveness is addressed to the sound discretion of the trial court and its action thereon is not ordinarily reviewable.

APPEAL by defendants from *Bone, J.*, at the June Term, 1948, of PASQUOTANK.

Civil action to recover damages for personal injury resulting from an alleged unlawful and malicious assault and battery, and for punitive damages in connection therewith.

On former appeal by defendants from judgment overruling demurrer to the complaint of plaintiff at Spring Term, 1948, opinion sustaining the ruling of lower court, was handed down on 25 February, 1948.

Plaintiff alleges in her complaint that she and defendant, Felton F. Garrett, are husband and wife, living in a state of separation; that on the night of 10 September, 1947, "the defendants, acting in concert and with joint and common purpose and intent, wrongfully, unlawfully, and maliciously" went to the residence of plaintiff "where the defendant Fesler being thereto aided and assisted by the defendant Felton F. Garrett secretly and without warning maliciously and forcibly seized this plaintiff and dragged her from the house" out to a point beyond the lights where defendant Garrett was hiding and lying in wait; that then both defendants forcibly carried her into the street where they publicly assaulted and beat her to the extent that she suffered lacerations, abrasions, bruises, contusions and other wounds, all to her "great indignity and humiliation." And after alleging more in detail the circumstances of the assault and her injuries, plaintiff prays judgment for both actual and punitive damages.

Defendant Felton F. Garrett, answering the complaint of plaintiff, admits that she is his wife; that they were living separate and apart; and "that plaintiff was slightly injured," he avers, "as the result of a fight in which she engaged with the defendant Lois Fesler," but he denies all other allegations of the complaint, and particularly denies that he "assaulted or injured the plaintiff in any way," or that he "cursed or threatened her in any way." And for further defense and answer this defendant, Felton F. Garrett, avers that on 8 March, 1948, "plaintiff, for a valuable consideration, executed and delivered to this defendant a full, final and complete release and discharge from any and all claims, demands and causes of action which she might have against him, particularly including the claim alleged in the above entitled action, which said release was in full and final settlement and satisfaction of the above entitled proceeding, and all claims which plaintiff had or might make therein against this defendant, which said release is hereby expressly pleaded in bar of plaintiff's claim herein."

And the defendant Lois Fesler, in her answer to allegations of plaintiff's complaint, admits that plaintiff is the wife of defendant Felton F. Garrett, and that plaintiff and defendant Garrett, for some time prior to 10 September, 1947, were living separate and apart; but she denies all other allegations of the complaint. However, for a further answer and defense, this defendant, Lois Fesler, avers in substance: That plaintiff had annoyed her in variously enumerated ways; that she had warned plaintiff repeatedly to stay away from her, Fesler's, home; that in spite of these warnings plaintiff "broke into" and "ransacked" her home on 10 September, 1947, while she was away; that, in connection with this incident, she warned plaintiff again to stay away from her home, and "plaintiff and this defendant became engaged in a fight, during which

the defendant slapped the plaintiff several times"; and "that plaintiff's injuries were caused by her own misconduct in annoying, harassing and attempting to injure and even kill this defendant." And defendant Fesler further pleads the release, referred to above as pleaded in defendant Garrett's answer, as a bar of plaintiff's claim herein.

Plaintiff, in reply, admits that on or about 8 March, 1948, she signed some sort of paper writing, but she expressly denies that the force and effect of it is to release defendants, or either of them, from liability to her upon the cause of action set out in her complaint, and she demands production of it. And, in this connection, she further alleges in detail that the alleged release and discharge was without consideration and therefore null and void; that her signature thereto was deceitfully and wrongfully procured by the false and fraudulent conduct, machinations, statements and representations of one or both of the defendants, acting through their agents, employees and emissaries, T. A. Harris and Kenneth Dickey; that as a part of said deceitful scheme, the defendants, and especially defendant Garrett, took advantage of a weakness of plaintiff for alcoholic drink, of which he, at least, knew, and of the mental distress under which she was then suffering; that in connection therewith defendant Garrett, her husband, and his codefendant well knew that plaintiff not only had been subjected to the indignity of wife beating, as alleged in her complaint, but of his undue attention and association with other women, under such circumstances as to bring shame and humiliation to her; that knowing all these things, and in a desire to further embarrass and humiliate her and to defraud her of her rights in this action he wrongfully connived and contrived with one who is known in Elizabeth City as T. A. Harris, to obtain from her by devious means the release which he has pleaded in his answer in this cause; that as by the circumstances she is informed and believes he, either directly or indirectly, caused the said T. A. Harris, who is not a resident of Elizabeth City but is an occasional visitor, holding himself out to be a real estate operator of consequence, to call upon plaintiff for the ostensible purpose of selling for her a small piece of land owned by her; that in consequence of what she now recognizes from all the circumstances to be a deceitful scheme to deprive her of her rights in this action, and still acting as the agent of one or both of the defendants, the said T. A. Harris continued his calls upon and attention to plaintiff; that as one of the devices to carry out said wrongful purpose he, Harris, introduced her to one Kenneth Dickey, a personable man who plaintiff is now informed and believes was likewise, either mediately or immediately, in the employ of the defendants, or one of them, and a member of said conspiracy; that thereupon said Dickey with the assistance of Harris, and, as plaintiff is informed and believes, with the knowledge and connivance of the defend-

ants, rapidly began to profess to plaintiff an ardent attachment and affection and to provide her with strong drink; that, in part, induced by the effect of the drinks, and her lonely, distressed and forsaken condition in life, she was led by his repeated professions to believe them to be true and to accept them as sincere; that as a part of said deceitful scheme and purpose they represented to plaintiff and induced her to believe that she should obtain a divorce from her husband, and be free to marry again, and that she should make a trip to Florida to improve her health and mind and there to give further consideration to the matter of divorce; that because of these blandishments and persuasions, coupled with unhappy state of mind and health, she consented to go, and did go, to Florida; that while she was visiting in Florida, Dickey again visited her and continued his assurances of affection, as well as representing to her that he was a man of wealth and affluence, well able to provide her with comforts and devotion if she would become his wife, but insisted it was first necessary that she dispose of the lawsuit against her husband, F. F. Garrett, being supported therein by Harris; that a few days after her return to Elizabeth City, to wit, on 8 March, 1948, when she was perturbed in arranging a submission to a charge of driving an automobile under the influence of intoxicants pending in Superior Court of Camden County, the said Dickey and Harris appeared, knowing of her mental distress, and asked her to have lunch with them; that while at lunch they, as was their custom, produced a bottle of liquor and poured her ample portions which she drank at their invitation; that later and while plaintiff's mental faculties were impaired by drinking, the men produced a paper writing which they, and especially Dickey, who had gained her confidence as aforesaid, told her was a paper disposing and settling her suit against her husband much to her advantage, and advised and insisted that she sign it; that by reason of the confidence which they had gained, the mental distress incident to the case in Camden, the effect of the drinks they had given her, the false statements and assurances they reiterated, and her reliance thereon, she was fraudulently and deceitfully induced to set her name to said paper, not knowing at that time, or being in mental condition to know and comprehend, the meaning, force and effect thereof; that her signature to said paper writing, the one pleaded in the answers in this cause, was procured by mistake on her part, induced by the aforesaid fraud on the part of defendants and their agents; that defendants knew of the wrongful acts and doings of said agents, fully ratified and accepted same and have claimed and still claim the benefits thereof; and that, later in the same day, said paper was delivered, she is informed and believes, to defendant F. F. Garrett, who sent to her by his agents her watch and ring and some figurines, all of which she owned already but which he had caused to be

withheld from her for several months,—that he sent her nothing more. Thereupon she prays that the paper writing be declared null and void; that defendants be required to surrender it for cancellation; and that she recover the relief prayed in her complaint.

When the case came for trial in Superior Court both plaintiff and defendants offered evidence tending to support their respective contentions. (In the evidence Dickey is referred to as Dicks.)

And in the course of offering evidence, defendants offered the release prepared for Garrett by his lawyer and given to him for use, and pleaded by defendants in bar of plaintiff's claim herein, photostatic copies of which appear as part of record on this appeal—in deleted form as follows:

"In consideration of the payment of the sum of $....., to me paid . . . . . .

. . . . . .

"Signed, sealed and delivered this.....day of....., 1948.

.....(Seal)

"STATE OF:

CITY OF:

"I, ..., a Notary Public or Clerk of Superior Court of the aforesaid county and state . . . . . .

. . . . . .

Upon the examination of the said WILMA T. GARRETT, separate and apart from her husband, and from an examination of said release, and from other knowledge and investigation by the undersigned, it appears to my satisfaction that the said WILMA T. GARRETT freely executed said contract and freely consented thereto at the time of her separate examination, and that the same is not unreasonable or injurious to her, and I so find the facts to be and so adjudged.

"Witness my hand and seal this.....day of....., 1948.

.....

Notary Public or
Clerk Superior Court

"My commission expires:
(Seal Here)"

The blanks shown are filled in as follows: The consideration "$500.00" is shown in type. The date is in handwriting "8th" "Mar 8." In handwriting is "Wilma T. Garrett" on blank line before the word "(Seal)." The blanks after "State of" and "City of" are not filled in. After the letter "I" in the certificate is the name of "Wrenn H. Mercer," which

also appears in blank above words "Notary Public or Clerk of Superior Court." The date of the certificate is in handwriting "8th" "March."

Indented seal of "Wrenn H. Mercer Notary Public Pasquotank County, N. C.," is shown, followed by date of expiration written in.

Motions of defendants for judgment as of nonsuit entered when plaintiff first rested her case, and renewed at the close of all the evidence were overruled, and each time they except.

The case was thereupon submitted to the jury upon these issues which the jury answered as shown:

"1. Did the defendant Lois Fesler assault and beat the plaintiff, as alleged in the Complaint? Answer: Yes.

"2. Did the defendant Felton F. Garrett assault and beat the plaintiff, as alleged in the Complaint? Answer: Yes.

"3. Did the plaintiff execute and deliver to the defendant Felton F. Garrett a paper writing purporting to discharge the said Garrett from any and all liability under this cause of action, as alleged in the Answer? Answer: Yes.

"4. If so, was the execution and delivery of said paper writing procured by the defendant Garrett by means of undue influence or fraud, as alleged in the Reply? Answer: Yes.

"5. Was the execution and delivery of said paper writing procured without consideration as alleged in the Reply? Answer: Yes.

"6. What amount of actual damages, if any, is the plaintiff entitled to recover of the defendants, or either of them? Answer: $20,000.

"7. What amount of punitive damages, if any, is the plaintiff entitled to recover of the defendant Felton F. Garrett? Answer: $5,000.

"8. What amount of punitive damages, if any, is the plaintiff entitled to recover of the defendant Lois Fesler? Answer: $5,000."

Defendants requested peremptory instruction in their favor in respect to issues 3, 4 and 5. The 4th and 5th were refused, and they duly excepted.

Motion of defendant to set aside the verdict as being excessive was denied. Exception.

From judgment for plaintiff in accordance with the verdict of the jury, defendants appeal to Supreme Court, and assign error.

Wilson & Wilson for plaintiff, appellee.

J. Henry LeRoy and McMullan & Aydlett for defendants, appellants.

WINBORNE, J. The first two questions, and the ones mainly debated on this appeal, challenge the rulings of the court in overruling defendants' motions for judgment as of nonsuit, and in refusing to give per-

emptory instructions as requested by them on the fourth and fifth issues, which appellants say are susceptible of collective argument.

In brief of appellants, in stating the facts, it is conceded that "the evidence is uncontradicted that Miss Fesler both slapped and pulled or dragged the plaintiff to the ground repeatedly during the brief period of the altercation," and that "the evidence is conflicting as to whether defendant Garrett participated in the assault." And no argument is advanced by them that judgment as of nonsuit should have been allowed on account of insufficient evidence to take the case to the jury on the first two issues. But the debate here is around the question as to whether there is sufficient evidence to support plaintiff's attack upon the release pleaded in the answers,—that is, to support her allegations that its execution by her was due to a mistake, induced by fraud on the part of defendant Garrett.

In this connection when considering defendants' demurrer to the evidence entered at the close of all the evidence, that is, motion for judgment as in case of nonsuit entered at that stage of the trial, pursuant to provisions of G. S., 1-183, as well as peremptory instructions requested by them, the evidence is to be taken in the light most favorable to plaintiff, and she is to be given the benefit of every fact or inference of fact pertaining to the issues involved, which may be reasonably deduced from the evidence. *Nash v. Royster,* 189 N. C., 408, 127 S. E., 356; *Cole v. R. R.,* 211 N. C., 591, 191 S. E., 353.

Applying this rule to the evidence shown in the record on this appeal, we are of opinion that the evidence is sufficient to take the case to the jury, and to support an affirmative answer to the fourth and fifth issues. The allegations of plaintiff in her reply are sufficient to raise these issues. These allegations constitute the framework, and the evidence favorable to her is sufficient to justify the allegations and to give form to the case. A recital of the evidence would be repetitious, and would serve no useful purpose. Indeed, as stated in *Cole v. R. R., supra,* "It should be remembered the testimony is in sharp conflict, and the jury has accepted the plaintiff's version of the matter."

"Fraud, actual and constructive, is so multiform as to admit of no rules or definitions. 'It is, indeed, a part of equity doctrine not to define it,' says *Lord Hardwicke,* 'lest the craft of men should find a way of committing fraud which might escape such a rule or definition.' Equity, therefore, will not permit 'annihilation by definition,' but it leaves the way open to punish frauds and to redress wrongs perpetrated by means of them in whatever form they may appear. The presence of fraud, when resorted to by an adroit and crafty person, is at times exceedingly difficult to detect. Indeed, the more skillful and cunning the accused, the less plainly defined are the badges which usually denote it. Under

such conditions, the inferences legitimately deducible from all the surrounding circumstances furnish, in the absence of direct evidence, and often in the teeth of positive testimony to the contrary, ample ground for concluding that fraud has been resorted to and practiced by one or more of the parties," *Stacy, J.*, in *Oil Co. v. Hunt,* 187 N. C., 157, 121 S. E., 184. See also *S. v. Lea,* 203 N. C., 13, at p. 30, 164 S. E., 737, as applied to conspiracies. The principles there stated are applicable to the present action.

Appellants contend further that plaintiff's testimony pertaining to failure of consideration cannot obtain for that the examining or certifying officer taking the acknowledgment of plaintiff to the release complied with the provisions of G. S., 52-12. However, the jury having found in answer to the fourth issue that the release was obtained by fraud, there is no contract between the husband and wife to which the provisions of G. S., 52-12, could apply.

Appellants further assign as error the failure of the court to allow their motion to set aside the verdict for excessiveness may not be sustained. Such motion is addressed to the sound discretion of the trial court, and is not reviewable on the showing here made. *Edmunds v. Allen, ante,* 250, and cases cited.

All other assignments of error in support of which argument is made in brief of appellants, have been given due consideration, and prejudicial error is not made to appear.

Therefore, in the trial below, there is

No error.

IN RE TAYLOR (STATE *v.* TAYLOR).

(Filed 13 October, 1948.)

1. Constitutional Law § 39: Criminal Law § 57d—

Where a person has been convicted of crime and final judgment entered, the proper procedure for him to challenge the constitutionality of his conviction for matters *dehors* the record is by writ of error *coram nobis.* Whether petition for the writ should be made to the trial court or whether petition for permission to file the petition in the trial court should first be made to the Supreme Court in the nature of a writ of error *coram vobis, quœre?*

2. Constitutional Law § 34d—

Where defendant in a prosecution less than capital is unable to employ counsel, the appointment of counsel for him is discretionary with the trial court; but in a capital case the right to the appointment of counsel is vouchsafed by provision of both the State and Federal Constitutions and by statute.

3. Constitutional Law § 34a—

Failure to appoint counsel for a person prosecuted for a capital offense relates only to due process and not the guilt or innocence of the accused, and therefore even though the conviction be set aside upon such ground, the accused would not be entitled to his discharge but only to a vacation of the judgments against him and a restoration of the indictments to the docket for trial.

4. Habeas Corpus § 2—

Habeas corpus is inappropriate to test the validity of a trial which resulted in conviction and final judgment against petitioner, both by reason of established procedure and also by statute. G. S., 17-4.

5. Habeas Corpus § 8—

Petition for *certiorari* to review judgment on return of writ of *habeas corpus* issued in petitioner's endeavor to collaterally attack a final judgment of conviction, will be dismissed.

PETITION by Laurie D. Taylor, Jr., for *certiorari* to review judgment on return to writ of *habeas corpus*. Petition filed 7 September, 1948.

The circumstances leading up to and surrounding the present application are these:

The petitioner, Laurie D. Taylor, Jr., is in the Central Prison at Raleigh under several sentences, three for life. On 8 July, 1948, he applied to the resident judge of the Seventh Judicial District, Honorable W. C. Harris, for a writ of *habeas corpus,* alleging that he was unable to employ counsel, and was denied the benefit of counsel, when he was required to plead to three capital charges of burglary and four indictments for larceny at the January Term, 1947, Pitt Superior Court. As Honorable John J. Burney was the presiding judge at this term of court, the petition for *habeas corpus* was referred to him for hearing and disposition. He heard the matter in Wilmington on 19 July, and dismissed the writ.

Thereafter, on 7 September, the petitioner applied here for writ of *certiorari* to bring up the judgment on *habeas corpus* for review. (Actually, the application is, in form, one for *habeas corpus*—broad enough, however, to cover *certiorari*). Before acting upon this application, the court designated J. C. B. Ehringhaus, Jr., Esquire, of the Raleigh Bar as counsel for the petitioner.

After several conferences with the petitioner and some vacillation on his part, counsel has filed the following report:

"REPORT OF COUNSEL APPOINTED BY THE COURT.

"To The Honorable The Chief Justice and the Associate Justices of the Supreme Court of North Carolina, Raleigh, North Carolina:

"Following receipt by the Court of a letter from the above named petitioner dated September 7, 1948, which said letter was in the nature

of a petition to review a judgment of Honorable John J. Burney, dated July 19, 1948, denying petitioner's application for discharge upon the return of a Writ of *Habeas Corpus,* the Court appointed the undersigned to advise and represent the petitioner in the Supreme Court. As counsel for petitioner, I beg leave to advise the Court as follows:

"As will appear from the record, the petition for Writ of *Habeas Corpus* alleged that the petitioner was unable to employ counsel and was denied benefit of counsel when he was required to plead to three capital charges of burglary and four indictments for larceny at the January Term, 1947, Pitt Superior Court. It is further alleged that the petitioner, who was then a minor without legal knowledge, training or experience in court procedure, advised the Trial Court before entering pleas to the indictments that he was unable to employ counsel and requested the Court to appoint counsel to advise with him and to protect his rights, but there was no counsel appointed to represent him at that time; that the petitioner was apprehensive of the consequences that might result to him from a public hearing of the offenses which were alleged to have occurred within the period of only a few weeks prior thereto; that he entered pleas of Guilty to the indictments of larceny and tendered pleas of Guilty of burglary in the Second Degree on the capital charges, which were accepted by the Solicitor; that the petitioner was thereupon sentenced to life imprisonment on each of the burglary indictments and to ten years imprisonment on each of the larceny charges, the sentence in all the cases to run concurrently; and that the petitioner is now serving his sentences in the Central Prison at Raleigh. It was further suggested and submitted that the disposition of the charges against the petitioner, especially the capital ones, without affording him the advice and assistance of counsel, was in violation of his constitutional and statutory rights.

"In the consideration of the rights of the petitioner, I came to the conclusion that serious statutory and constitutional questions were presented, particularly in the view of G. S., 15-4; *S. v. Farrell,* 223 N. C., 321, 26 S. E. (2d), 322; *Powell v. Alabama,* 287 U. S., 45, 77 L. Ed., 158, 84 A. L. R., 572. At the same time, however, and in the light of petitioner's present petition to review the judgment of Judge Burney in the *Habeas Corpus* proceeding, the question of the propriety of presenting these constitutional and statutory questions by way of *Habeas Corpus* proceedings arose. Under the authority of *S. v. Burnette,* 173 N. C., 734, and *S. v. Dunn,* 159 N. C., 470, I came to the conclusion that it was debatable whether the legality of the petitioner's trial based upon the suggestion of deprivation of statutory and constitutional rights could be decided on the merits in a proceeding in *Habeas Corpus* and that the Supreme Court, in the present state of the law, might feel justi-

fied in denying the petition for Writ of *Certiorari,* without deciding the case on its merits.

"On the other hand, I explored the possibility of raising such questions by means of Writs of Error *Coram Nobis.* Such a Writ, though seldom employed, is nonetheless a part of the established common law procedure, 24 C. J. S., 143, *et seq.,* and is a part of our procedure in North Carolina. G. S., 4-1; *Roughton v. Brown,* 53 N. C., 393; *Lassiter v. Harper,* 32 N. C., 392, and *Tyler v. Morris,* 20 N. C., 625. The Writ has been expressly held to conform to the due process of law requirements of the XIVth Amendment, particularly in factually similar situations. *Hysler v. Florida,* 315 U. S., 411; *Taylor v. Alabama,* 335 U. S., 252, decided June 21, 1948. Compare, *Nickels v. State,* 86 Fla., 208, 98 So., 502, on the facts, and *Chambers v. State,* 117 Fla., 642, 158 So., 153, on procedure.

"The pleas of Guilty, the expiration of the Term in which petitioner was tried, and the absence of opportunity to present these questions on appeal to the Supreme Court indicated that, chronologically, petitioner should, after giving notice, petition the Supreme Court for permission to file his petitions for Writs of Error *Coram Nobis* in the Superior Court of Pitt County. If upon petitioner's verification and the record in the *Habeas Corpus* proceeding, a *prima facie* showing of substantiality is made, the Court, in the exercise of its supervisory powers over inferior courts, could grant the petition and permit petitioner to proceed as above in Pitt Superior Court. N. C. Constitution, Article IV, Sec. 8; Compare *State v. Lawrence,* 81 N. C., 522, and *State v. Green,* 85 N. C., 600. See also note to *Halford v. Alexander,* 46 Am. Dec., 253-257.

"In my first interview with petitioner, I advised that, whatever the course he pursued to assert his statutory and constitutional rights, it could at best only result in new trials on the original Bills and that he would not be entitled to discharge unless acquitted on such new trials. Petitioner was repeatedly advised and enjoined that the assertion of his rights might again compel him to plead to the capital indictments. Being assured that he wished to have determined the legality of his trials, I advised him as indicated above and suggested either of two courses of action; first, to withdraw the letter of September 7, 1948 (which is broad enough to be considered as a petition for Writ of *Certiorari*), and file in the Supreme Court a new Petition for permission to file Petitions for Writs of Error *Coram Nobis* in Pitt Superior Court; or, second, to file an amendment to the September 7, 1948, letter and ask for the alternative relief of permission to file petitions for Writs of Error *Coram Nobis* in Pitt County should the Court be of the opinion that *Certiorari* should be denied.

"The petitioner has asked that I report to the Court that he does not wish to follow either of the courses suggested by me, but, rather, he desires that the Court take action upon his letter of September 7, 1948, without more. I now request that every consideration, consistent with the law, be given to his petition, for I am persuaded that, as regards the legality of his trials, he 'hath his quarrel just.' *State v. Farrell, supra,* and *Powell v. Alabama, supra.*

"I have caused to be filed with the Clerk a certified copy of the record in the *Habeas Corpus* proceeding, a certified copy of the record of petitioner's trials in Pitt Superior Court, and have served notice of the Petition for Writ of *Certiorari* upon the Attorney General. It is believed that the foregoing is sufficient under law and applicable Rules to give the Court jurisdiction to proceed to disposition of the Petition. Rule 34.

"I ask that the Court pardon the length of this and hope that it does not constitute a breach of the proprieties. However, I have felt that it was a part of my obligation and duty thus to make full report.

"Being mindful of the honor extended by the Court's appointment, I wish also to express my personal appreciation and that of my firm. Since my function as counsel in the Supreme Court is apparently terminated, it is requested that I now be relieved of further responsibility in the case and under my appointment. The Court can be assured, however, that I stand ready to serve further, either as counsel in the Supreme Court, as *amicus curiæ* or otherwise, should it be desired.

Respectfully,
/s/ J. C. B. EHRINGHAUS, JR.
(EHRINGHAUS & EHRINGHAUS)"

Complying with the suggestion contained in the above report and a second written request from the petitioner, dated 18 September, insisting that his application be granted, we proceed to a consideration of the matter.

J. C. B. Ehringhaus, Jr. (by Court appointment) for petitioner.

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

R. Brooks Peters, Jr., for State Highway & Public Works Commission.

STACY, C. J. The petitioner has been well advised, both as to the substantive and procedural law applicable to his situation, as will appear from an examination of the authorities cited in the report above set out.

Where the defendant in a criminal prosecution, less than capital, is unable to employ counsel, the appointment of counsel for him is discre-

tionary with the trial court. *S. v. Hedgebeth,* 228 N. C., 259, 45 S. E. (2d), 563. It is otherwise, however, in capital cases. G. S., 15-4; *S. v. Farrell,* 223 N. C., 321, 26 S. E. (2d), 322. "In a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feebleminded-ness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law." *Powell v. Alabama,* 287 U. S., 45, 77 L. Ed., 158, 84 A. L. R., 527.

The right to counsel in a capital case is vouchsafed the accused, both by constitutional provision—State and Federal—and by statutory enactment. G. S., 15-4; *S. v. Farrell, supra; Powell v. Alabama, supra; Wade v. Mayo,* 334 U. S., 672, decided 14 June, 1948.

The cases of *S. v. Pritchard,* 227 N. C., 168, 41 S. E. (2d), 287, and *Abernethy v. Burns,* 206 N. C., 370, 173 S. E., 899, are not to be overlooked. In the former, the court sought to appoint counsel for the accused. He declined to follow their advice, and they were relieved. In the latter, the plaintiff was able to employ counsel, but preferred "to go it alone," as was his right in a civil proceeding. G. S., 1-11.

The petitioner seems to think that he is entitled to be discharged on *habeas corpus.* In this he is mistaken. *In re McKnight, post,* 303. Failure to appoint counsel goes only to due process, and not to the guilt or innocence of the accused. In no event could he obtain more than a vacation of the judgments against him and a restoration of the indictments to the docket for trial. He alone can decide whether he wishes to assume the risks involved in such a move, bearing in mind, of course, that not all things lawful are expedient. The petitioner could find his last state worse than the first. However, he is entitled to pursue his rights, if so minded. All this has been pointed out to him by counsel. Up to now he seems to be obsessed with the idea, as he puts it, that "the writ of *habeas corpus* cannot be suspended in time of peace," which demonstrates anew the truth of Pope's assertion: "A little learning is a dangerous thing," which properly interpreted means that a smattering of expert knowledge in the hands of an inexpert is a dangerous thing. And so it is. Nevertheless, in deference to the petitioner's insistence, a ruling will be made on his petition for review.

It should be noted, perhaps, as pointed out in the answer to the petition filed here, that while charged with three capital crimes, the petitioner was allowed to plead guilty to lesser offenses under these indictments, and this after full consideration on the part of all concerned. Hence, the contention is made that the appointment of counsel for the petitioner was a matter resting in the sound discretion of the trial court,

and that no violation of any of his rights has been made to appear. *S. v. Hedgebeth, supra.*

However this may be and whatever the merits of the matter, it could avail the petitioner naught to review the judgment of Judge Burney dismissing the writ of *habeas corpus*. Such writ is inappropriate under our procedure to obtain for the petitioner the relief which he seeks, and he has been so advised. *In re Steele,* 220 N. C., 685, 18 S. E. (2d), 132; *S. v. Dunn,* 159 N. C., 470, 74 S. E., 1014; *S. v. Burnette,* 173 N. C., 734, 91 S. E., 364. Not only is this so under the apposite decisions, but it is also provided by G. S., 17-4, that "application to prosecute the writ shall be denied . . . (2) where persons are committed or detained by virtue of the final order, judgment or decree of a competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon such final order, judgment or decree." *In re Schenck,* 74 N. C., 607.

It follows, therefore, that the petition for review must be dismissed.

Mr. Ehringhaus is relieved of any further duty under his appointment here. He has diligently investigated the law, advised the petitioner of his rights, cautioned him in respect of the potential risks involved, filed certified copies of the records in the case, served notice on the Attorney-General, and he further signifies his willingness to comply with any additional request, albeit he has received no compensation for his services. Nothing has been overlooked and full consideration has been given to every phase of the matter.

Certiorari denied.

IN RE McKNIGHT (STATE v. McKNIGHT).

(Filed 13 October, 1948.)

1. Burglary § 14—

Burglary with explosives is punishable as for burglary in the second degree, which is by imprisonment for life or for a term of years in the discretion of the court. G. S., 14-57; G. S., 14-52.

2. Criminal Law § 81 (c) 4—

Defendant cannot be prejudiced by an inadvertence relating to a count, the punishment for which is not in excess of that imposed on another count upon which alone judgment was entered.

3. Habeas Corpus § 8—

Where *habeas corpus* is issued on the ground that the punishment imposed was in excess of that permitted by law, and it appears that the punishment imposed was within the statutory limits, petition for *certiorari* for review of the judgment on the return of the writ of *habeas corpus* will be dismissed, since review could avail petitioner naught.

IN RE MCKNIGHT.

PETITION by Carl McKnight for *certiorari* to review judgment on return to writ of *habeas corpus*. Petition filed 23 September, 1948.

No counsel for petitioner.

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

R. Brooks Peters, Jr., for State Highway and Public Works Commission.

STACY, C. J. The petitioner was convicted at the February Term, 1946, Caldwell Superior Court, of burglary with explosives and larceny. The judgment imposed was, that he be confined in the State's Prison at hard labor for not less than 25 nor more than 35 years. The validity of the trial was upheld on appeal at the Fall Term, 1946, reported 27 November, *S. v. McKnight,* 226 N. C., 766, 40 S. E. (2d), 413.

Thereafter, at the January Term, 1947, Caldwell Superior Court, the petitioner moved for a new trial on the ground of newly discovered evidence. After hearing duly held, this motion was denied. The petitioner was thereupon committed to the Central Prison at Raleigh, where he has since been serving his sentence.

In July, 1948, he applied to the resident judge of the Seventh Judicial District, Honorable W. C. Harris, for a writ of *habeas corpus,* which was issued and heard, and judgment entered upon return thereof, 22 July, 1948, remanding the prisoner to the custody of the Prison authorities.

The petitioner applies here for *certiorari* to review the judgment on return to the writ of *habeas corpus,* alleging that his sentence is in excess of that allowed by law. *S. v. Lawrence,* 81 N. C., 522; *S. v. Green,* 85 N. C., 600. The petitioner seems to think that he was tried for a non-burglarious breaking and entering in violation of G. S., 14-54, under which he could not be imprisoned for more than 10 years in the State's Prison. In this he is mistaken. He was convicted of burglary with explosives—the first and only count in the bill pertaining to breaking and entering the Post Office at Kings Creek.

It is provided by G. S., 14-57, that a conviction of burglary with explosives shall be punishable as for burglary in the second degree, as provided in G. S., 14-52. Under this latter statute, burglary in the second degree is punishable by imprisonment in the State's Prison for life, or for a term of years, in the discretion of the court.

It is recited in the judgment on return to the writ of *habeas corpus* that the prisoner was convicted on all three counts in the bill of indictment, and the record certified to the Prison authorities shows this to be so. But, on the trial, the third count in the bill was withdrawn from

the jury's consideration as appears in the case reported in 226 N. C., 766, 40 S. E. (2d), 413. However, no harm has resulted from the inadvertence, as only one judgment was entered, which was on the first count.

It could avail the petitioner naught to review the judgment on return to the writ of *habeas corpus*. *In re Steele*, 220 N. C., 685, 18 S. E. (2d), 132; *In re Taylor, ante*, 297. Hence, his petition will be dismissed.

Certiorari denied.

MRS. ELIZABETH MacCLURE, ADMINISTRATOR OF THE ESTATE OF DOUGLAS MacCLURE, DECEASED, v. ACCIDENT AND CASUALTY INSURANCE COMPANY OF WINTERTHUR, SWITZERLAND, A CORPORATION.

(Filed 13 October, 1948.)

1. Insurance § 48—

When the policy provides coverage while the car insured is being driven with insured's permission by another in the prosecution of insured's business, such driver stands in the same relation to the injured person as the named insured in regard to liability on the policy.

2. Insurance § 44c—

Where it appears that insured's agent gave insurer notice of the accident shortly after it occurred, and that insurer investigated the accident, knew of the institution of action against insured, and employed counsel to defend that suit, the defense that insurer had not been notified of the accident in the manner stipulated in the policy is not available.

3. Insurance § 44d—

Provision in a liability policy for co-operation by insured in preparing and prosecuting the defense to an action by the injured party is material, and substantial breach of this provision by insured would defeat recovery on the policy.

4. Evidence § 8—

The burden of proving an affirmative defense is on defendant.

5. Insurance § 44d—

After notice to the insurer of the accident, non-co-operation by insured in the preparation and prosecution of the defense to an action instituted by the injured party against insured, constitutes an affirmative defense to liability on the policy, regardless of whether the policy designates the co-operation clause a condition precedent, since such matters relate to conduct of insured subsequent to the accident maturing the liability.

6. Same—

Breach of the co-operation clause in the policy of liability insurance must result in detriment to insured in performance of its obligation to defend an action instituted by the injured person against insured in order to constitute a defense to liability on policy.

7. Trial § 24a—

Defendant cannot be entitled to nonsuit on an affirmative defense upon evidence offered by him, but nonsuit on an affirmative defense is proper only when plaintiff's evidence establishes the defense, since regardless of the weight and clarity of defendant's evidence upon the issue, the credibility of the evidence remains for the determination of the jury. G. S., 1-183.

8. Insurance § 50—

Execution on judgment obtained against insured by the party injured in an accident was returned *nulla bona*, and the person injured instituted this action against insurer on a policy of liability insurance. *Held:* Nonsuit on insurer's evidence of breach of the co-operation clause by insured was error, since such breach constitutes an affirmative defense with the burden of proof thereon upon insurer.

PLAINTIFF'S appeal from *Sink, J.*, Regular January Term, 1948, BUNCOMBE Superior Court.

This action to recover damages for the personal injury and death of plaintiff's intestate, was brought against the defendant Company on an accident or casualty insurance policy issued to one Dewey Delph with respect to injury or damage caused in the use of a LaSalle sedan owned by him. Delph was the proprietor of a carnival, or show, known as the "Blue Ribbon Shows," traveling in North Carolina, Virginia, Tennessee, and other southern states, with headquarters in Atlanta, Georgia; and was, at the time of the accident giving rise to the suit, showing in Asheville, North Carolina. At the time of the injury the offending automobile was being driven on the streets of Asheville by William F. Spence, a member of the show personnel, with the permission of the owner, Delph. The deceased, a small child, was fatally injured in a collision with the car so driven, on the 17th day of October, 1945, and died a few hours thereafter.

Delph notified defendant's Atlanta agent of the accident October 19 following, and in turn the latter notified defendant's district claim representative, Barnette. C. V. DeVault, claim agent at Asheville, was authorized to make investigation and take the matter in charge. Suit was begun October 1, 1946, and service was made on the Commissioner of Motor Vehicles under G. S., 1-105, October 14; and M. D. Kauffman, as purported agent in behalf of Spence, receipted registered notice thereof at Nashville, Georgia, October 24. The defendant employed Messrs. Smathers & Meekins of Asheville in behalf of Delph and Spence, to defend the action against them. Through these and other agencies the present defendant made continuous efforts to locate either or both of the defendants by letters written to each of them and by inquiries of persons thought likely to know their whereabouts or to be acquainted with the itinerary of the show. These efforts were unsuccessful as far as Spence

was concerned until a registered letter mailed to him at his home, Wytheville, Virginia, and there receipted for him by a purported agent, reached him April 7, 1947, at Brunswick, Georgia.

Meantime numerous letters had been written from time to time in which the necessity for filing answer to the suit was stressed and the failure to co-operate and its consequences both upon the suit and upon the attitude of the Company toward the suggested failure to co-operate according to the terms of the policy. Many of these letters were returned undelivered. Meantime, counsel for the plaintiff in that suit, Messrs. Williams & Williams, at the request of the defense attorneys, agreed to an extension of time to file answer; and finally, at the request of defense counsel, consented that the latter might file an unverified answer, and that the time should be extended until April 7. Such an answer had been prepared by defense counsel some time in March.

On April 7, 1947, Messrs. Smathers & Meekins, not having heard from Spence, filed a motion to be permitted to withdraw as counsel, which motion was supported by an affidavit reciting in detail the history of the case, the numerous attempts made to locate the client, reciting the provisions in the policy relative to co-operation as a condition precedent to its recovery, and requesting the court to find the facts. The Insurance Company had suggested withdrawal by letter of March 25,—"and then it shows on the Court Record that we have done everything within our power to locate Spence and have him verify his answer and co-operate with his insurer."

Permission at that time was declined and was not granted until May 12, following, at which time Judge Gwyn allowed the motion, making the requested findings of fact. This entire proceeding, including the findings of Judge Gwyn, was offered in evidence by the defendant and admitted over plaintiff's objection.

In response to the letter received by Spence at Brunswick, Georgia, April 7, he telegraphed Messrs. Smathers & Meekins on April 8 that he had received the letter the night before too late to answer by Western Union and could not communicate by telephone because of the strike, and asked to know what they wanted him to do. To this counsel replied by wire, stating that they had filed a motion to withdraw from the case and would take no further action unless assured that he would keep them advised every two weeks where he could be reached the following two weeks and that he would come to the trial; that if he agreed to do that he must "sign and return the answer as explained in our letter of March 7, or if not available, will prepare and forward another, provided you act at once and will co-operate from here on." The signed, verified answer was received by defense counsel on April 16. The record does not disclose that counsel did anything in the matter after locating Spence

except press the motion to withdraw which, as stated above, was granted on May 12.

Meanwhile, judgment by default and inquiry was signed April 11, and upon the inquiry of damages judgment was rendered against Spence for $11,000. Execution was issued on this judgment and returned *nulla bona;* the judgment, execution and return were manifested in evidence.

The policy contains the following provisions more immediately pertinent to this review and discussed in the opinion:

> "6. Notice of Accident. When an accident occurs written notice shall be given by or on behalf of the Insured to the Company at its United States Head Office at New York, N. Y., or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the Insured and also reasonably obtainable information respecting the time, place and circumstances of the accident, the names and address of the injured and of available witnesses."
>
> "7. Notice of Claim or Suit. Coverages A and B. If claim is made or suit is brought against the Insured, the Insured shall immediately forward to the Company every demand, notice, summons or other process received by him or his representative."
>
> "8. Assistance and Cooperation of the Insured. Coverages A and B. The Insured shall cooperate with the Company and, upon the Company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. The Insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of accident."
>
> "11. Action Against Company. Coverages A and B. No action shall 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 the amount of the Insured's obligation to pay shall have been finally determined either by judgment against the Insured after actual trial or by written agreement of the Insured, the Claimant and the Company.
>
> "III. Definition of 'Insured.' The unqualified word 'Insured' wherever used in Coverages A and B and in other parts of this policy, when applicable to such coverages, includes the Named Insured, and, except where specifically stated to the contrary, also includes any person or organization legally responsible for the use thereof, provided the actual use of the automobile is with the permission of the Named Insured."

There were numerous exceptions on the part of the plaintiff as to the exclusion of the evidence offered by him and to the admission of evidence offered by the defendant. They are omitted except as noted in the opinion.

At the conclusion of the plaintiff's evidence and again at the conclusion of all the evidence, the defendant demurred to the evidence and moved for judgment as of nonsuit, which was allowed, and the plaintiff appealed.

Williams & Williams for plaintiff, appellant.
Harkins, Van Winkle & Walton for defendant, appellee.

SEAWELL, J. Preliminarily we should observe that under the definition of "insured" in the above quoted clause of the policy, Spence, operator of the LaSalle automobile by permission of the owner, is as much entitled to the benefit of the insurance as the "named insured," Delph, and stands in the same relation to the plaintiff in the procedure for ultimate recovery.

The defense that the insurer had not been notified of the accident or of the institution of the suit against him is not tenable. Delph had promptly notified agents of the Company of the occurrence and they, together with claim adjuster DeVault, were immediately and actively employed in the investigation of the accident soon after it occurred. The record shows that the defendant was aware of the institution of the suit and immediately employed counsel to defend both Delph and Spence. In that capacity the counsel designated knew of the institution of the suit and were so conversant with the facts and with the plaintiff's claims, presumably as alleged in the complaint, that in an early letter addressed to Spence they advised him that he had a good defense, which defense they formulated in an answer.

The case is distinguishable on principle from *Peeler v. Casualty Co.*, 197 N. C., 286, 148 S. E., 261, cited by the appellee, as may be seen from the statement of facts in that case, p. 287: "It is admitted that the defendant never had written notice of a collision and knew nothing about it until the trial between the plaintiff and Graham had begun." (Graham was the insured.)

The plaintiff does not contest the only point in the *Peeler case* applicable to the case at bar,—that a forfeiture of his rights by the insured through substantial breach of the co-operation clause would defeat recovery on the policy. *Sears v. Casualty Co.*, 220 N. C., 9, 16 S. E. (2d), 419. There is no question here as to the validity and importance of clauses in liability insurance policies similar to that with which we are dealing, to the materiality of which appellee's counsel address many cita-

tions of authority. But the issue here concerns the manner in which the breach of the co-operation clause may be ascertained, and by which branch of the court it may be determined,—judge or jury. The cases cited by the appellee are not briefed to that point and will be found to vary in material aspects, both factual and legal.

The controversy narrows down to the co-operation clause in the policy of insurance and the propriety of nonsuit of the plaintiff, after a *prima facie* case had been made out, solely on defendant's evidence of its breach. We find no other plausible ground upon which the case could have been taken from the jury, except upon some breach of that clause; and appellee's brief, in its statement of the question involved, frankly assumes that nonsuit was granted on that ground, and defends here upon that theory.

The general rule is that the party who seeks to avoid liability by interposing an affirmative plea assumes the burden of proving his allegation by competent evidence before the jury. Stansbury, North Carolina Evidence, sec. 208; McIntosh, North Carolina Practice and Procedure, sec. 474; 38 C. J. S., Evidence, sec. 104, 162-3-4; *Pearson v. Pearson,* 227 N. C., 31, 32, 40 S. E. (2d), 477; *Wilson v. Casualty Co.,* 210 N. C., 585, 188 S. E., 102.

As we are dealing with a nonsuit of plaintiff's action based upon an affirmative defense set up by the defendant while the burden of proof with respect thereto rested upon him, it is well to say that we are advertent to the fact that the policy names compliance with all its terms a condition precedent to the maintenance of the suit. In passing it may be observed that the defendant made no objection to the pleading in that respect, and voluntarily undertook to prove its affirmative defense in avoidance of liability.

The designation of the condition as a condition precedent does not necessarily vary the court procedure or the rules of evidence which places the burden of proving an affirmative defense upon the party making it, especially where the condition relates to the conduct of the insured subsequent to the accident maturing the liability. The rule applies to that which is "affirmative in substance and not necessarily in form." Stansbury, North Carolina Evidence, sec. 208; *Walker v. Carpenter,* 144 N. C., 674, 57 S. E., 461; *Williams v. Ins. Co.,* 212 N. C., 516, 193 S. E., 728; *Wilson v. Casualty Co., supra.*

By the great weight of authority the rule is specifically applicable where the breach of the co-operation clause in insurance policies similarly worded is pleaded and relied upon by the insurer; and the burden of proof carries the issue to the jury.

In *General Casualty & Surety Co. v. Kierstead,* 67 F. (2d), 523, 525, the Court stated the principle thus: "The condition of the policy requir-

ing co-operation by the insured is in the nature of a condition precedent to liability on the company's part for the loss growing out of a claim with the disposition of which the insured's co-operation is demanded," but further says, "The defense is an affirmative one pleaded by the defendant, and the burden of proof was upon it. *Francis v. London Guarantee & Accident Co.,* 100 Vt., 425, 138 A., 780; *Cowell v. Employers' Indemnity Corp.,* 326 Mo., 1103, 34 S. W. (2d), 705; *Conroy v. Commercial Casualty Ins. Co.,* 292 Pa., 219, 140 A., 905; *United States Fidelity & Guaranty Co. v. Remond,* 221 Ala., 349, 129 So., 15."

The attempt by mere nomenclature to convert what is really a promissory warranty into a condition precedent is dealt with in Williston on Contracts, Vol. 3, sec. 667A, p. 1919:

> "The application of this principle to insurance policies is frequent, and the law has been thus stated: 'Those clauses usually contained in policies of insurance, which provide that the policy shall become void, or its operation defeated or suspended, or the insurer relieved wholly or partially from liability, upon the happening of some event, or the doing, or omission to do some act, are not in any proper sense conditions precedent. If they may properly be called conditions, they are conditions subsequent, and matters of defense, which, together, with their breach, must be pleaded by the insurer to be available as a means of defeating a recovery on the policy; and the burden of establishing the defense, if controverted, is, of course, upon the party pleading it.' "

It is to be observed that in substance the plea relates to conduct of the insured after the liability on the policy has matured by reason of the accident. It is not questioned that liability on the policy matures upon the happening of the accident; and the rights of the insured attach subject to be defeated by substantial failure to co-operate in a matter essential to the defense. Blashfield, Automobile Law, Vol. 6, sec. 4071, p. 111; *Pennsylvania Casualty Co. v. Phoenix,* 139 F., (2d), 823; *Dunn v. Jones,* 53 P. (2d), 918, 143 Kan., 218; *Fallon v. Mains,* 19 N. E. (2d), 68, 302 Mass., 166.

"The liability insurer claiming the forfeiture by the insured's breach of the co-operation clause has the burden of proof in that respect"; Appleman, Insurance Laws and Practice, Vol. 8, sec. 4787; and, "What constitutes co-operation or lack thereof is usually a question of fact for the jury"; 21 *ibid.,* sec. 12277; "The burden is upon the liability insurer to prove its alleged defense of lack of co-operation by the insured." See cases under note 32.

If the insurer relies on a substantive defense reserved in the policy, the defense becomes an affirmative one and the case is for the jury.

"Whether or not in any particular instance the insured has so far failed to give the co-operation in and about the defense of the action which is contemplated by the co-operation clause in the policy will ordinarily be a question of fact determinable by the jury." Blashfield, Automobile Law, Vol. 6, sec. 4059, p. 73. See cases under note 72.

While there is some contrary authority, the better reasoned cases hold that the failure to co-operate in any instance alleged must be attended by prejudice to the insurer in conducting the defense. Blashfield, Automobile Law, Vol. 6, sec. 4059, p. 78.

The clause cannot be interpreted in a way that would make it a mere device to entrap the insured, or a technicality so arbitrarily weighted that, without detriment to the insured in the performance of its obligation to defend, it wipes out that obligation, which is the essence of the contract, and a duty wholly surrendered to the insurer by its terms. We are unable to adopt a theory so opposed to substantial justice. *Levy v. Indemnity Insurance Co. of North America,* 8 So. (2d), 774, La. Appls.; *Associated Indemnity Corp. v. Davis,* 136 F. (2d), 71; *Pacific Indemnity Co. v. McDonald,* 107 F. (2d), 446; 131 A. L. R., 208; *State Automobile Mutual Ins. Co. of Columbus, Ohio, v. York,* 104 F. (2d), 730 (*certiorari* denied), 308 U. S., 591, 8 Cal. App. (2d), 532 (failure to attend trial); *Rochon v. Preferred Accident Ins. Co. of N. Y.,* 161 A., 429, 118 Conn., 190.

In *Hedgecock v. Ins. Co.,* 212 N. C., 638, 641, 194 S. E., 86, we find: "A judgment of nonsuit is never permissible in favor of the party having the burden of proof upon evidence offered by him," citing *Wharton v. Ins. Co.,* 178 N. C., 135, 100 S. E., 266; *Spruill v. Ins. Co.,* 120 N. C., 141, 27 S. E., 39; *Baker v. Ins. Co.,* 168 N. C., 87, 83 S. E., 16; *Thaxton v. Ins. Co.,* 143 N. C., 34, 55 S. E., 419; *Parker v. Ins. Co.,* 188 N. C., 403, 125 S. E., 6. "There is but one exception to this rule," says *Mr. Justice Barnhill* for the Court in the main case cited, "When the plaintiff offers evidence sufficient to constitute a *prima facie* case in an action in which the defendant has set up an affirmative defense, and the evidence of the plaintiff establishes the truth of the affirmative defense as a matter of law, a judgment of nonsuit may be entered."

In the absence of such evidence or admissions on the part of the plaintiff it does not matter how clearly the matter appears in the evidence of the defendant, decision is not thereby shifted to the court as a matter of law, since the question of credibility still remains; G. S., 1-183, and cases cited.

It is the practice of this Court to refrain, as far as it may without destroying the clarity of opinion, from comment on the evidence when the case is sent back for a new trial—a rule that cannot always be strictly observed when the question involved is a nonsuit upon demurrer.

We believe, however, that the case under review calls for an observance of the rule. We have refrained from passing upon the objections to the evidence because the same situation may not recur, but the want of specific discussion has no other significance. We find nothing in it, however, which would justify the lower court in nonsuiting the plaintiff solely upon the evidence of defendant who has made an affirmative defense with respect to which the burden of proof still rests upon him. The case should have gone to the jury.

The judgment of nonsuit must be reversed and the cause remanded for trial in its regular course.

Reversed.

FRED HENDERSON AND J. B. HENDERSON, D/B/A HENDERSON FLOWER SHOP, v. EDWIN GILL, COMMISSIONER OF REVENUE OF NORTH CAROLINA.

(Filed 13 October, 1948.)

1. Taxation § 34: Estoppel § 10—The sovereign cannot be estopped in the performance of a governmental function.

Plaintiff florists were advised by a collector of the Department of Revenue that sales of flowers grown on their own land were not subject to sales tax. Subsequently the Department of Revenue forced payment of sales tax on such sales and plaintiffs entered this suit to recover the tax paid under protest. *Held:* Even though plaintiffs are unable to collect sales tax from the purchasers on the past transactions and under the statute were merely agents for the collection of the taxes, and even though the acquiescence of the Commissioner of Revenue in the sales tax reports should be considered equivalent to an administrative interpretation of the statute, the State is not estopped by the misdirection and laches, since the collection of taxes is a governmental function and plaintiffs' agency in the collection of the taxes was one of law with fixed liability to account for the tax imposed.

2. Taxation § 1c—

Classification of businesses and transactions for taxation are unassailable when the description of the classes is reasonably definitive and clear and the classification is reasonable and not arbitrary.

3. Taxation § 38c—

In an action to recover taxes paid under protest, the taxing statute will be construed strictly against the taxing agency in the enumeration of classes subject to the tax, but the burden is upon the taxpayer to show that he comes within an exemption or exception.

4. Taxation § 30—

Flowers grown upon the vendors' own land are farm products within the meaning of the exemption of such products from the N. C. Sales Tax. G. S., 105-169 l.

5. Same—

Plaintiffs operated a florist shop and sold therein flowers grown by themselves on their own land and also flowers purchased from wholesalers. *Held:* The sale of flowers grown by them on their own land is not exempt from the N. C. Sales Tax, since even though such flowers be regarded as farm products, such sales were made by plaintiffs in their character and capacity as florists and not as farmers or producers. G. S., 105-169 l.

PLAINTIFFS' appeal from *Moore, J.*, June Term, 1948, WILKES Superior Court.

In this action the plaintiffs seek to recover back taxes paid the defendant under protest under circumstances set forth in the agreed statement of facts upon which the case was heard. These may be summarized as follows:

The plaintiffs are partners doing business under the trade name "Henderson Flower Shop." They were required to make reports on sales previously made by them. The sales were of flowers partly raised by them in a hot house, or green house, of their own, and upon land cultivated by plaintiffs, some sold as cut, and some after fabrication or shaping in the form of wreaths and designs, and partly flowers bought at wholesale and retailed through the shop.

The first report of plaintiffs' sales was made in March, 1946. At that time the books of plaintiffs were opened to defendant's auditor and collector, and a full disclosure was made of plaintiffs' sales, the manner of acquisition of their stock, and all other matters necessary to determine the taxes due the State on said sales.

The plaintiffs were then advised of the amount of taxes due, and the method by which the computation had been made to arrive at the taxes due. Plaintiffs were advised that they were not liable for sales tax on flowers sold as cut from the green house and cultivated area, and were not liable to be taxed on the labor and service entering into the cost price of the fabricated flowers; were liable for the tax on retail sale of flowers bought from others at wholesale, but not, however, on the service and labor that entered into the retail cost. The said agent found that the plaintiffs were liable for tax on 40 per cent of the total sales and were not liable on 60 per cent, and computed the tax which plaintiffs paid. Plaintiffs were thereupon instructed that they should hereafter report their sales on that basis, using as a model the report made out by him. At the stated times they were required to make their reports, from May, 1945, down to and including the last report in 1946, all of plaintiffs' reports were prepared and made according to these instructions—every report showing that plaintiffs were paying three cents sales tax on 40 per cent of their sales and were paying no tax on 60 per cent of their

sales, which continued to represent the tax due on the basis of the instruction.

The plaintiffs contend that they are not liable for the tax on sale of flowers as cut from the greenhouse, and raised by them through cultivation of their own soil, nor upon the labor and service of making into wreaths or designs of these or flowers bought at wholesale, and that they have paid all sums due the State in sales tax liability as the same became due, and owe the State nothing on their demand for delinquent taxes, which they, nevertheless, paid under compulsion and are justly entitled to recover back. They plead further that because of the advice and instructions given them by defendant's agent, which they followed, they are now unable to collect the three per cent tax from their customers.

They further contend upon the foregoing facts that because of misleading advice and instructions given the plaintiffs by defendant's agent whereby they are deprived of the opportunity to collect sales tax from purchasers as required by law, and by reason of laches in the matter of collection, defendant is estopped from the collection of the said tax.

The controversy was submitted to Judge Moore for hearing and decision without a jury. Judge Moore adjudged that plaintiffs recover nothing. Plaintiffs appealed.

W. H. McElwee for plaintiff, appellant.

Attorney-General McMullan and Assistant Attorneys-General Tucker and Abbott for the State.

SEAWELL, J. The plaintiffs, having paid the tax under protest, base their right of recovery back upon either of two propositions: (a) That under the facts of this case the defendant is estopped from collection of the taxes now classified as delinquent because of the misdirection and laches of the collecting agency; and (b) that they were and are in fact and law not liable for the tax on the items of sale excluded by the Revenue Department's auditor and agent, these being of the same character as now taxed.

1. From the stipulated facts it appears that the first report of sales made by the plaintiffs was formulated by an official auditor from the Revenue Department on a full disclosure of sales previously made, and with a knowledge of the sources and manner of acquisition of the products and materials sold.

It may be conceded that since the original report prepared by the auditor and subsequent reports made upon the same basis came to the Department in due time and, presumptively at least, received the attention of the Commissioner, who is *imprimis* charged with interpretation of the statute as an administrative duty; and if the reports were sufficiently

analytical to show the incidence of the tax and its basis according to the audit and instruction given these taxpayers, it might be inferred that the exemptions or non-liability as to certain items were the subject of an administrative ruling, or are to be so considered, regardless of any defect in the authority of the agent to bind the Commissioner. But that is not enough.

The case of plaintiffs has an appeal stronger than that which usually supports a plea of estoppel. The official representations made to them are now conceded to have been incorrect and misleading and because of the multitude of the transactions and want of any record of the purchasers they were thus deprived of the opportunity to collect the three per cent tax on sales made on products they were advised were exempt. Moreover, it must be noted that these plaintiff merchants were statutory agents for the collection of the tax on sales which were definitely imposed upon the consumer, and their responsibility arises on the assumption that they must so collect.

These facts, however potent in creating an estoppel in ordinary transactions between individuals, do not estop the State in the exercise of a governmental or sovereign right. *Taylor v. Shufford,* 11 N. C., 116; *Candler v. Lunsford,* 20 N. C., 542; *S. v. Bevers,* 86 N. C., 588; *S. v. Finch,* 177 N. C., 599, 99 S. E., 409; Bigelow on Estoppel, p. 372.

Although some other jurisdictions, on considerations regarded as more practical, if not more just, view the matter differently, the majority view seems necessary to prevent a chaotic condition and endless dispute in the collection of taxes and is so deep-rooted in our system that we are not at liberty to depart from it on the mere occurrence of a hard case.

The action here is against the State, by statutory permission; G. S., 105-406. The imposition and collection of taxes are, of course, governmental functions; and the State cannot, by the conduct of its agents be estopped from collecting taxes lawfully imposed and remaining unpaid; and under the law as we understand it neither can their conduct or advice create an estoppel against the State by these retail merchants on the theory of their mere agency since they are the agent of the law, with a fixed liability to account for the tax imposed. *Walgreen Co. v. Gross Income Tax Division,* 75 N. E. (2d), 784 (Ind.); *Commissioner of Corporations and Taxation v. St. Botolph Club,* 321 Mass., 269, 72 N. E. (2d), 518; *People v. Minuse,* 70 N. Y. S. (2d), 426; 31 C. J. S., Estoppel, sec. 147; 19 Am. Jur., Estoppel, sec. 166; 51 *id.,* Taxation, sec. 966.

2. A more interesting, if not more serious, question is mooted with respect to the actual liability of the plaintiff for the tax on the items excluded by the auditor from his computation,—and especially the sale of flowers as cut from the nine acres or the greenhouse of plaintiffs where they were cultivated and grown by the plaintiffs themselves.

The sales tax statute, after defining retail merchants,—(G. S., 105-167 (6)),—and imposing the three per cent tax generally on sales (G. S., 105-168 (b)), provides the following exemption (G. S., 105-169 (1)): "Sales of products of farms, forests, mines, and waters when such sales are made by the producers in their original or unmanufactured state."

The appellee contends, with citation of authority, that a valid distinction for upholding the tax exists in the fact that the sales in this instance were made in plaintiffs' character and capacity as florists and not as farmers or producers, contending that their operations in producing, if farming, were subordinate or incidental and the products constituted merely a source of supply for their mercantile business as florists.

Acting within the limits of our Constitution, a large field is afforded the Legislature in its choice of subjects for taxation. When these subjects are segregated by descriptions or definitions with reasonable clearness,—the classification reasonable and the distinctions made not arbitrary or capricious,—the imposition of the tax is not assailable. *S. v. Williams,* 158 N. C., 610, 73 S. E., 1000; *Snyder v. Maxwell,* 217 N. C., 617, 9 S. E. (2d), 19; *Leonard v. Maxwell,* 216 N. C., 89, 3 S. E. (2d), 316; 51 Am. Jur., Taxation, sec. 173, p. 231. As to the incidence of the tax where it is imposed upon a general class, as in the present instance retail merchants, the law is construed more strictly against the agency imposing the tax, and in favor of the taxpayer. But where the coverage is challenged by virtue of an exemption or exception, the burden is upon the challenger to bring himself within the exemption or exception. A want of clarity in describing the general class or in defining the exempted class often causes confusion, from which the present case is not free.

Perhaps the best aid to the interpretation of the exempting clause lies in its over-all meaning and purpose. The large field which it is intended to cover, that is to encourage cultivation of the soil upon which the life of the race depends, and secure an adequate supply of farm products for the welfare and comfort of man; and it is not to be supposed that the lawmakers intended to withdraw from the comprehensive wording of the statute the cultivation and sale of flowers because their appeal is only to the esthetic sense, for which *non curat lex.* The culture of the human race, no matter how tall the tree, or magnificent its flowering, has its root in the soil; and flowers are within the appreciation which makes it up. The gladiolas, dahlias and peonies cut from plaintiffs' nine acres and the more aristocratic roses, carnations and, perhaps, orchids taken from the quarter-acre enclosed in glass, must, we think by common acceptation, stand on the same footing as other farm products, just as the tulips grown on more extended farms in our County of Beaufort unquestionably do.

The contention is that the sales of the plaintiffs are taken out of the exception by reason of the fact that the flowers were sold by them not as farmers or producers but as tradesmen under the name of "Henderson Flower Shop" and in their ordinary business as florists. It is to be noted that we have no occupational tax on florists and must, therefore, resort to the popular conception of that term. Webster's dictionary defines it as "a cultivator of, or dealer in, ornamental flowers or plants." We assume that the defendant must be referring to the fact that the plaintiffs "major" in this activity rather than as farmers or producers; and the appellee points out, and cites persuasive authority to the effect, that where the product is produced incidentally as a supply to the main business the right to the exemption is lost. See *infra.*

It is an open question as to the exact meaning to be given "in its original state." A pig prepared for market is certainly not in its original state when dismembered and sacked; and the transition from pork to Smithfield ham is assisted by skill of as fine a quality as that employed in many manufactures; and the weaving of flowers into a wreath or design is not the real test of the tax imposition. How far the duality of occupation may be relied upon to justify the tax upon a sale through a shop devoted solely to trade carried on by the producer does not seem to have been passed on by our own Court and it leads us to the question whether the distinction is intended by the statute, well founded and reasonable.

It must be conceded, we think, that the weight of authority sustains the position taken by the defendant; and if there is any lack of propriety in the imposition of the tax it must be the subject of legislative rather than judicial action.

We have collateral authorities cited on both sides of the question but some have a more direct bearing. In *Curry v. Reeves,* 240 Ala., 14, 195 So., 428, we have the following:

> "Subdivision 'f' exempts 'the gross proceeds of sales of poultry and other products of the farm when in the original state of production, or condition of preparation for sale, when such sale or sales are made by the producer or members of his immediate family or for him by those employed by him to assist in the production thereof.' . . . The case of *State v. Kennerly and Patterson,* 98 N. C., 657, 4 S. E., 47, 48, contains some discussion of the meaning of the words 'products of the farm,' but we think the case of *Trustees of Rochester v. Pettinger,* 17 Wend., 265, from the New York Court bears a closer analogy to the instant case and is helpful in determining the question here presented. There a farmer was exempt from the law as to sale of his meats or other products of the farm. Though the defendant in that case owned and operated a farm, yet he also owned

and operated as a regular business a butcher shop, and the holding was that the meat sold in the butcher shop was not within the exempt class though it came from the butcher's own farm. The court observed that his regular business was that of a butcher and the farm an adjunct and largely a convenience to that business and of consequence the defendant did not occupy the farm as a farmer within the meaning of the exemption provision, but as a butcher, saying: 'He would occupy it, not as a farmer, but as a butcher, with a view the better to promote his business in that line.' "

The Pettinger opinion goes on to say that the exemptions were for the benefit of the farmer as such and for none other, and not for the regular business carried on by the dealer.

In the case at bar we must keep in mind that the tax is imposed with respect to sales made by a retail merchant and must be looked at from that angle; and this should properly be the beginning of our reasoning, rather than with the exception. The sale was a transaction carried on by the plaintiffs as retail merchants through a regular place of business devoted to that purpose. And in considering the taxability of the sale the distinction made by the defendant, to wit, that the business which brought about the sale was that of a retail merchant and not that of a farmer and cultivator of the soil in producing the product, does not seem to be an arbitrary or capricious distinction; and in view of the burden which rests upon the plaintiffs to bring themselves within the exception, we must regard it as a reasonable differentiation and justification for the tax.

The judgment against the plaintiffs of non-recovery or dismissal must be

Affirmed.

JOHN HORTON v. THOMAS W. PERRY, JR., JOHN W. WOOD, JR., AND JOHN W. WOOD, SR.

(Filed 13 October, 1948.)

1. Pleadings § 2: Trial § 11—

The consolidation of actions for convenience of trial is a matter resting in the sound discretion of the trial court, and the rules governing the exercise of the discretionary power of consolidation are inapplicable to the joinder of actions, which, while under the supervision of the court, is done on the initiative of the parties and is subject to the restrictions provided by G. S., 1-123.

2. Pleadings §§ 2, 10—

Defendants filing a cross-action are bound by the statutory restrictions relating to joinder of causes.

3. Same—

Plaintiff, riding in a wagon drawn by mules, was injured when a car traveling at a high speed struck the car immediately following the wagon, causing it to collide with the wagon. Plaintiff instituted suit against the drivers and owners of both cars. The owner of the car which was immediately following the wagon filed a cross-action for damages to his car against the owner and driver of the other car, who demurred to the cross-action. *Held:* The demurrer to the cross-action should have been sustained.

4. Trial § 11—

Plaintiff, riding in a wagon drawn by mules, was injured when a car traveling at a high speed struck the car immediately following the wagon, causing it to collide with the wagon. Plaintiff instituted suit against the drivers and owners of both cars. *Held:* A cross-action by the owner of the car immediately following the wagon to recover damages to the car against the owner who was driving the other car could not be properly consolidated with the plaintiff's action, since such cross-action constitutes an independent action between defendants unconnected with plaintiff's cause of action.

DEFENDANT Perry's appeal from *Williams, J.*, Regular August Term, 1948, CHATHAM Superior Court.

The plaintiff complains of injury to person and property through the alleged joint negligence of the defendants, in a three-way collision, or collisions between three vehicles at approximately the same time.

The plaintiff alleges, substantially, that he was driving along the highway near Pittsboro, in his own wagon, drawn by two mules, and was followed closely,—within four or five feet—by a car owned by the defendant John Wood, Sr., and driven by John Wood, Jr., the car having been furnished him by the defendant John Wood, Sr., and being driven by his consent. It further alleged that the Wood automobile was followed by the defendant Perry, driving his own car at a high and unlawful rate of speed, who drove violently into the Wood car, and the impetus of the collision caused the Wood car to crash into the plaintiff's wagon, causing much injury to the same and to the draught mules, and serious injury to the plaintiff. Appropriate specifications of negligence were made respecting the conduct of each defendant operating the automobiles and Wood, Sr., was joined on the principle *respondeat superior*.

The defendants answered, each denying his own negligence and liability; and the defendants Wood, Sr., and Wood, Jr., interposed as a "second further answer and defense" a cross-action against the defendant Perry, in which they allege that Perry's negligence alone caused the collision, set the damage to the Wood car at $300.00, for which Wood, Sr., as the owner thereof, demands judgment against Perry.

Perry filed a motion to strike out the cross-action as irrelevant, prejudicial, and improper.

The motion was overruled, and Perry appealed.

Wade Barber and Billy C. Smith for defendant, appellant.
Broughton & Teague for defendants, appellees.

SEAWELL, J. The motion of the appealing defendant to strike out the cross-action against him is based on the rule frequently invoked that only those matters germane to the cause of action asserted in the complaint, and in which all the parties have a community of interest, may be litigated in the same action. *Brown v. Coble,* 76 N. C., 391; *Logan v. Wallis,* 76 N. C., 416; *Street v. Tuck,* 84 N. C., 605; *Burns v. Williams,* 88 N. C., 159; *Mitchell v. Mitchell,* 96 N. C., 14, 17, 1 S. E., 648; *Montgomery v. Blades,* 217 N. C., 654, 9 S. E. (2d), 397; *Wingler v. Miller,* 221 N. C., 137, 19 S. E. (2d), 247; *Beam v. Wright,* 222 N. C., 174, 22 S. E. (2d), 270.

Against this position the appellees argue that the rule permitting consolidation of cases for the purpose of trial is applicable and should prevail.

There is, of course, a substantial difference between the consolidation of cases for the convenience of trial and the joinder of causes of action for judicial determination in their combined aspect. The former is in the exercise of the inherent power of the court and, in applicable cases, in its discretion; but this may be exercised only for the purpose of trial as will be found by repeated statements of the Court where the right has been exercised, and in that declared purpose will be found its limitations;—it cannot annul or suspend the statute relating to joinder. In none of the cited cases, as far as we can discover, has there been any attempt to supersede statutory authority.

Referring to consolidation in the latter sense—for convenience of trial,—Professor McIntosh, in his work on North Carolina Practice and Procedure, pp. 536, 539, says:

> "The Court has arranged the cases in which a consolidation may be made into three classes: '(1) where the plaintiff could have united all his causes of action in one suit, and has brought several, and these causes of action must be in one and the same right, and a common defense is set up to all; (2) where separate suits are instituted by different creditors to subject the same debtor's estate; (3) where the same plaintiff sues different defendants, each of whom defends on the same grounds, and the same question is involved in each.' These may not embrace all the cases, but they serve to illustrate the rule by which the court is governed in ordering such union. The last class might also include actions by different plaintiffs

against the same defendant, where the facts are substantially the same."

Cited in *Abbitt v. Gregory,* 201 N. C., 577, 594, 160 S. E., 896, and in *Peeples v. R. R., Edwards v. R. R., Kearney v. R. R.,* 228 N. C., 590, 46 S. E. (2d), 649. On page 594 will be found an extensive collection of authorities on the subject of consolidation, of which *Fleming v. Holleman,* 190 N. C., 449, 130 S. E., 171, *Hewitt v. Ulrich,* 210 N. C., 835, 187 S. E., 759, and *Robinson v. Transportation Co.,* 214 N. C., 489, 199 S. E., 725, are typical. But as a rule of court procedure, as we have said, it will not operate to annul or suspend the statute to let in litigation against the defendants on cross demands not related to the subject of the action while the plaintiff stands by merely to witness the fight.

The integration of causes of action, which we technically know as joinder, is not primarily instigated by the court, but is done on the initiative of the parties seeking to assert and enforce their rights by final judgment of the court; and while under the supervision of the court it is not a matter of discretion but is subject to the restrictions provided in the statute, G. S., 1-123; and defendants assuming the role of "actors" are similarly bound.

An examination of the cited authorities, many of which are collected in *Peeples-Edwards-Kearney v. R. R., supra,* makes this distinction clear; and none of the cases cited attempt to evade or depart from the pertinent Civil Procedure statutes. It is notable that the cases consolidated for the purpose of hearing preserve their distinctiveness throughout the proceedings upon appeal and are never amalgamated in the sense contended for by the appellees, and thus brought into repugnance with the statute.

The case at bar affords no exception to the practice. Study of the present case will show that it does not fulfill any of the conditions above cited upon which even a consolidation for trial should be allowed, if that were of importance. An outstanding defect in factual and legal pattern is that the cross-action of the defendant Wood against Perry is not a defense against the plaintiff or necessary to a determination of the controversy the plaintiff submitted to the jurisdiction of the court.

We have been led to a discussion of these distinctions because of the insistence of the appellees that the principle of consolidation is controlling in this case, either directly or by analogy. The authorities are uniformly against this position. *Bowman v. Greensboro,* 190 N. C., 611, 130 S. E., 502; *Rose v. Warehouse Co.,* 182 N. C., 107, 108 S. E., 389; *Coulter v. Wilson,* 171 N. C., 537, 88 S. E., 857; *Bobbitt v. Stanton,* 120 N. C., 253, 26 S. E., 817; *Baugert v. Blades,* 117 N. C., 221, 23 S. E., 179; *Gibson v. Barbour,* 100 N. C., 192, 6 S. E., 766; *Hulbert v. Douglas,* 94 N.C. 128; *Montgomery v. Blades, supra;* McIntosh, Practice and Procedure, *supra;* G. S., 1-222.

In *Montgomery v. Blades, supra,* it is said:

> "A defendant may file a cross action against a codefendant only if such cross action is founded upon or is necessarily connected with the subject matter and purpose of plaintiff's action, and while this section permits the determination of questions of primary and secondary liability and the right to contribution as between joint tortfeasors, it does not permit cross actions between defendants which are independent of the cause alleged by plaintiff."

To the same effect is *Hulbert v. Douglas, supra.*

Upon a similar statement of facts the same result is reached in *Liebhauser v. Milwaukee Electric Railway & Light Co.,* 180 Wis., 468, 43 A. L. R., 870. The plaintiff in that case sued both the railway company and the driver of an automobile which were in collision. The driver of the automobile filed a cross-complaint against his codefendant, alleging damage to his automobile due to its negligence. Demurrer to the cross-complaint was sustained. The court observed: "The mere fact that the two occurrences were nearly contemporaneous in time in no manner affects the question."

Grant v. McGraw, 228 N. C., 745, 46 S. E. (2d), 849, cited by defendant, is distinguishable from the instant case because of the difference of factors entering into the decision.

The judgment overruling the demurrer must be reversed, and the case remanded for trial. It is so ordered.

Reversed.

YOUNG A. MEDLIN v. L. R. POWELL, JR., AND HENRY W. ANDERSON, AS RECEIVERS OF SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 13 October, 1948.)

1. Master and Servant § 27—

The doctrine of assumption of risk, which constituted a defense under the Federal Employers' Liability Act except in cases where the negligence of the carrier consisted in the violation of some statute enacted for the safety of employees, 45 U. S. C. A. 54, was entirely abrogated by the amendment of 1939, 53 Stat., 1404, and since the amendment, assumption of risk in any guise or form is not available to the carrier as a defense.

2. Same—

Since the amendment of 1939, the doctrine of assumption of risk is entirely immaterial in an action under the Federal Employers' Liability Act, and therefore the carrier's plea of assumption of risk as a plea in bar is properly stricken from the answer upon motion of plaintiff employee.

MEDLIN *v.* POWELL.

APPEAL by defendants from *Williams, J.*, at June Term, 1948, of VANCE.

This is an action to recover for personal injuries under the provisions of the Federal Employers' Liability Act.

The plaintiff alleges in his complaint, that on the 9th day of January, 1946, he was in the employ of the defendants as a flagman and brakeman on one of the defendants' trains, which was being operated in interstate commerce; that he was injured by the negligence of the defendants' engineer, who was in charge of the train.

The defendants filed an answer denying plaintiff's allegations of negligence and pleaded the assumption of risk as a plea in bar of his right to recover.

The plaintiff moved the court to strike the plea in bar from the defendants' answer, on the ground that it is not a legal defense under the Federal Employers' Liability Act, and evidence in support of such plea would not be admissible in the trial of the action.

The motion was allowed, and defendants appeal and assign error.

Thos. J. Lewis, of Atlanta, Ga.; J. M. Peace, and A. A. Bunn for plaintiff.

Pittman, Bridgers & Hicks and Murray Allen for defendants.

DENNY, J. Since the adoption of the amendment to the Federal Employers' Liability Act, on 11 August, 1939, 53 Stat., 1404, 45 U. S. C. A. 54, the doctrine of assumption of risk is no longer a defense in actions arising under the Act, if the employee's injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of the defendant carrier. *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S., 54, 87 L. Ed., 610, 143 A. L. R., 967. Prior to the adoption of the above amendment, the assumption of risk as a defense had been abolished only where the negligence of the carrier had been in violation of some statute enacted for the safety of employees. *Jacobs v. Southern R. Co.*, 241 U. S., 229, 60 L. Ed., 970.

We think the ruling of the court below is sustained by the overwhelming weight of authority.

It is said in *Tiller v. Atlantic Coast Line R. Co., supra:* "We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment, and that Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to 'non-negligence.'" And after discussing at some length the difficulties courts have encountered in actions brought under the provisions of the Federal Employers' Liability Act, with particular reference to the difficulty of

distinguishing between contributory negligence and assumption of risk, the Court said: "It was this maze of law which Congress swept into discard with the adoption of the 1939 amendment to the Employers' Liability Act, releasing the employee from the burden of assumption of risk by whatever name it was called. The result is an Act which requires cases tried under the Federal Act to be handled as though no doctrine of assumption of risk had ever existed."

It seems clear to us that if the doctrine of assumption of risk had never been recognized as a defense, it would certainly be improper to permit it to be so pleaded. Moreover, the identical question presented on this appeal, was decided in the case of *Gray v. Pennsylvania R. Co.* (District Court S. D., N. Y.), 71 F. Supp., 683, in which the Court said: "In order to recover, plaintiff must prove that his injuries resulted, at least in part, from the negligence of one or more of defendant's employees. If he makes such proof, the Act provides that assumption of risk is no defense. If he fails to make such proof, he will be nonsuited and whether or not he assumed the risk of his employment is immaterial. Therefore, this defense is insufficient in law and must be stricken." Likewise, in *Eckenrode v. Pennsylvania R. Co.* (District Court E. D. Penn.), 71 F. Supp., 764, the Court held: "The *Tiller case* made it plain that under the Statute every phase of the doctrine of assumption of risk is completely eliminated, and it must not enter into the Court's consideration either as a defense or, upon the issue of negligence, as an element in determining the measure of the employer's duty of care to the injured employee. The practical effect of the Tiller decision upon the present case is that, for the purpose of determining what duty of care Sunderlin (the acting engineer) owed to Eckenrode, the latter must be treated as though he were a non-employee in a position in which he had a right to be. However, while the fact that he was an employee in no way reduced the duty of care which the defendant owed him, neither did it increase it."

In the case of *Pratt v. Louisiana & A. Ry. Co.*, 135 Fed. (2d), 692, the Circuit Court of Appeals, Fifth Circuit, held in an action similar to the one before us, "The defense of assumption of risk is not good; the only question is whether the carrier was negligent and, if so, whether that negligence was the proximate cause of Pratt's injury."

Also, the Supreme Court of Minn. said in the case of *Jacobson v. Chicago & N. W. Ry. Co.*, 221 Minn., 454, 22 N. W. (2d), 455: "In determining whether plaintiff was guilty of contributory negligence and whether, as defendant claims, his contributory negligence was the sole proximate cause of the accident, it is our plain duty to lay out of mind any question of whether he was guilty of assumption of risk, because that defense was entirely obliterated by the 1939 amendment of the act.

Crawford v. D. M. & I. R. Ry. Co., 220 Minn., 225, 19 N. W. (2d), 384. The defense of assumption of risk is not to be let in under the label of contributory negligence. *Tiller v. Atlantic Coast Line R. Co.,* 318 U. S., 54, 63 S. Ct., 444, 88 L. Ed., 610, 143 A. L. R., 967."

In *Perrett v. Southern Pac. Co.,* 73 Cal. App. (2d), 30, 165 Pac. (2d), 751, the Court said: "There can be no doubt but that under the majority opinion (in the *Tiller case*) it is error of a most serious nature to interject into a case, since 1939, the doctrine of assumption of risk, however disguised. There can be no doubt that since 1939, an employee cannot recover unless he pleads and proves negligence on the part of the employer. . . . When the jury is told that defendant can be held liable only upon proof of negligence, the defendant has received all of the protection to which it is entitled. To further tell the jury that the plaintiff assumes the risks of injury incident to his employment when the work is being done in the usual and ordinary way and without negligence on the part of defendant and that unless there was an unusual jerk out of the ordinary the jury must find for the defendant, is to assume that a 'normal' jerk cannot be the result of negligence. That is not the law since 1939." *Chicago Great Western Ry. Co. v. Peeler,* 140 Fed. (2d), 865.

The authorities support the view that in actions brought under the provisions of the Federal Employers' Liability Act, where it is alleged the employee's injury or death resulted in whole or in part from the negligence of any of the officers, agents or employees of the defendant carrier, recovery depends solely on whether or not the defendant carrier was negligent and if so did such negligence contribute to the injury of the employee. In such cases assumption of risk as a defense, has been abrogated. *Roberts v. United Fisheries Vessels Co.,* 141 F. (2d), 288; *Stewart v. Baltimore & O. R. Co.,* 137 F. (2d), 527; *McGivern v. Northern Pac. Ry. Co.,* 132 F. (2d), 213; *Patznsky v. Lowden,* 317 Ill. App., 613, 47 N. E. (2d), 338; *Henry v. Norton,* 66 N. Y. S. (2d), 317; *Pauly v. McCarthy,* 109 Utah, 398, 166 Pac. (2d), 501; *Tankersley v. Sou. Ry. Co.,* 73 Ga. App., 88, 35 S. E. (2d), 522; *Beamer v. Virginian Ry. Co.,* 181 Va., 650, 26 S. E. (2d), 43; *Francis v. Terminal R. Assn. of St. Louis,* 354 Mo., 1232, 193 S. W. (2d), 909; *Kansas City Sou. Ry. Co. v. Hopson,* 208 Ark., 548, 186 S. W. (2d), 946; *Kansas City Sou. Ry. Co. v. Chandler* (Texas), 192 S. W. (2d), 304.

The judgment of the court below is

Affirmed.

E. W. WHITAKER v. MARVIN WADE, JR.

(Filed 13 October, 1948.)

1. Attachment § 3—

The ancillary writ of attachment may be issued only on one or more of the grounds specified by statute, G. S., 1-440.3, and the grounds upon which it is issued must be made to appear by affidavit. G. S., 1-440.11.

2. Attachment § 18—

A defendant may attack the grounds of an attachment prior to the trial of the main issue, G. S., 1-440.36, or by allegations in his answer for determination upon the trial. G. S., 1-440.41.

3. Same—

Where defendant, in his answer, alleges the falsity of the averment in plaintiff's affidavit upon which attachment was issued, the issue thereon is properly submitted at the trial and, when answered in favor of defendant, the court properly dissolves the attachment and discharges defendant's surety from liability.

4. Attachment § 23—

Damages for wrongful attachment may not be assessed in the trial of the main action regardless of whether defendant's cause be considered an action on plaintiff's bond or a cross-action for the wrongful issuance of the writ, since in neither case can the cause arise until wrongfulness in the issuance of the writ has been adjudicated. G. S., 1-440.45.

5. Same—

Where it is determined upon the trial of the main issue that plaintiff's averment upon which attachment was issued was false, defendant may have damages assessed for the wrongful attachment either upon motion in the cause after judgment or by subsequent independent action.

APPEAL by plaintiff from *Edmundson, Special Judge,* May Term, 1948. Modified and affirmed.

Civil action to recover on open account for merchandise sold and delivered in which an ancillary warrant of attachment was issued.

Plaintiff instituted this action to recover $1,856.25, with interest, alleged to be due on open account. At the same time he sued out a warrant of attachment. The affidavit upon which the warrant was issued avers that defendant, a resident of this State, "is about to remove his property from the State with intent to defraud his creditors . . ." He filed attachment bond in the sum of $500.00. The sheriff levied upon one Fruehauf trailer and one 1945 Autocar tractor. Thereupon defendant filed his bond in the sum of $2,000, conditioned as required by statute, and the property seized was returned to him.

The defendant in his answer denies that he was about to remove his property from the State with intent to defraud his creditors and alleges

that plaintiff's affidavit was false and fraudulent and made for the purpose of injuring defendant and his good name; that the warrant of attachment was wrongfully issued; and that the seizure of his property was wrongful and unlawful. He prays judgment in the sum of $2,000.

When the cause came on for trial in the court below, issues were submitted to and answered by the jury as follows:

"1. In what amount, if anything, is the defendant indebted to the plaintiff?

"Answer: $1,425.00 with interest from the 25th day of January, 1947.

"2. At the time the warrant of attachment was issued was the defendant about to remove his property from the State with intent to defraud his creditors?

"Answer: No.

"3. In what amount, if anything, has the defendant been damaged by the attachment?

"Answer: $ .25."

The plaintiff excepted to the submission of the second and third issues and, upon the coming in of the verdict, moved to set aside the verdict on these issues. The motion was denied and plaintiff excepted. The court signed judgment for plaintiff on the first issue and for defendant on the third issue. The judgment likewise vacated the attachment and discharged the surety on defendant's replevin bond. Plaintiff excepted and appealed.

J. T. Flythe and J. Faison Thomson for plaintiff appellant.

No counsel contra.

BARNHILL, J. The ancillary writ of attachment may be issued only on one or more of the grounds specified by statute, G. S. 1-440.3, and the grounds upon which it is issued must be made to appear by affidavit. G. S. 1-440.11.

When the defendant contests the grounds on which the writ issued, the statute provides a ready means of attack upon the writ without awaiting the trial of the main issue. G. S. 1-440.36. But this remedy is not exclusive. G. S. 1-440.41. He may make the necessary allegations in his answer by way of defense and await the trail. *Bizzell v. Mitchell,* 195 N. C., 484. This latter course was pursued by the defendant. The falsity of the averment in plaintiff's affidavit is sufficiently alleged. Hence the submission of the second issue must be sustained. See G. S. 1-440.36 (c).

The jury having found by their answer to the second issue that the attachment was wrongfully issued, it was proper for the court to dissolve

the attachment and discharge the defendant's surety from liability. *Bizzell v. Mitchell, supra.*

Prior to 1947, there was no provision in the statute G. S. Chap. 1, Art. 35, for the assessment of damages in the original action against the plaintiff and his surety for the wrongful issuance of a warrant of attachment. The defendant was compelled to pursue his remedy by independent action after the groundlessness of the action or the ancillary writ was judicially determined. *Kramer v. Electric Light Co.,* 95 N. C., 277; *Mahoney v. Tyler,* 136 N. C., 40; *Hoft v. Lighterage Co.,* 215 N. C., 690, 3 S. E. (2d), 20; Anno., 85 A. L. R., 648.

But the Legislature in 1947, by Chap. 693, Session Laws of 1947, revised and re-enacted G. S. Chap. 1, Art. 35, making certain material changes therein. See G. S. 1-440.1 *et seq.* Part 6 of Chap. 693, Session Laws of 1947, is entitled "Procedure after Judgment" and the first section thereof is as follows:

"Sec. 1-440.45. When defendant prevails in the principal action.—

"(a) If the defendant prevails in the principal action, or if the order of attachment is for any reason dissolved, dismissed or set aside, or if service is not had on the defendant as provided by Sec. 1-440.7 . . .

"(b) . . .

"(c) The defendant may recover in the original action on any bond taken for his benefit therein, or he may maintain an independent action thereon."

This does not mean that defendant's claim against plaintiff's bond may be heard and damages assessed at the original hearing. It provides instead that such damages are to be assessed in the same action, at the election of the defendant, after judgment on the main issue.

Defendant's cause of action on the bond is bottomed on the wrongful issuance of the writ. The groundlessness of the writ is an essential element of his right to damages and this cannot completely exist or appear until that fact is judicially determined either by judgment vacating the writ or judgment against the plaintiff in the main action. Then only does defendant's cause of action on the bond arise and become complete. His proper remedy is by motion in the cause after judgment.

If defendant's cross action as alleged in his answer be treated as an action against plaintiff for the wrongful issuance of the writ and not as an action on the bond, the result is the same. His cause of action does not arise until the wrongfulness of the writ is adjudicated. Hence, "It would be anomalous and absurd to sue upon a cause of action before it had arisen. And quite as absurd to sue upon a constituent part of a cause of action that may never arise! There was therefore no *counterclaim* alleged." *Kramer v. Electric Light Co., supra.*

The submission of the third issue and the judgment thereon must be held for error. The cause must be retained on the docket for the assessment of the damages sustained by defendant by reason of the wrongful issuance of the warrant of attachment herein, provided defendant so elects. He may, however, if he so desires, pursue his cause by independent action.

The cause is remanded to the end that judgment may be entered accordant with this opinion.

Modified and affirmed.

EFFIE LEE, PEARL HOLTZCLAW, FLORA HOLLIDAY AND ZORA ALLISON, v. WALTER W. LEDBETTER AND WIFE, MARIE L. LEDBETTER.

(Filed 13 October, 1948.)

1. Deeds § 2a (3)—

Undue influence is the exercise of an improper influence over the mind and will of another to such an extent that his professed action is not that of a free agent, but in reality is the act of the person who procures the result.

2. Same—Evidence of undue influence held insufficient to be submitted to jury.

The record disclosed that defendants, a nephew and his wife, visited his aged uncle weekly for a long period of time before his death and that at the time of the execution of the deed to defendants, in which he reserved a life estate, and for which the nephew paid $75.00 upon advice that consideration was necessary to make the deed valid, it was understood by the uncle and defendants that they would build a small house near the one then occupied by the uncle and that defendants would move in the main house and look after the uncle who would live in the small house. Defendants deeded a part of the land to a neighbor in compliance with the uncle's request, and at the time of the uncle's death building materials had been placed on the premises preparatory to the erection of the contemplated home for the uncle. The only evidence of undue influence introduced by plaintiffs, nieces of the grantor, was to the effect that on the last of their infrequent visits to their uncle he was cool toward them, and that subsequent to the uncle's funeral the nephew stated to one of them that he had been trying to get the land for a year and had bought the place for $75.00, and that he suggested that plaintiffs take the personalty and he would take the land. *Held:* The evidence was insufficient to justify the submission of an issue of undue influence.

3. Deeds §§ 4, 16—

A deed based upon agreement of the grantees to maintain and care for grantor in his declining years is based upon sufficient consideration and is not voluntary.

LEE *v.* LEDBETTER.

APPEAL by defendants from *Clements, J.,* at April Term, 1948, of HENDERSON.

Action to set aside a deed executed on 9 February, 1946, by Robert Ledbetter to the defendants, in which instrument the grantor reserved a life estate.

Robert Ledbetter died on 18 March, 1946, at the age of 83, leaving as his nearest of kin the plaintiffs who were his nieces, the children of a deceased sister, and the defendant Walter W. Ledbetter and his sister, Mrs. B. Cogdill, the children of a deceased brother.

The deed was attacked on the ground that the grantor did not have the mental capacity to execute it and that it was procured by undue influence.

Issues were submitted to the jury and answered as follows:

"1. Was Robert Ledbetter mentally incompetent on 11 February, 1946, to execute the paper writing purporting to be a deed from him to the defendants Walter Ledbetter and his wife Marie L. Ledbetter, as alleged in the complaint? Answer: No.

"2. Was the execution of said paper writing procured by undue influence? Answer: Yes."

The second issue was submitted over the objection of the defendants.

From the judgment entered on the verdict, the defendants appeal and assign error.

Paul K. Barnwell and J. E. Shipman for plaintiffs.

R. L. Whitmire and Lewis P. Hamlin for defendants.

DENNY, J. The sole question presented for our consideration is whether or not there was sufficient evidence of undue influence offered in the trial below, to sustain the verdict on the second issue.

The record is replete with evidence to the effect that Robert Ledbetter stated from time to time to his neighbors and close friends, over a period of years, that he wanted his nephew, Walter W. Ledbetter, to have his land. He gave as his reason for wanting him to have the property, he had been good to him. It further appears the defendants visited him on an average of once a week for a long time before his death and did many things for him. The nieces visited him only two or three times a year, some of them not that often.

In addition to the evidence of old age, the mental and physical weakness of the grantor, the only evidence offered by the plaintiffs in support of their allegations of undue influence, was the testimony of some of the plaintiffs to the effect that when they went to his home in September, 1945, for the purpose of cleaning his house, he manifested a coolness toward them which he had not shown when they had gone there on a similar mission two years before; and that on Sunday following the

funeral of Robert Ledbetter, one of the plaintiffs asked Walter W. Ledbetter, "What are we going to do with the land, divide it or sell it?" Walter Ledbetter said, "I have been trying to get the land for the last year . . . and then said he bought the place." When asked how much he paid for it, he said "Seventy-five Dollars." Some of the plaintiffs also testified that he later proposed to them that they take the personal property belonging to the estate, which consists of several thousand dollars in money and bonds, and he would take the land, and it would not be necessary to pay inheritance taxes. Ledbetter denied making any of the above statements, but gave as his reason for the payment of the $75.00 to Robert Ledbetter, he was advised by his employer that some consideration was necessary to make the deed valid.

It also appears from the evidence that at the time the deed was executed it was understood between the grantor and these defendants that the defendants would build him a small house near the one occupied by him, and when this house was completed, the defendants would move in the one he then occupied and would look after him. The defendants were requested by Robert Ledbetter to convey a small part of the lands conveyed to them to Jess Townsend, a neighbor who had been friendly and helpful to him. The deed from the defendants to Townsend was executed and delivered, and at the time of the death of Robert Ledbetter, certain materials had been placed on the premises by the defendants, preparatory to the erection of the contemplated home for Robert Ledbetter.

Undue influence is a fraudulent, overreaching or dominant influence over the mind of another which induces him to execute a deed or other instrument materially affecting his rights, which he would not have executed otherwise. Or, to put it another way, it means the exercise of an improper influence over the mind and will of another to such an extent that his professed act is not that of a free agent, but in reality is the act of the third person who procured the result. *Myatt v. Myatt,* 149 N. C., 137, 62 S. E., 887; *In re Will of Turnage,* 208 N. C., 130, 179 S. E., 332; *In re Will of Harris,* 218 N. C., 459, 11 S. E. (2d), 310.

A careful consideration of the evidence on this record, bearing on the question of undue influence, when considered in the light most favorable to the plaintiffs, leads us to the conclusion that it is insufficient to sustain the verdict on the second issue. *In re Will of Ball,* 225 N. C., 91, 33 S. E. (2d), 619; *Gerringer v. Gerringer,* 223 N. C., 818, 28 S. E. (2d), 501; *Owens v. Rothrock,* 198 N. C., 594, 152 S. E., 681; *Myatt v. Myatt, supra.*

There is ample evidence to sustain the view that the grantor executed the deed involved herein, for the purpose of securing to himself adequate care and maintenance in his declining years. A deed based upon such an

agreement is not voluntary and without consideration. *Ayers v. Banks,* 201 N. C., 811, 161 S. E., 550; *Higgins v. Higgins,* 223 N. C., 453, 27 S. E. (2d), 128; *Gerringer v. Gerringer, supra.*

The defendants' exception to the submission of the second issue to the jury is sustained, and the judgment of the court below is

Reversed.

L. B. CHERRY AND JOANNA RAYNOR v. J. E. ANDREWS AND MARY W. GODDARD.

(Filed 13 October, 1948.)

1. Boundaries § 3b—

Whether a call in a deed down a branch to a swamp, thence up said swamp to another corner, conveys the land to the edge of the swamp or extends to the run of the swamp, involves a matter of fact for the determination of the jury, and nonsuit by the court predicated upon its holding as a matter of law that the description embraced the land only to the edge of the swamp, is error.

2. Reference § 14a—

Excepting to the order of compulsory reference and excepting to findings of fact of the referee and the filing of exceptions to the report of the referee and tendering issues and demanding a jury trial "upon said issues raised by the exceptions" *is held* sufficient to preserve the right to trial by jury upon the issues tendered.

APPEAL by plaintiffs from *Grady, Emergency Judge,* at May Term, 1948, of BERTIE.

Civil action to recover land, and for damages on account of trespass thereon.

Plaintiffs allege in their complaint that they are the owners in fee simple of two certain tracts of land in Windsor Township, Bertie County, the second tract of which is described as follows: "Beginning at Benjamin Raynor's back gate (as of 1892) on the path leading to where Watson Tayloe lived and died, and running said path to the branch; thence down the branch to Cashie Swamp; thence up said swamp to the Benjamin Raynor line, thence with said line to the Beginning, containing 150 acres more or less, being a part of the Joanna S. Tayloe land"; and that defendants have wrongfully and unlawfully entered, and trespassed, upon the land, cutting valuable timber therefrom, etc.

Defendants, answering, aver, among other things, "That it is admitted the plaintiffs own title to the Benjamin Raynor lands, which are more particularly described in the Benjamin Raynor land division of record in Book 172 at page 126, *et seq.,* Bertie County Public Registry," and

they aver their contention as to the location of the line of the Benjamin Raynor land all as designated on a plot of said division, which line adjoins the Watson Tayloe heirs land, and that defendants are the owners, and were cutting the timber upon the Watson Tayloe land at the time of the institution of this action. But defendants deny any trespass on lands of plaintiffs.

At the August Term, 1946, the court, finding from the pleadings that a boundary dispute is involved in the action, and being of opinion that the matter should be referred to a referee, as provided by law, entered an order of compulsory reference,—naming John H. Hall, Esq., of Elizabeth City, North Carolina, as referee, to hear the evidence of both parties, find the facts from the evidence and report his conclusions of law thereon. To this order both plaintiffs and defendants excepted, and demanded a jury trial upon the issues arising in this action.

When the case came on for hearing before the referee plaintiffs formally admitted "that if, either as a matter of law or as a mixed question of law and fact, the calls in the deeds in their chain of title, do not carry to the run of Cashie Swamp and thence up said run, then they are not entitled to recover herein."

The referee, reporting to the court, states that upon the hearing this action resolved itself into one to determine the true dividing line between the lands of the plaintiffs, and those of Mrs. Gladys W. Tayloe, under whom defendants hold a timber deed, etc., finding as a fact, summarily stated, that the parties to this action claim from a common source of title, to wit: Watson Tayloe,—the plaintiff by inheritance and *mesne* conveyance from Benjamin Raynor, to whom in 1892 a deed was made pursuant to foreclosure of a mortgage dated 1890, from Watson Tayloe to William J. Myers, mortgagee; and Mrs. Gladys W. Tayloe, under the will of Watson Tayloe, probated in 1920.

Among other things the referee further found as facts: That the lands in controversy in this action are swamp lands; that there is a well defined line of demarcation between the highland and the swamp; that there is some appreciable evidence of a branch extending from said point A (in red), which point is in the run of a branch, to the run of Cashie Swamp; that the call in the aforesaid mortgage deed, "thence down the branch to Cashie Swamp" has as its northern terminus the run of Cashie Swamp; and the call or boundary in said mortgage deed, "thence up said swamp," etc., is the run of said Cashie Swamp; that the heirs of Benjamin Raynor, by the said land division, "did not have a division of all the lands of which the said Benjamin Raynor died seized and possessed by virtue of the aforesaid conveyance from Watson Tayloe" and that defendants have cut timber from the lands in controversy to the damage of plaintiffs, etc.

Defendants, again excepting to the order of reference, filed numerous exceptions to the report of the referee, and tendered issues and demanded a jury trial "upon said issues raised by the exceptions." Plaintiffs thereafter moved the Superior Court (1) to overrule the exceptions of defendants, and (2) for judgment confirming the report. At a subsequent term the court overruled plaintiffs' motions. Plaintiffs excepted.

And when the case came on for hearing at the May Term, 1948, a jury being impaneled and the record explained and debated, the trial court entered judgment of nonsuit, predicated upon the premises that "counsel for plaintiffs admitted in court that if the description in the deed from Myers, mortgagee, to Benjamin Raynor does not extend from red letter A on the map sent by the referee with the report, on to the run of Cashie Swamp, the plaintiffs could not recover . . . and it being admitted by parties plaintiffs and defendants that Cashie River is a non-navigable stream, and the court having considered the report, exceptions and the evidence bearing upon the sole question involved as to the proper location of plaintiffs' lines, and the court being of the opinion upon the record and admissions made in court that plaintiffs are not entitled to recover."

Plaintiffs appeal therefrom to Supreme Court and assign error.

H. S. Ward for plaintiffs, appellants.

J. A. Pritchett and F. T. Dupree, Jr., for defendants, appellees.

WINBORNE, J. While there are two tracts of land described in plaintiffs' complaint as the subject of this action, the location of the lines of the second tract only are in dispute here. And the answer to this question is determinative of this appeal: Did the court err in holding as a matter of law that the description of this second tract of land in the deed under which plaintiffs claim terminates at the edge of Cashie Swamp? We hold that the ruling is erroneous.

In the light of applicable principles of law declared in the case of *Rowe v. Lumber Co.*, 133 N. C., 433, 45 S. E., 830, particularly in respect to the "Watkins 50-acre tract," and again in same case reported in 138 N. C., 465, 50 S. E., 848, in which *Brooks v. Britt*, 15 N. C., 481, is cited with approval, it would seem that whether the call "thence down the branch to Cashie Swamp" terminates at the edge of the swamp or extends on to the run of it, involves a matter of fact to be found by the jury upon the evidence offered.

However, testing the exceptions to the referee's report filed by defendants, and their tender of issues by rules of procedure for preserving right to jury trial in a compulsory reference case, as enunciated in decisions of this Court, it appears that they meet the requirement sufficiently to

withstand successful attack. See *Booker v. Highlands,* 198 N. C., 282, 151 S. E., 635; *Brown v. Clement Co.,* 217 N. C., 47, 6 S. E. (2d), 842.

For error pointed out, the judgment of nonsuit entered below is Reversed.

STATE v. CLARENCE FRANKLIN.

(Filed 13 October, 1948.)

1. Homicide § 27b—

A charge that where an intentional killing is admitted or established the law presumes that it was unlawful and that it was done with malice, will not be held for prejudicial error in failing to stipulate that the presumption arises only where the killing is of a human being with a deadly weapon, when all the evidence establishes that deceased was killed with a deadly weapon by defendant, and the only question arising on defendant's evidence is whether the gun was intentionally or accidentally fired.

2. Homicide § 27f—

The failure of the charge to include a threatened assault as well as an actual one as sufficient legal provocation to reduce murder in the second degree to manslaughter will not be held for prejudicial error when defendant's testimony is to the effect that an actual assault was being made upon him at the time, which the jury found was sufficient provocation to reduce the charge of murder in the second degree to manslaughter.

3. Same—

A charge that if the accused killed the deceased in the heat of passion caused by the assault and not from premeditation and deliberation, and not from malice, accused would not be guilty of more than manslaughter and would not be guilty of murder in the second degree, will not be held for prejudicial error as denying the defendant his right of self-defense when immediately following such charge the court gives proper and comprehensive instructions on defendant's plea of self-defense.

4. Criminal Law § 81c (2)—

The charge of the court will be considered contextually, and an exception to the charge will not be sustained when the charge, so construed, is in substantial compliance with law.

APPEAL by defendant from *Moore, J.,* at March-April Term, 1948, of MITCHELL.

Criminal action tried upon indictment charging the defendant with the felonious slaying of one Christine Franklin.

The State's evidence tends to show that on 14 June, 1947, the defendant, a first cousin of the deceased, got into a quarrel with some of the members of his uncle's family. The father of the deceased, Deck Franklin, and the father of the defendant are brothers and live about 100 yards

apart. Louis Franklin and the defendant had been to Grindstaff's store to get provisions on the day of the fatal shooting, and while on the trip each drank some beer. Thereafter the defendant tried to get Louis Franklin to go with him to get some more beer. Several members of Deck Franklin's family protested. Louis Franklin's sister, Cora, went to the home of defendant for the purpose of persuading him not to take her brother to get any more beer. When Cora Franklin got part of the way up the steps of defendant's home, the defendant struck her with a chair and knocked her down the steps. Deck Franklin and his family saw the defendant strike Cora and all of them went to the road. The defendant got his shotgun and a bag of shells, loaded the gun, rested the barrel on the bannister and fired, killing the deceased. He afterwards told the Sheriff of Mitchell County that he was shooting at Deck Franklin and not at Christine, who was only 13 years of age.

The defendant testified that before he got his gun, Deck Franklin, his wife, Sibyl, and two of his children, Eva and Louis, were approaching his home, "swearing they would kill him when they got there"; that when he got his gun and returned to the front porch Louis was coming up the steps and grabbed hold of the gun and Sibyl got hold of him before the gun fired; that he was not trying to shoot anybody. "Louis was trying to take the gun away from me. Sibyl was behind me. She jerked me backwards, and when she jerked me backwards and Louis grabbed the gun, we knocked it over some way and it fired. . . . At the time the gun fired I did not have it pointed at anybody and was not trying to shoot anybody. . . . Sibyl choked me. She dragged me back beside my bed. . . . Three persons had hold of me or the gun at the time it went off."

Verdict: Guilty of manslaughter. Judgment: Imprisonment in the State's Prison at hard labor for not less than seven nor more than ten years.

The defendant appeals, assigning error.

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

Proctor & Dameron, Charles Hutchins, and W. C. Berry for defendant.

DENNY, J. The defendant presents for review eight assignments of error based on exceptions to his Honor's charge. The first of these is directed to the following: "As I have charged you heretofore, where an intentional killing is admitted by the defendant or is established by the State beyond a reasonable doubt, the law presumes that it was unlawful and that it was done with malice, and nothing else appearing, the defend-

ant would be guilty of murder in the second degree, or manslaughter, as the jury may find the facts to be."

The defendant insists that the presumption of malice does not arise from an intentional killing, but only from the intentional killing of a human being with a deadly weapon, citing *S. v. Clark,* 225 N. C., 52, 33 S. E. (2d), 245; *S. v. Bright,* 215 N. C., 537, 2 S. E. (2d), 541; *S. v. Hawkins,* 214 N. C., 326, 199 S. E., 284, and he further contends this instruction is erroneous because it is tantamount to saying "any intentional killing is unlawful." We concede that this instruction, if standing alone, would be objectionable. We think, however, the exception is untenable, because in his charge immediately preceding the portion excepted to, the trial judge said: "Where it is admitted or established by the evidence beyond a reasonable doubt that the defendant intentionally killed the deceased with a deadly weapon, the law raises two presumptions against the defendant, first, that the killing was unlawful, and, second, that it was done with malice, and an unlawful killing with malice is murder in the second degree."

The evidence of the State and of the defendant clearly establishes the fact that the deceased was killed with a deadly weapon by the defendant, but he contends it was accidental, that he did not intend to shoot anyone. Therefore, the question for the jury to decide was whether the gun was intentionally or accidentally fired. We hold that on the facts disclosed on this record, the instruction was not prejudicial, when considered in connection with the preceding instruction.

In charging the jury on the sufficiency of legal provocation to reduce murder in the second degree to manslaughter, his Honor said: "The legal provocation that will reduce murder in the second degree to manslaughter must be more than mere words, as language, however abusive, neither excuses nor mitigates the killing, and the law does not recognize circumstances as legal provocation which in themselves do not amount to an assault. If, however, the deceased person assaulted the one accused, that is if he laid his hands on him or choked him, or shot at him without cause, and the accused killed the deceased in the heat of passion caused by the assault, and not from premeditation and deliberation, and not from malice, he would not be guilty of more than manslaughter, he would not be guilty of murder in the second degree."

The defendant insists the above instruction is erroneous in two respects. In the first place, the statement "the law does not recognize circumstances as legal provocation which in themselves do not amount to an assault" is incorrect; and in the second place, it states in effect that if the defendant was being assaulted or shot at, at the time the fatal shot was fired, he would be guilty of manslaughter, thereby denying to him the right of self-defense.

It is contended by the defendant that a threatened assault as well as an actual one will be sufficient legal provocation to reduce murder in the second degree to manslaughter. *S. v. Hightower,* 226 N. C., 62, 36 S. E. (2d), 649; *S. v. Mosley,* 213 N. C., 304, 195 S. E., 830; *S. v. Terrell,* 212 N. C., 145, 193 S. E., 161.

Conceding the contention of the defendant, we do not see how he was hurt by the instruction. In *S. v. Lee,* 193 N. C., 321, 136 S. E., 877, where a similar charge resulted in a new trial, there was no evidence of an actual assault and the jury returned a verdict of murder in the second degree. But here the defendant testified that at the time the fatal shot was fired he was actually being assaulted by three members of the family of Deck Franklin; that Mrs. Franklin was choking him and the others had hold of the gun, while other members of the family were coming upon him, swearing they would kill him. In view of this testimony and the further fact that the jury found there was sufficient legal provocation to reduce the charge of murder in the second degree to manslaughter, makes the exception without merit.

The further contention that the above charge denied the defendant his right of self-defense, cannot be sustained. For immediately following the above portion of the charge, the court gave a proper and comprehensive charge on the defendant's plea of self-defense. He was given every consideration in this respect, to which he was entitled under the law.

It must be conceded, however, that these portions of the charge, as well as some others, to which the defendant excepted and assigns as error, would be objectionable unless the charge is considered contextually. But when it is so considered, as it must be, it is in substantial compliance with the law. *S. v. Hough,* 227 N. C., 596, 42 S. E. (2d), 659; *S. v. Davis,* 225 N. C., 117, 33 S. E. (2d), 623; *S. v. Smith,* 221 N. C., 400, 20 S. E. (2d), 360.

We have carefully examined the remaining assignments of error presented for our consideration, and none of them show error of sufficient merit to warrant a new trial.

No error.

A. E. WYATT, ADMINISTRATOR OF THE ESTATE OF WILLIAM GILBERT WYATT, DECEASED, v. QUEEN CITY COACH COMPANY,

and

MAX WHITE, BY HIS NEXT FRIEND, L. L. WHITE, v. QUEEN CITY COACH COMPANY.

(Filed 13 October, 1948.)

1. Evidence § 7b—

In ordinary civil actions the burden of proof is by the preponderance of the evidence, which is simply evidence of greater weight than that offered in opposition to it.

2. Trial § 31d: Appeal and Error § 39h—

In this negligent injury action, the court, after several times correctly stating the burden of proof, charged that the jury should be satisfied "beyond a reasonable doubt" that defendant's negligence was the proximate cause of the injury in order to find the issue in the affirmative. After the jury had been out a short time, the court recalled it and explicitly withdrew and corrected the erroneous instruction. *Held:* The erroneous instruction was rendered harmless.

3. Appeal and Error § 39f—

The charge of the court will be construed contextually, and exceptions to excerpts therefrom will not be sustained when the charge, so construed, does not contain prejudicial error.

APPEALS by plaintiffs from *Clement, J.,* and a jury, at April Term, 1948, of RUTHERFORD.

Both of these actions arose out of a collision between a motorcycle and a motor bus, and were tried together by consent. The plaintiff, A. E. Wyatt, as administrator, sued the defendant, Queen City Coach Company, for damages for the wrongful death of his intestate, William Gilbert Wyatt, and the plaintiff, Max White, sued the defendant, Queen City Coach Company, for damages for personal injuries.

The accident occurred in a place other than a business or residential district on United States Highway No. 74 about six miles east of Asheville in Buncombe County between 8:30 and 9:00 a.m., on 31 August, 1947. The highway at this point was paved to a width of eighteen feet, and was marked by a center line put thereon by the State Highway and Public Works Commission.

When viewed most strongly in their favor, the evidence of the plaintiffs tended to establish the matters set out in this paragraph. William Gilbert Wyatt and Max White were traveling east upon a two-seated motorcycle at a speed not exceeding forty-five miles an hour. An eastbound motor bus of the Queen City Coach Company overtook the motorcycle at a speed of approximately seventy miles per hour, attempted to

pass the motorcycle without sounding its horn, and struck the motorcycle at least three feet to the right of the center line of the highway, killing Wyatt and injuring White.

The defendant introduced testimony, however, indicating that the tragedy occurred in the manner set out in this paragraph. When the bus overtook the motorcycle, its speed did not exceed fifty-five miles per hour. The driver of the bus gave the occupants of the motorcycle audible warning with his horn of his desire to pass, and accorded them a reasonable opportunity to heed such warning. They apparently heard the warning. The motorcycle gave way to the right, leaving the entire left side of the highway open for the free passage of the bus. The bus thereupon undertook to pass upon the left half of the highway. While the bus was passing, the motorcycle suddenly swerved to the left, crossed the center line of the highway, and struck the right side of the bus, causing the collision in controversy.

Issues were submitted to and answered by the jury in these words in the case in which A. E. Wyatt, administrator, was plaintiff:

1. Was the plaintiff's intestate, William Gilbert Wyatt, killed by the negligence of the defendant, as alleged in the complaint? Answer: No.

2. Did the plaintiff's intestate, by his own negligence, contribute to his death? Answer: . . .

3. What amount of damages, if any, is the plaintiff entitled to recover? Answer: . . .

Issues were submitted to and answered by the jury in these words in the case in which Max White was plaintiff:

1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: No.

2. Did the plaintiff, by his own negligence, contribute to his injury, as alleged in the answer? Answer: . . .

3. What amount of damages, if any, is the plaintiff entitled to recover? Answer: . . .

The court rendered judgments on these verdicts exonerating the defendants from liability to the plaintiffs, and the plaintiffs appealed, assigning nine excerpts from the charge as error.

C. O. Ridings, Charles C. Dalton, and J. Paul Head for plaintiffs, appellants.

Williams & Williams for defendant, appellee.

ERVIN, J. The plaintiffs assign as error the following from the charge: "Now, if you are satisfied by the greater weight of the evidence that the defendant was negligent in operating the bus it would be necessary for you to go further and be satisfied beyond a reasonable doubt

that the negligent conduct of the defendant was the proximate cause of the damage or injury."

In ordinary civil actions, the verdict should be based on the preponderance of the evidence. *Wilson v. Casualty Co.,* 210 N. C., 585, 188 S. E., 102; *Ellett v. Ellett,* 157 N. C., 161, 72 S. E., 861, 39 L. R. A. (N. S.), 1135, Ann. Cas. 1913 B, 1215. By a preponderance of the evidence is meant simply the evidence which is of greater weight than that offered in opposition to it. *Supply Co. v. Conoly,* 204 N. C., 677, 169 S. E., 415; 32 C. J. S., Evidence, section 1021. Hence, it appears that the instruction set out above was erroneous in that it imposed upon the plaintiffs on the issues relating to the actionable negligence of the defendant a greater degree of proof than that required by law. *Williams v. Building & Loan Association,* 207 N. C., 362, 177 S. E., 176; *S. v. Swink, ante,* 123, 47 S. E. (2d), 852.

Before giving this erroneous instruction, the court clearly charged the jury in several instances that the plaintiffs had the burden of establishing the actionable negligence of the defendant by the greater weight of the evidence. After the jury had been out a short time, the court recalled the jury and withdrew and corrected the erroneous instruction in these words: "In trying criminal cases, Gentlemen, the burden is on the State to satisfy the jury beyond a reasonable doubt before they convict the defendant. In this Court here cases of this kind where the burden is on the plaintiff or the defendant, it is upon him to satisfy you by the greater weight of the evidence. The burden is on the plaintiff to satisfy you by the greater weight of the evidence on the first and third issues in each case before you would answer in the plaintiffs' favor. The burden is on the defendant on the second issue in each case to satisfy you by the greater weight of the evidence before you would answer that issue in its favor. I inadvertently used the words 'beyond a reasonable doubt' when I meant to say 'by the greater weight of the evidence,' so if anywhere in my charge I said, 'beyond a reasonable doubt' it was an inadvertence, I meant to say 'by the greater weight of the evidence.'"

It is plain that this prompt and explicit withdrawal and correction of the erroneous instruction rendered its original giving harmless error. *Bailey v. Hayman,* 222 N. C., 58, 22 S. E. (2d), 6; *Jones v. R. R.,* 194 N. C., 227, 139 S. E., 242.

We have made a painstaking examination of all of the other assignments of error of the plaintiffs, and have reached the conclusion that none of them can be sustained. The court below delivered a comprehensive charge to the jury. It covers thirty-one pages of the record. When the extracts from the charge challenged by the plaintiffs are placed in their context and the instructions to the jury are read as a whole, it becomes manifest that the trial court performed its statutory duty to "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; *Lewis v. Watson, ante,* 20, 47 S. E. (2d), 484.

When all is said, the trial in the court below resolved itself into a legal battle over sharply contested issues of fact. The jury answered the issues relating to the actionable negligence of the defendant adverse to the plaintiffs under a charge free from prejudicial error. Hence, the trial of these actions must be upheld.

No error.

J. I. GARRIS v. DEWEY BYRD.

(Filed 13 October, 1948.)

1. Highways § 15—

Petitioner is entitled to the establishment of a cartway across the lands of another only if petitioner's land is not adjacent to a public road and has no adequate and proper means of ingress and egress to the highway, and he is not entitled to the relief if he has such means available to him at the time. G. S., 136-69.

2. Highways § 16—

The trial court found that petitioner had adequate ingress and egress to a public highway by permissive use of a private road across the lands of respondent, and then found that such permissive use was not sufficient and that petitioner is entitled to the establishment of a cartway over the lands of respondent. *Held:* The conflicting findings of the court make it advisable to vacate the judgment and remand the cause.

3. Same—

Upon judgment establishing petitioner's right to a cartway over private lands, the laying off of a cartway and the adjudication of damages are matters for the jury of view, subject to review by the court. G. S., 136-69.

APPEAL by defendant from *Moore, J.,* June Term, 1948, WILKES. Error.

Special proceeding under G. S. 136-68, 69, to establish a cartway or way of necessity from the lands of petitioner to a public highway.

Plaintiff owns a tract of land in Wilkes County. The land of defendant lies between his tract and the public road so that there is no public road leading to his property. He seeks the establishment of a cartway over and across the lands of defendant as provided by statute or, rather, the conversion of a permissive way into a cartway.

The defendant, answering, alleges that (1) plaintiff now has adequate means of ingress to and egress from his tract over and along a private road across defendant's land, which plaintiff has used and may continue

to use by plaintiff's permission, (2) plaintiff has adequate means of ingress and egress over and across the lands of another property owner, and (3) there are other adjoining landowners over whose property plaintiff may have a convenient cartway.

When the petition came on for hearing before the clerk he concluded that "it is necessary, reasonable and just that the petitioner have a cartway across the lands of the defendant" and appointed a jury of view to lay off said cartway and assess the damages. Defendant excepted and appealed.

When the appeal came on to be heard in the court below the parties waived trial by jury and agreed that the judge should find the facts and enter judgment thereon. Thereupon, after hearing the evidence and viewing the premises, the judge found certain facts and concluded that petitioner is entitled to a cartway across the land of defendant which cartway should follow the present roadway, widened to 14 feet, and that defendant is not entitled to any damages "by virtue of the establishment under this judgment of the cartway as hereinafter set out." Judgment was entered accordingly and defendant excepted and appealed.

Trivette, Holshouser & Mitchell for plaintiff appellee.

W. H. McElwee, John R. Jones, and Whicker & Whicker for defendant appellant.

BARNHILL, J. One of the primary questions the defendant seeks to present on this appeal is this: Is an adequate permissive way of ingress to and egress from property which is not served by a public road "other adequate means of transportation affording necessary and proper means of ingress thereto and egress therefrom" within the meaning of G. S. 136-69?

On this question the court found that petitioner now has "an adequate means of transportation or roadway as a proper means of ingress and egress . . . in all respects reasonable and adequate, and the petitioner has not been at any time cut off without an adequate means of egress and ingress to his property." It then concluded that the permissive use of a roadway is not sufficient and that petitioner is entitled to a cartway over and across the land of defendant. Thereupon, it entered its decree granting a cartway, specifying the course thereof, and denying defendant any damages for the land taken.

These findings and conclusions are so inconsistent and conflicting as to make it impossible for us to render any satisfactory decision of the question sought to be presented. The statute grants the right to a cartway only in the event the land of petitioner is not adjacent to a public road and has no "other adequate means of transportation affording neces-

sary and proper means of ingress thereto and egress therefrom." If he has such means available to him at the time, the petitioner is not entitled to the relief provided by G. S. 136-69.

If a permissive way is "in all respects reasonable and adequate" "as a proper means of ingress and egress," the petition should be denied. Conversely, if the permissive nature of the way renders it insufficient to meet the requirement of "other adequate means of transportation" within the meaning of the statute, the relief should be granted. On this record the court below found that the permissive way available to petitioner is "in all respects reasonable and adequate" and then concluded that it is not. In view of this condition of the record we deem it advisable to vacate the judgment entered and remand the cause for a rehearing.

It is not amiss to call attention to the fact that the court below undertook to "lay off" the cartway and to adjudicate the question of damages. These are matters for the jury of view. G. S. 136-69; *Triplett v. Lail,* 227 N. C., 274, 41 S. E. (2d), 755. Surely the imposition of an easement 14 feet wide and more than one-half mile long constitutes a "taking of property" and entitles the owner of the property so burdened to reasonable compensation. The amount to be awarded as compensation is for the jury of view to decide, subject to the right of the court to review their finding. G. S. 136-69.

The judgment entered is vacated and the cause is remanded for a rehearing *de novo.*

Error.

STATE v. BUD HICKS.

(Filed 13 October, 1948.)

1. Criminal Law § 53l—

The court is at liberty to disregard oral requests for instructions which do not relate to a substantial and essential feature of the case. G. S., 1-181.

2. Same: Criminal Law § 53d—

The State relied upon the testimony of several eyewitnesses, one of whom testified he saw defendant fire the fatal shot, and also introduced some circumstantial evidence of guilt. *Held:* The failure of the court to charge upon the law of circumstantial evidence in response to defendant's oral request cannot be held for error, since the court is not required to charge on circumstantial evidence when the State relies mainly upon direct evidence which is sufficient, if believed, to warrant conviction. G. S., 1-180.

APPEAL by defendant, Bud Hicks, from *Williams, J.,* and a jury, at the July Term, 1948, of LEE.

Bud Hicks was indicted for the murder of Thompson Hooker. As the State did not ask for a conviction of first degree murder, the court left it to the jury to determine from the evidence whether the accused was guilty of murder in the second degree, or manslaughter, or not guilty.

The State's evidence tended to show that Thompson Hooker was mortally wounded by a pistol bullet about 2:30 p.m. on June 6, 1948, while peacefully standing before the doorway of his home on Ramseur Street in Sanford. The State called to the stand six persons who claimed to have been eyewitnesses. These were Eliza Hooker, Hattie Watson, Wade Harrington, Joe Stone, Paul Hooker, and Will Hooker. All of them testified that at the instant of the shooting the defendant, Bud Hicks, and three companions were riding along Ramseur Street at a distance of some thirty feet from Thompson Hooker in a slowly moving automobile owned by the defendant, and that the fatal shot was fired from this vehicle. Eliza Hooker, Hattie Watson, Wade Harrington, and Joe Stone professed an inability to identify the shooter. But Will Hooker testified positively that he saw Bud Hicks push a pistol out of the rear window on the right side of the car and shoot Thompson Hooker. Paul Hooker deposed that he "heard a gun fire, and looked around, and saw Bud Hicks, and saw his hand being pulled back into the car, and there was a pistol in his hand." All of the State's witnesses agreed that immediately after the firing of the shot, the automobile speeded up and departed.

The defendant asserted that he and his companions left the neighborhood in which the deceased resided before the homicide, and were not connected with it in any way. Moreover, he offered testimony tending to show that Thompson Hooker was fatally wounded by the State's witness, Paul Hooker, while standing upon his porch and while arguing with Paul Hooker about some money.

The jury found the defendant guilty of murder in the second degree, and he appealed to this Court from the judgment entered on the verdict.

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

Neill McK. Salmon for the defendant, appellant.

ERVIN, J. Near the conclusion of the charge, counsel for defendant orally requested the court "to go into the law with respect to circumstantial evidence," and the court declined to do so because it understood that "the State relies upon direct evidence." The failure of the court to charge on the law concerning circumstantial testimony is assigned as error on the appeal.

Before the oral prayer was made, the court fully, clearly, and correctly charged the jury as to the presumption of innocence surrounding the accused, and as to the burden resting upon the State to establish his guilt beyond a reasonable doubt as a condition precedent to his conviction, and as to the rules of the law of homicide arising upon the evidence given in the case. Since the request of the defendant for the court to instruct the jury on the law relating to circumstantial evidence was not reduced to writing in conformity to G. S., 1-181, the court was at liberty to disregard it unless the instruction orally asked concerned a "substantial and essential feature of the case embraced within the issue and arising on the evidence." *S. v. Johnson,* 193 N. C., 701, 138 S. E., 19.

It is a well settled principle in this jurisdiction that the duty imposed upon the trial court by G. S., 1-180, to "declare and explain the law" arising in the case on trial does not require the court to instruct the jury upon the law of circumstantial evidence in a criminal action involving both direct and circumstantial testimony where the State relies principally upon the direct evidence and the direct evidence is sufficient, if believed, to warrant the conviction of the accused. *S. v. Warren,* 228 N. C., 22, 44 S. E. (2d), 207; *S. v. Sutton,* 225 N. C., 332, 34 S. E. (2d), 195; *S. v. Wall,* 218 N. C., 566, 11 S. E. (2d), 880; *S. v. Neville,* 157 N. C., 591, 72 S. E., 798; *S. v. West,* 152 N. C., 832, 68 S. E., 14.

This principle applies to the instant action. While some of the testimony was circumstantial in nature, the State relied in the main upon direct evidence to establish both the *corpus delicti* and the identity of the slayer. The identification of the accused as the killer of the deceased was made to depend primarily and principally on the credibility of the State's witness, Will Hooker, who testified with positiveness that he saw the defendant fire the death-dealing bullet. Hence, it follows that the court did not err in failing to instruct the jury on the law relating to circumstantial evidence.

We have carefully considered the other assignments of error and have concluded that none of them are of sufficient moment to justify a new trial. They raise no novel questions. The judgment rendered below is upheld because we find in law

No error.

STATE v. ANNIE WILLIAMS, PRENTISS WATSON AND ELIZABETH BADGETT.

(Filed 13 October, 1948.)

1. **Criminal Law § 9—**

In prosecution of one accused as an accessory after the fact, the burden is upon the State to prove that the principal felon had actually committed the felony stipulated, that the accused knew that such felony had been committed by the principal felon, and that the accused received, relieved, comforted, or assisted the principal felon in some way in order to help him escape, or to hinder his arrest, trial, or punishment.

2. **Same—**

One cannot become an accessory after the fact to a felony until such felony has become an accomplished fact. G. S., 14-7.

3. **Same—**

Where the State's evidence discloses that the accused rendered aid to the principal felon after the principal felon had mortally wounded deceased but before death ensued, motion to nonsuit in a prosecution of accused for being an accessory after the fact to the felony of murder should be allowed, since the evidence discloses that the felony of murder was not an accomplished fact when the assistance was given. G. S., 15-173.

APPEAL by defendant, Annie Williams, from *Williams, J.*, and a jury, at July Term, 1948, of LEE.

The defendants were indicted for being accessories after the fact to the felony of the murder of Thompson Hooker by Bud Hicks. The indictment contained the specific allegation that the aid rendered to the principal offender, Bud Hicks, by the defendants consisted in transporting him from the scene of his crime for the purpose of enabling him to escape apprehension and punishment.

Testimony was presented at the trial by both the prosecution and the defense. This evidence is stated below in the light most favorable to the State.

On the afternoon of Sunday, June 6, 1948, Bud Hicks deliberately shot and wounded Thompson Hooker without provocation while the latter was standing before his doorstep at 404 Ramseur Street in Sanford. Immediately after the shooting, Hicks fled from Sanford to a rural section of Lee County in an automobile owned by himself and driven by the defendant, Prentiss Watson. Hicks and Watson were accompanied on this flight by the defendants, Annie Williams and Elizabeth Badgett. Peace officers found Hicks and his companions at the home of Annie Williams in a country neighborhood in Lee County at a later hour of the afternoon. Hicks, Watson, and Annie Williams thereupon sought unsuccessfully to dissuade the officers from arresting Hicks by falsely

representing that Hicks had not been in Sanford anytime that day. After all these events had transpired, namely, on Monday, 7 June, 1948, Thompson Hooker died in consequence of his gun-shot wound.

Elizabeth Badgett was acquitted, but the jury found Annie Williams and Prentiss Watson guilty as charged in the bill of indictment. Judgment was pronounced against both of these parties. Watson accepted his sentence, and Annie Williams appealed to this Court, assigning as error the denial of her motion for judgment of nonsuit made when the State rested its case and renewed when all the evidence was concluded.

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

Neill McK. Salmon for defendant, Annie Williams, appellant.

ERVIN, J. When the State prosecutes one upon the charge of being an accessory after the fact to the felony of murder, it assumes the burden of proving the three essential elements of the offense, namely: (1) that the principal felon had actually committed the felony of murder; (2) that the accused knew that such felony had been committed by the principal felon; and (3) that the accused received, relieved, comforted, or assisted the principal felon in some way in order to help him escape, or to hinder his arrest, trial, or punishment. *S. v. Potter,* 221 N. C., 153, 19 S. E. (2d), 257; *Wren v. Commonwealth,* 26 Gratt. (67 Va.), 952.

In the nature of things, one cannot become an accessory after the fact to a felony until such felony has become an accomplished fact. Consequently, it is well established in law that "one cannot be convicted as an accessory after the fact unless the felony be completed, and, until such felony has been consummated, any aid or assistance rendered to a party in order to enable him to escape the consequences of his crime will not make the person affording the assistance an accessory after the fact." 22 C. J. S., Criminal Law, section 95. See, also, 14 Am. Jur., Criminal Law, section 102; Brill: Cyclopedia of Criminal Law, section 245.

Thus, it is held that a person cannot be convicted as an accessory after the fact to a murder because he aided the murderer to escape, when the aid was rendered after the mortal wound was given, but before death ensued, as a murder is not complete until the death results. *Harrel v. State,* 39 Miss., 702, 80 Am. Dec., 95; Burdick: The Law of Crime, section 224.

Such is the instant case. The evidence disclosed that the assistance, which was alleged to have been rendered by the appellant, Annie Williams, with intent to enable the principal felon, Bud Hicks, to escape, was given after Thompson Hooker had been mortally wounded, but before he died. Hence, the testimony showed that the felony of murder

was not an accomplished fact when the assistance was given, and the Court erred in denying the appellant's motion for judgment of involuntary nonsuit. G. S., 15-173.

The statute provides for punishment for any person becoming an accessory after the fact to any felony, "whether the same be a felony at common law or by virtue of any statute made, or to be made." G. S., 14-7. Since no such charge is laid in the present indictment, we refrain from expressing any opinion as to whether the evidence made out a case for the jury against the appellant as an accessory after the fact to the statutory felony of a secret assault under G. S., 14-31, or the statutory felony of an assault with intent to kill under G. S., 14-32. But it is noted that there are at least two interesting decisions in other states in which similar problems are considered. *People v. Haskins,* 337 Ill., 131, 169 N. E., 18; *Harrel v. State, supra.*

For the reasons stated, the judgment pronounced against the appellant, Annie Williams, in the court below is

Reversed.

GROVER POTTER, BY HIS NEXT FRIEND, SIMON HARDISON, v. BELIA SMITH CLARK, ADMR'X. of MARQUETTE POTTER CHASE.

(Filed 13 October, 1948.)

1. Executors and Administrators § 15d—

Plaintiff's evidence tending to show that he rendered valuable services to his foster grandmother, which services were rendered and accepted in expectation of compensation, *is held* sufficient to be submitted to the jury in an action against the foster grandmother's estate to recover the reasonable value of the services for the three years next preceding her death, the evidence being sufficient to rebut the presumption arising from the family relationship that the services were gratuitously rendered.

2. Same—

In this action by plaintiff to recover the reasonable value of services rendered his foster grandmother, allegations in the answer to the effect that the care and maintenance given plaintiff by his foster grandmother prior to her death exceeded the value of his services, though denominated a counterclaim, is treated as a further denial of plaintiff's right to recover, since defendant offered no evidence to support a counterclaim, and the defense was properly presented to the jury in a charge free from prejudicial error.

APPEAL by defendant from *Frizzelle, J.,* at May Term, 1948, of WAYNE. No error.

This was an action to recover for personal services rendered defendant's intestate. There was verdict for plaintiff, and from judgment thereon, defendant appealed.

George E. Hood for plaintiff, appellee.

J. Faison Thomson and Roy M. Sasser for defendant, appellant.

DEVIN, J. The evidence in this case unfolded an unusual background. In 1927, when the plaintiff was one year old, his mother Cora Mitchell was fatally injured in an automobile accident and the child was taken into the home of his maternal grandfather Thomas Potter, and his second wife Marquette Potter. The boy's name was changed to Grover Potter, and he lived in this home until his grandfather died in 1938, and thereafter he continued to live in the home with his foster grandmother Marquette Potter, except for about eight months in 1945, when he was in military service of the United States. He assisted his grandmother in the operation of a small grocery store. On the 4th day of June, 1946, Marquette Potter, in contemplation of a second marriage, and desiring to make some provision for Grover, executed a will in which she devised to him and his child a house and lot in Goldsboro, and on June 7th she married Will C. Chase, and the following day, June 8th, she suddenly became ill, and died that night. In accordance with the statute, G. S., 31-6, the attempted will was declared void as having been revoked by her subsequent marriage, and the intended devise to Grover Potter lapsed. The house and lot, together with all other property of Marquette Potter Chase, passed to her daughter Belia Smith Clark, who qualified as administratrix of her estate. Thereafter the plaintiff Grover Potter filed claim with the administratrix for compensation for services rendered the intestate, and when his claim was rejected instituted this action therefor.

The plaintiff offered evidence tending to show that valuable services were rendered the decedent by the plaintiff, that she manifested her intention that payment be made therefor, and that the services were rendered and accepted in expectation of compensation. Evidence was also offered as to the reasonable value of the services. The defendant's evidence tended to minimize the value of any services rendered, and to show that the care and maintenance of the plaintiff and payments made him more than compensated him for services rendered. The jury, however, accepted the plaintiff's view, and answered the issue in his favor, awarding him $1,200 compensation for his services for three years next preceding the death of the intestate.

Defendant's motion for judgment of nonsuit was properly denied, nor do we perceive any substantial error in the court's ruling on questions of

evidence. The court charged the jury, in accord with the decisions of this Court, that notwithstanding the family relationship existing between Mrs. Potter and the plaintiff, if the jury should find from the evidence and by its greater weight that plaintiff rendered valuable services to her in the expectation of receiving compensation, and that Mrs. Potter received and accepted the benefit of those services with the expectation and intention of paying therefor, this would overcome the presumption that the services were gratuitously rendered, and the jury should answer the issue in favor of the plaintiff in such amount as they should find from the evidence and by its greater weight would fairly compensate him for services rendered during the three years next preceding her death. *Francis v. Francis,* 223 N. C., 401, 26 S. E. (2d), 907; *Landreth v. Morris,* 214 N. C., 619, 200 S. E., 378; *Nesbitt v. Donoho,* 198 N. C., 147, 150 S. E., 875.

In her answer defendant had alleged that her intestate paid out for the care and maintenance of plaintiff amounts in excess of the value of his services. She denominated this a counterclaim but offered no evidence to support a counterclaim, and this allegation may be regarded only as a further denial of plaintiff's right to recover. It was doubtless so intended by the pleader. The defendant complains now that this was not properly presented to the jury, but from an examination of the entire charge we observe that the court called the attention of the jury to the defendant's contention on this point that the intestate spent in providing for the plaintiff and in giving him money more than his services were worth, and the evidence relating thereto was submitted to the jury, among the other matters, to be considered by them in determining the issue. *Young v. Herman,* 97 N. C., 280 (285); *Sanders v. Ragan,* 172 N. C., 612, 90 S. E., 777. No prejudicial error on this score sufficient to require the granting of a new trial has been made to appear. On the whole case we think the verdict and judgment should be upheld.

No error.

PARKWAY BUS COMPANY, INC., v. COBLE DAIRY PRODUCTS COMPANY, INC.

(Filed 13 October, 1948.)

Automobiles §§ 8d, 18h (3)—

The evidence tended to show that plaintiff's bus, shortly after a truck traveling in the opposite direction had passed it, struck the rear of defendant's truck which was parked on the right side of the highway on a dark and foggy night without lights, flares, or other signal. *Held:* While there was evidence of negligence on the part of defendant in violating G. S.,

20-161, the evidence discloses contributory negligence as a matter of law on the part of plaintiff's driver, and defendant's motion to nonsuit was properly allowed.

APPEAL by plaintiff from *Moore, J.*, at May Term, 1948, of WILKES. Affirmed.

This was an action to recover damages for injury to plaintiff's bus caused by collision with defendant's truck parked on highway at night without lights.

Plaintiff's evidence tended to show that the Coble truck was stopped at night, 17 January, 1947, on the west side of Highway No. 601, the paved surface being 18 feet wide. The stoppage was due to the breaking of one of the truck's dual wheels sometime that afternoon. There were no lights on the truck and no flares or other signals. The night was dark, rainy, and foggy. The road was straight. About 6:15 p.m. plaintiff's bus, weighing 17,000 pounds and carrying 12 passengers, traveling south at a speed of 30 to 35 miles per hour, struck the rear of the defendant's truck slightly to the left of center, and the impact crushed the front of the bus and drove the truck some 75 feet, and down an embankment, the bus traveling 68 feet. Shortly before this collision the bus met a truck traveling in the opposite direction, lights dimmed, but that vehicle had passed before the collision occurred. The lights on the bus were burning, and the driver testified he was within 8 or 10 feet of the truck before he saw it, too close to turn or stop. According to the testimony of the highway patrolman with ordinary automobile lights under the conditions then existing normal vision was 75 feet.

At the close of plaintiff's evidence defendant's motion for judgment of nonsuit was allowed and plaintiff appealed.

Larry S. Moore and John R. Jones for plaintiff, appellant.

J. T. Pritchett and Trivette, Holshouser & Mitchell for defendant, appellee.

DEVIN, J. While there was evidence of negligence on the part of the defendant in leaving parked on the highway after dark an unlighted truck, without flares or signals, in violation of G. S., 20-161 (*Peoples v. Fulk,* 220 N. C., 635, 18 S. E. (2d), 147; *Allen v. Bottling Co.,* 223 N. C., 118, 25 S. E. (2d), 388), we think the motion for judgment of nonsuit interposed at close of plaintiff's evidence, on the ground of the contributory negligence of the driver of plaintiff's bus, was properly allowed. *Austin v. Overton,* 222 N. C., 89, 21 S. E. (2d), 887.

The correct determination of legal responsibility for injury resulting from a rear-end collision on a highway at night between an unlighted standing vehicle and one that is moving is frequently attended with

difficulty. The line of distinction between those cases where a question of fact for the jury is raised, and other cases where as a matter of law on plaintiff's evidence contributory negligence is manifest, is not always easy to draw, but from an examination of the plaintiff's evidence here we are led to the conclusion that this case falls within the latter category. In the two latest cases on the subject, *Tyson v. Ford,* 228 N. C., 778, 47 S. E. (2d), 251, and *Riggs v. Oil Corp.,* 228 N. C., 774, 47 S. E. (2d), 254, on facts similar to those in evidence here, judgments of nonsuit were upheld. In the *Tyson case, Chief Justice Stacy* cites the recent decisions of this Court on the subject, on one side or the other of the question again presented by this appeal, and we think the ruling of the court below in this case is supported by the cases referred to. *Smith v. Sink,* 211 N. C., 725, 192 S. E., 108; *Powers v. Sternberg,* 213 N. C., 41, 195 S. E., 88; *Beck v. Hooks,* 218 N. C., 105, 10 S. E. (2d), 608; *Pike v. Seymour,* 222 N. C., 42, 21 S. E. (2d), 884; *Atkins v. Transportation Co.,* 224 N. C., 688, 32 S. E. (2d), 209; *McKinnon v. Motor Lines,* 228 N. C., 132, 44 S. E. (2d), 735.

We have examined the cases cited by the plaintiff, but do not find them controlling. In *Clarke v. Martin,* 215 N. C., 405, 2 S. E. (2d), 10, the situation was complicated by the fact that a searchlight attached to the cab of the parked truck was casting its rays to the rear. In *Cummins v. Fruit Co.,* 225 N. C., 625, 36 S. E. (2d), 11, the plaintiff at the moment was blinded by the lights of an approaching car. In *Williams v. Express Lines,* 198 N. C., 193, 157 S. E., 197, the Court was of opinion that there was a reasonable inference that under the existing conditions the plaintiff could not have seen the truck in time to have avoided the injury; and this view was made the basis of decision in *Lambert v. Caronna,* 206 N. C., 616, 175 S. E., 303. *Hobbs v. Drewer,* 226 N. C., 146, 37 S. E. (2d), 121, and *Hobbs v. Coach Co.,* 225 N. C., 323, 34 S. E. (2d), 211, involved head-on collisions.

In *Cole v. Koonce,* 214 N. C., 188, 198 S. E., 637, where nonsuit was reversed, it was thought by the Court that the evidence did not point to the contributory negligence of the plaintiff with that clearness and singleness of inference which must obtain to justify taking the case from the jury.

A review of the decisions of this Court on this subject illustrates the statement in *Cole v. Koonce, supra,* that "practically every case must stand on its own bottom." On the evidence which appears of record in the case at bar, we hold that the judgment of nonsuit was properly entered.

Affirmed.

N. C. RHODES, ADMR., v. CITY OF ASHEVILLE, ET AL.

(Filed 13 October, 1948.)

1. Appeal and Error § 40f—

Where there is but a single exception and assignment of error relating to the ruling of the court upon motion to strike certain portions of the complaint as irrelevant, the appeal presents only the question of whether the record is sufficient to uphold the judgment, and when the judgment is supported by the record, the exception must fail.

2. Appeal and Error § 7: Pleadings § 15—

Where there is no demurrer, the sufficiency of the complaint to state a cause of action is not presented for review.

APPEAL by defendants from *Pless, J.*, in chambers at Marion, 14 February, 1948.

Civil action to recover damages for death of plaintiff's intestate, alleged to have been caused by the wrongful act, neglect or default of the defendants.

The complaint alleges that the defendants are municipal corporations; that in their proprietary right, they own and operate the Asheville-Hendersonville Airport; that on the morning of 7 August, 1947, about 2:30 a.m., plaintiff's intestate presented himself at the airport as a potential passenger and was negligently and wrongfully shot and killed by the agent, servant and employee of the defendant in charge of the premises, who was on duty as night watchman at the time; whereupon plaintiff demands damages.

Prior to filing demurrer or answer, the defendants moved to strike out certain portions of the complaint as irrelevant, redundant and prejudicial. The motion was allowed in part and overruled in part.

From this ruling, the defendants "excepted . . . and assign error for that, as defendants contend, the said order . . . was contrary to law and the court erred in rendering said order." On this exception and assignment of error, the defendants appeal.

R. L. Whitmire and James P. Mozingo for plaintiff, appellee.

Edwin S. Hartshorn, Arthur Shepherd, L. B. Prince, and Robert W. Wells for defendants, appellants.

STACY, C. J. The appeal is here on a single exception and assignment of error. Hence, the matter for determination is the sufficiency of the record to uphold the judgment. *Wilson v. Charlotte,* 206 N. C., 856, 175 S. E., 306.

Apparently the briefs seek to join issue on governmental immunity, *Gentry v. Hot Springs,* 227 N. C., 665, 44 S. E. (2d), 85, but this is not the question which the trial court decided. We are precluded from considering the sufficiency of the complaint to state a cause of action in the absence of a challenge by demurrer. Moreover, it is alleged that the defendants are operating the facility in their corporate, rather than governmental, capacity.

The only question presented is the sufficiency of the record to sustain the judgment. *Lea v. Bridgeman,* 228 N. C., 565, 46 S. E. (2d), 555; *King v. Rudd,* 226 N. C., 156, 37 S. E. (2d), 116; *Query v. Ins. Co.,* 218 N. C., 386, 11 S. E. (2d), 139. Obviously, the judgment is supported by the record. Hence, the exception must fail on appeal. *Brown v. Truck Lines,* 227 N. C., 65, 40 S. E. (2d), 476; *Rader v. Coach Co.,* 225 N. C., 537, 35 S. E. (2d), 609.

Affirmed.

MINNIE HUNTER AND MATTIE HUNTER v. S. PEIRSON.

(Filed 13 October, 1948.)

1. Master and Servant § 39g—

The evidence tended to show that the defendant operated a general mercantile business, which included the selling and delivery of commercial fertilizers, and that plaintiffs' intestates had been working for a period of more than two months at stated weekly wages in delivering the fertilizers by truck when they met with fatal accident arising out of and in the course of their employment. *Held:* Decedents were not casual employees, and further, the injury arose within the scope of the employer's regular business, and therefore they were employees of defendant within the coverage of the Workmen's Compensation Act. G. S., 97-2 (b).

2. Master and Servant § 38—

Evidence tending to show that the employer regularly employed three persons in his general mercantile business and that for more than two months prior to the accident in suit he had employed two other persons at stated weekly wages to deliver fertilizers by truck in the operation of his mercantile business, *is held* to support the finding of the Industrial Commission that the employer had five or more persons regularly employed in his business and that he was therefore subject to the Workmen's Compensation Act. G. S., 92-2 (a).

APPEAL by defendant from *Frizzelle, J.,* at December Term, 1947, of HALIFAX. Affirmed.

Charlie C. Pierce, Ben E. Fountain, and A. W. Oakes, Jr., for plaintiffs, appellees.

A. W. Andleton and Ehringhaus & Ehringhaus for defendant, appellant.

DEVIN, J. Claims for compensation under the Workmen's Compensation Act for the death of Caesar Hunter and Major Hunter were allowed by the North Carolina Industrial Commission, and on defendant's appeal therefrom the court below affirmed the award.

The defendant now presents to this Court for review the question whether there was sufficient evidence to support the finding by the Industrial Commission of the jurisdictional fact that at the time of the happening complained of the defendant had as many as five persons regularly employed in the same business, so as to bring these claims within the provisions of the Compensation Act. G. S., 97-2 (a).

It sufficiently appears that defendant was engaged in the general mercantile business, and that this included selling commercial fertilizers which he caused to be delivered by truck to farmers in the surrounding territory. For this purpose the two decedents were employed, when the business required, to handle these fertilizers and drive the truck for delivery to defendant's customers. On 15 March, 1944, Caesar and Major Hunter, while driving defendant's truck loaded with fertilizers, in the regular course of business, were struck by a train on a railroad crossing and both were killed. If the provisions of the Workmen's Compensation Act apply, it is not controverted that the fatal injury by accident arose out of and in the course of their employment by the defendant.

The defendant admits that at the time there were three persons regularly employed in his place of business, and that he also employed Caesar and Major Hunter, whenever a carload of fertilizer arrived, to unload and deliver the fertilizer by truck to defendant's customers, both of those men being employed in the handling, driving and delivery thereof; nor does he controvert the fact that both were accidentally killed while so engaged. But defendant denies liability for compensation therefor to their dependents on the ground that the employment of these men was not such as would bring them within the category of persons "regularly employed," for whom provision is made in the statute (G. S., 97-2 (a)), and that they are excluded by the language of the statute which denies compensation to those whose "employment is both casual and not in the course of the business" of their employer. G. S., 97-2 (b).

The claimants' evidence tended to show that their decedents had been regularly employed by the defendant in hauling fertilizer from the last of October, 1943, to the time they were killed, working six days a week at a wage of $15 a week for Caesar and $12 a week for Major; that the

truck was kept by them at night at their home, and driven each day in the service of defendant. "After Christmas they hauled regularly." However, it appeared that decedents and their mother were share-croppers on defendant's land, and that in the late fall these men were employed to drive the truck in hauling farm products, and one of them was paid a monthly wage of $15 for feeding livestock. From defendant's statement it seems that from early in January, 1944, they were employed at 30c and 25c per hour, to drive defendant's truck for the delivery of fertilizer to his customers, and that they continued to be so employed for at least a part of each week for more than two months up to the time of their death, and were killed while so engaged. During this period and for this work at approximately weekly intervals payments were regularly made to both these men.

The Industrial Commission found that the defendant employed regularly five or more persons during the fertilizer season in operating his store and delivering fertilizer, operated as one business, and that decedents were employed by defendant to unload and deliver fertilizer by truck to his customers, which was work pertaining to the regular course of defendant's business, and that they sustained injury by accident arising out of and in the course of their employment therein which resulted in their death. We think these findings by the Commission are supported by the evidence, and that the ruling of the court below in affirming the award of compensation should be upheld. *Moore v. State,* 200 N. C., 300, 156 S. E., 806. The rule was clearly stated by *Justice Brogden* in *Johnson v. Hosiery Co.,* 199 N. C., 38, 153 S. E., 591: "If the work pertains to the business of the employer and is within the general scope of its purpose, the employment is not of a casual nature, although the hiring be for only a short period of time." . . . Furthermore, it has been held that "even though the employment is casual, the injury is compensable if occurring within the course of the employer's business." Here, the admitted employment of the decedents in the business of the defendant extended over a period of more than two months during which they worked, not by chance or for a particular occasion, but according to a definite employment, at stated wages, for a purpose in the usual course of defendant's business. While so engaged the decedents lost their lives as result of an injury by accident arising out of and in the course of their employment. *Hoffer v. Smith,* 148 Va., 220, 138 S. E., 474; *Smith v. Paper Co.,* 226 N. C., 47, 36 S. E. (2d), 730; *DeVine v. Steel Co.,* 227 N. C., 684, 44 S. E. (2d), 77; *Chadwick v. Department of Conservation,* 219 N. C., 766, 14 S. E. (2d), 842; *Thompson v. Funeral Home,* 205 N. C., 801, 172 S. E., 500; *Moore v. State, supra.*

The judgment of the court below affirming the award based upon findings warranted by the evidence will be upheld.

Judgment affirmed.

J. H. ELLER, J. W. CHURCH, PAUL H. SMITH, CLAUDE GARLAND AND J. R. BEAM, ON BEHALF OF THEMSELVES AND ALL OTHER CITIZENS, TAXPAYERS AND QUALIFIED VOTERS OF AVERY COUNTY, NORTH CAROLINA, v. R. W. WALL, J. L. HARTLEY AND P. A. VANCE, MEMBERS OF AND COMPRISING THE BOARD OF ELECTIONS OF AVERY COUNTY, NORTH CAROLINA.

(Filed 13 October, 1948.)

Appeal and Error § 31e—

Where, on appeal from the dissolution of a temporary restraining order, it appears that the act sought to be restrained has been done, the appeal will be dismissed, since the question presented by the appeal has become academic.

APPEAL by plaintiffs from *Clement, J.*, at Chambers, 19 August, 1948, in action in Superior Court of AVERY County.

The plaintiffs instituted this action to enjoin the Board of Elections of Avery County from holding an election in Avery County on August 28, 1948, under chapter 1084 of the 1947 Session Laws for the purpose of determining whether or not beer and wine should be legally sold in Avery County. Upon the plaintiffs' application, a temporary restraining order issued restraining the Board from taking steps toward conducting the election pending a hearing upon the notice to show cause accompanying the order. Upon the hearing before Judge Clement, the temporary restraining order was dissolved, and the action was dismissed. The plaintiffs thereupon appealed.

J. V. Bowers for plaintiffs, appellants.

Proctor & Dameron for defendants, appellees.

PER CURIAM. It was admitted on the argument that the election which the plaintiffs sought to enjoin was held on 28 August, 1948. As the action which the plaintiffs desired to prevent has already been taken, the question presented by the appeal from the ruling dissolving the restraining order has become academic, and the appeal will be dismissed in accordance with the practice prevailing in such instances. *Efird v. Comrs. of Forsyth,* 217 N. C., 691, 9 S. E. (2d), 466; *Rousseau v. Bullis,* 201 N. C., 12, 158 S. E., 553. Since the sole object of the litigation was the enjoining of the election and since this relief can never be granted, the dismissal of the action will not be held for error.

Appeal dismissed.

JESS YOUNG, EMPLOYEE, v. WHITEHALL COMPANY, INC., EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER.

(Filed 20 October, 1948.)

1. Master and Servant § 40f—

The provisions of the N. C. Workmen's Compensation Act relating to asbestosis and silicosis will be construed upon the basis that the remedies were provided with reference to the peculiar nature and incidents of these diseases.

2. Same—

The provisions of the N. C. Workmen's Compensation Act relating to asbestosis and silicosis were designed to affect the following objects: (1) To prevent employment in occupations with attendant dust hazards of unaffected persons peculiarly susceptible to asbestosis or silicosis; (2) to secure compensation to those workers affected with the diseases whose principal need is compensation; and (3) to provide compulsory changes of occupations for those workmen affected by asbestosis or silicosis, whose primary need is removal to employments without dust hazards. G. S., 97-52; G. S., 97-54 to 97-76.

3. Same—

A worker suffering from asbestosis or silicosis is disabled as defined by G. S., 97-54, if he is by reason of the disease incapacitated "from performing normal labor in the last occupation in which remuneratively employed," and the distinction between this definition and the definition of incapacity from other diseases or injury, G. S., 97-2, is highly significant in construing the provisions of the statute relating to asbestosis and silicosis, and must have been made to prevent unjust and oppressive consequences which might arise from the indiscriminate compulsion of workers suffering from these diseases to transfer to other employments.

4. Statutes § 5a—

Where a statute is ambiguous, resort must be had to judicial construction to ascertain the legislative will.

5. Same—

In construing a statute the court should consider the language of the statute, the mischief sought to be avoided and the remedies intended to be applied.

6. Same—

If the words of a statute permit, the court should not adopt a construction which will lead to unjust, oppressive or absurd consequences.

7. Master and Servant § 40f—

The provision of G. S., 97-61, for the compulsory change of occupation by a worker affected by asbestosis or silicosis to "employment in some other occupation" contemplates a transfer only when it appears to the Commission that there is a reasonable basis for the conclusion that the

employee possesses the actual or potential capacity of body and mind to work with substantial regularity during the foreseeable future in some gainful occupation free from the hazards of asbestosis or silicosis.

8. Master and Servant § 51—

A summary order of the Industrial Commission directing that an employee be removed from employment having attendant hazards of silicosis, and stipulating that the employee is entitled to compensation as stipulated in G. S., 97-61, does not preclude the worker from contesting before the Industrial Commission the applicability of the statute to him, since such order is entered without notice or hearing.

9. Master and Servant § 55d—

Where a material finding of fact of the Industrial Commission is not supported by evidence and other findings are insufficient for a proper determination of the cause, the Superior Court properly sets aside the award and remands the cause to the Industrial Commission.

10. Master and Servant § 40f—

Evidence that plaintiff could do "light work" if no silicosis dust were involved is insufficient to support a finding that he was not disabled from doing "ordinary work," since the two terms are not synonymous.

11. Same—

The fact that a worker performed his duties with regularity up until the date he was dismissed because he was affected with silicosis does not require a finding that he was not disabled at that time as defined by G. S., 97-61.

12. Same—

The statute recognizes that silicosis is a progressive disease and provides for compensation if disablement results at any time within two years after the last exposure to silica dust. G. S., 97-58.

13. Same—

If an employee is disabled by silicosis from performing normal labor in an occupation subject to the hazard of silica dust, such worker is entitled to ordinary compensation under the general provisions of the Workmen's Compensation Act unless the Industrial Commission further finds that there is a reasonable basis for the conclusion that he shows the actual or potential capacity of body and mind to work with substantial regularity during the foreseeable future in another occupation free from this hazard, and findings as to disablement and employability in other occupations is necessary for a proper determination by the Commission of the applicability of G. S., 97-61.

APPEAL by defendants from *Moore, J.*, at March Term, 1948, of MITCHELL.

This is a proceeding in which the plaintiff, Jess Young, asserts that he has suffered permanent and total disablement by the occupational disease of silicosis and asks compensation accordingly of the defendants,

Whitehall Company, Incorporated, his last employer, and Liberty Mutual Insurance Company, its insurance carrier, under the general provisions of the North Carolina Workmen's Compensation Act. The defendants concede that all parties are subject to the act, assert that plaintiff is a proper subject for compulsory change of occupation under G. S., 97-61, accept liability to plaintiff for the restricted compensation and readjustment benefit specified in G. S., 97-61, and maintain that plaintiff is not entitled to any further relief under any other provisions of the act.

The data set out in this paragraph is gleaned from records kept by the North Carolina Industrial Commission, the Advisory Medical Committee, and the Division of Industrial Hygiene of the State Board of Health, and received in evidence without objection at the hearing. Plaintiff was born 14 May, 1901. He became a miner at seventeen years of age, and earned his living by mining kaolin, mica, and feldspar from that time until 24 May, 1946, when he was denied further employment in the mining industry on account of silicosis. While such does not appear as an absolute fact, it is intimated that all of the exposure of the plaintiff to the inhalation of silica dust took place in North Carolina. Be this as it may, he spent the seven years next preceding 24 May, 1946, working in the feldspar mines of his last employer, the Whitehall Company, in this State. On various occasions, he was examined for silicosis in conformity to G. S., 97-60. It was observed as early as 27 October, 1936, that he suffered fibrosis of the lungs and shortness of breath, symptomatic of the presence of silicosis in some degree. X-ray photographs at subsequent examinations disclosed a progressive increase in the fibrotic condition of his lungs. Pursuant to a recommendation made by the Division of Industrial Hygiene in September, 1939, plaintiff was transferred to open cut mining in order that his exposure to silica dust might "be considerably less than that usually found in underground mining." The physicians making the statutory examinations in 1944, 1945, and 1946, found that the plaintiff was suffering from the second of the three recognized stages of silicosis, and urged that he "be removed from any further dusty exposure." On 24 May, 1946, plaintiff was laid off by his last employer, the Whitehall Company, because he had silicosis, and notice of his claim of occupational disease disability was filed with the Industrial Commission. Four days later, the Industrial Commission summarily issued the following order to the plaintiff:

"Upon the completion of the studies of your recent examination, the Advisory Medical Committee has advised the Commission that you have silicosis and that it is inadvisable for you to continue working in siliceous dust. In this the Commission concurs. The Commission finds as a fact that you will be benefited by being taken out of your present employ-

ment with the Whitehall Company, and hereby directs that you be removed from such hazardous employment within 60 days from date of this letter, unless for special reason this time should be extended upon approval of the Commission. . . . The Commission hopes that you can be transferred to some non-dust-hazardous job with your present employer; but if not, you are entitled to be compensated as for temporary total disability until you can obtain employment in some other occupation in which there is no hazard of such occupational disease. Compensation is limited to 20 weeks without dependents, 40 weeks with dependents, and for special training benefits not to exceed $300 and $500 respectively. Read Section 97-61. Provided your exposure meets the requirements of Section 97-63."

The plaintiff offered evidence before the hearing Commissioner tending to show that he had not been able to do any work whatever subsequent to 24 May, 1946, because of shortness of breath and incessant pain in his chest resulting from silicosis. His medical witness, Dr. C. D. Thomas, Director of the Western North Carolina Sanatorium, expressed the opinion based upon his knowledge of the plaintiff's condition that the plaintiff was actually incapacitated by silicosis from performing normal labor in the last occupation in which he was remuneratively employed, and that the plaintiff's disease was progressing and would probably become worse.

The defendants presented testimony before the hearing Commissioner tending to show that the plaintiff worked with regularity until 24 May, 1946; that subsequent thereto he applied for and obtained unemployment compensation for twenty weeks, representing to the North Carolina Unemployment Compensation Commission that he was willing to work if he could find something light; and that after his removal from work in the feldspar mine of the Whitehall Company he declined to accept vocational training tendered him by the State Division of Vocational Rehabilitation upon the ground that he "did not figure that he could handle a job." The defendants offered Dr. Otto J. Swisher, Director of the Division of Industrial Hygiene of the State Board of Health, as a medical witness. Dr. Swisher based his testimony upon the case history of the plaintiff and certain X-ray photographs rather than upon any personal knowledge of the plaintiff's state. He expressed the opinion that the plaintiff was afflicted by the first stage of silicosis, and that he "could do light work if there was no silica dust involved." He stated on cross-examination that in his judgment the plaintiff was actually incapacitated by silicosis from performing normal labor in the last occupation in which he was employed.

Upon the evidence adduced, the hearing Commissioner made the following findings of fact, conclusions of law, and award: "The Commis-

sioner finds it as a fact that the claimant is not disabled from doing ordinary work. However, the Commissioner does find that it is for the best interest of the claimant not to work in a dusty trade; and it is, therefore, directed that he be not employed by any other person in a dusty occupation. The Commissioner does find, however, that the claimant is entitled to the benefits provided in the Act, Section 97-60 and 97-61, where an employee is removed from the employment for the good of his health and is not disabled from doing work in which there is no dust hazard. The Commissioner further finds that the claimant in this case is a married man and has a family and is, therefore, entitled to forty weeks disability based upon his wages. It is, therefore, directed that an award issue requiring the defendants to pay the claimant compensation for a period of forty weeks at $21.00 per week, and all hospital and medical bills up to the date of this order when submitted to and approved by the Industrial Commission."

The plaintiff appealed to the Full Commission, which affirmed the findings of fact, conclusions of law, and award of the hearing Commissioner. The plaintiff then prosecuted an appeal to the Superior Court of Mitchell County, where the proceeding arose, and the Superior Court entered judgment setting aside the award of the Industrial Commission upon the ground that the findings of fact were insufficient for a proper determination of the questions raised and remanding the proceeding to the Industrial Commission for further findings. The defendants thereupon appealed to this Court from the judgment of the Superior Court.

Proctor & Dameron for plaintiff, appellee.

Harkins, Van Winkle & Walton for defendants, appellants.

ERVIN, J. As originally adopted in 1929, the North Carolina Workmen's Compensation Act provided merely for compensation for the death or disability of a workman resulting from injury by accident arising out of and in the course of his employment. G. S., 97-2. In 1935, an amendment broadened the scope of the Act by making compensable twenty-five designated occupational diseases, including asbestosis and silicosis. G. S., 97-53.

In thus extending the coverage of the statute, the Legislature expressly decreed that disablement or death of a workman from a designated occupational disease "shall be treated as the happening of an injury by accident within the meaning of the North Carolina Workmen's Compensation Act and the procedure and practice and compensation and other benefits provided by said act shall apply in all such cases *except as hereinafter otherwise provided.*" G. S., 97-52. It is *otherwise provided*

in later sections of the amending statute with respect to asbestosis and silicosis in several material particulars. G. S., 97-54, to G. S., 97-76.

A proper consideration of the special provisions of the statutes relating to asbestosis and silicosis must rest upon a conviction that in passing these laws the Legislature gave due heed to the nature of these diseases.

The definition of silicosis itself makes it plain that the legislators approved the amendment covering occupational diseases with full knowledge that silicosis is a disease of the lungs contracted by breathing air containing silica dust. G. S., 97-62. Besides, an analysis of the pertinent sections as a whole indicates that the lawmakers acted with an awareness of the discoveries of medicine and industry that silicosis is characterized by shortness of breath, decreased chest expansion, lessened capacity for work, reduced vitality, and a marked susceptibility to tuberculosis; that the average time before symptoms of the disease develop is from ten to fifteen years; that silicosis is incurable; that whether silicosis will result in death or disability to a particular worker is dependent on his susceptibility to the affliction and the duration and intensity of his exposure to silica dust; and that silicosis is a progressive disease, the lung changes continuing to develop for one or two years after complete removal of the worker from the silica hazard. Reed and Harcourt: The Essentials of Occupational Diseases, pages 161-174; Reed and Emerson: The Relation Between Injury and Disease, pages 182-186; Goldstein and Shabat: Medical Trial Technique, pages 773-776; Gray: Attorneys' Textbook of Medicine (2d Ed.), pages 1060-1070.

We are dealing here with silicosis alone. But as it and asbestosis are always coupled in the statutes, it is well to note that asbestosis is a disease of the lungs occurring in persons working in air laden with asbestos dust. G. S., 97-62. It is infrequent as compared to silicosis, but has somewhat similar symptoms and consequences. Gray: Attorneys' Textbook of Medicine (2d Ed.), pages 913-925; Goldstein and Shabat: Medical Trial Technique, pages 776-777.

When the special provisions of the occupational disease amendment relating to asbestosis and silicosis are read in their entirety, it is apparent that they are designed to effect these objects: (1) To prevent the employment of unaffected persons peculiarly susceptible to asbestosis or silicosis in industries with dust hazards; (2) to secure compensation to those workers affected with asbestosis or silicosis, whose principal need is compensation; and (3) to provide compulsory changes of occupations for those workmen affected by asbestosis or silicosis, whose primary need is removal to employments without dust hazards.

It is to be noted that there is a radical difference between the criterion of disability in cases of asbestosis and silicosis and that of disability in cases of injuries and other occupational diseases. An employee is dis-

abled by injury or an ordinary occupational disease within the purview of the Workmen's Compensation Act only *if he suffers incapacity because of the injury or disease to earn the wages which he was receiving at the time of the injury or disease in the same or any other employment.* G. S., 97-2. But a worker is disabled in cases of asbestosis or silicosis *if he is "actually incapacitated, because of such occupational disease, from performing normal labor in the last occupation in which remuneratively employed."* G. S., 97-54. The distinction in tests is highly significant, and arises out of the legislative consciousness that any attempt to compel an indiscriminate transfer of workers affected by asbestosis or silicosis from their accustomed occupations to other employments under the economic threat of deprivation of compensation would inevitably lead to unjust and oppressive consequences because of their doubtful capacity to engage in other work or because of the inherent difficulty of forecasting the courses of their diseases. With a view to averting such unjust and oppressive results, the Legislature established the general rule that an employee becoming disabled by asbestosis or silicosis within the terms of the specific definition embodied in G. S., 97-54, should be entitled to ordinary compensation measured by the general provisions of the Workmen's Compensation Act. G. S., 97-64.

Moreover, it is clearly implicit in the special provisions relating to asbestosis and silicosis that the lawmaking body did not contemplate that a worker suffering disablement by asbestosis or silicosis within the meaning of G. S., 97-54, should forfeit any right to ordinary compensation under the general provisions of the Act by voluntarily transferring his activities from an industry with dust hazards to an employment where no such hazards prevail. But the General Assembly did recognize that under exceptional circumstances salutary effects would follow a forced change of occupation by a worker affected by asbestosis or silicosis. Consequently, the Legislature enacted G. S., 97-61, which reads, in part, as follows:

"Where an employee, though not actually disabled, is found by the Industrial Commission to be affected by asbestosis and/or silicosis, and it is also found by the Industrial Commission that such employee would be benefited by being taken out of his employment and that such disease with such employee has progressed to such a degree as to make it hazardous for him to continue in his employment and is in consequence removed therefrom by order of the Industrial Commission . . ., he shall be paid compensation as for temporary total or partial disability, as the case may be, until he can obtain employment in some other occupation in which there are no hazards of such occupational disease; Provided, however, compensation in no case shall be paid for a longer period than twenty weeks to an employee without dependents, nor for a longer period

than forty weeks to an employee with dependents, and in either case said period shall begin from the date of removal from the employment, unless actual disablement from such disease results later and within the time limited in section 97-58."

Unhappily, the phraseology of G. S., 97-61, is not altogether free from ambiguity. Hence, the Court must resort to construction to ascertain the legislative will. In so doing, the Court should consider the language of the statute, the mischiefs sought to be avoided, and the remedies intended to be applied. *Hunt v. Eure,* 188 N. C., 716, 125 S. E., 484; *Alexander v. Johnston,* 171 N. C., 468, 88 S. E., 785. Furthermore, if words will permit, the Court should not adopt a construction which will lead to unjust, oppressive, or absurd consequences. *S. v. Earnhardt,* 170 N. C., 725, 86 S. E., 960.

G. S., 97-61, contains extreme sanctions calculated to effect the compulsory removal of the workers to whom it applies from industries with dust hazards to other work free from such hazards. Under its provisions, a worker falling within its scope may be barred from the only trade he knows and forced to seek his livelihood in what is to him a strange field of endeavor. At the same time, he may find an apparently just claim to ordinary compensation under the general provisions of the Act drastically curtailed while he is in quest of new employment by the provision that compensation shall not be paid in any case "for a longer period than twenty weeks to an employee without dependents, nor for a longer period than forty weeks to an employee with dependents." If he is removed from his employment in an industry with dust hazards by order of the Industrial Commission in conformity to the statute and "thereafter engages in any occupation which exposes him to the hazards of silicosis and/or asbestosis without first having obtained the written approval of the Industrial Commission, neither he, his dependents, personal representative nor any other person shall be entitled to any compensation for disablement or death from silicosis and/or asbestosis." If he seeks and obtains permission from the Industrial Commission to continue in his hazardous employment as an alternative to forced change of occupation, he must "waive in writing his right to compensation for any aggravation of his condition that may result from his continuing in his hazardous occupation; but in the event of total disablement and/or death as a result of asbestosis and/or silicosis with which the employee was so affected compensation shall nevertheless be payable, but in no case, whether for disability or death or both, for a longer period than one hundred (100) weeks."

It is well to note the meaningful language used by the Legislature in authorizing the Industrial Commission to compel a workman embraced by G. S., 97-61, to transfer from an industry in which he is subject to

the hazards of asbestosis or silicosis to "employment in some other occupation in which there are no hazards of such occupational disease." The term "occupation" denotes a vocation, trade, or business in which a person engages as the means of making a livelihood. *Dorrell v. Norida Land & Timber Co.*, 53 Idaho, 793, 27 P. (2d), 960; *Harper v. England*, 124 Fla., 296, 168 S., 403; *Sovereign, W. O. W. v. Craft*, 208 Ala., 467, 94 S., 831; *Everson v. General Accident Fire & Life Assur. Corp.*, 202 Mass., 169, 88 N. E., 658; *Joliff v. State*, 53 Tex. A. R., 61, 109 S. W., 176. The word "employment," as used here, implies continuity and some degree of permanency of occupation for hire or profit. *Stevens v. Modern Woodmen of America*, 127 Wis., 606, 107 N. W., 8, 7 Ann. Cas., 566.

Obviously, the Legislature enacted G. S., 97-61, for the paramount purpose of securing to an affected worker undergoing a compulsory change of occupation an independent position as a wage earner in some work free from dust hazards. When the language of the statute is considered in the light of the mischief sought to be avoided and the remedies intended to be applied, it becomes manifest that the Legislature has authorized the Industrial Commission to order a forced change of occupation for an employee affected by asbestosis or silicosis only in case it appears to the Commission that there is a reasonable basis for the conclusion that such employee possesses the actual or potential capacity of body and mind to work with substantial regularity during the foreseeable future in some gainful occupation free from the hazards of asbestosis and silicosis. This construction of the statute finds emphatic support in the provision that where "the forced change of occupation shall in the opinion of the Industrial Commission require that the employee be given special training in order to properly readjust himself, there shall be paid for such training and incidental traveling and living expenses an additional sum which shall not exceed three hundred ($300.00) dollars in the case of an employee without dependents, and which shall not exceed five hundred ($500.00) dollars in the case of an employee with dependents." Moreover, a contrary interpretation must necessarily be based upon the absurd premise that the lawmakers legislated in ignorance of, or with indifference to, the self-evident facts that the incapacity of a workman affected by asbestosis or silicosis to adapt himself to new employment or the progression of his disease may render it impossible for him to obtain or follow a gainful occupation in a new sphere of activity.

The task of applying the law to the case at bar still remains.

The Industrial Commission properly permitted the plaintiff to contest in this proceeding the applicability of G. S., 97-61, to him. The summary order made by the Commission in May, 1946, was not intended to

foreclose any of his rights against his last employer and its insurance carrier. Furthermore, such order was entered without notice or hearing.

We are constrained to hold upon the record here presented that the Superior Court was justified in setting aside the award and remanding the cause to the Industrial Commission because the evidence does not support the finding that the plaintiff "is not disabled from doing ordinary work" and the other findings of fact are insufficient for a proper determination of the questions raised. *Logan v. Johnson,* 218 N. C., 200, 10 S. E. (2d), 653; *Dependents of Poole v. Sigmon,* 202 N. C., 172, 162 S. E., 198; *Farmer v. Lumber Co.,* 217 N. C., 158, 7 S. E. (2d), 376.

When viewed in the light most adverse to him, the evidence merely tended to show that the plaintiff "could do light work if there were no silica dust involved." Light work and ordinary work are not synonymous in the realm of manual labor. We cannot agree with the assertion of the defendants that the finding here considered is both supported and required by the fact that the plaintiff worked with regularity in the mine of the Whitehall Company until 26 May, 1946. This contention scarcely comports with the records of the examinations held under G. S., 97-60, reciting that the examining physician had theretofore thrice concluded that plaintiff was suffering from silicosis in its second stage. Indeed, such records suggest that plaintiff may have been making his "heart and nerve and sinew serve their turn long after they are gone." However this may have been, the Legislature recognizes that silicosis is a progressive disease, and provides that an employer may be held liable for compensation for silicosis if disablement results at any time within two years after the last exposure to the disease. G. S., 97-58. The hearing here was not held until approximately eleven months after plaintiff's labors ceased.

Manifestly, the questions arising in this cause cannot be determined in the absence of a finding as to whether the plaintiff is actually incapacitated because of silicosis from performing normal labor in the last occupation in which he was remuneratively employed. If the Industrial Commission should find that plaintiff is disabled by silicosis in this sense, the plaintiff would be entitled to ordinary compensation under the general provisions of the Workmen's Compensation Act, unless the Industrial Commission further finds that there is a reasonable basis for the conclusion that the plaintiff possesses the actual or potential capacity of body and mind to work with substantial regularity during the foreseeable future in some gainful occupation free from the hazards of asbestosis and silicosis.

For the reasons given, the judgment of the Superior Court is

Affirmed.

D. P. WIKE v. THE BOARD OF TRUSTEES OF NEW BERN GRADED SCHOOLS AND UNITED STATES FIDELITY & GUARANTY COMPANY.

(Filed 20 October, 1948.)

1. Assignments § 1—

Remuneration which a party is to receive upon the completion of a contract is assignable, the liability of the debtor to pay the money to the assignee being merely postponed until the happening of the contingency upon which it is to become payable, at which time the assignment operates upon the fund.

2. Assignments § 3—

Where a contractor's performance bond contains an assignment of the contract to secure the obligations of the bond and any other indebtedness or liabilities of the contractor to the guaranty company, whether theretofore or thereafter incurred, the assignment to be effective in the event of breach of the bond or any other bond executed by the guaranty company on behalf of the contractor, specifically listing another contract for which the guaranty company had executed performance bond, the assignment is sufficient to cover moneys due under the contract for the purpose of indemnifying the guaranty company for loss sustained on such other bond because of breach in performance by the contractor.

3. Pleadings § 28—

Where, in an action by a contractor to recover the balance due upon completion of the work, the guaranty company which executed the contractor's performance bond is made a party and files answer alleging that it is entitled to the fund under the contractor's valid assignment of the contract to reimburse it for loss sustained on another performance bond executed for the contractor, it is error for the court to strike the answer and render judgment on the pleadings for the contractor, since the answer raises issues of fact which must be determined before the rights of the parties can be adjudicated.

STACY, C. J., took no part in the consideration or decision of this case.

APPEAL by defendant United States Fidelity & Guaranty Company from *Stevens, J.*, May Term, 1948, CRAVEN. Error.

Civil action to recover the sum alleged to be due on a builder's contract to construct an addition to a school building in New Bern, heard on motions (1) to strike answer of defendant guaranty company and (2) for judgment on the pleadings.

In February 1946, plaintiff and his copartner, trading as Ethridge & Wike Construction Company, contracted to construct certain apartment buildings for Dr. C. S. Barker. Defendant guaranty company, on application of the contractors, issued its performance bond, guaranteeing the performance of said contract.

In August 1946, said construction company contracted with defendant board of trustees to construct an addition to one of the Negro school

buildings in New Bern. Defendant guaranty company likewise, on application of the contractors, issued its performance bond guaranteeing the performance of this contract. The application for said bond dated 5 August 1946, executed by plaintiff and his copartner. contains the following:

"Each of the undersigned . . . hereby agrees as follows:

. . .

"Third, to assign and convey and does hereby assign and convey to the Company as collateral to secure the obligations herein *and any other indebtedness or liabilities of the undersigned to the Company, whether heretofore or hereafter incurred,* all the right, title and interest of the undersigned in and to: (a) said contract and any change, addition, substitution or new contract (including all retained percentages, deferred payments, earned moneys and all moneys and properties that may be due or become due under said contract, change, addition, substitution or new contract) . . . such assignment to be effective as of the date of the construction contract but only in event of (1) any breach of any of the agreements herein contained or of said contract or performance bond *or any other bond executed or procured by the Company on behalf of the applicant herein . . .*" (Italics added).

On 20 November 1946, Dr. Barker notified defendant guaranty company that the building contractors had defaulted in their contract with him. As a result it paid out the sum of $23,500.

Thereafter, on 12 December 1946, the contractors wrote defendant board of trustees two letters as follows:

"It is our desire that all future payments in connection with the construction of addition to the colored school in New Bern be made jointly to ourselves and Mr. John Dunn, Agent for U. S. Fidelity & Guaranty Co." Duly signed; and another of identical wording with the following added:

"We agree that Mr. John Dunn and R. L. Savage shall act as joint control agent and all withdrawals upon any funds that may be received shall be subject to the counter-signature of Mr. Dunn or Mr. Savage for U. S. Fidelity and Guaranty Co." Duly signed.

Likewise, defendant guaranty company notified the board of trustees of its claim and objected to the payment of any balance to plaintiff.

The contractors, having completed the construction of the school building, demanded payment of the balance due in the sum of $3,700.

The partnership of Ethridge & Wike Construction Co. having theretofore been dissolved by agreement under the terms of which plaintiff acquired the assets of the partnership, plaintiff Wike on 21 July 1947, instituted this action to recover said balance.

The defendant board filed answer in which it (1) admitted the balance due, (2) pleaded the above-quoted letters and notice, and (3) prayed that it be permitted to pay said sum into court subject to the final determination of the controversy in respect thereto between plaintiff and said guaranty company.

At the November Term, 1947, Harris, J., on petition of the guaranty company, entered an order making said guaranty company a party defendant to the end it might plead and assert its claim to said sum. The guaranty company thereupon filed an answer in which it pleads (1) plaintiff's default on the Barker contract and defendant's payment of $23,500 as a result thereof, (2) the assignment contained in the application for the bond covering the school building, (3) the letters from plaintiff and partner to the board of trustees and its notice of claim to said board, and (4) the action now pending in which it is seeking to recover of plaintiff and his copartner the sums expended by it by reason of their alleged default on the Barker contract. It prays that it be adjudged to be the owner and entitled to said balance of $3,700.

The $3,700 has been deposited with the clerk by the board of trustees under order of court and this action is now a controversy between plaintiff Wike and the guaranty company over the ownership of said fund. Hereinafter they will be treated as plaintiff and defendant respectively.

On 20 November 1947, plaintiff served notice on defendant that he would move the court for judgment on the pleadings and, on 4 February 1948, served another notice that he would move to strike the answer of defendant and for judgment on the pleadings.

When the cause came on for hearing in the court below on said motions, the court entered an order striking defendant's answer, rendered judgment on the pleadings for plaintiff and directed the clerk to pay said sum to plaintiff. Defendant excepted and appealed.

H. P. Whitehurst for plaintiff appellee.

Whitaker & Jeffress and R. L. Savage for defendant appellant.

BARNHILL, J. In equity a present assignment of money having a potential existence but not yet due will operate on the fund as soon as it is acquired. Hence the remuneration plaintiff was to receive for the construction of the school annex was assignable. The fact the money was not then due only operated to postpone the liability of the debtor until the contingency happened and the money became payable. *Godwin v. Bank,* 145 N. C., 320, 328; *Trust Co. v. Construction Co.,* 191 N. C., 664, 132 S. E., 804; *Bank v. Jackson,* 214 N. C., 582, 200 S. E., 444; 4 A. J., 239, 240. Restatement of the Law, Contracts, sec. 154.

The language used in the application for the school building contract performance bond is sufficient to constitute an assignment of the moneys to become due to plaintiff and his copartner as the work progressed and the balance due upon the completion of the contract.

The assignment was to secure not only the obligations assumed by the defendant under that bond, but also "any other indebtedness or liabilities of the undersigned (the contractors) to the Company, whether heretofore or hereafter incurred" by reason of the breach of that bond or "any other bond executed or procured by the Company on behalf of the applicant . . ." The Barker contract is listed in the application as one of the outstanding contracts in the process of performance. Any payment made by defendant by reason of its suretyship on plaintiff's performance bond executed in connection with that contract is secured by the assignment, and defendant alleges that the letters written to the school board were to effectuate the assignment after liability thereon had accrued.

It follows that the allegations contained in defendant's answer raise issues of fact upon which it is entitled to be heard. As these issues must be answered in order for the court to ascertain to whom the fund in controversy should be paid, the order striking the answer and the judgment on the pleadings must be held for error. *Petty v. Insurance Co.,* 210 N. C., 500, 187 S. E., 816; *Oldham v. Ross,* 214 N. C., 696, 200 S. E., 393; *Adams v. Cleve,* 218 N. C., 302, 10 S. E. (2d), 911; *Lockhart v. Lockhart,* 223 N. C., 123, 25 S. E. (2d), 465.

The order and judgment entered in the court below must be vacated and the cause reinstated on the civil issue docket for trial.

Error.

STACY, C. J., took no part in the consideration or decision of this case.

NAOMI McMILLAN LEDFORD v. HOLLY LEDFORD; J. FLAY LEDFORD AND WIFE, MARGARET W. LEDFORD; LOUISE LEDFORD WYATT AND HUSBAND, GUY E. WYATT; MARY GRACE LEDFORD HEMBY AND HUSBAND, FRANK H. HEMBY; HELEN BRUCE LEDFORD GRUBB AND HUSBAND, JACK GRUBB; SAM M. LEDFORD AND WIFE, CAROL LEDFORD; SARA BESS LEDFORD ORMAND AND HUSBAND, JACK ORMAND; AND A. B. LEDFORD.

(Filed 20 October, 1948.)

1. Judgments § 4—

The law will presume that a consent judgment duly entered of record is regular and that the attorney who signed it acted in good faith under authority from his client.

2. Same—

A consent judgment cannot be modified or set aside without the consent of the parties except for fraud or mutual mistake, or actual absence of consent.

3. Judgments §1—

Consent of the parties is prerequisite to the power of the court to sign a consent judgment, and if such consent does not exist at the time the court sanctions or approves the agreement, the judgment is void.

4. Judgments § 4—

The proper procedure to attack a consent judgment on the ground of want of consent at the time it was entered is by motion in the cause.

5. Same—

The question presented by a motion to set aside a consent judgment on the ground that movent did not consent thereto at the time it was entered is for the determination of the court, and the court is the sole judge of the weight and credibility of the evidence, and his findings are conclusive and not reviewable when supported by the evidence.

6. Appeal and Error § 40d—

The finding by the trial court that movent's attorney was authorized to sign the consent judgment, *held* supported by the evidence, and is conclusive on appeal.

7. Judgments § 4—

Inadequacy of the consideration for the signing of a consent judgment is alone insufficient to overthrow the consent judgment on the ground of fraud or mutual mistake.

APPEAL by petitioner from *Pless, Jr., J.*, July-August Term, 1948, of CLEVELAND.

Proceeding for the allotment of dower to petitioner as widow of J. F. Ledford, deceased, she having dissented from his last will and testament, —heard upon her motion in the cause to set aside a judgment entered in proceeding, on 27 October, 1947, signd by consent of her attorney, Peyton McSwain, by the terms of which it appears that the parties agreed upon a settlement and compromise of their differences,—whereby petitioner agreed to accept the sum of $15,000 in cash in settlement of all her rights of dower, and to distributive share in the personalty, in and to the estate of her deceased husband, J. F. Ledford, and to execute a deed releasing and relinquishing to executors and heirs at law and devisees of J. F. Ledford all her right, title and interest in and to his estate.

The grounds, upon which the motion to set aside the judgment is based, in general, are these: That the judgment (1) is void in that the petitioner did not consent thereto; (2) is voidable and irregular in that

it was entered contrary to the course and practice of the court; and (3) is inequitable, unfair, a gross injustice, and totally inconsistent with the established and admitted rights of petitioner.

The court, upon consideration of the motion, affidavits, and argument of counsel for petitioner, found facts, substantially these: That negotiations between attorneys for the parties extending over a substantial period of time, resulted in an offer by the heirs to pay to petitioner the sum of $15,000 in settlement of her claim to dower and of her distributive share in the estate; that the offer was discussed by petitioner and her attorney, Peyton McSwain, and after several days consideration her said attorney signed the consent judgment, and that on the following day she executed a deed which recites a compromise in effect in keeping with the terms of the offer, and received the executors' check for $15,000; that petitioner was fully apprised of her claims being settled for said amount; that there was no fraud or duress produced upon her by defendants, or by her attorney; that her said attorney was authorized to sign the consent judgment, and petitioner ratified it by executing the deed and accepting the check.

Whereupon, the court held as a matter of law that petitioner is not entitled to the relief sought, and, therefore, denied the motion to set aside the consent judgment.

Petitioner appeals therefrom to Supreme Court and assigns error.

Womble, Carlyle, Martin & Sandridge and John H. Small for plaintiff, appellant.

Falls & Falls for defendants, appellees.

WINBORNE, J. The first two grounds upon which petitioner bases her motion in the cause to set aside the consent judgment entered in the present proceeding appear to be predicated upon her contention that she had not authorized her attorney to sign such judgment.

In this connection, "A judgment entered of record, whether in *invitum* or by consent, is presumed to be regular, and an attorney who consented to it is presumed to have acted in good faith and to have had the necessary authority from his client, and not to have betrayed his confidence or to have sacrificed his right. The law does not presume that a wrong has been done. It would greatly impair the integrity of judgments and destroy the faith of the public in them if the principles were different," *Walker, J.*, in *Gardiner v. May*, 172 N. C., 192, 89 S. E., 955.

Moreover, it is a general rule of law that a judgment entered by the court upon the consent of the parties litigant, being in the nature of a contract to which the court has given its formal approval, cannot be subsequently modified or set aside without the assent of the parties, in

the absence of fraud or mutual mistake, or actual absence of consent, and then only by an appropriate legal proceeding. See, among other cases, *Gardiner v. May, supra; Keen v. Parker,* 217 N. C., 378, 8 S. E. (2d), 209; *Rodriguez v. Rodriguez,* 224 N. C., 275, 29 S. E. (2d), 901; *Williamson v. Williamson,* 224 N. C., 474, 31 S. E. (2d), 367; *King v. King,* 225 N. C., 639, 35 S. E. (2d), 893; *Lee v. Rhodes,* 227 N. C., 240, 41 S. E. (2d), 747; *McRary v. McRary,* 228 N. C., 714, 47 S. E. (2d), 27; and for over-all annotation see 139 A. L. R., 421, on subject, "Power to open or modify consent judgment."

The power of the court to sign a consent judgment depends upon the unqualified consent of the parties thereto, and the judgment is void if such consent does not exist at the time the court sanctions or approves the agreement of the parties and promulgates it as a judgment. *King v. King, supra; Williamson v. Williamson, supra; Rodriguez v. Rodriguez, supra; McRary v. McRary, supra.*

"When a party to an action denies that he gave his consent to the judgment as entered, the proper procedure is by motion in the cause," *King v. King, supra,* and cases cited. And when the question is raised as to whether a party to an action consented to a judgment, the court, upon motion, will determine the question. *King v. King, supra.* The findings of fact made by the trial judge in making such determination, where there is some supporting evidence, are final and binding on this court. See *Lumber Co. v. Cottingham,* 173 N. C., 323, 92 S. E., 9; *Alston v. R. R.,* 207 N. C., 114, 176 S. E., 292. He is the sole judge of the weight and credibility of the evidence, and his findings thereon are conclusive and are not reviewable by this Court. *Creed v. Marshall,* 160 N. C., 394, 76 S. E., 270.

Applying these principles, the finding of fact by the trial judge that petitioner's attorney was authorized to sign the consent judgment is conclusive, and is not subject to review on this appeal, if there be evidence to support it. And a careful consideration of the evidence before the trial judge, as shown by the record on this appeal, reveals support for such finding.

Next, as to third ground upon which the motion is based:

If the consideration upon which petitioner relinquished her dower right, and right to distributive share be inadequate, that alone will not suffice to overthrow the consent judgment. For analogous case see *Watkins v. Grier,* 224 N. C., 339, 30 S. E. (2d), 223.

Careful review of the record in respect to the questions raised, fails to disclose reversible error.

Affirmed.

STATE v. TROY McNEILL.

(Filed 20 October, 1948.)

1. Homicide § 16—

The killing of a human being with a deadly weapon must be intentional in order to raise the presumptions that the killing was unlawful and that it was done with malice.

2. Homicide § 27h—

Evidence for the State which tends to show that defendant had beaten his wife on many previous occasions, and that on the occasion in question he had been drinking and brutally beat her with a poker or other instrument, and that death ensued from the injuries thus inflicted, *is held* to require the submission to the jury of the question of defendant's guilt of manslaughter, since the evidence is susceptible to the interpretation that the killing was not intentional. G. S., 15-170.

3. Criminal Law § 81c (5)—

The verdict of guilty of the offense charged in the indictment does not cure error of the court in failing to submit to the jury the question of defendant's guilt of less degrees of the crime.

4. Criminal Law § 53h—

The failure of defendant to testify in his own behalf should not be made the subject of comment by the court except to inform the jury that a defendant may or may not testify in his own behalf as he may see fit, and that his failure to testify does not create any presumption against him. G. S., 8-54.

APPEAL by defendant from *Frizzelle, J.*, at May Term, 1948, of HARNETT.

Criminal prosecution upon indictment charging the defendant with the felonious slaying of his wife, Ernestine McNeill.

The evidence tends to show that the defendant was in his home on Sunday evening, 21 March, 1948, and that he had been drinking. His wife had been away, but came home about dark. He complained to her about her absence and then started beating her. He continued at intervals to beat her with a stick, a poker or some other instrument until a late hour of the night. In the meantime his daughter tried to intervene and he began beating her. She defended herself and escaped. A son, 15 years of age, was driven from the house and the defendant fired at him twice with a shotgun as the boy fled. The children returned later and their mother requested them to get someone to take her to a doctor. The defendant refused to let them leave the house. The deceased died about 4:30 a.m., on the morning of 22 March, 1948. According to the State's evidence, the defendant had beat his wife on many previous occasions.

The defendant did not go upon the stand or offer any evidence in his behalf.

Verdict: Guilty of murder in the first degree. Judgment: Death by asphyxiation. The defendant appeals, assigning error.

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

Everette Doffermyre and Charles Ross for defendant.

DENNY, J. In the trial below, the court instructed the jury it might return one of three verdicts, to wit: Guilty of murder in the first degree, guilty of murder in the second degree, or not guilty. The jury was then instructed there was no evidence in this case to warrant its submission to the jury on the question of manslaughter, and "therefore, the Court instructs the jury that you should not in any event find the defendant guilty of manslaughter." To this the defendant excepted and assigns it as error.

It is disclosed by the record that the defendant had beaten his wife on numerous occasions prior to the one which resulted in her death. His conduct on the night of 21 March, 1948, was indefensible. His attack on his wife was brutal in the extreme. Even so, in the light of all the State's evidence, we think it was error to exclude from the jury any consideration of manslaughter.

The intentional killing of a human being with a deadly weapon raises two presumptions, first, that the killing was unlawful, and, second, that it was done with malice; but these presumptions do not arise from the mere killing with a deadly weapon. *S. v. Childress,* 228 N. C., 208, 45 S. E. (2d), 42; *S. v. Debnam,* 222 N. C., 266, 22 S. E. (2d), 562. The killing with a deadly weapon must be intentional to raise these presumptions.

We think the evidence on this record does raise a question as to whether or not the defendant intentionally killed his wife with a deadly weapon. This being so, "the statute G. S. 15-170 requires that the 'less degree of the same crime' be submitted to the jury with proper instructions." *S. v. Childress, supra.* And the fact that the jury convicted the defendant of murder in the first degree does not cure the error. *S. v. Merrick,* 171 N. C., 788, 88 S. E., 501; *S. v. Thomas,* 184 N. C., 757, 114 S. E., 834; *S. v. Robinson,* 188 N. C., 784, 125 S. E., 617; *S. v. Lee,* 206 N. C., 472, 174 S. E., 288; *S. v. Burnette,* 213 N. C., 153, 195 S. E,. 356; *S. v. Childress, supra.*

The defendant also excepts and assigns as error the following portion of his Honor's charge: "The Court calls your attention to the fact that the defendant not only did not offer any testimony in his behalf, but did

not go on the witness stand as a witness in his own behalf. One placed on trial charged with the violation of the criminal law in this State has the right to elect whether he will or will not go upon the witness stand and give the jury the benefit of his version of the matter under review. The law says that in case the defendant elects not to go on the witness stand and testify that fact and circumstance shall not be considered against him prejudicially by the jury. It is not to be construed by the jury as a confession or acknowledgment by the defendant of his guilt."

The State contends this charge was not improper in view of the opinion in *S. v. Horne,* 209 N. C., 725, 184 S. E., 470. We concede the two charges are somewhat similar. However, since there must be a new trial in this case, we wish to call attention to the fact that the failure of a defendant to go upon the witness stand and testify in his own behalf should not be made the subject of comment, except to inform the jury that a defendant may or may not testify in his own behalf as he may see fit, and his failure to testify "shall not create any presumption against him." G. S., 8-54.

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

New trial.

JOSEPH G. WHEELER v. J. S. WILDER AND WIFE, ELLA WILDER.

(Filed 20 October, 1948.)

1. Wills § 31—

The cardinal rule in the interpretation of a will is to ascertain the intent of the testator as gathered from the four corners of the instrument, and to give effect to such intent unless contrary to some rule of law or in conflict with public policy.

2. Wills § 33b—

Testator devised an estate for life to his wife and then an estate to his nephew to have and to hold during his lifetime and after his death "to be inherited by nearest heir in the Wheeler family." Wheeler was the surname of both the testator and the nephew. *Held:* Construing the will as a whole, it is apparent that "nearest heir in the Wheeler family" referred to heir of testator and not the nephew, and the rule in *Shelley's case* is inapplicable. Since it appears that testator had collateral heirs who might inherit, the nephew cannot convey the fee simple.

APPEAL by defendants from *Williams, J.,* at August Mixed Term, 1948, of JOHNSTON.

Civil action for specific performance of written contract of sale and purchase of certain land in Johnston County, North Carolina.

The parties submitted the matters in controversy in this action upon an agreed statement of facts substantially these:

1. Plaintiff and defendants entered into a written contract on 21 June, 1948, for the sale and purchase of a certain specifically described tract, piece or parcel of land in Johnston County, North Carolina, by the terms of which contract plaintiff agreed to convey said land to defendants by good and sufficient deed "with full covenants and warranty," etc.

2. Plaintiff, in due time, tendered to defendants a deed in the form he had agreed to do, but defendants refused to accept same, and to pay the agreed purchase price, for that they contend that plaintiff cannot convey a fee simple title to said lands in that he acquired, and has only a life estate in said land, under the following provisions of the will of Alsey B. Wheeler, under which he claims title: "And after the death of myself, Alsey B. Wheeler and wife, Winnie Elizabeth Wheeler, we bequeath to our nephew, Joseph Gardner Wheeler, our tract of land, thirty-three acres and fifty three one-hundredths which he is to have and to hold during his lifetime, and after his decease to be inherited by nearest heir in the Wheeler family to have and to hold as long as the law will allow."

3. During the year 1929, Joseph G. Wheeler, who is the same person as Joseph Gardner Wheeler, named in said will, built a home on said land, and lived, and was living thereon at the time of the death of Winnie Elizabeth Wheeler, in August, 1930, and of Alsey B. Wheeler on 1 April, 1931. And Alsey B. Wheeler, at the time of making his will, and at the time of his death, owned the fee simple title to said land.

4. The land in controversy here is the identical tract of land devised to said Joseph Gardner Wheeler in the will of said Alsey B. Wheeler, and "all of the persons interested in the controversy presented hereby, namely, the soundness of the plaintiff's title are parties to this action, are of full age and are properly before the court."

The court finding the agreed statement of facts to be true, and being of opinion that by the language of the will of Alsey B. Wheeler, quoted in paragraph two above, an estate in fee simple is devised to Joseph Gardner Wheeler, the plaintiff herein, and that he is the owner in fee simple of the lands described in the contract to convey, set out in this action, entered judgment against defendants for specific performance.

Defendants appeal therefrom to Supreme Court and assign error.

A. M. Noble for plaintiff, appellee.
F. H. Brooks for defendants, appellants.

WINBORNE, J. The debate on this appeal is focused upon this clause "and after his decease to be inherited by nearest heir in the Wheeler family," which appears in the will of Alsey B. Wheeler.

Plaintiff, appellee, contends that the words "nearest heir in the Wheeler family," as used in the will, mean the "nearest heir in the Joseph Gardner Wheeler family," that is, his heirs. And defendants concede that if this be the meaning, plaintiff has a fee simple title under the rule in *Shelley's case.* This is the construction put upon the clause on the hearing below.

On the other hand, defendants contend that the words "nearest heir in the Wheeler family" mean the "nearest heir in the Alsey B. Wheeler family," that is, the nearest heir of the testator,—and that, hence, the life estate given to Joseph G. Wheeler was not enlarged into a fee simple.

"The cardinal principle in the interpretation of wills is to discover the intent of the testator looking at the instrument from its four corners, and to give effect to such intent, unless contrary to some rule of law or at variance with public policy." *Heyer v. Bulluck,* 210 N. C., 321, 186 S. E., 356; *Williams v. Rand,* 223 N. C., 734, 28 S. E. (2d), 247. "The object is to arrive at, if possible, the intention and meaning of the testator as expressed in the language used by him." *Patterson v. McCormick,* 181 N. C., 311, 107 S. E., 12.

Applying these principles to the case in hand, and considering the will of Alsey B. Wheeler, from its four corners, the intention of the testator seems clear from the language he used. It is significant that, first, he gives to his wife "all the real estate . . . to have and to hold her lifetime"; then "after the decease" of himself and of his wife, the language is "we bequeath to our nephew, Joseph Gardner Wheeler, our tract of land . . . which he is to have and to hold during his lifetime"; and, then, "after his decease to be inherited by nearest heir in the Wheeler family to have and to hold as long as the law will allow." In other words, it is apparent that the testator had in mind three objects of his bounty in this order, first, his wife, during her lifetime; second, his nephew, during his lifetime; and, third, his own blood kin in general. That is, after his wife had enjoyed his tract of land for life, and then after his nephew had enjoyed it for life, it should go to the nearest kin in his, the testator's, family.

And it is noted that while in the agreed statement of facts it is stated that "all of the persons interested in the controversy presented hereby, namely, the soundness of the plaintiff's title, are parties to this action, are of full age and are properly before the court," there are expressions in the briefs of counsel for appellants and for appellee, respectively, that tend to show that testator had no children, but had relatives,—appellant saying "it is agreed that Alsey B. Wheeler left heirs who could inherit this land in question."

In the light of the above holding, the judgment below is

Reversed.

GLENN C. BARLOW v. CITY BUS LINES, INC.

(Filed 20 October, 1948.)

1. Automobiles §§ 8d, 18h (3)—

Evidence tending to show that plaintiff was following a bus on a wet, slippery road, through fog and rain, that the bus suddenly stopped to discharge a passenger and that plaintiff's car collided with the rear of the bus, together with plaintiff's testimony that he did not see any brake lights or stop lights, and testimony of a patrolman that upon his investigation after the accident the auxiliary brake lights of the bus were not functioning and that the regulation rear lights, though burning, were covered with a film, *is held* to require the submission of the issue of contributory negligence to the jury, and judgment of nonsuit on the ground of contributory negligence is error.

2. Trial § 23a—

When diverse inferences may reasonably be drawn from the evidence, nonsuit is improper, since the weight of the evidence is for the jury and not the court.

3. Negligence § 19c—

It is only when the plaintiff proves himself out of court that nonsuit may be entered on the issue of contributory negligence.

4. Trial § 22c—

Discrepancies and contradictions, even in plaintiff's evidence, do not warrant nonsuit.

APPEAL by plaintiff from *Nettles, J.*, May Term, 1948, of CALDWELL.

Civil action for damages to plaintiff's automobile resulting from rear-end collision with defendant's bus, allegedly stopped on highway in the nighttime without proper signals or lights.

On the night of 24 October, 1947, about 11:30 p.m., the plaintiff was driving his 1941 Ford car, in foggy and rainy weather, on Highway No. 321, just outside the city limits of Hickory, when he struck the rear end of defendant City bus while it was standing on the paved portion of the highway, discharging a passenger.

Plaintiff says: "It happened on a little curve in the road. . . . The first thing I knew the bus stopped right in front of me . . . right on the highway, and I could not look around him because a car was coming from the opposite direction; it was raining and foggy. . . . I could not see any stop lights on the car (bus). It was dirty and muddy. I didn't see any brake lights. I was driving about 25 to 35 miles an hour. I hit the bus . . . and crossed to the other side of the highway. . . . There were no signs along the highway indicating a bus stop. . . . I asked the driver how come him to have on no stop lights, and he tried them and they wouldn't work. (Cross-examination) It was a foggy night . . . in

a thickly settled section. . . . I had been through there a good many times. I could not see 300 yards ahead that night. I could have if he had had on any red lights. I could have seen him nearly 1000 feet. . . . I don't know how far I skidded before hitting the bus, it was not a long distance. . . . I did not see it stepped off."

The Highway Patrolman who investigated the accident, testified that the markings on the highway indicated that plaintiff's brakes were applied approximately 35 feet before the impact, and the tracks which led from the rear of the bus indicated a distance of 65 feet from the point of impact to where the Ford had stopped on the left-hand side of the road next to a wire fence. "I found that the two auxiliary stop lights on the bus were not burning. The two small lights on the rear of the bus which were equipped at the time with three small lights on the top of the bus, with the two small lights on the bottom of the bus, which is a combination stop light and red light, were in operation. . . . The lights were not clear; they had a skim of film on the outside at that time. The auxiliary lights were not burning. . . . The bus is between 9 and 10 feet high . . . was lighted on the inside when I arrived, but I don't know whether it was lighted at the time of the collision. . . . The auxiliary brake light was not burning; the two regulation lights were working, but they were very dim due to the fact that a film was on the inside of the light. There was some film over the lights at the top of the bus. . . . I couldn't say whether the lights were burning at the time of the impact, but they were not burning when I got there. I couldn't see because it was foggy. . . . It was very foggy and the road was wet at the time."

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

W. H. Strickland for plaintiff, appellant.

Folger L. Townsend for defendant, appellee.

STACY, C. J. The question for decision is whether the evidence survives the demurrer. The trial court answered in the negative. We are inclined to a different view.

The case was made to turn in the court below on the contributory negligence of the plaintiff. Opposing inferences seem permissible from the evidence, especially in view of the ambiguity in the testimony of the Highway Patrolman who investigated the occurrence, and in this state of the record the decisions require that the case be submitted to the jury.

The two vehicles were proceeding in the same direction in the nighttime, through fog and rain, on a wet, slippery road. The plaintiff says "the first thing I knew the bus stopped right in front of me" and pro-

duced the rear-end collision as another car was coming from the opposite direction; that the bus was dirty and muddy; that he didn't see any brake lights or stop lights, and that the red lights were not in operation. The Highway Patrolman says the lights on the rear of the bus, which were burning when he arrived, including the lights at the top of the bus, were very dim due to a film on the inside of the lights. He further says, "I couldn't see because it was foggy. It was very foggy and the road was wet at the time." This evidence would seem to require the submission of the issue of contributory negligence to the jury.

It is true, there is other evidence less favorable to the plaintiff, but its probable weight is not for the court on motion for nonsuit. *Cummins v. Fruit Co.*, 225 N. C., 625, 36 S. E. (2d), 11; *Clarke v. Martin,* 215 N. C., 405, 2 S. E. (2d), 10; *Williams v. Express Lines,* 198 N. C., 193, 151 S. E., 197. "The rule applicable in cases of this kind is that if diverse inferences may reasonably be drawn from the evidence, some favorable to plaintiff and others to the defendant, the cause should be submitted to the jury for final determination." *Hobbs v. Mann,* 199 N. C., 532, 155 S. E., 163. It is only when the plaintiff proves himself out of court that nonsuit may be entered on the issue of contributory negligence. *Phillips v. Nessmith,* 226 N. C., 173, 37 S. E. (2d), 178; *Lincoln v. R. R.,* 207 N. C., 787, 178 S. E., 601.

Discrepancies and contradictions, even in plaintiff's evidence, are for the twelve and not for the court. *Emery v. Ins. Co.,* 228 N. C., 532, 46 S. E. (2d), 309; *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 case is controlled by the second line of authorities cited in *Tyson v. Ford,* 228 N. C., 778. Compare *Bus Co. v. Products Co., ante,* 352.

Reversed.

H. C. HARGETT v. ALFRED DELISLE AND WIFE, MARY ELEANOR DELISLE.

(Filed 20 October, 1948.)

Arbitration and Award § 2—

Where both parties invoke the jurisdiction of the Superior Court to determine their rights under their contract, and thus ignore or waive the provision of the contract for arbitration, neither party having pleaded the arbitration agreement or requested that their differences should be settled by arbitration, it is error for the court to dismiss the action, over the objection of one of them, on the ground that the arbitration agreement precluded an action at law.

HARGETT *v.* DELISLE.

APPEAL by plaintiff from *Stevens, J.*, May Term, 1948, of CRAVEN. Reversed.

This was an action to recover the balance due on a building contract. Notice of lien for materials and labor was filed. Defendants in answer denied any indebtedness to plaintiff and set up a cross-action for failure to complete building according to contract and for faulty workmanship. When the cause came on for hearing it was referred to a referee. The referee noted that the contract between the parties for the erection of the building contained proviso that "any disagreement arising out of the contract or any provision thereof shall be submitted to an arbitrator or arbitrators," and reported to the court that in his opinion this clause "provided the sole means by which this dispute could be settled." The court being of same opinion, and, concluding that plaintiff was without right to maintain this action, confirmed the report and dismissed the action. Plaintiff appealed.

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

R. E. Whitehurst and George B. Riddle, Jr., for defendants, appellees.

DEVIN, J. Notwithstanding there was a clause in the contract providing for arbitration of any disagreement arising out of the contract, the parties have elected to settle their differences in the law courts. The plaintiff has brought his action in the Superior Court and has filed notice of lien in accordance with the statute. The defendants have accepted the challenge in that tribunal, and filed answer denying indebtedness and setting up a cross-action. They ask affirmative relief in the Superior Court against the plaintiff. It is apparent that the parties have chosen to ignore and waive the provision as to arbitration. Neither has referred to it in the pleadings or asked that this method of settling the matters in controversy be employed. 117 A. L. R., 308, and cases cited.

The jurisdiction of the Superior Court invoked by both parties may not thus be abrogated over the objection of one whose relief for the cause alleged is now available in the manner he has pursued. Whether in any event, by a previously executed contract to arbitrate, the jurisdiction of the Superior Court could be ousted on motion of one of the parties after suit began is not presently presented. *Braddy v. Ins. Co.*, 115 N. C., 354, 20 S. E., 477; *Kelly v. Trimont Lodge*, 154 N. C., 97, 69 S. E., 764; *Williams v. Mfg. Co.*, 154 N. C., 205, 70 S. E., 290; *Cordell v. Brotherhood*, 208 N. C., 632 (639), 182 S. E., 141; *Blodgett v. Bebe*, 214 Pac., 38, 26 A. L. R., 1070; 3 Am. Jur., 871. See also *Copney v. Parks*, 212 N. C., 217, 193 S. E., 21; 135 A. L. R., 79.

There was error in dismissing the action. The judgment below should be vacated and the cause restored to the docket for trial by appropriate procedure.

Reversed.

STATE v. LONNIE V. DAVIS.

(Filed 3 November, 1948.)

1. Fornication and Adultery § 3—

In a prosecution for fornication and adultery the person jointly charged, but who is no longer on trial, is competent to testify against defendant as to the acts constituting the basis of the prosecution, since the proviso of G. S. 14-184 that the admissions or confessions of one shall not be received in evidence against the other relates to extra-judicial declarations and does not purport to render the person incompetent as a witness.

2. Criminal Law § 41a (1)—

The trend of the development of the rules of evidence has been to open the avenues to legal proof and to remove personal disqualification to testify, and testimony should not be barred except in the interest of a clearly defined public policy or unless clearly prohibited by statute. G.S. 8-49.

3. Fornication and Adultery § 3: Criminal Law § 42d—

Where, in a prosecution for fornication and adultery, the person jointly charged has testified as to the acts forming the basis of the prosecution, testimony that she had made substantially the same statements to another upon the investigation is competent for the purpose of corroboration.

4. Fornication and Adultery § 3: Criminal Law § 34a—

In a prosecution for fornication and adultery, testimony of an admission made by defendant that "he was guilty" of another charge based upon sexual relations with the other party, is competent as an admission of acts which with other similar acts tend to prove the offense of fornication and adultery.

5. Fornication and Adultery § 3: Criminal Law § 29b—

Defendant was charged with fornication and adultery with one of the orphanage girls under his supervision. *Held:* Testimony of another orphanage girl that defendant made improper advances to her is competent for the purpose of showing attitude, animus and purpose of defendant, and as corroborative of the State's case.

6. Criminal Law § 81c (2)—

Exceptions to portions of the charge will not be sustained when the charge construed contextually is free from prejudicial error.

7. Fornication and Adultery § 5—

In a prosecution for fornication and adultery, an instruction that if the jury found beyond a reasonable doubt that defendant and his alleged

paramour, not being married to each other, engaged in sexual intercourse with each other, with such frequency during the period to which the testimony related, that these illicit relations were habitual, they should return a verdict of guilty, *is held* without error.

8. Criminal Law § 81b—

The burden is on defendant to show error which materially and prejudicially affects his rights and but for which a different result probably would have ensued.

9. Fornication and Adultery § 4—

Evidence of defendant's guilt of fornication and adultery held sufficient to be submitted to the jury and overrule defendant's motion for nonsuit.

STACY, C. J., dissenting.

WINBORNE and DENNY, JJ., concur in dissent.

APPEAL by defendant from *Frizzelle, J.*, June Term, 1948, of HARNETT. No error.

The defendant Davis and Lola Mae Reeves were indicted for fornication and adultery under the statute G.S. 14-184. Lola Mae Reeves tendered plea of *nolo contendere* which was accepted by the State. Defendant Davis pleaded not guilty and was put to trial before the jury.

Lola Mae Reeves testified for the State, over objection of the defendant, that while she was living in the Free Will Baptist Orphanage at Dunn, of which defendant Davis was superintendent, and occupying a room near the bedroom of the defendant, she had sexual relations with him as many as six times during a period of three months, beginning March 1, 1947. Defendant used contraceptives. At that time she was fourteen years of age. Without objection she testified she had never had sexual intercourse with any person other than defendant.

The State offered, over objection, the testimony of the matron, Miss Wooten, that Lola Mae Reeves told her when questioned that she had had intercourse with defendant six times. This was admitted only for purpose of corroborating Lola Mae Reeves.

Martha Raines, another girl in the orphnaage, aged fifteen years, testified she was asked by defendant to come to his bedroom at night, and that she refused. Over objection she testified also he came to her room and got in bed with her, and she resisted his advances.

C. A. Jackson, Chairman Board of Trustees of the Orphanage, testified that the defendant, in a conversation about his conduct and his relations with Lola Mae Reeves, admitted it. "He said he was guilty." To this defendant excepted. Hoover Adams testified without objection that defendant told him he was guilty of having sexual relations with Lola Mae Reeves. A letter written by defendant to Lola Mae Reeves, expressing

regret for what had taken place, was also offered in evidence, over defendant's objection.

There was verdict of guilty as charged, and from judgment imposing sentence the defendant appealed.

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

Neill McK. Salmon for defendant.

DEVIN, J. The defendant noted numerous exceptions to the rulings of the trial court, but the principal attack made on the validity of the verdict and judgment below was on the ground that Lola Mae Reeves and Miss Wooten were rendered incompetent to testify against the defendant by the proviso in the statute defining the criminal offense of fornication and adultery that "the admissions or confessions of one shall not be received in evidence against the other." G.S. 14-184. However, we think this statutory prohibition relates to extra-judicial declarations and does not have the effect of preventing one jointly charged with this offense, who is no longer on trial, from testifying as a witness in the trial of the other to facts, otherwise competent, which are within her personal knowledge. Though indicted with defendant Davis, at the time Lola Mae Reeves testified as a witness her plea of *nolo contendere* had been accepted by the State and she was not on trial. She was not making a confession or an admission but testifying as a witness in support of the State's charge against the defendant Davis.

The words "admissions or confessions" may not here be regarded as synonymous with testimony. These terms usually refer to extra-judicial declarations made to others and which subsequently are offered in evidence against the party who made them. An admission or confession is not testimony but a fact to be proven by testimony. The prohibition of the statute is directed not to the person testifying but against the use in evidence of his previous admissions or confessions. *S. v. Rinehart,* 106 N. C. 787, 11 S. E. 512; *S. v. Williams,* 129 N. C. 581, 40 S. E. 84; 20 A. J. 472, 2 Wigmore, sec. 816, 1048. True, the admissions of one defendant are not ordinarily admissible against his co-defendant under the general rules of evidence regardless of this statute, but the declaration by the Legislature of a rule of evidence already recognized should not be held as suggesting a different legislative intent but rather as cumulative.

The offense of fornication and adultery came under the ban in North Carolina as early as 1741. Potter's Laws, 144. In 1805 the amended statute denouncing such conduct concluded with the proviso "that the evidence of the person who may be *particeps criminis* shall not be ad-

mitted to charge any defendant under this Act." This language was retained in the Revised Statutes of 1836, but in the Revised Code of 1854 the qualifying clause was modified to provide "that the admissions or confessions of one shall not be received in evidence against the other." This form of expression has been retained unchanged in all subsequent codifications. G.S. 14-184. Interpreting this statute this Court in 1877, in *S. v. Phipps,* 76 N. C. 203, approved the competency of the testimony of a co-defendant under circumstances substantially similar. In that case the defendants were indicted for fornication and adultery under this statute. After a *nolle prosequi* had been entered as to the *feme* defendant she was introduced as a witness to prove the charge against her co-defendant. Replying to the question presented by the appeal, "was she a competent witness for that purpose," this Court answered that she was. While the Court in its opinion in that case did not specifically cite this statute, it may not be deduced that the Court was inadvertent to the language of a statute it then had under consideration, and the question had been called to the attention of the Court in the defendant's brief where it was argued as here that the testimony of the *feme* defendant in open court was an "admission."

With this decision indicating the Court's interpretation of the effect of the language of the statute on the reception of the evidence of a co-defendant, announced in 1877, the statute has remained unchanged through subsequent re-codifications. We think the question should be regarded as definitely settled against the defendant's contention. In *S. v. Guest,* 100 N. C. 410, 6 S. E. 253, it was said: "In the case of *S. v. Phipps,* 76 N. C. 203, a *nol. pros.* was entered as to the female defendant, and she was allowed to testify, and prove the offense charged against the other defendant." In *S. v. Roberts,* 188 N. C. 460, 124 S. E. 833, the *feme* defendant's declarations tending to inculpate the male defendant were held admissible in evidence against him on the ground as stated by *Chief Justice Hoke,* that they were made in the male defendant's presence. In *S. v. Rinehart,* 106 N. C. 787, 11 S. E. 512, the extra-judicial admissions of the male defendant to a third person were held excluded from reception in evidence against the *feme* defendant under this statute. This would seem to indicate the purpose and extent of the enactment.

When the legislative prohibition is against the person testifying appropriate language to that effect is used. In G. S. 8-51 it is declared an interested party "shall not be examined as a witness" in his own behalf against the administrator of the deceased person, and in G.S. 50-10 the language is "neither husband nor wife shall be a competent witness to prove adultery." This latter categorical prohibition as to the person is in addition to the proviso in the same section that the "admissions" of

neither party shall be "received in evidence," which would seem to mark the distinction.

The trend of the development of the rules of evidence has been to open rather than close the avenues to legal proof of facts in issue, and to remove personal disqualification to testify. G.S. 8-49. Evidence is the means whereby the truth of a matter may be established, and its production should not be barred unless clearly prohibited by statute, or in the interest of a well-defined public policy. In the absence of either in this case we see no substantial reason why one who had been jointly charged should not have been permitted to testify against the defendant then on trial.

It follows, if Lola Mae Reeves was competent to testify as a witness in the trial, it was also competent for the State to support her testimony by corroborating evidence, offered after she had gone upon the stand, that she had made substantially the same statement to Miss Wooten at the inception of the investigation, and Miss Wooten's testimony was by the court carefully restricted to this purpose. *S. v. Williams, supra,* 140 A. L. R. 169; *S. v. McKeithan,* 203 N. C. 494, 166 S. E. 336; *S. v. Gore,* 207 N. C. 618, 178 S. E. 209. Nor can the defendant's exception to the testimony of the witness Jackson that the defendant Davis, in the course of a conversation about the latter's relations with Lola Mae Reeves, said "he was guilty." If, as suggested, he was then referring to another charge bottomed on sexual relations with her, it was competent as an admission of acts which with other similar acts tended to prove the offense of fornication and adultery. *S. v. Abernethy,* 220 N. C. 226 (230), 17 S. E. (2) 25; *Commonwealth v. Elliott,* 292 Pa. 16; *S. v. Willis,* 71 Conn. 293. A similar admission made by defendant Davis to the witness Adams was received without objection.

The defendant's exception to the testimony of Martha Raines, another young girl who was living in the orphanage at the time, that defendant made improper advances to her, cannot be sustained. This evidence was competent as showing the attitude, animus and purpose of the defendant, and as corroborative of the State's case. In *S. v. Edwards,* 224 N. C. 527, 31 S. E. (2) 516, where the defendant was charged with carnal knowledge of his young daughter, another daughter was permitted to testify that he had made advances of similar nature to her. See also *S. v. Harris,* 223 N. C. 697 (701), 28 S. E. (2) 232, where the rule is aptly stated.

The defendant noted exception to certain portions of the judge's instructions to the jury, but upon examination of the entire charge, and considering it contextually, we observe no prejudicial error. The court properly instructed the jury that if they found beyond a reasonable doubt that the defendant Davis and Lola Mae Reeves, not being married to each

other, engaged in sexual intercourse with each other with such frequency during the period to which the testimony related, that these illicit relations were habitual, they should return verdict of guilty. *S. v. Davenport,* 225 N. C. 13 (17), 33 S. E. (2) 136.

The burden was on the defendant to show prejudicial error. To warrant a new trial it must be made to appear that the rulings of the court below, now complained of, were material and prejudicial to his rights, and that but for such rulings a different result probably would have ensued. *S. v. King,* 225 N. C. 236, 34 S. E.(2) 3.

The evidence was sufficient to warrant submission of the case to the jury, and defendant's motion for judgment of nonsuit was properly overruled. The defendant offered no evidence, and the jury accepted the State's evidence and found the defendant guilty as charged. We discern no sufficient reason for disturbing the result. The verdict and judgment will be upheld.

No error.

STACY, C. J., dissenting: The question for decision is whether statements or declarations of one paramour may be used against the other in a prosecution for fornication and adultery. The answer is to be found in the character and content of the statements or declarations. If they contain or amount to admissions or confessions of guilt, to that extent they are inhibited by the statute. Otherwise and if otherwise competent, they may be given or received in evidence.

The statute forbidding fornication and adultery, G.S. 14-184, is couched in the following language:

"If any man and woman, not being married to each other, shall lewdly and lasciviously associate, bed and cohabit together, they shall be guilty of a misdemeanor: Provided, that the admissions or confessions of one shall not be received in evidence against the other."

It is the position of the appellant that the proviso of the statute was disregarded to his prejudice in the reception of the testimony of Lola Mae Reeves and also in the admission of the corroborative evidence of Marguerite Wooten.

I. *Exceptions Nos. 1 to 175 and 190 to 204:* The competency of the testimony of Lola Mae Reeves to prove the gravamen of the charge is held by the majority to be controlled by the decision in *S. v. Phipps,* 76 N. C. 203 (1877). In that case, however, no reference is made to the proviso in the statute upon which the prosecution was founded. Only the statute, G.S. 8-49, relating to the competency of witnesses in general is cited as authority for the position taken, and the law on the subject had been changed several times within the decade immediately prior thereto. Apparently, the question debated was whether the witness was incapaci-

tated "from interest or crime" to testify as was the case at common law and at the time of the codification of the subject statute in 1854. Chap. 34, Sec. 45, Code of 1854. This seems manifest from the language used, "she was not (competent to prove the charge) until the Act of 1866," and the single authority cited, *S. v. Rose,* 61 N. C. 406, which dealt exclusively with the competency of parties of record to testify.

The proviso was clearly overlooked in the cited case. There is no reference to it in the Court's opinion, which consists of only seven sentences. The decision is the law of that case, and no more. It is not a precedent here. How could it be known or understood that the proviso was there practically avoided or annulled when no mention is made of it in the opinion, and the competency of the witness was expressly made to rest on another statute? The Court's inattention to the proviso is revealed in the last paragraph of the opinion. The decision was patently an inadvertence. It was, and is, in direct contravention of the statute. The effort to invest it with authority which it obviously does not possess seems somewhat strained. *Stare decisis* is a sound principle, to be applied in proper cases, but "a single decision is not necessarily binding . . . and an opinion is not authority for what is not mentioned therein." *Lowdermilk v. Butler,* 182 N. C. 502, 109 S. E. 571. There is no virtue in persisting in error, as two wrongs do not make a right. *S. v. Martin,* 188 N. C. 119, 123 S. E. 631; *Spitzer v. Comrs.,* 188 N. C. 30, 123 S. E. 636.

Conversely, in the later case of *S. v. Simpson,* 133 N. C. 676, 45 S. E. 567 (1903), it was held that "under the peculiar and yet proper provision in section 1041 of the Code (now G.S. 14-184) admissions of a defendant (on the witness stand), while competent against the one making them, are not competent against the other." The Court was here speaking of inculpatory "admissions and declarations" made by the male paramour while testifying in a trial before a justice of the peace. He was convicted on such admissions, and the jury was instructed that "there was no evidence proper to be considered by them against the *feme* defendant."

Moreover, this statute has been brought forward and re-enacted on several occasions, without change, since the decision in the *Phipps case.* More of this anon.

In a number of later cases it has been held that an extra-judicial admission of one of the parties is competent only against the party making it and may not be received in evidence against the other. *S. v. Rinehart,* 106 N. C. 787, 11 S. E. 512; *S. v. Cutshall,* 109 N. C. 764, 14 S. E. 107; *S. v. Simpson,* 133 N. C. 676, 45 S. E. 567; *Powell v. Strickland,* 163 N. C. 393, 79 S. E. 872. Compare *S. v. Guest,* 100 N. C. 410, 6 S. E. 253 (where the husband of the *feme* paramour was allowed to testify, not the *feme* paramour as stated in *Powell v. Strickland*).

In at least three cases it has been said that an extra-judicial declaration of one of the parties, made in the presence of the other, may be used against the other, not to prove the truth of the declaration, but to show the behavior of the other concerning it. *S. v. Roberts,* 188 N. C. 460, 124 S. E. 833; *S. v. Lawson,* 123 N. C. 740, 31 S. E. 667; *S. v. Austin,* 108 N. C. 780, 13 S. E. 219. The general rule is, that a declaration made to or in the presence and hearing of a person, accusing him of the commission of or complicity in a crime, is, when not denied, admissible in evidence against him as warranting an inference of the truth of such declaration; provided, the occasion is such as to call for a denial. *S. v. Wilson,* 205 N. C. 376, 171 S. E. 338. It is the occasion, colored by some circumstance or significant conduct on the part of the accused, which renders such statements, otherwise incompetent as hearsay, admissible in evidence. *S. v. Evans,* 189 N. C. 233, 126 S. E. 607. The fact that such a declaration is made by the wife of the defendant or one not competent to testify against him, while material, is not regarded as controlling in determining its competency. *S. v. Portee,* 200 N. C. 142, 156 S. E. 783, 80 A. L. R. 1229. Even so, the principle of these decisions is inapposite here. There are no facts to attract it.

The inhibition of the statute makes no distinction between judicial and extra-judicial admissions or confessions. It is unbending in its severity: The admissions or confessions of the one "shall not be received in evidence against the other." *S. v. Ballard,* 79 N. C. 627. The testimony of the principal witness inculpated both parties. To the extent that it was self-incriminatory, it constituted an admission or confession within the meaning of the statute. *S. v. Simpson,* 133 N. C. 676, 45 S. E. 567; *S. v. Farrell,* 223 N. C. 804, 28 S. E. (2) 560; *S. v. Melton,* 120 N. C. 591, 26 S. E. 933. It is this which the proviso excludes as "evidence against the other." The inhibition is all-inclusive. It makes no distinction between admissions or confessions in the courtroom and those on the outside. They both run afoul of the inhibition. Nor is it material that the witness was no longer on trial. This could have no bearing upon the effectiveness of the proviso.

The argument advanced in favor of the opposite view is, that at the time of the codification in 1854, neither party could testify, and the proviso was necessarily limited to extra-judicial admissions or confessions; that the later removal of this incapacity of the parties to testify left the proviso intact without modification or enlargement, and that it has no application to the direct testimony of the parties. *S. v. Rose,* 61 N. C. 406. *Cf. S. v. McDowell,* 101 N. C. 734, 7 S. E. 785.

While it may be true that at the time of the codification in 1854 the proviso operated only on extra-judicial admissions or confessions, this was so, not because of its circumscription, but for want of any judicial

admissions or confessions to affect. It is broad enough to cover both, and it was the intention of the General Assembly at the time that both should be excluded, except as against the one making them. *S. v. Rinehart, supra.* There has been no change in the statute to indicate a contrary purpose. It is in the same form now as in 1854. The subsequent re-enactments have had the effect of activating the proviso to affect all within its scope and meaning, if such activation were needed to reach admissions or confessions made on the witness stand.

It is also suggested, though not debated on brief, that prior to 1854, the inhibition applied only to "the evidence of the person who may be *particeps criminis,*" whereas in the codification of that year the language of the proviso was changed to its present form and had the effect of removing the evidence of the person *particeps criminis* from its terms. A different view is indicated. The real result was quite the contrary or just the opposite. One *particeps criminis* or party of record was incapacitated to testify at the time, and the purpose of the change was to broaden the scope of the proviso so as to include admissions or confessions of any and all kinds, whenever and wherever made. Whether the testimony of a paramour comes within the inhibition depends upon its character and content. One may admit or confess guilt on the witness stand as readily as anywhere else, and the decisions so hold. Every lawyer knows the deadly effect of an admission or confession which falls from the lips of a party-witness. The proviso speaks to substance, not form, nor technicality, nor time, nor place.

Furthermore, for all practical purposes, to limit the proviso to extra-judicial admissions or confessions is to eliminate it from the statute. Such admissions or confessions made by one paramour are not competent against the other under the rule of evidence which excludes hearsay, *S. v. Lassiter,* 191 N. C. 210, 131 S. E. 577; *S. v. Allison,* 175 Minn. 218, 220 N. W. 653, 61 A. L. R. 970, unless made in the presence of the other and the occasion is such as to call for a response. *S. v. Roberts, supra; S. v. Wilson, supra.* The proviso would then be operative only in case there were no objection to such evidence. *S. v. Ballard,* 79 N. C. 627; *Hooper v. Hooper,* 165 N. C. 605, 81 S. E. 933. Of course, the principle of silent acquiescence in the face of an accusation of criminality can have no application to testimony or evidence in the courtroom. It is the occasion and the reaction of the accused to the accusation which renders it competent. The failure to respond to evidence creates no presumption against a defendant on trial. G.S. 8-54; *S. v. McNeill, ante,* 377.

True it is, for example, that proof of agency, including its nature and extent, may be made by the direct testimony of the alleged agent, while his extra-judicial declarations are inadmissible to prove the fact of agency or its nature and extent. *Parrish v. Mfg. Co.,* 211 N. C. 7, 188 S. E. 817.

This rests upon a different principle, however, and is unaffected by any legislative restriction.

Fornication and adultery was not indictable at the common law, 37 C. J. S. 119, but is a statutory offense and the proviso in question is a part of the legislative enactment. We must take the law as we find it. The appellant was first tried for obtaining carnal knowledge of a virtuous girl between 12 and 16 years of age and acquitted. G.S. 14-26. He and the principal witness are now charged with fornication and adultery on the same state of facts. *S. v. Malpass,* 189 N. C. 349, 127 S. E. 248. The appellant is entitled to the limitations of the statute under which he is presently indicted. The intention of the lawmaking body is not to be thwarted or defeated by interpretation.

There is no contention that the principal witness is incapacitated to testify in the case, but only that her admissions or confessions of guilt, wherever made, are not to be received in evidence against the appellant. Such is the meaning of the proviso which is neither obsolete nor outmoded but is equally as old and as new as the statute itself—indeed a condition annexed to its enactment, codification and re-enactments.

Finally, it should be remembered that while the alleged *feme* paramour seems willing to assume the role of prosecuting witness here, the tables may be turned in the next case, and to guard against imposition on the part of either, it is provided that the admissions or confessions of the one shall not be received in evidence against the other. Such is the law as it is written. *S. v. Simpson, supra.* After all is said and done, we must come back to the statute on which the prosecution is founded.

II. *Exceptions Nos. 181 and 182:* In any event, the testimony of Marguerite Wooten should have been excluded. It discloses an extra-judicial confession on the part of the alleged *feme* paramour; and while admitted only in corroboration of the principal witness, it was necessarily received in evidence against the appellant and is forbidden by the express terms of the statute. *S. v. Ballard,* 79 N. C. 627; *S. v. Simpson,* 133 N. C. 676, 45 S. E. 567.

The contrary suggestion has at least the merit of novelty. Prior to the present decision, it would have been regarded as an innovation, both in law and in logic. The notion that the State's corroborative evidence was not offered against the appellant represents a new conception of this kind of evidence. It hurts, but it was not used for that purpose. Palpably a *non sequitur.* Undoubtedly the solicitor considered the evidence important, since one jury had disbelieved the principal witness, and he therefore pressed for support of her testimony on the present prosecution. Conjure with these exceptions as we will, the conviction is firmly engendered that error was committed in the reception of the evidence, even under portions of the majority opinion, and yet the exceptions are over-

ruled. The reasons advanced in support of its admission are beside the point. The evidence is incompetent by reason of the statutory inhibition. The reception of evidence, made incompetent by statute, constitutes reversible error, and even when not challenged by exception, it will be considered *ex mero motu* by this Court on appeal. *Hooper v. Hooper, supra; Broom v. Broom,* 130 N. C. 562, 41 S. E. 673; *S. v. Gee,* 92 N. C. 756. Here, objections to the evidence were duly noted at the time.

Let us test it by illustration in this way: The solicitor fearing that the jury might disbelieve the principal witness, as did the former jury, seeks to shore up her testimony by showing that she had made an extra-judicial confession to her matron. The solicitor's fears are well founded, and without the corroborative evidence the appellant would have been acquitted; whereas, with it, he is convicted. Under these circumstances, to say that the confession offered in corroboration was not offered or received in evidence against the appellant is, to say the least, to engage in distinctions too attenuate for practical purposes. If this testimony, which spells the difference between acquittal and conviction, were not offered or received in evidence against the appellant, then upon what evidence was he convicted? The question seems to answer itself.

The provisional clause of the statute makes no distinction between the purposes for which the inhibited admissions and confessions are offered. It forbids their reception "in evidence against the other," for any purpose, and such is the effect of the holdings in *S. v. Ballard, supra,* and *S. v. Simpson, supra.* So, in overruling these exceptions, the proviso of the statute and the decisions in the *Ballard* and *Simpson cases* are perforce ignored or disregarded.

The fact that there may be other competent evidence, sufficient to convict, affords no basis for overruling these exceptions. This evidence went to the heart of the case, and entitles the appellant to another hearing.

III. *Exceptions Nos. 183 to 186:* The Chairman of the Board of Trustees of the Orphanage, C. A. Jackson, testified that he had a conversation with the appellant on the fourth Sunday in May, 1947, in which "he admitted he was guilty of the crime he was charged with." Objection; overruled; exception. Of what crime did the defendant admit he was guilty? The witness does not say. The appellant was then charged with carnal knowledge of a virtuous girl between 12 and 16 years of age on which he was later tried and acquitted. It was not until seven months thereafter, when the present bill was found by the grand jury at the January Term, 1948, that he was charged with fornication and adultery. The admission or confession, in the manner and form stated, appears too indefinite for general use in the present prosecution. It was necessarily prejudicial, as it was offered to prove the gravamen of the present charge and accordingly admitted.

The defendant has been convicted on incompetent evidence. Whatever his offense he is entitled to a hearing within the confines of the statute and otherwise free from error. "No person ought to be . . . deprived of his . . . liberty . . . but by the law of the land." Declaration of Rights, Art. I, Sec. 17. It were better that the defendant be tried again, or even allowed to escape, than that strikes should be called against him on balls which are clearly wide of the plate.

WINBORNE and DENNY, JJ., concur in dissent.

C. J. FLEMING v. CAROLINA POWER & LIGHT COMPANY.

(Filed 3 November, 1948.)

1. Pleadings § 30—

When a motion to strike matter from a pleading is made in apt time it is made as a matter of right and not of discretion.

2. Pleadings § 31: Indemnity § 4—In suit by indemnitor against indemnitee for negligence, indemnitee cannot bring in third parties and set up possible liability to them as defense.

In a suit by a consumer to recover damages to his property from a fire allegedly caused by the negligence of defendant power company, the power company alleged that the fire resulted from the negligence of the consumer in the installation and maintenance of equipment on the consumer's property, over which the consumer had sole control, and for a further defense, that the fire caused damage to the property of others and that under its contract with the consumer, the consumer obligated himself to indemnify the power company for any loss to it resulting from the consumer's negligence. The power company had the insurance companies which had paid the losses of such third parties brought in as parties defendant, and prayed for recovery against the consumer under the indemnity agreement or as joint tort-feasor for any amount which the insurance companies might recover against it on subrogated claims. *Held:* The further defense is not germane to the cause of action alleged in the complaint, and such defense and the prayer for relief thereon should have been stricken on plaintiff's motion.

3. Torts § 6—

G.S. 1-240 provides that a tort-feasor sued by the injured person may bring in joint tort-feasors as parties defendant, but the statute does not authorize a party sued for negligent injury to join injured third persons upon its allegation that plaintiff was a joint tort-feasor in causing the calamity resulting in injury to himself and such third parties, and thus force such injured third parties to prosecute their claims in plaintiff's action.

4. Pleadings § 2: Parties § 10a—

Where a fire destroys the property of a number of parties, each injured party has a separate and independent cause of action, and in a suit by one of them, defendant is not entitled to compel the joinder of the others, either in equity or at law, for the purpose of avoiding a multiplicity of suits. G.S. 1-69.

5. Parties § 12—

Where a person has been brought into a suit upon a compulsory order, and such party is neither a necessary nor a proper party to the suit, he is entitled to have his name stricken upon motion.

6. Pleadings § 10—Cross-action must be germane to subject matter in litigation and be necessary to complete determination of plaintiff's cause.

In a suit to recover damages to property caused by a fire resulting from alleged negligence of defendant, defendant alleged that plaintiff's own negligence caused the fire or that plaintiff was a joint tort-feasor with defendant in causing it, that the fire resulted in damage to the properties of third persons, and had the insurance companies which had paid the losses of such third persons joined as parties defendant. Defendant set up a cross-action against plaintiff for contribution or for indemnity under its contract with plaintiff for any amount which such insurance companies might recover against defendant on their subrogated claims. *Held:* The mere fact that all of the claims arose out of the same catastrophe is insufficient, and the cross-action does not arise out of the subject of the cause of action set out in the complaint and is not necessary to a complete and final determination of that cause, and therefore the cross-action should have been stricken upon plaintiff's motion as irrelevant and prejudicial.

APPEAL by C. J. Fleming, Plaintiff, and Sentinel Fire Insurance Company, Capital Fire Insurance Company, Citizens Insurance Company of New Jersey, Continental Insurance Company, The Home Insurance Company, American National Fire Insurance Company, The Alliance Insurance Company, St. Paul Fire and Marine Insurance Company, The Northern Assurance Company, Limited, Sun Insurance Office, Ltd., East & West Insurance Company of New Haven, Aetna Insurance Company, Firemen's Insurance Company, The North River Insurance Company, United States Fire Insurance Company, The Automobile Insurance Company of Hartford, Connecticut, Rochester American Insurance Company, British America Assurance Company, The London and Lancashire Insurance Company, Ltd., Westchester Fire Insurance Company and National Union Fire Insurance Company, from *Williams, J.*, June Term, 1948, VANCE Superior Court.

The plaintiff brought this action to recover damages for the destruction by fire of a tobacco warehouse building and equipment in Henderson, North Carolina, of which he was in large part owner, allegedly caused by the negligence of the defendant in its manner and method of supply-

ing electric current to the warehouse and defects in its equipment and devices used in passing the current to the point of delivery and its failure to use reasonable precautions in connection with the fire. The specifications of the negligent acts or omissions are not relevant to the appeal; but it has been thought germane that the contract under which the Power Company furnished current to the plaintiff provides that the Company merely undertook to carry the current to a point of delivery on the outside of the wall of the warehouse, where, it is alleged, the plaintiff received it and transmitted it through the warehouse on devices entirely installed, inspected, and controlled by him, and over which the Power Company had no control, and with respect to which it had no duty; and the defendant alleges it was without fault in causing the fire, which it avers in a "first further defense," came about through the fault of the plaintiff, in the manner specified in the answer. In a second further defense it is alleged that plaintiff agreed that "consumer (C. J. Fleming) shall indemnify, save harmless, and defend Company (Carolina Power & Light Company) against all liability, claims, judgments, costs and expenses for injury, loss or damage to persons or property on account of defective construction, wiring, or appliances on consumer's (C. J. Fleming's) side of point of delivery."

The second prayer for relief made by the defendant Company is addressed to this defense and is as follows:

> "That if a recovery is allowed against it for any amount, or amounts, that it have and recover judgment over against C. J. Fleming
>
> (a) under his liability under the indemnity agreement alleged and/or under his primary liability as a joint tort-feasor for the full amount or amounts so recovered of this defendant, with its costs and expenses incurred in conducting its defense, or if not entitled to such recovery, then
>
> (b) for full contribution under his liability as a joint tort-feasor under the provisions of G.S. 1-240."

Defendant further alleges in a cross-action that the fire which destroyed the warehouse destroyed also various items of property belonging to other persons and concerns covered by policies issued by several fire insurance companies named in the answer; that the plaintiff and the owners of the property so destroyed were insured against loss by the several fire insurance companies named in the answer and that they were fully compensated by the payments so made. The answer, through an appended exhibit, lists the names of said insurance companies, together with the amounts paid by each.

It is alleged in the "cross-action" that the insurance companies by reason of payments so made claim to be subrogated to the rights of the assureds to prosecute an action against wrongdoers claimed to be negligent in causing the fire, including the answering defendant; and that they have agreed amongst themselves to undertake to recover from the defendant the sums claimed to have been paid by them respectively, have pooled their interests, and have jointly employed "the attorneys of record in this action" to take action in the premises, including institution and prosecution of this action.

It is alleged that in the pursuit of this common enterprise to recoup their losses one of the attorneys wrote a letter to the various companies who had paid losses, as set forth in the answer, making a combined demand on the defendant Power Company, as negligent *causa* of the fire, for payment to said insurance companies, respectively, the amounts so disbursed.

Defendant, further amplifying its cross-action, alleges that the present action is brought and prosecuted in conformity with the agreement above set out as a test suit for the benefit of the named insurance companies and other companies like situated to cast the liability for the fire upon the defendant Company by court action and rely on the judgment so obtained as *res judicata,* foreclosing defenses against said insurers, or coercing defendant into compromise settlements in order to avoid the harassment and expense of defending "a multiplicity of actions."

The defendant, reiterating its denial of negligence and liability, points out "that if a recovery is allowed in this action or any other action or actions instituted or prosecuted by insurance companies in respect to their claims, the defendant Company is entitled to recover of the plaintiff Fleming, by virtue of the indemnity clause in the contract, the amount of such recovery, or recoveries, with cost and expenses of defending the present or any other relevant action. And the answer further avers that any cause of action the insurance companies may have, or any liability they may assert "arises out of facts and circumstances which are identical with those involved in this action." And, further, "That this is an action of an equitable nature instituted and prosecuted for the joint use and benefit of the said insurers of C. J. Fleming as the real parties in interest, and also for the joint use and ultimate benefit of the other said insurers mentioned in 'Exhibit A,' as hereinbefore alleged." And, ". . . That it is proper, convenient, equitable, and just that all of said claims and the alleged liability of this defendant thereon, as well as the liability of C. J. Fleming to this defendant in respect thereto, should be examined in this action and full relief be given to all of the parties in one comprehensive decree as may be necessary to properly determine and adjudicate

the respective rights and liabilities of the parties growing out of said alleged fire . . ."

On the facts, defendant alleges that the named insurance companies are "real parties in interest in this action and are, therefore, necessary and proper parties," and moves to have them brought in to assert their claims, if any they have, against this defendant or be forever barred;" in order that the rights of the said insurance companies, the plaintiff Fleming, and this defendant may be determined and finally adjudged.

The motion lists the names of insurance companies sought to be made parties, including those above set out in the record as defendants.

Upon this representation defendant Power Company's motion to make parties was allowed and summons issued against them bringing them into court as parties defendant.

Thereafter the plaintiff Fleming filed a demurrer to defendant's second "further answer and defense," relating to the alleged indemnity agreement above quoted, on the ground that it does not state a cause of action; filed a motion to strike the entire "cross-action" against Fleming from the answer, and also the second numbered prayer for relief based on the indemnity feature in the contract with defendant, above mentioned. Each of the 21 insurance companies brought in under motion of the defendant Power Company moved to have its name stricken from the answer on the ground that it is not a necessary party to the action, and has been improperly joined as party defendant.

At the June Term, 1948, of Vance Superior Court, the demurrer and motions were heard by Judge Williams, who entered orders overruling plaintiff's motion to strike, and denying the motions of the insurance companies to strike their respective names from the answer of the defendants.

The plaintiff and the insurance companies duly excepted and appealed.

Gholson & Gholson and Murray Allen for plaintiff, appellant.

Murray Allen for Insurance Companies, appellants.

A. A. Bunn, Perry & Kittrell, Kittrell & Kittrell, and A. Y. Arledge for defendant, appellee.

SEAWELL, J. Our attention is first directed to the motion of the plaintiff to strike from the answer the defendant's second further defense relating to the indemnity clause in the contract with the plaintiff, reading as follows:

> "Consumer (C. J. Fleming) shall indemnify, save harmless, and defend Company (Carolina Power & Light Company) against all liability, claims or judgments, costs, and expenses for injury, loss, or damage to persons or property on account of defective construction,

wiring or appliances on consumer's (C. J. Fleming's) side of point of delivery."

The plaintiff interposed his motion to strike in apt time to insist upon the relief as a matter of right, if entitled to it. *Parrish v. R. R.*, 221 N. C. 292, 20 S. E. (2) 299; *Duke v. Children's Comm.*, 214 N. C. 570, 199 S. E. 918; *Trust Co. v. Dunlop*, 214 N. C. 196, 198, 198 S. E. 645; *Pemberton v. Greensboro*, 203 N. C. 514, 166 S. E. 396.

It appears from the pleadings that plaintiff was not sole owner of the warehouse destroyed by the fire, and not the only person or concern damaged thereby. The possibility that others might be damaged by the negligence of the consumer, to whom current was furnished to a point of delivery outside the establishment, and passed through the equipment and devices of the consumer, and thus involve the Power Company in litigation with a third person as joint tort-feasor with Fleming, is the only apparent reason for the insertion of this clause; and certainly only in the event that such a situation has arisen could it be seriously considered. It is unnecessary and ill adjusted as a defense against self-inflicted injury on the part of defendant and would be ineffective as a device by which the Power Company sought to avoid liability for its own negligence in a suit, *inter partes*. None of the owners of property injured or destroyed by the fire except the plaintiff Fleming is involved in the suit; and in Fleming the defendant Power Company has the only suggested person whom it would implead as joint tort-feasor. G.S. 1-240, relating to contribution to joint tort-feasors, is clearly inapplicable to defendant's contention. In so far as it might apply to the parties litigant, the statute goes no further than to authorize bringing in all joint tort-feasors when the claim is asserted by a third party, and certainly does not apply to the persons apprehended to have been injured by the joint tort, G.S. 1-240, and cases annotated. *Lumbermen's Mutual Casualty Co. v. United States Fidelity, etc., Co.*, 211 N. C. 13, 188 S. E. 634.

The further defense does not seem to be relevant to any matter presently issuable in the controversy between Fleming and the Power Company, or between these original parties and the parties brought in under the motion in defendant's cross-action, and it should have been stricken out. The judgment to the contrary is reversed. (See discussion of the "cross-action," *infra*.)

The second prayer for relief based on the irrelevant defense must follow its fate.

The matters alleged by the defense as a "cross-action" do not assert or constitute any cause of action pleadable in the case, except as bearing on the matter of contribution and, therefore, would be relevant only against a joint tort-feasor when brought in. There has been no attempt

to bring in any joint tort-feasor, and under the facts pleaded in the answer there could be none save Fleming, who is already a party. The answering defendant has not asserted any cause of action against the additional parties or made any demand concerning them except that they be made parties and required to assert their claims. In defendant's pleading they are classified as parties subrogated to the rights of the supposed claimants and, therefore, actors against whom the Power Company proposes to defend.

We have adverted, *supra,* to the inapplicability of the statute, G.S. 1-240, upon which the defendant bases the propriety and validity of the challenged order. We add that this statute neither directly nor by implication authorizes the bringing in of persons who are apprehended to have been damaged or injured, at the convenience of the tort-feasor in determining the right to contribution in one trial.

The statute creates a new right—contribution between tort-feasors,—and authorizes the bringing in of a joint tort-feasor only when the defendant has been sued with respect to the tort, then only on proper allegations of fact; or a recovery over after judgment under the provisions of the statute. *Mangum v. So. Ry. Co.,* 210 N. C. 134, 185 S. E. 644; *Lackey v. So. Ry. Co.,* 219 N. C. 195, 13 S. E. (2) 234.

The gravamen of the motion lies in the additional argument that all the adverse parties in interest have pooled their demands and entered into a combination to fix the liability on it in a test suit,—in a sort of squeeze play,—intending, if successful, that the judgment in this action shall be thereafter pleaded as *res judicata.* By virtue of this combination it is argued, the defendant is threatened with the harassment of a multiplicity of suits involving the same liability; and it is urged that because of the involvement of the principle of subrogation the action is of an equitable nature and that it is within the power and is the duty of the Court, in the exercise of its equitable jurisdiction, to protect the rights of the defendant and relieve it from the embarrassment of a multiplicity of actions by requiring that all the matters be heard in a single action.

Frankly speaking, the Court is not aware of any rule of practice or procedure by which sleeping claims of this nature can be forced into the open and the persons and concerns to whom they appertain compelled to assert them for the convenience of a defendant, *quia timet.* "There is no process known to the law by which one man can compel another to sue him." 39 Am. Jur., Parties, sec. 93.

Whether legal or equitable, the joinder of causes of action and the parties to whom they belong must come within the provisions of our Code of Civil Procedure, G.S. 1-123, *et seq.,* G.S. 1-68, 1-69, *et seq.* (see cases annotated), unless by some special modifying statute or recognized rule of practice an exception is created. There is no such exception here.

It is true the Court may, *ex mero motu,* and in its discretion, "consolidate for trial separate actions by different plaintiffs against common defendants for damages arising out of the same accident except when such consolidation would be injurious or prejudicial to one or more of the parties." *Peeples v. R. R., Edwards v. R. R., Kearney v. R. R.,* 228 N. C. 590, 592, 46 S. E. (2) 649. That rule, however, does not go to force claimants to institute actions for the purpose of having them so consolidated; and in the absence of statutory authority cannot be so enlarged. The analogy suggested cannot be extended to establish or buttress the rule of practice suggested. *Osborne v. Canton* and *Kinsland v. Mackey,* 219 N. C. 139, 13 S. E. (2) 265.

It is not enough that the causes of action may have arisen from the same source,—in this instance the fire alleged to have been created by the answering defendant. The test of the matter lies in the nature of the particular cause of action and its relation to others sought to be joined. In the case at bar it is clear from the record that the damage and loss of property caused by the fire was, in each instance, an invasion of a personal and individual right in which none of the owners or subrogated parties shared, or have an interest; each is insulated from the other, personal, independent and unrelated. In other words, there is an entire lack of a community of interest in the subject matter of the pending suit and, therefore, the parties brought in under this compulsory order are neither proper nor necessary parties to the complete termination of the controversy. *Brown v. Coble,* 76 N. C. 391; *Logan v. Wallis,* 76 N. C. 416; *Street v. Tuck,* 84 N. C. 605; *Burns v. Williams,* 88 N. C. 159. In *Coulter v. Wilson,* 171 N. C. 537, 540, 88 S. E. 857, *Justice Hoke* quotes with approval 31 Cyc. 224, as follows: "A cross-action by a defendant against a codefendant or third party must be in reference to the claim made by plaintiff, and based upon an adjustment of that claim. Independent and irrelevant causes of action cannot be litigated by cross-actions." *Montgomery v. Blades,* 217 N. C. 654, 9 S. E. (2) 397; *Wingler v. Miller,* 221 N. C. 137, 19 S. E. (2) 247. "Questions in dispute among the defendants may not be litigated by cross-action unless they arise out of the subject of the action as set out in the complaint and have such relation to the plaintiff's claim as that their adjustment is necessary to a full and final determination of the cause." *Hulbert v. Douglas,* 94 N. C. 128; *Montgomery v. Blades, supra; Wingler v. Miller, supra; Beam v. Wright,* 222 N. C. 174, 22 S. E. (2) 270.

In *Schnepp v. Richardson,* 222 N. C. 228, 22 S. E. (2d) 555, it is said: "The cross-action defendants seek to set up against Fisher is not germane to, founded upon or necessarily connected with the subject matter in litigation between plaintiff and defendants. Decision on the issues thus attempted to be raised is not essential to a full and complete determina-

tion of the cause of action alleged by plaintiff. It should not be engrafted upon his action and thus compel him to stand by while defendants and Fisher litigate their differences in his suit. *Montgomery v. Blades, supra; Wingler v. Miller, supra; Burleson v. Burleson,* 217 N. C. 336, 7 S. E. (2) 706; *Beam v. Wright, supra.*" And, again, "The cross-action by defendant against a codefendant or a third party permitted under our practice must be in reference to the claim made by the plaintiff and based upon an adjustment of that claim;" citing *Coulter v. Wilson, supra; Montgomery v. Blades, supra; Wingler v. Miller, supra; Hulbert v. Douglas, supra.*

We refrain from extending the list of authorities. It is apparent that if the principle contended for by the appellee could prevail the gates would be opened and the courts inundated by a flood of unrelated cases, upon the insufficient ground of their origin in a common tort or disaster, —never significant when standing alone.

"Two or more persons injured by the same wrongful act must sue separately since each injury has a separate cause of action." McIntosh, N. C. Practice and Procedure, sec. 213, p. 13; *Harper v. Pinkston,* 112 N. C. 293, 17 S. E. 161; *Eller v. Carolina & N. W. R. R.,* 140 N. C. 140, 52 S. E. 305.

In *Insurance Co. v. Motor Lines,* 225 N. C. 588, 590, 35 S. E. (2) 879, *Mr. Justice Barnhill* says for the Court, "When property upon which there is insurance is damaged or destroyed by the negligent action of another, the right of action accruing to the injured party is for an indivisible wrong—and a single wrong gives rise to a single indivisible cause of action. *Powell v. Water Co.,* 171 N. C. 290, 88 S. E. 426; 1 Am. Jur. 493. The whole claim must be adjudicated in one action."

It may be noted that in the present action it does not appear that the plaintiff has been paid for his loss by any insurance company or has any such company been subrogated to his rights.

The remedy of a person brought into the suit upon a compulsory order is to have his name stricken out; *Winders v. Southerland,* 174 N. C. 235, 93 S. E. 726; *Worth v. Trust Co.,* 152 N. C. 242, 67 S. E. 590; *Bank v. Gahagan,* 210 N. C. 464, 187 S. E. 580.

Under the authorities cited it is the opinion of this Court that the additional parties brought in under the motion of the answering defendant should be stricken from the record, and it is so ordered.

There remains the question of striking out in its entirety the so-called cross-action of the answering defendant. Regarded as the basis for the motion to make additional parties, it has served its purpose of having that motion considered successfully in the court below and again dealt with on this appeal. From the conclusion reached on review the matter set up in the cross-action is not relevant to any issue which might be

raised by the original plea; and while the irrelevancy alone is a sufficient cause for striking, without the necessity of apparent prejudice, we think the allegations are not free from objection in the latter respect. The cross-action should have been stricken out, and it is so ordered.

Summarizing our conclusions: The second further defense is stricken from the record together with the prayers for relief relating thereto and to the cross-action. The order making the named insurance companies new parties is disapproved and reversed; and they are stricken from the record as parties to the case.

The cause is remanded to Vance Superior Court for judgment in accordance with this opinion.

Reversed.

AARON R. BROWN AND WIFE, CARRIE L. BROWN, v. WILL A. MOORE, SAM RASBERRY, JAMES H. LOCUST, NORMAL BATTLE, JOHN KORNEGAY, JESSE KORNEGAY, JAMES KIRKMAN, AND JOHN LEWIS EXUM, TRUSTEES OF ZION CHURCH, AFRICAN METHODIST EPISCOPAL ZION CHURCH IN AMERICA, OF CONTENTNEA TOWNSHIP, LENOIR COUNTY.

(Filed 3 November, 1948.)

1. Arbitration and Award § 1a—

The common law governs a written agreement for arbitration which is not in accordance with the procedure prescribed by the Uniform Arbitration Act. G.S. 1-544, *et seq.*

2. Arbitration and Award § 3—

An arbitration agreement under the common law may be revoked by any party thereto at any time before the award is rendered.

3. Same: Pleadings § 28—

Where in an action to cancel an award under a common law arbitration, the complaint alleges that plaintiffs withdrew from the arbitration after notice before the award was made, defendants cannot be entitled to judgment on the pleadings.

APPEAL by plaintiff from *Burney, J.*, at June Term, 1948, of LENOIR.

Civil action for cancellation of an award of arbitrators on ground that plaintiffs withdrew from the arbitration agreement before the award was made,—heard upon motion of defendants for judgment on the pleading.

Plaintiffs allege in their complaint, and defendants admit in their answer these facts:

I. That plaintiffs own a certain specifically described parcel of land situate in Contentnea Neck Township, Lenoir County, North Carolina, and defendants, as Trustees of Zion Church, African Methodist Episcopal Zion Church in America, hold title, for the use and benefit of said church, to another specifically described parcel of land in said township and county,—the two parcels of land adjoining each other.

II. That a dispute, having arisen between plaintiffs and defendants as to the true dividing line between their said respective parcels of land, plaintiffs, as parties of the first part, and defendants, as parties of the second part, entered into a written agreement, dated 23 May, 1946, by the terms of which they mutually agreed, briefly stated: (1) To submit to certain named arbitrators for settlement the location of the true dividing line,—the finding of the arbitrators, or of a majority of them "of said boundary line and the marking of the same" to "be forever binding upon the parties of the first part, their heirs and assigns, and upon the parties of the second part, their successors and assigns"—they "to be forever estopped from questioning same"; (2) that the arbitrators shall have full right and power (a) to fix the date for any hearing they may desire to have on the question of locating the true boundary line, and (b) to subpoena and swear witnesses; (3) that the arbitrators appoint a certain named surveyor to assist them in the locating, establishing and marking of the true boundary line as found by them, and who shall make a map thereof, which shall be duly recorded in the office of the register of deeds of Lenoir County, and as effective in fixing the said boundary line as if deeds were actually executed by the respective parties; (4) that the report of the arbitrators, fixing the true boundary line as aforesaid, shall be made and delivered to clerk of Superior Court of Lenoir County, and by him certified for registration in the office of the register of deeds of Lenoir County; (5) that the agreement and the report be so registered; and (6) that the cost be apportioned between the parties as specified.

III. That upon the conclusion of a hearing before the arbitrators on 20 September, 1946, it was agreed by all parties that final determination of the matter would be deferred until further investigation of the records of Lenoir County could be made by the surveyor,—after which the arbitrators would meet again; and that thereafter the arbitrators met on Monday night, 20 October, 1947, together with counsel of the respective parties, and received the report of the surveyor.

However, the allegations of the complaint and averments of the answer, as to what transpired from this point are not in complete accord.

Plaintiffs alleged (1) that the arbitrators made no award at the conclusion of the hearing on 20 October, 1947, but advised the parties and their counsel that they would render an award on Friday, 24 October, 1947; (2) that before any award was made by the arbitrators plaintiffs

caused notice of their withdrawal from the arbitration to be served upon the arbitrators, and upon the defendants Trustees on 23 October, 1947, and upon their attorney on 24 October, 1947, by the terms of which plaintiffs withdrew from the said arbitration agreement, and the arbitration thereunder, and gave notice of their refusal to be bound by any award thereafter to be made by the arbitrators appointed under said agreement, etc., (3) that notwithstanding said notices, the arbitrators, after 23 October, 1947, wrongfully and without authority in law signed a so-called award and attached thereto a map made by the surveyor, aforesaid, purporting to show the dividing line between the lands of plaintiffs and lands of defendants, and thereafter defendants wrongfully and without authority in law caused said so-called and alleged award, with a copy of said map attached, and the said agreement, to be filed in office of clerk of Superior Court of Lenoir County, and same now appears of record in office of said clerk in a certain book of "Dowers, Divisions, and Provisions," and said clerk has called upon plaintiffs to pay one-half the cost incident to the filing and recording said papers, and (4) that said alleged award, by reason of plaintiffs' withdrawal from the arbitration prior to the rendition thereof, is null and void, and the record thereof as aforesaid constitutes a cloud upon plaintiffs' title which they are entitled to have removed, and declared null and void, and canceled of record. Accordingly, plaintiffs pray judgment.

On the other hand, defendants aver that at the meeting on Monday, 20 October, 1947, after hearing the matter at considerable length, the arbitrators advised counsel for both sides that they would go into executive session and determine their findings and that they would thereafter have map of their findings and award made by the surveyor; that thereupon on said date the arbitrators did go into executive session and after due and full consideration of the matter, and on said date, and prior to any attempt on the part of plaintiffs to withdraw from said arbitration agreement, did make, find and declare what constitutes the true dividing line between lands of plaintiffs and lands of defendants as specifically set forth in accordance with the terms of the agreement, and had map thereof made, which, together with the report of arbitrators, was filed in office of clerk of Superior Court of Lenoir County, and appears of record in designated book and page of "Dowers, Divisions and Provisions," and was certified by the clerk of Superior Court, etc., and that plaintiffs are bound by the terms of said award, and have no right, either in law or equity, to change the same.

When this cause came on for hearing in Superior Court, motion of defendants for judgment on the pleading was allowed, and judgment approving and confirming the report of arbitrators, and taxing plaintiffs

with half the cost of the arbitration, and the cost of this action, was entered.

Plaintiffs appeal therefrom to Supreme Court and assign error.

Albion Dunn for plaintiffs, appellants.

F. E. Wallace for defendants, appellees.

WINBORNE, J. Appellants in challenging the action of the trial court in rendering judgment on the pleadings in favor of defendants, make these valid contentions which are determinative of this appeal: First, that the arbitration agreement here involved is in accordance with procedure at common law and not with that prescribed in the Uniform Arbitration Act, G.S. 1-544, *et seq., Andrews v. Jordan,* 205 N. C. 618, 172 S. E. 319; *Copney v. Parks,* 212 N. C. 217, 193 S. E. 21; and that, hence, the motion for judgment on the pleadings must be considered in the light of the common law. Secondly, that at common law a submission to arbitration might be revoked by any party thereto at any time before the award was rendered, and that "the revocation to be effective must be express unless there is a revocation by implication of law, and in case of express revocation, in order to make it complete, notice must be given to the arbitrators," and that "it is ineffective until this has been done." See *Williams v. Mfg. Co.,* 153 N. C. 7, 69 S. E. 902, and *Tarpley v. Arnold,* 226 N. C. 679, 40 S. E. (2) 33. And, thirdly, that in the light of the first and second contentions, the pleadings raise an issue or issues of fact as to whether plaintiffs have brought themselves within the principles above enunciated in respect to revocation of an arbitration.

For reasons stated, there is error in the judgment below.

Error and remanded.

LENA TEACHEY BARNES v. SECURITY LIFE & TRUST COMPANY, A CORPORATION.

(Filed 3 November, 1948.)

1. Insurance § 37—

Where plaintiff beneficiary establishes a *prima facie* case in an action on a policy of life insurance, insurer's evidence that the indebtedness for money borrowed by insured equalled or exceeded the cash surrender value of the policy and that it had exercised the right to cancel the policy, vested in it by the terms of the loan agreement, and had so notified insured, relates to matters in defense upon which insurer has the burden of proof.

2. Same: Trial § 24a—

Nonsuit is never permissible in favor of the party having the burden of proof upon evidence offered by him, since such adjudication involves the credibility of his witnesses, which is a matter for the jury.

APPEAL by plaintiff from *Burney, J.*, March Term, 1948, DUPLIN.

Civil action by beneficiary to recover on a life insurance policy.

On 15 February 1921, defendant issued its policy on the life of Octave Harris Barnes. Subsequent thereto, plaintiff was named as beneficiary.

On 7 May 1936 the defendant, on application of the insured, changed the policy to a paid-up participating policy of $5,000. At that time there was an indebtedness against the policy for money loaned the insured. The insured later executed a note for accrued interest. At the time the policy was converted, its benefit value was in excess of $5,000. The cash surrender value of this excess was applied as a credit on the indebtedness.

The policy loan agreement executed by the insured provides in part that whenever the total indebtedness against the policy, including accrued interest, shall equal the cash surrender value of the policy, the company, at its option, may cancel said policy and its accumulations "in which case the said policy contract shall immediately become and be void and of no effect unless and until reinstatement in accordance with the rules of the company."

On 10 July 1936 the defendant, acting under this provision, wrote the insured "that the indebtedness against the above policy equals the cash surrender value thereof and that the policy is now out of force." It offered to aid the insured in having the policy reinstated, but nothing further was heard from him.

On 8 August 1947, the insured died and on 17 November 1947 the beneficiary instituted this action to recover the amount alleged to be due on the policy. The defendant admitted the issuance of the policy, its conversion into a paid-up policy, and the death of the insured, and pleaded the special facts above cited in defense. When the cause came on to be heard, the court, at the conclusion of all the evidence, entered a judgment of nonsuit. Plaintiff excepted and appealed.

Oscar B. Turner for plaintiff appellant.

Womble, Carlyle, Martin & Sandridge for defendant appellee.

BARNHILL, J. The plaintiff offered evidence sufficient to constitute a *prima facie* case for the jury. Thereupon the defendant offered evidence tending to show that the indebtedness against the policy equaled or exceeded the cash surrender value and that it had exercised the right to cancel the policy, vested in it by the terms of the loan agreement, and

had so notified the insured. But these are matters in defense. As to them the burden of proof rests upon the defendant.

A judgment of nonsuit is never permissible in favor of the party having the burden of proof upon evidence offered by him. *Hedgecock v. Insurance Co.*, 212 N. C. 638, 194 S. E. 86. "The burden of proof being on the defendant to prove its defense the court could not adjudge that an affirmative defense is proven, for that involves the credibility of the witnesses, which is a matter for the jury." *Wharton v. Ins. Co.*, 178 N. C. 135, 100 S. E. 266; *Hedgecock v. Insurance Co., supra; MacClure v. Casualty Co., ante,* p. 305.

It follows that the judgment of nonsuit must be held for error

Reversed.

H. P. BRANDIS ET AL. v. HARRY MCMULLAN, ATTORNEY-GENERAL.

(Filed 3 November, 1948.)

1. Charities § 2—

Judgment approving an exchange by the trustees of a church of land held by it in fee simple for land of equal value held by it under a trust, upon the court's finding that all interested parties had duly assented to the exchange, and that the exchange was advantageous to all the parties, is affirmed.

2. Same—

An exchange by a church of properties owned by it out of and into a charitable trust upon condition that the church continue to use the present church building and facilities rent free until a new church building could be erected will not be held invalid for indefiniteness or as subject to unlimited postponement.

ERVIN, J., took no part in the consideration or decision of this case.

APPEAL by defendant, guardian *ad litem,* from *Pless, J.,* May Term, 1948, of ROWAN.

Proceeding to obtain approval of exchange of real estate out of and into charitable trust.

Under the Will of Maxwell Chambers, who died in 1855, four lots in what is now known as the Parsonage Square 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 a parsonage," etc. Other lots in an adjacent square, now known as the Church Square, are devised to the same devisees for the use of said church, "reserving and withholding from them the right of selling the same or any part of them," and upon condition stated the lots in both squares are to "pass over and be-

come invested in the Trustees of Davidson College" in trust and on condition stated.

There are other lots in the Church Square which the First Presbyterian Church of Salisbury owns in fee simple, having acquired them from sources other than the Will of Maxwell Chambers. These lots owned in fee simple and the lots in the Church Square acquired under the Will of Maxwell Chambers constitute the entire square.

It is proposed to exchange the fee-simple lots in the Church Square for a portion of the Parsonage Square of equal value so as to bring the whole of the Church Square under the terms of the trust set up in the Will of Maxwell Chambers, "upon condition that the Church may continue to use the present Church Building and facilities rent free until a new church building can be erected on the Parsonage Square."

The trial court found that all interested parties had duly assented to the exchange; that the proposed exchange was advantageous to all parties, and approved the same.

From this adjudication, John C. Kesler, Guardian *Ad Litem,* excepted and appeals.

Craige & Craige for Elders and Trustees of First Presbyterian Church of Salisbury, plaintiffs, appellees.

Neal Y. Pharr for Trustees of Davidson College, plaintiffs, appellees.

John C. Kesler, Guardian Ad Litem, defendant, appellant.

STACY, C. J. It will be observed that the portion of the Parsonage Square which the Trustees of the Maxwell Chambers Trust propose to exchange is not under the inhibition from sale or alienation as are the lots in the Church Square devised to the same devisees. *Brandis v. Trustees of Davidson College,* 227 N. C. 329, 41 S. E. (2) 833. Thus, on this record, and the determinations of the trial court the judgment approving the exchange will be sustained.

The suggestion of the guardian *ad litem* that the condition attached, "the church may continue to use the present Church Building and facilities rent free until a new church building can be erected on the Parsonage Square" is too indefinite and subject to unlimited postponement, was considered by the trial court and held to be insufficient to thwart the proposed exchange. We approve. *Reynolds Foundation v. Trustees of Wake Forest College* (Exception No. 6), 227 N. C. 500, 42 S. E. (2) 910.

The judgment will be upheld.

Affirmed.

ERVIN, J., took no part in the consideration or decision of this case.

STATE v. LUCILLE HARRIS.

(Filed 3 November, 1948.)

1. Vagrancy § 2—

A warrant charging defendant with living in the county without visible means of support and without working, is insufficient to charge defendant with vagrancy. G.S. 14-336.

2. Criminal Law § 56—

Where the warrant upon which defendant is tried fails to charge a crime, defendant's motion in arrest of judgment will be allowed.

APPEAL by defendant from *Stevens, J.*, and a jury, at August Term, 1948, of the Superior Court of LENOIR County.

This case reached the Superior Court on the appeal of the defendant from the Municipal-County Recorder's Court of the City of Kinston and County of Lenoir. Trial *de novo* was had in the Superior Court on the original warrant which was issued upon a complaint alleging that the accused "lives and resides in Lenoir County without any visible means of support and without working, thereby being a vagrant . . . contrary to . . . law and against the peace and dignity of the State of North Carolina." The jury found the defendant "guilty of vagrancy as charged in the warrant," and the defendant appealed to this Court from the judgment entered upon the verdict.

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

J. Frank Wooten for defendant, appellant.

ERVIN, J. The defendant moved in arrest of judgment in this Court on the ground that the warrant fails to charge the commission of a crime. Rules of Practice in the Supreme Court, Rule 21, 221 N. C. 558; *S. v. Jones,* 218 N. C. 734, 12 S. E. (2) 292; *S. v. Ballangee,* 191 N. C. 700, 132 S. E. 795; *S. v. Marsh,* 132 N. C. 1000, 43 S. E. 828, 67 L. R. A. 179.

It is evident that the draftsman of the criminal pleading under review undertook to charge that the accused is a vagrant within the purview of G.S. 14-336. He did not, however, accomplish his purpose because the averments of the complaint do not bring the defendant within any of the seven classes of persons described in the statute. Thus, the warrant is fatally defective in substance in that it fails to charge a crime. This being true, the motion in arrest of judgment must be sustained. *S. v. Morgan,* 226 N. C. 414, 38 S. E. (2) 166; *S. v. Johnson,* 226 N. C. 266, 37 S. E. (2) 678; *S. v. Vanderlip,* 225 N. C. 610, 35 S. E. (2) 885;

S. v. Jones, supra; S. v. Freeman, 216 N. C. 161, 4 S. E. (2) 316; *S. v. Callett,* 211 N. C. 563, 191 S. E. 27.

Judgment arrested.

PENN VESTAL v. CHARLES R. WHITE.

(Filed 3 November, 1948.)

1. Pleadings § 10—

Alleged false arrest sequent to an automobile collision is improperly joined by defendant as a cross-action in plaintiff's action to recover damages sustained as a result of the collision.

2. Pleadings § 31—

The granting of plaintiff's motion to strike a cross-action not properly pleadable in the action is without error, since the allegations of such cross-action are irrelevant and immaterial to plaintiff's cause.

APPEAL by defendant from *Coggin, Special Judge,* March Term, 1948, RANDOLPH. Affirmed.

Civil action to recover compensation for damage to the property and injury to the person of plaintiff resulting from the collision of two automobiles, heard on demurrer and motion to strike the cross-action pleaded in defendant's answer.

On 1 September 1947, an automobile owned and operated by plaintiff and an automobile owned and operated by defendant collided on Highway 64 near Asheboro. Plaintiff was injured and his automobile was damaged. He instituted this action to recover compensation, alleging that the collision was proximately caused by the negligence of the defendant.

The defendant filed answer in which he denies the material allegations in the complaint and sets up and pleads a cross-action for damages for false arrest by one Willard Vestal subsequent to the automobile collision. He alleges that Willard Vestal is a partner of plaintiff, that the automobile operated by plaintiff was the property of the partnership, and that, at the time of the alleged false arrest, Willard Vestal was acting for and in behalf of plaintiff. Willard Vestal has not been made a party to the action.

Plaintiff appeared and demurred to said cross-action for misjoinder of parties and causes of action and likewise moved to strike the same. The court below entered judgment sustaining the demurrer and striking said cross-action. Defendant excepted and appealed.

Miller & Moser for plaintiff appellee.

Ottway Burton for defendant appellant.

BARNHILL, J. The judgment of the court below sustaining the demurrer must be affirmed on authority of *Hancammon v. Carr, ante,* 52. What is there said is controlling here.

As the cross-action is not properly pleadable in this action, the allegations therein contained are irrelevant and immaterial. Hence there was no error in the judgment striking same.

Affirmed.

STATE v. MACK WILLIAMS.

(Filed 3 November, 1948.)

Criminal Law § 21—

In a prosecution for hit and run driving, the trial court properly refuses to submit an issue of former acquittal based upon a prior prosecution for involuntary manslaughter arising out of the same collision, since the offenses are different, both in law and in fact, and therefore the plea of former jeopardy is inapposite as a matter of law.

APPEAL by defendant from *Burney, J.,* April Term, 1948, of LENOIR.

Criminal prosecution on indictment charging the defendant with "hit-and-run-driving" resulting in death of Lee Graves in violation of G.S. 20-166.

The accident in which the deceased was killed occurred about 4 o'clock in the afternoon of 19 December, 1946, on Highway No. 258, three miles north of Kinston. The deceased was driving a 1942 Pontiac; the defendant a 1939 Oldsmobile. The Oldsmobile was driven into the side of the Pontiac, causing injury and death. On the night of the following day the defendant was apprehended and charged with involuntary manslaughter. He was acquitted of this charge at the September Term, 1947, Lenoir Superior Court.

Thereafter, at the October Term, 1947, Lenoir Superior Court, the present bill was returned by the grand jury in which the defendant is charged with willfully and feloniously leaving the scene of the accident without rendering assistance or disclosing his identity in violation of the "hit-and-run" statute.

When the case was called for trial, and after the jury had been selected and impaneled, the defendant entered a plea of former jeopardy or former acquittal and tendered issue to that effect for determination before entering upon the prosecution.

After hearing the defendant's evidence the court held as a matter of law that his plea of former acquittal was not good and declined to submit

the issue to the jury. To this ruling the defendant preserved exception, and assigns same as error.

Verdict: Guilty as charged.

Judgment: Imprisonment in the State's Prison for not less than 2½ nor more than 3½ years.

Defendant appeals, assigning errors.

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

W. A. Allen, Jr., and Allen & Allen for defendant.

STACY, C. J. The principal question for decision is whether the court was justified in declining to submit the issue of former acquittal to the jury. The position of the trial court is supported by the apposite authorities. *S. v. Davis,* 223 N. C. 54, 25 S. E. (2) 164, and cases cited.

The plea of former jeopardy, to be good, must be grounded on the "same offense," both in law and in fact. *S. v. Hankins,* 136 N. C. 621, 48 S. E. 593; *S. v. Taylor,* 133 N. C. 755; 46 S. E. 5; *S. v. Nash,* 86 N. C. 650. Here, there is a difference, both in law and in fact, between the former charge of manslaughter and the present indictment. *S. v. Midgett,* 214 N. C. 107, 198 S. E. 613; *S. v. Malpass,* 189 N. C. 349, 127 S. E. 248. Hence, the trial court was justified in holding as a matter of law that the defendant's plea could not be sustained.

The cases of *S. v. Bell,* 205 N. C. 225, 171 S. E. 50, and *S. v. Clemmons,* 207 N. C. 276, 176 S. E. 760, and the principles they illustrate, are not applicable to the facts of the instant record.

As the trial was free from reversible error, the verdict and judgment will be upheld.

No error.

STATE v. JAMES (PETE) WEST.

(Filed 3 November, 1948.)

Criminal Law § 80b (5)—

Where defendant's exceptions are not brought forward and grouped as required by Rule of Practice in the Supreme Court, No. 19 (3), the appeal will be dismissed, but where defendant has been convicted of a capital crime this will be done only after an inspection of the record proper and the exceptions fails to disclose prejudicial error.

APPEAL by defendant from *Burney, J.,* at April Special Term, 1948, of DUPLIN.

Criminal prosecution tried upon indictment charging the defendant with the felonious slaying of one Walter Johnson.

The State's evidence tends to show that Walter Johnson, a man 64 years of age and small of stature, weighing about 120 pounds, was mortally wounded on the morning of 22 January, 1948, in his filling station located between Wallace and Harrell's Store, in Duplin County, N. C. His skull was crushed, his face cut and he died without regaining consciousness. The deceased, prior to his death had been suffering with rheumatism in his right arm, to such an extent that many of his customers who knew him, drew their own gasoline.

Several of the State's witnesses had seen the defendant at the filling station on the morning the deceased was killed. A posse was formed to apprehend the defendant, but he escaped capture and went to New York City, where he was arrested and held in the F.B.I. Detention Home.

The Sheriff of Duplin County and one of his deputies went to New York on 29 February, 1948, for the purpose of bringing the defendant to North Carolina for trial. Before leaving New York the defendant told these officers he struck the deceased with an axe and took his pocketbook from his person, which contained $145.00 or $146.00, but he said he struck the deceased in self-defense. He reiterated the statements made in his confession in the trial below, and testified he got into an argument with Mr. Johnson about a check he had given him and Mr. Johnson got mad and attacked him with an axe; that he took the axe from him and hit Mr. Johnson in self-defense; that when he went to the store he was drunk; that he bought several bottles of beer from the deceased and drank them; that he had not thought of robbing Mr. Johnson until after he hit him, then he decided to take his money

Verdict: Guilty of murder in the first degree. Judgment: Death by asphyxiation.

The defendant appeals, assigning error.

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

E. Walker Stevens for defendant.

PER CURIAM. The record before us contains 82 exceptions, none of which are brought forward and grouped as required by Rule 19 (3), Rules of Practice in the Supreme Court, 221 N. C. 554. The appeal would be dismissed without further consideration but for the fact the defendant is under a sentence of death.

In capital cases, it is the usual rule of this Court to examine the record to see if any error appears. *S. v. Watson,* 208 N. C. 70, 179 S. E. 455. We have carefully examined the record proper and find no error therein.

Neither is any prejudicial error shown by the exceptions. *S. v. Lampkin,* 227 N. C. 620, 44 S. E. (2) 30.

Judgment affirmed; appeal dismissed.

MRS. MARY F. McCULLEN v. MAURICE DURHAM AND HUSBAND, P. P. DURHAM; MRS. BERTHA McCULLEN, ADMINISTRATRIX OF O. L. McCULLEN; FREMONT OIL MILL, A CORPORATION; W. F. TAYLOR, H. J. CARR, AND THE STANDARD FERTILIZER COMPANY.

(Filed 10 November, 1948.)

1. Evidence § 39: Frauds, Statute of § 9: Trusts § 2a—

A grantor may not engraft a parol trust on his warranty deed absolute in form regardless of whether the consideration recited was actually paid or not.

2. Husband and Wife § 12c—

Certification by the officer taking the acknowledgment of the wife that the deed is not unreasonable or injurious to her is essential to the validity of her conveyance of her property to her husband, whether directly or by indirection by conveyance to a third person who reconveys to the husband. G.S. 52-12.

3. Same—

The fact that deed executed by husband and wife to a third person conveying her separate property failed to contain certificate that the deed is not unreasonable and injurious to her, and that such third person shortly thereafter reconveyed to the husband, is alone insufficient to invalidate the transaction, it being necessary that there be allegation and proof that the transaction was for the purpose of conveying the wife's land to the husband by indirection in order for G.S. 52-12 to apply and raise the issue as to the invalidity of the transaction on this ground.

4. Trial § 37—

Where it is not alleged that the conveyance of the wife's property by the husband and wife to a third person and the reconveyance by such third person to the husband was for the purpose of conveying her property to him by indirection, the question of the invalidity of the transaction because the notary taking the acknowledgment of the wife failed to certify that the deed was not unreasonable or injurious to her does not arise upon the pleadings, and it is error for the court to submit issues relating thereto to the jury. G.S. 1-198.

5. Trial § 29—

Where the wife offers no evidence that the conveyance of her property to a third person by deed executed by herself and husband, and the reconveyance by such third person to the husband was for the purpose of conveying her property to him by indirection, it is error for the court to refuse the prayer of the opposing party for a directed verdict against her on the

issue of the invalidity of the transaction because of the failure of her deed to comply with G.S. 52-12, since a verdict is properly directed against a party upon whom rests the burden of proof when such party fails to offer evidence upon the issue.

6. Pleadings § 24a—

Recovery by a plaintiff must be based upon the facts alleged in her complaint, and a recovery upon a theory entirely independent of that stated in the complaint cannot be allowed to stand.

7. Trial § 48½: Appeal and Error § 40g—

The action of the court in setting aside the verdict as a matter of law upon a designated ground is reviewable, and an exception to the refusal of the court to enter judgment on the verdict is sufficient to present the question.

8. Judgments § 22b—

A duly docketed judgment constitutes a lien on realty of the judgment debtor acquired by him within ten years from the date of the rendition of the judgment, G.S. 1-234, and the court erroneously sets aside the verdict of the jury that the lien of the judgment attached to lands acquired by the judgment debtor within ten years when the wife of the deceased judgment debtor is unable to show that he acquired such lands as trustee for her benefit.

9. Execution § 23½a: Quieting Title § 2—

In an action to remove cloud on title, defendant's contention that plaintiff could not attack the sheriff's deed pursuant to execution under which he claims because plaintiff did not claim through or under the judgment debtor, is untenable when defendant files a cross-action or counterclaim asserting his title under the execution as against plaintiff in her capacity as widow of the judgment debtor.

10. Execution § 22—

Statutory provisions for sale under execution must be strictly followed in order for the sale to transfer title to the purchaser.

11. Judgments § 23: Execution § 16—

The lien of a judgment for the payment of money, except the lien of a judgment upon a homestead duly allotted, expires at the end of ten years from the date of its rendition, and an execution thereon must be completed by a sale within the life of the lien in order to be effective. G.S. 1-234; G.S. 1-306.

12. Execution § 21—

A sale under execution must remain open for ten days to afford opportunity for an increase in the bid, and during this period the bidder acquires no rights in law or in equity but occupies merely the *status* of a proposed purchaser or preferred bidder. G.S. 45-28.

13. Execution § 16—

Where execution sale is had less than ten days before the expiration of ten years after the rendition of the judgment, the sale is ineffective, since it

cannot be consummated within the ten year period, and the purchaser's contentions that the sheriff's deed related back to the day of the sale and that delay on the part of the sheriff in executing deed or making formal return could not adversely affect his rights as purchaser, are inapposite.

14. Estoppel § 6b—

In an action by a party attacking her conveyances to the judgment debtor, plaintiff is not estopped from attacking the validity of the execution sale under the judgment on the ground that it was not completed within the ten year period, since her acts prior to the sale amount to no more than a representation that title was then vested in the judgment debtor.

15. Same—

Representations made after execution sale cannot estop a party from attacking the sale, since such subsequent representations could not have induced the other party to bid at the sale.

APPEAL by defendant, the Standard Fertilizer Company, from *Edmundson, Special Judge,* and a jury, at the June Term, 1947, of the Superior Court of SAMPSON County. The signing of the judgment was postponed until 14 February, 1948, pursuant to the recorded consent of the plaintiff and the appellant authorizing the trial judge to decide certain motions and enter judgment out of the term and outside of the county and district.

The plaintiff brought this action to quiet her alleged fee simple title to 50 acres of land in Piney Grove Township in Sampson County, and to remove as clouds thereon specified adverse claims of the defendants to estates or interests therein. All of the defendants except the Fremont Oil Company and the Standard Fertilizer Company suffered judgment to be taken against them without answer. The Fremont Oil Company did not seek a review of the decree rendered against it after the trial in the court below. In consequence, this Court is concerned solely with the conflictive claims of the plaintiff and the Standard Fertilizer Company.

Since no substantial dispute exists with respect to the salient facts provoking this litigation, it will aid clarity of understanding to state them at this point. As revealed by all the testimony at the trial, these facts are summarized below.

The plaintiff, Mary F. McCullen, originally owned the 50 acres in question. On 19 February, 1930, she attempted to transfer the property to her husband, Junius McCullen, by the deed pointed out by the first issue. This purported conveyance was unquestionably invalid, however, for the reason that the notary public making the privy examination of the plaintiff did not certify that the deed was "not unreasonable or injurious to her" as required by the statute now embodied in G.S. 52-12 relating to

contracts between husband and wife affecting the *corpus* of the estate of the wife.

On 31 January, 1941, the plaintiff and her husband, Junius McCullen, executed to their daughter, Maurice Durham, the deed designated in the second issue. This instrument recited that it was based on "$10.00 and other valuable considerations" moving from the grantee to the grantors. It contained the covenants of seizin, right to convey, against encumbrances, and warranty customarily inserted in deeds of bargain and sale, and was sufficient in form to convey the 50 acres in controversy to Maurice Durham in fee simple—absolute. The execution of this deed was acknowledged by the plaintiff and Junius McCullen before Inez Hopkins, a notary public, who made certificate in due form as to the acknowledgment of both of the grantors and as to the private examination of the plaintiff. But the notary did not incorporate in her certificate any conclusion that the instrument was "not unreasonable or injurious" to the plaintiff. Registration of this deed was had seven days after its execution.

On 26 August, 1941, Maurice Durham and her husband, P. P. Durham, executed to Junius McCullen the deed specified in the third issue. This instrument was made and recorded in the manner prescribed by relevant statutes, and recited that it was supported by "$10.00 and other valuable considerations" moving from the grantee to the grantors. It was in tenor a deed of bargain and sale with the usual covenants, and was sufficient in form to vest the land in question in Junius McCullen in fee simple absolute.

In the meantime, certain judgments were entered against Junius McCullen. On 28 September, 1931, I. F. Faison recovered judgment against him for $175.00 with interest and costs, and on 3 April, 1939, the defendant, Standard Fertilizer Company, obtained judgment against him for $265.15 with interest and costs. The last named decree is that designated in the sixth issue. Each of these judgments was docketed in the Superior Court of Sampson County on the day of its rendition.

On 19 October, 1931, an execution upon the Faison judgment was placed in the hands of the Sheriff of Sampson County, who assumed that Junius McCullen had acquired title to the land described in the pleadings under the deed of 19 February, 1930, and summoned appraisers to lay off a portion of such land as the homestead of Junius McCullen. On 6 November, 1931, the appraisers allotted 31 acres of the property to Junius McCullen as his homestead, and declared the other 19 acres excess property subject to sale. The Sheriff then levied the execution on the 19 acres, but for some undisclosed reason proceeded no further.

At a later date, to wit, on 21 August, 1941, Isabelle Faison, the administratrix of I. F. Faison, procured a second execution to be issued upon

the Faison judgment. Junius McCullen thereupon brought an action against such administratrix and C. C. Tart, Sheriff of Sampson County, alleging that he owned the 50 acres in fee simple and that the homestead allotted to him on 6 November, 1931, was valid and subsisting, and praying that the administratrix and the Sheriff be enjoined from selling the 31 acres embraced within the alleged homestead for the satisfaction of the Faison judgment.

Junius McCullen obtained an order of court restraining the sale of the 31 acres in accordance with his prayer, and the Sheriff levied the execution upon the 19 acres which the appraisers had adjudged to be excess property. After due advertisement, the 19 acres were sold under the execution by the Sheriff on 22 September, 1941, to the defendant, the Standard Fertilizer Company, as the highest bidder, for $60.00, which was subsequently applied on the costs and the Faison judgment. The execution sale was held open for ten days under G.S. 45-28, but no advanced bid was received.

According to its recitations, the second execution was returnable "on or before the 30 day of September, 1941." The Sheriff did not prepare, execute, and deliver to the Standard Fertilizer Company his deed for the 19 acres until 25 May, 1942, and did not make formal return to the court as to his proceedings under the execution until 12 June, 1942. Soon thereafter Isabelle Faison, Administratrix of I. F. Faison, assigned any remainder due on the Faison judgment to a trustee for the benefit of Maurice Durham for a consideration of $300.00, which was equal to the principal, interest, and costs due on the judgment after the application of the net proceeds arising from the execution sale.

Junius McCullen died intestate 20 July, 1943, survived by his widow, the plaintiff, and an only child, Maurice Durham, and thereafter, to wit, on 25 April, 1946, the plaintiff commenced the present action.

In her complaint, the plaintiff alleged that her ownership of the 50 acres existed throughout the period set forth above; that Junius McCullen, the judgment debtor, did not have title to such land any time during such period; and that on account of the lack of title of the judgment debtor the Sheriff's deed to the Standard Fertilizer Company for the 19 acres was invalid and the docketed judgment of the Standard Fertilizer Company against Junius McCullen did not constitute a lien upon the residue of the 50 acres. The complaint also alleged that the sale of the 19 acres under execution was not consummated within ten years from the date of rendition of the Faison judgment and that by reason thereof the Sheriff's deed was void. The plaintiff further averred in her complaint that her assertion that she owned the land in controversy in fee and that the claims of the Standard Fertilizer Company to estates or interests therein constituted clouds on her title were not affected adversely by the

deeds of 31 January, 1941, and 26 August, 1941, for the reason that her husband, Junius McCullen, held such title as he acquired under these deeds as a trustee for her benefit. The plaintiff based her contention in this respect upon these allegations: (1) That Maurice Durham paid plaintiff nothing for the deed of 31 January, 1941, and accepted it upon the express agreement that she would hold the 50 acres for the benefit of the plaintiff until a loan was obtained thereon and would then reconvey the property to the plaintiff; and (2) that Maurice Durham executed and delivered the deed of 26 August, 1941, to Junius McCullen before obtaining a loan thereon in breach of her express agreement with the plaintiff and without receiving any consideration from Junius McCullen. While the complaint did not state that the alleged agreement between plaintiff and Maurice Durham rested in parol, such fact did appear when the plaintiff undertook to establish her allegations by evidence at the trial.

In its answer, the Standard Fertilizer Company denied the plaintiff's claim of title to the 50 acres; alleged that the Sheriff's deed vested in it title in fee to the 19 acres and that its docketed judgment of 3 April, 1939, constituted a lien upon the residue of the 50 acres; pleaded certain matters as estoppels *in pais* against plaintiff and Maurice Durham; and prayed by way of cross-action or counterclaim declarations that the liens of the judgments in controversy had attached to the 50 acres as property of Junius McCullen and that the Sheriff's deed for the 19 acres was valid in all respects.

Both the plaintiff and the Standard Fertilizer Company presented evidence at the trial sufficient to establish the uncontroverted facts heretofore stated. The plaintiff did not offer any other evidence of a material nature, except the oral testimony of Maurice Durham, which the court excluded, tending to show that nothing was paid for the deeds of 31 January, 1941, and 26 August, 1941, and that she accepted the deed of 31 January, 1941, upon a parol agreement that she would hold the 50 acres for the benefit of the plaintiff and reconvey it to the plaintiff after obtaining a loan thereon. The Standard Fertilizer Company presented evidence indicating that the plaintiff was accustomed to make tax returns for her husband, Junius McCullen; that she listed the 50 acres in his name until the execution sale; and that thereafter she returned the residue of 31 acres for taxation as his property.

The court submitted these six issues to the jury: (1) Was the deed dated the 19th day of February, 1930, from Mary F. McCullen to Junius McCullen, recorded in Book 443, at page 368, void for failure to comply with G.S. 52-12? (2) Was the deed dated January 31, 1941, from Mary F. McCullen and Junius McCullen to Maurice Durham, recorded in Book 518, at page 43, void for failure to comply with G.S. 52-12? (3) Did the deed dated August 26, 1941, from Maurice Durham and husband,

P. P. Durham, to Junius McCullen, recorded in Book 521, at page 321, convey the title to the lands described in the deed? (4) Was the deed from C. C. Tart, Sheriff, to Standard Fertilizer Company, dated May 25, 1942, and recorded in Book 526, void and does it constitute a cloud on the title to the lands described in it? (5) Is the judgment dated the 31st day of October, 1933, entitled, "Fremont Oil Mill *vs.* Junius McCullen," docketed in Book 31, at page 145, barred by the ten-year statute of limitations, and does it constitute a cloud on the title to the 50 acre tract or any part of it? (6) Is the judgment of Standard Fertilizer Company against Junius McCullen, docketed in Judgment Docket 35, page 102, a valid and subsisting lien on the residue of said 50 acre tract of land above the excess sold by the Sheriff?

The jury answered the first issue "Yes," the second issue "Yes," the third issue "No," the fourth issue "No," the fifth issue "No," and the sixth issue "Yes."

The court set aside the answers of the jury to the fourth, fifth, and sixth issues "as a matter of law" upon the specified ground that the evidence offered, the admissions in the pleadings, and the answers to the first, second, and third issues showed "that the title to the lands was vested in Mary F. McCullen, and not in Junius McCullen at all times from and after the 19th day of February, 1930," and rendered judgment that the plaintiff owned the entire 50 acres in fee simple free of the adverse claims of the defendants. The Standard Fertilizer Company thereupon appealed to this Court, assigning errors.

J. Faison Thomson and J. Abner Barker for plaintiff, appellee.

Jeff. D. Johnson, Jr., and Robert L. Coburn for defendant, Standard Fertilizer Company, appellant.

ERVIN, J. The trial court properly rejected the testimony of Maurice Durham under the well established rule of law that an express trust resting in parol cannot be engrafted in favor of the grantor upon a warranty deed conveying to the grantee an absolute and unqualified title in fee. *Poston v. Bowen,* 228 N. C. 202, 44 S. E. (2) 881; *Loftin v. Kornegay,* 225 N. C. 490, 35 S. E. (2) 418; *Briley v. Roberson,* 214 N. C. 295, 199 S. E. 73; *Penland v. Wells,* 201 N. C. 173, 159 S. E. 423; *Waddell v. Aycock,* 195 N. C. 268, 142 S. E. 10; *Perry v. Surety Co.,* 190 N. C. 284, 129 S. E. 721; *Blue v. Wilmington,* 186 N. C. 321, 119 S. E. 321; *Chilton v. Smith,* 180 N. C. 472, 105 S. E. 1; *Campbell v. Sigmon,* 170 N. C. 348, 87 S. E. 116, Ann. Cas. 1918 C, 40; *Ricks v. Wilson,* 154 N. C. 282, 70 S. E. 476. Under the pleadings and proofs here, the plaintiff's standing at the bar is not bettered a whit by the alleged nonpayment of the considerations recited in the deeds of 31 January and 26 August, 1941.

This is true for the reasons stated in the famous case of *Gaylord v. Gaylord,* 150 N. C. 222, 63 S. E. 1028, where it was said: "The authorities are to the effect that in a deed of this character, giving on its face clear indication that an absolute estate was intended to pass, either by the recital of a valuable consideration or by an express covenant to warrant and defend the title, no trust would be implied or result in favor of the grantor by reason of the circumstance that no consideration was in fact paid." The correctness of this observation was subsequently sanctioned by *Walters v. Walters,* 172 N. C. 328, 90 S. E. 304, and *Jones v. Jones,* 164 N. C. 320, 80 S. E. 430.

The defendant, Standard Fertilizer Company, excepted to the submission of the second and third issues upon the ground that they were not raised by the pleadings. It expressly waived the right to move for involuntary judgment of nonsuit under G.S. 1-183, but requested the court by written prayers to direct the jury to answer the second and third issues in its favor upon the hypothesis that no evidence had been adduced justifying findings for the plaintiff upon these issues, and saved exceptions to the refusal of the court to instruct the jury in accordance with such prayers. It also reserved exceptions to the judgment upon the assumption that it was not supported by the complaint. We are compelled to adjudge that these several exceptions were well taken.

It is undoubtedly true that a conveyance of her land by a wife to her husband is void if the officer taking the acknowledgment of the wife fails to state in his certificate his conclusions that the conveyance "is not unreasonable or injurious to her" as required by G.S. 52-12. *Caldwell v. Blount,* 193 N. C. 560, 137 S. E. 578; *Barbee v. Bumpass,* 191 N. C. 521, 132 S. E. 275; *Davis v. Bass,* 188 N. C. 200, 124 S. E. 566; *Foster v. Williams,* 182 N. C. 632, 109 S. E. 834; *Wallin v. Rice,* 170 N. C. 417, 89 S. E. 239; *Butler v. Butler,* 169 N. C. 584, 86 S. E. 507.

It is equally true that the law will not permit the salutary object of the statute to protect married women to be circumvented by indirection, and that a wife may not effectually convey her real estate to a third person to be held in trust by him for the husband or to be conveyed by him to the husband unless the examining or certifying officer incorporates in his certificate his conclusions that the conveyance "is not unreasonable or injurious to the wife." *Ingram v. Easley,* 227 N. C. 442, 42 S. E. (2) 624; *Fisher v. Fisher,* 217 N. C. 70, 6 S. E. (2) 812; *Garner v. Horner,* 191 N. C. 539, 132 S. E. 290; *Best v. Utley,* 189 N. C. 356, 127 S. E. 337.

But G.S. 52-12 and the decisions thereon have no bearing on the deeds of 31 January and 26 August, 1941, because it clearly appears from the pleadings, when rightly construed, and from the testimony, when properly interpreted, that there was neither allegation nor evidence in the cause that the deed of 31 January, 1941, from the plaintiff and

her husband, Junius McCullen, to Maurice Durham was made with any view to accomplishing an indirect conveyance of the plaintiff's property to her husband. *Coward v. Coward,* 216 N. C. 506, 5 S. E. (2) 537; *Davis v. Cockman,* 211 N. C. 630, 191 S. E. 322. Indeed, the converse was the case, for both the averments of facts in the complaint and the evidence offered in their support pointed out in an emphatic manner that the deed in question was executed for a diametrically different purpose. The essential allegation and proof were not supplied by the mere circumstance that a third person conveyed to a husband land which had been transferred to such third person by the wife seven months previously.

Notwithstanding these matters, the trial court made the answers of the jury to the second and third issues hinge solely upon whether the plaintiff had established "by the greater weight of the evidence her contention" that the deed of 31 January, 1941, "was void for that it having been conveyed to Mr. McCullen there was a requirement of G.S. 52-12 which was not complied with."

The error in this is manifest. The initial mistake of the trial court lay in submitting the second and third issues to the jury. This was improper for these issues did not arise on the pleadings. G.S. 1-198; *Fairmont School v. Bevis,* 210 N. C. 50, 185 S. E. 463; *Dickens v. Perkins,* 134 N. C. 220, 46 S. E. 490. But after submitting these issues to the jury, the court ought to have directed a verdict thereon for the defendant, Standard Fertilizer Company, in accordance with its prayers for instruction because the burden of proof on these issues rested on the plaintiff and there was no evidence to justify a finding thereon in her favor. *Timber Co. v. Cozad,* 192 N. C. 40, 133 S. E. 173; *Thomas v. Morris,* 190 N. C. 244, 129 S. E. 623; *Board of Education v. Makely,* 139 N. C. 31, 51 S. E. 784. "The court may always direct a verdict against the party who has the burden of proof if there is no evidence in his favor, as where he fails to introduce any evidence, or if the evidence offered and taken to the true fails to make out a case." McIntosh: North Carolina Practice and Procedure in Civil Cases, section 574. Besides, the judgment in this respect is not supported by the pleadings. *Simms v. Sampson,* 221 N. C. 379, 20 S. E. (2) 554; *Caudle v. Morris,* 160 N. C. 168, 76 S. E. 17. It awards the land in controversy to the plaintiff upon a theory entirely independent of that stated in her complaint. *Balentine v. Gill,* 218 N. C. 496, 11 S. E. (2) 456; *Green v. Biggs,* 167 N. C. 417, 83 S. E. 553; *McFarland v. Cornwell,* 151 N. C. 428, 66 S. E. 454. This the law will not countenance for the reason that the plaintiff must recover, if she recovers at all, upon facts alleged in her complaint. *Barron v. Cain,* 216 N. C. 282, 4 S. E. (2) 618; *McCollum v. Chisholm,* 146

S. E. 160; *Simpson v. Simpson,* 107 N. C. 552, 12 S. E. 447; *Willis v. Branch,* 94 N. C. 142; *Melvin v. Robinson,* 42 N. C. 80.

Ordinarily the errors just noted would warrant the award of a new trial to appellant without any determination as to the rightness of its remaining exceptions. Here, however, the defendant, Standard Fertilizer Company, was not content to rest upon its denial of the plaintiff's title. It expressly waived the privilege of moving for an involuntary judgment of nonsuit under the statute, and asked for a decree upon its cross-action or counterclaim establishing the validity of its claims. The fourth and sixth issues were designed to present this aspect of the case.

The court below set aside the verdict of the jury on these issues as a matter of law and not as a matter of discretion for the specifically designated reason that the admissions in the pleadings, the evidence, and the findings on other issues compelled it to adjudge "that the title to the lands was vested in Mary F. McCullen and not in Junius McCullen at all times from and after the 19th day of February, 1930." This necessitates consideration of the assignments of error predicated on the denial of the appellant's motion for judgment in its favor on the verdict, and the action of the court in setting aside the findings of the jury on the fourth and sixth issues. *Akin v. Bank,* 227 N. C. 453, 42 S. E. (2) 518.

When a judgment for the payment of money is duly docketed in the Superior Court of a county, it becomes a lien on the real property in such county owned by the judgment debtor at the time of the docketing or acquired by him "at any time thereafter, for ten years from the date of the rendition of the judgment." G.S. 1-234; *Durham v. Pollard,* 219 N. C. 750, 14 S. E. (2) 818; *Thompson v. Avery County,* 216 N. C. 405, 5 S. E. (2) 146; *Keel v. Bailey,* 214 N. C. 159, 198 S. E. 654. Since the plaintiff was unable to establish her allegation that Junius McCullen took title under the deed of 26 August, 1941, in the capacity of a trustee for her, it inevitably followed upon the record here presented that Junius McCullen was the absolute owner of the property in controversy under such deed, and that the lien of the Faison judgment and that of the judgment of the Standard Fertilizer Company attached to such property at the moment that the title vested in Junius McCullen. *Trust Co. v. Sterchie,* 169 N. C. 21, 85 S. E. 40; *Moore v. Jordan,* 117 N. C. 86, 23 S. E. 259. Therefore, the trial court erred in vacating the finding of the jury on the sixth issue as a matter of law, and in refusing to adjudge that the judgment of the Standard Fertilizer Company constitutes a lien upon the property in issue.

The plaintiff asserts, however, that the action of the court in setting aside the verdict on the fourth issue must be sustained even if title to the 50 acres did vest in Junius McCullen under the deed of 26 August, 1941, on the ground that the execution sale was not consummated until the

enforcement of the Faison judgment had become barred by the lapse of time. The appellant counters this contention with the proposition that the plaintiff ought not to be permitted to question the validity of the sheriff's deed because she does not claim the 19 acres covered by such instrument through or under the judgment debtor. If it be conceded that the argument underlying this position be sound, still it has no relevancy to the cross-action or counterclaim of the Standard Fertilizer Company, which is necessarily based on the theory that the sheriff's deed is operative against the plaintiff and her daughter, Maurice Durham, even in their respective capacities as widow and heir of the judgment debtor.

It is settled law that "an officer making a sale under execution acts solely by virtue of the statutory authority conferred, which must be strictly pursued; and where such power does not exist nothing passes by the sale." 33 C. J. S., Executions, section 199.

Our statutes provide, in substance, that with the exception of the lien of a judgment upon a homestead duly allotted, the lien of a judgment for the payment of money expires at the end of ten years from the date of its rendition, and that no execution may be issued thereon after the lien is gone. G.S. 1-234; G.S. 1-306; *Exum v. Railroad,* 222 N. C. 222, 22 S. E. (2) 424; *Lupton v. Edmundson,* 220 N. C. 188, 16 S. E. (2) 840. These statutes clearly manifest the legislative intent that the process to enforce the judgment lien and to render it effectual must be completed by a sale within the prescribed time. *Cheshire v. Drake,* 223 N. C. 577, 27 S. E. (2) 627. Hence, it follows "that the lien upon lands of a docketed judgment is lost by the lapse of ten years from the date of the docketing, and this notwithstanding execution was begun, but not completed, before the expiration of the ten years. The only office of an execution is to enforce the lien of the judgment by a sale of the lands, and this must be done before the lien is lost. The execution adds nothing by way of prolongation to the life of the lien." *Hyman v. Jones,* 205 N. C. 266, 171 S. E. 103.

We must now apply these principles to the case at bar. The land described in the sheriff's deed was exposed to sale on 22 September, 1941, under execution issued on the Faison judgment, and the Standard Fertilizer Company thereupon became the last and highest bidder for it. This event took place within ten years from 28 September, 1931, the date of the rendition of the Faison judgment. But under the pertinent statute now embodied in G.S. 45-28 the sale under execution could "not be deemed to be closed under ten days" in order to afford opportunity for an increase in the bid. C.S. section 2591; P. L. 1933, C. 482. During the interval specified by the statute, the Standard Fertilizer Company had no rights in law or in equity by reason of its bid. It occupied the status of a proposed purchaser or preferred bidder, whose offer to purchase or bid the

sheriff was precluded by law from accepting during the period allowed by statute for an increase in the bid. *Building & Loan Assn. v. Black,* 215 N. C. 400, 2 S. E. (2) 6; *Richmond County v. Simmons,* 209 N. C. 250, 183 S. E. 282. The tenth day after 22 September, 1941, the date the property was exposed for sale at public auction, was 2 October, 1941, which was the earliest possible date that the sale under execution could have been deemed closed, or consummated, and 2 October, 1941, was more than ten years after 28 September, 1931, the date of rendition of the Faison judgment. Thus, the sale of the 19 acres under the execution was not completed during the life of the lien of the Faison judgment, and the sheriff's deed passed nothing to the Standard Fertilizer Company because his statutory authority to enforce the lien of the judgment by a sale of the land ended the instant the judgment lien expired. It follows that the court did not err in setting aside the finding on the fourth issue and in adjudging that the sheriff's deed was invalid.

This holding does not conflict with the authorities indicating that mere delay on the part of the sheriff in executing his deed or in making formal return of his proceedings does not adversely affect the rights of the purchaser at a sale under execution. 33 C. J. S., Executions, Section 270, 318; Freeman on Executions (3d Ed.), Vol. 3, section 328. Likewise, it does not run counter to the general rule that a sheriff's deed made in pursuance of an execution sale operates from the day of the sale and not from the date of the deed. *Dobson v. Murphy,* 18 N. C. 586; *Cowles v. Coffey,* 88 N. C. 340. The Standard Fertilizer Company never acquired any right to a deed from the sheriff because in legal contemplation there was no sale under execution in the case at bar.

In closing, it is observed that there is no basis for the contention of the appellant that the plaintiff and her daughter, Maurice Durham, were estopped by their acts to question the validity of the sheriff's deed on the ground that the sale under execution was not consummated during the life of the Faison judgment. When viewed in the light most favorable to appellant, any such acts prior to the sale amounted at most to a representation that title was then vested in Junius McCullen. Manifestly, conduct subsequent to the sale did not induce the appellant to become a bidder at the sale. 31 C. J. S., Estoppel, section 71.

The errors of the trial court do not require a retrial of the issues joined between the plaintiff and the appellant for the determinative facts have been established by the answer to the sixth issue and the admissions in the pleadings. For this reason, the cause is remanded to the trial court with direction that it modify its decree so as to adjudge that the judgment which the Standard Fertilizer Company recovered against Junius McCullen on 3 April, 1939, constitutes a lien on the 50 acres described in the pleadings. As thus modified, the judgment rendered below is affirmed.

This course fully protects the rights of the Standard Fertilizer Company, and does not disturb the judgment as to the other defendants.

Error and remanded.

HARRY E. ROBBINS, SR., v. SYBIL S. ROBBINS.

(Filed 10 November, 1948.)

1. Habeas Corpus § 3—

Habeas corpus to determine the right to the custody of a child applies only when the issue arises between husband and wife who are living in a state of separation without being divorced. G.S. 17-39.

2. Same: Divorce § 17—

A decree awarding the custody of a child under the provisions of G.S. 17-39 does not oust the jurisdiction of the court to hear and determine a motion in the cause for the custody of the child in a subsequent divorce action between the parties. G.S. 50-13.

APPEAL by defendant from *Harris, J.,* June Term, 1948, of WAKE Affirmed.

Motion in the cause in the above entitled divorce action for the determination of the custody of the child of the marriage.

Defendant moved to dismiss the motion on the ground that the Superior Court of Wake County was without jurisdiction in the premises, for that before the divorce action was begun a proceeding to determine the custody of the child under G.S. 17-39 had been instituted in Craven County by writ of *habeas corpus,* and the court there had made orders and acquired and retained jurisdiction of the matter.

Defendant's motion and plea to the jurisdiction were overruled, and defendant excepted and appealed.

E. D. Flowers for plaintiff, appellee.

Charles L. Abernethy, Jr., for defendant, appellant.

DEVIN, J. Defendant's plea raised the question of the jurisdiction of the Superior Court of Wake County to determine the custody of the child of divorced parents on motion in the action in which the divorce judgment had been rendered. The power of the judge, before or after judgment in a divorce action wherein it is alleged there are children, to make orders respecting their custody, is expressly conferred by the statute G.S. 50-13.

The defendant, however, contends that jurisdiction as to the custody of the child in this case had already been acquired by the Superior Court in Craven County under the provisions of G.S. 17-39, pursuant to writ of *habeas corpus* issued by the judge thereof, and that the subsequent proceedings in Wake should not be held to supersede the jurisdiction previously acquired in Craven, and hence that the court in Wake was without jurisdiction to entertain plaintiff's motion. But it will be noted that the issuance of a writ of *habeas corpus* under G.S. 17-39 as a vehicle for determining the custody of a child applies only when the issue arises between "husband and wife who are living in a state of separation without being divorced." *In re Ogden,* 211 N. C. 100, 189 S. E. 119. It would seem to follow that when that *status* has ceased to exist as result of a divorce action and decree wherein the husband and wife and child were before the court, the jurisdiction of the court in which the divorce action was heard is not divested by the proceeding permitted only where undivorced husband and wife were living separate and apart. The reason for the grant of power by statute to the court to proceed under G.S. 17-39 by writ of *habeas corpus* to determine custody ceased when the *status* thus defined ceased. In the divorce action, as authorized by G.S. 50-13, ample forum is afforded for determining all matters of custody, care and maintenance of a child whose existence is called to the attention of the court in the pleadings, and where in such action jurisdiction to determine custody is invoked by motion in the cause, the motion may not be dismissed on the ground that a proceeding under G.S. 17-39 had previously been instituted. No question of venue was raised in the divorce action. The defendant appeared and filed answer in that cause.

The question here presented was decided against the defendant's contention in *In re Blake,* 184 N. C. 278, 114 S. E. 294; *In re Albertson,* 205 N. C. 742, 172 S. E. 44. The rule stated in *Childs v. Martin,* 69 N. C. 126, and *Haywood v. Haywood,* 79 N. C. 42, that, where two courts have equal and concurrent jurisdiction, the court in which jurisdiction first attaches should retain the cause, is not applicable here. "Jurisdiction of the court in which a divorce is granted to award the custody of a child is exclusive and continuing." *In re Blake, supra.*

The ruling of Judge Harris in the Superior Court of Wake, in overruling defendant's motion to dismiss for want of jurisdiction is

Affirmed.

THE BANK OF WADESBORO, OF WADESBORO, NORTH CAROLINA, EXECUTOR AND TRUSTEE UNDER THE WILL OF A. E. HENDLEY, DECEASED, v. RUTH HENDLEY, WIDOW OF A. E. HENDLEY; SADIE HENDLEY, UNMARRIED; A. E. HENDLEY, JR., AND WIFE, MARGARET D. HENDLEY; ANNE SHANKLE HENDLEY AND HER HUSBAND, ALBERT EUGENE HENDLEY, III; MARY GADDY HENDLEY AND WALTER ROSS HENDLEY, THOMAS McLEAN HENDLEY, THE LAST NAMED FOUR BEING MINORS, REPRESENTED BY BARRINGTON T. HILL, GUARDIAN AD LITEM, AND ANY UNBORN CHILDREN OF SADIE HENDLEY AND A. E. HENDLEY, JR., SAID UNBORN CHILDREN BEING REPRESENTED BY BENNETT M. EDWARDS, GUARDIAN AD LITEM, AND J. O. BOWMAN, SADIE HENDLEY AND A. E. HENDLEY, JR., COMMITTEE OF HENDLEY TRUST FOUNDATION.

(Filed 10 November, 1948.)

Executors and Administrators § 24—

Family agreements for the settlement of estates are favored by the courts, and the court properly approves a consent judgment signed by all interested parties not under disability and the guardians *ad litem* of unborn children and minor beneficiaries upon its finding from the evidence that such settlement is to the best interests of all parties.

APPEAL by plaintiff from *Shuford, Special Judge,* at September Term, 1948, of ANSON.

This is a civil action instituted by the Executor and Trustee of the last Will and Testament of A. E. Hendley, deceased, for instructions as to how the estate shall be administered.

All parties waived a jury trial and agreed that the trial Judge might hear the evidence, find the facts and render judgment thereon.

The facts pertinent to this appeal are as follows:

1. On 16 August, 1943, the testator executed a last Will and Testament prepared at his request by his attorney, in which he appointed the plaintiff herein Executor and Trustee. In this instrument the testator makes certain bequests and devises and creates certain trusts and authorizes his Executor and Trustee, in its discretion to carry on any business in which he might be engaged or financially interested in at the time of his death. In addition to the general powers of executors and trustees, the testator gave additional powers to his Executor and Trustee relative to the management of his estate. However, he did not expressly authorize it to sell any of his real estate.

2. Thereafter the testator attempted, without advice, counsel or assistance, to write certain purported codicils to his Will, which apparently were intended to explain and clarify certain provisions in his Will, but which in fact tended to confuse and contradict the provisions of the Will. The testator died 12 March, 1947, and his last Will and Testament, with the purported codicils, were probated in the office of the Clerk of the

Superior Court of Anson County, and the Bank of Wadesboro qualified and is now acting as Executor and Trustee as provided therein. The attorneys for the parties interested in the estate of A. E. Hendley, living and unborn, and the respective guardians *ad litem* who are parties to this action, agreed that it is for the best interest of all the beneficiaries of the estate of the late A. E. Hendley that there be a "family settlement," in so far as may be possible, of all matters pertaining to the proper administration of the estate and the establishment of the several trusts attempted to be created by the testator.

3. A family settlement was agreed upon and embodied in the judgment entered below. This agreement recognizes the validity of the original Will of the testator only, and provides for its terms and conditions to be carried out by the Executor and Trustee in the manner set forth in the judgment, which, among other things, provides for the sale of the farm lands, the court having found as a fact, after hearing the evidence, that these farms cannot be operated profitably by the Trustee. The judgment therefore provides that the proceeds from the sale of the farms now held in trust by the Trustee, shall be held in lieu of such lands and be subject to the trust provisions of the Will. The proceeds from the sale of other farm lands not held as a part of any special trust, to be subject to the general provisions of the Will.

4. The judgment below was entered by consent and as evidence of such consent, it was signed by all interested parties not under disability and by their attorneys of record, and by the respective guardians *ad litem* of the unborn children of such beneficiaries and for the minor defendants.

The plaintiff excepts to the signing of the judgment and appeals, assigning error.

Taylor & Kitchin for Petitioner.

Pittman, McLeod & Webb for A. E. Hendley, Jr., and wife, Margaret D. Hendley.

Bennett M. Edwards, guardian ad litem for the unborn children of Sadie Hendley and A. E. Hendley, Jr.

B. T. Hill for Sadie Hendley.

Barrington T. Hill, guardian ad litem for minors.

DENNY, J. The appellant excepts to the signing of the judgment below, and challenges the power of the court to order the sale of farm lands left in trust under a Will for the ultimate benefit of minors, even though the farms cannot be operated profitably.

The judgment below simply approves and orders compliance with a family settlement. The settlement not only appears to have been fairly

made, but doubtless will aid materially in the preservation of the Hendley estate. Such agreements are looked upon with favor by the courts.

We said in *Fish v. Hanson,* 223 N. C. 143, 25 S. E. (2) 461: "Family agreements looking to the advantageous settlement of estates or to the adjustment of family differences, disputes or controversies, when approved by the court, are valid and binding. They are bottomed on a sound public policy which seeks to preserve estates and to promote and encourage family accord. *Spencer v. McCleneghan,* 202 N. C. 662, 163 S. E. 753; *In re Estate of Wright,* 204 N. C. 465, 168 S. E. 664; *Reynolds v. Reynolds,* 208 N. C. 578, 182 S. E. 341; *Bohannon v. Trotman,* 214 N. C. 706, 200 S. E. 852; Schouler, Wills, Executors and Administrators (6d), sec. 3103." See also *Redwine v. Clodfelter,* 226 N. C. 366, 38 S. E. (2) 203; *In re Reynolds,* 206 N. C. 276, 173 S. E. 789; and *Tise v. Hicks,* 191 N. C. 609, 132 S. E. 560.

The judgment of the court below is

Affirmed.

T. LACY WILLIAMS, ADMR., v. HAROLD TILLMAN ET AL.

(Filed 10 November, 1948.)

Appeal and Error § 12—

The statutory requirements governing appeals *in forma pauperis* are mandatory and jurisdictional, and where the order allowing the appeal *in forma pauperis* is not supported by the statutory affidavit, there can be no authority for granting the appeal *in forma pauperis,* and the Supreme Court acquires no jurisdiction and can take no cognizance of the case except to dismiss it from the docket.

APPEAL by plaintiff from *Burney, J.,* March Term, 1948, of WAKE.

Civil action to recover damages for death of plaintiff's intestate, alleged to have been caused by the wrongful act, neglect or default of the defendants.

Plaintiff's intestate was fatally injured in a quarrel with a fellow employee while both were working for the Raleigh Superweld Service on the premises of the employer and in the course of their employmnt.

From judgment of nonsuit in favor of the individuals composing the employer-partnership, the plaintiff suffered a voluntary nonsuit as to the fellow employee, gave notice of appeal, and in the appeal entries appears the following: "Plaintiff allowed to appeal *in forma pauperis.*"

James H. Pou Bailey for plaintiff, appellant.

Ehringhaus & Ehringhaus for defendants, appellees.

STACY, C. J. The Court is without jurisdiction to entertain the appeal as the order allowing the plaintiff to appeal *in forma pauperis* is unsupported by the necessary affidavit. *McIntire v. McIntire,* 203 N. C. 631, 166 S. E. 732; *Hanna v. Timberlake,* 203 N. C. 556, 166 S. E. 733. The requirements of the statute allowing appeals *in forma pauperis* are mandatory, not directory, and a failure to comply with the requirements deprives this Court of any appellate jurisdiction. G.S. 1-288; *Powell v. Moore,* 204 N. C. 654, 169 S. E. 281; *Brown v. Kress Co.,* 207 N. C. 722, 178 S. E. 248; *Gilmore v. Ins. Co.,* 214 N. C. 674, 200 S. E. 407. See *S. v. Stafford,* 203 N. C. 601, 166 S. E. 734.

The notation in the appeal entries that plaintiff was "allowed to appeal *in forma pauperis*" is unavailing in the absence of adequate supporting affidavit. *Riggan v. Harrison,* 203 N. C. 191, 165 S. E. 358. There is no authority for granting an appeal *in forma pauperis* without the jurisdictional affidavit as denominated in the statute. *Lupton v. Hawkins,* 210 N. C. 658, 188 S. E. 110.

Giving bond on appeal, or revealing adequate leave to appeal without bond, is a jurisdictional requirement, and unless met by compliance, the appeal is not in this Court, and we can take no cognizance of the case except to dismiss it from our docket. *Honeycutt v. Watkins,* 151 N. C. 652, 65 S. E. 762; *Brown v. Kress Co., supra.*

Appeal dismissed.

RENALDO PASCAL, BY HIS NEXT FRIEND, J. H. PASCAL, v. BURKE TRANSIT COMPANY AND QUEEN CITY COACH COMPANY,

and

DAVID E. LAMBERT v. BURKE TRANSIT COMPANY AND QUEEN CITY COACH COMPANY.

(Filed 10 November, 1948.)

1. Torts § 6: Trial § 22a—

Where plaintiff does not demand any relief against a codefendant joined by the original defendant as a joint tort-feasor, the burden is on the original defendant to prove its cross-action for contribution, and upon motion of the codefendant for nonsuit on the cross-action the evidence must be considered in the light most favorable to the original defendant upon that cause. G.S. 1-240.

2. Automobiles § 18h (4)—Evidence of concurring negligence of codefendant held sufficient to be submitted to the jury.

The evidence considered in the light most favorable to the original defendant on its cross-action against its codefendant for contribution tended to show that the codefendant's bus was stopped on the highway on a

rainy, foggy night without a red light burning on the rear thereof in violation of G.S. 20-129(d), that the driver of the original defendant's bus, headed in the same direction, did not see the stationary bus until he was upon it, that he then applied his brakes and skidded to the left of the center of the road, where he collided with the car in which plaintiffs were traveling in the opposite direction. *Held:* The evidence was sufficient to overrule the codefendant's motion to nonsuit the cross-action.

3. Trial § 23a—

Where diverse inferences may reasonably be drawn from the evidence upon controverted questions of fact, nonsuit is properly denied, since the weight and credibility of the evidence is for the determination of the jury.

4. Infants § 11: Parent and Child § 8—

Where, in an action by a minor to recover for negligent injury, brought by his father as next friend, the pleadings and theory of trial seek recovery by plaintiff, as elements of damage, medical expenses and loss of earnings during plaintiff's minority, the father waives his right to recover and would be estopped from thereafter maintaining an action therefor even though the father is not a party of record, and therefore the failure of the court to exclude these items as elements of damage will not be held for error on defendant's exception taken after verdict.

5. Torts § 5—

Where plaintiffs seek no affirmative relief against a codefendant joined by the original defendant for the purpose of enforcing contribution against it as a joint tort-feasor, it is error for the court to enter joint and several judgments in favor of plaintiffs against both defendants upon the jury's finding that both were guilty of actionable negligence, since the liability of the codefendant is solely to the original defendant on its claim for contribution. G.S. 1-240.

6. Damages §§ 1a, 13a—

While it is preferable for the trial court to limit the recovery of prospective damages based on diminished earning capacity resulting from the injury to the present worth of such prospective losses, where the charge is based on the cash settlement rule for all injuries past and prospective and is otherwise full and comprehensive upon the issue, the failure of the court to limit prospective losses to the present cash value thereof will not be held for reversible error when it appears that the verdict is not excessive and that there was no request for further instructions on the issue.

ERVIN, J., took no part in the consideration or decision of this case.

APPEAL by defendants from *Patton, Special Judge,* at June Term, 1948, of BURKE.

The plaintiffs in each of these actions instituted suit alleging personal injuries and damages sustained as a result of the negligence of the defendant, Burke Transit Company, in a head-on collision between Renaldo Pascal's car and the Burke Transit Company's bus, about 10:15 p.m., on 19 February, 1947. It is alleged the collision occurred on Pascal's right

side of Highway No. 70, about three miles east of Morganton; the car driven by Pascal was proceeding in an easterly direction and the Burke Transit Company's bus was traveling in a westerly direction. David E. Lambert was a guest in the Pascal car.

The Burke Transit Company answered in both actions, alleging that if the plaintiffs were injured by its negligence, that the Queen City Coach Company proximately concurred in and contributed to such injuries, and asked that it be made a party. The defendant Burke Transit Company set up a cross-action against the Queen City Coach Company in each case, alleging that if it was negligent, which is not admitted, it avers that any damages suffered by the respective plaintiffs, were proximately caused by the negligence of the Queen City Coach Company, in that one of the regular coaches of the Queen City Coach Company, operating in the usual course of its business, was being operated without proper lights on the rear thereof, as required by law, and in that the operator or driver of the said bus stopped the said bus upon the said highway without signal, sign or warning, which because of the darkness, fog and rain and the lack of lights as aforesaid rendered said bus invisible until this defendant's bus driver was close upon it, and to avoid a rear-end collision suddenly applied the brakes of this defendant's bus, causing the same to skid upon the highway owing to the wet and slippery condition thereof, and thus to skid across the center line into collision with the automobile in which the plaintiffs were at the time traveling, and this defendant alleges that the proximate cause or one of the proximate causes of the injuries complained of by the plaintiffs was due to the careless and negligent operation of the bus of the Queen City Coach Company.

It is further alleged in these cross-actions that if the defendant was guilty of any negligence proximately causing the damages suffered by the respective plaintiffs, the Queen City Coach Company joined and concurred in producing such damages, and such joint and concurrent negligence constituted the Queen City Coach Company a joint tort-feasor within the meaning and purpose of G.S. 1-240; and prayed for the right of the Burke Transit Company for contribution by the Queen City Coach Company to be determined in these actions.

The Queen City Coach Company was made a party defendant in both cases, and filed answers to the cross-actions of its codefendant, denying the allegations contained therein.

The cases were consolidated for trial by consent of all parties.

Issues were submitted to the jury in the respective cases, and answered as follows:

"1. Was the plaintiff, Renaldo Pascal, injured and his property damaged by the negligence of the defendant, Burke Transit Company, as alleged in the complaint? Answer: Yes.

"2. Was the plaintiff, Renaldo Pascal, injured and his property damaged by the negligence of the defendant, Queen City Coach Company, as alleged in the answer and cross-action of the defendant, Burke Transit Company? Answer: Yes.

"3. What amount, if any, is the plaintiff, Renaldo Pascal, entitled to recover on account of his personal injuries? Answer: $21,500.00.

"4. What amount, if any, is the plaintiff, Renaldo Pascal, entitled to recover on account of the damages to his automobile? Answer: $935.00."

"1. Was the plaintiff, David E. Lambert, injured by the negligence of the defendant, Burke Transit Company, as alleged in the complaint? Answer: Yes.

"2. Was the plaintiff, David E. Lambert, injured by the negligence of the defendant, Queen City Coach Company, as alleged in the answer and cross-action of the defendant, Burke Transit Company? Answer: Yes.

"3. What amount, if any, is the plaintiff, David E. Lambert, entitled to recover on account of his personal injuries? Answer: $500.00."

From the judgments entered on the verdicts, both defendants appeal and assign error.

Theodore F. Cummings for plaintiffs, Renaldo Pascal and David E. Lambert.

J. B. Craven, Jr., and Mull & Patton for defendant, Burke Transit Company.

Williams & Williams for defendant, Queen City Coach Company.

APPEAL OF THE DEFENDANT, QUEEN CITY COACH COMPANY.

DENNY, J. This defendant seriously contends that its motion for judgments as of nonsuit on the cross-actions of the Burke Transit Company, for contribution under G.S. 1-240, should have been allowed.

After the Queen City Coach Company was made a party defendant, the plaintiffs did not amend their pleadings and allege this defendant was also negligent and that such negligence concurred with the negligence of the Burke Transit Company, in causing the injuries and damages sustained by them. Therefore, the burden was upon the codefendant, Burke Transit Company, in its cross-actions against the Queen City Coach Company, to show by the greater weight of the evidence that the Queen City Coach Company was negligent, and that such negligence concurred with its own negligence, if any, which joint and concurrent negligence was the proximate cause of the injuries and damages sustained by the plaintiffs. Consequently, we must consider the evidence on this issue in the light most favorable to the Burke Transit Company, and such company is entitled to the benefit of every reasonable inference to be drawn therefrom. *Buckner v. Wheeldon*, 225 N. C. 62, 33 S. E. (2) 480; *Lind-*

sey v. Speight, 224 N. C. 453, 31 S. E. (2) 371; *Ross v. Greyhound Corp.,* 223 N. C. 239, 25 S. E. (2) 852; *Wingler v. Miller,* 223 N. C. 15, 25 S. E. (2) 160.

The evidence tends to show that the plaintiff, Renaldo Pascal, was driving his car 35 or 40 miles an hour in an easterly direction on Highway No. 70, east of Morganton, about 10:15 o'clock at night, and a bus of the Queen City Coach Company, being operated in a westerly direction had stopped to discharge a passenger. The bus of the Burke Transit Company was also proceeding in a westerly direction.

The driver of the Burke Transit Company's bus testified: He was proceeding west and observed a car coming east which dimmed its lights and he also dimmed his lights. Visibility was very poor, it was "misting rain and kind of foggy, you couldn't see very far ahead . . . and all of a sudden I saw the Queen City bus in front of me . . . I saw no lights at all on the bus. I saw the bus from the lights of my bus. The Queen City bus was standing at a dead still when I observed it. . . . I applied my brakes. My bus skidded then . . . just a short distance across the black line . . . this on-coming car was there before I had a chance to cut it back to the right and I was right at the bus just as I skidded and caught the left corner of it (the Pascal car). They were pretty bright lights on the approaching car . . . To a certain extent on a wet highway that way they . . . did interfere with my seeing. . . . By the time the accident occurred I would say I was anywhere from six to eight feet from the Queen City bus. As I was getting out of my bus, the driver pulled off the highway . . . I would say he pulled up ahead of me 60 or 70 feet and he had about 2 feet of his bus still on the highway. . . . There was a shoulder there of 6 feet to his right. It was level. . . . The rear of the bus had . . . three or four of these small amber lights up on top. . . . I never saw those lights before the wreck happened, but after I got out of my bus and went out there those lights were burning after the wreck happened. Q. Was there a tail light burning at that time? A. No, sir. Q. Did you have any warning or notice that a bus was standing on the highway in front of you before you were in a short distance of it? A. No. . . . I was paying strict attention to the road. I did not see any lights on the Queen City bus."

Ray W. Benfield, a witness for the plaintiffs, testified: "I was a passenger in the Burke Transit bus, seated close to the front on the driver's side; I was looking out of the front of the bus, that is the windshield, and saw the car coming away off; I did not see the Queen City bus although at the time I was looking out of the front windshield; the first I knew the Queen City bus was in front of us, was hearing the driver, Mr. Puckett, say, 'Oh Lord, there is a bus.' . . . Mr. Puckett then hit the brakes and the bus sort of skidded or slid into the on-coming car; Mr. Puckett

never did turn to the left to pass the Queen City bus before the crash; I know he dimmed his lights for the on-coming car. I did not see the Queen City bus and was looking into the windshield, and it was clear; it was drizzling rain and sort of misting rain and the Queen City had only several dim lights at the top of the bus."

A witness for the Burke Transit Company testified: "I went to the scene of this accident on the evening of February 19, 1947. I went with the Sheriff. I observed the Queen City bus when I got there. The headlights were burning, they were on. I looked to see if the tail lights were burning. The tail light was not on. There were lights on the rear of the bus. They were across the top of the bus. The lights were on the red order, but I would not say they were bright red, I would say they were close to 10 feet high."

Other evidence also tends to show that the bus of the Queen City Coach Company, at the time of the collision, did not have a red light burning on the rear thereof, as required by G.S. 20-129 (d).

The factual situation here is somewhat similar to that in the case of *Barlow v. Bus Lines, ante,* 382, 49 S. E. (2) 793, in that the record also contains evidence less favorable to the right of the Burke Transit Company to maintain its cross-actions against its codefendant than that set out herein, but a motion for nonsuit should not be allowed when diverse inferences may reasonably be drawn from the evidence and the controlling and pertinent facts are in dispute. The weight and credibility to be given to evidence is for the jury and not for the court on motion for nonsuit. *Barlow v. Bus Lines, supra; Page v. McLamb,* 215 N. C. 789, 3 S. E. (2) 275; *Clarke v. Martin,* 215 N. C. 405, 2 S. E. (2) 10; *Cole v. Koonce,* 214 N. C. 188, 198 S. E. 637; *Ferguson v. Asheville,* 213 N. C. 569, 197 S. E. 146; *Williams v. Express Lines,* 198 N. C. 193, 151 S. E. 197.

The evidence seems to be sufficient to carry the cross-actions to the jury, and we so hold under the authority of *Barlow v. Bus Lines, supra; Cummins v. Fruit Co.,* 225 N. C. 625, 36 S. E. (2) 11; *Williams v. Express Lines, supra,* and other decisions in the second line of decisions cited in *Tyson v. Ford,* 228 N. C. 778, 47 S. E. (2) 251.

This defendant also excepts and assigns as error the failure of his Honor to charge the jury that an unemancipated minor is not entitled to recover for loss of time or diminished earning capacity during his minority, citing *Gillis v. Transit Corp.,* 193 N. C. 346, 137 S. E. 153, and *Shipp v. Stage Lines,* 192 N. C. 475, 135 S. E. 339. This exception is directed only to the charge in the Pascal case. At the time this action was instituted, Renaldo Pascal was 20 years of age, and his father, J. H. Pascal, was duly appointed next friend to prosecute the action. However, the plaintiff became 21 years of age before the case was tried. He was earning approximately $25.00 a week as a learner in a hosiery mill at the

time he was injured and owned the automobile he was driving on the night of the collision with the bus of the Burke Transit Company.

We concede the general rule to be under our decisions, that an unemancipated minor is not entitled to recover as an element of damages in an action for personal injuries, for loss of time and diminished earning capacity during minority, *Shipp v. Stage Lines, supra,* but the father of a minor may waive the right to recover for such loss and permit him to recover for his entire injury, including loss of wages and diminished earning capacity during minority. Although one who conducts a suit as the guardian or next friend of an infant is not a party of record, but the infant is the real party plaintiff, *Rabil v. Farris,* 213 N. C. 414, 196 S. E. 321, we see no reason why a parent who institutes an action as next friend in behalf of his minor child, and casts his pleadings and conducts the trial on the theory of the child's right to recover for loss of services and diminished earning capacity during minority as well as thereafter, should not be estopped from making a separate claim for such loss. This view is in accord with that expressed in 46 C. J., Section 115, p. 1301, and the authorities cited therein, where it is said: "A parent may waive or be estopped to assert his right to recover for loss or services, etc., by reason of injury to his minor child, and permit the child to recover the full amount to which both would be entitled, as where the parent as next friend brings an action on behalf of the child for the entire injury, or permits the case to proceed on the theory of the child's right to recover for loss of services and earning capacity during minority. In such case the parent treats the child as emancipated in so far as recovery for such damages is concerned, and cannot thereafter be permitted to claim that he, and not the child, was entitled to recover therefor. There is no waiver, however, where the parent is not shown to be connected in any way with the child's action, or to have had notice thereof, beyond the fact that the child lived with him; nor does the parent waive his right of action by suing as next friend for the child's pain and suffering and permanent impairment of earning capacity after majority."

It is likewise said in 39 Am. Jur., Sec. 83, p. 728: "Even where the parent has not emancipated the child prior to the injury, he may thereafter waive or relinquish in favor of the child his right to the latter's services, so as to permit the child to recover their value as part of his damages. In such a case, the child is entitled to recover the full amount to which both he and his parent would have been entitled if separate suits had been brought, and the parent is estopped from afterwards bringing any action in his own right." It is further stated therein, that where a parent brings an action as next friend to recover for injuries to his child, and "the parent claims damages for loss of time, diminished earning capacity, medical expenses, etc., he cannot make any claim for such items

in a subsequent action brought in his own right, but rather, they are to be recovered by the child in the first action only."

Where a suit is brought on behalf of a minor, it is a simple matter to limit the recovery in the pleadings or by special prayer for instructions, to such loss of wages and diminished earning capacity as the minor may suffer after he attains his majority. But where the action is brought by the father as next friend and no limitation on the minor's right to recover is pleaded and no request is made for such limitation during the trial of the case, and the charge of the court is sufficient to include compensation for all injuries and damages sustained from and after the date of the injury, the father will be deemed to have waived his claims for loss of services and diminished earning capacity of the child during minority, in favor of such child. *Gaff v. Hubbard,* 217 Ky. 729, 290 S. W. 696, 50 A. L. R. 1382; *Carangelo v. Nutmeg Farm,* 115 Conn. 457, 162 A. 4, 82 A. L. R. 1320.

This assignment of error is not sustained.

The court below entered joint and several judgments in favor of the respective plaintiffs against both defendants. The Queen City Coach Company excepted to the form of the judgment. The exception is well taken. The plaintiffs herein seek no affirmative relief from this defendant. The only relief sought against the Queen City Coach Company is the claim for contribution, as provided in G.S. 1-240, and set out in the cross-actions of the Burke Transit Company. *Wilson v. Massagee,* 224 N. C. 705, 32 S. E. (2) 335; *Charnock v. Taylor,* 223 N. C. 360, 26 S. E. (2) 911, 148 A. L. R. 1126. This defendant is entitled to a modification of the judgments in this respect.

We have carefully considered the additional exceptions and assignments of error brought forward by this defendant, and they present no prejudicial error.

Except as modified herein, the result below will be upheld.

APPEAL OF THE DEFENDANT, BURKE TRANSIT COMPANY.

The defendant excepts and assigns as error the following portion of his Honor's charge: "The Court charges you that if the plaintiff is entitled to recover at all . . . he is entitled to recover as damages one compensation in a lump sum, for all injuries past and prospective in consequence of the wrongful and negligent acts complained of. These, Gentlemen of the Jury, are understood to embrace indemnity for actual nursing and medical expenses and loss of time, or loss from inability to perform ordinary labor or the capacity to earn money. The plaintiff is to have a reasonable satisfaction, if he be entitled to recover at all, for the loss of both bodily and mental powers or for actual suffering, both of body and mind, which are the immediate and necessary consequences of the injuries,

and it is for you, the jury, to say under all the circumstances what is a fair and reasonable sum which should be paid to the plaintiff by way of compensation for the injuries sustained. The age and occupation of the injured party, the nature and extent of his business, the value of his services, the amount he was earning from his business, or realized from fixed wages at the time of the injury, or whether he was employed at a fixed salary or as a professional man, are matters properly to be considered. The sum fixed by the jury should be such as fairly compensates the plaintiff for the injuries suffered in the past and those likely to occur in the future. The award is (to be) made on the basis of a cash settlement of the plaintiff's injuries, past, present and prospective."

The above charge is in every essential particular the charge on damages laid down as a proper one, in the case of *Ledford v. Lumber Co.,* 183 N. C. 614, 112 S. E. 421, and approved in *Murphy v. Lumber Co.,* 186 N. C. 746, 120 S. E. 342; *Batts v. Telephone Co.,* 186 N. C. 120, 118 S. E. 893; *Mangum v. R. R.,* 188 N. C. 689, 125 S. E. 549; *Hall v. Rhinehart,* 191 N. C. 685, 132 S. E. 787; *Cole v. Wagner,* 197 N. C. 692, 150 S. E. 339; *Campbell v. R. R.,* 201 N. C. 102, 159 S. E. 327; *Patrick v. Bryan,* 202 N. C. 62, 162 S. E. 207; and *Smith v. Thompson,* 210 N. C. 672, 188 S. E. 395.

This defendant is relying on those decisions where new trials were granted for failure to limit the recovery for prospective loss to the present worth of such loss, among them being *Daughtry v. Cline,* 224 N. C. 381, 30 S. E. (2) 322; *Lamont v. Hospital,* 206 N. C. 111, 173 S. E. 46; and *Taylor v. Construction Co.,* 193 N. C. 775, 138 S. E. 129. An examination of these opinions will disclose that in each one of them the present worth rule was not followed nor the cash settlement rule, as laid down in *Ledford v. Lumber Co., supra.* While the present worth rule must be applied by the jury in arriving at the sum which will fairly compensate the injured party for all prospective loss, *Helmstetler v. Power Co.,* 224 N. C. 821, 32 S. E. (2) 611, there is no "fixed rule by which the amount of damages for impairment of earning capacity may be definitely measured," 25 C. J. S., sec. 87, p. 619, the amount to be awarded must be left to the sound judgment of the jury in the light of the evidence, based on the ability of the injured party to earn money, his age, his occupation, and his impaired or diminished earning capacity by reason of his injury. We think it is preferable for the trial judge to expressly charge the jury in this respect, that in arriving at the compensation for prospective damages or diminished earning capacity, the sum awarded should represent the present worth or the present cash value of such losses. But where the cash settlement rule has been used and the charge on damages is otherwise full and comprehensive, and it further appears that the verdict is not excessive, in the absence of a request for further instructions on the issue

of damages, a new trial will not be granted. *Hill v. R. R.*, 180 N. C. 490, 105 S. E. 184. We do not think the verdict in this case is excessive. The plaintiff was seriously and permanently injured. His bills for nurses, doctors and hospitalization, up to the time of the trial, amount to more than $5,000.00.

The other assignments of error have been carefully examined and they present no prejudicial error.

On the appeal of the Queen City Coach Company, modified and affirmed.

On the appeal of the Burke Transit Company, no error.

ERVIN, J., took no part in the consideration or decision of this case.

IN RE WILL OF MARY ELKINS GOODMAN, DECEASED.

(Filed 10 November, 1948.)

Wills §§ 9½, 12—

Where a duly attested typewritten will has interlineations in the body thereof and a paragraph added at the end thereof in the handwriting of testatrix, and the instrument is again signed by her, and the written words are sufficient in themselves to express testamentary intent and manifest no intent to revoke the will as a whole, and are not so inconsistent with the provisions of the will as to constitute a revocation, the written portions will be upheld as a holograph codicil to the will upon proper proof of the handwriting of the testatrix and that the instrument was found among papers regarded by testatrix as valuable.

BARNHILL, J., dissents.

APPEAL by caveator from *Pless, J.*, June Term, 1948, of CABARRUS. No error.

Issue of *devisavit vel non*.

The execution of the typewritten paper propounded as the last will and testament of Mary Elkins Goodman was proven by the two subscribing witnesses in accordance with the statute G.S. 31-3. This paper showed two interlineations and an additional paragraph at the bottom written with pen and ink in the handwriting of the testatrix, and signed again by her, and found among her valuable papers. The pen and ink portions were as follows: "To my nephew Burns Elkins 50 dollars"; at the end of paragraph 5, "Mrs. Stamey gets one-half of estate if she keeps me to the end"; and at the bottom of the paper, "My diamond ring to be sold if needed to carry out my will, if not, given to my granddaughter Mary

Iris Goodman," and signed again "Mary E. Goodman." The additional words were proven by three credible witnesses to be entirely in the handwriting of the testatrix.

Exception was noted to the instruction given by the court to the jury that the fact that the will is partly typewritten and partly in the handwriting of the deceased did not, standing alone, constitute a revocation or destruction of it, and that if the jury found by the greater weight of the evidence that the pen and ink part of the will was in the handwriting of Mrs. Goodman, and that her genuine signature was attached to the pen and ink part, and the paper as thus written was found among her valuable papers, that would be valid as a holograph codicil to the will, and if the jury so found they should answer the issue yes.

The jury answered the issue in favor of the propounders, and from judgment on the verdict, the caveator appealed.

Luther T. Hartsell, Jr., for appellees.

Morton & Williams and Bernard W. Cruse for appellant.

DEVIN, J. The paper writing propounded as the will of Mary Elkins Goodman was duly proven in accordance with the statute, G.S. 31-3, by the subscribing witnesses to the typewritten portion and by proof of the handwriting of the testatrix as to the written portions offered as a holograph codicil. But the caveator assigns error in the ruling of the court below that the writing by pen and ink on the typewritten will, which writing was entirely in the handwriting of the testatrix and again signed by her and found among her valuable papers, was sufficient, if so found by the jury, to constitute a valid holograph codicil.

It is apparent that the pen and ink additions to the typewritten paper and the paragraph at the bottom, being all in the handwriting of the testatrix and signed by her, manifested no intent to revoke the will, but rather assumed that in all other particulars the will should remain in full force and effect. *Boyd v. Latham,* 44 N. C. 367. These additional provisions are not so inconsistent with the provisions of the will as to constitute revocation, nor was there evidence of intent on the part of the testatrix to revoke the will but rather that every part of it should stand as her will. *In re Will of Roediger,* 209 N. C. 470, 184 S. E. 74, 57 A. J. 326-331.

The appeal presents the question whether an addenda in the handwriting and over the signature of the testatrix written on the face of the typewritten attested will may be upheld as a holograph codicil thereto.

That there may be a partial revocation of a clause in the will by a holograph codicil executed and proven in the manner the statute prescribes was upheld in *In re Love,* 186 N. C. 714, 120 S. E. 479. "A

codicil imparts not a revocation, but an addition, or explanation, or alteration of a prior will in reference to some particular, and assumes that in all other particulars the will is to be in full force and effect." *Baker v. Edge,* 174 N. C. 100, 93 S. E. 462. The codicil and the will considered together as a whole constitute the final disposition of testator's property. *Albright v. Albright,* 172 N. C. 351, 90 S. E. 303. In *In re Love, supra,* where some written words in the attested will were erased by inkmarks, it was held that in any of the modes prescribed by the statute (now G.S. 31-5) "there may be a partial revocation of a will," the modes specified including holograph will.

While the derivative and applied meaning of the word holograph indicates an instrument entirely written in the handwriting of the maker, this would not necessarily prevent the probate of a will where other words appear thereon not in such handwriting but not essential to the meaning of the words in such handwriting. *In re Will of Wallace,* 227 N. C. 459, 42 S. E. (2) 520; *In re Will of Parsons,* 207 N. C. 584, 178 S. E. 78; *In re Will of Lowrance,* 199 N. C. 782, 155 S. E. 876; *Hill v. Bell,* 61 N. C. 122, 61 A. L. R. 398. But where words not in the handwriting of the testator are essential to give meaning to the words used, the instrument will not be upheld as a holograph will. *In re Smith,* 218 N. C. 161, 10 S. E. (2) 676.

In *In re Will of Thompson,* 196 N. C. 271, 145 S. E. 393, among the valuable papers of the decedent were found not only an attested will but also the note of one Howerton, for $500, payable to the testator, on the back of which the testator had written and signed in his own handwriting an assignment to his wife "at my death." This was held a valid codicil to the will and its probate with the attested will upheld.

Here, the typewritten will signed by the testatrix and attested in accordance with the statute was a valid expression of testamentary intent. The additional words placed by her on this will written in her own handwriting and again signed by her are sufficient, standing alone, to constitute a valid holograph will; that is, the legacy of $50 to Burns Elkins, the devise of one-half of her estate to Mrs. Stamey, and the bequest of the diamond ring to Mary Iris Goodman are sufficiently expressed to constitute a valid disposition of property to take effect after death. These additional words were written, signed, and proven in strict conformity to the statute. Clearly, this addition to her previously executed will manifests the final disposition she wished made of her property. Does her purpose fail because the additional words were written upon the attested paper? We think not. The final paragraph written and signed by her appearing at the bottom of the typewritten will is a valid codicil. And for the same reason we think the written words appearing several lines above should be considered a part thereof and included within codicil

written and signed just below. The position of words or the signature in a holograph will are not usually material. *Paul v. Davenport,* 217 N. C. 154, 7 S. E. (2) 352; *Peace v. Edwards,* 170 N. C. 64, 86 S. E. 807.

We think the intention of the testatrix to provide something in her will for Burns Elkins and Mary Iris Goodman, and to increase the provision for Mrs. Stamey, expressed in the unmistakable manner here apparent, should be considered together as a valid holograph codicil to the will and provable as such.

In the case of *In re Will of Roediger,* 209 N. C. 470, 184 S. E. 74, where the testator made pencil interlineations and marginal notes on a typewritten attested will, it was held the paper was properly probated after eliminating the pencil notations. But it did not appear in that case that the testator signed the pencil notations or manifested intent that they should be regarded as part of or codicil to his will.

We think the instructions given by the court to the jury were correct on the evidence presented, and that the verdict and judgment should be upheld.

No error.

BARNHILL, J., dissents.

WILBUR M. LEE v. ROBERTSON CHEMICAL CORPORATION.

(Filed 10 November, 1948.)

1. Automobiles §§ 8i, 18i—

Failure of defendant traveling on a servient highway to stop in obedience to a highway stop sign before attempting to traverse an intersection with a through State highway, either within or outside the limits of a municipality, is not negligence *per se* but only evidence of negligence, and an instruction that it constitutes negligence *per se* must be held for reversible error. G.S. 20-158.

2. Automobiles § 7: Municipal Corporations § 39—

Statutory traffic regulations do not prevent proper municipal traffic ordinances, but the State regulations govern the operation of motor vehicles on State highways, including city streets which constitute a portion thereof, and municipal regulations to the extent of any conflict therewith are invalid.

APPEAL by defendant from *Harris, J.,* February Term, 1948, of WAKE. New trial.

This was an action to recover damages for injury to plaintiff's truck resulting from collision with defendant's truck.

The collision occurred at the intersection of Edenton and Blount Streets in Raleigh. Plaintiff's truck loaded with lumber was proceeding in a westerly direction on Edenton Street, and defendant's truck loaded with commercial fertilizers was being driven north on Blount Street. Edenton Street is a through street, constituting a portion of State Highways 1 and 64, and there was a highway stop sign at the southeast corner of the intersection on Blount Street.

It was alleged, among other things, that the driver of defendant's truck was negligent in failing to stop his vehicle before entering upon the intersection of these streets, and that the collision and damage proximately resulted therefrom. The allegations of negligence were denied in the answer.

Upon issues submitted the jury returned verdict in favor of plaintiff, and from judgment thereon, defendant appealed.

Harris & Poe and Logan D. Howell for plaintiff, appellee.

Douglass & McMillan for defendant, appellant.

DEVIN, J. Motion for judgment of nonsuit was properly denied, but we think defendant's exception to a material portion of the court's instruction to the jury must be sustained. The court charged the jury that it was the duty of defendant's driver in approaching the street intersection, under the law, to stop before entering, and "that if he failed to stop that would make him guilty of negligence *per se*, that is, negligence in itself." In view of the decisions of this Court in *Hill v. Lopez*, 228 N. C. 433, 45 S. E. (2) 539; *Nichols v. Goldston*, 228 N. C. 514, 46 S. E. (2) 320; *Swinson v. Nance*, 219 N. C. 772, 15 S. E. (2) 284; *Groome v. Davis*, 215 N. C. 510, 2 S. E. (2) 771; *Stephens v. Johnson*, 215 N. C. 133, 1 S. E. (2) 367; *Sebastian v. Motor Lines*, 213 N. C. 770, 197 S. E. 539, this instruction must be held for error entitling the defendant to a new trial. In *Groome v. Davis, supra*, it was said: "Failure to observe a stop sign is not negligence *per se*, not even *prima facie* negligence, just evidence of negligence." The statute G.S. 20-158 which requires drivers of vehicles to stop before entering a through highway where highway stop signs have been erected, contains also provision that failure to stop shall not be considered contributory negligence *per se*, and in *Sebastian v. Motor Lines, supra*, it was said that it followed as a necessary corollary that this provision applied also to the party sued, and that the defendant's failure to stop would not be considered negligence *per se*, but only evidence thereof.

Plaintiff argued, however, that the duty of a driver approaching this intersection on Blount Street was governed by a city ordinance, and this view apparently influenced the judge below in giving the instruction complained of. The only evidence on this point came from a police officer who testified he cited defendant's driver to court "for violating a city ordinance requiring drivers to bring their vehicles to a stop before entering an intersection where there is a stop sign." The nature and extent of the city ordinance does not appear. But this view cannot be upheld. It was said in *Swinson v. Nance, supra,* construing this statute, "This view is incorrect, since an ordinance of the town cannot displace the applicable state law, which makes such a failure merely evidence to go to the jury to be considered in the light of the surrounding circumstances." The state statute does not prevent proper municipal traffic regulations but city ordinances which are inconsistent with general state laws regulating the operation of motor vehicles on the highways (including city streets which constitute portions of State highways) are to the extent of such inconsistencies, invalid. *S. v. Stallings,* 189 N. C. 104, 126 S. E. 187; *S. v. Sasseen,* 206 N. C. 644, 175 S. E. 142. "In case of conflict the ordinance must yield to the state law." *S. v. Freshwater,* 183 N. C. 762, 111 S. E. 161; *Eldridge v. Mangum,* 216 N. C. 532, 5 S. E. (2) 721.

As there must be a new trial, it is unnecessary to consider other exceptions noted as they may not arise on another hearing.

New trial.

L. J. PENLAND, BRUCE COWAN AND FOREST PAINTER v. TOM GOWAN, CHAIRMAN, WILL HAWKINS, MEMBER, AND DR. B. A. DICKSON, MEMBER, OF THE COUNTY BOARD OF ELECTIONS OF McDOWELL COUNTY.

(Filed 10 November, 1948.)

Appeal and Error § 31e—

Where an election sought to be enjoined has been held, an appeal from judgment denying injunctive relief against the holding of the election will be dismissed, since the questions sought to be presented by the appeal have become academic.

APPEAL by plaintiffs from *Moore, J.,* September Term, 1948, McDOWELL.

Civil action for writ of injunction to restrain the holding of a special election under Chap. 1084, Session Laws, 1947.

When the cause came on for hearing in the court below, trial by jury was waived and the cause was submitted to the judge with full authority to hear the evidence, find the facts, and enter judgment upon the facts

found. The court, after finding the facts, entered judgment denying the injunctive relief prayed and dismissing the action. Plaintiffs excepted and appealed.

John C. Cheesborough and George Sandlin for plaintiff appellants.
Proctor & Dameron for defendant appellees.

PER CURIAM. A careful examination of the pleadings in this cause discloses that a writ of injunction is the only relief sought by plaintiffs. The only issue of fact raised in the pleadings is directed to the right of the plaintiffs to this relief. The election they seek to enjoin was held 31 August, 1948, and is now an accomplished fact. Hence, the questions plaintiffs seek to present on this appeal are academic. For that reason, the appeal is dismissed on authority of *Eller v. Wall, ante,* 359, and the cases there cited.

Appeal dismissed.

GEORGE C. GREEN FOR HIMSELF AND ALL OTHER TAXPAYERS OF THE TOWN OF WELDON, NORTH CAROLINA, v. P. R. KITCHIN AND J. T. MADDREY, MAYOR, AND WALKER CAMPBELL, W. A. PIERCE, C. R. TURNER, AND PIERCE JOHNSON, COMPRISING THE BOARD OF COMMISSIONERS OF THE TOWN OF WELDON, NORTH CAROLINA.

(Filed 24 November, 1948.)

1. Municipal Corporations § 5—

A municipal corporation has the powers prescribed by statute and those necessarily implied by law, and no other. G.S. 160-1.

2. Same—

The implied powers of a municipality are those which are necessarily or fairly implied in or incident to the powers expressly granted, or essential to the accomplishment of the purposes of the corporation.

3. Municipal Corporations § 7—

The town of Weldon is given explicit authority both by its charter and by the general law to appoint and employ police to maintain law and order within its borders. G.S. 160-9. 160-20, 160-21.

4. Municipal Corporations § 11½b: Evidence § 5—

It is a matter of common knowledge, of which the Supreme Court will take judicial notice, that a competent policeman must have special knowledge as to his duties and how they may be performed, which must be acquired either through experience or special training, and that the proficiency of even an experienced officer can be enhanced by proper instruction.

5. Municipal Corporations §§ 7, 41—

The explicit power of a municipality to appoint and employ police contemplates that the persons so engaged be qualified and competent, and therefore a municipality has implied authority, exercisable within the discretion of its governing body, to send its policemen to a police training school and to make proper expenditures for this purpose.

6. Municipal Corporations § 41—

The power of a municipality to appropriate money is governed by the same criterions as its taxing power, among which is that an expenditure must be for a public purpose.

7. Same: Taxation § 5—

A tax or an appropriation is for a public purpose if it is for the support of the government, or for any of the recognized objects of the government. N. C. Constitution, Art. V, sec. 3.

8. Same—

An expenditure by a municipality for special training of a police officer has for its object the maintenance of law and order, and therefore is for a public purpose.

9. Same—

The fact that moneys are paid to an individual does not affect the character of the expenditure, since the object of the expenditure and not to whom paid determines whether it is for a public purpose.

10. Same: Constitutional Law § 17—

The fact that a policeman may not remain in the employ of the municipality after receiving special training relates to the advisability of the municipality's expending funds for this purpose and does not affect the fact that the expenditure is for the public purpose of maintenance of law and order, and such expenditure does not grant an exclusive emolument or privilege to the policeman contrary to Art. I, sec. 7, of the N. C. Constitution.

11. Municipal Corporations § 5—

A municipality has governmental powers as an agency of the State and private or proprietary powers as a municipal corporation.

12. Municipal Corporations §§ 7, 41: Taxation § 4—

A municipal corporation has the governmental function of maintaining law and order within its boundaries as a governmental agency of the State, and in the performance of such function exercises a portion of the State's delegated sovereignty, and therefore an expense for this purpose is a necessary expense and may be incurred without a vote of the people. Art. VII, sec. 7, N. C. Constitution.

13. Pleadings § 15—

A demurrer admits allegations of fact but not conclusions of law drawn therefrom by the pleader.

14. Taxation § 4—

What are necessary expenses of a municipality is a question of law for the determination of the courts, and whether a given project is necessary or needed in a designated municipality is for the determination of the governing authorities of the municipality in the exercise of their discretion.

15. Municipal Corporations § 10—

The action of the governing body of a municipality in authorizing an expenditure of funds for a necessary municipal expense sanctioned by statute will be deemed tantamount to a determination and declaration that the expense is necessary in that particular municipality, and its action will not be held illegal on the ground that the resolution authorizing the expense failed to declare that the proposed expenditure is necessary in the particular locality or made such declaration in a defective manner.

16. Same: Pleadings § 15: Taxation § 4—

This suit was instituted to recover on behalf of a municipality money expended by it for special training of a policeman. The complaint alleged that the expenditure was not for a necessary expense of the municipality. Defendants demurred. *Held:* Whether the expense can be classified as a necessary municipal expense is a question of law not admitted by the demurrer, and the fact that the governing authorities authorized the expenditure is tantamount to a declaration by the municipality that such expense was a necessary expense of the town, with which discretionary determination the courts will not interfere, and therefore the action of the trial court in sustaining the demurrer is affirmed upon the determination of the questions of law involved in favor of defendants.

17. Municipal Corporations § 5—

The courts will not interfere with the exercise of discretionary powers conferred on municipal corporations for the public welfare unless their action is so clearly unreasonable as to amount to an oppressive and manifest abuse of discretion.

STACY, C. J., dissenting.

WINBORNE and DENNY, JJ., concurring in dissent.

APPEAL by plaintiff from *Williams, J.*, at June Term, 1948, of HALIFAX.

The action was begun on 17 January, 1948. The facts stated in the complaint may be summarized as follows: The plaintiff, George C. Green, is a citizen and taxpayer of the Town of Weldon, a municipal corporation of Halifax County, North Carolina, and prosecutes the action in behalf of himself and all other taxpayers of the municipality. The governing body of the Town of Weldon consists of its mayor, J. T. Maddrey, and its commissioners, Walker Campbell, W. A. Pierce, C. R. Turner, and Pierce Johnson, who are parties defendant. The defendant, P. R. Kitchin, is a policeman of the Town of Weldon, and served in such capacity at a salary of $225.00 per month during the several years preced-

ing the action. In conformity to a resolution adopted by the governing body of the Town of Weldon, the defendant, P. R. Kitchin, took a course in police training at the National Police Academy of the Federal Bureau of Investigation in Washington, D. C., during a ninety day period beginning on or about 1 April, 1946, and received from the Town of Weldon sums totaling $1,100.00 to cover his expenses and salary while attending the National Police Academy for such purpose. The payment of these sums was made out of tax moneys collected by the Town of Weldon from the plaintiff and its other taxpayers, and was not authorized by the vote of the citizens of the municipality. On 27 August, 1947, the plaintiff made demand upon the governing body of the Town of Weldon that it take proper steps to recover the $1,100.00 of P. R. Kitchin as an illegal disbursement of municipal funds. The governing body refused to do so, and plaintiff thereafter instituted this suit to recover the expenditure from P. R. Kitchin for the benefit of the Town of Weldon.

The defendants filed an answer in which they admitted the averments of fact contained in the complaint.

On the hearing, the plaintiff moved for judgment on the pleadings, and the defendants demurred *ore tenus* to the complaint on the ground that it did not state a cause of action. The trial court denied the motion of the plaintiff, sustained the oral demurrer interposed by defendants, and entered judgment dismissing the action. The plaintiff appealed, assigning these rulings as error.

Stuart Smith and George C. Green for plaintiff, appellant.

Albert Coats and Allsbrook & Benton for defendants, appellees.

ERVIN, J. Stated in its broadest terms, this case presents this problem: Does a city or town possess authority in law to expend moneys raised by taxation in specially training its police officers for the performance of their duties, when the expenditure has not been expressly sanctioned by legislative act or approved by a vote of the majority of the qualified voters of the city or town?

The plaintiff asserts initially that this question must be answered in the negative because the Town of Weldon lacks statutory power to use public funds to train its police.

A city or town has "the powers prescribed by statute, and those necessarily implied by law, and no other." G.S. 160-1. Neither its charter nor the general law confers upon the Town of Weldon in express words any authority to employ any of its resources in providing instruction for its police. Thus, the question arises at the threshold of the case as to whether such a power is necessarily implied by law. It is an established rule that a municipal corporation is authorized by implication to do an

act if the doing of such act is necessarily or fairly implied in or incident to the powers expressly granted, or is essential to the accomplishment of the declared objects and purposes of the corporation. *Brumley v. Baxter,* 225 N. C. 691, 36 S. E. (2) 281, 162 A. L. R. 930; *Mortgage Co. v. Winston-Salem,* 216 N. C. 726, 6 S. E. (2) 501; *Riddle v. Ledbetter,* 216 N. C. 491, 5 S. E. (2) 542; *Kennerly v. Dallas,* 215 N. C. 532, 2 S. E. (2) 538; *S. v. Gulledge,* 208 N. C. 204, 179 S. E. 883.

In Blackstonian phrase, North Carolina has delegated to municipalities power to maintain law and order within their respective borders since "the time whereof the memory of mankind runneth not to the contrary." Both its charter and the general law expressly empower the Town of Weldon to appoint and employ police for performing this function within its limits. Private Laws of 1891, Ch. 83, secs. 18, 23; G.S. 160-9, 160-20, 160-21.

The Legislature contemplated that persons engaged as police officers under this explicit grant of authority should be qualified to do the task specified above. Poets may be born, but policemen must be made. Some of the statutes relating to the duties and powers of the police appear in article 6 of chapter 15 and article 2 of chapter 160 of the General Statutes. Both the letter and the spirit of these laws reveal that a city or town cannot convert a neophyte into a policeman in the true sense of the word by the simple expedient of investing him with a badge, a billy, a firearm, and a uniform.

Before one is fitted to discharge the duties of a police officer, he must know what those duties are and how they can be performed. The requisite preparedness necessitates the possession of a special knowledge, which must be acquired either by traveling the hard road of experience or by sitting at the feet of teachers qualified to give proper instruction.

Since the fact is a matter of common and general knowledge in this jurisdiction, this Court judicially knows that persons employed to serve as police in the municipalities of this State seldom possses familiarity with their duties or skill in performing them when they enter such service. Although one may be experienced in law enforcement, his proficiency as an officer can undoubtedly be enhanced by proper instruction in modern methods of crime prevention and detection. Certainly a city or town must have competent policemen if it is to protect persons and property within its boundaries against the lawless. Whether a municipal corporation should rely upon experience, or training, or both for securing competency in its police ought to be left to the discretion of its governing body. Likewise, whether or not necessity compels or prudence justifies a specific outlay of municipal funds to provide special training for a particular officer seems to be a problem which of right lies within the domain of the municipality involved.

For these reasons, we conclude that the power of a city or town to spend tax money for instruction of its police in the performance of their duties is fairly implied in and incident to a power expressly conferred upon the city or town to appoint and employ police for preserving law and order within its limits. It follows that the Town of Weldon had implicit legislative authority to make the expenditure set out in the complaint.

The case at bar is readily distinguishable from *Madry v. Scotland Neck,* 214 N. C. 461, 199 S. E. 618, holding that cities and towns do not possess implied power to offer rewards for the apprehension or conviction of felons. While the Legislature has authorized municipalities to maintain law and order within their respective limits, it has not empowered them to engage in the apprehension of law breakers elsewhere or to undertake to prosecute criminal cases in the courts.

The plaintiff further asserts that the expenditure named in his complaint must be adjudged illegal as violative of the Constitution of North Carolina even if it was sanctioned by legislative fiat.

In this connection, the plaintiff maintains that when special training is given a police officer, the resultant increase of proficiency is a personal attribute of the officer; that the city or town cannot compel the officer to continue in its service after obtaining the training until it has received recompense for its outlay of public funds; and, that, therefore, the disbursement of public moneys for such purpose inures to the private advantage of the officer rather than to the collective benefit of the inhabitants of the city or town. Upon this premise, the plaintiff asserts that the expending of municipal tax money to train a policeman diverts public funds to the private use of the policeman contrary to Article V, section 3, of the Constitution, expressly limiting the levy of taxes to public purposes, and grants an exclusive emolument or privilege to the policeman contrary to Article I, section 7, of the Constitution, prescribing that "no man or set of men are entitled to exclusive emoluments or privileges from the community but in consideration of public services."

It is unquestionably a sound and salutary rule that the power to make appropriations of money out of the treasury of a city or town must be measured by the same criterions as those by which it is raised by taxation and put into such treasury. 51 Am. Jur., Taxation, section 323. Thus, we are presently confronted by the question of whether the expenditure here assailed was for a public purpose. *Nash v. Tarboro,* 227 N. C. 283, 42 S. E. (2) 209.

A tax or an appropriation is certainly for a public purpose if it is for the support of government, or for any of the recognized objects of government. *Ketchie v. Hedrick,* 186 N. C. 392, 119 S. E. 767; 51 Am. Jur., Taxation, section 326; 61 C. J., Taxation, section 20. Hence, the ex-

penditure challenged by the plaintiff was for a public purpose because its object was the maintenance of law and order, which is an essential function of government. 16 C. J. S., Constitutional Law, section 167.

The fact that the execution of the purpose required payment of the money involved to the defendant, P. R. Kitchin, did not affect its public character. This is true because "the test is not as to who receives the money, but the character of the purpose for which it is to be expended." 51 Am. Jur., Taxation, section 330; *Stanley v. Jeffries,* 86 Mont. 114, 284 P. 134, 70 A. L. R. 166. See, also, *Briggs v. Raleigh,* 195 N. C. 223, 141 S. E. 597.

The complaint reveals that the defendant, P. R. Kitchin, has been serving the Town of Weldon in the capacity of a police officer ever since he completed the course at the National Police Academy. For this reason, it seems somewhat inappropriate to argue here that the spending of municipal funds to train a policeman for the more efficient performance of his duties must be deemed to serve merely a private purpose because the municipality cannot compel him to remain in its service after obtaining the training until it has received recompense for its outlay of public moneys. But, in any event, this objection seems relevant to the question of the advisability of making the expenditure rather than to the existence of the power to make it. If the city or town does not choose to rely upon the mutual confidence and satisfaction existing between it and the police officer to induce the officer to stay in its employment for the desired period, it has the option of exacting an agreement from the officer with respect to this matter before making any outlay of public moneys.

The expenditure of tax moneys by a city or town to further the training of its policeman does not grant an exclusive emolument or privilege to the policeman contrary to Article I, section 7, of the Constitution because it is for a public purpose and "in consideration of public services." *Brumley v. Baxter, supra; Hinton v. Lacy,* 193 N. C. 496, 137 S. E. 669.

Finally, the plaintiff maintains that the expenditure in controversy was illegal under Article VII, section 7, of the Constitution even if it had legislative approval and was for a public purpose. The plaintiff asserts here that the prevention, detection, and prosecution of crime is a function of the State and not of the municipality; that the police of a city or town act for the State and not for the municipality when they undertake to enforce the law; and that in consequence the cost of training police officers of a city or town cannot be deemed a necessary expense of the city or town under Article VII, section 7, precluding a municipal corporation from levying or collecting taxes "except for the necessary expenses

thereof" without first being authorized so to do by a vote of the majority of its qualified voters.

The unsoundness of this contention is revealed by a consideration of the legal characteristics of cities and towns. "A municipal corporation is dual in character and exercises two classes of powers—governmental and proprietary. It has a twofold existence—one as a governmental agency, the other as a private corporation. Any activity of the municipality which is discretionary, political, legislative or public in nature and performed for the public good in behalf of the State, rather than for itself, comes within the class of governmental functions. When, however, the activity is commercial or chiefly for the private advantage of the compact community, it is private or proprietary. When injury or damage results from the negligent discharge of a ministerial or proprietary function it is subject to suit in tort as a private corporation. While acting in behalf of the State in promoting or protecting the health, safety, security, or general welfare of its citizens, it is an agency of the sovereign. No action in tort may be maintained for resulting injury to person or property." *Millar v. Wilson,* 222 N. C. 340, 23 S. E. (2) 42.

This Court has uniformly held that where the purpose for which a proposed expense is to be incurred by a municipality is the maintenance of public peace or administration of justice, or partakes of a governmental nature, or purports to be an exercise by the municipality of a portion of the State's delegated sovereignty, the expense is a necessary expense within the Constitution, and may be incurred without a vote of the people. *Sing v. Charlotte,* 213 N. C. 60, 195 S. E. 271; *Palmer v. Haywood County,* 212 N. C. 284, 193 S. E. 668; 113 A. L. R. 1195; *Martin v. Raleigh,* 208 N. C. 369, 180 S. E. 786.

It necessarily follows that the expenditure in controversy constituted a necessary expense within the meaning of Article VII, section 7, of the Constitution because the purpose of the expenditure was to enable the Town of Weldon to exercise that portion of the sovereignty of the State which had been delegated to it by the State for the maintenance of law and order within its borders. This holding harmonizes with *Tucker v. Raleigh,* 75 N. C. 267, where it is said that a debt contracted to obtain money to pay the compensation of the police is a necessary expense within the purview of the constitutional provision here considered.

In reaching this decision, we have not overlooked the allegations of the complaint that the expenditures involved "were not necessary expenses of said town, were unlawfully and wrongfully made from the revenues thereof, and constituted an unlawful appropriation of said funds for which said P. R. Kitchin is liable." These allegations are not averments of fact. They are mere conclusions of law asserted by the pleader. Consequently, they are not admitted by the demurrer. *Cathey v. Construc-*

tion Co., 218 N. C. 525, 11 S. E. (2) 571; *Richardson v. Richardson,* 207 N. C. 314, 176 S. E. 744; *Hussey v. Kidd,* 209 N. C. 232, 183 S. E. 255.

It follows that the averments of specific facts admitted by the demurrer are not affected by the general conclusions of law drawn therefrom by the pleader, and that the question of whether the expenditure named in the complaint was for a necessary expense within the meaning of Article VII, section 7, of the Constitution has not been converted into an issue of fact for determination by the jury.

Our conclusions may be simply stated in summary as follows:

Whether the expenditure in question was for a public purpose under Article V, section 3, of the Constitution, or was a necessary expense under Article VII, section 7, of the Constitution involved questions of constitutional law, which we have answered in the affirmative. Whether the expenditure had been authorized by the Legislature presented a question of statutory construction, which we have likewise answered in the affirmative. Whether the expenditure was necessary or needed in the particular instance specified in the complaint was a matter committed by law to the discretion of the governing body of the Town of Weldon.

These conclusions are in complete harmony with well considered decisions of this Court holding that "the courts determine whether a given project is a necessary expense of a municipality, but the governing authorities of the municipality determine in their discretion whether such given project is necessary or needed in the designated locality." *Starmount Co. v. Hamilton Lakes,* 205 N. C. 514, 171 S. E. 909. See, also, in this connection: *Fawcett v. Mt. Airy,* 134 N. C. 125, 45 S. E. 1029.

The town made this expenditure to maintain law and order within its borders. In so doing, it was performing an inherent function of sovereignty delegated to it by the State under statutes enacted by the Legislature in conformity to the Constitution. Since the Town of Weldon could not confer upon itself the constitutional and statutory authority to make an expenditure for this purpose by any action of its governing authorities, we are unwilling to adjudge that it acted illegally in this particular case in exercising a discretionary power conferred upon it by the Constitution and legislative fiat merely because of some supposed insufficiency in the phrasing of the resolution of its governing body directing the making of the expenditure. But even if it be assumed that the Town of Weldon could not exercise a discretionary power conferred upon it by the Constitution and the Legislature in the absence of some linguistic proclamation by its governing body that the expenditure in question was necessary or needed in the locality embraced by its limits, it seems to us that the action of the town council in expressly authorizing and directing the expenditure to be made ought to be deemed tantamount

to a determination and declaration on its part that it was necessary or needed for the proper enforcement of law and order within the municipality.

Our conclusions do not open a Pandora's box and render all authorized proceedings of the governing authorities of municipal corporations subject to judicial control. The converse is true for the reason that courts will not interfere with the exercise of discretionary powers conferred on municipal corporations for the public welfare, unless their action is so clearly unreasonable as to amount to an oppressive and manifest abuse of discretion. *Cox v. Kinston,* 217 N. C. 391, 8 S. E. (2) 252; *Riddle v. Ledbetter,* 216 N. C. 491, 5 S. E. (2) 542; *S. v. Weddington,* 188 N. C. 643, 125 S. E. 257, 37 A. L. R. 573; *Hudson v. Greensboro,* 185 N. C. 502, 117 S. E. 629; *Brown v. Hillsboro,* 185 N. C. 368, 117 S. E. 41; *S. v. Rice,* 158 N. C. 635, 74 S. E. 582, 39 L. R. A. (N.S.) 266; *S v. Staples,* 157 N. C. 637, 73 S. E. 112, 37 L. R. A. (N.S.) 696.

For the reasons set out above, the judgment of the court below must be Affirmed.

STACY, C. J., dissenting: The question for decision is whether the complaint states facts sufficient to constitute a cause of action.

It is alleged that the plaintiff is a citizen and taxpayer of the Town of Weldon; that the defendant, P. R. Kitchin, is and was at the times mentioned, a policeman of said town, with several years experience; that on 1 April, 1946, the Mayor and Board of Commissioners of Weldon adopted the following resolution:

"Motion by Mr. Johnson, seconded by Mr. Pierce and carried that the Clerk issue check to P. R. Kitchin for $425.00 to take care of estimated expenses to Police Academy. Mr. Kitchin was granted ninety days leave of absence with pay in order that he may attend the Police Academy in Washington, D. C. (The last sentence is presumably a part of the resolution, although somewhat uncertain as the record fails to show any closing quotation marks.)

It is accordingly alleged that pursuant to the above resolution, the defendant, P. R. Kitchin, received from the Town of Weldon the sum of $425 to cover his expenses at the Police Academy in Washington, and an additional sum of $675 as salary while on leave of absence attending said Academy, and that these payments were made from taxes levied on property of the plaintiff and other taxpayers of the Town of Weldon.

It is further alleged that the payments were made without special legislative sanction except as contained in the general law, and without a favorable vote of the qualified voters of the Town, and that said payments "were not necessary expenses of said Town."

The plaintiff made demand on the Mayor and Board of Commissioners that they take steps to recover these sums for the Town, which they have refused to do. *Hill v. Stansbury,* 223 N. C. 193, 25 S. E. (2) 604.

It thus appears that the complaint states a cause of action with accuracy and precision under Art. VII, sec. 7, of the Constitution: "No county, city, town, etc., shall contract any debt, etc., nor shall any tax be levied or collected by any officer of the same except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein."

The office of a demurrer is to test the sufficiency of a pleading, admitting, for the purpose, the truth of factual averments well stated and such relevant inferences of fact as may be deduced therefrom. *Leonard v. Maxwell, Comr.,* 216 N. C. 89, 3 S. E. (2) 316; *Ins. Co. v. Stadiem,* 223 N. C. 49, 25 S. E. (2) 202; *Ballinger v. Thomas,* 195 N. C. 517, 142 S. E. 761.

In the face of the admission on demurrer that the payments here in question "were not necessary expenses" of the Town of Weldon, we do not reach the question discussed in the majority opinion. Nowhere on the record now before us (complaint and demurrer) does it appear that the Commissioners of Weldon have declared or determined that the instant expenditures are necessary for the governance of the municipality. On the other hand, they have come into court and conceded on demurrer that the expenditures are "not necessary expenses of said Town." Where the body first charged with responsibility in the matter says the expenditures are not necessary, how can we say otherwise without usurping the powers of the local authorities? It is only when the question is presented as one of law, stripped of any question of fact, that the courts are authorized to act in the premises. When a case is presented on demurrer, we are required to construe the pleading liberally "with a view to substantial justice between the parties." G. S. 1-151; *Enloe v. Ragle,* 195 N. C. 38, 141 S. E. 477. The complaint is good as against the demurrer.

The Commissioners of the Town, to whom is confided the trust of regulating the affairs of the municipality, are first to determine as a matter of fact whether a given expenditure is "for the necessary expenses thereof" before the courts can be called upon to say whether such expenditure falls within the category of necessary governmental expenses. *Brodnax v. Groom,* 64 N. C. 244; *Evans v. Comrs.,* 89 N. C. 154; *Cromartie v. Comrs.,* 87 N. C. 134; *Satterthwaite v. Comrs.,* 76 N. C. 153.

The decisions are at one in holding that while the courts decide whether a particular municipal expense falls within the category of necessary municipal expenses, the governing authorities of the municipality first determine, in their discretion, whether such a municipal expense is necessary or needed for the designated locality. *Insurance Co. v. Guilford*

County, 225 N. C. 293, 34 S. E. (2) 430; *Power Co. v. Clay County,* 213 N. C. 698, 197 S. E. 603; *Sing v. Charlotte,* 213 N. C. 60, 195 S. E. 271; *Palmer v. Haywood County,* 212 N. C. 284, 193 S. E. 668; *Starmount Co. v. Hamilton Lakes,* 205 N. C. 514, 171 S. E. 909; *Black v. Comrs.,* 129 N. C. 121, 39 S. E. 818; *Fawcett v. Mt. Airy,* 134 N. C. 125, 45 S. E. 1029; *Storm v. Wrightsville Beach,* 189 N. C. 681, 128 S. E. 17. There is no occasion for the courts to consider the matter unless and until the prior factual determination has been made by the local authorities.

It was said in *Henderson v. Wilmington,* 191 N. C. 269, 132 S. E. 25, that the term "necessary expenses," as here used, "includes law and fact." The courts decide the one; the local authorities the other. The same expression occurs in a number of cases. *Glenn v. Comrs. of Durham,* 201 N. C. 233, 159 S. E. 439. Thus, in *Wilson v. Charlotte,* 74 N. C. 748, it was said: "It was held in *Brodnax v. Groom,* 64 N. C. 244, that if the object for which the money was to be raised came within the class of such as might be necessary for the country, it was left to the County Commissioners to decide whether in fact it was necessary or not, and their decision could not be reviewed by the court. This was also held in *Mitchell v. Trustees,* 71 N. C. 400." So thoroughly have the decisions settled the question that this has long been considered the accepted and established meaning of the section. *Starmount Co. v. Ohio Sav. Bank & Trust Co.,* 55 F. (2) 649. "What is a necessary expense for one locality may not be a necessary expense for another." *Storm v. Wrightsville Beach, supra.*

It may be noted that the resolution authorizing the expenditures in question makes no mention of whether they are for the necessary municipal expenses of the Town of Weldon. In this respect, the resolution is similar to the one appearing in the case of *Wilson v. Charlotte,* 206 N. C. 856, 175 S. E. 306, where the expense of a proposed drill tower to train the city's firemen was under consideration. But the circumstance in the instant case which renders the demurrer bad is the allegation that the expenditures "were not necessary expenses of said Town." This allegation is taken to be true for the purposes of the demurrer. It is not an allegation of law, but one of fact. *Black v. Comrs., supra; Wilson v. Charlotte,* 74 N. C. 748. The demurrer should have been overruled, and the defendants put to answer.

ADDENDUM.

After writing the above, the majority added a paragraph to its opinion saying that the allegation in question was not one of fact, but one of law, and hence not admitted by the demurrer.

A concurring dissent was thereupon filed pointing out that the added position of the majority was at variance with all the decided cases on the

subject, calling special attention to *Black's Case* where the identical question was in focus and pronouncement made thereon.

The majority then adds five more paragraphs to its opinion, the last four by way of "summary."

The first two paragraphs of the summary are new and appear to constitute a negation of the position last taken and to amount to a confession of error. The third immediately executes a *volte-face* on a supposed presumption which runs counter to the record and the decided cases. The entire summary is devoid of any reference to the crucial allegation and admission on demurrer that the expenses in question "were not necessary expenses of said Town." No presumption can arise, or be indulged, in the face of a contrary admission on the record. The fourth paragraph of the summary seeks to give assurance of benevolence in respect of the effect of the holding. Then why disrupt a long line of decisions and leave the law in confusion, when clarity and simplicity are so immediate and readily attainable?

If this Court is not going to follow its own established precedents, or the law as it is written, *S. v. Davis, ante,* 386, how is the practitioner to know what he can safely advise in legal matters, or the disquietude necessarily engendered thereby to be allayed? Confidence as well as logic must buttress the Court's decisions.

WINBORNE and DENNY, JJ., concurring in dissenting opinion: We fully concur in what is said in the dissenting opinion of *Stacy, C. J.*, but desire to say also, if the question were properly before us, we might not have any quarrel with the majority view that the expenses incurred in question here, might fall within that class of expenditures that come within the definition of "necessary expenses," within the meaning of Art. VII, sec. 7, of the Constitution of North Carolina. But if this Court is going to decide both questions of law and fact involved in what is "necessary expense" and when such expense is a necessary one for a particular locality, then governing authorities of municipalities may find themselves confronted with a *mandamus* to require them to send all their officers to a police school at public expense, whether they think it proper to do so or not.

None of our predecessors has said that what constitutes a necessary expense of a municipal corporation is purely a question of law. If it is purely a question of law, the governing bodies of municipal corporations are divested of any discretion or authority in the matter except to provide funds, and will on *mandamus* be liable to be required to provide for expenses which they might not in their sound discretion authorize.

We do not agree with the majority opinion that the allegation in the complaint to the effect that the expenses incurred in sending P. R.

Kitchin, a policeman of the Town of Weldon, to the National Police Academy, in Washington, D. C., were not necessary expenses of the Town of Weldon, is merely a conclusion of law and is therefore not admitted by the demurrer. Such a conclusion is not in accord with our decisions. The term "necessary expense" includes both law and fact. *Henderson v. Wilmington,* 191 N. C. 269, 132 S. E. 25. What is necessary expense is for the courts to decide, but whether or not an expenditure which the courts have declared falls within the class of "necessary expenses" is a necessary expense for a particular municipal corporation, must be determined by the governing authorities of such corporation in their sound discretion. *Insurance Co. v. Guilford County,* 225 N. C. 293, 34 S. E. (2) 430; *Power Co. v. Clay Co.,* 213 N. C. 698, 197 S. E. 603; *Sing v. Charlotte,* 213 N. C. 60, 195 S. E. 271; *Palmer v. Haywood County,* 212 N. C. 284, 193 S. E. 668; *Starmount Co. v. Hamilton Lakes,* 205 N. C. 514, 171 S. E. 909; *Henderson v. Wilmington, supra; Storm v. Wrightsville Beach,* 189 N. C. 679, 128 S. E. 17; *Fawcett v. Mt. Airy,* 134 N. C. 125, 47 S. E. 400; *Black v. Comrs.,* 129 N. C. 121, 39 S. E. 818; *Brodnax v. Groom,* 64 N. C. 244. In the last cited case, *Pearson, C. J.,* in speaking for the Court, said: "Who is to decide what are the necessary expenses of a county? The county commissioners; to whom are confided the trust of regulating all county matters. 'Repairing and building bridges' is a part of the necessary expenses of a county, as much so as keeping the roads in order, or making new roads; so the case before us is within the *power* of the county commissioners. How can this Court undertake to control its *exercise?* Can we say, such a bridge does not need repairs; or that in building a new bridge near the site of an old bridge, it should be erected as heretofore, *upon posts,* so as to be cheap . . .? In short, this Court is not capable of controlling the *exercise* of power on the part of the General Assembly, or of the county authorities, and it cannot assume to do so, without putting itself in antagonism as well to the General Assembly, as to the county authorities, and *erecting a despotism of five men;* which is opposed to the fundamental principles of our government, and the usages of all times past. For the exercise of powers conferred by the Constitution, the people must rely upon the honesty of the members of the General Assembly, and of the persons elected to fill places of trust in the several counties. This court has no power, and is not capable if it had the power, of controlling the exercise of power conferred by the Constitution, upon the legislative department of the government, or upon the county authorities."

Also in *Black v. Comrs., supra,* the plaintiff alleged that certain expenditures made by the County Commissioners were not for necessary expenses; the defendants in their answer alleged they were; whereupon this Court held the pleadings "raised an issue of fact which the Judge

is not authorized to try." The Court said further: "The defendant, probably seeing this trouble in its case, contended that the Court would presume that the Commissioners acted properly, and that the notes were given for *necessary expenses* of the county, and cited *McCless v. Meekins,* 117 N. C. 34, as authority for this contention. But that was where it was not denied but what that indebtedness was based upon the necessary expenses of the county; and this being so, the Court presumed that it was. But where there is an allegation and denial as to whether they were or were not for necessary expenses, the Court can presume nothing."

In the instant case we have no finding one way or the other by the governing authorities of the Town of Weldon, but the defendants, who are the members of the governing board of the Town of Weldon, have elected to demur to the complaint rather than answer and go to trial on the issues raised by the pleadings. Therefore, as we construe the pleadings, we are faced with an allegation that the expenditure was not a necessary expense for the Town of Weldon and an admission that the allegation is true. Even so, the majority opinion not only holds that expenses incurred in training a police officer fall within the class of expenditures that are "necessary expenses," within the meaning of our Constitution, but goes further and finds in the face of the admission to the contrary, that such expense is a necessary one of the Town of Weldon.

In the case of *Wilson v. Charlotte,* 206 N. C. 856, 175 S. E. 306, the City of Charlotte undertook to issue bonds for the purpose of erecting a fire drill tower, to be used in training firemen. The resolution authorizing the bond issue did not recite that such a tower was a "necessary expense" of the City of Charlotte, neither did the trial Judge so find, but on the contrary in the order entered therein the trial Judge stated "the Court is of opinion . . . that the construction of the fire drill tower is not a necessary expense for the City of Charlotte," and there being no exception to such finding of fact, this Court affirmed the judgment. The Court in the face of such finding, which surely could be no stronger than the admission by demurrer here, did not reach the question as to whether or not expenditures for a fire drill tower fall within the class of expenditures which are "necessary expenses," within the meaning of our Constitution. Neither do we, in our opinion, reach the question in this case.

We do not think this Court should usurp the fact finding powers vested exclusively in local municipal authorities, and it has never done so until now. The citizens of our respective municipal corporations have the right to expect and require the governing authorities of such corporations to determine in their sound discretion whether or not a given expense is necessary for that particular locality, and when the governing authorities have determined that an expenditure is a necessary expense for a locality, such finding, made in good faith, is binding on the courts if such expense

falls within the category of necessary expenses. *Black v. Comrs., supra.* However, the governing body of the Town of Weldon has made no such finding with respect to the expenditure involved in this action.

We think the demurrer should have been overruled, and we so vote.

ADDENDUM.

Since writing the above, the last two pages of the majority opinion, except the paragraph beginning on the preceding page, have been added. In this, they seem to try to say just the opposite to what the opinion decides. The case of *Black v. Comrs., supra,* is directly pertinent on the point at issue.

DR. J. H. WORLEY v. L. L. PIPES.

(Filed 24 November, 1948.)

1. Administrative Law § 4: Master and Servant § 53b (4)—Compensation Act provides exclusive remedy for determination of dispute as to fee for medical services to employee.

Where a physician renders services to an injured employee under private contract without knowledge that the injury was covered by the Compensation Act, and thereafter upon discovery that the injury is compensable, files claim for such services with the Industrial Commission in order that the employee get the benefit thereof, his remedy upon approval by the Industrial Commission in a sum less than the full amount of his claim, is to request a hearing before the Commission with right of appeal to the courts for review, G.S. 97-25, 97-26, 97-83 through 97-86, 97-90, 97-91, and this remedy is exclusive and precludes the physician from maintaining an action against the employee to recover the full contractual amount for the services and attacking the constitutionality of the relevant provisions of the Compensation Act.

2. Physicians and Surgeons § 13: Contracts § 7g—

Agreement by an injured employee to pay the physician engaged by him any balance due on his account after application of the amount approved by the Industrial Commission for the services is unenforceable and void, since the Act, G.S. 97-90 (b), makes the receipt of any fee for such services not approved by the Commission a misdemeanor.

APPEAL by defendant from *Alley, J.,* at Special May Term, 1948, of BUNCOMBE.

Civil action instituted in a justice of peace court of Asheville Township, Buncombe County, North Carolina, "for the recovery of the sum of $25.50 due *ex contractu* as alleged in the verified complaint in this cause."

Plaintiff alleges in his complaint in summary these facts:

1. That on 7 August, 1947, defendant sustained an injury by accident arising out of and in the course of his employment by K & Y Motor Lines, Inc., operator of a general motor freight business in North Carolina, who had accepted and was subject to the provisions of the North Carolina Workmen's Compensation Law, General Statutes Chapter 97, with insurance company carrier licensed to do business within the State of North Carolina.

2. That as a result of the injury described in the preceding paragraph defendant required surgical attention, and on 18 August, 1947, defendant visited the office of plaintiff, who was duly licensed to practice medicine and surgery in North Carolina, and as such duly registered and engaged in the active practice of the profession, specializing in surgery, and who was defendant's family physician, and plaintiff accepted him as such patient, and defendant employed plaintiff, without knowledge on the part of either that the case involved compensation under the Workmen's Compensation Law; and defendant made a token payment of $5.00, and impliedly agreed to pay plaintiff for professional services to be rendered as plaintiff's private patient.

3. That after examination and treatment by plaintiff, defendant had an uneventful complete recovery, due primarily to the skill and attention he received from plaintiff.

4. That the reasonable and fair value of plaintiff's services to the defendant in the matters and things herein set forth is the sum of $44.00, which is such as prevails in the community in which plaintiff and defendant reside for similar treatment of injured persons of like standard of living of defendant when such treatment is paid for by the injured person.

5. That after plaintiff had rendered the professional services hereinabove set forth defendant was advised by his employer that his injury was compensable under the North Carolina Workmen's Compensation Law,—whereupon defendant filed notice of claim for compensation with his employer and same was adjudicated by the North Carolina Industrial Commission, and on 27 October, 1947, the Commission awarded to him compensation for his injuries.

6. That at the time of filing his claim for compensation, as above alleged, defendant requested plaintiff to file a schedule of charges or bill for professional services rendered to defendant, in order that the employer might pay same, and thereby defendant would get the benefit of such payment, and such amount as was allowed would be credited by plaintiff and defendant would pay any excess.

7. That in consequence of the agreement referred to in last preceding paragraph, plaintiff filed his bill with the North Carolina Industrial Commission and it allowed only the sum of Thirteen and 50/100 ($13.50)

Dollars, leaving a balance of $25.50 due plaintiff, and thereupon plaintiff "billed the defendant" for the unpaid balance in the amount of $25.50 which defendant agreed to pay.

8. That thereafter defendant, in disregard of his contract, refused to pay said balance of $25.50, contending that he was not legally liable for professional services rendered for that the provisions of the Workmen's Compensation Act prohibited plaintiff from accepting payment for professional services in excess of the amount allowed by the Industrial Commission.

9. That defendant is indebted to plaintiff in the sum of $25.50, demand for payment having been made, and payment refused.

Whereupon plaintiff prays judgment against defendant for $25.50 and for costs, etc.

Defendant, in answer thereto, admits each of allegations of the complaint, except the allegation that he is indebted to plaintiff in the sum of $25.50, which he denies. And for further answer and defense defendant avers, briefly stated, that for the services rendered to him by plaintiff, plaintiff is entitled to compensation in the amount claimed but not from defendant, for that plaintiff is not entitled to receive from defendant for the professional services rendered, in that acceptance by plaintiff from defendant of fees in this case, unless approved by the Industrial Commission for services rendered, is prohibited by General Statutes 97-90, to wit: "(a) Fees for attorneys and physicians and charges of hospital for services under the Article shall be subject to the approval of the Commission.

"(b) Any person (1) who receives any fee, other consideration, or any gratuity on account of services so rendered, unless such consideration or gratuity is approved by the Commission or such court, shall be guilty of a misdemeanor, and upon conviction thereof, for each offense, be punished by a fine of not more than $500 or by imprisonment not to exceed one year, or by both such fine and imprisonment."

Wherefore defendant, having answered, prays judgment that plaintiff have and recover nothing.

Plaintiff, replying to the answer filed by defendant, alleges: "That the provisions of General Statutes 97-90 as set forth in defendant's answer are void, illegal and unconstitutional in that:

"1. Said law arbitrarily and unreasonably deprives the plaintiff and other physicians and surgeons and all injured employees who come under the provisions of General Statutes 97 of freedom of contract and of other rights and liberties protected under the Fourteenth Amendment to the United States Constitution, and Article I, section 17, of the Constitution of the State of North Carolina, and in violation of the Due Process

Clause of the 14th Amendment to the United States Constitution and Article I, section 17, of the Constitution of the State of North Carolina.

"2. The law constitutes class legislation and is discriminating, denying the plaintiff and other physicians and surgeons similarly situated of equal protection of the laws contrary to the 14th Amendment of the United States Constitution and to Article I, section 17, of the Constitution of the State of North Carolina."

Whereupon plaintiff reiterates his prayer for judgment as set forth in his complaint.

From judgment rendered in the justice of peace court appeal was duly taken, and return to notice of appeal duly docketed in Superior Court, where it was properly heard.

In Superior Court the parties waived a jury trial and agreed, in accordance with the provisions of the statute, that the judge could hear and find the facts and make his conclusions of law and thereupon render judgment.

Pursuant thereto the presiding judge finding the facts to be substantially as alleged in the complaint, concluded as matters of law:

"1. That the plaintiff and defendant entered into a valid contract for the giving and receiving of professional services, which was faithfully performed by the plaintiff and defendant received the benefits thereof in full by complete physical recovery, and that plaintiff is entitled to recover from the defendant the amount due under said contract, and that plaintiff did not waive or lose any rights under his contract by reason of accepting partial payment under an award of the Industrial Commission.

"2. That Section 97-90, and the other provisions of the Workmen's Compensation Act pleaded by the defendant as a bar to the plaintiff's right to recover under the contract in this case are void, illegal and unconstitutional in that:

"(A) Said law arbitrarily and unreasonably deprives the plaintiff and other physicians and surgeons and all injured employees who come under the provisions of General Statutes, Chapter 97, of freedom of contract and of other rights and liberties protected under the 14th Amendment to the United States Constitution and Article I, section 17, of the Constitution of the State of North Carolina,and in violation of the Due Process Clause of the 14th Amendment to the United States Constitution and Article I, section 17, of the Constitution of the State of North Carolina.

"(B) The law constitutes class legislation and is discriminatory, denying the plaintiff and other physicians and surgeons similarly situated of equal protection of the law contrary to the 14th Amendment of the United States Constitution and to Article I, section 17, of the Constitution of the State of North Carolina.

"3. That if the Workmen's Compensation Act is not unconstitutional it does not under the facts herein impair the right of the plaintiff to collect under the terms of the contract for professional services rendered to and received by the defendant, or restrain the defendant from paying for the services rendered under said contract."

Upon the findings of fact and conclusions of law so made, the court entered judgment in favor of plaintiff and against defendant in the sum of $25.50, with interest, and costs.

Defendant appeals therefrom to Supreme Court and assigns error.

George Pennell for plaintiff, appellee.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody, amicus curiæ.

Victor S. Bryant and Robert I. Lipton for North Carolina Industrial Council, amicus curiæ.

Narvel J. Crawford for defendant, appellant.

WINBORNE, J. At the threshold of this appeal, the defendant, appellant, upon the other facts found by the court, challenges, first, the findings of fact made, and the conclusions of law reached, by the court that he, defendant, is indebted to plaintiff for professional medical services rendered. In the light of pertinent provisions of the North Carolina Workmen's Compensation Act, Chapter 97 of the General Statutes, we are of opinion and hold that the challenge is well taken and should be sustained. Hence, plaintiff is not in position to question the constitutionality of G.S. 97-90 and other provisions of the Workmen's Compensation Act, to which other assignments of error relate, and, therefore, the debate of that question goes for naught.

The purpose of the General Assembly of this State, as stated in *Winslow v. Carolina Conference Asso.*, 211 N. C. 571, 191 S. E. 403, in providing for compensation for an employee, who has suffered injury, or for the dependents of an employee who has suffered death by accident arising out of and in the course of his employment, G.S. 97-2 (f) and (j), without fault on the part of the employer, where both employee and employer have accepted the provisions of the act, and are, therefore, bound by them, that the North Carolina Industrial Commission, created by the act for the purpose, G.S. 97-77, shall administer its provisions to the end that both employee and employer shall receive the benefits and enjoy the protection of the act. See also *Conrad v. Foundry Co.*, 198 N. C. 723, 153 S. E. 266; *Lee v. Enka Corp.*, 212 N. C. 455, 193 S. E. 809.

In the *Enka case* it is said that the right of the employee to compensation, and the liability of the employer therefor, are founded upon mutual

concessions, as provided in the act, by which each surrenders rights and waives remedies which he theretofore had under the law of this State. The act establishes a sound public policy and is just to both employer and employee. See also *Conrad v. Foundry Co., supra.*

While the act is not compulsory, *Lee v. Enka Corp., supra,* it provides that from and after 1 July, 1929, every employer and employee, except as there stated, shall be presumed to have accepted the provisions of the act respectively to pay and accept compensation for personal injury or death by accident arising out of and in the course of the employment, and shall be bound thereby, unless he shall have given, prior to any accident resulting in injury or death, notice to the contrary in the manner provided in the act. G.S. 97-3. The act provides that no contract or agreement, written or implied, no rule, regulation, or other devise shall in any manner operate to relieve an employer, in whole or in part, of any obligation created by the act, except as therein otherwise expressly provided. G.S. 97-6. It is also provided that no claim for compensation under the act shall be assignable; moreover, all compensation and claims therefor shall be exempt from all claims of creditors and from taxes. G.S. 97-21. The act also provides that the rights and remedies therein granted to an employee where he and his employer have accepted the provisions of the act, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee as against his employer at common law, or otherwise, on account of such injury, loss of service, or death, subject to provisos not pertinent here. G.S. 97-10.

Moreover, in addition to compensation provided to be paid by the employer to employee for injury by accident arising out of and in the course of the employment, the act provides that "medical, surgical, hospital, and other treatment, including medical and surgical supplies as may reasonably be required for a period not exceeding ten weeks from date of injury to effect a cure or give relief and for such additional time as in the judgment of the Commission will tend to lessen the period of disability shall be provided by the employer." G.S. 97-25. And in this connection the act provides that the pecuniary liability of the employer for medical, surgical, hospital service or other treatment required, when ordered by the Commission, shall be limited to such charges as prevail in the same community for similar treatment of injured persons of a like standard of living when such treatment is paid for by the injured person. G.S. 97-26. And, in respect thereto, the act further provides (a) that fees for attorneys and physicians and charges of hospitals for services under the act shall be subject to the approval of the Commission, and (b) that any person who receives any fee, other consideration, or any gratuity on account of services so rendered, unless such consideration or gratuity

is approved by the Commission or such court, shall be guilty of a misdemeanor, and upon conviction, punished as indicated. G.S. 97-90. Furthermore, the act provides that all questions arising under this act, if not settled by agreements of the parties interested therein, with the approval of the Commission, shall be determined by the Commission, except as otherwise therein provided. G.S. 97-91.

And for a remedy, the General Assembly has provided by this act that if the employer and injured employee fail to reach an agreement in regard to compensation within certain time, either party may make application to the Industrial Commission for a hearing in regard to the matters at issue, and for a ruling therein, upon receipt of which the Commission shall set a date for, and give notice of hearing. G.S. 97-83. Then the Commission, or any of its members, shall hear the parties at issue, and shall determine the dispute, and make an award. G.S. 97-84. Provision is made by which there may be a review of the award by the full commission. G.S. 97-85. Appeals from the full commission to Superior Court, and from Superior Court to Supreme Court are provided for. G.S. 97-86.

And the Commission may make rules, not inconsistent with the act, for carrying out the provisions of the act. G.S. 97-80.

Thus it is seen that the General Assembly has prescribed an adequate remedy by which any matter in dispute and incident to any claim under the provisions of the Workmen's Compensation Act may be determined and settled.

Now, then, in the light of these provisions of the North Carolina Workmen's Compensation Act, it is seen that plaintiff alleges in his complaint, and the court finds as facts, that on 7 August, 1947, defendant was employed by K & Y Motor Lines, which was subject to and had accepted the provisions of the North Carolina Workmen's Compensation Act; that while so employed and actually at work defendant was injured by accident arising out of and in the course of his employment; that defendant filed notice of claim for compensation with his employer and same was adjudicated by the North Carolina Industrial Commission, and compensation awarded by the Commission for his injury; that while plaintiff rendered medical services to defendant, as alleged, without knowledge that the case involved compensation under the Workmen's Compensation Law, he, at the time defendant filed his claim for compensation as above stated, and at request of defendant, filed his bill for professional services rendered defendant, in order that the employer might pay same and defendant thereby get benefit of such payment and the amount allowed would be credited by plaintiff and defendant would pay any excess; and that, in consequence of such agreement, plaintiff filed his bill with the North Carolina Industrial Commission and it allowed only $13.50, which left a balance of $25.50.

Thus plaintiff makes it appear, by his affirmative allegations, that the parties were subject to the provisions of the North Carolina Workmen's Compensation Act, and that he submitted his bill to, and for the approval of the Industrial Commission, and received approval for less than the full amount, and it does not appear that he asked for any hearing before the Commission, or that he appealed. Under such circumstances, he is bound by the provisions of the act.

The remedy provided by the act is exclusive. *Bar Association v. Strickland,* 200 N. C. 630, 158 S. E. 110; *Maxwell v. Hinsdale,* 207 N. C. 37, 175 S. E. 847; *Rigsbee v. Brogden,* 209 N. C. 510, 184 S. E. 24; *Wilkinson v. Boomer,* 217 N. C. 217, 7 S. E. (2) 491.

In the *Bar Association case, supra, Brogden, J.,* writing for the Court, said: "The courts everywhere are in accord upon the proposition that if a valid statutory method of determining a disputed question has been established, such remedy so provided is exclusive and must be first resorted to and in the manner specified therein."

And since the act provides that fees for physicians shall be subject to the approval of the Commission, and makes it a misdemeanor for anyone to receive any fee for services so rendered unless it be approved by the Commission, any promise made by defendant, the employee, to pay plaintiff the balance due on his account is unenforceable and void.

Consequently, the court below erred in finding and concluding that defendant is indebted to plaintiff as alleged.

Therefore, plaintiff may not challenge the constitutionality of the act in the respects indicated. "A party who is not personally injured by a statute is not permitted to assail its validity." *Adams, J.,* in *Yarborough v. Park Commission,* 196 N. C. 284, 145 S. E. 563.

The judgment below is

Reversed.

DR. N. H. MATROS v. HOWARD OWEN.

(Filed 24 November, 1948.)

Administrative Law § 4: Master and Servant § 53b (4): Physicians and Surgeons § 13—

The sole remedy of a physician to recover for services to an injured employee where the employee and employer are subject to the Workmen's Compensation Act is by application to the Industrial Commission in accordance with G.S. 97-83 to consider plaintiff's bill for such services notwithstanding that the employer denies liability for the injury on the ground that it did not arise out of and in the course of the employment, G.S. 97-25, G.S. 97-26, and the physician may not challenge the constitutionality of

the relevant provisions of the statute by an independent suit against the employee to recover for the medical services.

APPEAL by defendant from *Alley, J.*, at Special May Term, 1948, of BUNCOMBE.

Civil action instituted in a justice of peace court of Asheville, Buncombe County, North Carolina, "for the recovery of the sum of Twenty-five ($25.00) Dollars due *ex contractu,* as alleged in verified complaint filed in this cause."

The complaint in this action differs from the complaint in the action of *Worley v. Pipes, ante,* 465, only in these respects: It is alleged here that:

1. On 29 December, 1947, the defendant sustained an injury by accident arising out of and in the course of his employment, as a mechanic, by Harry's Cadillac-Pontiac Company, Inc., operator of a general garage business in the city of Asheville, North Carolina, which was subject to and had accepted the provisions of The North Carolina Workmen's Compensation Act, Chapter 97, with The Shelby Mutual Casualty Company of Shelby, Ohio, as carrier as defined by G.S. 97-93.

2. That when defendant was injured, as stated in preceding paragraph, his employer as aforesaid directed him to see plaintiff for professional service, as a patient covered by the North Carolina Workmen's Compensation Act, and pursuant thereto defendant went to plaintiff, and requested and received surgical attention from plaintiff, resulting later in an uneventful complete recovery, due primarily to the skill and attention he received from plaintiff, the reasonable and fair value of plaintiff's services being $25.00.

3. That after notice to defendant's employer of his claim, and after plaintiff herein had filed with employer his schedule of charges or bill for professional services to defendant herein, the employer and carrier denied liability upon the ground that defendant did not sustain injury by accident arising out of and within the course of his employment.

4. That thereafter plaintiff filed with defendant a schedule of charges or bill and claim for payment of $25.00 for the professional services as aforesaid, which defendant refused to pay for that he was not legally liable to plaintiff therefor in that the provisions of the Workmen's Compensation Act prohibited plaintiff from accepting compensation from defendant, and that he made no contract with plaintiff for payment, but admitted that services rendered were worth the amount charged.

5. That the reasonable and fair value of plaintiff's services to defendant is the sum of $25.00; that the charge is such as prevails in the community in which plaintiff and defendant reside, for similar treatment of injured persons of like standard of living of defendant, when such treat-

ment is paid for by the injured person; and that defendant is indebted to plaintiff in the sum of $25.00, after demand and payment refused.

(It is not alleged that plaintiff has applied to North Carolina Industrial Commission for approval of his bill for services rendered to defendant.)

Defendant, answering, denied indebtedness to plaintiff in any amount, for reasons set up in further answer, but admitted all other allegations. In such further defense, defendant made substantially the same averments as were made by defendant in further answer in *Worley v. Pipes, ante,* 465, and further, that, notwithstanding the fact that employer denied liability and refused to pay for medical treatment required by defendant, he, defendant, is not liable for such charges because the statute requires employer to furnish medical attention even though the defendant was not entitled to compensation for the injury, which protection is granted defendant under the provisions of G.S. 97-25. And plaintiff, replying, alleges, the same matters and things as plaintiff in *Worley v. Pipes, ante,* 465, alleged in his reply.

The justice of the peace rendered judgment for plaintiff, and on appeal duly taken, docketed and heard in Superior Court the parties waived a jury trial and agreed, in accordance with the provisions of the statute, that the judge could hear and find the facts and make his conclusions of law and thereupon render judgment. Thereupon, the court finding the facts to be substantially as alleged in the complaint, and, being of opinion that the matters and things pleaded by plaintiff as set forth in his reply, are well founded, reached the same conclusions of law as in *Worley v. Pipes, ante,* 465, and rendered judgment for plaintiff in the sum of $25.00 with interest and costs.

Defendant appeals therefrom to Supreme Court, and assigns error.

Sale, Pennell & Pennell for plaintiff, appellee.

Narvel J. Crawford for defendant, appellant.

WINBORNE, J. The defendant, appellant, presents on this appeal the same assignments of error as those presented in *Worley v. Pipes, ante,* 465.

The provisions of the North Carolina Workmen's Compensation Act, set forth in the opinion in *Worley v. Pipes, ante,* 465, are applicable to this case. However, the factual situation here differs from that in the *Worley case* in that here the plaintiff alleges in his complaint and the court finds as facts (1) not only that on 29 December, 1947, defendant was employed as a mechanic by Harry's Cadillac-Pontiac Company, which was subject to and had accepted the provisions of The North Carolina Workmen's Compensation Act, and was injured by accident arising out of and in the course of his employment, but that plaintiff rendered

surgical service to defendant with information from defendant that his employer had directed him, as a patient covered by the said Workmen's Compensation Act, to plaintiff for professional service; (2) that defendant complied with all the provisions of the North Carolina Workmen's Compensation Act by giving to his employer timely notice of his injury, and plaintiff filed with defendant's employer bill for the professional services to defendant; and (3) that said employer and his carrier declined to accept responsibility for the injury,—assigning as reason that from their investigation they were of opinion that defendant did not sustain injury by accident arising out of and in the course of his employment.

Thus, while it does not appear that either party applied to the North Carolina Industrial Commission for a hearing in regard to the matter at issue, and for a ruling thereon as provided in G.S. 97-83, plaintiff affirmatively alleges and the court finds that the parties were subject to and accepted the provisions of the Workmen's Compensation Act. That being so, the applicable remedy open to defendant and to plaintiff, in respect to his bill for services rendered, was to make such application to the Industrial Commission and have it consider for approval plaintiff's bill in the light of the provisions of G.S. 97-26. If the applicant be dissatisfied with the ruling of the Industrial Commission an appeal may be taken pursuant to provisions of the Compensation Act. Indeed, plaintiff may find that he may yet make such application. G.S. 97-22, G.S. 97-23, G.S. 97-24, and G.S. 97-47, as amended by 1947 Session Laws, Chapter 823. *Whitted v. Palmer-Bee Co.,* 228 N. C. 447, 46 S. E. (2) 109.

But under the facts alleged defendant is not indebted to plaintiff for the services rendered, and there is error in the finding of fact and conclusion of law and judgment that defendant is so indebted to plaintiff.

Therefore, as in *Worley v. Pipes, ante,* 465, plaintiff may not challenge the constitutionality of the act in the respects indicated.

The judgment below is

Reversed.

CRICHTON P. CUTHRELL (ORIGINAL PARTY PLAINTIFF) AND HUSBAND, W. R. CUTHRELL (ADDITIONAL PARTY PLAINTIFF), v. REBECCA JANE JOHNSON GREENE.

(Filed 24 November, 1948.)

1. Trusts § 2b: Frauds, Statute of, § 5—

Plaintiff alleged that her employer changed the beneficiary in a policy of insurance on his life to another employee under an agreement, understood, discussed and acquiesced in by all parties, that upon his death such other employee would pay out of the proceeds of such insurance the balance due

on a mortgage on plaintiff's home, and thus recompense both employees for services faithfully rendered. *Held:* The action is one to establish a parol trust and not one to recover on a promise by the employer to answer for the debt of plaintiff, and therefore G.S. 22-1 has no application.

2. Trusts § 2b: Evidence § 25—

Plaintiff employee instituted this action against another employee upon an agreement under which the employer made defendant employee the beneficiary in a policy of insurance on his life with the understanding that defendant would pay out of the proceeds of the insurance the balance due on a mortgage on plaintiff employee's house. *Held:* Questions asked plaintiff on cross-examination by defendant's attorney as to whether she was not seeking to hold defendant for a debt owed plaintiff by the deceased employer are irrelevant to the issue of the existence of a parol trust, and plaintiff was prejudiced by the refusal of the court to sustain her objections thereto.

3. Same—

Plaintiff employee instituted this action against another employee upon an agreement under which the employer made defendant employee the beneficiary in a policy of insurance on his life with the understanding that defendant would pay out of the proceeds of the insurance the balance due on a mortgage on plaintiff's house. *Held:* Questions asked plaintiff's husband on cross-examination by defendant's counsel as to whether he did not know that the proceeds of policies of insurance could not be charged with the debts of the deceased insured, are irrelevant to the issue of the existence of a parol trust, and objection to the questions should have been sustained.

4. Trial § 7—

While wide latitude is allowed counsel in his argument to the jury, counsel may not travel outside the record and inject into his argument facts of his own knowledge or other facts not included in the evidence, and when he does so, it is the duty of the presiding judge upon objection to correct the transgression.

5. Trial §§ 7, 8—

Ordinarily the failure of a party to testify in a civil action raises no presumption against him, but where the evidence is such as to call for testimony by the party in contradiction of the adverse party's direct testimony, the failure of such party to testify is a circumstance to be considered by the jury, and is a proper subject of fair comment by counsel.

6. Same: Appeal and Error § 39l—

Plaintiff testified that decedent changed the beneficiary in a policy of insurance on his life to defendant with the understanding that defendant would pay out of the proceeds the balance due on a mortgage on plaintiff's house, and that in several conversations between all the parties defendant agreed to make such payment. *Held:* The failure of defendant to testify in contradiction of plaintiff's testimony was a proper subject of comment by plaintiff's counsel, and argument of defendant's attorney that she failed to testify because she was pregnant was improper, since it related to matters *dehors* the record, and was prejudicial.

CUTHRELL *v.* GREENE.

APPEAL by plaintiff from *Harris, J.,* at April Civil Term, 1948, of FRANKLIN.

Civil action to recover on alleged parol trust.

The record discloses these matters: Plaintiff Crichton P. Cuthrell, as original party plaintiff, alleges in her complaint substantially these pertinent facts:

1. That the time of the matters and things complained of defendant, then Rebecca Jane Johnson, was, and for several months preceding had been, employed as secretary to Dr. Herbert G. Perry of Louisburg, North Carolina, and plaintiff Crichton P. Cuthrell was then, and for a period of approximately fifteen years had been, employed as clinical nurse for said Dr. Perry.

2. That a short time prior to 2 March, 1945, having an opportunity to purchase a home in Louisburg, North Carolina, and having the highest regard for his judgment in business affairs, plaintiff Crichton P. Cuthrell, consulted Dr. Perry with regard to purchasing said home and the best method of financing same, as she did not have in hand funds sufficient to pay for the same in cash, and, as result of this consultation, Dr. Perry advised her to purchase the home and he would finance the amount of $3,000 for her by securing same by a first mortgage on the property.

3. That in consequence of the advice and agreement of Dr. Perry, as just stated, plaintiff purchased the property and took title to same, and at same time executed and delivered a deed of trust to W. L. Lumpkin, Trustee, for the holder or bearer of the notes, securing notes in amount of $3,000, and delivered same to Dr. Perry and received therefor $3,000 which was paid as part of purchase price for her home.

4. That in the month of January, 1946, in the Cherry Hotel in Wilson, North Carolina, when plaintiff and her husband had gone to see Dr. Perry concerning his hospital in Louisburg, Dr. Perry, in the presence of them and of defendant, stated that "plaintiff would never have to pay the mortgage upon her home as he was indebted to her for long and loyal service for more than he could ever pay"; and, again, on or about 4 April, 1946, Dr. Perry, while at the home of plaintiff, having been in failing health for some time, and having stayed at home of plaintiff through several spells of sickness, and being at the time separated from his wife and family, "expressed himself" in the presence of plaintiff and her husband and defendant, then Rebecca Jane Johnson, now Greene, "that he was very worried about the condition of his health and that in appreciation for the plaintiff's long, loyal service to him as an employee and benefactor during his illness, that should anything happen to him, that he wished to make financial arrangement whereby the plaintiff would never be called upon to pay the then existing remaining balance of $2,700 due upon the aforesaid deed of trust which he stated had been transferred to

and was then being held by P. W. Elam, and that he had an insurance policy in the amount of $15,000 then payable to his estranged wife, in which he was going to change the beneficiary to the said Rebecca Jane Johnson and that one of the conditions for changing said beneficiary was that from the proceeds of the same, in case of his death, that the said Rebecca Jane Johnson would pay in full for the plaintiff the amount due upon said deed of trust, and the said Rebecca Jane Johnson then and there agreed to do so"; and "that thereafter on April 8th the said Dr. Herbert G. Perry changed the beneficiary in policy No. 1029549 of the Pacific Mutual Life Insurance Company to the defendant, then Rebecca Jane Johnson."

5. That thereafter, about 1 September, 1946, said Dr. Perry again in the home of plaintiff, critically ill with tuberculosis, "called the plaintiff and her husband . . . and the defendant to his bedside and advised them that in his opinion, he would not live more than a few days and that he wished to appoint his pallbearers and at the same time of appointing the same he reminded the defendant . . . that one of the conditions of changing the beneficiary in the aforesaid insurance policy to her was that she was to pay the remaining amount due on the mortgage on the plaintiff's home, from the proceeds thereof, and that he specifically did not want the plaintiff to ever have to pay one cent due upon it, and that he had not made any provision for the plaintiff in his will for her long and valuable service to him, for the reason that he was taking care of what he wished to leave to the plaintiff by way of said insurance policy; that then and there, again the defendant . . . assured the said Dr. Perry, and the plaintiff and her husband, that she would pay from the proceeds of the insurance policy the amount due upon the mortgage and that the same would be entirely taken care of in accordance with the said Dr. Herbert G. Perry."

6. That two days thereafter, on 3 September, 1946, Dr. Perry died in the home of plaintiff, and on or about 27 February, 1947, defendant collected the amount of said insurance policy in the sum of $15,000.

7. That thereupon plaintiff contacted defendant and "requested her to comply with her trust, and pay the amount due upon the mortgage in the sum of $2700 with interest"; that defendant made one excuse after another for not complying, and plaintiff continued to make demands upon her to do so, and on 12 March, 1947, defendant paid to plaintiff $500 with an explanation that at that time she could not pay the remainder as she had had to buy out of the proceeds of the insurance policy the dower right of the widow of Dr. Perry in a certain house, formerly his home and hospital, and to pay attorney's fees for collecting the insurance and "that she would take care of the balance as soon as she could get a final settlement from her attorneys"; but that though plaintiff has con-

tinued to request defendant "to make full settlement of her trust" she has declined, neglected and refused to pay the balance due.

And upon these allegations plaintiff prays judgment against defendant in sum of $2,200 with interest from 2 March, 1946, etc.

After the filing of the complaint, and upon motion of defendant Walter R. Cuthrell, husband of original plaintiff, was made party plaintiff, for that the deed to the home place was made to "Walter R. Cuthrell and wife, Crichton P. Cuthrell," and his name appeared on the notes and deeds of trust,—and he came into court and adopted the complaint filed by his wife as hereinabove set forth.

Defendant, answering the complaint, admits that she was employed by Dr. Herbert G. Perry as secretary and nurse for some time preceding his death; that Dr. Perry made her beneficiary in an insurance policy on his life; that Dr. Perry spent several days prior to his death in the home of plaintiffs; that Dr. Perry died on date, and that she collected $15,000 on the insurance policy, as alleged in complaint; and that she did buy the dower interest in the Dr. Perry home place, and pay her attorneys' fees—but defendant denies all other material allegations of the complaint.

And by way of further defense, defendant avers that in the event such a contract, as alleged in the complaint, did exist between plaintiffs and Dr. Perry, it not being in writing as required by G.S. 22-1, it is not enforceable against defendant, and she pleads this statute as a bar to plaintiffs' recovery in this action.

Upon the trial in Superior Court *feme* plaintiff and her husband testified in specific detail in support of the allegations of the complaint, and offered other testimony in corroboration of their testimony. Defendant, though present in court throughout the trial, offered no testimony.

At the close of all the evidence, plaintiffs moved for a directed verdict on the evidence. The motion was denied. Exception by plaintiff.

The case was submitted to the jury upon these issues:

"1. Did Dr. Herbert G. Perry create a parol trust in Rebecca Jane Johnson as trustee for the benefit of Crichton P. Cuthrell by reason of the change of the beneficiary in an insurance policy as alleged in the complaint?

"2. In what amount is defendant indebted to plaintiff?"

The first issued was answered "No." The second issue was not answered.

From judgment on the verdict in favor of defendant, plaintiffs appeal to Supreme Court and assign error.

E. C. Bulluck and Charles P. Green for plaintiffs, appellants.

Lumpkin, Lumpkin & Jolly and Yarborough & Yarborough for defendant, appellee.

WINBORNE, J. Careful consideration of the several assignments of error brought forward and presented on this appeal reveals error prejudicial to plaintiff which necessitates a new trial.

In connection with the questions presented it must be borne in mind that the cause of action upon which plaintiff Crichton P. Cuthrell bases this action is an alleged parol trust in her favor, created by Dr. Herbert G. Perry as a condition for changing the beneficiary, and naming defendant as beneficiary, in a certain policy of insurance on his life, in that he required of defendant an agreement that she would pay, out of the proceeds of the policy, the amount of balance due on a deed of trust executed by plaintiffs as security for balance of purchase price on the home of plaintiff. This is not an action to recover on a contract of indebtedness, express or implied, by Dr. Herbert G. Perry to Crichton P. Cuthrell. The issue is whether or not Dr. Perry created the trust in favor of Crichton P. Cuthrell as alleged in the complaint. He either did or did not. And the statute of frauds, G.S. 22-1, providing in substance that an action on a promise to pay the debt of another may not be maintained unless the agreement upon which it is based shall be in writing, and signed by the party charged, or by some other person lawfully authorized, is not applicable to an action on a parol trust.

We now come to consider, in the light of the purpose of this action, certain of the exceptions presented by plaintiff.

1. The second exception is to the action of the trial court in overruling objection to this question, three in one, asked plaintiff Crichton P. Cuthrell on cross-examination by counsel for defendant: "Q. Are you trying to hold somebody else for what he owed you? You brought this suit for what he owed you? Isn't that what you are doing?" These questions are not relevant and pertinent to the issue in the case, and are calculated to prejudice the cause of plaintiff in the minds of the jury. The objection should have been sustained.

2. The third and fourth exceptions are directed to the action of the court in overruling objection to questions asked W. R. Cuthrell, witness for, and husband of plaintiff Crichton P. Cuthrell, on cross-examination by counsel for defendant. After the witness had testified that he is in the insurance business, these questions were asked him: "Q. And you are in it now, and you know about the provision of the North Carolina law which says that you cannot charge a beneficiary of an insurance policy or a man's life insurance with his debts?" And, again: "Q. Don't you know that under the North Carolina law the proceeds of an insurance policy payable to a named beneficiary cannot be charged with the debts of the deceased?" The import of these questions runs counter to the theory of the alleged cause of action on which the action is based, and, if for no

other reason, they are irrelevant, and prejudicial to plaintiff. There is error in not sustaining the objections to them.

3. The sixth exception has its setting in this incident occurring on the trial: "One of the counsel for defendant, during the course of his address, argued to the jury that the defendant, Rebecca Jane Johnson Greene was not required to prove anything or even take the stand and that Rebecca Jane Johnson Greene was pregnant and for that reason did not go upon the witness stand to testify; counsel for the plaintiff objected to this argument to the jury by counsel and asked the court to instruct the jury not to consider such argument as such argument was improper; motion by the plaintiffs' attorney was overruled and the defendant's attorneys were permitted by the court to argue to the jury that the defendant Rebecca Jane Johnson Greene's reason for not going on the witness stand was that she was pregnant."

Under the circumstances of this case, we are of opinion, and hold, that the explanation by counsel for defendant as to why she did not go upon the witness stand exceeds the bounds of permissible argument. While wide latitude is given to counsel in addressing the jury, *McLamb v. R. R.*, 122 N. C. 862, 29 S. E. 894, he may not "travel outside of the record" and inject into his argument facts of his own knowledge or other facts not included in the evidence. McIntosh, N. C. P. & P., p. 621; *Perry v. R. R.*, 128 N. C. 471, 39 S. E. 27; *S. v. Howley*, 220 N. C. 113, 16 S. E. (2) 705; *S. v. Little*, 228 N. C. 417, 45 S. E. (2) 542; *S. v. Hawley, ante*, 167, 48 S. E. (2) 35. And when counsel does so, it is the right and, upon objection, the duty of the presiding judge to correct the transgression, *S. v. Little, supra*, and cases there cited.

In the present instance, the court having overruled the objection of plaintiff to the statement being made to the jury by counsel for defendant, the question arises as to whether the statement is prejudicial to plaintiff. Ordinarily, in a civil action, the failure to testify, standing alone, "counts for naught against a party, and the jury should presume nothing therefrom; but when the case is such as to call for an explanation," *McNeill v. MaNeill*, 223 N. C. 178, 25 S. E. (2) 615, or the evidence is such as to call for a denial, as in the present case, the situation is different. See also *Goodman v. Sapp*, 102 N. C. 477, 9 S. E. 483; *Hudson v. Jordan*, 108 N. C. 10, 12 S. E. 1029; *Powell v. Strickland*, 163 N. C. 393, 79 S. E. 872; *Trust Co. v. Bank*, 166 N. C. 112, 81 S. E. 1074; *Bank v. McArthur*, 168 N. C. 48, 84 S. E. 39; *In re Hinton*, 180 N. C. 206, 104 S. E. 341; *Walker v. Walker*, 201 N. C. 183, 159 S. E. 363; *York v. York*, 212 N. C. 695, 194 S. E. 486. Compare *Barker v. Dowdy*, 224 N. C. 742, 32 S. E. (2) 265.

In the present case the failure of defendant to go upon the witness stand to contradict the direct testimony offered by plaintiff as to what Dr. Perry

said in her presence, and to her with respect to changing the policy of insurance on his life, and naming defendant as beneficiary under the policy, requiring that, out of the proceeds of the policy, the deed of trust on plaintiff's home be paid, and as to the agreement by defendant to so pay it, was a circumstance against her to be considered by the jury, and was proper subject of fair comment by counsel for plaintiff in addressing the jury. *Goodman v. Sapp, supra; Powell v. Strickland, supra; York v. York, supra.*

The statement of counsel for defendant, in explanation of why defendant did not go upon the witness stand injected into the case facts or evidence of facts not included in the testimony offered on the trial, and impinged upon the right of plaintiff to have the jury consider the case only in the light of the evidence properly admitted in the course of the trial.

Since there is to be a new trial, other exceptions appearing in the record of case on appeal need not be considered.

New trial.

IN RE WILL OF I. M. L. BROCK, DECEASED.

(Filed 24 November, 1948.)

1. Wills § 17—

A caveat proceeding is not a civil action but a special proceeding *in rem* for the determination of the single question of *devisavit vel non.*

2. Wills § 18e—

Parties to whom citations must issue in a caveat proceeding are only those who are entitled under the will or interested in the estate, G.S. 31-32, G.S. 31-33, and who are parties interested in the estate must be determined in view of the nature of the proceeding as one *in rem.*

3. Wills § 17—

The distinction between a caveat proceeding and other controversies or adversary civil actions is one of substance as well as of form.

4. Wills § 18e—

Persons to whom citations must issue in a caveat proceeding are not cited as parties, but merely as interested persons to view proceedings and participate if they elect to do so. G.S. 31-33.

5. Same—

In a caveat proceeding, neither the grantees in deeds executed by testator prior to his death nor the persons to whom such grantees have conveyed the property, either before or after testator's death, nor the heirs at law of deceased grantees are necessary parties to the determination of the issue

of *devisavit vel non* when such persons are not beneficiaries under the will nor heirs of testator, and therefore, even if it be conceded they are proper parties, the trial judge, in the exercise of his discretion, is under no legal obligation to order citations to bring them in.

6. Same—

Where the executrix has fully administered the estate and filed her final account prior to the filing of a caveat, and has died pending the caveat proceeding, it is not necessary that the court appoint a personal representative for the deceased executrix nor an administrator *d. b. n.* for the estate of the testator.

CAVEATOR'S appeal from *Burney, J.*, May Term, 1948, ONSLOW Superior Court.

The appeal is concerned with the contest of the purported will of I. M. L. Brock, deceased, and the order of Judge Burney refusing to make additional parties at the instance of contestants after caveat had been some time filed, and the cause came on for a hearing and continuance for the caveators had been denied.

The death of Brock occurred the 19th day of November, 1941, and on the 28th day of November following, the executrix named in the will offered it before the Clerk of the Superior Court, where it was probated in common form. About November 26, 1945, caveat to the will was filed by R. C. Brock and John R. Brock, sons of the testator, and beneficiaries under the will. Citation was issued by the Clerk under the statute, G.S. 31-33, to all the beneficiaries under the will and heirs at law of the testator. The cause came on for a hearing at May Term, 1948, and the caveators filed a motion, verified as to the facts contained in it, presenting the names of other persons alleged to be interested in the proceeding and "necessary to the final determination of the controversy," and moved that citations should be issued bringing them into court.

The motion was in writing and sets up the alleged facts upon which it is based:

"MOTION: NOW COME J. R. Brock and R. C. Brock, caveators in the above captioned proceeding, and respectfully showeth to the Court the following facts:

"1. That the above captioned proceeding was instituted in the Superior Court of Onslow County for the purpose of caveating the paper writing propounded as the last will and testament and codicil of I. M. L. Brock, deceased, said proceeding having been instituted on the 26th day of November, 1945.

"2. That Emma Ruth Brock, widow of I. M. L. Brock, deceased, and who qualified as executrix of the estate of I. M. L. Brock, deceased, was made a party to the above captioned proceeding.

"3. That the said Emma Ruth Brock is a devisee under the terms and provisions of the paper writing propounded as the last will and testament, and codicil thereto, of I. M. L. Brock, deceased.

"4. That, pending the trial and final determination of the above captioned proceeding, and on the..... day of....., 1946, Emma Ruth Brock died while a resident of Onslow County, North Carolina, leaving her surviving as her sole heirs at law and next of kin the following children, to wit, Olivia Brock Kennington, Benjamin W. Brock and Isaac (Ikie) Brock.

"5. That there appears of record in the office of the Register of Deeds of Onslow County in Book 190, at page 419, a paper writing bearing date July 12, 1941, purporting to be a deed from I. M. L. Brock to Emma Ruth Brock, conveying lands therein described.

"6. That there appears of record in the office of the Register of Deeds of Onslow County in Book 190, at page 420, a paper writing bearing date July 12, 1941, purporting to be a deed from I. M. L. Brock to Emma Ruth Brock, conveying lands therein described.

"7. That there appears of record in the office of the Register of Deeds of Onslow County in Book 190, at page 421, a paper writing bearing date July 12, 1941, and purporting to be a deed from I. M. L. Brock to Emma Ruth Brock, conveying 36 acres of land, more or less.

"8. That there appears of record in the office of the Register of Deeds of Onslow County in Book 190, at page 422, a paper writing bearing date July 12, 1941, and purporting to be a deed from I. M. L. Brock to Emma Ruth Brock, conveying two tracts of land therein described, one containing 100 acres, more or less, and the other containing 8 acres, more or less.

"9. That there appears of record in the office of the Register of Deeds of Onslow County in Book 190, at page 423, a paper writing bearing date July 12, 1941, purporting to be a deed from I. M. L. Brock to Emma Ruth Brock, conveying a portion of two tracts of land, each containing 100 acres, more or less.

"10. That there appears of record in the office of the Register of Deeds of Onslow County in Book 190, at page 424, a paper writing bearing date July 12, 1941, purporting to be a deed from I. M. L. Brock to Isaac (Ikie) Brock and Emma Ruth Brock, conveying one acre of land, more or less.

"11. That there appears of record in the office of the Register of Deeds of Onslow County in Book 190, page 425, a paper writing bearing date July 12, 1941, purporting to be a deed from I. M. L. Brock and Emma Ruth Brock to Isaac (Ikie) Brock, conveying 70 acres of land, more or less.

"12. That there appears of record in the office of the Register of Deeds of Onslow County in Book 190, at page 426, a paper writing bearing date July 12, 1941, and purporting to be a deed from I. M. L. Brock to Emma Ruth Brock, conveying Lots 6, 7, 8, 9 and 10 of subdivision of farm lands containing 78.92 acres, more or less.

"13. That there appears of record in the office of the Register of Deeds of Onslow County instruments purported to have been executed by Emma Ruth Brock to Benjamin Wadsworth Brock, affecting the title to the real estate of which I. M. L. Brock died seized and possessed, as follows:

"Emma Ruth Brock to Benjamin Wadsworth Brock, recorded in the office of the Register of Deeds in Book 192, page 593, conveying 36 acres, more or less;

"Emma Ruth Brock to Benjamin Wadsworth Brock, recorded in the office of the Register of Deeds in Book 192, page 594, conveying one acre, more or less;

"Emma Ruth Brock to Benjamin Wadsworth Brock, recorded in the office of the Register of Deeds in Book 192, page 595, conveying 110-acre tract and a one-acre tract, more or less;

"Emma Ruth Brock to Benjamin Wadsworth Brock, recorded in Book 192, page 596, conveying Lots Nos. 6, 7, 8, 9 and 10 of subdivision of farm lots containing 78.92 acres, more or less;

"Emma Ruth Brock to Benjamin Wadsworth Brock, recorded in Book 192, page 597, conveying 12 acres, more or less;

"Emma Ruth Brock to Benjamin Wadsworth Brock, recorded in Book 192, at page 598, conveying lands on the Quaker Bridge Road.

"14. That, as the movants are advised, believe and so allege, no person has qualified as administrator of the estate of Emma Ruth Brock, deceased, or applied for letters of administration of the said estate.

"15. That the paper writing propounded as the last will and testament, and codicil thereto, of I. M. L. Brock, deceased, purports to dispose of the real and personal properties of which he died seized and possessed.

"16. That, as the movants are advised, believe and so allege, Benjamin W. Brock is lawfully married to Carrie Mae Brock, and that Olivia Brock is married to Joseph P. Kennington and her legal name is now Olivia Brock Kennington.

"17. That any verdict, decree or judgment entered in the above captioned proceeding affects the title to the properties described in each of the instruments hereinbefore referred to as appearing of record in the office of the Register of Deeds for Onslow County, being the properties of which I. M. L. Brock died seized and possessed,

specifically affecting the interest of Benjamin W. Brock and wife, Carrie Mae Brock; Olivia Brock Kennington and husband, Joseph P. Kennington, in the said properties and the said movants are advised, believe and so allege that Benjamin W. Brock and wife, Carrie Mae Brock, Olivia Brock Kennington and husband, Joseph P. Kennington, are proper and necessary parties to the above captioned proceeding, to the end that such verdict, orders and decrees entered in said proceeding and in the final determination of the same, may be binding upon the said parties as muniments of title relating to the lands and properties of which I. M. L. Brock died seized and possessed, title to which is claimed by them and/or either of them as devisees under the paper writing propounded as the last will and testament of I. M. L. Brock, deceased, and the codicil thereto, claimed by them and/or either of them as grantees under any one or all of the paper writings hereinbefore referred to and alleged as appearing of record in the office of the Register of Deeds of Onslow County, purporting to convey the lands of which I. M. L. Brock died seized and possessed and/or as heirs at law of the said Emma Ruth Brock, deceased.

"18. That it is necessary, in order that all matters pertaining to the title to the properties of which I. M. L. Brock died seized and possessed may be finally determined in the above captioned proceeding, that a personal representative of the estate of Emma Ruth Brock, deceased, be duly appointed by the Clerk of the Superior Court of Onslow County and duly made a party to the above captioned proceeding as provided by statute relating to such matters.

"WHEREFORE, the movants pray that an order be entered in the above captioned proceeding as follows:

"(1) Directing that the Clerk of the Superior Court of Onslow County forthwith appoint some competent and discreet person to act as the personal representative of the estate of Emma Ruth Brock, deceased, to the end that such personal representative as is appointed and qualified may be made a party to the above captioned proceeding and citation issued therefor in the manner prescribed by law.

"(2) That Benjamin W. Brock and wife, Carrie Mae Brock, and Olivia Brock Kennington and husband, Joseph P. Kennington, be made parties to the above captioned proceeding and that citations issue to them from the office of the Clerk of the Superior Court of Onslow County in the above captioned proceeding as provided by law.

"(3) For such other and further relief as the movants may show themselves entitled to upon the whole cause."

Where necessary to an understanding of the discussion and decision, specific reference to pertinent items of the will will be made in the opinion.

The motion was declined and the caveators appealed.

Warlick & Ellis and J. A. Jones for caveators, appellants.

Bailey & Holding, John D. Larkins, William F. Ward, R. A. Nunn, and E. W. Summersill for appellees.

SEAWELL, J. In this jurisdiction the right to contest a will by caveat is given by statute; and the procedure to be followed is outlined in the statute conferring the right, G.S. 31-32, 31-33, *et seq.* It is not a civil action, as classified in the Code of Civil Procedure, but a special proceeding *in rem* leading to the establishment of the will as a testamentary act under the issue *devisavit vel non. In re Haygood's Will,* 101 N. C. 574, 578, 8 S. E. 222; *In re Will of Westfeldt,* 188 N. C. 702, 125 S. E. 521; *Bailey v. McLain,* 215 N. C. 150, 1 S. E. (2) 372; *S. v. McGlynn,* 20 Cal. 233; *Ex parte Re Elliott,* 22 Wash. (2) 334, 156 P. (2) 427; 157 A. L. R. 1335, anno. 57 A. L. R. 262, 57 A. M. Jur. 757. Often this issue is subdivided, according to the angle or nature of the attack, into ancillary issues, the most common of which are those relating to undue influence and testamentary capacity; but every caveat to a will leads to the simple inquiry we have mentioned, *devisavit vel non,* and the rules of procedure are framed with reference to that feature.

Under G.S. 31-32, *supra,* the right conferred and the time in which it may be exercised, is expressed as follows:

> "31-32. When and By whom Caveat filed.—At the time of application for probate of any will, and to the probate thereof in common form, or at any time within seven years thereafter, any person entitled under such will or interested in the estate may appeal in person or by attorney to the Clerk of the Superior Court and enter a caveat to the probate of such will, etc."

It will thus appear caveat to a will may be filed only by persons *"entitled under such will or interested in the estate."* And section 31-33, directing the issue of citations, "to all devisees, legatees, or other parties in interest," does not enlarge the definition of *interest* given in the preceding section.

It is to be noted that the persons so interested are not cited as parties to the proceeding but merely as interested persons to view proceedings and participate if they elect to do so, although no doubt the court, when properly and timely advised, would cause citation to issue to anyone

designated by statute as interested but who has been omitted. See *Mills v. Mills,* 195 N. C. 595, 143 S. E. 130.

In this proceeding the Clerk of the Superior Court issued citation to all the heirs of I. M. L. Brock, the testator, and all the beneficiaries under the will. The question raised is whether Benjamin W. Brock (who was neither heir nor devisee of the testator but holds certain deeds from I. M. L. Brock and other deeds from Emma Ruth Brock, devisee), and Carrie Mae Brock (an heir at law of Mrs. Emma Ruth who died pending the proceeding), have such interest as to make it obligatory on the part of the court to order citation to issue to them as "necessary parties" to the final determination of the proceeding. These two are the persons whom the caveators seek to have made "parties." Neither of them, as will presently appear, have an interest in contesting the will.

Here we must interpose some discussion of rules of procedure peculiar to the subject under review,—the probate of the will in solemn form.

The rules peculiar to this procedure arise, as we have said, from the legally accepted theory that the proceeding is *in rem*—perhaps more strictly so regarded than any other proceeding with which the courts deal. This concept has given rise not only to exclusive designations or nomenclatures given to persons concerned with the proceeding, but also terms which are peculiar to their relation to the investigation. In this respect the whole proceeding stands apart from ordinary civil actions. The *in rem* nature of the proceeding dominates the investigation, and in many important respects the parties litigant have little of the usual control over the course of trial on the issue. Once propounded for probate in solemn form the proceeding must go on until the issue *devisavit vel non* is appropriately answered; and no nonsuit can be taken by the propounders or by the caveators. *In re Will of Westfeldt, supra.*

It is the peculiar relation of the contesting parties to the proceeding which demands attention here. The fact is that they are not parties, or indeed cited as parties according to the rules pertaining to ordinary adversary actions arraying those interested as parties plaintiff and defendant, whatever the significance or necessity for the citation may have as a matter of notice. *Bailey v. McLain, supra.*

Justice Holmes said, "The life of the law has not been logic; it has been experience." This subject, set apart in the minds of men, lay, professional and curial, under the influence of a recognized solemnity, has had an insulated development, and it is not strange that there may be found at some points disagreement between rules so evolved and those applied in ordinary adversary actions.

The effort is made in appellants' brief to similarize this sort of special proceeding with the rules applied in ordinary controversies or adversary civil actions, and both statutes and precedents pertaining to the latter

are cited as controlling; and, indeed, we find in 57 Am. Jur., 760, 763, a suggestion that in those jurisdictions where the right to contest the will is given to any person interested, there is some approach to the procedural requirements in the latter class of controversy. If the differences between the proceedings were at all points in form, and never in substance, this view might prevail; but we are confronted with distinctions which go to the substance rather than the form. We feel sure that if there is any further *rapprochement,* in our jurisdiction, it must be at the hands of the Legislature, not the courts.

Perhaps, however, in the particular case a closer look at the status of the persons the caveators seek to have made parties will render the discussion less abstract.

The caveators base their motion upon the fact that there are on the records of Onslow County eight deeds by I. M. L. Brock to his wife, Emma Ruth Brock, conveying various parcels of land, executed July 12, 1941, some months before the will became effective through the death of the testator on November 19 of the same year; that Emma Ruth Brock, devisee under the will, at some date which does not appear from the record, executed six deeds to Benjamin W. Brock, conveying various parcels of land therein described. The caveators claim in their brief that Benjamin Brock has now in his possession at least 75 per cent of all the lands of which I. M. L. Brock died seized and possessed.

For the purposes of this appeal it appears from the record that the testator Brock in fact and law did not die seized and possessed of the lands conveyed to his wife by the eight deeds above mentioned, all made prior to his death.

There are three items in the will devising lands to Mrs. Emma Ruth Brock, the wife. There is no way apparent in the record by which the Court is able to correlate any of the conveyances mentioned with the three items of the will which convey real estate to Emma Ruth Brock, or to determine the ultimate source of title of Emma Ruth Brock's deeds to Benjamin Brock; and the Court will not make an assumption on such an important matter. Nor is it able in this case to act upon the suggested contingency that the Brock deeds to his wife may be invalid, or invalidated.

The interest which allegedly qualifies Olivia Brock Kennington as a necessary party upon the issue *devisavit vel non* is the supposed inheritance of title from her mother to such property as might be devised to her under the will. Olivia was not herself an heir of the testator, or a beneficiary of the will. If the will were set aside the estate of the testator would not be obligated to Mrs. Emma Ruth Brock, the mother, except as to widow's dower, her year's allowance, or child's share of the personalty, all of which obligations were canceled by her death. If it stands, Olivia

could only inherit that part of the devise to the mother which had not been stripped away either by the conveyances made by the testator before his death; or by the deeds of her mother to Benjamin Brock if the deeds were made subsequent to his death and could be related to the devise. It does not affirmatively appear to the Court that she has such an interest as the statute contemplates in order to make her citation necessary.

We do not ignore the fact that appellants have made certain general claims with regard to the relation of these persons to the estate of the testator; but they have also particularized the facts upon which such claim is based. Conceding, but not deciding, that these persons may be proper parties to the proceeding, they are not necessary parties; and the trial judge, in the exercise of his discretion, was under no legal obligation to order citations to bring them in.

In their motion below, the caveators asked that a personal representative be appointed for Emma Ruth Brock, the executrix and devisee under the will, who died pending the proceeding; and in this Court, without any amendment to the motion, suggested that an administrator *d. b. n.* should be appointed for the estate of I. M. L. Brock. In this request it seems to us that counsel is inadvertent to the nature of the proceeding. The record discloses that the executrix prior to the caveat of the will had fully administered the estate of the testator and filed her final account; and the personalty of Mrs. Emma Ruth Brock certainly has nothing to do with this proceeding. Any rights which the parties now have, or may have at the termination of this proceeding with respect to these subjects, must be determined in a separate proceeding.

For the reasons above stated, the judgment of the court below is

Affirmed.

E. R. WHITE v. LOUIS ORDILLE.

(Filed 24 November, 1948.)

1. Attachment § 4: Garnishment § 2—

Where it does not appear that a nonresident has been brought into this State by, or after waiver of, extradition, personal property brought into the State by such nonresident is subject to attachment or garnishment. G.S. 15-79, G.S. 1-458, G.S. 1-461.

2. Arrest and Bail § 6—

Any justice of the peace has the power to take bail for persons brought before him charged with a misdemeanor or a felony less than capital, and a person charged may give a recognizance bond or deposit the amount required in cash or may elect to refuse to give security and go to jail. G.S. 15-102, G.S. 15-105.

3. Arrest and Bail § 8—

A recognizance, either bond or cash in lieu thereof, is an acknowledgment of a debt to the State conditioned upon defendant's appearance at the time and place specified and his compliance with the judgment of the court, and therefore cash deposited by him as security for his appearance remains his property subject to the conditions of his recognizance, and his right to the return of the cash upon performance of the conditions of the recognizance is a property right which exists in him.

4. Garnishment § 2—

Where a nonresident has filed a cash recognizance, his right to the return of the money upon compliance with the conditions of the recognizance is an intangible property right which is subject to garnishment although the money may not be taken out of the hands of the magistrate prior to the satisfaction of the conditions of the recognizance, and upon appearance of defendant at the preliminary hearing in compliance with the recognizance the entire amount is subject to the lien of the garnishment, and the magistrate properly requires an additional recognizance upon binding the defendant over to the Superior Court for trial. G.S. 1-461.

APPEAL by plaintiff from *Pless, J.*, at March Term, 1948, of RANDOLPH.

Civil action to recover of defendant the principal sum of $2,400.00, with interest, for cash allegedly obtained by him from plaintiff on 15 March, 1947, for which he gave to plaintiff his check drawn on The Lincoln National Bank of Washington, D. C., and payable to the order of cash,—payment of which defendant stopped at the bank,—heard upon motion of defendant, on special appearance, to set aside the attachment and garnishment issued herein, to discharge the property seized and to dismiss the action for that the property in question was *in custodia legis* and immune from attachment and garnishment.

The record on this appeal shows these pertinent matters: On 23 February, 1948, defendant, a resident of the City of Washington, District of Columbia, was arrested in a cafe in Greensboro, North Carolina, on warrant issued at instance of plaintiff charging him with false pretense in connection with the transaction on which this civil action is based, and was taken before E. H. Morris, a justice of the peace for Randolph County, when and where he deposited with the justice of the peace the sum of $3,000 in lieu of bond for his appearance on 1 March, 1948, for a preliminary hearing—and was thereupon released from custody. (The record does not show for what purpose defendant was in the State of North Carolina at the time of his arrest in Greensboro as aforesaid.)

On 1 March, 1948, the hearing was continued to 8 March, 1948, at which time probable cause was found against defendant on said charge of false pretense, and he was bound over to the March 29 Term of Superior Court of Randolph County, under an appearance bond in the sum of

$3,500. Defendant tendered to the justice of peace as such bond $500 in cash and requested that same be accepted along with the $3,000 theretofore deposited by him, but the justice of peace refused to accept the $500, and to use or permit Louis Ordille to use the $3,000 as portion of the new bond on ground that the $3,000 had been attached in this action, and defendant, subsequently and independently of the cash deposit, made a new bond in the sum of $3,500 for his appearance at the above designated term of the Superior Court.

In the meantime, on 27 February, 1948, plaintiff instituted this civil action in the Superior Court of Randolph County and had warrant of attachment against property of defendant and directed to the sheriff of Randolph County, and notice of garnishment issued and served on 27 February, 1948, with copy of warrant of attachment, on E. H. Morris, the justice of the peace before whom the criminal warrant was pending. The notice of garnishment required E. H. Morris to appear at the office of clerk of Superior Court in the courthouse in Asheboro, N. C., at 10 o'clock a.m., on 10 March, 1948, to answer on oath (1) what he owes defendant, Louis Ordille, and what effects of said Louis Ordille he has in his possession and had at time of serving said attachment, and (2) whether there are in the hands of any other person any debts or effects belonging to defendant, and what person, etc.

Upon the hearing on the notice to E. H. Morris, on 10 March, 1948, before the Clerk of Superior Court, the facts in respect to the cash deposit and preliminary hearing and the making of a new bond for appearance in Superior Court being made to appear substantially as above recited, and that at time the warrant of attachment and notice were served on him "E. H. Morris had in his possession belonging to Louis Ordille the sum of Three Thousand ($3000.00) in cash," put up in lieu of bond for his appearance as aforesaid, and that "he has said money under those circumstances," the Clerk of Superior Court entered order that the $3,000 held by E. H. Morris be turned over to sheriff of Randolph County "to be held by him under the warrant of attachment, as a fund out of which to pay any judgment that may be obtained in this action against defendant, Louis Ordille."

Thereafter, on 13 March, 1948, defendant entered a special appearance in the action for the sole purpose of making motion, and moved the court to strike out the return of the sheriff, to set aside the warrant of attachment, discharge the property seized thereunder, and to dismiss this action, for that the court has not, in this action, properly acquired jurisdiction over the person of this defendant. "And as grounds for this motion, this defendant respectfully shows unto the court: That there is attached hereto an affidavit by the defendant, Louis Ordille, setting forth the facts (substantially as hereinabove recited in this opinion) upon which this

special appearance and motion is based; that, upon the facts shown in the annexed affidavit by the defendant, the plaintiff herein has attempted, through said warrant of attachment, to serve a summons under civil process upon defendant at a time when the defendant, a nonresident, was in the State of North Carolina for the sole purpose of attending to litigation, and that the defendant is exempt from such service either personal or by seizure of property deposited by him *in custodia legis* for use in such litigation."

When the motion of defendant on such special appearance came on for hearing before the judge presiding at March Civil Term the judge entered a judgment, in which after reciting "it appearing to the court, upon affidavits filed by the plaintiff and the defendant, that the property of the defendant, to wit, $3,000, heretofore deposited with E. H. Morris, Justice of the Peace, and seized by the sheriff of Randolph County under said attachment is exempt from such attachment": it is "ordered, adjudged and decreed that the return of the sheriff in this cause be stricken, that said attachment be and the same is hereby set aside and that the property seized thereunder, to wit, the sum of $3,000 cash, be returned to the defendant or his counsel, and that said action be, and the same is hereby dismissed and the plaintiff is taxed with the costs."

Plaintiff appeals from this judgment to Supreme Court, and assigns error.

J. A. Spence for plaintiff, appellant.
King & King for defendant, appellee.

WINBORNE, J. Upon plaintiff's challenge to the judgment from which this appeal is taken, there arises this determinative question: Does a defendant in a criminal prosecution in a justice of the peace court of the State of North Carolina, who is a nonresident of the State, and who voluntarily deposits with the justice of the peace cash in lieu of bond for his appearance before the justice of the peace for a preliminary hearing, have such property right and interest in the deposit as is liable to attachment and garnishment at the instance of his creditor pending such preliminary hearing?

We are of opinion, and hold, that he does have such property right in the deposit.

The statutes and decisions of this Court are to the effect that a defendant in a criminal proceeding pending in the State, who is a nonresident of the State, is immune from personal service of process in a civil action arising out of the same facts as the criminal proceeding only when he is brought into the State by, or after waiver of extradition proceeding. See G.S. 15-79, G.S. 15-82, G.S. 8-65, and the recent case *Hare v. Hare,* 228

N. C. 740, 46 S. E. (2) 840, where the subject is discussed in opinion by *Denny, J.*

By the same token, if such defendant be immune from personal service of such process only under those circumstances, his property within the State would be immune from attachment and garnishment only when so brought into the State by defendant. In the present case it does not appear that defendant, when arrested in Greensboro, N. C., had been brought into the State by, or after waiver of extradition proceeding. Hence the cash of defendant, which he voluntarily put up with the justice of the peace in lieu of bail or recognizance for his appearing to answer the charge on preliminary hearing, would not be immune from the process of attachment and garnishment, unless perchance, it be wholly *in custodia legis,* that is, in the custody of the law.

So it becomes necessary to ascertain the relative positions of the justice of the peace, the State and the defendant in respect to the cash so put up or deposited by defendant in lieu of bond.

In this State any justice of the peace before whom persons charged with a misdemeanor or a felony, not capital, but who have not been committed to prison by an authorized magistrate, may be brought, has power to take bail. G.S. 15-102. And if the offense charged in the warrant be not punishable with death, the justice of the peace may take from the person arrested a recognizance with sufficient sureties for his appearance at the next term of the court having jurisdiction, to be held in the county where the offense is alleged to have been committed. G.S. 15-105.

And the law contemplates that a defendant in a criminal prosecution may give security for his appearance to answer to the charge and the Court has held that the fact that defendant of his own volition, chooses to deposit the amount of the bond required in cash is not a violation of the statute, but a compliance with its spirit and meaning. *S. v. Mitchell,* 151 N. C. 716, 66 S. E. 202. In the *Mitchell case,* in opinion by *Brown, J.,* it is stated: "The court could not compel the defendant to deposit cash or give security of any kind. He had the privilege to go to prison if he preferred."

A recognizance is a debt of record acknowledged before a court of competent jurisdiction, with condition to do some particular thing. It binds the defendant to appear and answer to a specified charge, to stand and abide the judgment of the court and not to depart without leave of the court. *S. v. White,* 164 N. C. 408, 79 S. E. 297.

Thus in this State a recognizance in a criminal proceeding is an acknowledgment by the defendant that he is indebted to the State of North Carolina in an amount fixed by the court, conditioned upon his personal appearance at a time and place specified by the court to answer the charge against him, to stand and abide the judgment of the court and not to

depart without leave of the court. And where cash is deposited by a defendant as security for his appearance, it remains his property subject to the conditions of a recognizance,—the justice of the peace becoming the custodian of the cash for the benefit of the State only in so far as the debt of defendant to the State is concerned. If defendant fails to perform the conditions, the deposit will be subject to forfeiture. But if he perform the conditions, the cash deposit would be returnable to him. This is a right which he may enforce against the custodian of the deposit. It is a property right which existed in him.

The right of defendant in and to the cash deposit is similar to that of trustor in a deed of trust by which property is assigned or conveyed to a trustee as security for a debt to a third person. The trustor has an equity in the property assigned or conveyed. And when the debt is satisfied, whether by sale of the property assigned or conveyed, or otherwise, the residue or the whole, as the case may be, remaining in the hands of the trustee is to the use of the trustor, and he has the right to recover it. That is, as soon as the purposes of the deed in trust are satisfied, there is but one equity remaining, and that is in the trustor, whose right to the residue can be enforced at law. This is a property right, liable to garnishment. See *Peace v. Jones,* 7 N. C. 256.

And, applying the provisions of the statute G.S. 1-458, this Court holds that all property in this State, whether real or personal, tangible or intangible, owned by a nonresident defendant in an action to recover on any of the causes of action included within the provisions of G.S. 1-440, under which the present action comes, is liable to attachment. *Newberry v. Fertilizer Co.,* 203 N. C. 330, 166 S. E. 79. Moreover, the statutes G.S. 1-459 and G.S. 1-461, *et seq.,* provide for levy upon intangible property and prescribe the procedure against the garnishee in such cases.

Furthermore, the text writers say that it is settled law that, in general, property or funds *in custodia legis* are not subject to attachment or to garnishment, but that the authorities are not harmonious in their determinations as to when the rule applies; that it has been stated generally that property or money is deemed to be in the custody of the law when it is held to be disposed of in some particular manner prescribed by law, or according to orders of the court; and that garnishment has sometimes been recognized as a proper remedy for the purpose of acquiring a lien upon property in the custody of the law, though an actual seizure of the property after it has once come into the custody of the law is recognized as improper. 4 Am. Jur. 795. However, a creditor has been permitted to reach by garnishment money deposited with the clerk of a court, in pursuance of law, in place of an undertaking on appeal. 4 Am. Jur. 803. *Dunlop v. Patterson Fire Ins. Co.,* 74 N. Y. 145. 30 Am. Rep. 283.

The *Dunlop case* is very similar to the one in hand. There attachments were levied upon $2,000 placed in the hands of the clerk of the city court of Brooklyn in lieu of an undertaking on appeal from a judgment in an action in favor of one Redfield against defendant. And motions were made to set aside the attachments. The Court of Appeals of the State of New York, in opinion by *Folger, J.*, had this to say: "Doubtless the property which was, in fact, made the subject of the attachment, was in the custody of an officer of a court of record, and the appellant would at the time have had no right to remove it therefrom, or to meddle with it. But doubtless also, the appellant had a right and interest in that property, which was capable of being transferred by it, by its own act of assignment. Had it made an assignment of it, that act would not have removed it from the custody of the officer holding it, nor would it have put upon him any greater liability than he assumed by the primary reception of it. He was liable to hold it, to answer the event of the litigation of Redfield with the appellant, and to return to the latter all that was not required to answer the proper demand of the former. And after the litigation should have been over with Redfield, would not the clerk have been liable to the defendant for the whole or a *residuum* of the moneys, which liability could be enforced? And it was this last liability which would be the subject of the assignment . . . It may be granted that no process should have been issued which commanded the taking actual possession of the property . . . But there was power to grant an attachment against the property of the appellant. The money in the hands of the clerk of the city court, or a residuary interest in it, was such property. The fund itself could not be taken away from him. It was the right to have from him, after the litigations with Redfield was ended, the whole or a residue of that money, which was such property. That right was not in the custody of that clerk, so that he could ever retain it, or, of right, pass it on to another. An attachment against the appellant's property, levied upon that, took nothing out of the custody of the clerk, nor meddled with anything in his hands. It seized upon an intangible right, by means of the order of the Supreme Court and notice to the clerk of the issuance thereof. Such process and such action upon it made no conflict of jurisdiction between the two courts. The city court held the money, with a conceded right. The officer of the Supreme Court held the right to receive it, or some of it, from the clerk, when the city court should see fit to declare the purpose fully served for which it took it into custody." This opinion of the New York Court is sound in logic, and the reasoning there is appropriate to the case in hand.

Applying these principles to the case in hand, the right of defendant in the cash voluntarily deposited by him as security in lieu of bond for his appearance to answer the charge preferred against him, is liable to

garnishment; and the purposes for which the cash was deposited having been accomplished by defendant appearing, and later giving a new recognizance for his appearance in Superior Court, the clerk properly ruled that the entire amount of the deposit is subject to the lien of the attachment in this action.

For reasons stated, there is error in the judgment below, and the case is remanded to the end that judgment be entered in accordance with this opinion.

Error and remanded.

STATE v. SETH GIBSON, JR.

(Filed 24 November, 1948.)

1. Criminal Law § 81b—

In order for appellant to be entitled to a new trial, the record must not only show error but also that appellant was prejudiced thereby.

2. Criminal Law §§ 44, 81a—

Ordinarily a motion for continuance on the ground of a want of time for counsel for accused to prepare for trial is addressed to the sound discretion of the trial judge, and his ruling thereon is not subject to review except upon a showing of gross abuse of discretion.

3. Criminal Law § 81a: Constitutional Law § 34a—

Constitutional rights of one accused of crime cannot be granted or withheld by the court as a matter of discretion, and therefore claim of deprivation of such rights raises a question of law which must be considered and determined upon appeal.

4. Constitutional Law § 34d—

A defendant has the constitutional right to be represented by counsel whom he has selected and employed, and in prosecutions for capital felonies the court has an inescapable duty to assign counsel to a person unable to employ one. Constitution of N. C., Art. I, sec. 11; XIV Amendment to the Federal Constitution.

5. Same: Criminal Law § 44—

The constitutional guarantee of the right of counsel requires that the accused and his counsel shall be afforded a reasonable time for the preparation of his defense.

6. Criminal Law § 44—

Continuances are not favored and ought not to be granted unless the reasons therefor are fully established, and therefore an application for a continuance should be supported by an affidavit showing sufficient grounds for the motion. G.S. 1-176.

7. Same: Constitutional Law § 34d—Record held not to show that defendant was prejudiced by denial of motion for continuance.

Trial of defendant charged with capital offense was set for the afternoon following the appointment of counsel for him by the court. Counsel moved for a continuance on the ground of insufficient time to prepare the defense and suggested that defendant should have an examination with a view of determining his mental state. Counsel gave no specific reasons for the assertion they had had inadequate time to prepare the defense, did not suggest that defendant was without sufficient mental capacity to undertake his defense, and did not state that they contemplated seeking his acquittal on the ground of insanity. Witnesses were few and resided in the neighborhood, and no complicated factual or legal questions were involved. *Held:* The record fails to show that the requested continuance would have enabled defendant and his counsel to obtain additional evidence or otherwise present a stronger defense, and therefore upon the record the denial of the motion was not prejudicial.

8. Criminal Law § 57b—

Motion for a new trial for newly discovered evidence may be made in the trial court at the next succeeding term after the case is certified down.

APPEAL by prisoner, Seth Gibson, Jr., from *Rousseau, J.,* and a jury, at September Term, 1948, of GASTON.

The indictment alleged that on 5 September, 1948, the prisoner perpetrated the capital felony of rape upon a "female child under the age of twelve years" contrary to G.S. 14-21. He was arrested the same day, and indicted on the morning of 13 September, 1948, which was the opening day of the term. Immediately after the return of the indictment, the presiding judge found that the accused was not able to employ counsel, and appointed attorneys to defend him. After he had consulted with his counsel, the prisoner was arraigned and entered a general plea of not guilty, and the case was set for trial at two o'clock on the afternoon of the following day, *i.e.,* 14 September, 1948.

After the arraignment and before the trial, counsel for the accused moved orally for a continuance of the trial to a subsequent term. The record entry pertaining thereto is as follows:

"Counsel for defendant: We are moving for a continuance in the case on the grounds: First, that we haven't had ample time to prepare the case; second, that after conferring with the defendant we feel that he should be examined by a competent physician, and that due to the fact that he doesn't have any money the Court should order this examination. He should have a thorough examination. Any doctor will probably want to observe him over a period of two days. Court: Do you want it continued for any other witnesses than a doctor? Counsel for defendant: His father has laryngitis. We might be able to hear him and we might not. Solicitor: You don't make any contention that this defendant

doesn't know right from wrong? Counsel for defense: I do, at times. Court: Motion denied. Counsel for defendant: Exception. Defendant's Exception No. 1. Court: Let the record show that counsel for defendant were appointed by the Court on the morning of September 13, 1948, and that this action was set for trial at 2:00 p.m. the afternoon of September 14, 1948."

Trial proceeded according to schedule. The State offered testimony of a compelling nature tending to establish the matters set out in this paragraph. The prisoner, an adult man, enticed the prosecutrix, a small girl about ten years of age, into woods in or near Cramerton, and raped her, seriously lacerating her vaginal tissues and causing much hemorrhage. The prosecutrix made outcry at once and was carried to physicians, who observed her torn and bleeding state, and expressed opinion that it resulted from forcible penetration. Officers of the Sheriff's department arrested the prisoner in Gastonia some hours after the offense, and found blood and semen on the clothing he wore at the time. When apprehended, the prisoner was sober and sensible. Shortly thereafter, he confessed to sexual intercourse with the prosecutrix, and piloted officers to the spot in the woods where the assault took place.

The prisoner testified in substance that he suffered from a periodical amnesia on the day named in the indictment, and did not know where he was or what he did. Cross-examination indicated, however, that the memory of the accused was rather reliable with respect to events at other times and places.

His father testified that he was not normal in that he was addicted to brooding and the use of aspirin and "Standback."

The jury found the prisoner "guilty of rape as charged in the bill of indictment." The court refused to set aside the verdict, and entered judgment that the prisoner suffer death by the administration of lethal gas in conformity to the statute, G.S. 15-187. Thereupon the prisoner appealed to this Court.

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

O. A. Warren and W. J. Allran, Jr., for prisoner, appellant.

ERVIN, J. The sole basis for the demand of the prisoner for a new trial is that the court erred to his prejudice in refusing a continuance of the case.

While the circumstances lend some color to the argument that trial was had in the court below with regrettable dispatch, we must perform our function as an appellate court with due regard for the fundamental and indispensable rule that the record must not only show error, but also that

the appellant was prejudiced thereby. *S. v. Phillips,* 227 N. C. 277, 41 S. E. (2) 766; *S. v. Cogdale,* 227 N. C. 59, 40 S. E. (2) 467; *S. v. Perry,* 226 N. C. 530, 39 S. E. (2) 460; *S. v. Hart,* 226 N. C. 200, 37 S. E. (2) 487; *S. v. Smith,* 226 N. C. 738, 40 S. E. (2) 363; *S. v. Bullins,* 226 N. C. 142, 36 S. E. (2) 915; *S. v. Walls,* 211 N. C. 487, 191 S. E. 232; *S. v. Jones,* 206 N. C. 812, 175 S. E. 188. As *Chief Justice Stacy* so well said in the famous case of *S. v. Beal,* 199 N. C. 278, 154 S. E. 604: "The foundation for the application of a new trial is the allegation of injustice arising from error, but for which a different result would likely have ensued, and the motion is for relief upon this ground. Unless, therefore, some wrong has been suffered, there is nothing to relieve against. The injury must be positive and tangible, and not merely theoretical."

Ordinarily a motion for a continuance on the ground of a want of time for counsel for accused to prepare for trial is addressed to the sound discretion of the trial judge, and his ruling thereon is not subject to review on appeal in the absence of circumstances showing that he has grossly abused his discretionary power. Relevant decisions compel the conclusion that an abuse of discretion has not been made manifest in the case at bar. *S. v. Henderson,* 216 N. C. 99, 3 S. E. (2) 357; *S. v. Godwin,* 216 N. C. 49, 3 S. E. (2d) 347; *S. v. Whitfield,* 206 N. C. 696, 175 S. E. 93; *S. v. Sauls,* 190 N. C. 810, 130 S. E. 848; *S. v. Burnett,* 184 N. C. 783, 115 S. E. 57.

But the prisoner does not rest his contention that prejudicial error occurred on the trial solely on the proposition that the court grossly abused its discretionary power in refusing to continue the trial of the case to a subsequent term. He asserts with much earnestness that the denial of his motion for a continuance deprived him of his constitutional right of representation by counsel. Since the constitutional rights of an accused cannot be granted or withheld by the court as a matter of discretion, this claim of the prisoner raises a question of law, which must be considered and determined. *S. v. Farrell,* 223 N. C. 321, 26 S. E. (2) 322.

Both the State and Federal Constitutions guarantee to every man the right to be represented in criminal prosecutions by counsel whom he has selected and employed. N. C. Const., Art. I, sec. 11; U. S. Const., Amend. XIV; *U. S. ex rel. Mills v. Ragen,* 77 F. Supp. 15. Besides, a state court has an inescapable duty to assign counsel to a person unable to employ one when such person is charged with a capital felony. *S. v. Hedgebeth,* 228 N. C. 259, 45 S. E. (2) 563; *S. v. Farrell, supra; Williams v. Kaiser,* 323 U. S. 471, 89 L. Ed. 398, 323 U. S. 471; *Powell v. Alabama,* 287 U. S. 70, 77 L. Ed. 171, 53 S. Ct. 55, 84 A. L. R. 527.

The right of representation by counsel is not intended to be an empty formality. As the Supreme Court of Georgia declared in *Blackman v.*

State, 76 Ga. 288: "This constitutional privilege would amount to nothing if the counsel for the accused are not allowed sufficient time to prepare his defense; it would be a poor boon indeed. This would be 'to keep the word of promise to our ear and break it to our hope.'" Hence, it has become an established principle of jurisprudence that the constitutional guaranty of the right of counsel requires that the accused and his counsel shall be afforded a reasonable time for preparation of his defense. *S. v. Farrell, supra; S. v. Whitfield, supra;* 22 C. J. S., Criminal Law, section 478.

When all is said, this appeal presents this precise problem: Does the record affirmatively show that the presiding judge denied the prisoner and his counsel a reasonable time in which to prepare the defense by ruling him to trial instead of continuing the cause? This question must be answered in the negative. *S. v. Whitfield, supra; Avery v. Alabama,* 308 U. S. 444, 84 L. Ed. 377, 60 S. Ct. 321.

As a general rule, continuances are not favored, and ought not to be granted unless the reasons therefor are fully established. *Commonwealth v. Miller,* 289 Mass. 441, 194 N. E. 463. In the nature of things, the ruling on a motion to continue must be based on matters called to the judge's attention at the hearing of the motion previous to trial on the merits. For this reason, it is desirable that an application for a continuance should be supported by an affidavit showing sufficient grounds for the continuance. Indeed, the relevant statute contemplates that this is to be done. G.S. 1-176; *S. v. Banks,* 204 N. C. 233, 167 S. E. 851.

Here, the prisoner did not undertake to support his oral motion for a continuance by affidavit or other proof. Moreover, the suggestions of his counsel did not indicate the existence of any substantial reason for the requested postponement beyond the natural reluctance of the accused to face immediate trial on so serious a charge. The action involved no complicated factual or legal questions. Witnesses were few, and resided in the neighborhood. For aught that appears in the record to the contrary, counsel had full opportunity to consult with the prisoner, to investigate the case, to interview witnesses, and to secure the attendance of witnesses at the trial. While they advised the court in a general way that they had not had ample time to prepare the defense, they gave no specific reasons for the assertion, and did not intimate that they had not fully acquainted themselves with both the law and the facts of the case.

What was said in *United States v. Nierstheimer,* 166 F. (2) 87, is pertinent here. "In a capital case the court should not move so rapidly as to ignore or violate the rights of the defendant to a fair trial. No standard length of time must elapse before a defendant in a capital case should go to trial. Each case, and the facts and circumstances surrounding it, provides its own yardstick. There must not be a mere sham proceeding

or idle ceremony of going through the motions of a trial. However, courts do not deny due process just because they act expeditiously. The law's delay is the lament of society. Counsel must not conjure up defenses when there are none. Continuances to investigate and the subpoenaing of witnesses are matters that counsel must consider. If no witnesses are suggested or information furnished that would possibly lead to some material evidence or witnesses, the mere failure to delay in order to investigate would not be, in and of itself, a denial of due process."

It is true counsel hinted that the court ought to order the examination of the accused by a competent physician with a view to determining his mental state. The court might well have heeded this suggestion, but nothing in the record discloses that its failure to do so prejudicially affected the right of the prisoner to a fair trial. When this matter was presented for consideration, counsel did not advise the court that accused was without sufficient mental capacity to undertake his defense or that they contemplated seeking his acquittal upon the ground of insanity. Furthermore, no showing or suggestion was made that medical evidence on this point was not already available, or that an effort to procure such testimony by other means had been made and had resulted in failure. It is worthy of note that the presiding judge declined to set aside the verdict at the end of the trial after he had had full opportunity to see and hear the prisoner on the stand and evaluate his mental condition.

In homely metaphor, counsel asked to go fishing without submitting any substantial reason for believing there were any fish in the pond. A continuance ought to be granted if there is an apparent probability that it will further the ends of justice. Consequently, a postponement is proper where there is a belief that material evidence will come to light and such belief is reasonably grounded on known facts. But a mere intangible hope that something helpful to a litigant may possibly turn up affords no sufficient basis for delaying a trial to a later term. *S. v. Madison,* 49 W. Va. 96, 28 S. E. 492.

A painstaking consideration of the record engenders a somewhat firm conviction that counsel for the prisoner suffered from the lack of any substantial defense rather than from any scarcity of time. Be their zeal for their client's cause ever so great, advocates cannot make brick without straw. It all comes to this: the record fails to show that the requested continuance would have enabled the prisoner and his counsel to obtain additional evidence or otherwise present a stronger defense.

The conclusion that no prejudicial error appears on the record compels an affirmance of the judgment. Nevertheless, a word of caution may not be altogether beside the mark. Justice must not fall into Scylla in seeking to avoid Charybdis. The prompt trial of criminal actions is to be encouraged. But in keeping clear of the law's delays, courts should not

try cases with such speed as to raise a suspicion that "wretches hang that jurymen may dine."

A human life is at stake. Counsel for the prisoner stated on the argument here that they had some tangible hope of unearthing material evidence tending to show the insanity of their client. If their endeavor in this respect proves fruitful, they may present such testimony to the court below at the first criminal term after 1 January, 1949, on a motion for a new trial for newly discovered evidence. *S. v. Dunheen,* 224 N. C. 738, 32 S. E. (2) 322; *S. v. Edwards,* 205 N. C. 661, 172 S. E. 399; *S. v. Casey,* 201 N. C. 620, 161 S. E. 81. In the meantime, they are at liberty to apply to the Governor for any necessary stay of execution.

In the trial below, we find in law

No error.

BILLIE WRIGHT, BY HIS NEXT FRIEND, J. M. WRIGHT, v. J. BEATTY WRIGHT.

(Filed 24 November, 1948.)

1. Automobiles § 24d—

Where an invitee of the driver is riding in the automobile with the knowledge and consent of the owner, the owner is liable on the principle of *respondeat superior* for injury to the invitee proximately caused by the negligence of the driver.

2. Automobiles § 24½e—

Testimony that a taxicab driver had his minor son in the cab with him and that the employer owner saw the son in the car and knew the driver was about to make a business trip, is sufficient to take the question to the jury as to whether the employer owner acquiesced in the child's riding as a nonpaying passenger.

3. Automobiles § 19—

The duty which the owner owes to an invitee or guest is that of ordinary care.

4. Parent and Child § 3b—

The rule that a minor child may not recover against his father for negligent injury does not preclude the child from recovering from the father's employer on the principle of *respondeat superior* for negligence committed by the father as employee, and *a fortiori* the employer comes under the rule when the negligence arises out of a breach of special duties and obligations to the public existing by reason of the business in which he is engaged.

5. Automobiles § 24a: Principal and Agent § 10—

The owner of a taxicab is under duty of observing due care in its operation of which duty he cannot divest himself by employing another to operate the automobile in the prosecution of his business, and the owner will be held liable for the negligence of the driver in such instance under the principle of *qui facit per alium, facit per se.*

6. Parent and Child § 3b—

Recovery by an infant on the principle of *respondeat superior* against his father's employer for injury resulting from the father's negligence does not permit recovery by the minor against his father indirectly, since any action brought by the employer against the father would not be upon the principle of subrogation to the minor's right but for breach of the agency contract by the father in not observing the requisite standard of faithfulness owed the employer.

PLAINTIFF'S appeal from *Nettles, J.,* March-April Term, 1948, CLEVELAND Superior Court.

Horace Kennedy for plaintiff, appellant.

D. Z. Newton for defendant, appellee.

SEAWELL, J. Plaintiff, a six-year-old boy, sues by his next friend to recover damages for a personal injury sustained by reason of the negligence of the driver of a motor vehicle owned by the defendant, and at the time used in the business of transporting passengers by taxicab. The operator of the taxicab, employee of defendant, was the child's father. The father is not joined as a party to the action.

The child was not a paid passenger. The complaint describes him as an invitee, with the knowledge and consent of the defendant owner.

Denials in the answer raised issues as to defendant's liability and the plaintiff proceeded with evidence. The defendant offered none.

The appeal is from a judgment of nonsuit on defendant's demurrer at the conclusion of plaintiff's evidence. This evidence consisted entirely of the testimony of the father, driver of the taxicab, with photographs and exhibits relating to the injury.

The witness testified that he had been driving for the defendant, who owned a fleet of cabs, eight or ten months, operating from a taxicab stand in Shelby. He explained that the child's mother worked at night in a textile plant, and he had been carrying the child with him on numerous occasions, at times when he went in to check up with defendant, and that the boy was with him in the car on the night of the injury.

On the issue of negligence the evidence, *inter alia,* tends to show that the taxicab was not equipped with adequate brakes, and that the brakes did not respond at all to the attempted application, causing the car to go

out of control and into collision with the curb and a telephone pole, causing the injury. The driver, at the time, had been following a truck which he attempted to pass, and was endeavoring to avoid an automobile coming from the opposite direction. The evidence was legally sufficient to be submitted to the jury on the question of negligence; and the injury to the child, as disclosed by the evidence, was of a serious and permanent nature.

The evidence critically bearing on the status of the plaintiff as invitee we quote verbatim:

> "On May 17, 1947, at night, my little son Billie was in the car with me. That was not the first time he had been with me. I had before this had him in my cab and driven him with the knowledge of J. Beatty Wright, but I cannot say as to the exact number of occasions I had done this, but he was with me several times when I went to check up with Mr. Beatty Wright, and Mr. Wright saw my son in the car with me. On May 15th, Mr. Beatty Wright came by the service station, and we were sitting around the station and I asked what time was it and he said five past twelve, and I said I had a trip to the American Grill to get some people and bring them back to town; it was to Fred Hoppes' place I was going to carry them to, and he said, "I am going in and go to bed, . . ."

and on cross-examination:

> "I certainly had an accident that night of May 15; the policemen have the dates, and I swear that it was on the night of May 15, and I was working for Mr. Wright at that time, and it was on Monday night; and my child did not pay to ride in the cab and I had him with me because my wife was working on the third shift and I was over in Shelby and I had a trip to Kings Mountain and I wanted my child to spend the night with me. Mr. Beatty Wright had never told me that I could carry my child in the cab, and had not told me not to pick up anyone but a paid passenger; he never had told me that he wanted pay for my child riding in the cab with me, but I do know that he saw the child in the cab with me that night, for my child was in the seat, leaning over against me."

Our inquiry is narrowed to the question whether there was, in this, evidence in behalf of the plaintiff sufficient to engender an inference that he was, at the time of the injury, an invitee, with the knowledge and consent of the defendant owner; and whether, although in fact such invitee, he is in position, as son of the negligent operator of the car, to invoke the law against the defendant on the principle of agency and *respondeat*

superior; or to put it conversely—whether the defendant to whom the negligence of the employee is imputed as a matter of public policy, or as an agent through whom the employee was acting, may avail himself of the immunity from suit extended to the father as a defense against his own liability.

1. It does not require the express permission of the owner to constitute a passenger an invitee, or guest, nor does it require express authority, either general or specific, given the driver in charge of a taxicab to carry a nonpaying passenger as such invitee or guest. Knowledge and consent are ordinarily held sufficient to raise the inference. The owner acquiesces in a situation which he does not seek to avoid when the opportunity is afforded.

"The owner need not have expressly invited the passenger to ride in the automobile so long as he knew of and acquiesced in the passenger's presence." Schwartz, Trial of Automobile Cases, sec. 373, p. 490. "Where the passenger is riding in the machine with the knowledge and consent of the owner, and he is injured through the driver's negligence and without fault on his own part, he may recover from the owner." *Ibid.*, sec. 388.

Our own decisions are in accord. In *Russell v. Cutshall,* 223 N. C. 353, 26 S. E. (2) 866, after stating the rule that the owner is not liable for negligent injury to a mere invitee of the driver, we find it stated: "The particular nature of the employment, or the circumstances existing at the time, or *acquiescence on the part of the employer* may create an exception to the general rule," citing *Fry v. Utilities Co.,* 183 N. C. 281, 111 S. E. 354; *Hayes v. Creamery,* 195 N. C. 113, 141 S. E. 340. We underscore the part of the opinion pertinent to the facts under review here. Whether it be an exception to a general rule, or expressed as an independent rule, where the invitee is riding with the knowledge and consent of the owner the latter is liable, on the principle *respondeat superior* for injury proximately caused by the negligence of the driver. *Fry v. Utilities Co., supra; Hayes v. Creamery, supra.*

Counsel for the plaintiff point out that the evidence tends to show that the driver, in going in to "check up" personally with the defendant, had the boy with him in the car, and that on the night of the injury he was in the car and that defendant saw him leaning over against him; and knew he was about to make a business trip.

We are not prepared to say that the evidence was insufficient to make consent and acquiescence a jury matter.

The measure of the duty which the owner owes an invitee or guest is that of ordinary care. *Fry v. Utilities Co., supra; Hayes v. Creamery, supra;* 5 Am. Jur., Automobiles, sec. 230, citations under n. 9.

2. The appellee argues that the plaintiff is barred from maintaining the suit because the negligence which proximately caused the injury was

that of the father, against whom no action can be maintained; and cites in support of that position *Small v. Morrison,* 185 N. C. 577, 118 S. E. 12.

Since *Small v. Morrison* presents an entirely different situation from that obtaining in the case under review—there the father was joined in the action,—we must assume that appellee is arguing for extension of the doctrine which precludes the child from suing the father for tort so as to cover all actions attempted to be brought by the child against other parties for the reason that the action arose out of the negligence of the father. This defense, unsuccessfully interposed in *Dunlap v. Dunlap,* 150 A. 905, 71 A. L. R. 1055, is there formulated by the proponent: "No recovery can be had for damages resulting from an injury to a defendant (*sic*) minor, caused by the father's negligence." (The injured party was plaintiff.)

In *Small v. Morrison* the question of agency and *respondeat superior* with which we now deal was not involved. The master-servant relation was absent, the father acting independently, and not in a dual capacity. In that case the minor plaintiff sued the father and an insurance company in which the latter held an indemnity policy which required as a condition precedent to recovery that a judgment should first be obtained against the insured and execution issued thereon. The suit failed because such judgment against the father could not be obtained. *Chief Justice Stacy,* writing the opinion for the Court, laid down the rule that an unemancipated minor child living as a member of the family may not maintain an action against the father for tort (including negligent injury). That is the law in this jurisdiction; but it is not the question now before us; and the conclusion we have reached does not bring us into disagreement or disharmony with that holding, or in conflict with the precedent.

The great weight of authority is against the position taken by the appellee. *Schubert v. Schubert Wagon Co.,* 249 N. Y. 253, 164 N. E. 42, 64 A. L. R. 293; *Poulin v. Graham,* 102 Vt. 307, 147 A. 698; *LeSage v. LeSage,* 224 Wis. 57, 271 N. W. 369; *Hensel v. Hensel Yellow Cab,* 209 Wis. 489, 245 N. W. 159; *McLaurin v. McLaurin Furniture Co.,* 166 Miss. 180, 146 So. 877; *Chase v. New Haven Waste Material Corp.,* 111 Conn. 377, 150 A. 107, 68 A. L. R. 1497; *Dunlap v. Dunlap, supra; Mi-Lady Cleaners v. McDaniel,* 235 Ala. 469, 179 So. 908, 116 A. L. R. 639; Anno. 68 A. L. R. 1500; 39 Am. Jur., Parent and Child, sec. 91; Prosser on Torts, 909; Restatement, Agency, sec. 217. Some of the cited cases deal with suits brought by the wife against the employer of the husband; many of them deal with suits brought by minor children against the employer of the father; but no matter on what domestic relation the immunity from action is predicated, or on what identical or differing philosophy it is based, the decisive principle is idenical: The personal immunity from suit because of the domestic relation does not extend to the employer

so as to cancel his liability or defeat recovery on the principle *respondeat superior* when the injury was inflicted by the servant acting as such.

While the cited cases do not confine the principle to instances in which, because of the nature of the business, a special duty of the employer is involved, and we do not intend so to confine it, it is proper to point out that in the instant case the defendant was engaged in a business of service to the public in which such special duties were involved and *a fortiori* should come under the rule. We quote from 35 Am. Jur., p. 980, sec. 549, which we think presents the universal rule:

> "It is well-settled law that an employer who, by reason of his calling or the business in which he is engaged, owes special legal duties and obligations to the public or to those with whom there exists some contractual relation cannot shirk or evade such special duties and obligations by committing its performance to another; he is bound absolutely to perform the obligation, and he is liable for a failure to do so in any respect whereby injury results to others, whether such failure results from negligence or from the wilful, wanton, or criminal conduct of the employee or agent to whom the duty has been committed. Being bound to do the act or perform the duty, if he does it by another the employer is treated as having done it himself."

In this instance the employer, in prosecution of the business in which he was engaged, committed to his agent, the driver of the taxicab, not only the function of mechanical transportation but the duty of observing due care, which was primarily his own and of which he could not divest himself, although, under the necessity of the business, he exercised it through another.

The law which puts the master's hand on the steering wheel does not find its sole support in a fictional device by which public policy is created and adjusted to a felt need of society and expressed in juristic forms; it is grounded more securely on the doctrine of agency,—the principle applied in countless instances since that doctrine was first developed,—the fundamental principle, the "alter ego," and, in this instance, the constructive presence of the principal; *"Qui facit per alium, facit per se,"* which in *Schubert v. Schubert Wagon Co., supra, Justice Cardozo,* speaking to this branch of the subject, freely but pungently translates into the maxim, "He who acts through another *acts by himself.*"

The suggestion that suit against the master might by indirection accomplish that to which the rule denies direct action, should the master sue his negligent employee, is answered in *Schubert v. Schubert Wagon Co., supra,* from which we have quoted so copiously, where it is observed that any action brought against the employee would not be on the principle of subrogation, that is by virtue of the minor's right, but for breach of the

agency contract and not observing the requisite standard of faithfulness "in respect to the duty" owed to the master.

The precise point is one of first impression here, but far from new in the great network of jurisdictions with which we work in common to achieve a better balanced and more perfect jurisprudence. Text writers and authorities which we are accustomed to consult and which review the entire field of decided cases are uniform in presenting the rule as we conceive it to be. 35 Am. Jur., Master and Servant, sec. 543, p. 974; 39 Am. Jur., Parent and Child, sec. 91, p. 737; Prosser on Torts, Hornbook Ed., sec. 99, p. 909; Restatement, Agency, sec. 217 (b); see also, Restatement, Vol. 2, sec. 489, Families of Servants.

Adopting what we believe the better reasoned view, and the one more consonant with sound public policy, we conclude that the Superior Court was in error in nonsuiting plaintiff's case, and the judgment to that effect is reversed to the end that there may be a trial upon the merits.

Reversed.

JOHN J. McILROY v. AKERS MOTOR LINES, INC., AND WADE D. PHILEMON.

(Filed 24 November, 1948.)

1. Automobiles § 24½e—

Evidence offered by plaintiff tending to show that the employer sent the employee in the employer's truck on an errand requiring about an hour's time, that the employee accomplished the mission and then drove the truck on several exclusively personal trips, and that the accident in suit occurred while the employee was driving the truck on one of the personal trips, some eight hours after he had been sent on the mission, *is held* to justify nonsuit on the issue of *respondeat superior*.

2. Automobiles § 23b—

Where the owner has knowledge, actual or imputable, that the driver is unfit at the time the vehicle is entrusted to him, the owner will be liable for the negligence of the driver, but in order for the principle to apply there must be evidence of actual or constructive knowledge on the part of the employer that the driver was incompetent, reckless or was addicted to excessive and habitual use of liquor.

3. Automobiles § 24½e—Evidence held insufficient for jury on issue of negligence of employer in entrusting operation of truck to employee.

Evidence tending to show that at the time the employer hired the employee causing the injury the employer made a perfunctory investigation which failed to discover that the employee had been convicted of drunkenness and drunken driving, but that the employee had driven for the employer for eight months without evidence of accident or drinking or addic-

tion to intoxication, and that on the occasion in question the employee appeared sober when the truck was entrusted to him for a mission but that he had had one drink of whiskey, without the knowledge of defendant's manager or anyone in authority, two hours prior to the time he was directed to drive the truck, and that the accident in suit occurred some eight hours thereafter while the employee was on a purely personal mission *is held* insufficient to be submitted to the jury on the issue of the negligence of the employer in entrusting the operation of the truck to the employee.

APPEAL by defendant Akers Motor Lines, Inc., from *Patton, Special Judge,* April Term, 1948, of MECKLENBURG. Reversed.

This was an action to recover damages for injury to plaintiff's person and property alleged to have been caused by the negligence of the defendants in the operation of a motor truck.

Plaintiff's automobile was struck by the corporate defendant's truck which was then being driven by defendant Philemon, an employee. The collision occurred on a four-lane highway some four miles north of Charlotte about 8:30 or 9 p.m. 24 December, 1945. The surface of the highway was slick from ice and sleet, and plaintiff's automobile had skidded and stalled, partially obstructing two lanes of the highway. By a flashlight, warning was given approaching automobiles. Defendant Philemon drove his co-defendant's truck without turning or slackening speed against plaintiff's automobile causing serious injury. It was alleged Philemon failed to keep proper lookout, drove at excessive speed, and was under the influence of intoxicating liquor. Philemon filed no answer.

Plaintiff alleged that at the time of the collision Philemon was driving for the Akers Motor Lines, Inc. (hereinafter called the defendant) in the scope of his employment, and further that the defendant was negligent in that it employed this man and retained him in its service as a truck driver when it knew or by investigation should have known he was not a fit person to drive a truck, and that on the occasion complained of defendant negligently directed Philemon to drive a truck on the streets and highways when it knew or should have known that he was under the influence of intoxicants and not in condition to operate a motor vehicle.

Defendant admitted ownership of the truck, and that Philemon was in its employ, but denied that, at the time, he was operating the truck in the course of its business and averred that he was using it solely for his own purposes, and the defendant denied the allegations as to the unfitness of Philemon as a truck driver, or that on this occasion it knew or had reason to know that he had taken anything to drink.

On the trial the plaintiff offered the defendant's admission of ownership of the truck and employment of Philemon, and also introduced evidence in support of its allegations as to the negligent operation of the truck by Philemon. One witness, who was at the scene of the collision,

noticed the odor of alcohol on Philemon's breath, and a policeman testified in his opinion he was under the influence of intoxicants, though upon what he based his opinion was not stated. Plaintiff offered evidence from criminal court records that Philemon before his employment by defendant had been convicted of several offenses, including drunkenness, drunken driving, and in one instance larceny. Plaintiff then offered the adverse examination of Philemon and that of the Dispatcher and Assistant Dispatcher of the Akers Motor Lines, Inc. From these it appeared that at the time of Philemon's employment in April 1945 the late war was still being waged, and that motor freight carrying was an essential industry and employment handled through the U. S. E. S.; that Philemon applied through this agency and was sent to defendant; that he was asked about drinking and replied that he drank when he wished but not when on duty —"did not work drunk." Philemon gave as reference his father and the City of Charlotte for which he had worked. A phone conversation with an official elicited response that he was a careful driver, but this was denied by the city official. Criminal records were not checked, nor was it customary to do so in investigating the fitness of prospective employees. The adverse examination of Philemon offered by plaintiff tended to show that he was employed to drive a pick-up truck in Charlotte and its environs, collecting and delivering freight, and had been so employed for eight months. On the morning of December 24th, due to weather conditions and the season, all work on part of the numerous employees of defendant had ceased by 11:30. One of the drivers had a quart of whiskey and this was consumed by all the drivers, fifteen in number, in the drivers' room. Philemon took one drink. Due to previous potations an off-duty driver named Ratchford became intoxicated, fell down some steps and cut his head. Being informed of this, the defendant's manager directed Philemon to take Ratchford home in his truck and return. This would have consumed not more than an hour. Philemon put the man in his truck and set out. There was no freight in the truck. The manager on his way home, about 12 o'clock, saw this truck apparently on its return proceeding along the street in the direction of defendant's terminal. Philemon's statement was that after he took the man home he did not take the truck in, but rode around town, and then went out in the country to his aunt's place and went hunting; then came back to Charlotte and went home where he remained until 8 o'clock. Then with his brother, sister, and brother-in-law in the truck with him he was driving again out to his aunt's when the collision occurred. He had had nothing more to drink since the drink he had that morning. True, he pleaded guilty to driving drunk, but that was because he had been sitting around the courthouse for so long trying to get the case heard, he paid the fine to get it off. He had been told by the manager, after taking the man home, to take the

truck back and put it in the yard. The drink he had taken was about two hours before the manager told him to take the truck out. He was not intoxicated. He was not certain that the manager came in the drivers' room at all, though the whiskey bottle was not where it could be readily seen but was on the floor.

Issues were submitted to the jury and answered as follows:

"1. Was the plaintiff injured, and his automobile damaged, by the negligence of the defendant Philemon in the operation of a truck of the defendant Akers Motor Lines, Inc., as alleged in the complaint?

"Answer: Yes.

"2. If so, was the defendant Philemon, at the time and place of the plaintiff's injury and damage, operating said truck within the scope of his employment and in the furtherance of the business of the defendant Akers Motor Lines, Inc., as alleged in the complaint?

"Answer: Yes.

"3. Was the plaintiff injured, and his automobile damaged, by reason of the negligence of the Akers Motor Lines, Inc., in entrusting the operation of said truck to said Philemon, as alleged in the complaint?

"Answer: Yes.

"4. What damages, if any, is the plaintiff entitled to recover by reason of his personal injuries?

"Answer: $7,500.00.

"5. What amount is the plaintiff entitled to recover by reason of the damage to his automobile?

"Answer: $400.00."

From judgment on the verdict, defendant Akers Motor Lines, Inc., appealed.

Ralph V. Kidd and Robinson & Jones for plaintiff, appellee.

Smathers, Smathers & Carpenter for defendant, appellant.

DEVIN, J. That the injuries of which plaintiff complained were caused by the negligence of the defendant Philemon in the operation of the motor truck of the corporate defendant was not denied. But the effort of the plaintiff to hold Philemon's employer, the defendant Akers Motor Lines, Inc., responsible for his negligence encountered serious opposition. The plaintiff in the first place alleged that the truck at the time of and in respect to the transaction complained of was being driven by Philemon in the course of the corporate defendant's business, and within the scope of his employment. In order to support this allegation by proof plaintiff was under necessity of using in evidence the adverse examination of Philemon and that of two other employees of defendant Motor Lines. From this evidence it is apparent that at the time of the injury Philemon

was not about his employer's business but engaged in activities and purposes of his own entirely apart therefrom. In violation of his instructions to take the truck out for a particular purpose, requiring not more than an hour, and then return it to defendant's yard, Philemon used the truck solely for his own pleasure and purpose, without the knowledge or consent of the employer, and not in furtherance of its business. There was a total departure from the employer's business and the work he was instructed to perform. The evidence was insufficient to support recovery on the theory of *respondeat superior*. *Rogers v. Black Mountain,* 224 N. C. 119, 29 S. E. (2) 203; *Walker v. Manson,* 222 N. C. 527, 23 S. E. (2) 839; *Creech v. Linen Service Corp.,* 219 N. C. 457, 14 S. E. (2) 408; *McLamb v. Beasley,* 218 N. C. 308, 11 S. E. (2) 283; *Parrott v. Kantor,* 216 N. C. 584, 6 S. E. (2) 40; *Liverman v. Cline,* 212 N. C. 43, 192 S. E. 849; *Martin v. Bus Line,* 197 N. C. 720, 150 S. E. 501.

The plaintiff, however, sought recovery against the corporate defendant upon another principle. He alleged that the defendant had knowingly, or without due investigation, employed an unfit person to drive its truck on the highway, and particularly on the occasion complained of, had directed such driver to operate the truck on the highway when it had reason to know that he was then under the influence of intoxicating liquor. The issue submitted without objection on this point presented the single question, "Was the plaintiff injured and his automobile damaged by reason of the negligence of the Akers Motor Lines, Inc., in entrusting the operation of said truck to said Philemon as alleged in the complaint?" The allegation was that defendant "knew or in the exercise of due care should have known that Philemon was under the influence of intoxicants" at the time the truck was entrusted to him on 24 December, 1945. No other issue on any other phase of the pleadings or proof was presented by the plaintiff to the court or by the court submitted to the jury. The proof offered by the plaintiff on the quoted issue was that Philemon had had one drink of whiskey two hours before he was directed to drive the truck, and that this was without the knowledge of the defendant's manager who gave the direction or of anyone in authority. Philemon asserted he was not intoxicated at the time. The plaintiff offered evidence that Philemon had previous to his employment by defendant been convicted of drunkenness and drunken driving, and that the one under whom he worked at his last employment by the City was not asked about him, though defendant's witness testified that inquiry was made and favorable response elicited. But there was no evidence of Philemon's unfitness or delinquency during the eight months preceding the injury, though his conduct during that time had been checked in due course by the defendant. Plaintiff seemed to have based his case on the theory that defendant had entrusted the operation of its truck on this occasion to one whom it knew or should have

known was under the influence of intoxicants. The evidence offered is insufficient to sustain this view.

Unquestionably liability on the part of the owner of a motor vehicle may arise from his entrusting the operation of the vehicle to one who is incompetent to drive it, or who is known to be reckless, or is intoxicated, or from known habit is likely to become intoxicated. *Williamson v. Eclipse Motor Lines,* 145 Ohio St. 467, 168 A. L. R. 1356; *Crowell v. Duncan,* 145 Va. 489, 50 A. L. R. 1425; *Fisher v. Fletcher,* 191 Ind. 529, 22 A. L. R. 1392; 5 Blashfield Cyc. Auto. Law, 63. But knowledge on the part of the owner that the driver sometimes drank to excess but was not intoxicated when put in possession of the automobile was held in *Fisher v. Fletcher, supra,* insufficient to invoke this rule. It seems fairly deducible from the decisions in this and other jurisdictions that the principle of the liability of the owner based upon his knowledge of the unfitness of the driver is applicable where there is evidence of a known habit of intoxication (*Nicholson Construction Co. v. Lane,* 177 Tenn. 440); or addiction to intoxicants (168 A. L. R. 1375); or likelihood of the driver becoming intoxicated (*Grier v. Grier,* 192 N. C. 760, 135 S. E. 852); or that he is given to the habitual and excessive use of liquor (*Taylor v. Caudle,* 210 N. C. 60, 185 S. E. 446). Liability depends upon the knowledge or imputable knowledge of the owner of the driver's unfitness at the time the vehicle is entrusted to him. *Tyree v. Tudor,* 183 N. C. 346, 111 S. E. 714; *Shorter v. Cotton Mills,* 198 N. C. 27, 150 S. E. 409; *Grier v. Grier, supra; Harrison v. Carroll,* 139 F. (2) 427, 50 A. L. R. 1450 (Annotation). In the case at bar the defendant's investigation of the fitness of Philemon as a truck driver at the time he was employed in April 1945 was rather perfunctory, but from plaintiff's evidence it appears that he drove this truck regularly in defendant's service for eight months, during which time his conduct was under observation, without evidence of accident or of drinking or addiction to intoxication. Nor is there evidence that when Philemon was directed to drive the truck 24 December, 1945, his appearance indicated he was intoxicated or had been drinking. One of the witnesses whose examination was offered by plaintiff testified Philemon "acted sober."

No injury occurred on this occasion while Philemon was performing the duty assigned him by the defendant, nor was the evidence such as to show that the injury complained of, which occurred some eight hours later, was under the circumstances probable (*Robertson v. Aldridge,* 185 N. C. 292 (296), 116 S. E. 742); or was likely to occur (*Reich v. Cone,* 180 N. C. 267, 104 S. E. 530; *Hawes v. Haynes,* 219 N. C. 535, 14 S. E. (2d) 503); or could reasonably have been foreseen when the truck was entrusted to Philemon for a temporary specific purpose. *Lee v. Upholstery Co.,* 227 N. C. 88, 40 S. E. (2) 688; *Grier v. Grier, supra.*

For the reasons stated, we conclude that the evidence was insufficient to warrant submission of the 2nd and 3rd issues to the jury, and that the motion of defendant Akers Motor Lines, Inc., for judgment of nonsuit should have been allowed. The judgment below is

Reversed.

V. T. JAMES v. HARRY N. SUTTON, CHIEF BUILDING INSPECTOR OF THE CITY OF CHARLOTTE, AND THE CITY OF CHARLOTTE, A MUNICIPAL CORPORATION.

(Filed 24 November, 1948.)

1. Municipal Corporations § 37—

The power of the governing body of the City of Charlotte to zone, both under the ordinance and the statute, is non-delegable, and therefore the municipal Board of Adjustment has no power to authorize a type of business or building prohibited by the municipal zoning ordinance. G.S. 160-172 *et seq.*

2. Same—

The municipal zoning ordinance in question provided that only structures intended "to be used in whole or in part for any of the following specified purposes" should be erected or altered, and then gave in succeeding sections those enterprises which were permitted and those which were prohibited. *Held:* The language "to be used in whole or in part" is controlling, and the ordinance does not require that property be used exclusively for the purposes specifically authorized in order to be permitted.

3. Same—Proposed use of premises held not prohibited by zoning ordinance and board of adjustment should determine petition on the merits.

Petitioner sought a building permit for the erection of a candy factory and a candy retail sales room. The zoning ordinance in question permitted the erection of buildings in the zone to be used in whole or in part for retail of articles manufactured on the premises provided such use was not injurious to adjacent premises by reason of the emission of dust, fumes, smoke, etc. *Held:* The enterprise is not prohibited by the ordinance, and the Board of Adjustment should determine the application on its merits upon the basis of the good faith of petitioner's intention to use a substantial part of the structure for retail sales, and as to whether the manufacture and wholesale marketing of candy would be injurious to adjacent premises or in conflict with the general intent and purpose of the ordinance.

APPEAL by respondents from *Coggin, Special Judge,* June Extra Term, 1948, MECKLENBURG.

Petition for writ of *certiorari* to review an order of the Board of Adjustment of the city of Charlotte.

In June 1947 the city of Charlotte adopted a comprehensive zoning ordinance covering all property within its corporate limits. This ordi-

nance creates districts designated as B1 districts. The uses to which property in a B1 district may be subjected are defined as follows:

"SECTION V—BUSINESS 1 DISTRICT

"(A) USES

"Within any B1 district, as indicated on the Building Zone Map, only buildings, structures, or land intended or designed to be used in whole or in part for any of the following specified purposes shall be erected or altered:

"(I) RESIDENCE 2 USES

"Any use permitted in Section IV of this ordinance shall be permitted in B1 Districts.

"(II) OTHER USES

"(a) (RETAIL BUSINESS) Commercial billboards or advertising signs. Restaurant. Hand Laundry, with five (5) or less employees. Ice delivery station. Shop for making articles to be sold at retail on the premises. Any other enterprise for profit, for the convenience and service of, and dealing directly with and immediately accessible to the ultimate consumer, and being an enterprise not mentioned as prohibited in a B2 District and not injurious to adjacent premises or occupants thereof by reasons of the omission (*sic*) of dust, fumes, smoke, odor, or noise."

Subsections b, c, and d are not material to the question presented.

Petitioner owns a lot in Charlotte, purchased in 1944, located at 1543-45 West Trade Street, in a B1 district as designated in the ordinance. On 26 February 1948, he applied to the building inspector for a permit to build a candy factory on said lot. The building inspector declined to issue the permit and he appealed to the Board of Adjustment. The appeal was heard 2 March, and the Board, by resolution, sustained the building inspector and denied the building permit. Thereupon the petitioner applied to the Superior Court for a writ of *certiorari* which was issued 26 April 1948.

At the hearing on the appeal before the Board of Adjustment, it was made to appear to the Board that petitioner desired to construct a building on his lot to be used as a candy factory and a candy retail sales room; that he would employ eight to ten people; and that from 15% to 20% of the candy manufactured would be sold at retail on the premises and the balance wholesale; and the Board found these to be the facts.

When the cause came on for hearing in the court below, it was made to appear to the court by admission of counsel that the Board denied petitioner's application for a building permit for the reason it believed itself without legal power to grant the same. The court, being of the opinion the Board of Adjustment is vested with authority to permit a noncon-

forming use and therefore acted under an erroneous conception of the law, vacated the order of the Board and remanded the proceeding to the Board for a new hearing. The respondents excepted and appealed.

J. Spencer Bell and Guy T. Carswell for petitioner appellee.
John D. Shaw for respondent appellants.

BARNHILL, J. The court below was in error in concluding that the Board of Adjustment possesses authority to permit a nonconforming use to be made of property zoned under the city of Charlotte zoning ordinance. The power to zone is conferred upon the governing body of the municipality. G.S. 160-172 *et seq.* That power cannot be delegated to the Board of Adjustment. Hence it has no power either under the statute or under the ordinance to permit a type of business or building prohibited by the ordinance, for to do so would be an amendment of the law and not a variance of its regulations. We so held in *Lee v. Board of Adjustment,* 226 N. C. 107, 37 S. E. (2) 128, and we adhere to that decision.

But on this record the petitioner does not seek a permit to erect a nonconforming building or a building for a nonconforming use. He proposes to use the building in part for the retail sale of candy "dealing directly with and immediately accessible to the ultimate consumer" and the proposed business is not one "mentioned as prohibited in a B2 District."

The ordinance does not restrict the buildings within a B1 district to use for the retail sale of merchandise only. They must be used "in whole or in part" for one of the specified purposes or for the sale of merchandise directly to the ultimate consumer.

We find nothing in the ordinance which can be construed to indicate that the governing body of Charlotte intended to prohibit a combination candy factory and retail sales plant in a B1 district or to characterize such business as objectionable *per se* when erected and maintained in such district. Indeed, shops to be used in whole or in part for making articles to be sold at retail on the premises are expressly permitted. If it intended to restrict B1 districts to businesses engaged exclusively in the retail sale of merchandise, as the Board seems to have concluded, it failed to use language sufficient to accomplish that purpose. The language "to be used in whole or in part" contained in Section V of the ordinance is controlling.

Whether the additional use for the manufacture and wholesale marketing of candy will be "injurious to adjacent premises or occupants thereof by reasons of the omission (*sic*) of dust, fumes, smoke, odor, or noise" or is a variance in conflict with the general purpose and intent of the ordinance and does violence to its spirit is for the Board to decide.

The cause must be remanded to the Board of Adjustment for a hearing on the merits of the application. If it finds as a fact that the petitioner intends in good faith to use a substantial part of the proposed building for the retail sale of candy, then it is for the Board to decide whether the additional use for the manufacture and marketing of candy at wholesale is, under all the circumstances, in accord with the ordinance. If so, the permit should be granted.

The court below is directed to enter its order in accord with this opinion and to that end the cause is

Remanded.

GOULD MORRIS ELECTRIC COMPANY v. ATLANTIC FIRE INSURANCE CO.

(Filed 24 November, 1948.)

1. Insurance § 43b—

A policy insuring specified goods while in transit "against loss or damage directly caused by . . . collision of the conveyance on which the goods are carried . . . derailment, overturning of trucks or collapse of bridges," *is held* to cover damage to the topmost articles on the load protruding above the top of the truck resulting when the articles collided with an overhead concrete bridge under which the truck was driven.

2. Insurance § 43a—

If a policy of insurance prepared by insurer is reasonably susceptible to two interpretations, the one imposing liability, the other excluding it, the former is to be adopted and the latter rejected.

3. Insurance § 43b—

Where a policy insures against loss or damage to a cargo of goods while in transit, the enumeration of the methods by which loss or damage usually occurs will not be construed as a limitation of liability when such construction is contrary to the mutual intent of the parties as gathered from the language of the instrument as a whole.

4. Contracts § 8—

The heart of a contract is the intention of the parties, which is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time.

APPEAL by plaintiff from *Edmundson, Special Judge,* April Term, 1948, of WAKE.

Civil action to recover on contract of insurance.

The plaintiff, desiring to transport a truck load of water heaters from Nashville, Tenn., to Raleigh, N. C., on or about 4 November, 1947, ap-

plied to the defendant for insurance to protect the cargo against loss or damage while in transit.

On the face of the policy appears the following:

"Trip Transit Policy

"Atlantic Fire Insurance Company

"Amount $2500.00 . . . Premium $25.00

"In consideration of the stipulations herein named . . .

1. "Does insure Gould Morris Electrical Co. . . . on shipment of lawful goods and merchandise consisting principally of water heaters . . .

2. "This insurance attaches from the time the goods or merchandise leave . . . initial point of shipment and covers continuously thereafter while in due course of transit until safely delivered . . .

3. "This policy insures . . .

"Against loss or damage directly caused by fire, lightning, cyclone, tornado . . . collision of the conveyance on which the goods are carried . . ., derailment, overturning of trucks or collapse of bridges."

After the pleadings were filed, the parties agreed upon the facts and submitted the case to the court for determination without the intervention of a jury.

It is stipulated: That the cargo of 26 electric water heaters, packed in crates, was loaded on plaintiff's open-body truck; that four of the topmost heaters protruded above the top of the truck, and that plaintiff's employees took a tarpaulin, which was no part of the truck, and covered the cargo by tying it to the body of the truck. And further, that while in transit, the truck was driven under an overhead concrete bridge and the four topmost heaters, covered with the tarpaulin, were damaged to the extent of $215.48 when they collided with the under side of the bridge.

The court being of opinion that the policy in suit did not cover the stipulated damage or loss, entered judgment dismissing the action, from which the plaintiff appeals, assigning error.

Harris & Poe for plaintiff, appellant.

J. L. Emanuel for defendant, appellee.

STACY, C. J. In the court below, and here, the parties have selected the proper construction of the phrase "collision of the conveyance on which the goods are carried" as the battleground of debate and the crucial question for decision.

While this language, standing alone and strictly construed, might limit liability to a collision of the conveyance itself and not extend to a collision of the load on the truck, as held below, we regard the interpretation too restrictive under all the terms of the policy.

In the first place, the policy is a single "Trip Transit Policy," which within itself implies protection to the property while in transit on the particular trip. The purpose of the policy was to insure the cargo, not the truck, while in transit from Nashville, Tenn., to Raleigh, N. C. Undoubtedly the plaintiff thought it had such insurance.

Secondly, it insures against loss or damage to specific items of property, *i.e.,* water heaters, and not against loss or damage to goods or merchandise generally. Thus, the parties knew, from the amount of insurance and the character of the shipment, that, in all probability, portions of the cargo would extend above the top of the truck.

Thirdly, whether the enumeration of the usual causes of loss or damage in the third paragraph of the policy was intended as enlargements or limitations on the liability declared in the first two paragraphs is not altogether clear. Hence, the construction favorable to the insured and consistent with the purpose for which the policy was issued becomes pertinent. *Jones v. Casualty Co.,* 140 N. C. 262, 52 S. E. 578.

Policies of liability insurance, like all other written contracts, are to be construed and enforced according to their terms. If plain and unambiguous, the meaning thus expressed must be ascribed to them. But if they are reasonably susceptible of two interpretations, the one imposing liability, the other excluding it, the former is to be adopted and the latter rejected, because the policies having been prepared by the insurers, or by persons skilled in insurance law and acting in the exclusive interest of the insurance company, it is but meet that such policies should be construed liberally in respect of the persons injured, and strictly against the insurance company. *Roberts v. Ins. Co.,* 212 N. C. 1, 192 S. E. 873, 113 A. L. R. 310; *Underwood v. Ins. Co.,* 185 N. C. 538, 117 S. E. 790; *Bray v. Ins. Co.,* 139 N. C. 390, 51 S. E. 922; *Bank v. Ins. Co.,* 95 U. S. 673.

Here, the policy on its face insures against loss or damage to the cargo while in transit, and the enumeration of the methods by which loss or damage usually occurs was intended primarily as a description of the ordinary ways and means of sustaining loss or damage, rather than a limitation of liability. That such was the mutual intent and within the contemplation of the parties is readily gathered from the language of the instrument as a whole. *Jones v. Realty Co.,* 226 N. C. 303, 37 S. E. (2) 906. The heart of a contract is the intention of the parties, which is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time. *Jones v. Casstevens,* 222 N. C. 411, 23 S. E. (2) 303.

The above interpretation finds support in at least two cases where similar policies were under consideration, one a Michigan case, *C. & J. Commercial Driveway, Inc., v. Fidelity & Guaranty Fire Corp.,* 258

Mich. 624, 242 N. W. 789, and the other a Pennsylvania case, *Burks County Const. Co. v. Alliance Ins. Co.,* 162 Pa. Sup. 153, 56 A. (2) 338.

The cases cited in support of a contrary view, one a Nebraska case, *Barish-Sanders Motor Co. v. Firemen's Fund Ins. Co.,* 134 Neb. 188, 278 N. W. 374, and the other a Massachusetts case, *Mendelsohn v. Automobile Ins. Co.,* 290 Mass. 228, 195 N. E. 104, are distinguishable by reason of variant clauses or factual differences. But, if not, a conflict in the authorities results which gives added emphasis to the suggestion that an ambiguity in a written contract should be inclined against the party who prepared the writing. *Wilkie v. Ins. Co.,* 146 N. C. 513, 60 S. E. 427.

On the record as submitted, the judgment should have been for the plaintiff.

Reversed.

OLIVER D. LANDIS v. SAM GITTLIN, T/A GITTLIN CHARLOTTE BAG COMPANY.

(Filed 24 November, 1948.)

1. Evidence § 37—

Where notice to produce certain designated documents is served on defendant in time for defendant to procure and produce the documents at the trial, defendant cannot complain of the admission of secondary evidence in proof of their contents upon his failure to produce the documents.

2. Appeal and Error § 39e—

Any error in the admission of evidence over objection is cured by the later admission of like testimony of the same witnesses without objection.

3. Evidence §§ 37, 41—

Testimony by plaintiff as to statements he had made to defendant as to the contents of certain documents, which defendant did not deny, is not incompetent either as secondary proof of the written instruments or under the hearsay rule.

APPEAL by defendant from *Coggin, Special Judge,* June Term, 1948, MECKLENBURG. No error.

Civil action to recover commissions alleged to be due under a sales agency contract.

On 19 November 1945 the defendant, by written agreement, constituted plaintiff selling agent for defendant "and all its subsidiaries" with authority to "sell a line of cotton wrappers to the Textile Mills, for and on behalf of the Gittlin Charlotte Bag Company and all its subsidiaries." The written contract does not specify the terms of the employment. Instead, it is devoted almost entirely to provisions binding plaintiff not to

enter into the employment of any other person or corporation "in any business within the Southeastern United States."

Plaintiff alleges that there was a contemporaneous oral agreement supplementing the written contract by the terms of which defendant agreed to pay him a commission of 5% "on all sales that he made, or on any orders that were sent in direct to the defendants from a customer whom plaintiff had secured." He alleges further that he procured the Spartan Mills as a customer; that it sent in reorders in an amount sufficient to entitle him to $1250 in commissions; that other customers procured by him sent in reorders upon which he is entitled to commissions in the amount of at least $1000; and that defendant has failed and refused to pay said commissions now due him.

The defendant, in his answer, admits the written and oral contracts, but alleges that the oral contract was "to pay plaintiff commission on orders secured, received and forwarded to defendant by plaintiff." He does not deny that the alleged reorders were sent in and received by it as alleged, but denies that he agreed to pay any commission thereon or is indebted to plaintiff in any amount by reason thereof.

In the trial below, issues were submitted to and answered by the jury as follows:

"1. By the terms of the contract between the plaintiff and defendant, was the plaintiff to receive commissions for re-orders sent directly to the defendant by the purchaser, as alleged in the plaintiff's complaint?

"Answer: Yes.

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

"Answer: $1,250.00."

From judgment on the verdict defendant appealed.

G. T. Carswell and Warren C. Stack for plaintiff appellee.

Wm. M. Nicholson and Porter B. Byrum for defendant appellant.

BARNHILL, J. This cause was called for trial on 7 June 1948. Prior thereto, on 4 June, plaintiff had served on defendant notice to produce at the trial certain specifically designated orders received from Spartan Mills and orders received from certain other mills. When he was called upon at the trial to produce these invoices pursuant to the notice, defendant declined to do so on the grounds the orders were at the home office in Newark, N. J., and the notice to produce allowed insufficient time for the production thereof. The court ruled the notice sufficient and held that defendant's failure to produce rendered secondary evidence thereof competent. In this there was no error.

These were the original records concerning the subject matter of the action. Plaintiff had long before called defendant's attention thereto as

the basis of his claim. Defendant at no time denied their existence or the substance of their contents. If he did not have them available at the trial in support of his defense, he cannot now complain that the court permitted secondary evidence in proof of their contents.

Furthermore, plaintiff was permitted to give in evidence the number, date, and quantity of each reorder he contends was sent in by the Spartan Mills. The admission of this evidence from the same witness without objection cured the former error, if error it was. *Bryant v. Reedy,* 214 N. C. 748, 200 S. E. 896; *Leonard v. Insurance Co.,* 212 N. C. 151, 193 S. E. 166; *McClamroch v. Ice Co.,* 217 N. C. 106, 6 S. E. (2) 850; *Davis v. Davis,* 228 N. C. 48.

The plaintiff was permitted to testify concerning the contents of invoices which were not produced. But his testimony in respect to the contents of these invoices was offered in the form of statements made by him to the defendant. He told the defendant he had been to Spartan Mills and had been shown the reorders and he gave defendant detailed information as to their contents which defendant did not deny. This testimony was not incompetent either as secondary proof of written instruments or under the hearsay rule. *S. v. Dilliard,* 223 N. C. 446, 27 S. E. (2) 85. It was admissible without proof of prior notice to produce the original orders.

In the final analysis, this case was essentially one of fact. The plaintiff offered evidence of an oral contract to pay him 5% commissions on all reorders sent in by customers secured by him. He likewise offered testimony of reorders from the Spartan Mills sufficient in amount to entitle him to commissions in the sum of $1,250. The defendant did not at any time deny the amount of these reorders. He was content to deny the contract to pay commissions thereon.

The jury, in a trial free from error, has rendered its verdict on the conflicting testimony in favor of the plaintiff. The verdict and the judgment thereon must be sustained.

No error.

LOTTIE B. TOWNSEND v. CAROLINA COACH COMPANY, A CORPORATION.

(Filed 24 November, 1948.)

1. Process § 8a—

It is not required that a person in this State who receives money for a foreign corporation in the course of business must be an employee or agent of the corporation in order for service of process on such person to be effective. G.S. 1-97 (1).

2. Same—

It is not required that the designation of persons as agents for the purpose of service of process on foreign corporations must be factually agents or employees of the corporation provided the statutory designation of process agents has reasonable relevancy to the end sought.

PLAINTIFF'S appeal from *Pless, J.*, April Term, 1948, CABARRUS Superior Court.

Plaintiff instituted this action to recover damages for a personal injury and for loss of property, including baggage and personal belongings, and for mental suffering, anxiety, and discomfort and humiliation in consequence of said loss.

Service (the validity of which is now questioned) was made in attempted compliance with G.S. 1-97, which in terms provides:

> "Service by copy.—The manner of delivering summons in the following cases shall be as hereinafter stated:
>
> "1. If the action is against a corporation, to the president or other head of the corporation, secretary, cashier, treasurer, director, managing or local agent thereof. Any person receiving or collecting money in this state for a corporation of this or any other state or government is a local agent for the purpose of this section. Such service can be made in respect to a foreign corporation only when it has property, or the cause of action arose, or the plaintiff resides, in this state, or when it can be made personally within the state upon the president, treasurer or secretary thereof."

For want of answer, judgment by default and inquiry was rendered by the Clerk of the Superior Court of Cabarrus County. The cause stood for hearing on the inquiry of damages at January Term, 1948. The Presiding Judge ruled that plaintiff could not recover except for loss of baggage and wearing apparel, and for expenses incurred in an effort to recover same. Thus a restricted issue as to damages was submitted and answered in the sum of $676.00, and judgment rendered therefor.

Thereafter the defendant moved to set aside the verdict and judgment for want of service of summons on the defendant, and the motion was heard before Pless, J., at April Term, 1948, at which time the judgment was set aside.

The facts are found in the Judgment and Order made on that date:

> "This cause coming on to be heard, and being heard at the April Term, 1948, of the Superior Court of Cabarrus County, North Carolina, before J. Will Pless, Jr., Judge Presiding, upon the motion of the defendant to set aside the default judgment, the verdict and final judgment, after hearing the matter the Court finds as a fact that at

the time of the purported service of summons, Mrs. Pearl Miller was engaged in the sale of tickets at the Union Bus Station in Concord, selling tickets for the defendant bus line as well as others, and that in that capacity she received money for the said tickets. The Court further finds as a fact that Mrs. Miller was not in the direct employ of the defendant Coach Company, but that she was employed by George Huffstetler and M. E. Newton, trading as Concord Bus Station, who acted as lessees of the bus station, operated it, furnished all the usual services to the public necessary and incident to the sale of tickets, handling baggage, and the general objects usually performed at bus stations. The Court further finds as a fact that the moneys received by Mrs. Miller in her capacity as an employee of the lessee partnership were turned over by it to the defendant Coach Company; that the defendant Coach Company paid to the partnership an amount equal to 10 per cent of the receipts for the sale of tickets as compensation for their services. The Court further finds that Mrs. Miller was not in the direct employment of the Coach Company, and that her employment or discharge was within the exclusive authority of the lessee partnership. The Court further finds that, in addition to the sale of tickets, Mrs. Miller, when necessary, supervised the transfer of baggage and shipments being handled by both bus companies, but that she was the employee of Huffstetler and Newton, lessees of the station, who had the primary duty of furnishing such service.

"Upon all the facts found and as a matter of law, the Court concludes that Mrs. Miller was not the employee of the Carolina Coach Company, and was not a person upon whom process directed to the Carolina Coach Company could be legally served; whereupon the Court sets aside the service of process, the default judgment before the Clerk, the verdict and the final judgment in this cause.

"Upon the announcement by the Court of the ruling setting aside the service of process, the defendant says that it has entered a general appearance and does not wish to put plaintiff to the expense of instituting a new action, and will, if given time, file pleadings in the cause. The Court then in its discretion allowed the defendant 30 days within which to file answer or otherwise plead."

The plaintiff appealed.

B. W. Blackwelder for plaintiff, appellant.
Arch T. Allen and E. T. Bost, Jr., for defendant, appellee.

SEAWELL, J. The defense challenges the validity of the service of summons on Mrs. Miller, who sold tickets over the defendant's lines and

collected the money for the same, and individually supervised the handling of baggage, on the ground that she was the employee of Huffstetler and Newton, lessees of the Bus Station, who furnished all the facilities and service to the public necessary and incident to the sale of tickets; and that the moneys collected by her were received in her capacity as an employee of the lessee partnership rather than the defendant, and were turned over by them to the defendant. To put it succinctly, the defense reads into the statute what they contend is necessarily implied,—"any person receiving or collecting money in this state for a corporation (and employed thereby)," etc., will constitute an agent on whom service may be made. To put it more plainly, the defendant contends that the word "for" as used in the statute implies direct employment and not mediate action through the interposition of another employment to which the receiver of the money is accountable.

The statute was intended to facilitate service on a corporation which functions only through its officers and agents; and not only to provide for service near at hand when officers of a corporation, domestic or foreign, may reside at a great distance, but to resolve any doubt as to who might be validly served. Here the setup would defeat the purpose of the statute, if the theory of the appellee is correct, by return to a still greater confusion—to determine what member of the lessee agency to which the bus station and its ticket selling and coach securing activities have been farmed out is a fair target for the sheriff.

The power of the Legislature to establish categories *pro hac vice* not known to the glossary in that relation, when done in reasonable relevancy to the end sought, is unquestioned. The Secretary of State is, factually, not the agent of any foreign corporation who may be affected by service made upon him; and there need be in fact no factual agency or employment relation between the ticket seller at the bus station and the defendant company in order that she might be declared service agent by statutory definition. The question is only one of construction and statutory intent.

The question is not free from plausibilities *pro* and *con*. But we think no harm can come to corporations in like situation with the defendant in giving the statute its more liberal construction as a remedial measure, and we are persuaded that the phraseology justifies this conclusion. *Railroad v. Cobb*, 190 N. C. 375, 129 S. E. 828; *Pardue v. Absher*, 174 N. C. 676, 94 S. E. 414; *Copland v. Telegraph Co.*, 136 N. C. 11, 48 S. E. 501.

We hold the service valid, and the judgment to the contrary is reversed. This is without prejudice to the right of the defendant to move to set aside the judgment for excusable neglect, if so advised.

Reversed.

R. E. PARKER AND WIFE, MRS. R. E. PARKER, v. FIRST-CITIZENS BANK & TRUST COMPANY, ADMINISTRATOR OF THE ESTATE OF A. G. STEVENS, DECEASED.

(Filed 24 November, 1948.)

1. Sales § 11—

Where the cash sale of an automobile and transfer of title is effected upon receipt of a check from the purchaser, as between the parties, the check is conditional payment and the transfer of title is conditioned upon collection of the check, and upon the dishonor of the check no title passes and the property remains the property of the sellers.

2. Principal and Agent § 4—

Death of the principal terminates the authority of the agent.

3. Trover and Conversion § 1—

Unauthorized sale of property of another constitutes a conversion, and the owner may elect to sue for the recovery of the specific property or he may ratify the sale and sue to recover the proceeds thereof, unless estopped.

4. Executors and Administrators § 5—

Plaintiffs' intestate gave a check for the purchase price of an automobile and authorized his agent to resell it. Intestate died before the check was presented for payment and prior to the resale by his agent. *Held:* Title to the car never passed and the administrator receiving the proceeds of the resale with notice holds same in trust for the owners, and such sum was never the property of intestate or his estate, and is not liable for the debts of the estate or cost of administration.

APPEAL by defendant from *Harris, J.*, March Term, 1948, WAKE. No error.

Civil action to recover proceeds of sale of automobile.

On 16 June 1947, plaintiffs offered for sale at Mann's Public Auction their 1947 Studebaker automobile. A. G. Stevens became the purchaser. He gave his check in the sum of $1,825, drawn on the defendant bank, in payment of the purchase price and the certificate of title was transferred and assigned to him.

On 17 June, Stevens sent the automobile to High Point for resale. On that day at 10:30 a.m., he committed suicide. Later in the day his agent, Wilbur Sanders, sold the automobile in High Point for $1,870 cash.

On 18 June, plaintiffs presented the Stevens check to defendant bank for payment, which payment was refused. The check has not been paid.

On 19 June, defendant, having qualified as administrator of the estate of Stevens, demanded of Sanders the proceeds of the sale of the automobile made in High Point, and was paid $1,853.05, representing the sale price, less costs.

The plaintiffs instituted this action to recover $1,853.05, the amount received by defendant as the proceeds of the sale of said automobile. When the cause came on for hearing, the court below submitted appropriate issues and gave the jury peremptory instructions thereon in favor of plaintiffs. The jury answered the issues as instructed. From judgment on the verdict, defendant appealed.

Arch T. Allen and T. Lacy Williams for plaintiff appellees.
William T. Hatch for defendant appellant.

BARNHILL, J. The sale of the automobile to defendant's intestate being a cash transaction, payment of the purchase price by check constituted a conditional payment and, as between the parties, transfer of title was conditioned upon the payment of the check by the bank upon which it was drawn. As the check was dishonored and not paid, no title passed to the purchaser. The property remained the property of the plaintiffs. *Hayworth v. Insurance Co.,* 190 N. C. 757, 130 S. E. 612, and cases cited; *Dewey v. Margolis,* 195 N. C. 307, 142 S. E. 22; *Lumber Co. v. Hayworth,* 205 N. C. 585, 172 S. E. 194; *South v. Sisk,* 205 N. C. 655, 172 S. E. 193; *Barksdale v. Banks,* 206 Ala. 569, 90 So. 913; *National Bank of Commerce v. R. R.,* 46 N. W. 342; *Lee v. Marion Nat. Bank,* 166 S. E. 148, rehearing, p. 160; *Thomas v. Insurance Co.,* 104 F. (2) 480; *Ratliff v. Insurance Co.,* 269 S. W. 546; *Alcohol Co. v. Harger,* 31 A. (2) 27; *Birmingham v. Rice Bros.,* 26 N. W. (2) 39; *First National Bank v. Griffin,* 120 P. 595; *Clark v. Hamilton Diamond Co.,* 284 P. 915; *Towey v. Esser,* 24 P. (2) 853; *Manget v. Bank,* 149 S. E. 213; 55 C. J. 579; 46 A. J. 644; Vold on Sales, 167, 174; Waite on Sales, 2d Ed., 283. See also Anno., 31 A. L. R. 578 and 54 A. L. R. 526, where numerous cases are cited.

The authority of the agent of the purchaser to resell the automobile terminated at the death of his principal. Restatement of Law, Agency, sec. 120; 2 A. J. 52. Resale by him after the death of his principal constituted a conversion of plaintiffs' property. By reason of this conversion, plaintiffs had the election of either one of two remedies. They could sue to recover the specific property or they could ratify the sale and sue to recover the proceeds thereof. 18 A. J. 163.

As the plaintiffs transferred and delivered to the purchaser the certificate of title to the automobile and thus placed him and his agent in the position of apparent owners, it may be that they are estopped to pursue the property itself and recover it from the last vendee. Be that as it may, the defendant, who merely stands in the shoes of its intestate, received the proceeds of the sale with notice and holds the fund for the use and benefit of plaintiffs. *Woodbury v. Nu-Enamel Corp.,* 215 N. C. 790,

1 S. E. (2) 566; *Porter v. Alexander,* 195 N. C. 5, 141 S. E. 343; *Sever v. McLaughlin,* 79 N. C. 153; *Towey v. Esser, supra; Birmingham v. Rice Bros., supra; Manget v. Bank, supra; First National Bank v. Griffin, supra; Lee v. Marion Nat. Bank, supra; Nelson v. Conroy Sav. Bank,* 194 N. W. 204; *Lewis v. McMahon & Co.,* 271 S. W. 779; 53 A. J. 933; 18 A. J. 163. They having elected to sue in *assumpsit* for the purchase price, the defendant is liable to them in the amount received. That plaintiffs are entitled to judgment therefor is the only reasonable inference to be drawn from the evidence offered.

The fund never belonged to the deceased or his administrator. Instead, it was at all times the property of plaintiffs. Hence it cannot be charged either with the debts of the estate or the costs of administration.

The charge of the court is sustained by the record. No prejudicial error in the trial is made to appear. Hence, the judgment must be affirmed.

No error.

CLARA C. STALLINGS v. OCCIDENTAL LIFE INSURANCE CO.

(Filed 24 November, 1948.)

1. Insurance § 30d—

The life policy in suit provided that it should not be effective until the first premium was paid and that no agent had authority to deliver the policy contrary to the provisions thereof. Insurer's agent delivered the policy and countersigned receipt for advance payment of part of the first premium. *Held:* Upon conflicting evidence as to whether there was conditional delivery for the purpose of inspection or an absolute delivery upon applicant's promise to pay the balance of the first premium, the issue should be submitted to the jury, and it is error for the court to direct a verdict against insurer.

2. Same—

While the acts of a life insurance agent which render him liable for the balance due on the first premium on a policy delivered by him may not inure to the benefit of the applicant or beneficiary, a letter by insurer to the agent inquiring whether the applicant had given a note for the balance of the first annual premium may be competent upon the question of the agent's authority to deliver the policy upon the applicant's promise to pay the balance of the first annual premium.

BARNHILL and WINBORNE, JJ., took no part in the consideration or decision of this case.

APPEAL by defendant from *Harris, J.,* April-May Term, 1948, of FRANKLIN.

Civil action to recover on double indemnity supplement attached to life insurance policy.

The policy in suit is for $1,000 on the life of Horace Rubbin Stallings, payable to his mother, Clara C. Stallings, with double indemnity in case of personal bodily injury effected solely through external, violent and accidental means, which results in death within 90 days thereafter.

The policy, together with supplement, seems to have been issued 27 June, 1947, although the effective date is recited in both as 1 May, 1947.

The application is dated 3 June, 1947, at which time the applicant made an advance payment of $5.00, which was sent to the defendant along with the application, and which the defendant still has.

The policy was issued, together with official premium receipt showing the premium to be $25.41 with advance payment of $5.00, and sent to the defendant's authorized agent, E. D. Wilder, who countersigned the receipt and delivered both the policy and the receipt to the applicant. He turned them over to his mother with the statement that they were for her and he was "to pay for it when my first check comes."

The policy provides that it shall not take effect until the first premium is paid, and that no agent has authority "to deliver any policy contrary to the provisions hereof."

The agent says the delivery of the policy and receipt was only for purposes of inspection. However, on cross-examination he stated: "I left the policy with him and it was all right with me for him to pay it (the balance of $20.41) out of his government check. . . . I countersigned the receipt and turned it over to him. . . . At the time I carried the policy down and gave it to him, I gave him this official premium receipt and he accepted the policy. I didn't object to him keeping it. . . . I went back twice after the policy was delivered . . : in an effort to collect the money due. . . . I never did ask him to return the policy." The witness further said that under his contract with the defendant he was required to pay the first premium or return the policy within 60 days; that the policy had been outstanding more than 60 days without his paying the balance of the premium; that his commissions were 65% of the first premium, and that "the balance due the company would have been $3.89. . . . All the Company is interested in is the $3.89, the rest of it, $16.52, was my commission."

The father of the applicant testified that on the agent's second visit after the delivery of the policy, "he asked for $10.00 and the boy didn't have it. . . . Mr. Wilder did not at any time ask my son to return the policy."

The applicant was accidentally killed in a motorcycle wreck on 23 September, 1947.

On 29 October, 1947, the defendant's claim department made inquiry by letter of its agent: "Will you please advise us whether or not Mr. Stallings gave you a note for the balance of the annual premium under

this policy or whether you made any arrangement with him to complete the payment at some later date."

The defendant pleaded the terms of the policy and moved to nonsuit, which was overruled.

There was a directed verdict for the plaintiff, and from judgment thereon, the defendant appeals, assigning errors.

E. C. Bulluck for plaintiff, appellee.

Smith, Leach & Anderson for defendant, appellant.

STACY, C. J. The question for decision is the correctness of the directed verdict.

The case turns on whether there was a conditional delivery of the policy for purposes of inspection, as contended by the defendant's agent, or an absolute delivery upon acceptance of the applicant's promise to pay balance of first premium out of the first government check thereafter received by him. *Pender v. Ins. Co.*, 163 N. C. 98, 79 S. E. 293; *Murphy v. Ins. Co.*, 167 N. C. 334, 83 S. E. 461; *Underwood v. Ins. Co.*, 185 N. C. 538, 117 S. E. 790.

As the evidence is conflicting on this central issue it should have been submitted to the jury for determination. There was error in directing a verdict for the plaintiff.

The letter of October 29th to the defendant's agent gives intimation of his authority to deal with the balance of the first premium on a credit basis.

While the agent has rendered himself liable to the defendant for the balance due on the first premium, there is no contention that this liability was imposed for or inures to the benefit of the plaintiff. However, on the facts of the instant record, it may have some bearing upon his authority to accept the applicant's promise to pay the balance of the first premium out of his government check. *Murphy v. Ins. Co., supra.*

New trial.

BARNHILL and WINBORNE, JJ., took no part in the consideration or decision of this case.

STATE v. JAMES W. HOUGH.

(Filed 24 November, 1948.)

Automobiles § 30d—

Officers who reached the scene of the accident some thirty minutes after it occurred testified that in their opinion defendant driver was intoxicated or under the influence of something, and one of them testified that he smelled something on defendant's breath, but both testified that they did not know whether defendant's condition was due to drink or to injuries sustained by him in the accident. *Held:* The evidence raises no more than a suspicion or conjecture as to whether defendant was driving under the influence of liquor or narcotic drugs, and defendant's motion as of nonsuit should have been allowed. G.S. 20-138.

APPEAL by defendant from *Coggin, Special Judge,* at June Criminal Term, 1948, of MECKLENBURG.

Criminal prosecution tried upon a warrant charging the defendant with operating a motor vehicle upon the public highway while under the influence of intoxicants.

The State's evidence tends to show that the defendant, on 8 May, 1948, about 11:00 p.m., was operating a 1941 Buick Sedan on the Beatties Ford Road, which turned over and injured him. The officers who testified for the State arrived at the scene of the wreck 25 or 30 minutes after the wreck occurred. One of the officers testified: "In my opinion Mr. Hough was under the influence of some intoxicant when I observed him that night. I base my opinion on the fact that I smelled something on his breath." On cross-examination, he testified: "Yes, Mr. Hough complained of some injuries which he received in the wreck. I don't know what injuries he received, but I heard he was in the hospital ten days. No, I do not know whether his condition which I observed that night was due to his injuries, or to what he had to drink. I could not tell." The other officer testified: "In my opinion he was intoxicated or under the influence of something." Then on cross-examination, he testified: "No, I don't know just what injuries Mr. Hough received when his car turned over. I heard he was in the hospital, later. He did complain of his back hurting him that night. No, I don't know whether Mr. Hough's condition which I observed that night came from what he had had to drink, or whether it came from his injuries he sustained. I took him to Memorial Hospital, where his wounds were dressed and strapped up. Then we came back to the police station. Yes, I allowed him to go home without being confined to jail, due to the fact that he was injured."

The defendant testified he drank three bottles of beer between noon and 7:30 p.m., on 8 May, 1948, but that he had not had anything to drink between 7:30 p.m. and 11:00 o'clock, when the accident occurred; that

as he was rounding a curve on Beatties Ford Road about 10 miles from Charlotte, and at about the sharpest point in the curve, the sway-bar underneath his car broke and tilted the car over; that X-rays made at Mercy Hospital the following day showed he had three broken ribs and two broken vertebrae; that he stayed in the hospital ten days and had to wear a back brace after he got out.

From a verdict of guilty and the judgment entered thereon, the defendant appeals, assigning error.

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

Carl Horn, Jr., and G. T. Carswell for defendant.

DENNY, J. The defendant challenges the correctness of the court's ruling below, denying his motion for judgment as of nonsuit made at the close of the State's evidence and renewed at the close of all the evidence.

We said in *S. v. Carroll,* 226 N. C. 237, 37 S. E. (2) 688: "We realize the necessity for strict enforcement of the statutes enacted for the protection and safety of the public in the use of our highways, but, before the State is entitled to a conviction under G.S. 20-138, . . . it must be shown beyond a reasonable doubt that the defendant was driving a motor vehicle on a public highway of this State, while under the influence of intoxicating liquor or narcotic drugs. And a person is under the influence of intoxicating liquor or narcotic drugs, within the meaning and intent of the statute, when he has drunk a sufficient quantity of intoxicating beverage or taken a sufficient amount of narcotic drugs, to cause him to lose the normal control of his bodily or mental faculties, or both, to such an extent that there is an appreciable impairment of either or both of these faculties."

In the instant case, all the evidence we have as to whether or not the defendant drove his automobile on a public highway while under the influence of an intoxicant, came from the officers who reached the scene of the wreck about thirty minutes after it occurred. One of them testified that he based his opinion as to the intoxicated condition of the defendant on the fact that he smelled something on his breath. The other testified that in his opinion the defendant was intoxicated or under the influence of something. But both witnesses testified that they did not know whether or not the defendant's condition which they observed that night came from what he had to drink or whether it came from the injuries he sustained. If the witnesses who observed the defendant immediately after his accident, were unable to tell whether or not he was under the influence of an intoxicant or whether his condition was the result of the injuries he had just sustained, we do not see how the jury could do so. It

is disclosed by the testimony that the defendant was suffering at the time from painful and serious injuries sustained when his car overturned.

We do not think this evidence is sufficient to raise more than a suspicion or conjecture as to whether or not the defendant at the time of his injury, was under the influence of liquor or narcotic drugs within the meaning of G.S. 20-138, and construed in *S. v. Carroll, supra. S. v. Flinchem,* 228 N. C. 149, 44 S. E. (2) 724; *S. v. Murphy,* 225 N. C. 115, 33 S. E. (2) 588; *S. v. Boyd,* 223 N. C. 79, 25 S. E. (2) 456; *S. v. Todd,* 222 N. C. 346, 23 S. E. (2) 47.

The defendant's motion for judgment as of nonsuit should have been allowed.

Reversed.

QUEEN CITY COACH COMPANY v. LUMBERTON COACH COMPANY.

(Filed 24 November, 1948.)

Indemnity § 2c—

Plaintiff coach company authorized defendant coach company to operate under its franchise with proviso that defendant should indemnify and save harmless the plaintiff from any and all loss or damage occasioned by the operation of motor vehicles of the defendant. *Held:* The indemnity agreement does not cover attorneys' fees and expenses expended by plaintiff in aiding in the defense of suits arising out of an accident in the operation of defendant's bus over the franchise route, it not being alleged that plaintiff was called upon or required to defend or that defendant failed to pay all damages and costs growing out of the suits.

APPEAL by plaintiff from *Patton, Special Judge,* April Term, 1948, of MECKLENBURG. Affirmed.

Suit to recover on a contract of indemnity.

Plaintiff alleged that by contract plaintiff authorized defendant to transport passengers under plaintiff's franchises over certain state highway routes, with proviso that defendant should "indemnify and save harmless the party of the first part (plaintiff herein) from any and all damages or loss occasioned by the operation of motor vehicles of the party of the second part (defendant herein) over the franchise routes of the party of the first part." Defendant agreed to carry liability insurance in accordance with the rules of the Utilities Commission. It was alleged that while defendant was operating under this contract one of defendant's buses was involved in a collision in which four persons were killed and fifteen others injured, and that suits for damages growing out of this collision were instituted against defendant, and that in four of these suits the plaintiff herein was made party defendant along with the present defendant, and that plaintiff, doubting the adequacy of defendant's liability

insurance and in view of its limited assets, employed counsel to defend these suits and was caused to expend therefor $8,374.92, and that demand for reimbursement therefor has been refused.

The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, in that the complaint does not allege any damages have been assessed or paid by the plaintiff, or that any loss has been occasioned by the operation of defendant's motor vehicles, but that the only claim is for the fees and expenses of attorneys employed by plaintiff in defending these suits against defendant and plaintiff; that the complaint does not allege that defendant failed to carry liability insurance in accord with the regulations of the Utilities Company, or that defendant was called upon to defend or that the contract provided for defense of suits or payment of attorneys' fees, or that the suits were not properly defended, or that any judgment had been recovered against the plaintiff, or that defendant had failed to pay all damages and costs adjudged in connection with the suits referred to.

The demurrer was sustained, and plaintiff excepted and appealed.

Shearon Harris for plaintiff, appellant.

McKinnon & Seawell for defendant, appellee.

DEVIN, J. This was a suit to recover under the indemnity clause in a contract between the two coach companies whereby the defendant Coach Company was given authority to operate motor buses over certain franchise routes of the plaintiff Coach Company, with provision in the contract that defendant should indemnify and save harmless the plaintiff from any and all damages or loss occasioned by the operation of defendant's motor vehicles over these franchise routes. It was alleged that growing out of defendant's operations under the contract a number of suits were instituted against defendant, and that in some of these the present plaintiff was joined as party defendant, and that to defend these suits plaintiff employed attorneys and has incurred expense therefor which it now seeks to recover from the defendant under its contract of indemnity. Defendant's demurrer on the ground of the insufficiency of the complaint to state a cause of action was sustained. An examination of the complaint in the light of the challenging demurrer leads us to the conclusion that the court below has ruled correctly and that the judgment should be upheld.

The language in which the contract of indemnity is couched, as set out in the complaint, affords ground for recovery for damages or loss occasioned plaintiff by the operation of defendant's buses over plaintiff's franchise routes, but is not sufficiently comprehensive to include reimbursement for the fees of attorneys employed by plaintiff to defend suits

brought against the defendant or both defendant and plaintiff. There is no allegation that any damages or costs were adjudged against or paid by the plaintiff, or that loss was occasioned by the operation of defendant's buses, or that plaintiff was called upon or required to defend, or that defendant failed to pay all damages and costs growing out of the suits referred to. The use of the word loss in connection with the word damages would seem to indicate damages assessed and loss resulting from an adverse judgment. *Power Co. v. Casualty Co.*, 153 N. C. 275, 69 S. E. 234. In the absence of an express agreement therefor this would not include amounts paid for attorneys' fees. *McCabe v. Assurance Corp.*, 212 N. C. 18, 192 S. E. 687; *In re Will of Howell*, 204 N. C. 437, 168 S. E. 671; *Parker v. Realty Co.*, 195 N. C. 644, 143 S. E. 254; *Lowe v. Fidelity Co.*, 170 N. C. 445, 87 S. E. 250; *Midgett v. Vann*, 158 N. C. 128, 73 S. E. 801; *Bank v. Land Co.*, 128 N. C. 193, 38 S. E. 813. Nor is the expense of employing attorneys in the successful defense of a suit for damages for tort allowable as part of the costs or recoverable in the absence of an express agreement therefor. *Power Co. v. Casualty Co.*, 153 N. C. 275, 69 S. E. 234; G.S. 6-21. Expense unnecessarily incurred for attorneys' fees may not be recovered. 42 C. J. S. 587; 27 A. J. 474. In *Lowe v. Fidelity Co., supra*, the defendant there was required to reimburse plaintiff for attorneys' fees, but that was for the reason that the Fidelity Company was under contract to defend the suit and had wrongfully failed to do so. *Anderson v. Ins. Co.*, 211 N. C. 23, 188 S. E. 642.

There are numerous decisions in other jurisdictions, to which plaintiff calls our attention, in which attorneys' fees are held recoverable by the successful litigant as items of costs, and are also regarded as losses for which reimbursement is allowed under certain indemnity contracts, but, considering the language of the contract of indemnity in the case at bar in the light of our decisions, we think the complaint for the recovery of sums expended for attorneys' fees under the contract here alleged is demurrable as insufficient to state a cause of action. Accordingly the judgment below is

Affirmed.

STATE v. ROBERT MUSE.

(Filed 24 November, 1948.)

Assault § 14c: Criminal Law § 53g—

Upon evidence tending to show that defendant hit his antagonist with as many as four rocks while his antagonist was prone on the ground, and the deadly character of the weapons in the manner and circumstance of their use is submitted to the jury, it will not be held for reversible error

that the court submitted the case on the question of defendant's guilt of assault with a deadly weapon or not guilty and refused to submit the question of defendant's guilt of simple assault, the character of the affray prior to the time defendant's antagonist was knocked unconscious not being controlling.

APPEAL by defendant from *Sink, J.*, February Term, 1948, of BUNCOMBE.

Criminal prosecution on indictment charging the defendant with an assault with a deadly weapon with intent to kill, inflicting serious injury not resulting in death. G.S. 14-32.

There was evidence on behalf of the State (the defendant offered none) tending to show that on the night of 2 December, 1947, the defendant and his wife and John Henry Penland were in a taxicab near the corner of Tiernan and Nelson Streets in the City of Asheville. They were all drinking. The two men fell to fighting, and the defendant Muse cut Penland with a knife. The driver of the taxicab pulled both men out of the cab, they were "pretty well intoxicated." He noted that Penland's clothes had been cut. The two men fell on the ground. Horace Johnson, who lived near-by, saw from his window that Penland had been "knocked out." Muse picked up as many as four rocks and hit him in the face or on the head with them while he was down. Johnson called the police. They found Penland unconscious "with his ear busted and blood all over his face." He had "a gash near his jugular vein and his ear cut all the way through." He was rushed to the hospital. Stitches were required on his neck, or throat, at a point near his mouth, and on his ear.

The court instructed the jury that one of two verdicts might be returned under the evidence, *i.e.*, guilty of an assault with a deadly weapon or not guilty.

Verdict: Guilty of assault with a deadly weapon.

Judgment: Fifteen months on the roads.

Defendant appeals, assigning errors.

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

R. R. Reynolds, I. C. Crawford, and C. C. Jackson for defendant.

STACY, C. J. The question for decision is whether there was error in limiting the jury to one of two verdicts, *i.e.*, guilty of an assault with a deadly weapon or not guilty.

The court eliminated the felony charge, and submitted the case to the jury on "a less degree of the same crime charged," that is, an assault with a deadly weapon. Whether the less-aggravated offense of a simple assault should also have been submitted to the jury is the point pre-

sented by the appeal. Ordinarily, the position might prevail, *S. v. Bentley,* 223 N. C. 563, 27 S. E. (2) 738, but on this record where the manner and circumstance of the use of the alleged weapons was submitted to the jury and found to be deadly, we think the exception too tenuous to work a new trial. *S. v. Randolph,* 228 N. C. 228, 45 S. E. (2) 132. The character of the weapons seems not to have been mooted on the hearing. The defendant would have us consider only the evidence as to what transpired while the parties were in the taxicab. However, this was only the beginning of the affray.

No reversible error has been made to appear; hence the verdict and judgment will be upheld.

No error.

STATE v. J. H. PHILLIPS.

(Filed 24 November, 1948.)

1. Homicide § 16—

The presumptions that a homicide was unlawful and done with malice do not arise against the slayer in a prosecution for homicide unless he admits or the State proves that he intentionally killed the deceased with a deadly weapon.

2. Homicide § 27b—

Where there is no evidence that defendant intentionally killed deceased, a charge on the presumptions arising from an intentional killing with a deadly weapon and upon the burden resting upon defendant to rebut such presumptions, will be held prejudicial error as tending to confuse the jury.

APPEAL by defendant, J. H. Phillips, from *Williams, J.,* and a jury, at the August Term, 1948, of WAYNE.

The defendant was indicted for the murder of Henry Bruce Gurganus. The State did not seek a conviction for first degree murder, and the court left it to the jury to determine whether the defendant was guilty of murder in the second degree, or manslaughter, or not guilty.

The homicide occurred about midnight on 13 January, 1948, upon premises in charge of the defendant while the deceased was engaged in an affray with one Leslie Mitchell. No evidence was presented at the trial indicating that the slaying was intentional.

There was evidence in behalf of the State tending to show that the deceased was killed by the unintentional discharge of a pistol which was being handled by the defendant in a criminally careless and reckless manner.

The defendant claimed, however, that the deceased met death through misadventure, and adduced testimony indicating that the killing resulted from the accidental and unintentional discharge of the defendant's pistol while the defendant was lawfully endeavoring to suppress the affray between the deceased and Mitchell. G.S. 15-39.

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

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

J. Faison Thomson and William A. Dees, Jr., for defendant, appellant.

ERVIN, J. The defendant assigns as error the following instruction of the court to the jury: "When it is proven beyond a reasonable doubt that the defendant intentionally shot and killed the deceased with a deadly weapon, to wit, a pistol, and I charge you that a pistol in this case is a deadly weapon, then the law casts upon the defendant the burden of proving to your satisfaction, not beyond a reasonable doubt or by the greater weight of the evidence, circumstances which would mitigate murder in the second degree to manslaughter or excuse it altogether on the grounds of accident."

The presumptions that a homicide was unlawful and done with malice do not arise against the slayer in a prosecution for homicide unless he admits or the State proves that he intentionally killed the deceased with a deadly weapon. *S. v. Ellison,* 226 N. C. 628, 39 S. E. (2) 824; *S. v. Burrage,* 223 N. C. 129, 25 S. E. (2) 393; *S. v. Debnam,* 222 N. C. 266, 22 S. E. (2) 562; *S. v. Gregory,* 203 N. C. 528, 166 S. E. 387. Since there was no testimony at the trial tending to show that the killing of the deceased by the defendant was intentional, the instruction which the defendant challenges was not pertinent, and tended to confuse the jury. The question of the guilt or innocence of the accused upon the charge of manslaughter ought to have been submitted to the jury with appropriate instructions. *S. v. Limerick,* 146 N. C. 649, 61 S. E. 568. Hence, the verdict and judgment in the court below are set aside, and the appellant is awarded a

New trial.

STATE v. JAMES R. HEATER, JR.

(Filed 24 November, 1948.)

1. Rape § 25—

Evidence in this case *held* sufficient to be submitted to the jury upon the charge of assault upon a female with intent to commit rape.

2. Rape § 24—

In order to constitute an assault with intent to commit rape there must not only be an assault but also an intent on the part of the defendant to gratify his passion notwithstanding any resistance on the part of his intended victim.

3. Rape § 25—

In a prosecution for an assault with intent to commit rape it is error for the court to refuse to give, in substance at least, defendant's requested instruction, based upon his testimony, to the effect that he would not be guilty if he desisted immediately prosecutrix resisted his advances.

APPEAL by defendant from *Coggin, Special Judge,* at May Term, 1948, of WAKE.

Criminal prosecution tried upon indictment charging the defendant with assault on a female with intent to commit rape.

The jury returned a verdict of guilty, and from the judgment entered thereon, the defendant appeals, assigning error.

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

Thos. W. Ruffin for defendant.

DENNY, J. The evidence offered in the trial below is sufficient to withstand the motion for judgment as of nonsuit, and the exception to the ruling of the court below, denying such motion, will not be sustained.

The defendant testified that he had been in the home of the prosecuting witness several times during the week in which he is charged with assaulting her with intent to commit rape; that she had encouraged his attentions; that he had kissed her and embraced her on several previous occasions; that while he intended to have sexual intercourse with her on the day in question, when she resisted his advances he quit the minute he found out she did not want any more of his attentions and did not want to go that far; that he apologized and told her he had misunderstood her intentions.

In the light of the above evidence, the defendant excepts and assigns as error the failure of the trial judge to give his prayer for special instructions, tendered in apt time, as follows: "I further charge you

that if you find from the evidence in this case, not beyond a reasonable doubt but . . . to your satisfaction that when the defendant discovered that the prosecuting witness did not want to receive any attention from him and resisted him that he desisted and quit his advances toward her, then I charge you that it would be your duty to return a verdict of 'not guilty' because the law is that the defendant must have had an intent to gratify his passion on the person of the woman notwithstanding any resistance she might make and if he quit and desisted in his attentions when she resisted, then he would not be guilty."

This Court said in *S. v. Massey,* 86 N. C. 658: "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." *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; *S. v. Gay,* 224 N. C. 141, 29 S. E. (2) 458; *S. v. Moore,* 227 N. C. 326, 42 S. E. (2) 84.

A careful review of the evidence leads us to the conclusion that the defendant's prayer, or the substance thereof, should have been given; therefore the exception upon which this assignment of error is based, will be upheld.

The defendant is entitled to a new trial, and it is so ordered.

New trial.

Z. B. JOHNSON AND WIFE, MRS. LILLIE JOHNSON, C. D. JOHNSON AND WIFE, MRS. BERTIE JOHNSON, MRS. FLORENCE J. PERRY AND HUSBAND, H. K. PERRY, PLAINTIFFS, V. R. M. JOHNSON AND WIFE, MRS. LELA JOHNSON, B. C. JOHNSON AND WIFE, MRS. TRIB JOHNSON, AND R. H. JOHNSON AND WIFE, MRS. ADNA JOHNSON, DEFENDANTS.

(Filed 1 December, 1948.)

1. Evidence § 7a—

The placing of the burden of proof is determinable from the pleadings before the introduction of evidence under the rule that the burden of proof lies upon the party who will be defeated if no evidence relating to the issue is given on either side.

2. Same—

Plaintiff has the burden of proof on all allegations, negative as well as affirmative, which are essential to his claim or cause of action.

3. Same: Partition § 5b—

Where defendants in partition deny co-tenancy and plead sole seizin, the burden is upon plaintiffs to show title in the parties by tenancy in common. G.S. 46-3.

4. Same—

Defendants' answer denied plaintiffs' allegation of co-tenancy and pleaded sole seizin. Plaintiffs, by reply, alleged the existence, probate and registration of a deed from the common source of title to one of defendants, and alleged that the deed was a forgery, and prayed that it be declared null and void. *Held:* The nonexistence of the deed is essential to the establishment of plaintiffs' claim of tenancy in common, and that the instrument had been duly signed, sealed and delivered is a rebuttable presumption arising from the fact of probate and registration, and therefore plaintiffs have the burden of proving that the deed was a forgery in order to establish their claim or cause of action.

5. Deeds § 3—

Either plaintiff or defendant who claims title under a probated and registered deed is entitled to call to his aid the rebuttable presumption arising from the probate and registration that the instrument had been duly signed, sealed and delivered, and the burden of proving the contrary rests upon the party seeking to establish title upon allegation that the grantor did not in fact execute the instrument.

6. Appeal and Error § 39a—

Error favorable to appellants cannot be prejudicial.

7. Appeal and Error § 39c—

Where plaintiffs offer no evidence upon an issue essential to their cause of action, and therefore are not entitled to recover on any aspect of the case, any error committed against them in the trial is harmless.

APPEAL by plaintiffs from *Harris, J.*, and a jury, at January Term, 1948, of FRANKLIN.

Certain facts are not in dispute. In 1881, the tract described in the pleadings was allotted to Mrs. Nancy Johnson as her share in the lands of her deceased father. During the thirty-five or forty years immediately preceding the issuance of the summons, the defendant, B. C. Johnson, occupied these premises. On 20 March, 1920, the paper writing mentioned in the first issue set out below was registered in Book 227, at page 501, in the office of the Register of Deeds of Franklin County. The instrument bore date 22 January, 1920, and purported to be a warranty deed with the usual covenants whereby Mrs. Nancy Johnson conveyed the land in controversy to the defendant, B. C. Johnson, in fee simple for a recited consideration of $1,000.00. The document appeared upon its face to have been regularly signed by mark by Mrs. Nancy Johnson, who was unable to write, and to have been acknowledged by her

before a justice of the peace, and to have been ordered registered by the Clerk of the Superior Court of Franklin County in due form. On 21 August, 1944, Mrs. Nancy Johnson died intestate, leaving her surviving as heirs at law the plaintiffs, Z. B. Johnson, C. D. Johnson, and Mrs. Florence J. Perry, and the defendants, B. C. Johnson, R. M. Johnson, and R. H. Johnson. Subsequent to this event, the defendant, B. C. Johnson, executed documents sufficient in form to reserve life estates in the property in question for himself and his wife, Mrs. Trib Johnson, and to vest the remainder in such property in the defendant, R. M. Johnson, in fee.

This litigation began on 25 April, 1947, when the plaintiffs presented a petition alleging that the plaintiffs, Z. B. Johnson, C. D. Johnson, and Mrs. Florence J. Perry, and the defendants, B. C. Johnson, R. M. Johnson, and R. H. Johnson, owned the tract in issue as tenants in common and praying that it be partitioned among them by sale. The defendants filed answers, in which the defendant, R. H. Johnson, disclaimed any interest in the property, and in which the defendants, B. C. Johnson, Mrs. Trib Johnson, and R. M. Johnson, denied the co-tenancy alleged by the plaintiffs and pleaded sole seizin in themselves. Neither the petition nor the answers made mention of the alleged deed from Mrs. Nancy Johnson to B. C. Johnson.

The plaintiffs thereupon filed a reply containing this allegation: "That these plaintiffs are informed and believe and therefore aver that the defendants, B. C. Johnson and wife, Mrs. Trib Johnson, and R. M. Johnson claim the lands concerned in this proceeding under color of a purported deed of conveyance of said lands from Mrs. Nancy Johnson to B. C. Johnson, which appears of record in Book 227, at page 501, in the office of the Register of Deeds of Franklin County, North Carolina, but these plaintiffs are informed and believe and therefore aver that the said purported deed was never made, executed or delivered by the said Mrs. Nancy Johnson to B. C. Johnson or to anyone else, and that the said Mrs. Nancy Johnson, up until the time of her death, never knew or suspected that any such purported deed existed, and that the said purported deed was placed upon the public record without the knowledge or consent of the said Mrs. Nancy Johnson." In the reply, the plaintiffs asked that "the prayers of the petition herein be granted and that the purported deed which appears of record in Book 227, at page 501, as aforesaid, be declared by the court to be null and void and of no effect."

The decision on the trial was made to turn on the question as to whether Mrs. Nancy Johnson had executed the deed of 22 January, 1920. The trial judge ruled that the burden of establishing the fact of the execution of the purported deed was upon the defendants, B. C. Johnson, Mrs. Trib Johnson, and R. M. Johnson, who claimed under it. These defendants

offered evidence tending to show that Mrs. Nancy Johnson signed, sealed and delivered the instrument in question in due form of law. The plaintiffs presented testimony for the avowed purpose of sustaining the converse proposition, but such evidence had no tendency to disprove the execution of the instrument in controversy by Mrs. Nancy Johnson.

The issues submitted to the jury with the answers thereto were as follows: (1) Was the deed appearing of record in Book 227, at page 501, in the office of the Register of Deeds of Franklin County, made, executed, and delivered by Mrs. Nancy Johnson to B. C. Johnson? Answer, Yes; and (2) Are the petitioners Z. B. Johnson, C. D. Johnson, and Mrs. Florence J. Perry tenants in common with the defendants B. C. Johnson and wife, Mrs. Trib Johnson, and R. M. Johnson? Answer, No.

The trial judge rendered judgment for the defendants, B. C. Johnson, Mrs. Trib Johnson, and R. M. Johnson, on the verdict, and the plaintiffs appealed, assigning errors.

John F. Matthews for plaintiffs, appellants.

Charles P. Green, Hill Yarborough, and E. F. Yarborough for defendants, appellees.

ERVIN, J. The trial judge committed error favorable to plaintiffs in imposing upon the defendants, B. C. Johnson, Mrs. Trib Johnson, and R. M. Johnson, the burden of establishing by the greater weight of the evidence that Mrs. Nancy Johnson did in fact sign, seal, and deliver the deed, which was admitted to registration on 20 March, 1920. An analysis of the pleadings in the light of relevant legal principles and authorities makes this observation indisputably clear.

The question as to whether the burden of proof rests with a plaintiff or a defendant is determined from the pleadings before the introduction of evidence. 20 Am. Jur., Evidence, section 136. Plaintiff has the burden of proof with respect to all elements of his claim or cause of action. *Bank v. Construction Co.*, 203 N. C. 100, 164 S. E. 621. What he must allege, he must prove. *Hood v. Cobb*, 207 N. C. 128, 176 S. E. 288. He is even required to make proof of his negative allegations if they are essential to the establishment of his case. *Hood v. Cobb, supra; S. v. Connor*, 142 N. C. 700, 55 S. E. 787; 31 C. J. S., Evidence, section 105. "Whenever, whether in plea or replication or rejoinder or surrejoinder, an issue of fact is reached (says 2 Wharton Ev., sec. 354), then, whether the party claiming the judgment of the court asserts an affirmative or negative proposition, he must make good his assertion. On him lies the burden of proof." *Cook v. Guirkin*, 119 N. C. 13, 25 S. E. 715.

The question as to which party to an action has the burden of proof with respect to either a particular issue or the entire case finds solution

through the application to the pleadings of a simple test. The burden of proof lies upon the person who will be defeated as to the particular issue or the entire case if no evidence relating thereto is given on either side. *Huneycutt v. Brooks,* 116 N. C. 788, 21 S. E. 558; *Coffman v. Spokane Chronicle Pub. Co.,* 65 Wash. 8, 117 P. 596, Ann. Cas. 1913 B 636; 20 Am. Jur., Evidence, section 135; 31 C. J. S., Evidence, section 104.

The plaintiffs claimed judgment for partition of the land in controversy upon a petition making the essential averment that they and the defendants owned such lands as tenants in common. G.S. 46-3. When the defendants, B. C. Johnson, Mrs. Trib Johnson, and R. M. Johnson, denied the plaintiffs' allegation of co-tenancy and pleaded sole seizin in themselves, the law cast upon the plaintiffs the burden of showing title as alleged, *i.e.,* the tenancy in common. *Davis v. Crump,* 219 N. C. 625, 14 S. E. (2) 666; *Bailey v. Hayman,* 218 N. C. 175, 10 S. E. (2) 667; *Talley v. Murchison,* 212 N. C. 205, 193 S. E. 148; *Lester v. Harward,* 173 N. C. 83, 91 S. E. 698; *Huneycutt v. Brooks, supra.*

The answer of the defendants did not plead the existence or record of the alleged deed from Mrs. Nancy Johnson to B. C. Johnson as an affirmative defense or otherwise. But the plaintiffs rightly realized as a practical matter that the record of the deed was a lion in their path, barring their claim to an interest in the land. In consequence, they filed a reply in which they disclosed the existence, probate and registration of the deed, and alleged in substance that the deed was a forgery, and prayed that it "be declared by the court to be null and void and of no effect." To all intents and purposes, the reply of the plaintiffs injected a new cause of action into the case, *i.e.,* a cause of action for the cancellation of the record of a forged deed as a cloud on the title of the plaintiffs to undivided interests in the land. *Byerly v. Humphrey,* 95 N. C. 151; Annotation: 78 A. L. R. 182.

This was new matter. Manifestly, the burden of showing that the deed was a forgery devolved upon the plaintiffs under the pleadings in the case at bar for the reason that the nonexecution of the instrument by the supposed grantor constituted an essential element of their claim or cause of action. The reply of the plaintiffs disclosed the existence of the alleged deed and the fact that it had been probated and registered. The probate and registration gave rise to the rebuttable presumption that the instrument had been duly signed, sealed, and delivered by the purported grantor. *Best v. Utley,* 189 N. C. 356, 127 S. E. 337. Thus, the plaintiffs would have suffered defeat on the issue as to the execution of the deed if no evidence had been offered on either side with respect thereto.

This conclusion is sanctioned by repeated decisions of this Court holding that the burden of proving his assertion of nonexecution rests on a

plaintiff who seeks to establish a claim to land upon an allegation that the grantor named in a probated and registered deed regular on its face did not in fact execute the instrument. Besides, the same cases clearly establish the rule that a party claiming title under such probated and registered deed can call to his aid the rebuttable presumption that the supposed grantor executed such deed whenever the instrument is subjected to attack on an allegation of nonexecution without regard to whether he be the plaintiff or the defendant. These propositions find full support in these authorities: *Bank v. Griffin,* 207 N. C. 265, 176 S. E. 555; *Gulley v. Smith,* 203 N. C. 274, 165 S. E. 710; *Best v. Utley, supra; Faircloth v. Johnson,* 189 N. C. 429, 127 S. E. 346; *McMahan v. Hensley,* 178 N. C. 587, 101 S. E. 210; *Rogers v. Jones,* 172 N. C. 156, 90 S. E. 117; *Lee v. Parker,* 171 N. C. 144, 88 S. E. 217; *Linker v. Linker,* 167 N. C. 651, 83 S. E. 736; *Buchanan v. Clark,* 164 N. C. 56, 80 S. E. 424; *Fortune v. Hunt,* 149 N. C. 358, 63 S. E. 82; *Smithwick v. Moore,* 145 N. C. 110, 58 S. E. 843; *Helms v. Austin,* 116 N. C. 751, 21 S. E. 556.

The trial judge was understandably misled on the question of the burden of proof as to the execution of the deed in issue by a too literal reliance upon certain language in *Belk v. Belk,* 175 N. C. 69, 93 S. E. 726; *Jones v. Coleman,* 188 N. C. 631, 125 S. E. 406; and *Burton v. Peace,* 206 N. C. 99, 173 S. E. 4. In *Belk v. Belk,* the party claiming under the questioned deed was the plaintiff, and the broad statement that "the legislature . . . evidently intended that the burden as to due execution should be imposed upon the party claiming under the deed, when there is an issue joined in regard to it calling for proof" was correct as applied to him. The holding of the Court in *Jones v. Coleman* is correctly digested in the first headnote, which says that a plaintiff who attacks the validity of a probated and registered deed by an allegation of nonexecution must "sustain his contention by the greater weight of the evidence, and an instruction that he is required to do so by clear, strong, and convincing proof is reversible error." The remark near the conclusion of the opinion that "the burden of establishing the fact of the execution of the deed by the grantor was upon the defendant who claims under the deed" runs counter to the authorities cited in the opinion, was not necessary to the decision, and constituted an *obiter dictum.* 21 C. J. S., Courts, section 190. In *Burton v. Peace,* the defendant was not content to rest on the rebuttable presumption of execution raised by the probate and registration. He undertook to establish it as a fact by the oral testimony of witnesses. Unfortunately for him, this evidence effectually rebutted the presumption by showing affirmatively that the deed in question had never been delivered. Consequently, verdict and judgment for the plaintiff was upheld. The inadvertent expression in the opinion to the effect that the presumption of execution arising from the probate and

registration of a deed does not apply when the deed is offered by a plaintiff "for the purpose of attack" was not necessary to the determination of any question in the case, conflicted with the numerous decisions on the subject, constituted an *obiter dictum,* and cannot be accorded the force of an adjudication abrogating the presumption in the area of its greatest usefulness.

The action of the trial court in placing the burden of proof as to the execution of the determinative deed on the wrong parties worked no injury to defendants in final result for the reason that the jury found that Mrs. Nancy Johnson actually signed, sealed, and delivered the instrument.

On this appeal, the plaintiffs assert with much earnestness that the case ought to be tried anew for other errors which they claim the court committed in admitting the testimony of the defendants and in charging the jury on the issue as to the making of the deed.

The present record impels us to adjudge any such errors to be harmless. Here, the burden of proving their allegation that the supposed grantor did not execute the deed in controversy rightly rested upon the plaintiffs. No evidence was presented at the trial tending to sustain the truth of this essential averment. Hence, the plaintiffs were not entitled to a favorable decision in any event, the verdict returned by the jury was the only one justified by the evidence, and the judgment rendered was correct on the merits. *Clark v. Henrietta Mills,* 219 N. C. 1, 12 S. E. (2) 682; *Weatherman v. Ramsey,* 207 N. C. 270, 176 S. E. 568; *Ins. Co. v. Cates,* 193 N. C. 456, 137 S. E. 324; *Fulcher v. Lumber Co.,* 191 N. C. 408, 132 S. E. 9; *Overton v. Highsmith,* 191 N. C. 376, 131 S. E. 742.

As the record has not revealed an error affecting any substantial right of the plaintiffs, the judgment rendered in the court below will not be disturbed.

No error.

IN THE MATTER OF THE ESTATE OF M. A. GALLOWAY, DECEASED, T. I. GALLOWAY AND O. F. GALLOWAY, ADMINISTRATORS.

(Filed 1 December, 1948.)

1. Appeal and Error § 40d—

Findings of fact made under a misapprehension of the law will be set aside and the cause remanded for consideration of the evidence in its true legal light.

2. Executors and Administrators § 3—

In a proceeding under G.S. 28-32 for revocation of letters of administration, the question determinable by the clerk is solely whether the administrators have been guilty of default or misconduct in the due execution of their office, and the rights and liabilities of adverse parties in the estate may not be litigated in such proceeding.

3. Same: Appeal and Error § 40b—

In revoking letters of administration under G.S. 28-32 the clerk exercises a legal discretion which is reviewable on appeal.

4. Executors and Administrators § 5—

Personal property of a person who dies intestate passes directly to his administrator, his real property descends directly to his heirs at law, subject to be divested only if it becomes necessary to sell lands to make assets with which to pay debts, and the only interest of the administrator in the realty is the right to subject the lands to the payment of the debts and costs of administration when the personalty is insufficient.

5. Descent and Distribution § 12—

All amounts due for use and occupancy of real property after the death of intestate become the property of the heirs to whom the realty descends.

6. Executors and Administrators § 3—

Heirs at law of the estate were appointed administrators of the estate. *Held:* An order of the clerk revoking the letters of administration upon consideration of evidence of their failure to account for rents and profits from the realty is based upon a confusion of their duties, obligations and liabilities as administrators and their rights and liabilities as heirs at law, and the cause will be remanded in order that the evidence may be considered in its true legal light.

APPEAL by the administrators T. I. Galloway and O. F. Galloway from *Rousseau, J.*, at Regular Civil Term, May 1948, of MECKLENBURG.

Application by petition to clerk of Superior Court of Mecklenburg County for revocation of letters of administration issued 6 March, 1940, to, and for removal of T. I. Galloway and O. F. Galloway as administrators of M. A. Galloway, deceased.

From the petition of petitioners, the answer of the administrators, the reply of petitioners, affidavits of petitioners, and affidavit of the administrators, these facts in summary seem to be uncontroverted: M. A. Galloway, late of Mecklenburg County, North Carolina, died on 22 October, 1933, intestate and survived by his wife and nine children; two of the children, T. I. and O. F., were appointed administrators of the estate of their father on 6 March, 1940,—giving an administrator's bond in the sum of $100, with two sureties, one of whom being the petitioner R. A. Galloway, a son of the intestate. The other two petitioners, A. J. Galloway and W. L. Galloway, also are sons of intestate. A year's

support was not laid off to the widow, nor was dower allotted to her. She and four of the children, including the two appointed administrators, resided on lands of which intestate was seized at time of his death. The widow, as appellants say in their brief, died 5 March, 1942.

The administrators, answering the affidavit of petitioners, filed an affidavit in which it is contended: (1) That no inventory of personal property was filed for the reason that no such property belonged to the estate, and (2) that the furniture in the home was property of their mother and that she disposed of that. And they entered motions that certain portions of affidavit of petitioners be stricken out because they relate to the real estate which did not pass to them as administrators. The clerk took no action on the motion.

The record also shows that when the petition came on for hearing, the clerk entered an order on 4 May, 1948, in which it is recited: that "it appearing . . . that T. I. Galloway and O. F. Galloway were appointed administrators of the estate of M. A. Galloway, deceased, in 1940 and that they have never filed a proper inventory or final account and have failed to make a final settlement of the estate . . . and that they have been in possession of the property belonging to said estate growing out of which is a dispute between and among the heirs at law of M. A. Galloway, deceased, including the administrators aforesaid; . . . that the administrators have failed to settle the debts and obligations of the estate; . . . that a judgment creditor is now petitioning the court to be permitted to sell the lands belonging to said estate in order to make assets to pay said judgment; . . . that there is a first mortgage against the said real estate which is unpaid; and that the other heirs at law are making claims against the administrators for the wrongful use and occupation of the property belonging to the estate; and . . . that for good cause the said administrators should be removed as such and required to make a complete accounting for their management of said estate; and that a disinterested administrator *de bonis non* should be appointed in order to take such steps as may be necessary in order to finally settle the debts of the estate without prejudice to the rights of any of the heirs at law."

Thereupon, the clerk "for good cause and in the discretion of the court" adjudged that T. I. Galloway and O. F. Galloway be removed as such administrators and the letters appointing them recalled; that they file a complete accounting of the estate of M. A. Galloway, and turn over to the administrator *de bonis non* appointed by the court, or to the court, such property as they may have belonging to said estate.

To this "order and every part thereof as to law and fact the said T. I. Galloway and O. F. Galloway, administrators, except and appeal to Superior Court . . ."

When the appeal came on for hearing before judge of Superior Court, the administrators renewed their motion to strike out portions of the affidavits as aforesaid. Denied. Exception.

Thereupon the judge "upon examination and consideration of the records in the case," find "as facts, in addition to the facts found by the clerk, that the said administrators, after the death of the widow of the said M. A. Galloway, made use of the premises belonging to the estate for their own benefit by using the houses on said premises as residences for themselves and families, and by renting the lands themselves and fixing the amount of rents to be paid to the estate, without authority so to do from the court; . . . that the said administrators deny the right of the petitioners to any share or interest in the estate, alleging that the petitioners have received advancements to the full extent of their shares without such claim having been adjudicated in any manner; and . . . that the said T. I. Galloway and the said O. F. Galloway since they have been in charge of the said estate have received as tenants benefits from the Federal Farm Administration or Agency, commonly called "AAA" in the form of conservation payments the sum of six hundred thirty nine dollars and ninety three cents, for which they have not accounted to the estate nor reported to the court," entered judgment "that the order of the clerk of the Superior Court . . . dated May 4, 1948, and every part thereof, be and the same is hereby upheld and approved; and the finding of fact therein, together with the additional findings of fact hereinabove set forth by this court, are hereby adopted and made the findings in all respects of this court."

To the signing of the foregoing judgment and order the administrators T. I. Galloway and O. F. Galloway except and appeal to Supreme Court, and assign error.

Wm. H. Abernathy for administrators, appellants.

G. T. Carswell and Wade H. Williams for petitioners, appellees.

WINBORNE, J. A reading of the record on this appeal leads to the conclusion that the judgment from which this appeal is taken was rendered upon facts found under a misapprehension of the law. In such case the facts found will be set aside on the theory that the evidence before the court should be considered in its true legal light. *McGill v. Lumberton,* 215 N. C. 752, 3 S. E. (2) 324, and cases there cited. See also *S. v. Calcutt,* 219 N. C. 545, 15 S. E. (2) 9; *Stanley v. Hyman-Michaels Co.,* 222 N. C. 257, 22 S. E. (2) 570; *S. v. Williams,* 224 N. C. 183, 29 S. E. (2) 744; *Coley v. Dalrymple,* 225 N. C. 67, 33 S. E. (2) 477; *Troitino v. Goodman,* 225 N. C. 406, 35 S. E. (2) 277; *S. v. Gause,*

227 N. C. 26, 40 S. E. (2) 463; *Whitted v. Palmer-Bee Co.,* 228 N. C. 447, 46 S. E. (2) 109.

The statute G.S. 28-32 pertaining to revocation of letters of administration provides that "if, after any letters have been issued, it appears to the clerk, or if complaint is made to him on affidavit . . . that any person to whom they were issued . . . has been guilty of default or misconduct in the due execution of his office . . . the clerk shall issue an order requiring such person to show cause why the letters should not be revoked"; and "on the return of such order, duly executed, if the objections are found valid the letters issued to such persons must be revoked and superseded, and his authority shall thereupon cease."

"This proceeding," as stated in *Edwards v. Cobb,* 95 N. C. 4, opinion by *Merrimon, J.,* "is neither a civil action nor a special proceeding under the code of civil procedure. Its purpose is not to litigate the alleged rights and liabilities of adverse parties, settle the same, and give judgment against one party in favor of another, but it is to require one who is charged by the law with special duties and trusts, for whomsoever may be interested, to show cause . . . why he shall not be removed from his place or office, because of some disqualification, malfeasance, misfeasance or nonfeasance, that disqualifies or unfits him in that respect and renders it necessary that he shall be promptly removed from it."

That is, the question before the clerk is whether the administrator "has been guilty of default or misconduct in the due execution of his office." G.S. 28-32. In passing upon such question, the clerk exercises a legal discretion which may be reviewed on appeal. See *Edwards v. Cobb, supra; In re Battle,* 158 N. C. 388, 74 S. E. 23; *In re Estate of Wright and Wright v. Ball,* 200 N. C. 620, 158 S. E. 192. *In re Estate of Styers,* 202 N. C. 715, 164 S. E. 123; *Jones v. Palmer,* 215 N. C. 696, 2 S. E. (2) 850; *Edwards v. McLawhorn,* 218 N. C. 543, 11 S. E. (2d) 562.

In *Jones v. Palmer, supra,* it is stated: "The clerk is not compelled to remove an administrator for failing promptly to file an inventory when in his judgment the estate has received no damage; . . . nor for failure to file account . . . nor for delay in winding up an administration. Instead of removal the performance of all these duties may be enforced by appropriate proceeding. *Atkinson v. Ricks,* 140 N. C. 418, 53 S. E. 230; *Barnes v. Brown,* 79 N. C. 401. But he may remove an . . . administrator for such failure and must do so when he finds the omission of duty is sufficiently grave to materially injure or endanger the estate, or if compliance with the orders of the court in the supervision and correction of the administration are not properly obeyed."

While personal property of a person who dies intestate passes directly to his administrator, his real property descends directly to his heirs at law, subject to be divested only if it becomes necessary to sell land to

make assets with which to pay debts. *Parker v. Porter,* 208 N. C. 31, 179 S. E. 28.

All rents accruing from rental or use and occupancy of real property after the death of the intestate become the property of the heirs to whom the real property descends. See *Trust Co. v. Frazelle,* 226 N. C. 724, 40 S. E. (2) 367. Indeed, it may be that the benefits paid under the AAA are matters of concern only to the heirs at law.

The only right that the administration can have in the real property of his intestate is the right to subject it to the payment of the debts and costs of administration when the personal property is insufficient for that purpose. *Parker v. Porter, supra.*

Applying these principles to the case in hand, it would seem that the duties, obligations and liabilities of the administrators may have been confused with their rights and liabilities as heirs at law.

Hence in the light of this opinion the case is remanded to the end that the matter be re-heard and the facts found in their true legal light.

Error and remanded.

STATE v. JOE F. DAVIS, J. D. GUNTER, R. L. HARKEY AND E. M. WAGLEY.

(Filed 1 December, 1948.)

1. Gaming § 8—

In a prosecution under G.S. 14-304, it is competent for witnesses who have examined and studied the machines in question to testify as to their physical description and operation.

2. Same: Criminal Law § 31a—

It is competent for a witness who has examined, studied and operated the machines in question to testify as to the physical changes necessary to convert, or reconvert, them into coin slot operated machines, since such testimony relates to matters within his knowledge based upon facts of his own observation, and is not expert testimony based upon hypotheses of fact; and further, his testimony as to the time necessary for such reconversion, if incompetent, could not be prejudicial.

3. Gaming § 9—

It was admitted that the machines in question were owned by one defendant and rented by him to the other defendants. The State introduced testimony of an officer, who had examined and studied the machines, that from his observation they could be converted, or reconverted, to coin slot operated machines by simple mechanical changes. *Held:* The evidence was sufficient to overrule defendants' demurrer, and the fact that the witness failed to complete a demonstration of the conversion of such a machine

because of lack of soldering tools, does not amount to a failure of the State's evidence upon the critical issue. G.S. 14-306.

DEFENDANT'S appeal from *Patton, Special Judge,* April 12, 1948, Extra Criminal Term, MECKLENBURG Superior Court.

In separate warrants the defendants were charged as follows: Joe F. Davis with owning, storing, possessing, selling, and leasing on shares slot machines in violation of G.S. 14-304; and the other three defendants with possessing slot machines in violation of said statute. They were convicted in the Recorder's Court of the City of Charlotte, and on appeal the cases were consolidated for trial and heard upon the same warrants at April 12 Special Criminal Term of Mecklenburg, on defendants' pleas of not guilty.

The State proceeded to develop its case through the testimony of the officers concerned with the capture of the machines and arrest of the defendants. The evidence tended to show they went into the several places of business of the defendants and found the machines or devices in question installed for operation, took possession of them as gambling devices or slot machines condemned by law, and arrested the defendants who had them in possession. It was admitted that the machines were owned by Davis and rented by him to the defendants. The machines were introduced as evidence in court; and witnesses testified that they were identical in construction and operation. It was agreed that photographs of the machines should be sent up with the record in lieu of the machines.

The evidence tended to show that the machines were of the pinball type, but the slots had been filled up so that money could not be put into them. The machines, the witness stated, had been fitted to operate by remote electrical control through a box or device placed behind the counter, by which the several successive stages of operation in propelling the balls against the pins and automatically adding up the result on the lighted scoreboard was accomplished by the person "playing."

A. L. White, lieutenant in the city police department, testified that he was familiar with machines like that introduced in evidence, and had occasion to make a mechanical examination of these machines, identical with the one introduced in evidence.

He was permitted, over objection and exception, to testify regarding their adaptability to conversion into slot machines. He testified that the slot or recess in the coin lever of the machine now had a thin piece of metal over the hole or slot so that it could not in its then condition actuate the further operation; that it was only necessary to remove the electrically operated relay, after the covering strip of metal had been removed, to convert the machine into a coin slot operated machine, and that this might be done in 15 or 20 minutes.

The witness then described the operation in detail, and stated that this would convert the machine into a coin slot machine which could be operated by putting a coin in the recess of the lever and pushing it in. The witness stated that he had examined identical machines and that it made unpredictable scores.

On cross-examination the witness was asked to convert the machine into a coin slot machine, and stated that tools were necessary—a soldering iron to connect at least four contacts. Furnished a coin slot device for inserting the coin, the witness found no difficulty in inserting the coin-carrying member but further operation was impossible, as witness stated, because it was necessary to restore the electrical contacts with this device, which would require soldering a few wires.

At the conclusion of the State's evidence the defendants demurred to the evidence, made separate motions of judgment of nonsuit, which were declined, and defendants excepted.

There was a verdict of guilty as to each defendant. Defendants made motion to set aside the verdict for errors committed on the trial. The motions were declined and defendants excepted. Judgment was pronounced that defendant Joe F. Davis be confined in the common jail of Mecklenburg County, pay a fine of $100 and costs, the prison sentence suspended for two years upon condition that the defendant did not violate any law of the State, and especially the laws relating to slot machines and similar devices. As to the other three defendants, each, prayer for judgment was continued for five years. Defendants objected, excepted, and appealed.

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

Henry E. Fisher, G. T. Carswell, and Carl Horn, Jr., for defendants, appellants.

SEAWELL, J. The objections of the defendants to the physical description and operation of the machines introduced in evidence, given by witnesses who had examined, studied and tried them in operation, are without merit. Of the same character is the objection to the testimony of White relating to the physical changes necessary to convert, or we should properly say in view of the evidence, reconvert the machines into coin slot operated machines.

The feature of the trial defendants more strongly challenge as objectionable relates to the testimony of White that the change could be made in 15 or 20 minutes and what they contend was his failure, or demonstration, that it could not be accomplished at all. The appellants contend that his estimate of the time required was incompetent as opinion evi-

dence, and even so his demonstration was tantamount to a failure of the State's evidence on the critical issue, justifying a nonsuit on the demurrer.

We cannot agree to either proposition.

The witness was testifying as to matters within his knowledge, upon facts of his own observation, and not as an expert within the ordinary legal acceptation of that term who bases his findings on the testimony of others,—hypotheses of fact, the truth of which he must assume. His statement is made in connection with the simple physical changes he saw necessary to effect the conversion; and we should say the defendants, if there should be some technical doubt as to the competency of the evidence, could hardly be prejudiced by the witness' estimate of the time it would take to solder connections in three or four wires.

The evidence tends to show that the adaptation of the machines to use as slot machines under the definition given in G.S. 14-306 could be readily and easily made; and the motion for judgment of nonsuit was properly declined.

Other exceptions are not regarded as meritorious.

We find

No error.

MOTOR FINANCE COMPANY v. J. CLAUDE PUTNAM.

(Filed 1 December, 1948.)

1. Contempt of Court § 2b—

An employer cannot be held in contempt for paying salary accruing to a judgment debtor after issuance and service on the employer of an order in proceedings supplemental to execution, since the order, properly construed, speaks as of the date of its issuance, and since in law the order could not apply to prospective earnings of the judgment debtor. G.S. 1-368.

2. Execution § 25—

Prospective earnings of the judgment debtor are neither property nor a debt, and may not be reached in supplemental proceedings against the employer of the judgment debtor. G.S. 1-358, G.S. 1-360.

APPEAL by plaintiff from *Burney, J.*, 17 August, 1948, in proceedings supplemental to execution in the Superior Court of NEW HANOVER County.

The plaintiff, Motor Finance Company, recovered a judgment against the defendant, J. Claude Putnam, an employee of Radio Station WMFD. Execution was issued, and returned unsatisfied. The plaintiff then instituted proceedings supplemental to execution against the Radio Station under Article 31 of the General Statutes, and obtained an order from the

Clerk of the Superior Court, requiring R. A. Dunlea, an officer of the Radio Station, to appear before the Clerk at his office in the courthouse on 7 January, 1948, for examination under G.S. 1-360, and forbidding Radio Station to make any disposition of "the property of J. Claude Putnam not exempt from execution or any debt due to the said J. Claude Putnam until further orders in the premises." This order was issued and served 23 December, 1947.

Radio Station WMFD has never had any property of the defendant in its possession, and was not indebted to him in any way when the above order was signed and served. But between 23 December, 1947, and 7 January, 1948, the Radio Station paid $100.00 to Putnam for salary accruing subsequent to 23 December, 1947. The record does not affirmatively disclose that Radio Station WMFD is a legal entity, or what duties were assigned by it to Dunlea. It is assumed here, however, that the Radio Station is a corporation, and that Dunlea had complete charge of its affairs at the times in controversy.

Dunlea appeared before the Clerk at the time and place specified in the order of 23 December, 1947, and was examined on oath by counsel for plaintiff, who thereby discovered that Radio Station WMFD had made the payment of salary set forth above. The plaintiff thereupon moved that the Radio Station and Dunlea be attached as for a contempt of court under G.S. 1-368 on the ground that the payment was made in willful disobedience of the order of 23 December, 1947. While the record is silent on the point, it is assumed here that the contempt proceedings were initiated by an order to show cause in conformity to G.S. 5-7.

At the hearing, the court found and adjudged in substance that Radio Station WMFD and Dunlea had not disobeyed the order and were not guilty of any contempt. From judgment accordingly, the plaintiff appealed.

Walton Peter Burkhimer for plaintiff, appellant.

J. Hardie Ferguson for Radio Station WMFD and R. A. Dunlea.

ERVIN, J. The order of the Clerk forbade Radio Station WMFD to make any disposition of "the property of J. Claude Putnam not exempt from execution or any debt due to the said J. Claude Putnam until further orders in the premises."

The plaintiff asserts that the Radio Station willfully disobeyed the order by paying to the defendant salary accruing after the issuance and service of the order, and that by reason thereof the court below erred in refusing to punish the Radio Station and its general manager, Dunlea, as for a contempt under G.S. 1-368.

The plaintiff's position is untenable because the order could apply only to property owned by the judgment debtor, Putnam, or to debts due to him on 23 December, 1947, the day whereon the order was issued and served. This is true for two reasons. In the first place, the order itself, when properly construed, spoke as of that date.

Besides, the order would have been without support in law if it had undertaken to subject to the plaintiff's demands the prospective earnings of the judgment debtor. The order was entered in a proceeding supplemental to execution against a third person, and was predicated upon sections 1-358 and 1-360 of the General Statutes. When these statutes are read either singly or as a component part of Article 31 of the General Statutes, it is plain that a supplemental proceeding against a third person is designed to reach and apply to the satisfaction of the judgment property of the judgment debtor in the hands of the third person or debts due to the judgment debtor by the third person at the time of the issuance and service of the order for the examination of the third person. Prospective earnings of a judgment debtor are entirely hypothetical. They are neither property nor a debt. *Hill v. Central Trust Co.,* 33 Ohio App. 204, 168 N. E. 768.

While there seems to be no decision of this Court upon this precise problem, our conclusion finds full support in the well considered opinions is *Osborne v. Wilkes,* 108 N. C. 651, 13 S. E. 285, and *Guano Co. v. Colwell,* 177 N. C. 218, 98 S. E. 535, where it is said that the statutes relating to supplemental proceedings are not intended to give a judgment creditor a "lien upon the debtor's skill or attainments."

Moreover, our statutes concerning proceedings supplemental to execution were adopted from New York, where it has been steadfastly held under the original statutes that "future earnings, wages, or salaries to become due, or which become due after service of the order for examination, cannot be reached by supplementary proceedings." 23 C. J., Executions, section 943, and cases cited. The basis for this ruling is set forth in an exhaustive opinion in *Re Trustees of Board of Publication and Sabbath-School Work,* 22 Misc. Rep. 545, 50 N. Y. S. 171, where it is said: "Proceedings supplementary to execution are directed against property which, at the time of the order for his examination, the judgment debtor has in his possession or under his control, or which is actually due to him, and . . . no property subsequently acquired, and no future earnings of any kind, and no earnings for personal service rendered within 60 days preceding such order, if necessary for the use of his family, can be reached. The same rule applies to all supplementary proceedings against third persons, for every one of them proceeds upon an allegation to the effect that the third party has certain property belonging to the

judgment debtor which then and there ought to be applied toward the satisfaction of the claim of the judgment creditor."

For the reasons given, the order of the Clerk had no application to salary accruing to the judgment debtor after its issuance and service, and the judgment of the court below must be

Affirmed.

ROSCOE TAYLOR v. B. C. HODGE.

(Filed 1 December, 1948.)

1. Trial § 22b—

The defendant's evidence in contradiction to that of plaintiff is not to be considered in determining the sufficiency of the evidence to overrule nonsuit.

2. Malicious Prosecution § 1a—

To make out a case of malicious prosecution it is necessary that the plaintiff show (1) malice; (2) want of probable cause; and (3) favorable termination of the proceeding upon which the action is based.

3. Malicious Prosecution § 5—

A *nolle prosequi* is a sufficient termination of a criminal action to support an action for malicious prosecution.

4. Malicious Prosecution § 4—

In an action for malicious prosecution, constructive malice may be inferred from want of probable cause.

5. Malicious Prosecution § 3—

Want of probable cause is a mixed question of law and fact.

6. Malicious Prosecution § 10—

The evidence tended to show that, incident to a controversy between them, plaintiff refused to surrender possession of defendant's saw until defendant returned plaintiff's brace and bit, and that on the following day defendant swore out a warrant charging plaintiff with larceny of the saw. *Held:* The question of want of probable cause is for the determination of the jury upon the basis of whether a man of ordinary prudence and intelligence under the circumstances would have known that the charge of larceny had no reasonable foundation.

7. Malicious Prosecution § 3—

The fact that the recorder has found probable cause for the purpose of binding plaintiff over for trial in the Superior Court upon the charge, does not conclude plaintiff in an action for malicious prosecution when a *nol. pros.* has been taken in the Superior Court.

TAYLOR *v.* HODGE.

DEFENDANT'S appeal from *Edmundson, Special Judge,* April Term, 1948, WAKE Superior Court.

E. D. Flowers and J. B. Bilisoly for plaintiff, appellee.
L. A. Doub and Sam J. Morris for defendant, appellant.

SEAWELL, J. This action was brought to recover damages for an alleged malicious prosecution of the plaintiff by the defendant in a criminal action falsely charging him with stealing an "electric skil saw"—an automatic carpenter's tool belonging to the defendant.

The complaint and answer are not involved in the exceptions and present no novel features. The sole exception is to the overruling of the defendant's demurrer to the evidence and motions for judgment as of nonsuit. On the trial the plaintiff's evidence in substantial summary tended to show as follows:

The plaintiff had served the defendant as carpenter foreman for about six years and in that capacity had charge of all the tools used, including the saw over which the controversy arose. Most of the time it was kept in the store, but when not there it was kept on plaintiff's porch. It had been used on the job on the Saturday morning when plaintiff quit work and was sitting in the little house next to defendant's where they had been working. It was brought to the porch and left there. The plaintiff testified that he had possession of all the tools when he was on the job and Mr. Hodge told him to take the skill saw.

The plaintiff wished to take employment where he was offered more money and told the defendant so. This the defendant resented and an acrimonious discussion followed.

There was no concealment of the saw or its location. However, Hodge was in possession of a brace and bit belonging to the plaintiff which had been borrowed and which he wanted returned. Hodge refused to return the brace and bit, saying that Taylor had treated him "damned dirty" in leaving him; that he would never get the brace and bit. Thereupon Taylor refused to give up the saw until Hodge brought back the bit. After threatening to take out claim and delivery for the saw, the defendant angrily left the house, demanding, however, that plaintiff vacate the house next day.

On the following Friday the plaintiff was arrested on a warrant sworn out by the defendant, charging him with stealing the saw. At the hearing before the recorder's court of Wendell, Taylor was bound over to the Superior Court, where in due time a *nolle prosequi* was taken, terminating the case.

Plaintiff testified as to the publicity given the charge of theft and incident damage to his reputation, and loss of employment.

The defendant's evidence differed from the plaintiff's at material points; but on the motion to nonsuit its comparative force and effect was a matter for the jury.

To make out a case of malicious prosecution it is necessary that the plaintiff show (1) malice; (2) want of probable cause; and (3) favorable termination of the proceeding upon which his action is based. *Perry v. Hurdle, ante,* 216, 49 S. E. (2) 400; *Melton v. Rickman,* 225 N. C. 700, 36 S. E. (2) 276; *Miller v. Greenwood,* 218 N. C. 146, 10 S. E. (2) 708; *Wingate v. Causey,* 196 N. C. 71, 72, 144 S. E. 530; *Railroad v. Hardware Co.,* 138 N. C. 175, 50 S. E. 571.

Favorable termination of criminal action against the plaintiff is sufficiently shown by *nolle prosequi* in the Superior Court; *Wilkinson v. Wilkinson,* 159 N. C. 265, 74 S. E. 740; *Hatch v. Cohen,* 84 N. C. 602; there is evidence of express malice in the defendant's conduct, not merely of a general nature, but in specific application to the transaction under review; and constructive malice may be inferred from want of probable cause and reckless disregard of plaintiff's rights under reasonable notice thereof; the defense is, therefore, more particularly addressed to the question of probable cause.

What is probable cause, and what constitutes a lack of it,—both positive and negative conditions,—have been frequently and variously defined. *Wilkinson v. Wilkinson, supra; Hatch v. Cohen, supra; Bowen v. Pollard,* 173 N. C. 129, 91 S. E. 711; 34 Am. Jur., Malicious Prosecution, sec. 47, and cited cases. Under any definition given, we cannot see how the defendant can avoid the unfavorable inferences to be drawn from his conduct with respect either to its malicious motivation or want of probable cause.

Want of probable cause is regarded as a mixed question of law and fact. *Wilkinson v. Wilkinson, supra; Bowen v. Pollard, supra; Rawls v. Bennett,* 221 N. C. 127, 19 S. E. (2) 126. On the factual side the jury had evidence tending to show circumstances which would seem to assure a normal person of average intelligence that the charge of stealing had no reasonable foundation, was wanting in the essential of probable cause. While the ordinary layman may not know, technically, all the elements entering into the crime of larceny, the nature of the offense is too well understood and popularly recognized to permit withdrawal from the jury the inference that the defendant acted against his own light—laid the charge regardless of facts within his knowledge which should have convinced a man of ordinary prudence and intelligence of the plaintiff's innocence of that crime; and the inferences from the evidence were such as must be left to the jury upon the issue whether such probable cause actually existed. *Bowen v. Pollard, supra.*

This defense urges that the finding of probable cause by the recorder incidental to binding Taylor over to the Superior Court concludes him on that issue and entitles defendant to a nonsuit.

Had the recorder so found, in passing on a matter within his jurisdiction to try and determine, that conclusion might be sound. But courts of final jurisdiction have been slow to concede that finality of result to courts of Justices of the Peace and similar courts where jurisdiction in the premises is confined to preliminary examination for purpose of holding the accused for subsequent trial only; at most holding that it is *prima facie* evidence, but not conclusive. 34 Am. Jur., p. 744, sec. 65; *Bowen v. Pollard, supra; Young v. Hardwood Co.*, 200 N. C. 310, 156 S. E. 501; *Kelly v. Shoe Co.*, 190 N. C. 406, 130 S. E. 32; *Mitchem v. Weaving Co.*, 210 N. C. 732, 188 S. E. 329.

Even so, if the case went no further that might be necessarily true since the plaintiff must show that the action terminated favorably to him before his action can be brought. Whatever effect the finding of probable cause on preliminary examination for the purpose of holding the accused for subsequent trial in the proper court might have on the issue generally, it is not necessary for us to say; in any event it is not, in this jurisdiction, conclusive upon the plaintiff in the prosecution of his suit when the prosecution upon which it is based has terminated favorably to him. *Hatch v. Cohen, supra.* In this case and others above cited the factual situation was parallel, showing the accused to have been bound over in the preliminary court.

The evidence was sufficient to be submitted to the jury, and they have answered. We find

No error.

NEAL HAWKINS v. TOWN OF DALLAS.

(Filed 1 December, 1948.)

1. Trial § 21: Appeal and Error § 7—

Motion to nonsuit must be renewed at the close of all the evidence in order to present on appeal the question of the sufficiency of the evidence.

2. Municipal Corporations §§ 16, 22—

Where a party has performed work for a municipality under a contract involving more than $1,000.00 which was let without advertisement as required by G.S. 143-129, the contract is void and he may not recover thereon, but he is entitled to recover on the principle of *quantum meruit* the reasonable and just value for material and labor so furnished of which the town received the benefit.

APPEAL by defendant from *Rousseau, J.*, at March Civil Term, 1948, of GASTON.

Civil action to recover on contracts for paving of street and laying and constructing sewer lines.

Plaintiff alleges in his complaint substantially these facts:

1. That on or about 2 June, 1947, at request of an official of the town of Dallas he submitted written bids: (1) for installing a certain specified sewer line at cost plus ten per cent and manholes at given price; and (2) to furnish all materials and labor for the paving of certain streets adjacent to the old courthouse square for a specified sum of money, which bids were accepted by the defendant, with agreement that work should begin on 9 June, 1947, and to be paid for within ten days after its completion.

2. That plaintiff began work on 9 June, 1947, pursuant to the contract, and completed the jobs according to contract on 28 June, 1947, and thereupon rendered to defendant itemized invoices therefor in accordance with contract in the total amount of $8,323.32, claim for which plaintiff duly presented to the lawful municipal authorities to be audited and allowed; but that said authorities have disallowed the claim.

3. That the labor and materials necessary to the completion of the said contract were furnished and provided by plaintiff in good faith, and although plaintiff has often rendered statement to defendant, and made repeated demands for payment of the amount due, the defendant has failed and neglected to pay same or any part thereof; and that for all of it, $8,323.32, with interest from given date, defendant is justly indebted to plaintiff.

Defendant answering the complaint of plaintiff admits that a claim has been made by plaintiff upon defendant, and has been denied by defendant for that it is unlawful; but denies all other material allegations.

And by way of further answer and defense, defendant avers, in material and pertinent part, that if any agreement was entered into between plaintiff and anyone purporting to act for defendant (1) such agreement is illegal, null and void and is in nowise binding upon defendant for that (a) it was not entered into in compliance with the requirements of G.S. 143-129, but (b) without authority, either express or implied, to bind defendant, and (2) such agreement was entered into "unlawfully, wilfully and knowingly with the intent to evade the requirements of the law with regard to advertisements and public lettings of municipal contracts, and . . . in pursuance of an unlawful conspiracy to obtain, without advertisement or public letting, work for the plaintiff and to make and establish excessive prices therefor with the intent to defraud the Town of Dallas."

Plaintiff, in reply to the averments of defendant's further answer and defense, admits the agreement as set forth in the complaint, but denies all other material parts.

Upon the trial in Superior Court plaintiff offered evidence tending to support the allegations of his complaint, and to indicate that of the $8,323.32, for which claim is made by him, the sum of $6,778.32 represents actual cost to him, including amounts paid by him to subcontractors, —the difference being profit to him; and that the price charged is fair and reasonable. And it was stipulated by plaintiff, at close of his evidence, "that he had learned that there was not any advertisement for bids."

Defendant, reserving exception to the denial of its motion for judgment as of nonsuit when plaintiff first rests his case, offered evidence tending to show: That the present mayor, then clerk, of defendant Town of Dallas, knowing of the location of the pavement in question, talked with plaintiff before the road was laid and told him that he was the clerk, and that there was no money in the town treasury, the present board had not paid plaintiff because the work was not advertised, and thought it was illegal and was afraid the citizens of the town would hold them responsible; that while the town does not have the money, it is not the desire of the town to reap the benefits, and that if it is a legal charge, the present board wants to pay it.

The record fails to show that the motion for judgment as of nonsuit was renewed at close of all the evidence.

The case was submitted to the jury on this issue: "What amount, if any, is the plaintiff entitled to recover?" The jury answered the issue, "$6,778.32."

From judgment in favor of plaintiff on the verdict rendered, defendant appeals to Supreme Court and assigns error.

L. B. Hollowell for plaintiff, appellee.

George B. Mason and James Mullen for defendant, appellant.

WINBORNE, J. Appellant fails to show error in either of the two matters assigned as error on this appeal.

First, as to denial of motion for judgment as of nonsuit: Defendant, by offering evidence and failing to renew its motion for judgment as in case of nonsuit at the close of all the evidence, as provided in G.S. 1-183, waived its exception to the denial of such motion entered by it when plaintiff first rested his case. *Lee v. Penland*, 200 N. C. 340, 157 S. E. 31; *Rental Co. v. Justice*, 211 N. C. 54, 188 S. E. 609, and numerous other cases.

Second, as to a portion of the charge of the court to the jury: The court held, and charged, without exception, in substance that, though the contract here involved be illegal for that it was entered into without the town having advertised for proposals or bids, it would be manifestly unfair for the town to receive the benefit of the work and labor provided and the materials furnished in installing the sewer line and in paving the street, without paying plaintiff the reasonable and just value thereof. Immediately following is this portion of the charge, to which exception is taken.

"The Court, Gentlemen, is holding as a matter of law, and the Court so instructs you, that this contract was illegal and that the plaintiff cannot, in this action, receive a profit himself, under an illegal contract, but the Court charges you, gentlemen, the burden being on the plaintiff to so satisfy you, that the plaintiff is entitled to recover in this action the reasonable, just value of the material and labor so furnished which the town received the benefit of."

The statute, G.S. 143-129, in prescribing procedure for letting of public contracts, provides, among other things, that no construction requiring an estimated expenditure of public money in an amount of one thousand dollars or more, except in cases of certain emergencies, shall be performed, nor shall any contract be awarded therefor by a county, city, town or other subdivision of the State, unless the provisions of the section be complied with. Among other provisions, it is required that proposals for the construction shall be invited by advertisement in the manner and for the time specified.

This Court has held that a contract not made in conformity to the statutory requirements is void, and the contractor may not recover on the contract. *Realty Co. v. Charlotte,* 198 N. C. 564, 152 S. E. 686; see also *Jenkins v. Henderson,* 214 N. C. 249, 199 S. E. 31; *Raynor v. Commrs. of Louisburg,* 220 N. C. 348, 17 S. E. (2) 495.

Nevertheless, where the construction work has been actually done and accepted the Court holds that the county, city or town "is bound on a *quantum meruit* for the reasonable and just value of the work and labor done and material furnished." *McPhail v. Comrs.,* 119 N. C. 330, 25 S. E. 958; *Realty Co. v. Charlotte, supra; Stephens Co. v. Charlotte,* 201 N. C. 258, 159 S. E. 414; *Commrs. of Brunswick Co. v. Inman,* 203 N. C. 542, 166 S. E. 519. See also *Moore v. Lambeth,* 207 N. C. 23, 175 S. E. 714. Compare *Raynor v. Commrs. of Louisburg, supra.*

In the light of the principle of *quantum meruit* applied as stated above, there is no error in the portion of the charge to which the exception relates.

For reasons stated there is, in the judgment below,

No error.

J. J. GRAHAM, JR., v. CLIFFORD GRAHAM ET AL.

(Filed 1 December, 1948.)

1. Mortgages § 35c—

The evidence tended to show that the *cestui* instructed the trustee to foreclose the deed of trust and to have someone bid in the property for him, and that at the sale the person selected by the trustee did bid in the property for the *cestui*. *Held:* An instruction to the effect that as a matter of law the bidder was an agent of the trustee and the sale voidable, is error, since a *cestui* is entitled to buy at the foreclosure sale in the absence of fraud or collusion, and therefore can do so through an agent.

2. Cancellation of Instruments § 12—

Where plaintiff, attacking a deed of trust for fraud or undue influence, introduces some evidence of misrepresentation after the execution of the instrument but no evidence of overreaching on the part of the *cestui* at the time the instrument was executed, it is not error for the trial court to instruct the jury to answer the issue of fraud and undue influence in the negative.

APPEAL by plaintiff and defendant from *Rousseau, J.*, April Term, 1948, of MECKLENBURG.

Civil action to recover possession of land and to remove cloud on title.

Two brothers are contending over a 40-acre farm in Mecklenburg County, each claiming title from their father, the plaintiff to the whole by foreclosure under deed of trust and the defendant to one-half interest by inheritance.

The father purchased the farm in 1902, and executed deed of trust on the property to W. G. Jordan to secure the payment of a $485.05-note. The plaintiff acquired by purchase and assignment this note and deed of trust in 1915. The note was renewed from time to time, the last renewal being executed on 25 February, 1942, for $1,522.32, which represented principal and accrued interest, and was secured by deed of trust on the property made to Neal Y. Pharr, Trustee, and registered in Book 1071, page 141, Public Registry of Mecklenburg County.

The father, a widower, died at the plaintiff's home in South Carolina on 16 February, 1943. The defendant and his wife live in this State at the old home place.

On 3 May, 1943, the Trustee, on instructions from the plaintiff that he foreclose and have someone bid the property in for him, sold the property, after due advertisement, and it was bid in by J. M. Dwelle for the plaintiff. Plaintiff says: "I was not up here on the day of the sale. I never saw Mr. Dwelle and never heard of him before today. I wrote Mr. Pharr and I undoubtedly asked him to handle it for me."

The Trustee testified: "I conducted the foreclosure sale. I did not bid in the property. . . . The property was bid in by J. J. Graham, Jr., by J. M. Dwelle, Agent. . . . It is entirely possible that I had instructions from J. J. Graham, Jr., to have someone bid the property in for him. . . . It is entirely possible that I told Mr. Dwelle that I had instructions from Graham to bid on the property for some specified amount. . . . The bid was $1,690.71, subject to all unpaid taxes and assessments, including 1943 taxes. . . . I don't remember whether that was the only bid that was put on the property."

The issues, submitted to the jury and answered under instructions from the court, follow:

"1. Was the deed of trust, recorded in Book 1071, at page 141, in the office of the Register of Deeds of Mecklenburg County, and relied upon by the plaintiff, secured or obtained by undue influence or fraud, as alleged in the answer? Answer: No.

"2. Was the foreclosure which took place on the 3rd day of May, 1943, voidable in law? Answer: Yes.

"3. Is the plaintiff the owner, in fee simple, of the premises and entitled to immediate possession? Answer: No."

From judgment on the verdict, both sides appeal, assigning errors.

J. Spencer Bell for plaintiff.

Thaddeus A. Adams for defendant.

STACY, C. J. In 1943, J. J. Graham, Sr., died seized of a farm in Mecklenburg County and leaving him surviving two sons, who are now contending over the old home place or the rooftree. Both appeal from the outcome in the court below, each presenting a single question vital to his position.

1. Plaintiff's appeal: The plaintiff is satisfied with the answer to the first issue, and contends that the jury should have been instructed to answer the second and third issues in his favor also, if the evidence is to be believed.

The court instructed the jury that "a trustee in the sale of land under a deed of trust cannot bid for either party," and "the court has concluded, as a matter of law," that, here, if the trustee "requested someone else to bid the land in for the plaintiff," the man who did the bidding was the trustee's agent, and therefore the trustee did the bidding himself, and that makes a voidable sale.

The instruction seems to be predicated on the case of *Davis v. Doggett*, 212 N. C. 589, 194 S. E. 288. In that case, however, it was conceded that the attorney who conducted the sale and bid in the property was acting as agent for both seller and buyer. Here, the situation is quite

different. The foreclosure was conducted by the Trustee. The property was bid in by the plaintiff's agent, J. M. Dwelle. The case of *Mills v. Mutual B. & L. Asso.,* 216 N. C. 664, 6 S. E. (2) 549, is likewise distinguishable.

The plaintiff was the *cestui* in the deed of trust. In the absence of fraud or collusion, he was entitled to buy at the foreclosure sale. *Bunn v. Holliday,* 209 N. C. 351, 183 S. E. 278. Of course, what he could do himself, he could do through an agent.

On the record as presented the instruction must be held for error.

2. Defendants' appeal: The defendants are satisfied with the answer to the second and third issues, and insist with confidence that error was committed by the trial court in instructing the jury to answer the first issue in the negative.

There is much in the evidence to suggest a want of charity or even generosity on the part of the plaintiff towards his less fortunate brother. Nevertheless the first issue speaks to undue influence or fraud in the procurement of the deed of trust, and the record is barren of any overreaching on the part of the plaintiff at the time of its execution by his father. He may have misled his brother in subsequent correspondence, but not his father at the time of its execution. At least, such is the record as it now appears. Whether the defendant has any remedy in equity under the doctrine of a constructive trust is not presented.

Hence, the result:

On Plaintiff's Appeal, New trial.

On Defendant's Appeal, No error.

LOUIS J. ZIBELIN AND WIFE, CENNIE C. ZIBELIN, v. PAWTUCKET MUTUAL FIRE INSURANCE COMPANY.

(Filed 1 December, 1948.)

1. Insurance § 19a—

The provisions of the standard form of fire insurance policy are valid, and the rights and liabilities of both insurer and insured must be determined in accordance with its terms.

2. Insurance § 24a—

In order for denial of liability to dispense with the provision of the policy requiring the filing of proof of loss within a specified time, it must appear that such denial was made on other grounds within the time limited for filing of proof of loss.

3. Insurance § 22f—

At the time of the issuance of the policy, knowledge of the local agent is ordinarily imputable to insurer, but after the policy has been issued and loss has occurred, the local agent has no authority to waive provisions or conditions in the policy contrary to the express limitation on his authority contained therein.

4. Same—

Insurer is ordinarily bound by waiver or extension of time for filing proof of loss based upon the acts of its officer or adjuster, but is not so bound by unauthorized acts of its local agent.

5. Insurance § 24a—

The allegations of the complaint disclose that after the occurrence of loss, insurer's local agent advised insured to defer filing formal claim until such time as materials could be obtained for repairs, and that insured failed to file proof of loss within the time specified in the policy and did not institute action on the policy until after the expiration of the time limited therein. There was no denial of liability by insurer on other grounds within the time limited for filing proof of loss. *Held:* Insurer's demurrer should have been sustained.

APPEAL by defendant from *Burney, J.*, August Term, 1948, of NEW HANOVER. Reversed.

Suit on standard fire insurance policy with windstorm coverage.

Plaintiff alleged issuance of policy 29 April, 1944, and damage to his dwelling house by wind 3 August, 1944. By formal stipulation as addenda to the complaint it was admitted that no written proof of loss was given until 6 April, 1946, and that no extension of the time limited by the policy for filing such proofs was given by the company. Suit was instituted 16 January, 1947. Plaintiff alleged, however, that immediately after the loss he reported it to the defendant's local agent who "advised plaintiff that due to inability to obtain building material at that time it would be advisable for the plaintiff to make such temporary repairs as possible and wait the formal filing of claim until such time as materials could be obtained and proper repairs made." Plaintiff further alleged that not being familiar with the terms of his contract he acted upon the suggestion and advice of defendant's agent and delayed filing formal written proofs of loss; that when same were filed (April, 1946) with defendant's local agent, liability was denied.

The policy in this case, a standard fire insurance policy with windstorm coverage, which was made a part of the complaint, provided, among other things, that (1) "No one has power to waive any provision or condition of this policy except such as by the terms of the policy is the subject of agreement added hereto, nor shall any such provision or condition be waived unless the waiver is in writing added hereto, nor shall

any provision or condition of this policy or any forfeiture be waived by any requirement, act, or proceeding on the part of this company relating to appraisal or to any examination herein provided for; nor shall any privilege or permission affecting the insurance hereunder exist or be claimed by the insured unless granted herein or by rider added hereto. (2) The insured shall give immediate notice, in writing, to this company, of any loss or damage, protect the property from further damage . . .; and the insured shall, within sixty days after the fire, unless such time is extended in writing by this company, render to this company a proof of loss, signed and sworn to by the insured. . . . (3) No suit or action on this policy for the recovery of any claim shall be sustained in any court of law or equity unless the insured has complied with all the requirements of this policy, nor unless commenced within twelve months next after the fire."

Defendant's demurrer to the complaint was overruled and defendant excepted and appealed.

J. Hardie Ferguson for plaintiff, appellee.

Harriss Newman and Rountree & Rountree for defendant, appellant.

DEVIN, J. Unfortunately for the plaintiff, he failed to observe the terms of his policy and to comply with its plainly written provisions. The contract between the plaintiff and the Insurance Company embodied in the standard form of fire insurance policy is one prescribed by statute (G.S. 58-177), and its provisions have been held by this Court to be valid and just to insured and insurer. *Greene v. Ins. Co.*, 196 N. C. 335, 145 S. E. 616. The rights and liabilities of both under the policy must be ascertained and determined in accord with its terms. *Insurance Co. v. Wells*, 226 N. C. 574, 39 S. E. (2) 741; *Midkiff v. Ins. Co.*, 197 N. C. 139, 147 S. E. 812; *Muse v. Assurance Co.*, 108 N. C. 240, 13 S. E. 94. There was here no denial of liability on other grounds by the Insurance Company within the time limited for filing proof of loss which would have dispensed with that requirement. *Mercantile Co. v. Ins. Co.*, 176 N. C. 545, 97 S. E. 476; *Gorham v. Ins. Co.*, 214 N. C. 526, 200 S. E. 5. While provisions in the policy restricting the local agent's power to waive conditions as a general rule do not include conditions existing at the inception of the contract, *Aldridge v. Ins. Co.*, 194 N. C. 683, 140 S. E. 706, the rule is otherwise as to those arising after the policy has been issued and loss has occurred. *Bullard v. Ins. Co.*, 189 N. C. 34, 126 S. E. 179; *Smith v. Ins. Co.*, 193 N. C. 446, 137 S. E. 310. Suggestions made by the local agent to the insured after loss are not within the scope of his authority. *Horton v. Ins. Co.*, 122 N. C. 498, 29 S. E. 944. Nor may he alter the terms of the policy after its issue and loss thereunder

has been reported. *Sun Ins. Office v. Scott,* 284 U. S. 177, 29 A. J. 623. Limitations on the agent's authority expressed in unambiguous language in the policy must be held binding on the insured. May on Ins., secs. 137-138. In *Tatham v. Ins. Co.,* 181 N. C. 434, 107 S. E. 450, it was held the provision in the policy limiting the time within which suit may be instituted was not extended or waived because of the time consumed under an agreement for appraisal. Plaintiff relied upon the suggestion and advice of defendant's local agent, but this cannot be held binding upon the company or to extend its liability, after the inception of the contract and after the loss, beyond that which it has undertaken and which is expressed in the written contract. As the parties have contracted so must they be bound.

The cases cited by plaintiff are not controlling on the facts here presented. At the time of issuing the policy the local agent *pro hac vice* represents the company and his knowledge is ordinarily held to be notice to his principal. But this rule does not apply to authorize extension of time for the performance of conditions precedent to establishing liability after the loss has occurred, and in direct contradiction of the terms of the written contract of insurance. While a waiver by an officer of the company or by an adjuster, who for the very purpose of determining and adjusting the loss has been called in by the Insurance Company, is generally held binding on the company as to filing proofs of loss (*Strause v. Ins. Co.,* 128 N. C. 64, 38 S. E. 256; *Dibbrell v. Ins. Co.,* 110 N. C. 193, 14 S. E. 506), that situation is not presented here.

The judgment overruling the defendant's demurrer is

Reversed.

STATE, EX REL. UNEMPLOYMENT COMPENSATION COM., v. EDMUND LUNCEFORD ET AL.

(Filed 1 December, 1948.)

Master and Servant § 60—Employees belonging to groups, members of which participated in strike, are not entitled to unemployment benefits.

The labor dispute which brought about a stoppage of work involved the maintenance of membership clause in the contract of employment and also a general increase in wages. Employee-claimants belonged to a grade or class of workers some of whom participated in and were directly interested in the controversy. *Held:* Employee-claimants are not entitled to unemployment compensation benefits, G.S. 96-14 (d) (2), nor may they successfully contend that, as they were not members of the union and did not participate in, or help finance the labor dispute, they should not be deprived of unemployment compensation benefits, since the labor dispute also involved a general increase in wages from which they stood to benefit.

UNEMPLOYMENT COMPENSATION COM. *v.* LUNCEFORD.

APPEAL by employee-claimants from *Pless, J.*, March Term, 1947, of RICHMOND.

Proceeding before Unemployment Compensation Commission (now Employment Security Commission) to determine validity of claims and disqualifications for unemployment benefits.

The operative facts are these:

1. The Entwistle Manufacturing Company is engaged in the manufacture of cotton piece goods in its plant at Rockingham and normally employs (among other workers) "watchmen," "speeders," "spoolers" and "creelers."

2. The employee-claimants here, Colin O'Brien ("watchman"), John D. Lisk ("speeder"), Edna J. Tyson ("spooler") and J. H. Tyson ("creeler") were unemployed from 17 September to 29 October, 1945 (and perhaps longer) by reason of a labor dispute between the management and Local No. 603, Textile Workers Union of America, CIO, duly certified bargaining agent of the employees, over the terms of the contract of employment—principally the maintenance of membership clause —but also a general increase in wages.

3. The employee-claimants here were not directly interested in the labor dispute (which brought about a stoppage of work at the mill) as they were not members of the Union, nor did they participate in, help finance, or benefit from the dispute. Each did, however, belong to a grade or class of workers, some of whom participated in and were directly interested in the controversy.

The Unemployment Compensation Commission found that the employee-claimants were disqualified to receive benefits under the applicable provisions of the Unemployment Compensation Law, and denied their claims, which findings and conclusions were upheld on appeal to the Superior Court.

From this latter ruling, the employee-claimants appeal, assigning error.

W. D. Holoman, R. B. Overton, R. B. Billings, and D. G. Ball for Unemployment Compensation Commission, appellee.

George S. Steele, Jr., for employee-claimants, appellants.

STACY, C. J. The case is controlled by the decision in *Unemployment Compensation Commission v. Martin*, 228 N. C. 277, 45 S. E. (2) 385.

Indeed, the employee-claimants here, realizing that the decision in the *Martin case* might settle their own, after permission duly obtained, filed brief in the case as *amici curiæ* and suggested that the disqualification for benefits provided in G. S. 96-14 (d) (2) should be construed to apply only to those workers in the same grade or class who stood to benefit by

the labor dispute. The present appeal is frankly an effort to have the *Martin case* reconsidered and overruled.

The appellants are hardly in position to insist upon a reversal of the judgment in the instant case, even under their interpretation of the statute, for not only are they *ipsissimis verbis* in the same "grade or class of workers," some of whom were participating in or financing or directly interested in the dispute, but they also stood to benefit from the labor dispute as it involved a general increase of wages as well as the maintenance of union membership.

It is the position of the appellants, however, that the chief bone of contention between the parties was the maintenance of membership clause, which could benefit only the Union—thus limiting the same "grade or class of workers" to members of the Union—so the appellants say, citing out-of-state authorities, but this position and contention seems to overlook the fact that the entire contract, including a general increase of wages, was also involved in the dispute.

Speaking to the subject in *In re Steelman,* 219 N. C. 306, 13 S. E. (2) 544, it was said: "The statute withholds benefits during the stoppage of work which is caused by a labor dispute, from all persons participating in or financing or directly interested in the labor dispute and from all grades or classes of workers of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, and any of whom are participating in or financing or directly interested in the dispute. Each claimant is required to show to the satisfaction of the Commission that he is not disqualified for benefits under the terms of this section. It thus appears that the State seeks to be neutral in the labor dispute as far as practicable, and to grant benefits only in conformity to such neutrality."

The correct result seems to have been reached in the court below.

Affirmed.

T. G. GRIGGS, OTIS C. BRIGMAN, AND ANDREW D. JORDAN, TRADING AS T. G. GRIGGS TRUCKING COMPANY, v. STOKER SERVICE COMPANY, INC., AND YORK-SHIPLEY, INC.

(Filed 15 December, 1948.)

1. Pleadings § 5—

The fact that plaintiffs make no specific demand for judgment against one of defendants does not preclude recovery against such defendant when the facts alleged are sufficient to support recovery and there is a general prayer for relief, since the right to recover is not dependent upon the prayer for relief but upon the allegations and proof.

2. Carriers § 14—

Where, in making a settlement with the purchaser after wrongful delivery of the goods to him by the carrier, the seller contracts with the purchaser to pay the freight charges, the carrier may recover the charges from the seller on the contract.

3. Carriers § 9—

A bill of lading is both a receipt and a contract to transport and to deliver the goods as therein stipulated.

4. Carriers § 14—

Under bills of lading conforming to the Federal Act and regulations of the Interstate Commerce Commission, 49 U.S.C.A. 81-124, the shipper is liable to the carrier for freight charges unless it signs the non-recourse statement on the face of the bill directing the carrier not to make delivery without payment of freight.

5. Same—

Where, after delivery by the carrier to the purchaser without the surrender of the bill of lading, the seller accepts from the purchaser full payment for the article covered by the bill of lading, the seller by accepting the benefits of the wrongful delivery is estopped to deny liability to the carrier for the freight charges.

6. Carriers § 12½—

It is the duty of a common carrier not only to safely transport goods entrusted to it but also to deliver them to the party designated by the terms of the shipment, or to his order, at the place of destination, and when the carrier, contrary to the terms of shipment, delivers the goods without surrender of the bill of lading, the delivery is wrongful and the carrier becomes liable for any loss which the shipper sustains thereby. The fact that the bill of lading contains direction to notify the purchaser at the place or destination does not affect the liability of the carrier for wrongful delivery.

7. Same—

Where the carrier delivers the goods without surrender of the bills of lading properly endorsed as required by the contract, the shipper may treat such wrongful delivery as a conversion of the property by the carrier and sue the carrier for the full value of the goods, or it may repossess the goods and recover from the carrier the amount expended in such repossession as damages proximately resulting from the wrongful delivery.

8. Same—

A shipper may ratify the wrongful delivery of goods by the carrier, but what constitutes a ratification depends upon the facts of each particular case and the burden is on the carrier to show a ratification by the shipper with full knowledge of all material facts.

9. Same—

The shipper made twelve separate and unrelated shipments under twelve separate and unrelated bills of lading. In each case the carrier delivered the goods without surrender of the original bills of lading as required by

the contract. Thereafter the shipper accepted full payment for the articles covered by three of the bills of lading. *Held:* The act of the shipper in ratifying the wrongful delivery under the three bills of lading neither compels nor justifies an inference that he thereby intended to ratify the other wrongful deliveries.

10. Same—

Evidence tending to show that after wrongful delivery of articles by the carrier without the surrender of the original bills of lading as required by the contract, the shipper accepted full payment of certain items from the person to whom wrongful delivery was made, and repossessed the other items, *held* not to compel the conclusion as a matter of law that the shipper ratified the wrongful delivery, but to the contrary, is sufficient to support the court's finding that the acts of the shipper did not constitute a ratification, since such acts are consonant with intention on the part of the shipper merely to minimize the loss.

11. Appeal and Error § 40d—

In a trial by the court under agreement of the parties, G.S. 1-184, the findings of fact of the court based upon the evidence have the same force and effect as a verdict of the jury.

APPEALS by plaintiffs and by the defendant, York-Shipley, Inc., from *Coggin, Special Judge,* at the June Term, 1948, of MECKLENBURG.

To clarify the controversy, the undisputed events preceding the litigation will be stated at the outset.

The plaintiffs, T. G. Griggs, Otis C. Brigman, and Andrew D. Jordan, reside at Ruby, South Carolina. As co-partners under the name of Griggs Trucking Company, they are engaged in the transportation of property in interstate commerce for compensation as common carriers by motor vehicle under the Federal Motor Carriers Act. The defendant, York-Shipley, Inc., a corporation doing business at York, Pennsylvania, manufactures and wholesales heating equipment, and is hereafter designated as York-Shipley for convenience of description. The defendant, Stoker Service Company, Inc., is a corporation engaged in retailing and installing heating equipment in a territory centering at Charlotte, North Carolina, and is hereafter called Stoker Service for ease of narration.

Between 7 January, 1947, and 7 February, 1947, York-Shipley made twelve shipments of heating equipment from York, Pennsylvania, to Charlotte, North Carolina, upon motor trucks operated by plaintiffs. The shipments were consigned to the order of York-Shipley, and were made on uniform order bills of lading. Each bill of lading contained the direction "Notify Stoker Service Co., Inc., at 1444 S. Tryon Street, Charlotte, North Carolina," and the provision "The surrender of the original order bill of lading properly indorsed shall be required before the delivery of the property." The freight charges on the twelve shipments amounted to $890.13.

Section 7 of each bill of lading provided that the consignor should be "liable for the freight and all other lawful charges," unless the consignor directed that the shipment should "be delivered to the consignee without recourse on the consignor" by signing a statement on the face of the bill in these words: "The carrier shall not make delivery of this shipment without payment of freight and all other charges." The defendant, York-Shipley, did not sign such statements on any of the bills of lading.

As shipments were made, drafts for the sale prices were drawn upon Stoker Service by York-Shipley, and were forwarded with the bills of lading attached to banks in Charlotte for collection. These drafts totaled $21,925.98.

Stoker Service never paid the drafts or obtained the bills of lading. When the shipments arrived at Charlotte, the plaintiffs delivered them to Stoker Service without collecting the freight charges and without demanding the production and surrender of the bills of lading.

A few days later, to wit, on 14 February, 1947, York-Shipley and Stoker Service entered into a written contract concerning these matters without notice to the plaintiffs. Under this agreement, Stoker Service relinquished to York-Shipley at the place of business of the former in Charlotte all of the equipment included in the twelve shipments except four items retained by it, and paid York-Shipley for such four items the aggregate sale price of $3,842.79 designated therefor in the appropriate drafts; and York-Shipley released Stoker Service of "all obligation . . . in connection with the bank drafts drawn by York-Shipley, Inc., on the Stoker Service Company" and agreed to be "responsible for the payment of all unpaid freight . . . charges" on all of the property, except the four items kept by Stoker Service. The items retained by Stoker Service were covered by four of the bills of lading, and practically all of the equipment repossessed by York-Shipley was embraced by the other eight.

The plaintiffs began this action by suing Stoker Service for the freight charges on all twelve shipments. Stoker Service thereupon procured an order making York-Shipley a party defendant, and filed an answer praying that it be exonerated from liability and that York-Shipley be adjudged legally accountable to plaintiffs for the transportation charges. The action was nonsuited on the trial as to Stoker Service, and no appeal has been prosecuted from this ruling. In consequence, this Court is concerned only with the conflictive claims of the plaintiffs and York-Shipley.

After York-Shipley became a party, the plaintiffs filed a somewhat informal pleading in which they allege sufficient facts to show a right on their part to recover the freight charges of York-Shipley in its capacity as consignor and by virtue of its contract of 14 February, 1947, with Stoker Service. This pleading does not demand judgment against York-

Shipley for the freight charges, but it does pray "for such relief as the plaintiffs are entitled to in the premises." York-Shipley answered, admitting it was bound by its contract with Stoker Service. But it denied liability for the transportation charges and asserted a counterclaim against plaintiffs for breaches of the contracts of carriage because of their delivery of the several shipments to Stoker Service without production and surrender of the bills of lading. Plaintiffs replied, alleging that the supposed misdelivery had been previously authorized by York-Shipley and had been subsequently ratified by York-Shipley by its contract of 14 February, 1947, with Stoker Service.

Pursuant to the written consent of the parties filed with the Clerk, the action was tried by Judge Coggin without a jury under G.S. 1-184. The court made findings of fact on evidence properly presented conforming to the undisputed matters hereinbefore set out.

In addition, the court made these findings of fact adverse to the plaintiffs, to wit: (1) That York-Shipley did not authorize plaintiffs to deliver any of the shipments to Stoker Service without production and surrender of the bills of lading; (2) that York-Shipley did not ratify the wrongful delivery of the property repossessed by it or waive its rights against the plaintiffs therefor by its contract of 14 February, 1947, with Stoker Service; and (3) that York-Shipley entered into such a contract and actually expended $805.47 reclaiming the property repossessed by it thereunder in a reasonable effort to avoid or minimize the damaging effects of the wrongful delivery of the shipments to Stoker Service. These findings were based in part upon evidence indicating that Stoker Service professed a financial inability to pay for the equipment in its entirety. The plaintiffs did not except to these findings, which were supported by testimony on the trial.

York-Shipley contended that the pecuniary losses resulting to it from the misdelivery of its property exceeded the expenses of $805.47 set out above, and that it was entitled to recover an additional $943.85 on account of salaries and expense accounts which it allegedly paid to some of its agents while they were negotiating the contract of 14 February, 1947, and repossessing the heating equipment thereunder. But the testimony presented by York-Shipley to establish this contention did not prove convincing to the court, which found on the entire evidence that the claimed loss of $943.85 "did not result from . . . acts of the plaintiffs." York-Shipley excepted to this finding.

After making its findings of fact and drawing conclusions of law therefrom, the court "decreed that the plaintiffs have and recover of the defendant York-Shipley, Inc., the sum of $890.13, and that the defendant York-Shipley, Inc., have and recover of the plaintiffs the sum of

$805.47, and that the defendant York-Shipley, Inc., be taxed with the costs of this action."

The plaintiffs and York-Shipley took separate appeals from this judgment to this Court.

M. K. Harrill and James E. Leppard for the plaintiffs, appellants and appellees.

Covington & Lobdell for defendant York-Shipley, Inc., appellant and appellee.

ERVIN, J. The defendant, York-Shipley, asserts on its appeal by appropriate assignments of error that the pleadings of the plaintiffs do not state a cause of action against it for recovery of the freight charges, and that by reason thereof the court erred in concluding and adjudging that it is liable to plaintiffs for the same.

The pleadings of the plaintiffs are somewhat informal and do not contain any specific demand for judgment against the defendant, York-Shipley, for the amount of the freight charges. In consequence, they fall short of the standard of good pleading under G.S. 1-122, which clearly contemplates that a plaintiff should set forth in his complaint a demand for the relief to which he supposes himself entitled. Notwithstanding this statute, however, the decisions have consistently followed the rule that under the code of civil procedure the relief to be granted in an action does not depend upon that asked for in the complaint, but upon whether the matters alleged and proved entitle the complaining party to the relief granted, and this is so in the absence of any prayer for relief. *Bryan v. Canady,* 169 N. C. 579, 86 S. E. 584; *McNeill v. Hodges,* 105 N. C. 52, 11 S. E. 265; *Knight v. Houghtalling,* 85 N. C. 17. As *Chief Justice Merrimon* said in *Presson v. Boone,* 108 N. C. 79, 12 S. E. 897: "When the cause of action appears sufficiently from the complaint, though informally alleged, and the case is tried upon its merits, the court ought to enter such judgment, as the pleadings, the admissions of fact, the findings of fact in some cases by the court or a referee, or the verdict of a jury upon issues submitted to them, warrant, without regard to an imperfect or improper demand for judgment in the complaint or other pleadings, or whether there be any formal demand therefor. The merits of the matter litigated and settled appearing, the law at once suggests the proper judgment to be given. While it is far better and very desirable that the pleadings shall be directly pertinent, precise and orderly, still when they can be upheld as sufficient, this must be done, if to do so works no injustice to a party. This is the spirit and purpose of the present method of civil procedure."

These remarks apply with peculiar force to the case at bar. When the pleadings of the plaintiffs are construed with a proper degree of liberality, they sufficiently allege all facts necessary to show the right of the plaintiffs to recover the freight charges from York-Shipley, and contain a general prayer "for such relief as the plaintiffs are entitled to in the premises." In addition, the record makes it plain that the plaintiffs are entitled to their judgment against York-Shipley for the freight charges. As a matter of fact, liability for such charges on the equipment repossessed by York-Shipley from Stoker Service may be predicated solely upon the express admission of York-Shipley that it is bound by the terms of the contract of 14 February, 1947, making it "responsible for the payment of all unpaid freight or transportation charges" on all of the property included in the twelve shipments "with the exception of the four items" retained by Stoker Service. Other considerations compel the adjudication that York-Shipley is acountable to plaintiffs for the freight charges on these four items.

A bill of lading is said to be both a contract and a receipt. It is a receipt for the goods shipped, and a contract to transport and deliver the same as therein stipulated. *Aman v. Railroad,* 179 N. C. 310, 102 S. E. 392; *St. Louis, I. M. & S. R. Co. v. Knight,* 122 U. S. 79, 7 S. Ct. 1132, 30 L. Ed. 1077.

The shipments here moved in interstate commerce under uniform order bills of lading conforming to the Federal Bill of Lading Act and the regulations of the Interstate Commerce Commission. 49 U. S. C. A. 81-124. The contract embodied in each of these bills of lading provided in express terms that the consignor should "be liable for the freight and all other lawful charges," unless it relieved itself of such liability by signing the non-recourse statement on the face of the bill directing the carrier not to make "delivery of this shipment without payment of freight and all other lawful charges." York-Shipley did not sign the non-recourse statement on any of the bills of lading. It is well settled that "under these provisions if the non-recourse clause is not signed by the consignor, he remains liable to the carrier for all lawful charges." *Illinois Steel Co. v. Baltimore & Ohio R. Co.,* 320 U. S. 508, 64 S. Ct. 322, 88 L. Ed. 259. See, also, these cases: *Pennsylvania R. Co. v. Marcelleti,* 256 Mich. 411, 240 N. W. 4, 78 A. L. R. 923; *Western Maryland R. Co. v. Cross,* 96 W. Va. 666, 123 S. E. 572; *Grand Trunk Western R. Co. v. Makris,* 142 Misc. 807, 255 N. Y. S. 443.

York-Shipley accepted full payment of the sale price of the four items kept by Stoker Service. In thus taking the benefits of the act of the plaintiffs in transporting and delivering these items to Stoker Service, York-Shipley estopped itself to deny liability to the plaintiffs for the freight charges on such four items as the consignor named in the bills of

lading covering such items. *Auto Co. v. Rudd,* 176 N. C. 497, 97 S. E. 477; *Vick v. Wooten,* 171 N. C. 121, 87 S. E. 989; *McCullers v. Cheatham,* 163 N. C. 61, 79 S. E. 306.

This brings us to a consideration of the judgment on the counterclaim.

As *Mr. Justice Field* so well said in *North Pennsylvania Railroad Company v. Commercial National Bank of Chicago,* 123 U. S. 727, 8 S. Ct. 266, 31 L. Ed. 287, "The duty of a common carrier is not merely to carry safely the goods entrusted to him, but also to deliver them to the party designated by the terms of the shipment, or to his order, at the place of destination."

Each of these shipments moved in interstate commerce under an order bill of lading obligating the plaintiffs not to deliver the freight except upon "the surrender of the original order bill of lading properly indorsed" by York-Shipley. When the plaintiffs delivered the property to Stoker Service without the presentation and surrender of the bills of lading properly endorsed, they delivered the goods to one who was not lawfully entitled to the possession of them under the bills of lading and the relevant statutes, and became liable for any loss which the shipper, York-Shipley, sustained thereby. 49 U.S.C.A. 89-90; *Pere Marquette R. Co. v. French & Company,* 254 U. S. 538, 41 S. Ct. 195, 65 L. Ed. 391; *Railroad v. Armfield,* 189 N. C. 581, 127 S. E. 557. The liability of plaintiffs to York-Shipley is not affected in any degree by the fact that the bills of lading contained a direction for plaintiffs to notify Stoker Service of the arrival of the freight at Charlotte. *Killingsworth v. Railroad,* 171 N. C. 47, 87 S. E. 947; *Sloan v. Railroad,* 126 N. C. 487, 36 S. E. 21; *King v. Barbarin,* 161 C. C. A. 311, 249 F. 303.

If York-Shipley had been so minded, it could have refrained from taking any steps to avoid or minimize the loss resulting from the wrongful delivery of its goods, and treated such delivery as a conversion of such goods by plaintiffs, and sued plaintiffs for the full value of the goods at the time and place of the conversion. *Killingsworth v. Railroad, supra;* 9 Am. Jur., Carriers, section 581; 13 C. J. S., section 174.

But York-Shipley did not elect to sue plaintiffs for conversion. Instead of so doing, it minimized the loss resulting from the wrongful delivery by accepting the sale price of a relatively small part of the goods from the person improperly receiving the shipments and by repossessing the remainder of the goods at an expense of $805.47, and obtained judgment against plaintiffs on its counterclaim for the amount of the outlay as damages proximately flowing from breaches of the contracts of the plaintiffs to require production and surrender of the order bills of lading properly endorsed before delivering the goods.

The plaintiffs attack the validity of the judgment rendered in favor of York-Shipley on the counterclaim on the ground that York-Shipley

had ratified the wrongful delivery and precluded itself thereby from suing them therefor by making the agreement of 14 February, 1947, with Stoker Service and by accepting the advantages accruing to it thereunder.

Undoubtedly, a misdelivery of freight by a carrier may be ratified by the shipper so as to relieve the carrier of liability. 9 Am. Jur., Carriers, section 557. The rule as to ratification is thus stated in 10 C. J., Carriers, section 381: "An unauthorized delivery may be ratified by the party entitled to delivery of the goods; and, where such delivery is ratified with a full knowledge of the facts, the carrier is thereby exempted from further liability. But, in order to release a carrier from liability for wrongful delivery on the ground of ratification, it must plainly appear that the ratification was intended with full knowledge of all material facts. What constitutes a ratification depends on the facts of each particular case and may be shown by express words or implied from words, acts, or silence. The burden of showing ratification rests on the carrier. If the facts relating to ratification are in dispute or if reasonable minds might draw different conclusions from the facts, the question of ratification is for the jury."

Here, the court deemed the evidence relating to ratification to be conflicting, and made a finding of fact to the effect that the wrongful delivery of the property reclaimed by York-Shipley had not been ratified. This finding was fully supported by the testimony indicating that York-Shipley was merely seeking to avoid or minimize the loss resulting from the wrongful acts of the plaintiffs. *Arrington v. Railroad,* 51 N. C. 68, 72 Am. D. 559; *Cooper v. Express Co.,* 165 N. C. 538, 81 S. E. 743; *Lipman Refrigerator Co. v. Baltimore & Ohio Warehouse Co.,* 20 Ohio App. 523, 152 N. E. 686; *Alderman Bros. Co. v. New York, N. H. & H. R. Co.,* 102 Conn. 461, 129 A. 47.

The plaintiffs assert, however, that the facts relating to this phase of the case are undisputed, and engender the inescapable legal conclusion that a ratification did occur. This contention is untenable, even if one accepts the premise that the evidence concerning ratification is without conflict. This case involves twelve separate and unrelated shipments under twelve separate and unrelated bills of lading. Manifestly, the act of a shipper in ratifying the wrongful delivery of specified items of freight consigned under one or more bills of lading neither compels nor justifies an inference that he thereby intended to ratify other wrongful deliveries of other property transported under other bills of lading. Moreover, we think the legal result would have been the same on the present record if all of the equipment had been shipped under one bill of lading for the reason that the mere acceptance by the owners of payment for part of the goods delivered to the wrong person does not operate as a waiver of the wrongful delivery of the remainder. *Lester v. Delaware*

L. & W. R. Co., 92 Hun. 342, 36 N. Y. S. 907; *Olvany v. Nyamco Associates*, 154 Misc. 807, 278 N. Y. S. 242.

The case at bar is distinguishable from *Brown v. Vandalia R. Co.*, 163 Ill. App. 473, and *Blowers v. Canadian Pac. R. Co.*, 155 F. 935, where it was properly held that a shipper ratifies a wrongful delivery by accepting from the person to whom delivery is made payment of the entire price of the goods, or part payment with a promise to pay the balance.

The contention of York-Shipley that the court erred in refusing to adjudge the plaintiffs liable to it for an additional $943.85 is without merit. The court found that this alleged loss "did not result from the acts of the plaintiffs." This finding has the same force and effect as the verdict of a jury. McIntosh: North Carolina Practice and Procedure in Civil Cases, section 516.

For the reasons given, the trial and judgment in the court below will be upheld.

Judgment affirmed on appeal of plaintiffs.

Judgment affirmed on appeal of defendant, York-Shipley, Inc.

STATE v. HOBART FRYE.

(Filed 15 December, 1948.)

1. Criminal Law § 79—

Exceptions not set out in appellant's brief or in support of which no reason is stated or authority cited will be deemed abandoned. Rule of Practice in the Supreme Court, No. 28.

2. Criminal Law § 52a (3)—

In order for circumstantial evidence to be sufficient to sustain conviction it is necessary that the facts established be of such nature and so connected or related as to point unerringly to defendant's guilt and exclude any other reasonable hypothesis.

3. Larceny § 7—Circumstantial evidence of defendant's guilt of larceny held sufficient.

A safe, with contents of over fifty dollars in value, was stolen in the nighttime, and carried away in a vehicle. Circumstantial evidence as to tire tracks, similarity of paint from the safe with particles of paint found in defendant's car, etc., tended to show that defendant's car was used in the asportation, and there was evidence that a sales slip for merchandise purchased by defendant and foot-tracks with peculiar markings in which defendant's shoes fitted perfectly, were found at a place at which the car stalled in carrying the safe away. *Held:* The evidence is sufficient for a finding beyond a reasonable doubt that defendant was present and was

implicated in the larceny charged, and is not inconsistent with his evidence that others were seen operating the vehicle during the night in question, and the denial of defendant's motions to nonsuit was not error.

APPEAL by defendant from *Hamilton, Special Judge,* at May Term, 1948, of MOORE.

Criminal prosecution upon bill of indictment containing three counts charging in summary that defendant (1) unlawfully, willfully, and feloniously did break and enter building occupied by Pinehurst Greenhouses with intent to steal, take and carry away its property; (2) feloniously did steal, take and carry away one large metal safe, $100 in money, government bonds and other securities of value more than $50, property of Pinehurst Greenhouses; and (3) feloniously did receive and have said safe, money, bonds and other property of Pinehurst Greenhouses knowing that same had been feloniously stolen, taken and carried away, all contrary to the form of the statute, etc.

Upon the trial in Superior Court the State offered evidence in chief tending to show these facts and circumstances: On 16 November, 1947, at 5:30 o'clock p.m., the doors to the office building of the Pinehurst Greenhouse were locked. The window, an "up and down window," which had just been put in the end of an addition to the building, was closed but not locked. On that date there was in this building a steel safe, about three feet high by two and a half feet wide. It would take two men to roll it. Two men could pick it up. The safe contained at the time the Greenhouse money taken in the day before, approximately $170 in change and bills and a few checks, in addition to bonds of the manager of the Greenhouse and other articles of personalty belonging to others. The next morning, when the manager and others arrived at the building, the safe was gone, the window at the back was closed just as it was the evening before and the door was locked from the outside. The sheriff was called. The safe was found about a mile and a quarter away in the woods. The door of it was bursted and off; parts of it laying around on the ground; and it was face down. None of the property was found. The sheriff and police officers found that there were tracks of a man and of a woman at the window of the Greenhouse; and they also found where the safe had been rolled out of the office to the front door and apparently loaded onto a car or truck backed up to the front, and hauled away.

The tracks of the vehicle indicated that the treads of three of the tires, one rear and two front, were of same make and alike, and that of the right rear tire was different. The left front tire was slick,—practically worn down to the fiber in a couple of places. The right front and left rear tires were good.

The officers picked up the tracks in front of the building and followed them along a circuitous route down a kind of sandy road, through a field,

out an old road, and into the woods. There in the woods and rough, it appeared that the vehicle "got stuck up," but the tracks went on 75 or 100 yards further down in the wood to the point where the safe was found. The officers observed and followed tracks of the vehicle leading from the place where the safe was found along a specific route through woods, grass, fire lane and mud into the hard surface and on into the yard of the Fuller Currie home. Along the route the vehicle apparently "got stuck up" three times. First, in a clay pit; second, where a woman's track and a man's track,—apparently made in trying to push the car out,—were seen; and third, where there was a man's track, also apparently made in trying to push the car out. At this last place there was very deep sand that had been plowed up recently, and the man's tracks, several of them were very plain. Also at this point the sheriff saw and picked up a paper sales slip, lying on the ground. (See more about this slip later.) After entering the yard of the Fuller Currie home, the tracks were around the house and out to the gun club and back into the yard again.

The officers then went to A. J. Frye's (defendant's father's home), where they saw the same tracks, and after talking with Mrs. Currie over there, they followed these tracks back to Hickory Inn, to Herbert Worthy's, and from there back on the hard surface street. They hit the same track again below the race track, which leads from the Southern Pines road back to Fred Arnett's.

The officers then went to Hamlet, arriving there about 5 o'clock in the afternoon, and found defendant at his father-in-law's house. Defendant's car, a Plymouth coupe, was in the back yard. The officers testified that the tires on that car at the time made a track like the track described leading from the Greenhouse to where the safe was found, and that the opening in the back part of the coupe was large enough for the safe to be put in it. The officers thereupon arrested defendant. And the chief of police testified that defendant said that on Sunday night he had been to his father's and Hickory Inn and Fred Arnett's and Jackson Hamlet's,—and that he spent the night at Fuller Currie's home,—where he went in and to bed around 1 o'clock; that he did not leave there at any time during the night; that he had been to all the places the officer mentioned in following the tracks—driving his car, a Plymouth coupe, but did not state that he went to the place where the safe was; that he was at his father's and left there around 10 o'clock, and went to Hickory Inn, and to Jackson Hamlet's, hunting in vain for whiskey; and that he left the Currie home next morning about 7 o'clock in his car, driving back to Hamlet.

The chief of police testified that the right-foot shoe of defendant fitted perfectly the man's tracks, several of them, where the car was last stuck;

that the heel of the shoe had two rings around it; and this track in the sand had two rings around the heel of it.

The sheriff testified as to the sales slip found at the third place where the tracks of the vehicle indicated it had been stalled, and where a man's tracks were seen, and without objection by defendant, that he went to this store in Hamlet and asked the saleslady, whose name is on the slip, if she sold these particular articles and that she said she sold them to Hobart Frye; that he later showed the slip to Hobart Frye and he said he bought those articles; and that later he talked to Hobart Frye's wife and she said Hobart Frye gave her that merchandise.

And the chief of police also testified that Polly Currie was at the Fuller Currie home the next morning; "that a bunch is in and out of there all the time"; and that "that is the house of the late Fuller Currie and members of the family include Floyd, Dave and Peggie."

The State also offered evidence tending to show (1) that clay was on the car in front, and that it looked like the clay at the clay hole where the vehicle apparently stalled; that bushes, leaves, pine straw or needles and a piece of stump were "up under the car,"—pine needles in the car—some on the floor boards; (2) that there were in the back of the car "a number" of particles of black paint that looked like the paint on the safe; (3) that an axe was found on the wood-pile at the Fuller Currie home, and on it were two substances, one of which looked to be paint, and the other to be brass or copper,—similar in color with the dial or portion of safe broken; (4) that the particles of paint found in the back of the car, together with paint taken from the safe, as well as the axe and the dial of the safe, were submitted to the Federal Bureau of Investigation for comparison.

In this connection, a special agent of the FBI, testifying as an expert, stated (1) that he made spectographic comparison of the material taken from the compartment and trailer hitch, and of the black material taken from the axe, and the known paint from the safe, and in each instance the paint was "identical in comparison and could have come from the same source"; and (2) that he made a like comparison of the dial and handle from the safe, and the other material found on the axe, and found this material of which the knob is composed to be similar to the composition of the substance on the head of the axe and "they could have come from the same source,"—that so far as he could tell they were identical in color and substance; and that the safe paint was identical in composition; but the safe paint is different from the car paint.

And the State's evidence in chief also tended to show that defendant denied continuously all the way through that he had anything to do with the alleged robbery.

The State, having first rested its case, and the court having overruled defendant's motion then made for judgment as of nonsuit, to which defendant excepted, defendant offered evidence.

Defendant, as witness for himself, testified on direct examination: That he was born and raised in Moore County but had been living in Richmond County twelve years; that on 16 November he came to see his father who was very ill; that he came Saturday afternoon, the 15th, and stayed until Monday morning when he went back home; that he stayed at his father's house until about 11:30; that because his brother Roger from Washington, and his sister and others were there, and there wasn't room at his father's, he went over to the Fuller Currie house to spend the night; that he left his car in front of the house; that he went to sleep around one o'clock, and didn't see the car any more until a quarter to seven the next morning; that the car was in good running condition when he left it there that night, but next morning he could get it only in low gear; that he went to his brother's filling station and got it fixed; that the car got hot before he reached Pinehurst, and, on examination, he found a hole had been knocked in the radiator.

Defendant further testified that he did not lend his car for any such purpose; that Pauline Currie had a brother Davis Currie staying at the Currie house; that he saw an axe at the wood-pile but denied having anything to do with the breaking and entering the Greenhouse, or taking or breaking into the safe, or that he gave permission to anyone to use his car that night.

And, under cross-examination, defendant testified that he spent the second night over there at the Currie home; that he took Polly Currie and Davis Currie when he went for whiskey immediately after he got to the house, around a quarter to twelve; that he parked his car and did not take the keys out of it, and they were in there the next morning; and after returning to the house he, defendant, took two drinks, about 1 o'clock, and sat on the bed in the front room possibly 10 or 15 minutes—Davis sitting there with him—and he fell asleep talking; that he did not take his clothes off at all that night; that he just untied his shoes; that he didn't know anything else until 7 o'clock the next morning, and he had his shoes and clothes on then; and that he was lying across the bed; that the next morning his car was in the back yard; and that as he pulled out of the driveway he discovered that his car was not in the condition it was when he left it—it wouldn't go into second gear.

He further testified that he purchased the items listed on the sales slip on 15 November, but that he did not know, and could not explain how that slip got out in the woods where the officers found it. He further testified that on Sunday night, the 16th, he saw the night watchman in Pinehurst, whom he knew, and talked to him one time around 20 or 5

minutes to 12 o'clock; that at that time Polly Currie and Davis were with him; that Davis was in the back seat, lying down, and Polly in the front seat on the right-hand side; and that he did not know where Polly and Dave were on the day he was testifying.

Roger Frye, as witness for defendant, testified in pertinent part: "I am brother of Hobart Frye, and I am Court Reporter for the U. S. District Court in Washington . . . I was at home on the 16th of November, because my father was about to die. I saw my brother Hobart at my father's a little after 11 o'clock. I knew Hobart's automobile and I know Davis Currie. At 5 o'clock in the morning someone knocked at the front door and I got up and it was Davis Currie. He wanted to see his mother, who was living upstairs. I went on the back porch and I saw Dave get into the car, but before leaving he lighted a cigarette and I saw Davis and his sister in the car. I didn't see Hobart or anyone else in the car . . ."

And on cross-examination he continued: "While I was up, I saw this young man Davis come . . . I knew his mother was living upstairs. He went upstairs to talk to her. He stayed 15 or 20 minutes . . . His sister was in the car, on the front seat, on the opposite side . . . Dave was under the wheel."

Mrs. C. L. Hensley, also witness for defendant, testified: "I am Hobart Frye's sister. Hobart was at my father's house that night. My father was very sick at the time. He left there around 11 o'clock . . . I know Hobart's car. I saw other persons driving it at 5 o'clock Monday morning. I was acting as nurse at my father's house. I went on duty at 11:00 and came off at 5:00. I saw Davis Currie and his sister Pauline Currie and Hobart was not in the car. I was in my car when they drove up and I waited there a minute to see who it was . . ."

Then on cross-examination, she continued in part: ". . . I saw my brother Roger that morning when I left . . . Then I walked on out and got into my car . . . My car was on the back . . . This other car drove up to my car within a few feet, possibly 10 feet . . ."

John Frye, also a witness for defendant, in pertinent part testified: "I live about 40 or 50 yards from my father's house. I am brother of Hobart Frye and I saw him the night of November 16th. Hobart left about 11:15. I know his car as I have seen it many times. I saw it about 5 o'clock in the morning. A road runs by the corner of my house. For a car to come through my yard almost hits the house. This car started through there making quite a bit of racket and running through the flowers. My wife said 'Get up and see who that is.' I noticed it was Hobart's car. I did not see him then . . . the car came back through the yard and I saw a man and a woman in the car. I recognized the man as Dave Currie but I couldn't recognize the woman."

Defendant also offered evidence tending to show that he was engaged in gainful occupation, introducing bank deposit slips and checks to indicate his engagement in the pursuit of his occupation, with employees under him.

When the defendant rested his case the State offered testimony of the night watchman for the town of Pinehurst. He testified that he knows defendant Hobart Frye and Polly Currie; that he saw them on the night traveling in a Plymouth coupe,—Hobart driving,—she riding with him; that he did not see any other person in the car; that he talked to Hobart between 10 and 15 minutes at right around 2 o'clock,—talking over the general run of things; that Polly asked him where he went from where he then was; that defendant heard what was said; that at that time he was 350 to 400 yards from the Greenhouse; that in response to the question asked him, he told her that he went from there to the power-house, and that she told him which way he went when he left the Green-house . . . the Manor Hall, and . . . to Holly Inn . . . said she had been that route and punched the keys herself; that the car moved when he left; that it went right around by the laundry and the laundry yard in the direction of the Pinehurst Greenhouse; that in the course of his round he got to the Greenhouse at 4 o'clock that morning; and that he couldn't tell there was anything wrong,—just shined his light, and saw the door closed and kept going.

At the close of all the evidence, defendant renewed his motion for judgment as in case of nonsuit. Motion denied. Exception.

Verdict: Guilty of larceny.

Judgment: Confinement in the State Central Prison at Raleigh for not less than three nor more than five years.

Defendant appeals therefrom to Supreme Court and assigns error.

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

H. F. Seawell, Jr., for defendant, appellant.

WINBORNE, J. While on this appeal defendant assigns as error twenty-one exceptions as shown in the record, and states in his brief seven questions as involved on this appeal, he designates no specific exceptions in the argument advanced in his brief, but seems to devote attention, in the main, to the contention that he is entitled to judgment as of nonsuit.

Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned by him. Rule 28 of Rules of Practice in the Supreme Court, 221 N. C. 562, and numerous cases cited thereunder.

Nevertheless, we have adverted to all of the exceptions, and find in them no sufficient error to justify sending the case back for new trial. However, we deem it expedient to treat the question of nonsuit, so earnestly urged by counsel for defendant.

The court submitted the case to the jury on two counts, breaking and entering, and larceny,—instructing the jury that any one of three verdicts might be rendered, guilty of the charge of breaking and entering, etc., guilty of larceny, or not guilty. It is true the court first gave the instruction that one of two verdicts, guilty or not guilty, could be returned by the jury; but the jury was called back into the courtroom and properly given the instruction first above stated.

Now, then, are the facts and circumstances shown in the record of sufficient force and import to support a verdict of guilty of larceny, of which defendant was convicted? We think so.

The State relies wholly upon circumstantial evidence to connect defendant with the crime committed. In passing upon the legal sufficiency of such evidence for a conviction of a felony, as in this case, "the rule is that the facts established or advanced on the hearing must be of such nature and so connected or related as to point unerringly to the defendant's guilt and exclude any other reasonable hypothesis." *Stacy, C. J.,* in *S. v. Harvey,* 228 N. C. 62, 44 S. E. (2) 472; *S. v. Coffey,* 228 N. C. 119, 44 S. E. (2) 886.

However, unlike the factual situations and circumstances in the *Harvey* and *Coffey cases,* the facts and circumstances detailed in the evidence offered by the State in the case in hand is of legal sufficiency for a conviction of the felony of larceny.

We have here evidence tending to show that the safe and its contents were taken in the nighttime and hauled away in a four-wheel motor vehicle. We also have evidence tending to show that the motor vehicle used in hauling the safe is the automobile, a Plymouth coupe, owned by defendant. And the evidence as to the shoes of defendant fitting the tracks of a man, apparently made in pushing the vehicle when stalled, and as to the sales slip which was found at the place where the vehicle was stalled, is sufficient for a finding beyond a reasonable doubt that defendant was present and was implicated in the larceny charged. Moreover, such finding would not be, and is not inconsistent with the evidence offered by defendant tending to show that others were seen operating defendant's automobile at an early morning hour of the night the crime was committed.

No error.

STATE v. VERLIN BLANKENSHIP.

(Filed 15 December, 1948.)

1. Automobiles § 30a—

A person is intoxicated within the purview of G.S. 20-138 if he has drunk a sufficient quantity of intoxicating beverage to impair to an appreciable extent the normal control of his bodily or mental faculties.

2. Criminal Law § 52a (1)—

Upon motion to nonsuit, the evidence must be taken in the light most favorable to the State, giving it the benefit of every reasonable inference deducible therefrom.

3. Automobiles § 30d—

Defendant had an accident while driving his car on the highway. Testimony of witnesses who saw and observed defendant shortly before and shortly after the accident that they smelled alcohol on his breath, and that at that time defendant was intoxicated, *is held* sufficient to be submitted to the jury in a prosecution for driving a motor vehicle on the highways while under the influence of intoxicants. G.S. 20-138.

4. Automobiles § 29b—

Evidence that defendant, while intoxicated, was driving his car at a speed of from 55 to 60 miles per hour from one side of the road to the other, and had passed a truck after the truck had passed his car, that he had been requested several times by a passenger in his car to slow down, and that he lost control of the car, which twice ran off the road onto the shoulder and turned over leaving scuffed marks on the highway for a distance of 267 feet and throwing one of the passengers from the car to his fatal injury, *is held* sufficient to be submitted to the jury on a charge of reckless driving. G.S. 20-140.

5. Same: Automobiles § 18h (1)—

Physical facts at the scene may speak louder than the testimony of witnesses.

6. Automobiles § 28a—

Culpable negligence is the intentional, willful or wanton violation of an ordinance for the protection of human life which proximately results in injury or death, or the inadvertent violation of such statute or ordinance under circumstances amounting to a thoughtless disregard of consequences or a heedless indifference to the safety of others, proximately resulting in injury or death.

7. Automobiles § 28e—

Evidence that defendant was driving on the public highways of the State while under the influence of intoxicating liquor in violation of G.S. 20-138, and was driving recklessly in violation of G.S. 20-140, which proximately caused the death of a passenger in his car, is sufficient to be submitted to the jury in a prosecution for manslaughter.

STATE *v.* BLANKENSHIP.

APPEAL by defendant from *Clement, J.*, at August Term, 1948, of WILKES.

Criminal prosecution upon three separate bills of indictment charging defendant with crimes of manslaughter in "No. 150 W. D."; operating a motor vehicle upon the public highway while under influence of intoxicants, etc., in "No. 151 W. D."; and reckless driving, etc., in "No. 152 W. D.," charges in eight counts, consolidated for trial, and tried with criminal prosecutions upon two separate bills of indictment charging Fred Church with crimes of (1) manslaughter, and (2) operating a motor vehicle while under the influence of intoxicants. Fred Church was acquitted of manslaughter, but was convicted on the second bill, from which he did not appeal.

Defendant pleaded not guilty.

The State offered, upon the trial in Superior Court, evidence tending to show the following facts:

The scene of the alleged offenses, with which defendant stands charged, and of which he is convicted, is located on the North Wilkesboro-Boone highway, U. S. 421, about twenty miles west of North Wilkesboro. At the time of the wreck in question about 9 o'clock on the night of 22 December, 1946, the automobile operated by defendant was traveling west on said highway. A State Highway patrolman, describing the scene, testified, "There is a curve just this side from where I found the car, east of the scene of the accident, approximately 100 yards . . . Back of that curve there is another curve, the road is kind of crooked, where this accident occurred is kind of a bend in the road . . . It was not snowing, but right this side of the accident it was wind snowing, blowing snow across the road . . . I do know that where it happened was between two curves. It was practically straight where the wreck occurred."

A narrative of events previous to the time of the wreck as given on direct examination of the State's witness, Ruth Mast, who lives at Stoney Point in Wilkes County, North Carolina, about twelve miles west of the point of said wreck, as we calculate from the evidence, in summary, is as follows: About 6 o'clock p.m., on 22 December, 1946, Logan Church, accompanied by Fred Church and Gurney Greene, riding in a motor vehicle, a pick-up driven by Logan, came to her home and "picked" her up. They carried Gurney to his home at Congo, located on a dirt road about two miles off highway 421, and about 15 miles from her home. They then went to a little store across from Gurney Greene's. They stayed there around 45 minutes or an hour. Verlin Blankenship, the defendant, traveling in a '40 Ford, came about 8 o'clock. After awhile they started home, Logan, Fred and Ruth, in the pick-up, Logan driving, —and Verlin in front in his car, going back toward the highway. Two stops were made on the dirt road. At the second stop, apparently near

to the highway, Logan and Ruth got in the car with Verlin, he driving. They left first. Fred got in the pick-up, and followed. Up the road about a mile Fred passed Verlin. "Then Verlin passed Fred." When Fred passed, Verlin was driving the car "about 50 miles an hour." When Verlin passed Fred, the car "was going about 55 to 60 miles an hour. He was driving pretty fast at that time . . . on one side of the road, then on the other . . . going backward and forward." Ruth asked him "three or four times to slow down." They had come about three miles when the wreck occurred. Logan asked Ruth to light a cigarette for him. She says, "When I went to give him the cigarette, I looked toward him. When I looked back in the road the car was wrecking . . . I mean leaving the road. Logan and I were thrown out of the car." Logan's body came to rest on the hard surface of the highway. He died. She landed in the ditch, and was knocked unconscious.

Ruth Mast further testified: "There wasn't any one in front of our car on the road at the time the car left the road. He met a pick-up at the curve, a pick-up or car . . . It had just passed when the car . . . left the road." Then, on cross-examination, she continued in part: "Fred passed us . . . after we got on the hard surface. Then we passed Fred. We had just met a car. He slowed down before the wreck occurred. He was driving all right as far as I could see immediately before it happened . . . We met a car at the curve just before we started wrecking. The lights did not blind all of us, not that I could tell. I was lighting a cigarette, I didn't have my face toward the road . . . Just before the wreck . . . Verlin was driving the car at a reasonable rate of speed . . . driving all right on the road."

The evidence as to physical facts in relation to the wreck follows: Ruth Mast testified that when she regained consciousness "the car was sitting over from me in the road . . . on its wheels . . . The windshield was broken, the front end, the glass and door on my side was broken, I think."

And the State Highway patrolman testified: "Just before getting to the body it showed where the car had been in the ditch and crossed out across the road and rolled and turned up on the four wheels. There were scuff marks from the wheels approximately 180 feet before getting to the point where the body of Logan Church was lying, and about 87 feet from the body to the car . . . Beginning at a point 267 feet east of the place where the car was found in the road . . . scuff marks on the road led into the side ditch, then back into . . . and to the middle of the road . . . The body was 87 feet east of . . . the car." This same witness, being recalled, gave this further summary: "The skid marks started about the center line of the highway, continued on the left-hand side of the road going west and went over to the right-hand side of the road and crossed

the shoulder, then continued on the right-hand side of the road across the shoulder, started at the center of the highway, went to the right and across the shoulder into the side ditch and up on the edge of the bank,—there was a bank on the right-hand side of the road some three or four feet high, and left the bank and crossed back across the shoulder and on to the highway and turned up on its wheels, the car turned up on its wheels . . . The car, from . . . where it left the bank . . . was 87 feet. It was right at the foot of the mountain."

And the evidence as to defendant being under the influence of intoxicants follows: Ruth Mast testified: "I first saw Verlin Blankenship over at the store about 8 o'clock. I could smell alcohol on him . . . as to whether he was under the influence of intoxicating liquor at the time . . . I think he was . . . I saw him with some liquor. He had some in a half pint bottle in his pocket . . . He came in and took it out of his pocket and took a drink. That was about an hour before the wreck . . . That is all I saw him take . . . I think he was under the influence of intoxicating liquor at the time he drove that car from the store over to where we exchanged. I could smell it on him at that time. When we made the exchange . . . it was about a half hour from then until we had the wreck . . . During that time . . . after the wreck . . . at the time of the wreck, I think he was under the influence of intoxicating liquor . . . I could smell alcohol and whiskey on him, that is my opinion."

Another witness, J. C. Gallimore, testified: "The defendant Blankenship was intoxicated pretty bad, to tell the truth of it, at that time. He was intoxicated when he came around the car . . . I would say it was about 9:15 at night when I came upon the scene of the wreck . . ."

A funeral director testified: "I saw the defendant Verlin Blankenship, there that night. I did observe his breath. He smelled of whiskey . . . I think he was under the influence of intoxicating liquor."

And the highway patrolman testified: "It was somewhere around 11 or 11:30 when I got there . . . at the scene . . . I saw . . . Verlin Blankenship there that night . . . I smelled alcohol on his breath. I did have an opportunity to observe him there, over a period of approximately an hour . . . It is my opinion that he was under the influence . . . I found one part of a pint of whiskey in the car . . . in the front seat on the floor board . . . . white, non-tax-paid liquor . . . just a drink or two, a small amount . . ."

Verdicts: Guilty of manslaughter, guilty of operating a motor vehicle while under the influence of intoxicants and guilty of reckless driving.

Judgments: No. 9. Confinement in common jail for a term of 3 years, assigned to work on roads under supervision of State Highway and Public Works Commission. No. 10. Confinement in common jail for a term of 4 months, etc., this sentence to run concurrently with that in No. 9.

No. 11. Confinement in common jail for a term of 4 months, etc. This sentence to run concurrently with that in No. 9.

(Here let it be noted that in response to a writ of *certiorari* issued by this Court, *ex mero motu,* the Clerk of Superior Court of Wilkes County, North Carolina, certifies under seal of said court, that it appears from the court records that these cases were continued from term to term, and given new numbers at each succeeding term, and that accordingly at the trial term the bills of indictment originally numbered 150, 151 and 152, respectively, were numbered 9, 10 and 11, respectively, as indicated in the judgments pronounced.)

Defendant appeals to Supreme Court from judgments rendered, and assigns error.

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

Trivette, Holshouser & Mitchell for defendant, appellant.

WINBORNE, J. The question presented by defendant, and most earnestly argued, as involved on this appeal challenges the rulings of the trial court in declining to sustain his motions for judgment as of nonsuit on each of the charges preferred against him. After a careful consideration of the evidence in the case in the light of pertinent statutes, G.S. 20-138, G.S. 20-179, G.S. 20-140, and G.S. 20-141, and decisions of this Court, we are of opinion and hold that the evidence is sufficient to take the case to the jury, and to support a verdict of guilty on each of the offenses of which defendant stands convicted.

Now as to the offenses charged against defendant:

As to the offense of driving while under influence of intoxicating liquor: The statute, G.S. 20-138, provides that "it shall be unlawful and punishable. as provided in Section 20-179, for . . . any person who is under the influence of intoxicating liquor . . . to drive any vehicle upon the highways within this State." And G.S. 20-179, as rewritten by 1947 Session Laws of North Carolina, Chapter 1067, Section 18, declares that every person who is convicted of violation of Section 20-138, relating to . . . driving while under the influence of intoxicating liquor . . . shall, for the first offense, be punished by a fine of not less than one hundred dollars ($100.00), or imprisonment for not less than thirty (30) days, or by both such fine and imprisonment, in the discretion of the court . . . etc."

And in *S. v. Carroll,* 226 N. C. 237, 37 S. E. 688, in opinion by *Denny, J.,* this Court held that "before the State is entitled to a conviction under G.S. 20-138 . . . it must be shown beyond a reasonable doubt that the defendant was driving a motor vehicle on a public highway of this State,

while under the influence of intoxicating liquor or narcotic drugs." And that "A person is under the influence of intoxicating liquor or narcotic drugs, within the meaning and intent of the statute, when he has drunk a sufficient quantity of intoxicating beverage or taken a sufficient amount of narcotic drugs, to cause him to lose the normal control of his bodily or mental faculties, or both, to such an extent that there is an appreciable impairment of either or both of these faculties."

Applying the provisions of the statute, G.S. 20-138, as interpreted in *S. v. Carroll, supra,* to the evidence in the present case taken in the light most favorable to the State, and giving to the State the benefit of every reasonable inference deducible from the evidence, as we must do in considering a motion for judgment as of nonsuit in a criminal prosecution, *S. v. Gentry,* 228 N. C. 643, 46 S. E. (2) 863, and *S. v. Davenport,* 227 N. C. 475, 42 S. E. (2) 686, and cases cited, we are of opinion that the evidence is sufficient to support a finding by the jury beyond a reasonable doubt that defendant did on the occasion in question operate his car, a motor vehicle, upon a public highway of this State, while under the influence of intoxicating liquor as defined in *S. v. Carroll, supra.*

As to the charge of reckless driving, etc.: The statute, G.S. 20-140, provides that "any person who drives any vehicle upon a highway carelessly and heedlessly in willful or wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property, shall be guilty of reckless driving, and upon conviction shall be punished as provided in Sec. 20-180."

And G.S. 20-180, as rewritten by the 1947 Session Laws of North Carolina, Chapter 1067, Section 19, declares that "every person convicted of violating Section 20-140 or Section 20-141 shall be guilty of a misdemeanor." Moreover, the statute, G.S. 20-141, pertaining to speed restrictions, provides that "No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing."

Applying the language of the statutes G.S. 20-140 and G.S. 20-141 to the evidence in the present prosecution, taken in the light most favorable to the State, and giving to the State the benefit of every reasonable inference deducible therefrom, as we must do in considering a motion for judgment as of nonsuit in a criminal prosecution, *S. v. Gentry, supra,* and *S. v. Davenport, supra,* it would seem that the evidence is sufficient to justify and to support a finding by the jury beyond a reasonable doubt that at the time of the wreck in question defendant was driving recklessly within the meaning of the statute, G.S. 20-140. See *S. v. Steelman,* 228 N. C. 634, 46 S. E. (2) 845.

In this connection, attention may be directed in particular to the testimony tending to show (1) that defendant had been driving his car at speed of fifty-five to sixty miles per hour, from one side of the road to the other, and passing the pick-up after it had passed his car; (2) that he had been requested three or four times, by a passenger in his car, to slow down; (3) that at the time he was under the influence of intoxicating liquor; and (4) that the car had wrecked in the manner indicated by the marks on the highway, and was damaged as indicated. From this testimony, if believed, it may be reasonably inferred that at the time of the wreck the car was being operated with terrific momentum and wholly out of control. This is so, even though the witness Ruth Mast testified that defendant had slowed down and was driving at a reasonable rate of speed at the time of the wreck. Some physical facts speak louder than the testimony of witnesses. *Powers v. Sternberg,* 213 N. C. 41, 195 S. E. 88, and cases cited.

As to the charge of involuntary manslaughter: This charge is based upon culpable negligence as distinguished from actionable negligence. The distinction between the two is clearly pointed out by *Stacy, C. J.,* in *S. v. Cope,* 204 N. C. 28, 167 S. E. 456. In the *Cope case* it is stated that culpable negligence in the law of crimes is something more than actionable negligence in the law of torts; that it is such recklessness or carelessness proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others; that it may be in an intentional, willful or wanton violation of a statute or ordinance for the protection of human life or limb which proximately results in injury or death; or that it may be in an inadvertent violation of a prohibitory statute or ordinance accompanied by recklessness of probable consequences of a dangerous nature, when tested by the rule of reasonable prevision, amounting altogether to a thoughtless disregard of consequences or a heedless indifference to the safety of others, if injury or death proximately ensue. See *S. v. Miller,* 220 N. C. 660, 18 S. E. (2) 143, where the evidence there was held to be insufficient to establish culpable negligence.

However, applying this principle to the evidence relating to the violations by defendant of the statutes (1) against operating a motor vehicle upon public highways of this State under the influence of intoxicating liquor, G.S. 20-138, and (2) against the driving of any vehicle upon a highway recklessly, etc., G.S. 20-140, of which the jury has convicted defendant, the only question remaining is whether the violation of either of these statutes proximately caused the death of Logan Church. The evidence in this respect does not seem to admit of debate. It was purely a question of fact for the jury. And the jury has spoken. So be it!

The cases of *S. v. Miller, supra,* and *S. v. Lowery,* 223 N. C. 598, 27 S. E. (2) 638, upon which defendant relies in his brief, are distinguishable from the present case in factual situations.

Other exceptions appearing in the record and debated in brief of defendant filed in this Court have been carefully considered, and in the matters to which they relate, we fail to find reversible error.

No error.

STATE v. WRIGHT W. JONES.

(Filed 15 December, 1948.)

1. Criminal Law § 31h—

The exclusion of testimony as to whether defendant "knew exactly what he was doing" when under the influence of narcotics cannot be held for error, since the inquiry upon the issue of defendant's mental irresponsibility is whether he knew right from wrong and not whether he knew exactly what he was doing.

2. Criminal Law § 31c (3)—

The exclusion of testimony cannot be held prejudicial when the record fails to show what the witness would have answered.

3. Criminal Law § 31c—

The qualification of an expert is ordinarily a matter resting in the sound discretion of the trial court.

4. Criminal Law § 31h—

On the issue of mental capacity, the exclusion of opinion evidence as to the effect specified drugs would have on a person cannot be held for reversible error when it does not appear that the testimony of the witness would have related to whether the drugs would render a person unable to distinguish right from wrong.

5. Criminal Law § 5b—

Upon the plea of mental irresponsibility, the test is the capacity of defendant to distinguish between right and wrong at the time and in respect of the matter under investigation.

APPEAL by defendant from *Armstrong, J.,* at March Criminal Term, 1948, of GUILFORD (High Point Division).

Criminal prosecution on indictment charging the defendant with the murder of his wife, Leora Jones.

The record discloses that in the late afternoon of 7 January, 1948, Leora Jones was in the kitchen of her home, preparing the evening meal, when her husband, the defendant approached from behind and struck

her with a hatchet. A struggle ensued between the two which was carried on throughout the house and finally ended in a small hall near the bathroom, where the body of the deceased was found with knife wounds in her chest which produced her death.

The defendant entered a plea of not guilty and sought to show that he was insane or irresponsible at the time, superinduced by excessive use of narcotics or dope—morphine.

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.

James V. Morgan for defendant.

STACY, C. J. Only two questions are presented by the appeal.

1. The defendant offered his brother as a witness, who told of the defendant's use of dope over a long period of time and the effect it had upon him, especially in respect of his nervous system. Near the close of his examination in chief, he was asked this question: "When he was under the influence of dope, do you have an opinion as to whether he knew exactly what he was doing?" Objection; sustained; exception.

The ruling must be sustained on appeal for two reasons: First, the question did not go to the defendant's sanity; it stopped short of the requisite inquiry; and, secondly, the record fails to show what the witness would have answered. *S. v. Webb,* 228 N. C. 304, 45 S. E. (2) 345; *S. v. Utley,* 223 N. C. 39, 25 S. E. (2) 195; *S. v. Thomas,* 220 N. C. 34, 16 S. E. (2) 399.

2. The defendant sought to qualify an unlicensed pharmacist as an expert to testify in respect of the effects of nembutal and morphine on individuals. The court refused to qualify the witness as an expert for want of sufficient showing in respect of his qualifications. The witness stated that he knew what effect these drugs would have upon a person, and presumably he would have so testified, albeit the record fails to show what his testimony would have been.

For three reasons, then, the ruling must be sustained on appeal. In the first place, the qualification of an expert is ordinarily a matter resting in the sound discretion of the trial court, *S. v. Smith,* 223 N. C. 457, 27 S. E. (2) 114; *S. v. Wilcox,* 132 N. C. 1120, 44 S. E. 625; secondly, it does not appear to what extent the witness would have gone in his testimony, *S. v. Journegan,* 185 N. C. 700, 117 S. E. 27; and, thirdly, the record fails to show what testimony the witness would have given.

The question at issue was the capacity of the defendant to distinguish between right and wrong at the time and in respect of the matter under investigation. *S. v. Harris,* 223 N. C. 697, 28 S. E. (2) 232; *S. v. Potts,* 100 N. C. 457, 6 S. E. 657; *S. v. Brandon,* 53 N. C. 463. It does not appear that the witness proposed to speak to this question, either directly or obliquely.

No reversible error has been shown; hence the verdict and judgment will be upheld.

No error.

B. N. NALL v. MAMIE B. NALL.

(Filed 15 December, 1948.)

1. Divorce § 12—

In an action for divorce, a verified answer and cross-action setting forth a cause of action for divorce *a mensa*, G.S. 50-7, is sufficient to sustain an order allowing alimony *pendente lite*. G.S. 50-15.

2. Divorce § 2½—

The lapse of seven years from the time of the separation does not bar a cross-action for divorce *a mensa* on the ground of constructive abandonment, or an application for alimony *pendente lite*, either by laches or any statute of limitation.

3. Appeal and Error § 40d—

Where there is no request for findings of fact and the sole exception is to the signing of the order appealed from, the failure of the court to set forth in detail the facts constituting the basis of its order is not fatal.

APPEAL by plaintiff from *Armstrong, J.*, September Term, 1948, of MOORE. Affirmed.

H. F. Seawell, Jr., for plaintiff, appellant.

William D. Sabiston, Jr., for defendant, appellee.

DEVIN, J. The plaintiff husband instituted his suit for divorce *a vinculo* on the ground of two years separation. G.S. 50-6. The defendant wife filed a cross-action for divorce *a mensa* on allegations in her answer of abandonment, and cruel treatment which endangered her life, and of such indignities offered to her person as to render her condition intolerable and life burdensome. G.S. 50-7. The facts upon which her cross-action was based were set forth at length. She alleged the separation was without fault on her part, and that solely because of his treatment of her she was forced to leave him 26 August, 1941. She further alleged she was without sufficient means to subsist during the prosecution of her

suit and to defray the necessary expenses thereof. The answer was properly verified, and upon this she moved the court for allowance of alimony *pendente lite* and counsel fees. Upon consideration of this answer the court found she was entitled to the relief demanded in her answer, and thereupon entered an order that the plaintiff make certain payments therefor pending the action. G.S. 50-15; *Massey v. Massey,* 208 N. C. 818, 182 S. E. 446. Plaintiff excepted to the signing of the order and appealed.

The allegations in defendant's answer and cross-action are sufficient to afford basis for the allowance of alimony *pendente lite. Hennis v. Hennis,* 180 N. C. 606, 105 S. E. 274; *Ragan v. Ragan,* 214 N. C. 36, 197 S. E. 554; *Barwick v. Barwick,* 228 N. C. 109, 44 S. E. (2) 597. The plaintiff argued here that because the separation took place nearly seven years before the filing of her cross-action, the defendant is barred either by laches or by some statute of limitations, but neither position is tenable. *Garris v. Garris,* 188 N. C. 321, 124 S. E. 314. While the court below did not set out the facts in detail as the basis of its order, there was no request for other or additional findings, and the only exception was to the signing of the order. *Craver v. Spaugh,* 227 N. C. 129, 41 S. E. (2) 82; *Rader v. Coach Co.,* 225 N. C. 537, 35 S. E. (2) 609; *Query v. Ins. Co.,* 218 N. C. 386, 11 S. E. (2) 139; *McCune v. Mfg. Co.,* 217 N. C. 351, 8 S. E. (2) 219.

The ruling of the court in entering the order appealed from is

Affirmed.

MRS. MARY GREY SABINE v. EDWIN GILL, COMMISSIONER OF REVENUE OF THE STATE OF NORTH CAROLINA.

(Filed 15 December, 1948.)

1. Pleadings § 15—

A demurrer tests the sufficiency of the allegations of the complaint, admitting for the purpose their truth, to state any cause of action for which plaintiff may demand relief, and the demurrer should be overruled unless there is fatal defect either in want of sufficient averment to state a cause, or because of positive allegations showing that the supposed grievance is not actionable.

2. Taxation § 24—

Where a resident of this State is a beneficiary of income derived from a business carried on by active trustees in another state, each state may constitutionally tax the income from the business, the other state against the trustees as the *situs* of its earning and this State against the beneficiary as the *situs* of its reception and residence of the recipient.

3. Taxation § 23½—

While double taxation is not favored, it is not *ipso facto* unconstitutional, and will be upheld when the intention to impose it is clear and its imposition is not discriminatory.

4. Taxation § 29—

In order for a resident taxpayer to be entitled to deduct income derived from a business situated in another state from his income taxable by this State, the taxpayer must show that he has a business or investment in such other state, that the income therefrom is taxable in that state, and that the questioned income is derived from such business or investment. G.S. 105-147 (10).

5. Taxation § 23½—

While the coverage of a taxing statute must be construed against the State, the burden is on the taxpayer to show that he comes within an exception or exemption, and the State will never be presumed to have surrendered or relinquished its taxing power unless the intention to do so is expressed in clear and unambiguous terms, admitting of no other reasonable construction.

6. Taxation § 29—Where business of estate is managed by active trustees, resident beneficiary of income is liable for tax thereon notwithstanding state of situs collected income tax.

In this action to recover income tax paid under protest, the complaint alleged in substance that plaintiff was entitled to a portion of the income from a business carried on in another state by active trustees, that the state of the *situs* of the business taxed the income therefrom, that the profit from the business was paid to a trustee in this State which distributed the income, and that plaintiff was forced to pay income taxes to this State on her share of the income thus derived. *Held:* Demurrer to the complaint was properly sustained since upon its allegations the business situated in such other state was owned by the estate and managed by active trustees, and therefore plaintiff did not "have" a business in such other state so as to bring her within the purview of G.S. 105-147 (10).

7. Statutes § 5a—

A statute must be construed as written, and while it is subject to judicial construction it may not be amended by judicial interpretation.

PLAINTIFF'S appeal from *Burney, J.*, 25 March, 1948, WAKE Superior Court.

The action is for recovery back of income taxes paid under protest, and brought under authority of G.S. 105-267.

The plaintiff was at the time of the alleged liability for the tax a resident of the State of North Carolina and a beneficiary under a testamentary trust under which the income taxed was derived from a business carried on, as authorized by the will, by trustees in the State of Virginia, and had there been taxed as income earned in that state. The complaint alleges that the payment of the tax to the Virginia taxing authorities

was compulsory, and plaintiff contends that the facts entitle her to the deduction or exemption provided in G.S. 105-147 (10).

The trust above mentioned was set up in the will of James P. Grey, the father of the plaintiff, who was then a resident of Mecklenburg County, North Carolina, and who died in that county on the 30th day of December, 1942. The will was admitted to probate in Mecklenburg County and shortly thereafter, in an ancillary proceeding, was admitted to probate in the Corporation Court of the City of Bristol, Virginia. Executors to the will are the Commercial National Bank of Charlotte, F. L. Jackson, Mecklenburg County, North Carolina, and Robert E. Kell of the City of Bristol, Virginia. The executors named in the will qualified in North Carolina February 5, 1943, and thereafter, in the same month, F. L. Jackson and Robert E. Kell qualified as executors and trustees for the estate in Virginia; and all these parties are now acting as executors and trustees.

At the time of his death the testator-trustor owned about 93 per cent of a hosiery mill and business located in the City of Bristol, Virginia, under the name and style of Grey Hosiery Mills, which was then being operated as a partnership by the said testator and others residing in the State of Virginia. The will provided that the business should be carried on by the trustees named, and to that end, pursuant to authority of a judgment entered in an appropriate proceeding by the Superior Court of Mecklenburg County, North Carolina, and a decree entered by the Corporation Court of the City of Bristol, Virginia, the estate of the testator, through Robert E. Kell and F. L. Jackson, Virginia executors and trustees, was put into a partnership for the operation of the business by the trustees and business partners on the basis that the said estate was, and is, the owner of 93 per cent interest in the business, the remaining 7 per cent being owned by the other partners; 3 per cent having been given to Jackson, individually, by the will. Under the will the Commercial National Bank of Charlotte, as executor and trustee, was made the custodian of all the assets of the estate and empowered to collect, receive and disburse all funds belonging thereto. In deference to this provision the Corporation Court of the City of Bristol, in which the will had been probated and the executors above named and trustees had qualified, in its decree directed, authorized and empowered the Virginia executors and trustees to pay over to and remit to the Commercial National Bank of Charlotte, as disbursing agent and depository, all the distributable income from the Grey Hosiery Mills business to which the estate of the testator should become entitled; and in pursuance thereto the Virginia executors and trustees paid over to and deposited with the said Commercial National Bank of Charlotte the distributable earnings of the Grey Hosiery Mills for the year 1943 to which the estate of the said James P. Grey was

entitled as the owner of 93 per cent interest in the business; and out of such distributable income so paid to it for the year 1943 the said Commercial National Bank of Charlotte paid and distributed to the plaintiff the sum of $40,114.51 during the year 1943, that being the portion of the distributable income which the plaintiff was entitled to receive as beneficiary under the will.

After this distribution, on demand of the taxing authorities of that state, the plaintiff paid to the State of Virginia a tax upon the income so received. The State of North Carolina demanded a payment of tax in the sum of $2,663.35 upon the distributed share of income received by the plaintiff. This the plaintiff paid under protest and as above stated brought this action for its recovery back.

The relation of the plaintiff as beneficiary under the will to the estate and the business so conducted is manifested in a portion of Item 6, reading as follows:

> "The remainder of the net annual income from my entire trust estate shall be paid to my children, Isabel, Mary and James, in monthly installments, and in the following proportions: Two-fifths to each of my daughters, Isabel and Mary, and one-fifth to my son, James, so long as they, and each of them shall live."

The daughter Mary, now Mrs. Sabine, is plaintiff.

The contest is as to the applicability of the statute invoked by the plaintiff, pertinent provisions of which read as follows:

> "G.S. 105-147 (10). Resident individuals and domestic corporations having an established business in another state, may deduct the net income from such business or investment if such business or investment is in a state that levies a tax upon such net income."

The defendant demurred to the complaint for that it did not state a cause of action. The demurrer was sustained and the action dismissed. From this judgment plaintiff appealed.

Attorney-General McMullan and Assistant Attorneys-General Tucker and Abbott for the State.

Taliaferro, Clarkson & Grier and Robert P. Stewart for plaintiff, appellant.

SEAWELL, J. The defendant demurs to the complaint on the ground that it does not state a cause of action. Such a demurrer admits the truth of all the allegations of fact and inferences reasonably drawn therefrom. *Ferrell v. Worthington,* 226 N. C. 609, 39 S. E. (2) 812; *Smith*

v. Smith, 225 N. C. 189, 34 S. E. (2) 148; *Kemp v. Funderburk,* 224 N. C. 353, 30 S. E. (2) 155. It tests the sufficiency of the allegations in law to present any cause of action for which the plaintiff may demand relief. A fatal defect may occur because of the want of averment of an actionable cause, or because of the pressure of positive allegations showing that the supposed grievance is not actionable. The foregoing summary of facts alleged in the complaint is premised on this rule.

The challenge to the complaint is that the factual situation presented in it does not entitle plaintiff to the exemption she claims by invoking G.S. 105-147 (10); and the question is reduced to a matter of statutory construction.

There is no doubt, nothing else appearing, both Virginia and North Carolina could constitutionally tax the income in question,—Virginia (against the active trustees) as the *situs* of its earning, and, perhaps we might say, the *situs* of the Virginia trust; and North Carolina (against the beneficiary) as the *situs* of its reception and residence of the beneficiary. *Guaranty Trust Co. v. Virginia,* 305 U. S. 19, 83 L. Ed. 16; *Lawrence v. State Tax Commission,* 286 U. S. 276, 76 L. Ed. 1102. But the court would still have to consider the question of statutory construction and intent.

Passing, for the moment the interstate feature, double taxation, even within the State, is not *ipso facto* necessarily obnoxious to the Constitution when the intention to impose it is clear and it is free from discriminatory features, however odious to the taxpayer. But it is not favored; and there is authority that statutes should be so construed as to avoid it when the intent is not clearly expressed. 51 Am. Jur., Taxation, sec. 286, and cases cited.

The plaintiff's argument, oral and in her brief, has brought to our attention instances in which the administrational practice here has avoided the inequity of double taxation, intrastate, by looking through form to substance,—through the trust to the immediate beneficiary. These we understand to be instances of simple holding or passive trusts. We do not question the correctness or propriety of these rulings. But because of the different relationships involved in the case at bar and in these instances, either as rulings of the Attorney-General or administrational interpretations of the taxing laws, they have no bearing upon the question before us except as possibly reflecting a policy worth considering in the field of interstate taxation whither the statute carries us, in its attempt to avoid similar taxation;—to avoid a practice which in most states of the Union is regarded as economically unsound, unduly burdensome, and unfair to those whose business activities cross state lines and provide a taxing *situs* in each. Many states of the Union have sought to avoid the more pronounced hardships of such double taxation by the enactment of reciprocal laws. Nossamon, Trust Administration and

Taxation, sec. 714, and cases cited. The statute under review is of that character, and so is the similar Virginia law. Virginia Tax Code (Appendix, 1942 Virginia Code, Tax Code, Ap., sections 39, 40). The statutes of the several states enacted for this purpose are far from universal in phraseology and scope; Altman and Keesling, Allocation of Income in State Taxation, pp. 195 to 197; and opinions based upon them must be studied with reference to the statutes they interpret. Opinions based upon disparate situations, factual and legal, rarely present rules of universal application, and we sometimes find that enthusiasm of expression has outrun the letter and spirit of the law.

This Court is not empowered to build upon the statute and enlarge the conditions upon which the plaintiff may be afforded relief; and the distance here between the trustees and the beneficiary seems to be too great for the judiciary to close the gap by making them to all intents and purposes one. The statute provides a deduction for individuals and domestic corporations "having an established business in another state" and provides that the net income from "such business or investment may be deducted if such business or investment is in a state that levies a tax upon such net income."

Therefore, in order to bring herself within the exemption, plaintiff must show (1) that she has a business or investment in the State of Virginia; (2) that the income therefrom is taxable in that state; and (3) that the questioned income is derived from such business or investment. With the last two requirements it may be conceded that the plaintiff has complied; but in number (1) there is a hurdle more difficult to surmount.

The exemption is to "resident individuals and domestic corporations *having* an established business in another state." The word "have," amongst many other meanings, is pertinently defined in the dictionaries as meaning "to hold in possession or control; to hold as property; to own," Webster; "to hold or possess in ownership; or own," Century. And it has been used immemorially to denote the ultimate in possession, control or ownership; "to possess corporally," Black's Law Dictionary.

True, there is an established business and an investment in the State of Virginia, but it belongs to the estate and not to the plaintiff or those like situated under the will. The latter, including the plaintiff, are neither legal nor equitable owners. The Virginia trustees are in the administration of an active trust, not a mere passive or holding trust. Under the will and orders of the court they were put into a partnership with Virginia partners; and the partnership property, including the business itself and whatever good will it may have, consists of a portion of the estate which is committed to them. Incidentally we may say that wide powers are given to the trustees to alter the form of the estate's

investment when necessary to do so. And, by the will, the whole remainder of the estate, of which this business happens to be a part, is put under obligation to the particular plaintiff here only for the period of her natural life. Not only is the income produced in Virginia by the activities of the trustees under the will using what is still the property of the estate, but under the will and the decrees of the court it does not leave the hands of the trustees until it is transmitted to a co-executor and trustee, the Commercial National Bank of Charlotte, in the State of North Carolina, and distributed by it. The trusteeship is far from a mere agency which might lend itself more readily to the concept of constructive holding or receipt from an agent. While the plaintiff has a legal right to the income, its character as a trust fund does not cease until so produced and distributed. It is an intangible which belongs to the trust estate and becomes hers only by distribution. *Blodgett v. Silberman,* 277 U. S. 1, 72 L. Ed. 749; *Latta v. Jenkins,* 200 N. C. 255, 156 S. E. 857.

We are reminded in appellee's brief that the burden is on the taxpayer to show that she comes within the exemption or exception, *Henderson v. Gill, ante,* 313, 49 S. E. (2) 754; *Valentine v. Gill,* 223 N. C. 396, 27 S. E. (2) 2; *Benson v. Johnston County,* 209 N. C. 751, 185 S. E. 6; and it is also true that the taxing law as to its coverage must be construed more strictly in favor of the taxpayer; and it seems to be especially pertinent to the problem under consideration that the state is never presumed to surrender or relinquish its taxing power unless the intention "to relinquish it is declared in clear and unambiguous terms admitting of no other reasonable construction." 51 Am. Jur., Taxation, sec. 526, and cases cited.

On analytical approach these rules are not in conflict; and from all of them, considering the need of clarity and precision in the taxing laws, we must assume that the Legislature chose adequate words and terms to express its intent,—subject, of course, to judicial construction, but not to judicial amendment. In this instance had the Legislature so intended they might have immunized those in like situation with the plaintiff by exempting all income *derived* from a foreign established business or investment taxable at its *situs.* Indeed, in its further reference the statute uses the term "derive,"—but it has already tagged the "established business or investment" as being that of the taxpayer who seeks the benefit of exemption; and this, we think, is an essential part of the classification or definition. If, on the principle contended for, we once go beyond the language of the law, the step by step rationalization of the statute might easily imperil legitimate revenues of the State not offensive to the policy which the reciprocal statutes under consideration seek to promote; *Guaranty Trust Co. v. Virginia, supra; Lawrence v. State Tax Commission, supra;* thus building up a "jurisdiction of concepts," rather than

one of law. *Schubert v. Schubert Wagon Co.,* 249 N. Y. 253, 164 N. E. 42, 64 A. L. R. 293.

The plaintiff in this case has no such right in the established business or investment from which the revenue is derived and is not so related to it as would justify the Court in ignoring the trusteeship, which not only has the legal title, but the active custody, control and operation of the property and facilities which produced the income which the plaintiff received as a resident of the State.

The ably contested question of permissible statutory definition makes it appropriate to re-examine the limitations placed upon the Court in that respect: *In re Poindexter,* 221 N. C. 246, 20 S. E. (2) 49, 140 A. L. R. 1138; *Randall v. R. R. Co.,* 107 N. C. 748, 12 S. E. 605; *Norman v. Ausbon,* 193 N. C. 791, 138 S. E. 162; *S. v. Whitehurst,* 212 N. C. 300, 193 S. E. 657; *Rice v. Panel Co.,* 199 N. C. 154, 154 S. E. 69; 50 Am. Jur., sec. 228, p. 212. We do not feel that the Court may take up where the lawmakers left off.

For these reasons we are of the opinion that the plaintiff has not brought herself within the exemption provided in the cited statute and that this affirmatively appears from the allegations in the complaint.

The demurrer was properly sustained, and the judgment must be

Affirmed.

CHARLES A. CANNON AND THE WACHOVIA BANK & TRUST COMPANY, ADMINISTRATORS C. T. A. OF THE ESTATE OF DAVID H. BLAIR, AND THE WACHOVIA BANK & TRUST COMPANY AND ADELAIDE CANNON BLAIR, TRUSTEES OF THE TESTAMENTARY TRUST OF DAVID H. BLAIR, v. ADELAIDE CANNON BLAIR AND JOHN FRIES BLAIR, SURVIVING TRUSTEES OF THE INTER VIVOS TRUSTS RECORDED IN THE OFFICE OF THE REGISTER OF DEEDS FOR GUILFORD COUNTY IN BOOK 727, AT PAGE 56, AND BOOK 1061, AT PAGE 330, AND ADELAIDE CANNON BLAIR, PERSONALLY, AND ADA BLAIR, EMMA BLAIR, ELVA BLAIR AND DAVID H. BLAIR, JR.

(Filed 15 December, 1948.)

1. Appeal and Error §§ 6c (3), 40d—

In a trial by the court under agreement, G.S. 1-184, the court's findings are conclusive and are not subject to review in the absence of exceptions that they are not supported by evidence.

2. Deeds §§ 3, 5—

The presumption of delivery arising from the registration of a deed obtains notwithstanding that the registration is made subsequent to the death of grantor, and such presumption is sufficient to support a finding by the court that the instrument was duly delivered.

3. Same: Trusts § 3a—

Heirs at law executed an instrument conveying the *locus* in trust for the purpose of investing the fee simple title in the son of one of them upon the death of the last trustor, and reserved to each of them the privilege of occupying and enjoying the premises for life. The instrument was found among the valuable papers of one of the heirs, who was also one of the trustees. *Held:* The deceased heir had an interest in the property entitling him to possession of the deed after its execution and delivery, and therefore the fact that it was found after his death among his valuable papers raises no presumption of nondelivery.

4. Deeds § 4: Trusts § 3a—

Heirs at law executed an instrument conveying the *locus* in trust for the purpose of investing the fee simple title in the son of one of them after the death of the last trustor, and reserved to each heir the right to occupy and enjoy the premises during his life. *Held:* The instrument constituted a trust indenture to hold the property intact, to provide a homeplace for the heirs during their lives, and to enable the child of one of them to eventually receive the entire estate, and therefore the instrument was supported by a valuable consideration, especially as to the heir whose son was to eventually receive the property.

APPEAL by plaintiffs from *McSwain, Special Judge,* at the November Term, 1948, of the High Point Division of the Superior Court of GUILFORD.

Abigail Blair died intestate 13 February, 1906, owning a tract of land in Guilford County, which thereupon descended to her three sons, David H. Blair, William A. Blair, and John J. Blair, and her four unmarried daughters, Martha Blair, Emma Blair, Ada Blair, and Elva Blair, in equal shares as tenants in common. While the record does not positively show such to be the case, it intimates that this land was the Abigail Blair homeplace. This action involves the question as to the present ownership of the one-seventh undivided interest in this property inherited by David H. Blair.

David H. Blair married Adelaide Cannon, and had by her an only son, David H. Blair, Jr.

On 20 March, 1931, William A. Blair conveyed his one-seventh undivided interest in this property to Adelaide Cannon Blair.

There appears of record in the office of the Register of Deeds of Guilford County in Book 1061, at page 330, a trust indenture dated 21 September, 1932, whereby David H. Blair, Adelaide Cannon Blair, John J. Blair, Martha Blair, Emma Blair, Ada Blair, and Elva Blair, grantors, purported to convey the Abigail Blair tract as a whole to David H. Blair, Adelaide Cannon Blair, and John Fries Blair, grantees, as trustees for David H. Blair, Jr., "subject to the privilege of each of the grantors to occupy, use, and enjoy the premises during his or her natural life." The indenture stipulates that the trustees shall convey the property to David

H. Blair, Jr., "upon the death of the last surviving grantor." It contains an additional provision in these words: "If David H. Blair, Jr., should die prior to the time herein specified for the conveyance and transfer of the trust estate to him, the trustees shall, at said specified time, convey the said trust estate to the person or persons legally entitled thereto."

Each of the seven grantors therein named signed and sealed the trust indenture of 21 September, 1932, and acknowledged its execution in due form of law during the month of October, 1932. It was found unrecorded after the death of David H. Blair among the valuable papers of David H. Blair and other members of the Blair family in the home on the property in question, in which David H. Blair frequently visited and in which Emma Blair, Ada Blair, and Elva Blair have resided ever since the death of Abigail Blair. Shortly thereafter, to wit, on 20 February, 1945, the trust indenture was recorded in due form of law in the office of the Register of Deeds of Guilford County. The instrument recites the receipt by the grantors of a consideration of $1.00, but it was conceded on the trial that such sum was not actually paid for the conveyance.

David H. Blair died 21 September, 1944, leaving a will in which he bequeathed and devised his residuary estate, both real and personal, to Adelaide Cannon Blair and the Wachovia Bank & Trust Company as trustees for his son, David H. Blair, Jr. The trustees are given "full power and authority to sell and convey any or all of the real estate, either at private sale or public auction, as may to them seem best to the interest of the estate," and are directed to close the trust "as of December 31, 1954, by turning over to David H. Blair, Jr., the entire property making up said trust, whether the same be real estate or securities." It was conceded by all parties at the trial that the one-seventh undivided interest in the *locus in quo* which descended to David H. Blair at the death of Abigail Blair passed to the testamentary trustees as a part of the residuary estate of David H. Blair, if the trust indenture of 21 September, 1932, did not constitute a valid conveyance of such interest.

On 26 July, 1946, Adelaide Cannon Blair, individually, and Charles A. Cannon and the Wachovia Bank & Trust Company, Administrators *cum testamento annexo* of David H. Blair, and the Wachovia Bank & Trust Company and Adelaide Cannon Blair, trustees of the testamentary trust of David H. Blair, executed and delivered in due form of law a deed sufficient in terms to convey to Adelaide Cannon Blair and John Fries Blair, as surviving trustees under the indenture of 21 September, 1932, the one-seventh undivided interest of Adelaide Cannon Blair and the one-seventh undivided interest of David H. Blair in the Abigail Blair lands for a recited consideration of $10.00, which was actually paid to the grantors by the grantees. The actual value of the one-seventh undivided interest of David H. Blair in the Abigail Blair tract was "in excess of

$14,000.00" on 26 July, 1946, but the deed recited that the claim of the administrators and testamentary trustees thereto was "of little or no value" to the estate of David H. Blair because of doubt as to whether the title was vested in them under the will or in Adelaide Cannon Blair and John Fries Blair, as surviving trustees, under the trust indenture of 21 September, 1932.

John J. Blair and Martha Blair died testate before the commencement of the litigation.

On 22 September, 1948, the plaintiffs, Charles A. Cannon and the Wachovia Bank & Trust Company, administrators *cum testamento annexo* of David H. Blair, and the Wachovia Bank & Trust Company and Adelaide Cannon Blair, trustees of the testamentary trust of David H. Blair, brought this action against the defendants, Adelaide Cannon Blair and John Fries Blair, surviving trustees of the *inter vivos trusts* recorded in the office of the Register of Deeds for Guilford County in Book 727, at page 56, and Book 1061, at page 330, and Adelaide Cannon Blair, Emma Blair, Ada Blair, Elva Blair, and David H. Blair, Jr., individually, asking for a declaratory judgment that the plaintiffs owned the one-seventh undivided interest of David H. Blair in the Abigail Blair tracts. The plaintiffs attacked the validity of the trust indenture of 21 September, 1932, on these grounds: (1) It was not delivered by David H. Blair; and (2) it was a deed of gift, which was invalidated by G.S. 47-26 for want of recordation within two years after making. They assailed the deed of 26 July, 1946, on the ground that it was executed "under a mistake of fact as to the legal effect of the trust indenture of the 21st of September, 1932, and for a grossly inadequate consideration."

All of the defendants answered, alleging expressly that the deeds in question are valid and praying that Adelaide Cannon Blair and John Fries Blair, surviving trustees, be declared the owners of the interest in controversy. The defendant, David H. Blair, Jr., the sole beneficiary of the trust created by the will of David H. Blair, specifically averred in his answer that he confirmed and ratified the action of the plaintiffs in executing the deed of 26 July, 1946.

Trial was had before Judge McSwain without a jury under G.S. 1-184 pursuant to the written consent of the parties filed with the Clerk. The plaintiffs offered in evidence the matters heretofore set out, and the court made these findings of fact therefrom: (1) That the trust indenture of 21 September, 1932, was executed and delivered by David H. Blair; and (2) that such indenture "was not a deed of gift, as alleged in the complaint, but the same was a trust deed or trust agreement, executed for a good and valuable consideration by all the parties named therein." The court supplemented its second finding by an additional specific finding that the trust indenture was "a contract between the parties to do three

things: First, hold the property inherited from Abigail Blair intact without being subject to partition or division by any of the grantors named in said indenture; second, to provide a home for the unmarried daughters of Abigail Blair; and, third, to enable David H. Blair, Jr., the only child of David H. Blair and Adelaide Cannon Blair, to receive eventually all of the property described in said trust agreement instead of the one-seventh undivided interest belonging to his father, David H. Blair, and the one-seventh undivided interest belonging to his mother, Adelaide Cannon Blair."

Upon these findings, the court entered judgment that the trust indenture of 21 September, 1932, and the deed of 26 July, 1946, "are legal, valid, and binding conveyances" and that the title to the property in litigation was vested in Adelaide Cannon Blair and John Fries Blair as surviving trustees. From this judgment, the plaintiffs appealed, assigning errors.

J. Allen Austin for plaintiffs, appellants.

W. H. Beckerdite for defendants, appellees.

ERVIN, J. When an action is tried by the court without a jury pursuant to the provisions of G.S. 1-184, the findings of fact of the trial judge are conclusive, and are not subject to review on appeal, in the absence of exceptions that they are not supported by evidence. *Best v. Garris,* 211 N. C. 305, 190 S. E. 221; *Buchanan v. Clark,* 164 N. C. 56, 80 S. E. 424. Although it is questionable whether such position can be sustained on the record in the case at bar, it is assumed here that the plaintiffs reserved appropriate exceptions to the findings of fact adverse to them on the ground that such findings were not supported by evidence at the trial. *Eley v. Railroad,* 165 N. C. 78, 80 S. E. 1064.

When thus construed, the record presents these inquiries concerning the trust indenture of 21 September, 1932:

1. Was there evidence at the trial to support the finding that David H. Blair, as grantor, delivered this instrument to the grantees?

2. Was there testimony at the trial to sustain the finding that David H. Blair, as grantor, executed this document for a valuable consideration?

In our opinion, both of these questions must be answered in the affirmative.

The trust indenture had been signed, sealed, acknowledged, probated, and recorded when it was offered in evidence. Hence, there was sufficient evidence to warrant the finding that this instrument was duly delivered by David H. Blair in his capacity as a grantor. This is true because the probate and registration of a deed raise a rebuttable presumption of delivery. *Bank v. Griffin,* 207 N. C. 265, 176 S. E. 555; *Gulley v. Smith,*

203 N. C. 274, 165 S. E. 710; *Best v. Utley,* 189 N. C. 356, 127 S. E. 337; *Faircloth v. Johnson,* 189 N. C. 429, 127 S. E. 346; *McMahan v. Hensley,* 178 N. C. 587, 101 S. E. 210; *Lee v. Parker,* 171 N. C. 144, 88 S. E. 217; *Smithwick v. Moore,* 145 N. C. 110, 58 S. E. 843; *Helms v. Austin,* 116 N. C. 751, 21 S. E. 556. As was said in *Wetherington v. Williams,* 134 N. C. 276, 46 S. E. 728: "The fact of registration is not conclusive as to either the execution or the probate of the deed. The *factum* of the instrument may be disputed after its registration, and the party who assails the deed may show, if he can, that it was not in fact delivered. But as long as the probate and registration stand unimpeached and unimpaired, they furnish sufficient *prima facie* evidence of the execution of the deed, which, of course, always includes delivery. He who would avoid this presumption, arising from registration, must do so by proof sufficient to rebut it or to repel its legal force and effect."

The presumption of delivery resulting from the registration of the trust indenture of 21 September, 1932, arose in this case notwithstanding the prior death of David H. Blair. *Linker v. Linker,* 167 N. C. 651, 83 S. E. 736; *Fortune v. Hunt,* 149 N. C. 358, 63 S. E. 82. It is familiar law that "where a deed has been registered, whether after or before the death of the grantor, it is presumed to have been delivered, and the burden shifts to the other side to rebut that presumption." *Rogers v. Jones,* 172 N. C. 156, 90 S. E. 117.

We are not inadvertent to the testimony indicating that the trust indenture was found among the papers of David H. Blair after his death. This evidence was not incompatible in any degree with the finding that the deed was delivered by David H. Blair during his lifetime. He reserved a life estate in the property covered by the deed. Moreover, he was one of the trustees who acquired legal title to the remainder in such property under the conveyance. In consequence, he was entitled to the possession of the deed and was interested in its preservation subsequent to its delivery as much as any other person on earth. *Ratione cessante cessat ipsa lex.* Both authority and reason declare that a presumption of nondelivery of a deed does not arise from the finding of it among the grantor's effects on his death when he reserved an interest in the property or was otherwise lawfully entitled to its possession after its delivery. *Cribbs v. Walker,* 74 Ark. 104, 85 S. W. 244; *Smith v. Adams,* 4 Tex. Civ. App. 5, 23 S. W. 49.

The court properly found from the face of the trust indenture itself that the conveyance of the one-seventh undivided interest of David H. Blair in the Abigail Blair tract was founded on a valuable consideration. This instrument was correctly construed in the supplemental finding of fact. In return for his interest, David H. Blair acquired some legal rights in the property to which he would not otherwise have been entitled.

Exum v. Lynch, 188 N. C. 392, 125 S. E. 15; *Railroad v. Ziegler Brothers,* 200 N. C. 396, 157 S. E. 57; *Grier v. Weldon,* 205 N. C. 575, 172 S. E. 200. Moreover, the beneficial interest accruing to his son, David H. Blair, Jr., was a sufficient consideration for the conveyance. *Institute v. Mebane,* 165 N. C. 644, 81 S. E. 1020.

The conclusions set out above compel an affirmance of the judgment declaring that Adelaide Cannon Blair and John Fries Blair, as surviving trustees, hold title to the property in dispute under the indenture of 21 September, 1932. This makes it unnecessary for us to express any opinion as to the validity of the deed of 26 July, 1946.

The judgment rendered in the Superior Court is

Affirmed.

JAMES A. PALMER, E. ALAN BISANER, P. N. DEVERE, KENNETH L. QUIGGINS AND HENRY B. DAY, COMPRISING THE NORTH CAROLINA STATE BOARD OF EXAMINERS IN OPTOMETRY, v. H. M. SMITH.

(Filed 15 December, 1948.)

1. Physicians and Surgeons and Allied Professions § 1—

Mere statutory declarations that certain acts constitute the practice of optometry is ineffectual when such acts do not constitute the practice of optometry within the statutory definition thereof.

2. Constitutional Law § 12—

Legislative declaration cannot convert a private business into a public one, and the police power cannot be extended to create a monopoly or special privilege when the restrictions have no real or substantial relation to the public health, safety or welfare.

3. Same: Physicians and Surgeons and Allied Professions § 1—

G.S. 90-115 proscribing a person not a licensed optometrist from replacing or duplicating an ophthalmic lens or replacing or duplicating the frame or mounting for such lens, is unconstitutional, since the acts proscribed do not constitute the practice of optometry as defined by G.S. 90-114, and the proscription has no reasonable relation to the public health, safety or welfare.

4. Constitutional Law § 10b—

The duty of the courts to declare a statute void when it contravenes the organic law is essential to orderly government under our constitutional system.

APPEAL by plaintiffs from *Harris, J.,* at February Term, 1948, of WAKE.

PALMER *v.* SMITH.

This is a civil action instituted in the Superior Court of Wake County, for the purpose of enjoining the defendant from the illegal practice of optometry in violation of the provisions of Chapter 90 of the General Statutes of North Carolina, relating to the practice of optometry.

The defendant was enjoined 17 October, 1947, until the further order of the court from engaging in the practice of optometry within the State of North Carolina, by employing any means for the measurement of the powers of vision and the adaptation of lenses for the aid thereof, and from duplicating or attempting to duplicate any lens for ophthalmic use without a written prescription from a person authorized under the laws of North Carolina to practice optometry or medicine.

When this cause came on for hearing, trial by jury was expressly waived by all parties, and it was agreed that the trial judge should hear the evidence, find the facts, draw his conclusions of law and enter judgment accordingly.

The court found as a fact that this action was instituted by plaintiffs under and by virtue of the provisions of Chapter 90 of the General Statutes of North Carolina, and that the defendant has heretofore endeavored to take the measurements of the powers of vision of certain individuals and has given directions and advice as to the fitness of spectacles, eyeglasses or lenses for the correction of vision of such individuals.

The court further found as a fact that the defendant has engaged in selling, furnishing, replacing or duplicating, or attempting to sell, replace or duplicate lenses, frames and/or mountings without a written prescription from a person authorized under the laws of the State of North Carolina to practice optometry or medicine, and that the defendant has not been issued a license to practice optometry in the State of North Carolina.

Upon these facts, the court being of the opinion that the defendant, in endeavoring to take the measurements of the powers of vision and prescribe spectacles, glasses or lenses for certain individuals has engaged in the practice of optometry as defined in Section 90-114 of the General Statutes of North Carolina and should be restrained from such practices in the future; and being of the further opinion that that portion of Section 90-115 of the General Statutes of North Carolina, which reads: "Within the meaning of this Article, a person shall be deemed as practicing optometry who does, or attempts to, sell, furnish, replace, or duplicate, a lens, frame, or mounting, or furnishes any kind of material or apparatus for ophthalmic use, without a written prescription from a person authorized under the laws of the State of North Carolina to practice optometry, or from a person authorized under the laws of North Carolina to practice medicine," is unconstitutional as being in contravention of the Fourteenth Amendment, Section 1, of the Constitution of the

United States, and as being in contravention of Article I, Sections 1, 17 and 31 of the Constitution of the State of North Carolina, and is, therefore, invalid and unenforceable; and entered judgment accordingly. The plaintiffs appeal and assign error.

Arch T. Allen, Drury B. Thompson, and Oscar G. Barker for plaintiffs.
Robert H. Dye and Bailey & Holding for defendant.

DENNY, J. The sole question for determination on this appeal is whether or not an optical mechanic is practicing optometry when he replaces or duplicates an ophthalmic lens, or replaces or duplicates the frame or mounting for such lens. No other mechanical work of the optician is prohibited by this section (G.S. 90-115), for the statute expressly provides: "The provisions of this section shall not prohibit persons or corporations from selling completely assembled spectacles, without advice or aid as to the selection thereof, as merchandise from permanently located or established places of business, nor shall it prohibit persons or corporations from making mechanical repairs to frames for spectacles; nor shall it prohibit any person, firm or corporation engaged in grinding lenses and filling prescriptions from replacing or duplicating lenses on original prescriptions issued by a duly licensed optometrist, and oculist."

The defendant does not challenge the power of the Legislature to regulate the practice of optometry as defined in Section 90-114 of the General Statutes of North Carolina, and therefore, he did not appeal from the judgment below, which restrained him from such practice.

It will be noted the State of North Carolina exercises no legislative or regulatory control over opticians, other than to require the payment of an annual privilege tax. The plaintiffs insist, however, that the duplication of an ophthalmic lens or the duplication or replacement of a frame or mounting for such lenses, constitutes the practice of optometry, and is not a mere mechanical operation or process which an optician has the right to perform.

G.S. 90-114 defines the practice of optometry as "the employment of any means, other than the use of drugs, medicine, or surgery, for the measurement of the powers of vision and the adaptation of lenses for the aid thereof." This definition is in substantial accord with those given in other jurisdictions. Words & Phrases, Per. Ed., Vol. 30, p. 31; *Martin v. Baldy,* 249 Pa. 253, 94 A. 1091; *Sage-Allen Co. v. Wheeler,* 119 Conn. 667, 179 A. 195, 98 A. L. R. 897; *McNaughton v. Johnson,* 242 U. S. 344, 61 L. Ed. 352. See Annotations 98 A. L. R. 905, for additional authorities.

"An 'optician' is not a licensed practitioner, but is one who makes eyeglasses and lenses and fills prescriptions of the oculist or optometrist, much in the same manner as the druggist carries out the direction or prescription of the physician. *Stern v. Flynn,* 278 N. Y. S. 598, 154 Misc. 609." Words & Phrases, Per. Ed., Vol. 29, p. 608.

The mere fact that a statute provides that a person shall be deemed as practicing optometry if he duplicates a lens or replaces or duplicates a frame or mounting, without a prescription, does not make it so, unless such duplication or replacement constitutes the practice of optometry within the statutory definition thereof. *S. v. Harris,* 216 N. C. 746, 6 S. E. (2) 854, 128 A. L. R. 658; *State v. McGrail,* 117 W. Va. 51, 183 S. E. 686; *State Ex Rel. Booth v. Beck Jewelry Enterprises,* 220 Ind. 276, 41 N. E. (2) 622, 141 A. L. R. 876. "Private business may not be regulated or converted into public business by legislative fiat." 11 Am. Jur., p. 1060, sec. 294. Moreover, the exercise of the police power will not be upheld where its use tends only to create a monopoly or special privilege and does not tend to preserve the public health, safety or welfare. *S. v. Lockey,* 198 N. C. 551, 152 S. E. 693; *Georgia State Board of Examiners in Optometry v. Friedmans' Jewelers, Inc.,* 183 Ga. 669, 189 S. E. 238; *People v. Griffith,* 280 Ill. 18, 117 N. E. 195; *Liggett Co. v. Baldridge,* 278 U. S. 105, 75 L. Ed. 204.

It is undisputed on the record that a qualified optician can take a whole or broken lens and by the use of a vertometer or lensometer, duplicate such lens with accuracy and exactness. The process of duplication is conceded to be a purely mechanical one. And according to the plaintiffs' evidence, only in about fifteen per cent of the cases do the prescriptions of optometrists or oculists contain any reference to the type or kind of frame or mounting that is to be used, or how the lenses are to be placed in the frame or mounting. Except where the patient has "a muscular unbalance," it seems the selection of the frame or mounting is left to the optician or the patient, and the manner in which the lens is set in the frame or mounting is left altogether to the optician. Several optometrists and oculists testified in the hearing below, that they always require a re-check of glasses prescribed for their patients to ascertain whether or not the optician filled the prescription accurately. However, it seems to be the more general practice, according to the record, for the optician to make the glasses according to the prescription, fit them to the wearer's face and deliver them to the patient, most of whom never return to the optometrist or the oculist for a re-check. The patient in such cases merely assumes the responsibility for error, if there be any, in the filling of the prescription. He does no more than this when he has a qualified optician to duplicate a lens or replace or duplicate a frame or mounting without a prescription.

Furthermore, it seems to be the usual practice in cases where a lens is broken, if the glasses had been satisfactory to the patient, and the patient seeks the advice of an optometrist or oculist, for the optometrist or oculist to take the broken lens and request the optician to duplicate it. Ordinarily no other instruction is given. The evidence further supports the view that there is no more likelihood of error in duplicating a lens or duplicating a frame or replacing one, than there is in filling an original prescription. Consequently, for all practical purposes, this case comes down to this: Shall an optician be permitted to duplicate an ophthalmic lens or place such lens in a new frame or mounting without a prescription or request from an optometrist duly authorized to practice optometry in North Carolina, or from a person authorized to practice medicine in this State?

We do not think the duplication of an ophthalmic lens or the duplication or replacement of a frame or mounting for such lenses, constitutes the practice of optometry as defined in G.S. 90-114. And what was said in *S. v. Harris, supra,* applies with equal force to the factual situation here. There the Court said: "Obedience to the Constitution on the part of the Legislature is no more necessary to orderly government than the exercise of the power of the Court in requiring it when the Legislature inadvertently exceeds its limitations. 'It has been frequently stated, in cases where the questions are presented for judicial review, that in order to sustain legislation under the police power, the courts must be able to see that its operation tends to some degree to prevent some offense or evil or to preserve public health, morals, safety, and welfare, and that if a statute discloses no such purpose, has no real or substantial relation to these objects, or is a palpable invasion of rights secured by fundamental law, it is the duty of the courts so to adjudge and thereby give effect to the Constitution.' 11 Am. Jur., p. 1087, sec. 306. In such a situation the duty of the Court is clear."

It must be conceded that the statute under consideration was intended to regulate the practice of optometry, and not the optical trade. And so long as the optician confines his work to the mere mechanical process of duplicating lenses, replacing or duplicating frames and mountings, "making mechanical repairs to frames for spectacles," filling prescriptions issued by a duly licensed optometrist or oculist, and does not in any manner undertake "the measurement of the powers of vision and the adaptation of lenses for the aid thereof," he is not practicing optometry.

The judgment of the court below will be upheld.

Affirmed.

STATE v. CHARLES WELLBORN.

(Filed 15 December, 1948.)

1. Conspiracy § 6—

The evidence tended to show that a gun fight between defendant and his companion on the one hand and a third person on the other was precipitated by defendant's companion, that defendant's companion had made repeated threats to kill such third person, and that defendant and his companion were seen together several times shortly before the affray. There was no evidence that defendant had any knowledge of the threats or of his companion's intent prior to the actual encounter. *Held:* The evidence is insufficient to resist defendant's motion to nonsuit the charge of conspiracy to commit a felonious assault.

2. Criminal Law § 34g: Assault § 12—

Where, in a prosecution for felonious assault, there is no sufficient evidence of a conspiracy between defendant and his companion, testimony of prior threats to kill such third person made by defendant's companion and evidence as to ill feeling between those two, is incompetent, and the admission of such evidence entitles defendant to a new trial on the charge.

DEFENDANT'S appeal from *Sink, J.*, August Term, 1948, CHEROKEE Superior Court.

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

T. M. Jenkins for defendant, appellant.

SEAWELL, J. The defendant Wellborn was charged in a bill of indictment containing two counts (a) with conspiring with one Guy Cain, now deceased, to feloniously assault, beat and wound one Hubert Wells with a deadly weapon and inflict on him serious injury and (b), (again with the deceased Cain joined in the indictment), with felonious assault on the said Wells, and beating and wounding him with a deadly weapon, to wit: a pistol, with intent to kill, and inflicting upon him serious injury not resulting in death.

On the defendant's plea of not guilty the trial proceeded.

The evidence discloses that the defendant Wellborn and Guy Cain had been seen together at various times on the night of the gun fight in which Wells was wounded and Guy Cain killed, and Wellborn himself seriously wounded; and that about 12 o'clock at night he and Guy Cain in a pickup truck started out from a public parking place near the police station and directly behind a car occupied by Wells and two girl friends as it passed them, and followed it for about a block when Cain demanded that the Wells car pull over. When Wells stopped the car both Cain and Wellborn got out of the truck and Cain approached Wells' car. As he approached

Wells got out of his car with his gun in hand and warned Cain to come no further. One of the girls in the car testifying for the State said that Wells shot first, and immediately about six shots followed in rapid succession. At the end of the shooting Wells was lying upon the ground seriously wounded, Cain was standing near with two pistols in his hands, and Wellborn was leaning against the pickup truck seriously wounded and apparently in poor condition. Wells survived his wounds and was released from the hospital in about two weeks but some months later was killed in an airplane wreck. Cain died of his wounds; Wellborn alone survives.

The evidence relied on by the State to support the charge of conspiracy is confined to the circumstance of Wellborn being seen with Cain a few times that night and that he accompanied Cain in the pickup truck when following the Wells car to the place of the fight. The evidence discussed *infra* leads to the conclusion that in proving the conspiracy the State relied upon the contacts between Wellborn and Cain during the incubation period in which Cain was nursing his anger and planning the killing of Wells, and the incidents noted below.

But there is no evidence that Cain had ever communicated to Wellborn his purpose or that prior to the actual fatal encounter Wellborn had any knowledge of the intent. Whether the circumstances surrounding the immediate occurrence amounted to evidence of a concert of action is another matter. In this situation the State undertook to prove the guilt of defendant of the conspiracy by introducing evidence of the declarations of Guy Cain and his demonstrations of anger and threats, apparently on the theory that they were the declarations and conduct of a co-conspirator made and done in the furtherance of the conspiracy. The character and significance of this evidence and its irrelevance to the charge against the defendant is illustrated by the following excerpts:

Neil Hughes had testified that on the night Wells was shot he was working at the Murphy Cafe on the opposite side of the street from Hubert Wells' place of business. He saw Guy Cain and Hubert Wells in the cafe at 9:30 or 10 o'clock that night. Harold Wells and Hubert Wells were sitting in a booth drinking coffee when Guy Cain came in. Witness stated that Cain said something to him. At this point the following occurred:

"Q. Now, going back to Mr. Cain, you say he called you over to the booth; what, if anything, did Mr. Cain say about Hubert Wells?"

Defendant objected; overruled, and exception.

"Q. Go ahead. What did Mr. Cain tell you?"

Objection, overruled. Exception.

"A. He asked me if I saw Hubert Wells, and I said he was sitting up there with Harold and he said, 'I am going to kill that S. O. B.' and I

said, 'You don't mean it, you are just joking;' and he got a plate of food and went out the front door and I didn't see him any more."

By the court: "To all the foregoing the defendant in apt time excepts and moves to strike. Motion overruled and defendant excepts."

"I saw Mr. Cain have a conversation with Miss Davis where you just enter into the kitchen from out of the cafe. He had some food on a plate in his hand."

"Q. Did you observe Mr. Cain's demeanor, whether he appeared to be normal? Describe his appearance."

Defendant objects. Overruled. Exception.

"A. If ever I saw anybody mad he was mad. He had hold of her arm and had a plate of food in his hand and went out the back door."

Defendant objected. Overruled and exception.

"Q. Did you that night, or shortly after that, communicate to Hubert Wells what Mr. Cain said he was going to do?"

Objection by defendant.

By the court: "Now Wells is dead."

By Mr. Grey: "I'm not asking what Wells said."

By the court: Objection. Overruled and exception. Over objection and exception of defendant the witness was permitted to testify as follows:

"I closed at 12:00 and didn't know when Miss Davis left or how she left the cafe. She left just a little before we checked up. I went out the front door when I closed and that is when I saw Mr. Cain with Mr. Wells. Clara Daughtery was working there that night. I do not know if anyone left with Myrtle Davis or whether they left together. When I came out of the cafe I said to Cain, 'Let's go home.' Mr. Wellborn didn't say anything. They were just sitting there."

Harold Wells testified that he was in the cafe on the night of the shooting. Over objection and exception of the defendant he was permitted to say that he told Hubert Wells what Cain had said, repeating it: "You see that S. O. B. coming in the door? I am going to kill him tonight."

Myrtle Davis testified for the State that on the night of the shooting she was working at the cafe and had been working there for about two or three years; that she was "keeping company" with Hubert Wells. She knew Charles Wellborn and had known Cain for about a year. Was with Wells when he got shot. On that night she saw Cain in the cafe.

Over objection and exception by the defendant she was permitted to testify that Cain said to her, "If you go with that S. O. B. tonight I will kill him before the night is over," and that she told Wells about it. And further, that Cain said he would be waiting.

The witness stated that later she was in the car with Wells and Miss Daughtery, and driving back down town. Wellborn and Cain were parked near the drug store. "We started to pull in and they pulled in

behind us. We went on down the street to the Henry House and Cain said for him to pull over, and he pulled over to the sidewalk."

The witness testified that Cain got out of the truck and came toward the Wells car. Wells got out of the car with his gun in hand, telling Cain not to come any nearer, that he didn't want to have any trouble. "Cain came over to the door and one shot was fired. That was when I thought he shot Cain. Wellborn and Cain came out of the truck on the same side."

Clara Daughtery, witness for the State, was permitted to testify over the objection and exception of the defendant about what Guy Cain told her in regard to killing Wells. The testimony is of the same character as that of the witness Davis and the exceptions are numerous. Repetition is unnecessary.

At the conclusion of the State's evidence the defendant demurred to the evidence as to each count in the indictment and as to the indictment as a whole, and made a motion for judgment as of nonsuit. The motions were declined and exceptions noted.

The defendant testified that he knew nothing of any ill feeling between Cain and Wells. That on the night in question he had umpired or refereed second base at a baseball game, getting away from the game late in the night. That when he reached town he ran up with Guy Cain who asked him to carry him back to the park so that he might get his own car which he had left there, and he did so. They drove back into town and he and Guy Cain were sitting in the same car at a public parking place when a car containing Wells and the girls passed and Cain said that he wanted to speak to Wells, and not knowing that anything was wrong between them he drove the car in the direction in which the Wells car was going until Cain demanded that the latter car turn in; and that when Cain got out of the car he tried to hold him back but could not do so and was pulled out of the car with him. That he was shot as Cain approached the Wells car and knew little more about it because of the seriousness of his wounds; knew little else about what had happened. He denied participating in the fight at all.

The State, however, in rebuttal, put on Harold Wells, a cousin of Hubert Wells, who stated that shortly after the occurrence he visited Wellborn in the hospital and asked him why he had shot Hubert. The reply as testified by the witness was that Hubert shot Cain and he was trying to protect his buddy, shot him to prevent him from killing Cain "or something like that."

At the end of all the evidence the defendant demurred again to the evidence, as to each count, and moved for judgment of nonsuit. The motions were denied and defendant excepted.

The case was submitted to the jury who returned a verdict of guilty on both counts. The defendant moved to set the verdict aside for errors of law, which motion was refused, and he excepted. To the ensuing judgment on the verdict, he excepted and appealed.

Clearly the evidence was legally insufficient to support the verdict of guilty on the first count charging conspiracy, and the demurrer thereto should have been sustained.

On the second count the admission of evidence of Cain's declarations and demeanor not in the presence of the defendant constitutes reversible error, entitling him to a new trial thereon, and it is so ordered.

On the first count, Reversed.

On the second count, New trial.

G. BADGER McLEOD AND WIFE, LILLIE C. McLEOD, IN BEHALF OF THEMSELVES AND OTHER CITIZENS AND TAXPAYERS SIMILARLY SITUATED, v. TOWN OF WRIGHTSVILLE BEACH, NORTH CAROLINA.

(Filed 15 December, 1948.)

1. Appeal and Error § 40c—

While findings of fact in injunctive proceedings are reviewable on appeal, nevertheless such findings will not be disturbed when they are supported by evidence and appellant fails to show cause for reversal.

2. Municipal Corporations § 25b—

The evidence in this case *is held* to support the court's finding that the land in question does not constitute a portion of a street of defendant municipality.

3. Municipal Corporations § 25a: Injunctions § 4d—

Persons having no title or interest in certain property may not enjoin a municipality from using such property for a recognized municipal purpose on the ground that such use would constitute a nuisance, since the municipality has the power of eminent domain and relief for any depreciation in value of plaintiff's contiguous property would be by action for damages and not injunction.

PLAINTIFFS' appeal from *Burney, J.*, July 15, 1948, at Chambers in Wilmington, NEW HANOVER Superior Court.

The plaintiffs brought this action for injunction permanently restraining the defendant from proceeding further in the construction of a pumping station intended to be connected with the city water system, and a mandatory decree requiring the removal of the uncompleted structure.

The plaintiff complains that the structure it is intended to complete constitutes a nuisance in that it is located in the public street adjacent to plaintiffs' dwelling, which is nearing completion, and interferes with ingress and egress to and from the premises; and will, if completed, obstruct the plaintiffs' view from that side of the house, important because of the character of the surroundings and the use to which the property is put as a pleasure resort; and that if put into operation the noise of the continual pumping will interfere with the comfort and welfare of plaintiffs in the enjoyment of their property. All this the defendant denies.

The plaintiffs, at the time of institution of the action, obtained a temporary restraining order and order to show cause, returnable before Judge Burney, who heard the matter at Chambers in Wilmington, July 15, 1948.

The decision of the appeal deals principally with the question of obstructing the public streets of the city, and incidental relief demanded by the plaintiffs regarding the alleged nuisance, and it is not thought necessary, nor is it practicable, to set out in detail many of the assignments of error brought forward, such as objections to the admission of evidence, which have, nevertheless, been duly considered. Evidence pertinent to the inquiry is summarized:

At the hearing the pleadings on both sides were introduced as affidavits in the cause and numerous other affidavits were presented together with explanatory maps and photographs.

It may be inferred from the evidence that plaintiffs own the property on which they are now building, by *mesne* conveyances of successive holders from 1910. They purchased in 1946. The lot so purchased appears upon the map of Wrightsville Beach Extension duly recorded in New Hanover County, showing its location as bounded on the East by Lumina Avenue and on the South by Raleigh Street. On the south it runs with Raleigh Street approximately 100 feet toward Banks Channel, otherwise known as The Sound. In that place Banks Channel, looking to the north, veers eastward, making an angular area beyond the west boundary of the property, including what is designated on the map as the "bluff," or bank, running down into a declivity increasing in degree to the water line. There has been built around plaintiffs' property, on the property line, a retaining wall of cinder blocks, along the Raleigh Street side and partially on Lumina Avenue and along the sound side. The physical situation at the *situs* of the controversy as shown by the maps and description of witnesses is as follows:

The area known as Raleigh Street between Lumina Avenue and the sound is unpaved. Near the western line of plaintiffs' property and at the point where the bank begins to incline toward the water of the sound, the city, about 12 years ago put up a barrier of posts 12″ in diameter and

30″ above the ground, closing off the bank leading to the sound as a dangerous area, and to prevent the use of that portion of the area by the public as a passageway or street. This portion of the area known as Raleigh Street is described as a "dead end" and incapable of use as a street because of the steep declivity of the bank, the contour and topography of the ground; and the evidence of defendant tends to show that it had never been used as such and could not be so used.

The structure of which the plaintiffs complain is beyond this barrier toward the sound; and the contour map sent up with the record shows a substantial incline in the bank, beginning before the structure is reached and continuing with greater declivity beyond it. The structure as far as completed shows a concrete slab over the well approximately 6′ square, about half way between the north and south boundaries of Raleigh Street projected westerly, but somewhat nearer the northern boundary. Between the structure and north side there is 19.23′ and between the structure and the south side it is 24.85′ which with the 5.92′ width of the slab, makes up the 50′. It is a base for the pump house which is intended to be about 7′ high, including the cap put on to prevent noises. From this base it is intended to connect by short underground pipe with pipe already installed in the area as a part of the water system. The western boundary of plaintiffs' property is east of this structure and the concrete slab foundation is some 10′ beyond the aforementioned barrier, toward the sound.

For the plaintiffs Mrs. Bullock, in her affidavit, states that she owns a home on Raleigh Street and has known it as it extends from the Atlantic Ocean to the Sound for the last eight years. That about the year 1940 her husband built a pier at the western terminus of Raleigh Street and that the street has been continuously used as a street by the public and property owners adjacent thereto, and owners of the pier. Further, that employees of the city have in the past put gravel and other substances on the surface so that the street from Lumina Avenue westward to the Sound could be used and that it has been used by automobiles and other vehicles as well as pedestrians.

The defendant introduced further evidence tending to show that a condition of extreme emergency existed in the city respecting its water supply, which was wholly inadequate. That the city had employed competent engineers who had made a thorough survey with a view to the location of a well site giving access to water sufficiently free from salt, or salinity. That in this survey they tested water from other borings and found it to be too saline for use; and that the location chosen was the only available site where pure water could be obtained.

Affidavits offered by defendant tended to show that the well was placed approximately 25′ from the high water mark of the sound and in an area that had never been used as a public street by the Town of Wrightsville

and that the area west of Lumina Avenue comes to a dead end or "drop-off" beyond which it could not be used as a street. The evidence tended to show that all the area sometimes called Raleigh Street west of Lumina Avenue adjoining the property of the plaintiffs which could be used at all is still open to the plaintiffs and has not in any manner been cut off, and that they have adequate access thereto. Evidence with illustrating photographs was offered tending to show that plaintiffs had the area between barrier posts mentioned and Lumina Avenue offering free access to their premises.

Considering this evidence and more to like effect which may be regarded as cumulative on both sides and needs no further detailed notice, Judge Burney found *inter alia* that the area called Raleigh Street west of Lumina Avenue had never been accepted as a public street by the City of Wrightsville Beach, had not been laid out, graded, prepared or improved by the City nor generally accepted as such by the public. That there is no specific west end or terminus to the street shown; and that the topography and drop or incline of the bank made it necessary for the town to erect barriers to cut off that area from any use by the public as a street; that the well complained of is located approximately 10′ west of the barrier, and with the concrete structure complained of is wholly west of the said barriers; and that the well and its foundations and the structure intended to house the pumps and motor do not, and will not, interfere in any manner with the use of plaintiffs' property or access thereto; or any portion of the area called Raleigh Street which could be used as a street by the public or the plaintiffs. To these findings plaintiffs excepted.

On the facts so found the trial court concluded that plaintiffs were not entitled to the relief demanded and entered judgment declining the prayer for injunction and dismissed the action. Plaintiffs excepted and appealed.

Varser, McIntyre & Henry for plaintiffs, appellants.

Poisson, Campbell & Marshall (By: Wm. B. Campbell) and Marsden Bellamy for defendant, appellee.

Seawell, J. Realizing that the crux of the present controversy lies in the question whether the City of Wrightsville has accepted or adopted the area in which the well and pump house is located as a public street, either through appropriate resolution of its governing body or acts from which such adoption might be inferred, we have endeavored as far as practicable to confine the foregoing summary of the proceedings below, and particularly the evidence, to the immediate issues. We do not consider as of controlling importance many of the objections taken on the

trial to the admission of evidence and do not discuss them in detail. They have been, however, carefully considered.

While the action is captioned as an action in behalf of the public, there is no challenge to the jurisdiction of the trial court to hear the controversy, make findings of fact and conclusions of law and enter judgment thereupon.

We do not find it necessary in this discussion to balance, item by item, the findings of fact with supporting evidence, because the issue is so narrow the relevancy is readily seen. And while it has been held that the appellate court is not bound by the findings of fact by the trial judge in granting or withholding an injunction, (*Mullen v. Louisburg,* 225 N. C. 53, 33 S. E. (2) 484; *Smith v. Bank,* 223 N. C. 249, 251, 25 S. E. (2) 859), we are at a loss to find any substantial reason why they should be disturbed, and are impelled to hold that the conclusions of law necessarily follow as a correct application of legal principles.

From a legal point of view, as testing the validity and propriety of the instant proceeding, it seems clear to us that failing to establish their contention that the offending structure is within the public street, plaintiffs have presented no ground for injunctive interference with the city's project.

The land upon which the alleged nuisance is located does not belong to the plaintiffs nor was it, so far as the record shows, owned by their predecessors in title. The allegations of nuisance, therefore, take on a new angle of incidence. There remains but the question raised by the plaintiffs as to the obstruction of view or outlook, and expected discomfort of noise; but we see no obstruction of a public thoroughfare. Whether upon similar allegations and proof the plaintiffs would have a legal standing in court against a private owner of the adjacent property for such a use of it, we need not inquire. The plaintiffs are not suing a private person, but a municipality which has the power of eminent domain; and if they have suffered any loss or impairment of their property by reason of actionable nuisance their remedy is not by injunction.

The judgment of the court below is

Affirmed.

J. K. MASON, JR., L. I. WYLIE, SR., MANLEY W. WELLMAN, JAMES W. SMITH, W. K. CARPENTER, WALTER ALLPERT, N. L. VON BOSKERCK, CARL O. COMBS, W. D. SHANNON, E. H. MILLS, MRS. HENRY ADDOR, I. G. WYLIE, A. G. WALLACE, E. J. AUSTIN, AND 375 CITIZENS AND TAXPAYERS OF ABERDEEN SCHOOL DISTRICT NO. 7, TOO NUMEROUS HERE TO SET FORTH AND ALL OTHER TAXPAYERS OF MOORE COUNTY, NORTH CAROLINA, WHO CARE TO MAKE THEMSELVES PARTIES PLAINTIFF, v. MOORE COUNTY BOARD OF COMMISSIONERS, G. M. CAMERON, CHAIRMAN, MOORE COUNTY BOARD OF EDUCATION, F. D. FERRELL, CHAIRMAN, MOORE COUNTY BOARD OF ELECTIONS, S. H. RIDDLE, CHAIRMAN.

(Filed 15 December, 1948.)

1. Appeal and Error § 9—

Appeal by the party seeking review is necessary to give the Supreme Court jurisdiction, and this fact must appear by appeal entry of record, G.S. 1-279, G.S. 1-280, and in the absence of appeal entry of record the purported appeal must be dismissed.

2. Appeal and Error § 21½—

Where the record fails to show a jurisdictional fact, the Supreme Court is without power to correct the record, since it can have no jurisdiction of the cause.

3. Same—

Counsel may not correct the record proper by stipulation.

4. Appeal and Error § 22—

The Supreme Court is bound by the record as certified.

5. Taxation § 3—

The vote on the question of issuance of bonds for a necessary expense is not against the registration, and a favorable vote of the majority of those voting in the election is sufficient to validate the bond resolution and authorize the issuance and sale of the proposed bonds. N. C. Constitution, Art. V, sec. 4. G.S. 153-92.

CIVIL ACTION, heard by *Phillips, J.*, at Chambers in Rockingham, N. C., on the return to the notice to show cause why the order theretofore issued, restraining defendants from certifying the vote and the results of a school building bond election, should not be made permanent.

The defendants authorized the issuance of county bonds in the aggregate sum of $375,000 to finance the construction of a new school building in Aberdeen School District No. 7 in Moore County. As the county had not reduced its bonded indebtedness during the preceding fiscal year, they ordered that the question of issuance of said bonds and the levy of a tax sufficient to pay the same be submitted to the qualified electors of the county and to that end called a special election. Thereupon, plaintiffs

instituted this action and upon their application, Williams, J., issued a temporary restraining order returnable before Phillips, J. This order was modified by Armstrong, J., so as to permit the holding of the election but prohibiting the certification of the results pending final hearing. The election was held. There were 3,042 votes cast, of which 1,558—a majority of 74—were in favor of the issuance of the bonds. There are 12,224 registered voters in the county.

When the cause came on for hearing before Phillips, J., on the notice to show cause why the temporary restraining order should not be made permanent, he found the facts fully and upon the facts found, dissolved the restraining order theretofore issued and adjudged that "when and if said bonds are hereafter sold in the manner prescribed by law, they will constitute valid and legal indebtedness against the County of Moore."

Appeal entries appear at the foot of the judgment as follows:

"To the signing of the foregoing order, the defendants in apt time except and in open court give notice of appeal to the Supreme Court. Further notice waived. By consent the plaintiffs allowed 30 days in which to make up and serve case on appeal to Supreme Court and defendants 30 days thereafter to serve countercase or file exceptions. Appeal bond fixed in the sum of $200.00."

It is not made to appear that plaintiffs excepted to the judgment or appealed or gave notice of appeal either in open court or within the time prescribed by statute.

H. F. Seawell, Jr., for plaintiff appellants.

Spence & Boyette for defendant appellees.

BARNHILL, J. The defendants have not perfected the appeal the record shows they noted in the court below. Indeed, they are not the parties aggrieved. The cause is brought here by plaintiffs. But the record fails to disclose the jurisdictional facts necessary to vest us with authority to entertain the appeal.

That the entries of appeal are not those the parties intended to make would seem to be apparent. To guard against the possibility there may have been an error in transcribing the record, the Clerk of this Court communicated with the Clerk of the Superior Court of Moore County for the purpose of having him check the record here against the original. He, in response, filed in this Court the original judgment together with the accompanying appeal entries from which it appears that the record below is as certified.

Thus it does not appear of record that plaintiffs excepted to the judgment entered, or appealed therefrom, or gave any notice of appeal. This

is a fatal defect, jurisdictional in nature, which precludes us from considering the appeal on its merits.

A party seeking the review of a judgment of the Superior Court must first appeal therefrom, G.S. 1-279, and must cause his appeal to be entered on the judgment docket "and notice thereof to be given to the adverse party unless the record shows an appeal taken and prayed at the trial . . ." G.S. 1-280. These entries and the subsequent docketing of the record on appeal here is what vests this Court with jurisdiction and "puts it in efficient relation and connection with the court below . . ." *Walton v. McKesson,* 101 N. C. 428. Without them, this Court has no jurisdiction and is without authority to consider the questions attempted to be presented. Instead, the purported appeal must be dismissed. *Moore v. Vanderburg,* 90 N. C. 10; *Spence v. Tapscott,* 92 N. C. 576; *McCoy v. Lassiter,* 94 N. C. 131; *Brooks v. Austin,* 94 N. C. 222; *Manufacturing Co. v. Simmons,* 97 N. C. 89; *Walton v. McKesson, supra; Howell v. Jones,* 109 N. C. 102; *R. R. v. Brunswick County,* 198 N. C. 549, 152 S. E. 627.

"There are no entries, however, showing any exception by defendant, or any notice of appeal to the plaintiff, either in open court or within the time prescribed by statute. C.S. 641, C.S. 642. The appeal docketed in this Court by the defendant must therefore be dismissed. *Corp. Comm. v. R. R.,* 185 N. C. 435, 117 S. E. 563; *Howell v. Jones,* 109 N. C. 102, 13 S. E. 889. The record filed in this Court must show at least that an appeal was taken from the judgment. Otherwise this Court acquires no jurisdiction of the action. Const. of N. C., Art. IV, sec. 8." *R. R. v. Brunswick County, supra.*

"It is not sufficient that the appellant intended to appeal, as perhaps he did, but it must appear of record that he did in fact appeal. This is essential to make the appeal effective and put this Court in relation with the Superior Court." *Manufacturing Co. v. Simmons, supra.*

Since the absence of any appeal entry by plaintiffs was called to the attention of the Clerk of the Superior Court of Moore County, counsel have filed in this Court a stipulation that plaintiffs did appeal, and they now consent, in so far as they are authorized so to do, that the record shall be amended to so show. This is not sufficient to remedy the jurisdictional defect in the record.

Even if we are vested with authority in proper instances to correct the records of the Superior Court, we could enter no valid order to that end until we had first acquired jurisdiction. Nor may counsel correct the record proper by stipulation. The remedy is by motion in the cause in the Superior Court. *Land Bank v. Cherry,* 227 N. C. 105, 40 S. E. (2) 799, and cases cited; *Ragan v. Ragan,* 212 N. C. 753, 194 S. E. 458, and cases cited.

This Court is bound by the record as certified by the Clerk of the Superior Court. If it fails to disclose the necessary jurisdictional facts we have no authority to do more than dismiss the appeal. *S. v. Robinson, post,* 647.

We may note that the plaintiffs suffer no substantial harm by reason of this disposition of the attempted appeal. The proceeding in respect to the authorization of the bonds, the calling of the election, and the holding thereof were in all respects regular and fully complied with the statutory requirements. The judge below so found and the record supports the findings.

When the proposed bonds are for a necessary expense and the question whether they shall be issued is submitted to the electors of the governmental unit as required by N. C. Const., Art. V, sec. 4, the vote is not against the registration. The favorable vote of a majority of those voting in the election is sufficient to validate the bond resolution and authorize the issuance and sale of the proposed bonds. ". . . the proposed indebtedness must be approved by a majority of those who shall vote thereon." N. C. Const., Art. V, sec. 4; G.S. 153-92; *Hallyburton v. Board of Education,* 213 N. C. 9, 195 S. E. 21; *Gill v. Charlotte,* 213 N. C. 160, 195 S. E. 368; *Sessions v. Columbus County,* 214 N. C. 634, 200 S. E. 418; *Twining v. Wilmington,* 214 N. C. 655, 200 S. E. 416; *Coe v. Surry County,* 226 N. C. 125, 36 S. E. (2) 910.

Appeal dismissed.

E. C. PHIPPS v. W. W. VANNOY AND WIFE, MRS. W. W. VANNOY.

(Filed 15 December, 1948.)

1. Clerks of Court § 7—

In a proceeding by the father to obtain custody of his child from the parents of his deceased wife, his contention that defendants' motion to dismiss the proceeding in the Superior Court for want of jurisdiction should be denied since there is no controversy respecting the custody of the child such as would confer jurisdiction upon the juvenile court is untenable, since the question is one of jurisdiction and not the right of petitioner to the custody, and since the contention is perforce made in the midst of a controversy.

2. Habeas Corpus § 3—

Jurisdiction to determine the custody of a minor child in *habeas corpus* proceedings lies only as between parents living in a state of separation without being divorced, and such jurisdiction is ousted immediately upon the filing of the complaint in an action for divorce between the parties. G.S. 17-39.

3. Divorce § 17—

Immediately upon the institution of an action for divorce the jurisdiction to determine the custody of minor children of the parties is vested in the Superior Court in which the divorce action is pending, and such action is pending for this purpose until the death of one of the parties. G.S. 50-13.

4. Same—

Where decree for divorce is entered outside this State, either parent may have the question of custody of the children of the marriage determined as between them in a special proceeding in the Superior Court. G.S. 50-13.

5. Clerks of Court § 7—

The juvenile court has exclusive original jurisdiction to determine the custody of an infant under sixteen years of age, G.S. 110-21 (3), in all cases except those in which the Superior Court is given jurisdiction by G.S. 17-39 or by G.S. 50-13.

6. Habeas Corpus § 3: Clerks of Court § 7—

Petitioner's wife was awarded the custody of their child in the action between them for divorce. After her death petitioner instituted *habeas corpus* proceedings against her parents to obtain the custody of the child. *Held:* The juvenile court has exclusive jurisdiction of the controversy, and the dismissal of the *habeas corpus* proceedings by the Superior Court on the ground of want of jurisdiction is affirmed. G.S. 110-21 (3).

APPEAL by petitioner from *Clement, J.*, August Term, 1948, WILKES. Affirmed.

Proceeding by writ of *habeas corpus* to determine the custody of an infant.

Freda Mae Phipps is an infant nine years of age. Her mother is dead and her father resides in Buncombe County. Prior to her death, the mother had custody of the child and it lived in the home of its maternal grandparents. After the mother's death, the child continued to reside with said grandparents, and the petitioner, the father, contributed to its support until the institution of this proceeding.

On 12 June 1948, Nettles, J., on application of petitioner in Buncombe County, issued a writ of *habeas corpus* directed to respondents to determine the controversy respecting the custody of said child of petitioner. At the hearing, it being made to appear that at the January Term, 1946, of Wilkes County, in a divorce action there pending, the custody of the child was awarded to the mother, Nettles, J., transferred the proceeding to Wilkes County to be heard as a motion in the cause in the divorce action.

When the cause came on to be heard before Clement, J., in Wilkes County, he, on motion of respondents, dismissed the writ for that "an action of this kind will not lie for the reason that the Juvenile Court has

original exclusive jurisdiction in this case." Petitioner excepted and appealed.

Robert M. Gambill and Sam M. Cathey for petitioner appellant.

J. T. Pritchett and Trivette, Holshouser & Mitchell for respondent appellees.

BARNHILL, J. The petitioner stressfully contends that the father, being a fit and suitable person, has sole right to the custody of his child "as a rule of law," and that therefore a controversy respecting the child's custody such as would confer jurisdiction upon the juvenile court cannot arise in the absence of proof of abandonment or other special fact not here appearing.

This position cannot be sustained. The right of petitioner to the custody of his child is not at issue on this appeal. The sole question is one of procedure which, on this record, is jurisdictional. Furthermore, the contention is made in the middle of a controversy in respect to the custody of said infant. The cause of petitioner may be just and the contention of respondents may be unfounded and unwarranted—nonetheless, there is a controversy. Otherwise there would be no need to seek the aid of the courts.

We have four separate statutory provisions respecting the manner of determining the right to the custody of an infant when custody is the only question at issue. G.S. 17-39, G.S. 50-13, and G.S. 110-21 (3). Any apparent conflict or inconsistency in the provisions of these statutes has been reconciled and harmonized in former decisions of this Court.

The provisions of the first two, G.S. 17-39 and G.S. 50-13, may be invoked only in cases where the custody of a child is the subject of controversy between its parents.

When the parents are living in a state of separation without being divorced a controversy between them over the custody of a child born of the marriage may be adjudicated under a writ of *habeas corpus.* G.S. 17-39; *In re Blake,* 184 N. C. 278, 114 S. E. 294; *McEachern v. McEachern,* 210 N. C. 98, 185 S. E. 684. This writ is an extraordinary peremptory criminal process not ordinarily available in a civil proceeding. It is not to be used "as a claim and delivery of the person," *In re Parker,* 144 N. C. 170, *In re Young,* 222 N. C. 708, 24 S. E. (2) 539, and "it is not available as between other parties, nor as between divorced parents." *In re Young, supra; In re Parker, supra; In re Gibson,* 222 N. C. 350, 23 S. E. (2) 50; *In re Ogden,* 211 N. C. 100, 189 S. E. 119; *In re Albertson,* 205 N. C. 742, 172 S. E. 411; *McEachern v. McEachern, supra.* It is not to be used except when the undivorced parents of the child are living in a state of separation. While there was some departure

from this rule prior to the enactment of the Juvenile Court Act (Chap. 97, P. L. 1919, now Art. 2, Chap. 110, General Statutes), *Latham v. Ellis,* 116 N. C. 30; *In re Fain,* 172 N. C. 790, 90 S. E. 928, this Court has been careful to limit its use to this one purpose since the enactment of the latter statute providing a ready and adequate remedy in other cases.

So soon as the "state of separation" between husband and wife resolves itself into, brings about, or is followed by an action for divorce in which a complaint has been filed, the jurisdiction of the court acquired under a writ of *habeas corpus* as provided by G.S. 17-39 is ousted and authority to provide for the custody of the children of the marriage vests in the court in which the divorce proceeding is pending. *Robbins v. Robbins, ante,* 430; *In re Blake, supra; McEachern v. McEachern, supra; In re Albertson, supra; Tyner v. Tyner,* 206 N. C. 776, 175 S. E. 144; *Story v. Story,* 221 N. C. 114, 19 S. E. (2) 136. Jurisdiction rests in this court so long as the action is pending and it is pending for this purpose until the death of one of the parties.

When, however, the parents were divorced outside this State, either parent may have the question of custody as between them determined in a special proceeding in the Superior Court. G.S. 50-13.

In all other instances in which the custody of an infant less than sixteen years of age is the subject of the controversy, the juvenile branch of the Superior Court of the county where the child resides or is to be found has exclusive original jurisdiction. G.S. 110-21 (3); *In re Thompson,* 228 N. C. 74. That is to say, the juvenile branch of the Superior Court has exclusive original jurisdiction in all cases wherein the custody of an infant under sixteen years of age is the subject of the controversy except (1) in cases between undivorced parents living in a state of separation, G.S. 17-39, or (2) where there is an action for divorce, in which a complaint has been filed, pending in this State, G.S. 50-13, or (3) where the parents have been divorced by decree of a court of a State other than North Carolina, G.S. 50-13.

It is to be noted that the exceptions include only cases in which the controversy is between the parents of the infant. In such cases the family relations are involved and each party has some natural as well as legal claim to the child. The child itself is under the protective custody of the court which exercises its sound discretion in providing for its welfare. For these reasons, perhaps, the Legislature, in adopting General Statutes, Chap. 110, Art. 2, saw fit to leave G.S. 17-39 and G.S. 50-13 unimpaired so that the authority to exercise this discretion would remain in the Superior Court judge rather than be vested in an inferior judicial official. In any event, we have so construed the statutes.

It follows that the court below correctly concluded that it was without jurisdiction to hear the matter either as upon a writ of *habeas corpus* or as a motion in the divorce action theretofore pending in Wilkes County.

The cases cited and relied on by petitioner are not in conflict with the conclusion here reached. In the *TenHoopen case,* 202 N. C. 223, 162 S. E. 619, the parents were living in a state of separation. While the writ, issued on the petition of the father, was directed to the maternal grandparents of the child, it was made to appear that the mother had possession of the child and the grandparents only had temporary custody as agents of the mother. Hence, in reality it was a contest between the parents living in a state of separation. So the Court held. In the *Shelton case,* 203 N. C. 75, 164 S. E. 332, the custody of an illegitimate child was at issue. The case was decided shortly after the adoption of the Juvenile Court Act and the question of jurisdiction was not mooted. But this Court, in the factually similar *McGraw case,* 228 N. C. 46, held that a writ of *habeas corpus* is not the proper medium for settling a controversy over the custody of a child as between its putative father and natural mother. *In re Hamilton,* 182 N. C. 44, 108 S. E. 385, is *contra* the contention of the petitioner.

The judgment entered in the court below was in accord with the decisions of this Court and is

Affirmed.

ROBESON COUNTY DRAINAGE DISTRICT NO. 4 AND THE BOARD OF DRAINAGE DISTRICT COMMISSIONERS OF ROBESON COUNTY DRAINAGE DISTRICT NO. 4 v. LESLIE J. BULLARD AND WIFE, LYDA M. BULLARD.

(Filed 15 December, 1948.)

1. Drainage Districts § 15: Appeal and Error § 40a—Appeal from judgment on facts agreed does not present matters not ruled upon by trial court.

From the statement of facts agreed it appeared that land of defendants was subject to drainage liens in a specified amount which were due and unpaid, that the drainage district had collected funds more than sufficient to pay bonds issued by it, and that the commissioners intended to use all surplus funds realized for the purpose of repairs and improvements. Defendants contended that the commissioners were without authority to make repairs or improvements after the expiration of three years from the completion of the canals, and that therefore defendants and all other landowners in the district were entitled to a rebate *pro rata* of the excess over the amount required to discharge the unpaid bonds. Defendants excepted to the judgment that plaintiff recover the unpaid assessments not barred by the statute of limitations, and that the land be condemned for sale for the purpose of paying the assessments. *Held:* Since the trial court did not

rule on the authority of the commissioners to use surplus funds for repairs and improvements, the question is not presented on appeal, and there being no question raised as to the validity of the assessments or the fact that they are due and unpaid, the exceptions to the judgment cannot be sustained.

2. Drainage Districts § 15—

The court has authority under G.S. 160-93 upon rendition of judgment for plaintiff to include as an element of cost one reasonable attorney's fee for plaintiff.

APPEAL by defendants from *Nimocks, J.*, 22 March, 1948, as of October Civil Term, 1947, of ROBESON.

Civil action instituted 1 May, 1947, to declare lien on four tracts of land described in the complaint for drainage assessments due for years set forth, and for foreclosure of such liens by sale of said lands. G.S. 105-414, formerly C.S. 7990.

Defendants, answering, deny liability for said assessments, and plead in bar of recovery herein the ten-year statute of limitations, G.S. 160-93, in bar of such portions thereof as "arose and accrued more than ten years prior to the institution of this action," and prayed an order for an accounting by plaintiffs and for distribution of surplus funds on hand derived from collection of drainage assessments.

When the cause came on for hearing at October Civil Term, 1947, of Superior Court of Robeson County, plaintiffs and defendants, through their respective attorneys, agreed to waive a jury trial, and stipulated pertinent facts to the end that the court might consider same and render judgment, either in or out of term, out of the county and out of the district.

The facts agreed (1) cover every step in the requirements of the Drainage Act, Chapter 156 of the General Statutes for valid assessments against lands of defendants described in the complaint, and even for valid certificates of sale issued to plaintiffs by the tax collector pursuant to a sale of lands described in complaint for nonpayment of those assessments; and (2) show that all of the assessments are due but certain of them became due more than ten years prior to the date of the institution of this action,—as to which all parties concede that an action on those assessments is barred by the ten-year statute of limitations. G.S. 160-93. It is also agreed that the Robeson County Drainage District #4 was formed in 1930.

Other facts agreed are these:

1. That of the principal amount of $30,000 of bonds issued by the plaintiffs, under authority of the Drainage Act aforesaid, only $6,000 principal remains unpaid; that plaintiffs had in bank to its credit as of date of last audit the sum of $8,913.64 which had been realized from the

collection of drainage assessments against lands located within and comprising said Drainage District; and that there are unpaid assessments as listed, some of which are barred by the ten-year statute of limitations.

2. That no repairs have been made to the canals and bridges of the Drainage District, since the completion thereof, and said canals are partially filled, and they and other improvements are in a bad state of repair; and that unless prevented from doing so by an order of court, the Board of Drainage Commissioners of said District contemplate using such money as it may have to its credit, after retiring the bonds remaining unpaid, as well as such as may be realized from collection of unpaid assessments, for the purpose of redredging the said canals, reconstructing bridges throughout the district and making such other repairs as will place said canal and other improvements in good condition.

Upon the foregoing agreed facts, plaintiffs contend that they are entitled to a judgment (1) against each of the four said tracts of land of defendants, described in the complaint, in the principal sum of all assessments against each, which matured less than ten years next prior to the institution of this action, with interest, and (2) condemning said lands for sale, and appointing a commissioner to sell same for the purpose of paying said assessments, and interest and costs allowed by law.

On the other hand, defendants contend that under the Drainage Act, plaintiffs are authorized to levy and collect only an amount sufficient (1) to pay the expenses of creating the district and its necessary administrative expenses, (2) to pay off the bonds issued for said purpose and interest thereon, and (3) to maintain the canals and bridges in said district for a period of three years next following the completion thereof; and that since there is on hand a sufficient fund to pay off and discharge the remaining unpaid bonds, and interest thereon, they, the defendants, together with all other landowners in the District, are entitled to a rebate *pro rata* in the amount of taxes levied and assessed, both paid and unpaid, which are in excess of the amount required to pay off and discharge the remaining unpaid bonds; and that plaintiffs do not have the legal right to use such excess in redredging the canals, etc., as they contemplate doing.

However, upon the facts agreed and submitted, the court held in effect that certain assessments which matured more than ten years prior to the date of the institution of this action are barred, by the statute of limitations, but that as to all other of the assessments plaintiffs are entitled to recover,—and, in accordance therewith adjudged:

1. That plaintiffs have and recover judgment against the respective tracts for the amount of the assessments against same, which are not barred by the statute of limitations,—set out in detail. (To this part of the judgment defendants except. Exception No. 1.)

2. That the several tracts of land be condemned for sale, and sold for purpose of paying the drainage assessments, interest and cost, etc. (To this part of the judgment defendants except. Exception No. 2.)

3. That plaintiffs recover of defendants the costs of this action to be taxed by the clerk,—including therein $200 as attorneys' fees to attorneys for plaintiff expressly "in accordance with the provisions of G.S. 160-93." (To this part of the judgment defendants except. Exception No. 3.)

From judgment so entered defendants appeal to Supreme Court, and assign error.

Johnson & Johnson for plaintiffs, appellees.

F. D. Hackett and Ellis E. Page for defendants, appellants.

WINBORNE, J. Defendants, appellants, in brief filed on this appeal, do not challenge the right of plaintiffs to maintain this action for the foreclosure of unpaid drainage assessments levied under the provisions of Chapter 156 of the General Statutes, payment of which is in default; nor do they question the validity of the assessments as levied, or the fact that they are due and unpaid. Hence, nothing else appearing, the portions of the judgment to which the first and second exceptions are taken by defendants are in accordance with law.

Moreover, since the trial court has not ruled on the questions attempted to be raised upon the agreed facts in respect to the surplus funds in hands of plaintiffs and the uncollected assessments, such questions are not now before this Court for determination. It is not amiss, however, in this connection to direct attention to certain provisions of the Drainage Act, particularly: G.S. 156-103, pertaining to the force and effect of assessments levied; G.S. 156-103, pertaining to assessment liens; G.S. 156-92, as amended by 1947 Session Laws, Chapter 982, Section 1, pertaining to control, and repair of improvements by Board of Drainage Commissioners; G.S. 156-98, pertaining to authority and discretion of Board of Drainage Commissioners in respect to excess drainage tax levied, assessed and collected; and G.S. 156-116 (3), pertaining to disposition of surplus funds.

As to the third exception: Defendants question in particular the allowance of attorneys' fees to be charged as part of the cost in the case. They contend that G.S. 160-93, recited in the judgment as authority for such allowance, is not applicable to actions for foreclosure of delinquent drainage assessments. This contention is untenable.

It has been held by this Court that an action in the nature of an action to foreclose a mortgage, C.S. 7990, now G.S. 160-93, is open to drainage districts. *Drainage Dist. v. Huffstetler,* 173 N. C. 523, 92 S. E. 36; *Comm. v. Epley,* 190 N. C. 672, 130 S. E. 497; *Wilkinson v. Boomer,*

217 N. C. 217, 7 S. E. (2) 491; *Nesbit v. Kafer,* 222 N. C. 48, 21 S. E. (2) 903. And G.S. 160-93 provides in pertinent part, that "in any action to foreclose a special assessment the costs shall be taxed as in any other civil action, and shall include an allowance for the commissioner appointed to make the sale, which shall not be more than five per cent of the amount for which the land is sold, and one reasonable attorney's fee for the plaintiff." Thus the statute authorizes "one reasonable attorney's fee for the plaintiff" to be included and taxed in the costs.

In the connection in which this provision for attorney's fee is set forth in the statute, it would seem that the Legislature intended that the allowance of attorney's fee should be made at the conclusion of the proceeding and not in the course of it. However, since only one attorney's fee may be allowed in the case, we are not disposed to disturb the order made.

Affirmed.

KATHRYN PATTERSON v. CITY OF LEXINGTON AND LEXINGTON BASEBALL CLUB COMPANY.

(Filed 15 December, 1948.)

1. Negligence § 4f (2)—

Where a grass covered bank or ramp is customarily or frequently used by spectators at a baseball park, persons so using the ramp are invitees of the operators.

2. Same—

The operators of a baseball park are under duty to their patrons to exercise due care to prevent injury which reasonably could have been foreseen, and to give warning of hidden perils or unsafe conditions ascertainable by reasonable inspection.

3. Negligence § 4e—

Plaintiff was injured while leaving her seat on a grass covered bank or ramp in a baseball park, by a route other than the one she used in going to her seat, when she stepped into a hole some two inches deep and eight or ten inches long or stepped on a soft drink bottle or rock, and fell to her injury. *Held:* The operators of the park could not be expected to maintain the embankment free from roughness or unevenness or slight depressions and nonsuit was properly entered in her action against the proprietors.

APPEAL by plaintiff from *Edmundson, Special Judge,* February Term, 1948, of DAVIDSON, Affirmed.

This was an action to recover damages for a personal injury sustained by plaintiff while attending a baseball game in the park owned by the

City of Lexington and used by the defendant Lexington Baseball Club. A fall resulted in the breaking of a bone in plaintiff's leg. Negligence on the part of both defendants was alleged.

The City leased the park to the Baseball Club and agreed to "maintain said premises and baseball park in such condition as may be necessary for the playing of baseball and the training of players," but the defendant Baseball Club was "to have complete control of said premises and park between March 1st and September 15th of each year."

The plaintiff frequently attended games in this park, and was there on the night of 6 September, 1947, in company with some members of her family. They arrived at the park late and found all seats in the grandstand and bleachers filled. Thereupon plaintiff followed the crowd along a path to an embankment or ramp beyond the bleachers and parallel with the third base-line. There she seated herself on a Coca-Cola crate and watched the game. The park and every part of it was well lighted. This embankment was grass-covered, and sloped upward from the playing field. It was 15 or 20 feet high at the back and extended to the park fence. She was seated near the top of the bank. She testified that after the game she started down the bank moving "kind of sideways," and when within 3 feet of the bottom "my foot went in this hole or something. I don't know what it was, whether it was a rock or bottle. It turned my foot and I fell over about three times. My left foot went into the hole. The ground was rough so that I was being careful coming down. I didn't see a thing where I put my left foot. I know there was a hole or something. I didn't see a hole, but the grass was so high I couldn't see it." Another witness observed a hole or depression near where plaintiff fell some 2 inches deep and 8 or 10 inches long. It appeared that customarily some spectators at ball games sat on this bank. The grass was allowed to grow on the bank to prevent erosion, and was mowed from time to time by the City.

At the conclusion of all the evidence the renewed motion of the defendants for judgment of nonsuit was allowed, and plaintiff excepted and appealed.

D. L. Pickard and Charles W. Mauze for plaintiff, appellant.

Hubert E. Olive for defendant City of Lexington, appellee.

Phillips & Bower for defendant Lexington Baseball Company, appellee.

DEVIN, J. The fact that the grass-covered bank or ramp on which plaintiff was seated as she watched the baseball game was customarily or frequently used by spectators for this purpose was sufficient to impose upon the defendants a duty to exercise ordinary care for the prevention of injury to those whom it invited and who chose to sit on this bank, but we

think the evidence here fails to disclose negligent breach of such duty proximately causing the injury complained of by the plaintiff.

Baseball is an outdoor game. Those who operated a park appropriate for playing this game for the entertainment of spectators, as shown by the evidence in this case, would not be expected to maintain the grass-covered slopes of an embankment on which some spectators chose to sit entirely free from roughness or unevenness or slight depressions. Defendants were not insurers of the safety of those who entered their park but were only held to the obligation of exercising due care to prevent injury which reasonably could have been foreseen and to give warning of hidden perils or unsafe conditions ascertainable by reasonable inspection. *Bowden v. Kress,* 198 N. C. 559, 152 S. E. 625; *Williams v. Stores Co., Inc.,* 209 N. C. 591, 184 S. E. 496; *Anderson v. Amusement Co.,* 213 N. C. 130, 195 S. E. 386; *Watkins v. Furnishing Co.,* 224 N. C. 674, 31 S. E. (2) 917; *Drumwright v. Theatres, Inc.,* 228 N. C. 328, 45 S. E. (2) 379; *Hahn v. Perkins,* 228 N. C. 727, 46 S. E. (2) 854; 38 A. J. 754. Plaintiff thinks it was a hole which caused her foot to turn, though she was not sure, or probably it might have been a rock or an empty Coca-Cola bottle which had been tossed aside by some spectator, or, as suggested by defendants, a dent or depression caused by the heels of some sitter on the sloping bank. The determination of the exact cause of her fall thus involves an element of speculation. *Hahn v. Perkins, supra.* No complaint is made that the defendants failed to provide ushers to conduct persons to or from seats on this bank, as apparently none were needed, nor is it alleged there were insufficient lights. *Drumwright v. Theaters, Inc., supra.* Plaintiff found her way safely along a path and to the place where she chose to sit but she did not return the same way. *Burns v. Charlotte,* 210 N. C. 48, 185 S. E. 443; *Walker v. Wilson,* 222 N. C. 66, 21 S. E. (2) 817.

Whether in any event the City of Lexington as lessor of the park, under the terms of the lease, could be held liable for negligence in causing or permitting on this bank a hole or depression, such as the plaintiff has described, need not be determined, as we think the plaintiff has failed to make out a case of actionable negligence.

The judgment of nonsuit is

Affirmed.

STATE v. JOHN HORACE CORRELL.

(Filed 15 December, 1948.)

1. Criminal Law § 22—

When a defendant charged with murder is convicted of manslaughter and is granted a new trial on appeal, the new trial is upon the original indictment, and defendant's contention that upon the second trial he could not be prosecuted for murder in the second degree because the former conviction of manslaughter amounted to an acquittal on that charge, is untenable.

2. Homicide § 27f—

Where all the evidence tends to show that defendant, after the inception of difficulty, sought out his *feme* companion and attempted to use her as a shield in his gun fight with his victim, and there is no evidence that his adversary had any animosity towards his companion, the refusal of the court to give special instructions requested as to the right to kill in defense of another, is without error, since the principle is not presented by the evidence.

3. Criminal Law § 50f—

While wide latitude is allowed in the argument to the jury, counsel should not inject into the argument facts of his own knowledge or outside the record, and when counsel does so it is the right and duty of the judge to correct the transgression either at the time or in the charge to the jury.

4. Criminal Law § 51—

The conduct of the trial, including the argument of counsel, is largely within the control and discretion of the trial court, but the judge should be careful that nothing is said or done which would be calculated unduly to prejudice any party in the prosecution or defense of his case.

5. Criminal Law § 50f—

Defendant in a criminal prosecution should not be subjected to unwarranted abuse by the solicitor or private prosecution in the argument to the jury, and the characterization of defendant as a "small-time racketeering gangster" *is held* highly improper and objectionable.

6. Same—

Where the court sustains defendant's objection to improper remarks of counsel for the private prosecution in the argument to the jury, and immediately instructs the jury that they should not consider such remarks, the defendant will not be held prejudiced thereby.

APPEAL by defendant from *Moore, J.*, at June Term, 1948, of WILKES.

Criminal prosecution upon a bill of indictment charging defendant with murder of one Charles Baker.

Defendant was originally tried at the March Term, 1947, of Superior Court of Wilkes County, and convicted of manslaughter, and given a

sentence of from three to five years in the State Prison. He appealed to Supreme Court, and a new trial was awarded. See 228 N. C. 28, 44 S. E. (2) 334.

When the case came on for new trial the solicitor for the State announced in open court that the State would not place defendant on trial for murder in the first degree, but for murder in the second degree, or manslaughter, as the evidence may warrant. Thereupon defendant filed a plea in bar for that the State having elected in the first instance not to put him on trial for murder in the first degree, but for murder in the second degree, or manslaughter, as the facts might warrant, the verdict of guilty of manslaughter only is equivalent to a verdict of not guilty of murder in the second degree; and hence to put him on trial for murder in the second degree at the new trial ordered by the Supreme Court would constitute double jeopardy in violation of his constitutional rights. The trial judge, finding the facts to be as stated in the plea, but being of contrary conclusion of law, overruled the plea, and defendant excepts.

The evidence offered by the State on the retrial is in substantial accord with that introduced by the State on the first trial. And in view of decision reached on this appeal, a recital of the evidence is unnecessary. Defendant offered no evidence, and rested his case on the State's evidence.

Verdict: Guilty of murder in the second degree. Judgment: Imprisonment in Central Prison at Raleigh for a term of not less than seven nor more than ten years.

Defendant appeals therefrom to Supreme Court, and assigns error.

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

Hayes & Hayes, W. H. McElwee, Jones & Bowers, and Fate J. Beal for defendant, appellant.

WINBORNE, J. Careful consideration of all of the eighty-six assignments of error covering eighty-nine exceptions presented by defendant on this appeal, fails to reveal prejudicial error for which the judgment rendered on verdict returned in the trial below may be disturbed. However, it seems expedient to advert specifically to a few of them.

Four of the assignments of error relate to the action of the trial judge in overruling defendant's plea in bar based upon verdict of manslaughter on the first trial as hereinabove stated, and to portions of the charge admitting of a verdict of murder in the second degree on this trial. It appears, however, from former decisions of this Court that it is an accepted principle of law in this State that when on appeal by defendant from judgment on a verdict of guilty in a criminal prosecution a new trial is ordered, the case goes back to be tried on the bill of indictment as laid.

S. v. Stanton, 23 N. C. 424; *S. v. Grady,* 83 N. C. 643; *S. v. Bridgers,* 87 N. C. 562; *S. v. Craine,* 120 N. C. 601, 27 S. E. 72; *S. v. Groves,* 121 N. C. 563, 28 S. E. 262; *S. v. Freeman,* 122 N. C. 1012, 29 S. E. 94; *S. v. Gentry,* 125 N. C. 733, 34 S. E. 706; *S. v. Matthews,* 142 N. C. 621, 55 S. E. 342; *S. v. Beal,* 202 N. C. 266, 162 S. E. 561, 80 A. L. R. 1101.

In *S. v. Stanton, supra,* this Court, in opinion by *Ruffin, C. J.,* finding error in the judgment from which appeal was taken, stated that "as this is done at the instance of the prisoner, the former verdict must be set aside entirely, and a *venire de novo* awarded to try the whole case." This decision rendered in the year 1841 established principle which has been recognized and applied throughout the subsequent years. For full discussion of the subject see opinion by *Adams, J.* (1932) in *S. v. Beal, supra.*

Two other assignments of error relate to the failure of the court to give a special instruction requested by defendant pertaining to the right of a person to kill in defense of another. In the course of the charge to the jury the court adverted to the fact that defendant contended that he fired the fatal shot in defense of himself and of his companion, Miss Fields, but did not give the instruction as requested. Though defendant, as he says through his counsel, "leans very heavily" on these exceptions, and considers the matter to which they relate highly prejudicial to him, the evidence fails to present a situation for the application of the principle of the right of defendant to kill in defense of Miss Fields. The evidence is to the effect that after defendant had slapped Charles Baker behind the counter and Charles Baker had gotten his pistol from the cash register, behind the counter, defendant, followed by Baker, walked out on the dance floor and got Miss Fields between him and Baker, and put his left hand on her left shoulder and drew his gun and fired over her right shoulder. And there is no evidence that Baker showed any disposition to harm Miss Fields. All the evidence is that his attention was directed to defendant, with whom he was having the difficulty.

Three other assignments of error are directed to rulings of the court in respect to objections to argument of counsel for the private prosecution: (1) The record shows that in the course of argument of one member of the private prosecution, he, pointing his finger at defendant, stated, "I argue to you the defendant is a married man. I don't know whether that is his wife over beside him or not"; that objection by defendant was sustained, and he excepted; that the court cautioned counsel to refrain from this line of argument and instructed the jury not to consider it; and that upon counsel persisting in this line of argument, to which defendant again objected, the court again instructed counsel not to pursue such argument, whereupon, counsel stopped it. Defendant excepted. (2) The record also shows that another member of the private prosecution, pointing his

finger at defendant, stated: "Gentlemen, you are dealing with a small-time racketeering gangster," to which argument defendant objected; and that objection was sustained and defendant excepted.

In this connection, while wide latitude is given to the counsel in making their arguments to the jury, *S. v. O'Neal,* 29 N. C. 252; *McLamb v. R. R.,* 122 N. C. 862, 29 S. E. 896, counsel may not "travel outside of the record" and inject into his argument facts of his own knowledge or other facts not included in the evidence. McIntosh N. C. P. & P., p. 621; *Perry v. R. R.,* 128 N. C. 471, 39 S. E. 27; *S. v. Howley,* 220 N. C. 113, 16 S. E. (2) 705. And when counsel does so, it is the right and duty of the presiding judge to correct the transgression,—and he may do so at the moment or wait until he comes to charge the jury. *S. v. O'Neal, supra; Melvin v. Easley,* 46 N. C. 386; *McLamb v. R. R., supra; Perry v. R. R., supra.*

In the *McLamb case* it is stated that "Where remarks are improper in themselves, or are not warranted by the evidence, and are calculated to mislead or prejudice the jury, it is the duty of the court to interfere."

On the other hand, the conduct of a trial in the court below, including the argument of counsel, must be left largely to the control and discretion of the presiding judge. Nevertheless, as stated by *Walker, J.,* in *S. v. Tyson,* 133 N. C. 692, 45 S. E. 838, the judge should be careful that nothing be said or done which would be calculated unduly to prejudice any party in the prosecution or defense of his case. *S. v. Howley, supra.*

Applying these principles to the present case, the court very properly sustained objection to the remarks of counsel, to which reference is first made hereinabove,—and while the persistence of counsel might have justified reprimand, it would seem that the jurors could not have misunderstood that the remarks should be erased from their minds. Indeed, if the court had not properly cautioned the jury in this instance, the defendant could hardly complain since the testimony of several of his witnesses on former trial as shown in the record of former appeal is to the effect that defendant is a married man.

Likewise the court very properly sustained objection to the remarks of counsel characterizing defendant as "a small-time racketeering gangster." Webster defines racketeer as "One who singly or in combination with others extorts money or advantages by threats of violence or of unlawful interference with business," and a gangster as "A member of a gang of roughs, hireling criminals, thieves, or the like." Characterization is not argument. *S. v. Tucker,* 190 N. C. 708, 130 S. E. 720. There is nothing in the record to justify such abuse of defendant personally, and of fair debate, and it was highly objectionable. A severe reprimand by the court would have been justified. Defendants in criminal prosecution should be convicted upon the evidence in the case, and not upon prejudice

created by abuse administered by counsel for private prosecution privileged to speak for the State. But by sustaining the objection made by defendant, the judge indicated to the jurors that the remark had no place in the trial. This is all the defendant asked him to do. Hence, though the record does not show that the judge made further effort to correct the transgression, we are unable to hold as a matter of law that defendant has been prejudiced by the improper remarks.

Moreover, when the charge of the court, to which numerous other exceptions are taken, is considered contextually and as a whole, it would seem that prejudicial error is not made to appear.

No error.

STATE v. F. A. FAIN.

(Filed 15 December, 1948.)

1. Arrest and Bail § 2—

An officer, if assaulted or resisted in serving legal process or in making an arrest, is not under duty to retreat, but has the right to use such force as may be necessary in the proper discharge of his duties, even to the extent of taking life, the limitations upon his conduct being that he may not act maliciously so as to be guilty of wanton abuse of authority, or use any greater force than is reasonable and apparent under the circumstances.

2. Criminal Law § 53d: Assault § 14b—Charge held for error in failing to explain law arising upon defendant's contentions supported by evidence.

The evidence was not conclusive as to whether defendant officer was clothed with a search warrant when he knocked at the door of prosecuting witness at nighttime. Defendant's testimony was to the effect that upon being admitted by the prosecuting witness, he disclosed his mission to serve a search warrant, and that an affray immediately ensued in which both parties fired and in which he inflicted serious injury. *Held:* It was error for the court to fail to explain the law relating to defendant's right to use such force as was necessary in the performance of his duty and his right to kill in self-defense without retreating if the jury should find from the evidence the facts to be as contended by him. G.S. 1-180.

APPEAL by defendant from *Sink, J.*, at August Term, 1948, of CHEROKEE.

Criminal prosecution tried upon indictment charging defendant of an assault with a deadly weapon with intent to kill one Pearl Posey, and inflicting upon her serious injury not resulting in death.

The State offered evidence tending to show that the defendant went to the home of Mrs. Pearl Posey in East Murphy, where she and her husband, Ben Posey, resided, between three and four o'clock in the morning

of 28 December, 1945; that he knocked on the door and woke up Mrs. Posey; whereupon she came downstairs and inquired who was there, and received no answer. That after asking three or four times who was there and receiving no answer, she informed the person that if he did not tell her who was there she would not open the door. That she had her gun in one hand and a flashlight in the other. That she finally unlocked the door and it was pushed open by the defendant, who pushed his gun in her stomach and grabbed her hand, knocked the flashlight out of her hand and pushed his pistol through her navel. That she pushed him back out of the door when a gun fired, that she screamed and hollered and the defendant grabbed her and shot her.

The defendant testified that he was a deputy sheriff of Cherokee County and a policeman of the Town of Murphy. That on the night in question he was working as an extra policeman for the Town of Murphy and went on duty about 11:00 p.m. That he went to the home of Pearl and Ben Posey about 1:30 a.m., and that he had with him a search warrant which had been given to him by the sheriff of Cherokee County, directing him to search the home of Pearl Posey. "When I went there I went up to the door and knocked on the door and Mrs. Posey came to the door and opened the door, . . . and I told her I had a search warrant for her for whiskey, and she said, 'You G.d. s.o.b.' and shot. When she shot she had her gun that way (indicating) and I knocked her shot off. . . . I had my gun in my right overcoat pocket and when I pulled it out I shot at her."

The evidence was conflicting as to whether or not the defendant was clothed with a search warrant, directing him to search the home of Mrs. Posey, at the time in question. If the defendant did have such a warrant it had been lost or mislaid at the time of the trial, and was not available for introduction in evidence.

The jury returned a verdict of guilty of assault with a deadly weapon and from the judgment imposed, the defendant appeals and assigns error.

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

J. B. Gray, O. L. Anderson, and C. E. Hyde for defendant.

DENNY, J. The defendant excepts and assigns as error the failure of the trial judge to declare and explain the law of self-defense and to apply it to the evidence in the case.

Since we have no way of ascertaining whether the jury returned the verdict of guilty of an assault with a deadly weapon against the defendant because he used excessive force in executing a duly issued process of the court, or whether it found him guilty because he was acting without

being clothed with such process, we think there was error in the charge of the court.

The court gave the general rule of law applicable to the service of process, and then gave the respective contentions of the State and the defendant. But nowhere in the charge did the court explain the law applicable to the evidence upon which the defendant's contentions were based, should the jury find the facts from the evidence to be as contended by him. G.S. 1-180; *Lewis v. Watson, ante,* 20, 47 S. E. (2) 484. Neither was the jury instructed as to the legal rights of an officer when confronted with a sudden peril while in the discharge of his official duties.

It is said in 6 C. J. S., sec. 13 (d), p. 615: "An officer, where he acts in self-defense, may, if necessary, kill an offender who endangers his life or safety, while attempting an arrest. If the officer is assaulted, he is not bound to fly to the wall, but if necessary to save his own life, or to guard his person from great bodily harm, he may even kill the offender; this rule applies, although the arrest is being made for a misdemeanor," citing *S. v. Dunning,* 177 N. C. 559, 98 S. E. 530, 3 A. L. R. 1166, where *Hoke, J.,* in speaking for the Court, said: "It is a principle very generally accepted that an officer, having the right to arrest an offender, may use such force as is necessary to effect the purpose, and to a great extent he is made the judge of the degree of force that may be properly exerted. Called on to deal with violators of the law, and not infrequently to act in the presence of conditions importing serious menace, his conduct in such circumstances is not to be harshly judged, and if he is withstood his authority and purpose being made known, he may use the force necessary to overcome resistance and to the extent of taking life if that is required for the proper and efficient performance of his duty. It is when excessive force has been used maliciously or to such a degree as amounts to a wanton abuse of authority that criminal liability will be imputed."

And again in *S. v. Miller,* 197 N. C. 445, 149 S. E. 590, this Court, speaking through its present *Chief Justice,* said: "An officer, in making an arrest or preventing an escape, either in case of felony or misdemeanor, may meet force with force, sufficient to overcome it, even to the taking of life, if necessary. *S. v. Dunning,* 177 N. C. 559, 98 S. E. 530. And he is not required, under such circumstances, to afford the accused equal opportunities with him in the struggle. He is rightfully the aggressor, and he may use such force as is necessary to overcome any resistance. . . . If the offender put the life of the officer in jeopardy, the latter may *se defendendo* slay him; but he must be careful not to use any greater force than is reasonably and apparently necessary under the circumstances, for necessity, real or apparent, is the ground upon which the law permits the taking of life in such cases."

Conceding, but not deciding, that the defendant was duly clothed with a search warrant, directing him to search the home of Pearl Posey for whiskey, and he went there for that purpose, and while attempting to execute such warrant he was fired upon by Mrs. Posey, in the manner testified to by him, he would be entitled to have the jury pass upon (1) whether he was acting in good faith at the time; (2) whether he used more force than was necessary to the proper performance of his duty; and (3) whether he shot the prosecuting witness in self-defense. *S. v. Jenkins,* 195 N. C. 747, 143 S. E. 538; *S. v. Finch,* 177 N. C. 599, 99 S. E. 409.

We think the defendant is entitled to a new trial, and it is so ordered.

New trial.

STATE v. ERNEST ROBINSON.

(Filed 15 December, 1948.)

1. Criminal Law § 42f—

Where one or more of the State's witnesses testifies adversely to the State, the State is not precluded from showing by other witnesses a contrary state of facts upon the point.

2. Criminal Law § 52a (4)—

Conflict in the testimony of the State's witnesses, some testimony being inculpatory and some being exculpatory, does not justify nonsuit.

3. Same—

Where the State offers exculpatory testimony defendant is entitled to the benefit thereof, and when the State offers no evidence *contra*, defendant is entitled to nonsuit.

4. Same: Assault § 13—

Where all the evidence of record tends to show an accidental shooting, and there is no evidence that the weapon was intentionally discharged or was handled so recklessly as to constitute culpable negligence, defendant is entitled to his discharge in a prosecution for assault with a deadly weapon, and judgment against him will be reversed on appeal.

5. Criminal Law § 77d—

The Supreme Court is bound by the record as certified regardless of whether the case is settled by counsel or by the judge or is fixed by operation of law, and the appeal must be decided upon the record without indulging in assumptions as to what might have occurred.

APPEAL by defendant from *Burgwyn, Special Judge,* April Term, 1948, RICHMOND. Reversed.

STATE *v.* ROBINSON.

Criminal prosecution upon a bill of indictment charging that the defendant did feloniously assault one Judy Bell Robinson, his wife, with a deadly weapon, a rifle, inflicting serious injury not resulting in death.

Defendant, his wife, and her father lived in the same home. On the night of 10 January 1948, the two men were away from home and the wife went to her brother-in-law's home to await their return. The wife and the father returned first. After midnight, the defendant came in, went into the bedroom where his wife was and told her he wanted to return to the wake but had no money, and he wanted to pawn his rifle. At that time the rifle was in a rack over the bed, and his wife was standing by the bed. A "low" light was on. As he took the rifle down, it struck the bed and was discharged. "When it struck the bed it went off. It was hanging right over the bed and he taken it down and it hit the bed and went off and that's where I was at. I was standing up . . . he didn't throw it up to shoot or anything . . . I didn't say anything to him—you know—towards any fuss. He asked me about—you know—letting his brother-in-law hold it to get some money to go back to the wake."

The bullet struck the woman on her right side and went through her "top skin" and lodged in her right shoulder. She was hospitalized for about a week.

After the rifle fired, the defendant and his wife went into the next room, and she called her father and told him she was shot. He reached for his gun and defendant went on out. She told her father not to shoot "because an accident happened."

The next day, about 11:00 a.m., defendant surrendered to an officer who was looking for him. At that time he told the officer he did not go back home because "he was afraid old man Rufus and his son would do something to him."

This is a summary of all the evidence offered by the State. There was no testimony for the defendant. The court overruled defendant's demurrer to the evidence and submitted the same to the jury. There was a verdict of guilty of an assault with a deadly weapon. From judgment thereon, defendant appealed.

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

Pittman, McLeod & Webb for defendant appellant.

BARNHILL, J. The State ordinarily is not bound by the adverse testimony of one of its witnesses but may offer other conflicting evidence. That is, it is not precluded from showing that the facts are other than as related by one or more of its witnesses. *S. v. Mace,* 118 N. C. 1244; *S. v. Edwards,* 211 N. C. 555, 191 S. E. 1; *S. v. Freeman,* 213 N. C. 378, 196

S. E. 308; *S. v. Todd,* 222 N. C. 346, 23 S. E. (2) 47; *S. v. Watts,* 224 N. C. 771, 32 S. E. (2) 348.

When its evidence is conflicting—some tending to inculpate and some to exculpate the defendant—it is sufficient to repel a demurrer thereto and must be submitted to the jury. *S. v. Edwards, supra; S. v. Mace, supra; S. v. Todd, supra.*

When, however, the State's case is made to rest entirely on testimony favorable to the defendant, and there is no evidence *contra* which does more than suggest a possibility of guilt or raise a conjecture, demurrer thereto should be sustained. *S. v. Todd, supra; S. v. Coffey,* 228 N. C. 119; *S. v. Watts, supra; S. v. Boyd,* 223 N. C. 79, 25 S. E. (2) 456; *S. v. Penry,* 220 N. C. 248, 17 S. E. (2) 4; *S. v. Prince,* 182 N. C. 788, 108 S. E. 330; *S. v. Gordon,* 225 N. C. 757, 36 S. E. (2) 143.

When the State offers evidence which tends to exculpate the defendant, he is entitled to whatever advantage the testimony affords and so, when it is wholly exculpatory, he is entitled to his acquittal. *S. v. Cohoon,* 206 N. C. 388, 174 S. E. 91.

The record before us, viewed in the light of these principles of law, leads to the conclusion that the court below should have sustained defendant's motion to dismiss as in case of nonsuit.

All the testimony points to an accidental shooting. While we may surmise that the whole truth has not been told and that an intentional assault was in fact committed, there is no evidence to support that inference. There is no testimony tending to show either that the rifle was intentionally discharged or was so recklessly used as to constitute criminal liability for the resulting injury. There is no testimony tending to show the defendant committed any criminal offense.

It may not be amiss to note that the court below, in its charge, giving the contentions of the State, referred to evidence tending to show that defendant's wife was in bed asleep when she was shot, that there was some argument following which defendant picked up his rifle and intentionally shot her, and to other incriminating facts and circumstances which do not appear in the testimony included in the record before us. This would seem to indicate that the record fails to include all the evidence offered by the State.

Be that as it may, the record on appeal imports verity, and this Court is bound thereby. *S. v. Debnam,* 98 N. C. 712; *S. v. Price,* 175 N. C. 804, 95 S. E. 478; *S. v. McWhirter,* 193 N. C. 845, 137 S. E. 657; *S. v. Stansberry,* 197 N. C. 350, 148 S. E. 546; *S. v. Goff,* 205 N. C. 545, 172 S. E. 407; *S. v. Sheffield,* 206 N. C. 374, 174 S. E. 105. This is true even though the case is settled by counsel, *S. v. Chaffin,* 125 N. C. 660; *S. v. Brown,* 207 N. C. 156, 176 S. E. 260; and not by the judge, *S. v. Griggs,*

197 N. C. 352, 148 S. E. 547, or is fixed by operation of law, *S. v. Starnes,* 220 N. C. 384, 17 S. E. (2) 346.

The Supreme Court is bound by the case on appeal, certified by the clerk of the Superior Court, even though the trial judge has had no opportunity to review it, and must decide questions presented upon the record as it comes here, without indulging in assumptions as to what might have occurred. *S. v. Wolfe,* 227 N. C. 461, 42 S. E. (2) 515; *S. v. Gause,* 227 N. C. 26, 40 S. E. (2) 463; *S. v. Miller,* 214 N. C. 317, 199 S. E. 89; *S. v. Dee,* 214 N. C. 509, 199 S. E. 730; *S. v. Batson,* 220 N. C. 411, 17 S. E. (2) 511, 139 A. L. R. 614.

The defendant is entitled to his discharge. To that end the judgment below is

Reversed.

CAROLINA COACH COMPANY v. CENTRAL MOTOR LINES, INC., AND THEODORE ADDISON.

(Filed 15 December, 1948.)

1. Appeal and Error § 39e—

The exclusion of testimony cannot be held prejudicial when the record fails to disclose what the testimony of the witnesses would have been.

2. Appeal and Error § 39b—

Exceptions relating to an issue correctly left unanswered by the jury because of answers to previous issues will not be sustained, since the matter cannot be prejudicial.

3. Appeal and Error § 6a—

A party may not take exception to a ruling by the court in his favor.

4. Evidence § 30a—

The admission of photographs for the purpose of explaining the testimony of witnesses after they had testified that the photographs were a fair representation of the conditions existing at the time of the accident, with minor exceptions pointed out, cannot be held for error on exception on the ground that the photographs were taken after material changes had been made at the scene when the objecting party offers no evidence to sustain its contention.

5. Appeal and Error § 6c (6)—

Exceptions to the court's statement of the contentions ordinarily will not be sustained when it does not appear that appellant objected and called same to the attention of the trial court at the time.

6. Trial § 49—

A motion to set aside the verdict upon conflicting evidence on the ground that the verdict is contrary to the weight of the evidence is addressed to

the sound discretion of the trial court and its determination thereof is not reviewable.

7. Appeal and Error § 40a—

Exception to the signing of the judgment is untenable when the judgment follows the verdict.

8. Appeal and Error § 7: Trial § 28—

In order to test the sufficiency of defendant's evidence upon an affirmative defense, plaintiff must move for a directed verdict on that issue, the burden thereon being upon defendant, and in the absence of such motion exception on appeal to the submission of the issue on the ground that it was not supported by evidence will not be considered.

APPEAL by plaintiff from *Edmundson, Special Judge,* at February Term, 1948, of DAVIDSON.

Civil action to recover for damage to, and for loss of use of bus allegedly resulting from actionable negligence of defendant.

Defendants, answering, deny any negligence on their part, and plead sole negligence and contributory negligence of plaintiff.

Upon the trial in Superior Court these three issues were submitted to the jury:

"1. Was the plaintiff's property damaged through the negligence of the defendants, as alleged?

"2. Did the plaintiff by its own negligence contribute to its damages as alleged in the answer?

"3. What amount, if any, is the plaintiff entitled to recover of the defendant?"

The jury answered the first issue "Yes," and the second issue "Yes," but, in accordance with the instructions of the court, having so answered the first and second issues, did not answer the third issue.

From judgment for defendant and against plaintiff, on verdict so rendered, plaintiff appeals to Supreme Court, and assigns error.

I. E. Johnson and W. H. Steed for plaintiff, appellant.

Phillips & Bower and McCrary & DeLapp for defendants, appellees.

WINBORNE, J. Plaintiff, appellant, brings forward ten assignments of error, in none of which is prejudicial error made to appear. However we treat them *seriatim:*

Assignments of error Nos. 1, 2 and 4, based on exceptions of same numbers, are directed to the ruling of the court in sustaining objection by defendants to certain questions asked by counsel for plaintiff relating to cost of operation of buses of plaintiff. The record does not show what the answer of the witness would have been if permitted to answer. Com-

petency of the testimony is not, therefore, presented by the assignments of error. *Barbee v. Davis,* 187 N. C. 78, 121 S. E. 176, and cases cited. See also *Ice Co. v. Construction Co.,* 194 N. C. 407, 139 S. E. 771. Moreover, all of these questions here under consideration have bearing only on the third issue, that is, the issue of damages, which was not reached for answer by the jury. Hence, for this reason if there were error in sustaining the objections to them, it would be harmless.

Assignment of error No. 3 is founded on exception No. 3, taken to the action of the court in overruling objection by defendant to question asked by plaintiff pertaining to knowledge of the witness as to the cost of operation of the particular bus of plaintiff involved in this action. This ruling is in plaintiff's favor. Hence the exception is without merit.

Assignment of error No. 5, covering exception No. 5, to the action of the court in overruling objection by plaintiff to the introduction of photographs, defendants' exhibits 1 and 2. Plaintiff states in its brief that these photographs were taken after material changes had been made at the scene of accident and did not represent the condition of the road and land surrounding the highway. However, the only evidence we find in the record as to photographs comes, first, on cross-examination of the driver of plaintiff's bus, who testified: "This picture looks pretty near like the surroundings there just before I got to the telephone pole and ran into it. That's what I call a shoulder," and, second, on direct examination of Addison, defendant and witness for defendants, who testified: (indicating) "I say that picture is a fair representation of the conditions of the road, the entrance to Lee's Diner, the Diner itself and the land surrounding the highway at the time of the wreck. It is all except this little building right here. There is no difference in the land or the highway or the driveway." Following this statement of Addison, the photographs were offered. The court instructed the jury in effect that the photographs are not substantive evidence and are offered and received only for the purpose of illustrating the testimony of the witness, if the jury find that they do illustrate, and for no other purpose. This ruling is in keeping with decision in *S. v. Gardner,* 228 N. C. 567, 46 S. E. (2) 824, and cases there cited.

Assignments of error Nos. 6 and 7 are based upon exceptions of like numbers, to portions of the charge in which the court was stating contentions of defendant. If there were matter in the statement, not supported by the evidence, it does not appear that plaintiff objected and called that fact to the attention of the court at the time the statements were made. A failure to do so constitutes, ordinarily, a waiver of objection to the statement. *McMahan v. Spruce Co.,* 180 N. C. 636, 105 S. E. 439; *Vance v. Guy,* 224 N. C. 607, 31 S. E. (2) 766, and cases cited. Nothing

is made to appear here that would constitute an exception to the ordinary rule.

Furthermore, as to the 7th assignment of error, this relates to a statement of contention of defendant as to awarding damages. If there were error in the statement of such contention, and it had been called to the attention of the court, and not corrected, it would be harmless for that it relates to the third issue which was not reached for answer by the jury.

Assignments of error Nos. 8 and 9, covering exception No. 8, are to the action of the court in overruling plaintiff's motion "to set aside the verdict as being contrary to the law and evidence, and for a new trial," and exception No. 9, to the signing of the judgment. In this connection, the statute G.S. 1-207, formerly C.S. 591, provides that the judge who tries the cause may, in his discretion, entertain a motion, to be made on his minutes, to set aside a verdict and grant a new trial upon exceptions, or for insufficient evidence, or for excessive damages. "This is not the same question as in motion of nonsuit, or to direct a verdict, where the judge must allow the case to go to the jury if there is sufficient evidence to be considered by them, that is, more than a scintilla, or to give rise to a mere conjecture; but he may be of opinion that, after considering the evidence, the jury came to a wrong conclusion and for that reason set aside the verdict. Since it is a matter of discretion, there is no definite rule to control its exercise," McIntosh N. C. P. & P., p. 674, Section 610 (4). Indeed, a motion to set aside a verdict as not in conformity with the evidence is addressed to the discretion of the trial judge, when the evidence is conflicting, as in the present case, and will not be considered on appeal. *Hoke v. Whisnant,* 174 N. C. 658, 94 S. E. 446. And as to the signing of the judgment, it is sufficient to say that it follows the verdict.

Lastly, assignment of error No. 10, relating to no exception, is as stated in brief of plaintiff, directed against "the action of the court in submitting the issue of contributory negligence to the jury, when there was no evidence to support said issue." In this connection the record fails to show that plaintiff objected and excepted to the submission of the issue of contributory negligence; nor does it show that plaintiff moved for a directed verdict on that issue. If plaintiff desired to test the legal sufficiency of the evidence offered by defendants to support their defense of contributory negligence, the burden of proof of which was on them, it should have moved, in apt time, for a directed verdict on the issue of contributory negligence. And having failed to do so, plaintiff may not, in case on appeal to Supreme Court, effect a valid exception upon which to challenge the legal sufficiency of the evidence to justify the submission of the issue.

At any rate there is no contention that the answer of defendants fails to properly plead the defense of contributory negligence. A reading of the answer reveals the sufficiency of the averments in this respect. And a perusal of the testimony offered by defendants, as shown in the record on this appeal, indicates an abundance of evidence to justify, and to support the verdict as rendered by the jury.

For these reasons, the assignments of error are not sustained, and in the judgment below we find

No error.

RUBY HARRELSON AND HUSBAND, W. J. HARRELSON; LIZZIE MAE DOVE AND HUSBAND, AUSTIN DOVE; MARY KEITH DOWLESS AND HUSBAND, W. L. DOWLESS, v. CARL GOODEN AND WIFE, EVELYN GOODEN; ALDEN GOODEN AND WIFE, RUTH GOODEN.

(Filed 15 December, 1948.)

1. Descent and Distribution § 13—

An advancement is an irrevocable gift *in praesenti* to enable the donee to anticipate his inheritance to the extent of the gift, and whether a gift constitutes an advancement depends upon the intention of the parent at the time the gift is made. G.S. 29-1, Rule 2.

2. Same—

The nature of the gift, the consideration expressed, and the circumstances under which it was made, are material in determining whether a gift by a parent is intended to be an advancement.

3. Same—

Where a parent conveys land of substantial value to one of several children for a nominal consideration and thereafter dies intestate, the presumption is he intended the conveyance as an advancement.

4. Same—

The value of an advancement is to be determined as of the date of its making.

5. Same—

Conflicting evidence as to the value of land conveyed by the parent to his child and as to the amount of consideration paid therefor and as to declarations by the son as to whether the land was given and received as an advancement, *held* to raise issue of fact determined by the verdict of the jury.

6. Appeal and Error § 38—

The burden is on appellant to show harmful error.

7. Evidence § 46—

A witness who establishes his familiarity with the lands in question and states he has an opinion satisfactory to himself as to their value at the time in question, is competent to give his opinion as to their value.

8. Descent and Distribution § 13—

In ascertaining the value of an advancement of realty for the purpose of equalizing the heirs' share in the real estate, or in charging the child advanced in the distributive share of the personalty in the event the advancement exceeds the value of his share of the realty, the commissioners should take into consideration any payments found to have been made for the land conveyed as an advancement.

APPEAL by defendant Alden Gooden from *Carr, J.*, May Term, 1948, of BLADEN. No error.

McLean & Stacy for plaintiffs, appellees.
Varser, McIntyre & Henry for defendants, appellants.

DEVIN, J. In the partition proceeding instituted by the three *feme* petitioners for the division of the lands which descended to them as heirs at law of their father A. W. Gooden, deceased, they sought to exclude from a share therein their brothers, the defendants Carl and Alden Gooden, on the ground that these defendants, by conveyances to them of land without consideration by their father, had been advanced their full shares in the father's estate. Subsequently a voluntary nonsuit was entered as to defendant Carl Gooden.

The issue raised by the pleadings, and supported by the evidence offered, as to the defendant Alden Gooden was submitted to the jury and answered in favor of the plaintiffs. The jury found that the real property described in the deed from his father should be accounted for by the defendant Alden Gooden as an advancement in the division of the estate. Judgment so determining the question thus litigated was entered by the court, and the defendant Alden Gooden appealed.

The statute, G.S. 29-1, Rule 2, provides in substance that when a parent dies intestate having settled upon or advanced to his child any real estate such child shall be excluded from share in the real estate descended from his parent, except so much as will when added to the real estate so advanced make his share equal to those who have not been advanced. And in case the advancement in real estate is of greater value than an equal share descending to the other children, the one so advanced shall be charged in the distribution of the personal estate of the parent with the excess in value over an equal share.

The purpose of the statute is to produce equality among those equally entitled to property descending from a parent, in accord with the pre-

sumed intention of the parent. *Jerkins v. Mitchell,* 57 N. C. 207; *Nobles v. Davenport,* 183 N. C. 207, 111 S. E. 180. The doctrine of advancements is of ancient origin and pre-existing custom was made the subject of enactment in England in the reign of Charles II, 1682-1683. The North Carolina statutes on the subject began with Laws of 1784, Chap. 22, sec. 2. In the language of *Justice Adams* in *Nobles v. Davenport, supra,* "In its legal sense an advancement is an irrevocable gift *in praesenti* of money or property, real or personal, to a child by a parent, to enable the donee to anticipate his inheritance to the extent of the gift." *Parker v. Eason,* 213 N. C. 115, 195 S. E. 360; *Paschal v. Paschal,* 197 N. C. 40, 147 S. E. 680. Whether the gift is an advancement or not depends on the intention of the parent at the time the gift is made. *Bradsher v. Cannady,* 76 N. C. 445. The nature of the gift, the consideration expressed, and the circumstances under which it is made are material in determining the intention. *Harper v. Harper,* 92 N. C. 300. When a parent dies intestate having previously made a conveyance of land of substantial value to one of several children for a nominal consideration, the presumption is that he intended the land thus conveyed as an advancement. *Melvin v. Bullard,* 82 N. C. 33; *Harper v. Harper, supra; Kiger v. Terry,* 119 N. C. 456, 26 S. E. 38; *Nobles v. Davenport, supra; Ex Parte Barefoot,* 201 N. C. 393, 160 S. E. 365. And the value of the advancement is to be determined as of the date of its making. *Stallings v. Stallings,* 16 N. C. 298; *Lunsford v. Yarbrough,* 189 N. C. 476, 127 S. E. 426.

In the case at bar the question litigated was whether the conveyance of 14½ acres of land by A. W. Gooden to his son Alden Gooden for the recited consideration of "ten dollars and other good and valuable considerations paid" was intended as an advancement, or was a sale for a substantial consideration. This was the ground on which the contest was waged. The issue submitted followed the language of the statute. *Harper v. Harper, supra.* The appellant offered evidence of a book entry in the father's handwriting of "receipt of $250 on land received by Alden Gooden. Paid in full Jan. 1, '45." On the other hand the plaintiffs offered evidence of declarations by the defendant to the effect that the land was given by his father and received by the son as an advancement, and that the value of the 14½ acres was $3,000 while the value of the remainder of the father's real estate, 85 acres, was worth $3,500. There was evidence *contra* by the defendant. Upon the issue thus joined the verdict went against the defendant. The triers of the facts have rendered their decision after hearing all the evidence, and we are not disposed to disturb their finding. The burden is on the appellant to show harmful error. *S. v. Davis, ante,* 386, 50 S. E. (2) 37. Appellant excepted to the ruling of the court permitting a witness to give in evidence his opin-

ion of the value respectively of the 14½ acres of land and of the 85 acres. However, the witness had testified he was living on the Gooden land in 1944, and had lived there four years, that he knew both tracts of land and had an opinion satisfactory to himself as to their value at the time the deed to Alden Gooden was made. This evidence was not incompetent. Its probative value, subject to being tested on cross-examination, was for the jury. Stansbury Ev., sec. 128; *Light Co. v. Rogers,* 207 N. C. 751, 178 S. E. 575. Appellant's exceptions to the judge's charge cannot be sustained. The determinative issue of fact was fairly presented to the jury, and an examination of the entire charge leads us to the conclusion that it was in substantial accord with the decisions of this Court, and laid down correctly the principles of law applicable to the evidence presented.

The judgment, to which defendant noted exceptions, was warranted by the verdict and the evidence offered, and seems in accord with the provisions of the statute, G.S. 29-1, Rule 2. *Harper v. Harper, supra.* However, we think the judgment should have given authority to the commissioners to be appointed by the clerk to take into consideration any payments found to have been made by the defendant Alden Gooden on the land conveyed him in determining the value of the advancement.

In the trial we find

No error.

W. A. BROWN AND WIFE, ELIZABETH BROWN, v. M. E. GLASS AND WIFE, CLELLIE GLASS.

(Filed 15 December, 1948.)

1. Highways § 15—

G.S. 136-68 and G.S. 136-69, relating to the establishment of cartways for ingress and egress to a highway over intervening lands, are in derogation of common law and must be strictly construed.

2. Same—

Petitioners are not entitled to the establishment of a cartway over the intervening lands of another for the purpose of egress to the highway for a home they propose to construct on their adjoining land, since such use does not come within those enumerated in the statute.

DEVIN, J., dissenting.

DEFENDANTS' appeal from *Burgwyn, Special Judge,* February 16, 1948, Civil Term, GUILFORD Superior Court.

This proceeding was begun by petition for a cartway over the lands of defendants by adjoining landowners, alleging that petitioners have no outlet or means of egress to the public road except as it be granted over

defendants' land, and that defendants have refused to permit them to pass over it. G.S. 136-68, 136-69.

The case reached the Superior Court of Guilford County on appeal of defendants.

On the trial the evidence of plaintiff tended to show that they owned a small tract of 11½ acres of land on which it was their intention to build a home. The land joins the land of Brown, Jr.'s father, but there is no road over that land which plaintiffs can use except a log road, over which plaintiffs might pass in dry weather, but could not get out that way in wet weather. That way is six-tenths of a mile to a highway, and over the land of the defendants to a public road is two-tenths of a mile.

The evidence as to the road crossing the elder Brown's adjoining property tended to show that at times when the weather was dry it could be used but at other times, when the weather was wet, it was practically impassable or could be used only with difficulty.

The evidence disclosed that the defendant had once agreed that plaintiffs might have a road over his land but changed his mind and informed them if they got over it, it must be by airplane.

At the conclusion of plaintiffs' evidence the defendants demurred thereto and moved for judgment as of nonsuit. The motion was declined and defendants excepted.

Wm. E. Comer for plaintiffs, appellees.
Frazier & Frazier for defendants, appellants.

SEAWELL, J. The plaintiffs' right to a cartway over defendants' land is subject to strict observance of the conditions laid down in the statute. The statute itself is in derogation of the right of the adjoining landowner over whose land the cartway passes and must be strictly construed. *Warlick v. Lowman,* 103 N. C. 122, 9 S. E. 458. The statute enumerates the purposes for which the petitioner's land must be used in order to confer upon the owner the right of a "way of necessity" over another's land and the listing of them excludes other uses not named, the presence of one of those named becoming a condition precedent to the exercises of the right. It will be observed that all of them respect substantial traffic or transportation of products taken from the land.

One of the uses of the land justifying the condemnation of an outlet or cartway is cultivation of the soil. The appellees urge that the building of a home implies such cultivation, certainly of a garden spot, and that this presumption brings their case within the statute. The presumption, if we could indulge it, is by no means violent; and we must perforce, in view of the strictness with which the statute has heretofore been administered, and the opportunity the lawmakers have had to amend it, leave

it to the Legislature to say when they shall regard mere home owners and home builders as important as the industries in which they engage and the products they take from the land.

We have no doubt that the petitioners could truthfully say that they were planning to cultivate at least some portion of their small holdings, but we seriously question whether we can say it for them. At present the evidence does not bring the petition within the statute.

It is unnecessary to deal with other objections to the trial. The demurrer should have been sustained; the order to the contrary is

Reversed.

DEVIN, J., dissenting: I do not agree that the provisions of the cartway statute should be so strictly construed as in this case apparently to defeat its remedial purpose.

In *Ford v. Manning,* 152 N. C. 151, *Justice Hoke* said, "While many of the decisions are to the effect that these statutes, being in derogation of common right, should be strictly construed, and the petitioner required to bring himself clearly within the meaning of their terms, there is doubt if some of the cases have not gone too far in applying this principle of construction, and if it is not a more wholesome rule to construe the statute in a way to promote its principal and beneficent purpose."

And in *Gorham v. R. R.,* 158 N. C. 504 (511), *Justice Allen* adopted the above quoted language of *Justice Hoke* as expressing the proper basis for decision in the later case. Said he: "Following this view, we are of opinion that the petitioners have brought themselves within the language and spirit of the statutes by showing that there is no public road leading to their lands, and by offering evidence that the proposed cartway is necessary, reasonable, and just, and that the existence of the permissive way is not fatal to their demand."

Here the petitioner, according to his evidence, had planned to build a home on land he had purchased, and had the lumber sawed, but was unable to haul the material for building the house to his premises from the Hilltop Road, two-tenths of a mile away, except over a private way on defendant's land. The defendant had withdrawn permission to use the way for this purpose, and suggested that petitioner could either sell his land or "get an airplane." Plaintiff then instituted this action to obtain a cartway.

The question largely litigated below was whether petitioner had another and longer permissive way available, but this was resolved by the jury in favor of the petitioner. Building on a tract of land a home, with those surroundings which are usually associated with a dwelling, would seem to carry necessarily the connotation of "action preparatory" to the cultivation of land. G.S. 136-69. As was said in *Brown v. Mobley,* 192

N. C. 470 (474), "Home-owning in the country should be encouraged in every way—better homes, with convenient roads leading to them."

I think the petitioner's evidence was sufficient to survive a nonsuit, and that the verdict and judgment should be upheld.

ROBERT M. JACOBS, EMPLOYEE, v. SAFIE MANUFACTURING COMPANY, EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER.

(Filed 15 December, 1948.)

1. Master and Servant § 43—Employer held not estopped from setting up defense that claim was not filed within one year of accidents.

The evidence tended to show that claim for compensation was not filed within one year of the accidents, that defendant's superintendent, in response to messages from claimant, promised to come see claimant, but failed to do so, and that claimant's sister, on a visit to the superintendent, was referred to a clerk to ascertain whether the accident had been reported, but that the superintendent was gone when she returned to his office. *Held:* The evidence does not show any representation by defendant that the accident had been reported, or any agreement, express or implied, that the bar of the statute would not be pleaded, and therefore defendant was not estopped from setting up the defense of the bar of the statute, and the finding of the Industrial Commission that the claim was barred is conclusive. G.S. 97-24.

2. Master and Servant § 55d—

The findings of fact of the Industrial Commission are conclusive on appeal when supported by any competent evidence.

APPEAL by plaintiff from *Patton, Special Judge,* at May Term, 1948, of RICHMOND.

This is a proceeding for compensation under the provisions of the North Carolina Workmens' Compensation Act, for an alleged injury by accident arising out of and in the course of the employment of the plaintiff by the defendant, Safie Manufacturing Company, on 13 August, 1945. The defendant Liberty Mutual Insurance Company was the insurance carrier of its codefendant at the time of the accident. The plaintiff, Robert M. Jacobs, hereinafter called "claimant," was employed in the card room of the defendant, Safie Manufacturing Company, on 13 August, 1945, and for sometime prior thereto.

The facts found by the hearing commissioner, and which are supported by the evidence, are briefly stated as follows:

1. The claimant sustained an injury by accident while working for the Safie Manufacturing Company, in June, 1945, while carrying a bag

of motes estimated to weigh from 150 to 200 pounds up a stairway, but had no disability following this accident. On the 13th or 14th of August, 1945, while lifting a box of motes, the claimant felt a sharp pain in his back radiating up his shoulder blades.

2. The claimant has been in bed since 14 August, 1945, and has been paralyzed since about 1 September, 1945, due to an epidural abscess, the cause of which is unknown, but was precipitated by the above accidents.

3. Claimant was born 12 July, 1926, and was 18 years of age at the time of his accident in June, 1945, and 19 years of age when he sustained a minor accident in August, 1945.

4. The accidents were first definitely reported to the defendant employer on 13 August, 1946; and no report on the Commission's Form 19 was made by the employer to the Commission.

5. The first notice of claim given to the Commission was forwarded by the claimant through his attorney, on 27 January, 1947, and received by the Commission on the following day.

6. At no time during the year immediately following these accidents was the claimant mentally incompetent, except for a short period of time following his operation.

Upon the foregoing facts the hearing commissioner held as a matter of law that claimant's right to compensation is barred by G.S. 97-24, such claim not having been filed with the Industrial Commission within one year after the accidents. Claimant appealed to the Full Commission, and from an adverse ruling to the Superior Court. At the hearing below, the award of the Commission was affirmed, and claimant appealed to the Supreme Court.

Jones & Jones for plaintiff.

Pierce & Blakeney for defendants.

DENNY, J. The claimant contends that by reason of the inequitable conduct of the defendant-employer, the defendants should be held to be estopped from setting up the defense that his claim was filed too late; that such conduct was responsible for the delay of more than one year in filing his claim.

It must be conceded that unless the doctrine of equitable estoppel can be invoked by the claimant in this proceeding, he is not entitled to recover.

The evidence tends to show that claimant sent two or three messages to the Superintendent of the Safie Manufacturing Company, requesting him to come to see him, and that he promised to do so, but never did. The sister of claimant had a conversation with defendant-employer's Superintendent in December, 1945, and he asked her what was wrong with her brother; she testified she told him he was hurt in the mill and

he referred her to some lady to find out whether or not she had any report of the accident; that the lady informed her she had a report of an injury to the claimant's finger; that when she went back to see the Superintendent he had gone in the mill, and she did not see him again until she carried her brother in a rolling chair, to the mill on 13 August, 1946.

It does not appear that the defendant-employer did anything to lull this claimant into believing that his accident had been reported, as required by G.S. 97-22, or that his claim would be filed with the Industrial Commission. Furthermore, there is no evidence of an express or implied agreement on the part of the employer, not to plead the provisions of G.S. 97-24 in bar of any claim that might be filed after the expiration of the time fixed therein. *Wilson v. Clement Co.,* 207 N. C. 541, 177 S. E. 797; *Lilly v. Belk Bros.,* 210 N. C. 735, 188 S. E. 319. On the other hand, there is evidence to support the finding of fact by the Commission that these accidents were not reported to the defendant-employer until 13 August, 1946, and to which finding there is no exception. Such finding is conclusive on appeal. *Creighton v. Snipes,* 227 N. C. 90, 40 S. E. (2) 612; *Rader v. Coach Co.,* 225 N. C. 537, 35 S. E. (2) 609; *Fox v. Cramerton Mills,* 225 N. C. 580, 35 S. E. (2) 869; *Brown v. Carolina Aluminum Co.,* 224 N. C. 766, 32 S. E. (2) 320; *Hegler v. Cannon Mills,* 224 N. C. 669, 31 S. E. (2) 918.

In view of the findings of fact by the Commission, and the failure to file a claim for compensation with the Industrial Commission within one year after claimant's accidents, the judgment below will be upheld. *Whitted v. Palmer-Bee Co.,* 228 N. C. 447, 46 S. E. (2) 109; *Lineberry v. Mebane,* 218 N. C. 737, 12 S. E. (2) 252; *Winslow v. Carolina Conference Asso.,* 211 N. C. 571, 191 S. E. 403; *Lilly v. Belk Bros., supra; Wilson v. Clement Co., supra.*

Affirmed.

STATE v. JAMES CREECH.

(Filed 7 January, 1949.)

1. Criminal Law § 44—

Defendant's motion for continuance was based upon the unpreparedness of certain expert witnesses to testify before consultation with a third, and the necessity for time to take depositions of two out-of-State witnesses. The solicitor disclosed that the third expert witness was available, and offered to permit defendant to introduce in evidence the written statement of the main out-of-State witness. *Held:* The motion for continuance was addressed to the sound discretion of the trial court, and the want of prejudice in the denial of the motion is apparent in this case in that the experts testified without suggestion of want of preparation and the statement of the out-of-State witness was admitted under the agreement.

2. Homicide § 20: Criminal Law § 32c—

In a prosecution for uxoricide, it is competent for the State to show defendant's conduct over the period of his married life, involving frequent quarrels, separations and ill-treatment of the deceased by the defendant during the times of defendant's periodic drunkenness, for the purpose of showing malice or a settled state of feeling inimical to the deceased.

3. Same—Exclusion of testimony of one witness as to matter amply established by witnesses for both sides held not prejudicial.

In this prosecution for uxoricide, the State's evidence tended to show that defendant treated his wife considerately and generously when sober, but that during the times of defendant's periodic drunkenness he was guilty of cruelty and harshness toward her. The defendant introduced testimony of his good treatment of his wife when sober. The court excluded testimony on cross-examination of one of the State's witnesses as to defendant's good treatment of his wife on certain occasions, stating in effect, in response to interrogation by defendant's counsel, that defendant could not show considerate conduct to rebut the State's evidence of ill-will. *Held:* While the evidence was competent, its exclusion is not held for prejudicial error, since the fact was amply established by the testimony of witnesses for both the State and defendant, and the ruling of the trial court was apparently to prevent defendant from belaboring a matter which was conceded or really not disputed.

4. Criminal Law § 81b—

The burden is upon appellant not only to show error but also that the error injuriously and prejudicially affected his cause, as the presumption is against him.

5. Criminal Law § 42c—

It is competent for the prosecution to disclose by cross-examination of defendant's expert witness that defendant paid him to testify in order to test the bias or partiality of the witness.

6. Criminal Law § 31h—

Where defendant's witness testifies as to defendant's mental incapacity due to habitual drunkenness, it is competent for the State on cross-examination to inquire as to defendant's extensive business activities in order to show defendant's mental capacity despite his use of intoxicants.

7. Homicide § 17—

In a prosecution for uxoricide, evidence that defendant had been twice married and twice divorced before his marriage to deceased, is irrelevant to the issue and incompetent, but its admission in the present case, where defendant was tried by a jury selected from the county where he had lived from boyhood and which doubtless knew defendant's entire career, *is held* a harmless inadvertence.

8. Criminal Law § 28—

Defendant enters upon a trial with the common law presumption of innocence in his favor, and upon his plea of not guilty, the burden is upon the State to establish his guilt beyond a reasonable doubt.

9. Homicide § 16—

Where, in a prosecution for first degree murder, defendant does not admit the killing nor take the witness stand, the burden is upon the State to establish each element of the offense beyond a reasonable doubt, which it may do by establishing an intentional killing with a deadly weapon with further evidence that the killing was premeditated and deliberate.

10. Homicide § 27b—

The failure of the court, in a single instance, to charge that the killing with a deadly weapon must be intentional in order to raise the presumption of malice will not be held for reversible error when in other portions of the charge the rule is correctly stated and the *lapsus linguæ* is corrected by the court before concluding the instructions.

11. Criminal Law § 5c: Homicide § 16—

A defendant is presumed sane, and the burden is upon him to show to the satisfaction of the jury the affirmative defense of insanity, or drunkenness to an extent which renders him mentally incompetent.

12. Criminal Law § 81c (1)—

Defendant's exceptions, even considered in their totality, *held* not to disclose prejudicial error in this prosecution for murder in the first degree, in view of the fact that the record as a whole discloses defendant's stubborn purpose to kill deceased and an immediate consciousness of wrong which prompted him to surrender to the sheriff.

13. Criminal Law § 5a—

The test of mental responsibility for crime is the ability to distinguish between right and wrong at the time and in respect to the matter under investigation.

BARNHILL, J., dissenting.

ERVIN, J., concurring in dissent.

APPEAL by defendant from *Williams, J.*, August Term, 1948, of JOHNSTON.

Criminal prosecution on indictment charging the defendant with the murder of his wife, Mattie Creech.

The record discloses that on 28 July, 1948, around the hour of midnight, the defendant shot and killed his wife with a double-barrel shotgun in the home of a neighbor, where she had gone and was staying temporarily as a result of a quarrel with the defendant on the 16th of the same month. The scene of the homicide was in the Brogden section of Johnston County about a quarter of a mile from the defendant's home.

The August Term of Johnston Superior Court convened on 16 August, 1948, and the grand jury returned a true bill against the defendant on the first day of the term. Arraignment was had and plea entered on the same day, and the defendant moved for a continuance on the ground that he had not had sufficient time to prepare his defense. Affidavits and

exhibits were submitted, and the solicitor agreed, upon request, to aid in the production of the witnesses for the defendant, or to admit the exhibits as their sworn testimony and the truth of the statements contained therein. The motion was thereupon overruled, a special venire was ordered, and the case was set for hearing on the following morning. Exception.

THE STATE'S EVIDENCE.

In assuming the burden of establishing the crime as charged, the prosecution offered evidence tending to show that Mrs. Elsie Mae Creech (with whom the defendant's wife was then staying temporarily) took the defendant's wife to Durham on Tuesday night, July 27, so that she might enter Duke Hospital for an examination on the following morning. This was done and they returned home late that evening. At about 11:00 p.m., the defendant appeared at the home of Elsie Mae Creech, and after being invited in with a cordial salutation, he stepped into the hall and said: "Elsie Mae, what did they find wrong with Mattie today?" He was informed that X-rays were taken and she would get the reports later. About that time the defendant's wife came up and he asked her the same question. Elsie Mae Creech then asked the defendant and his wife to go into the living room, which they did. She followed in a few minutes and the defendant remarked, "I have some whiskey out there in the car if you girls would like to have a drink." They both declined. He then said: "Well, I have got some peaches out there, would you like to have some of them?" Up to this point the defendant appeared to be normal and in possession of his normal faculties. After some conversation about the peaches, he stood up and said, "There is no use beating around the bush any longer," and looking at his wife he inquired, "Are you planning to go back home or not?" She replied that "she was not planning to"; whereupon he became angry, used some profanity, and said a lawyer would see her in the morning. He then left, got in his car, and drove off.

In about ten minutes the defendant returned with a shotgun, threatening to kill everybody in the house. Johnnie Grimes, who, with his family, lived in a part of the house, grappled with the defendant in the hall and tried to take the gun away from him, but was unable to do so. While this was taking place, the other occupants of the house went into an adjoining bedroom. All the lights in the house were on, except in this bedroom. Johnnie Grimes then jumped back through the door into the bedroom, and he, Elsie Mae and Mattie pushed against the door to keep the defendant from entering. After pushing the door four or five times, the defendant fired through the panel of the door and struck his wife who slumped down to the floor. The defendant then began to push the door anew, and Johnnie Grimes advised the others to flee for safety. This they did, hiding in the weeds outside and under the house. The defendant soon

came out and Elsie Mae Creech heard him say, "I especially wanted to kill Mattie and Elsie Mae." Pretty soon the defendant returned to the house, entered the room where his wife lay, took aim and shot the top of her head off. He then went out on the back porch, set the gun down in the corner, and called Johnnie Grimes to come and take him to the sheriff. In a few minutes the defendant's car was heard to start up, and go off in the direction of Smithfield.

Mary Edna Grimes, age 13, who had sought safety by hiding in the edge of the adjacent woods, saw the defendant get in his car. She says, "He reached towards the glove compartment, took out a bottle and turned it up to his head. . . . He must have taken more than one drink as he kept it up there and took it down and then got another. He drove off towards Smithfield."

Sometime between 12 and 1:00 a.m. the defendant appeared at the sheriff's office and gave himself up to Deputy Sheriff Lester Hales. After inquiring for the sheriff, the defendant said: "Well I just as well tell you: I blowed her damn brains out. . . . I killed Mattie. This damn Duke Hospital, I have stood it as long as I can and I blowed her damn brains out." The defendant turned over to the officer his pocketknife and $427 in money which he had on his person. He counted the money in the presence of the officer. His count was accurate. The jailer said the defendant "looked like a crazy man; drunk and crazy too." Cross-examination: "I did not hear him speak but once. He said, 'I am as crazy as hell.'" The officers then went to make an investigation. They located the gun at the house; and on the front seat of the defendant's car they found a bottle with some whiskey in it. These were offered in evidence.

The prosecution offered Jack Gardner as a witness, who testified that the defendant came to his filling station between 9 and 10 o'clock on the evening of the homicide. He was there an hour or more, during which time he took two or three drinks. He said he had been to Pinehurst and had called his wife from there at Duke Hospital but the nurse would not let him speak to her. He remarked that "he wished she was dead; wished he could wake up in the morning and hear that she was dead, that would be the sweetest music he had ever heard." When he left the filling station, "he could walk all right; perfectly all right; and talked all right. He drove his car away." There was a basket of peaches and a double-barrel shotgun in the back of the defendant's car.

THE DEFENDANT'S EVIDENCE.

The defendant refrained from going on the witness stand, but offered evidence intended to satisfy the jury of his mental debility or insanity at the time of the homicide.

On Wednesday, July 21, the defendant took a motor trip to Valdosta, Ga. He picked up a young man in Lumberton, a hitch-hiker, and took

him along for company and to help with the driving. The defendant got very drunk on this trip. On his way back he spent two days and two nights in a hospital at Savannah, Ga. Dr. John G. Sharpley, of the Hospital, certified that when the defendant came there on the 22nd, he showed symptoms of "chronic alcoholism . . . and some mental confusion. . . . He was discharged on July 24th, his nervousness had ceased and he seemed to be in very excellent spirits. He showed no signs of mental aberration."

The defendant offered a number of witnesses who testified that he was "heavily under the influence" on the night preceding and during the day of the homicide. And further that the defendant and his wife got along all right, except when he was drinking; that drink was the cause of their several separations.

Millard Parrish and Mrs. Cassie Lee testified that they drove past the home of Elsie Mae Creech on the night of July 28, between 11:30 and 12 o'clock, and within a short distance their car flashed against an automobile which had "slid off the road and into the edge of the woods on the left side." They ran by, but stopped at the first side road to go back and render assistance. Before they could turn round and while looking for a flashlight, the defendant appeared on the right-hand side of their car and got in the front seat. He was wet and looked like he was drunk. He said he wanted to go to the sheriff's office; that he had killed his wife. Later he said he wanted to stop and tell his father and mother what had happened. Pretty soon, he slumped over as if he were dozing. When they reached the father's house, the defendant got out of the car and went up the steps and had a conversation with his father and mother. They then took the defendant to the sheriff's office.

On the next day, Dr. Watson Wharton saw the defendant, said he appeared to be having a "hang-over" from being drunk. He took a specimen of his blood at about 12:20 p.m. and sent it to Dr. Haywood Taylor at Duke University for examination and laboratory analysis. Dr. Wharton gave it as his opinion that "12 hours prior to my examination he was not in condition, by reason of drunkenness, to understand and weigh the nature and consequences of his acts."

Dr. Taylor testified that the specimen of blood "contained alcohol to the extent of .14 per cent." He gave it as his opinion that if the specimen had been taken 12 or 13 hours earlier, it would have shown an alcoholic content of from .25 to .3 per cent; and that a person with that percentage of alcoholic concentration "would not be capable of forming a deliberate and premeditated intent to kill and know the consequences of it."

Dr. J. F. Owen, a psychiatrist of Raleigh, testified that in consequence of a telephone call from one of defendant's counsel around 10 o'clock on the morning of July 29th, he went to Smithfield at about 3:00 p.m. that

day and saw the defendant for a couple of hours. He returned later on August 2nd and spent a half-hour with him. In all, he saw the defendant three times before the trial. He gave it as his opiinon that "the defendant was not in a mental condition to think out beforehand what he intended to do and to weigh and understand the nature and consequences of his acts on the night of July 28th."

Mr. and Mrs. J. Rufus Creech, father and mother of the defendant, testified that when the defendant came to tell them of the killing he was not himself, "he wasn't natural . . . he wasn't right. . . . The expression in his eyes was awful . . . just like a wild man. . . . He had a wild, crazy look. . . . He didn't even look like himself."

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.

J. M. Broughton, Wm. B. Wellons, G. A. Martin, Norman C. Shepard, and Larry F. Wood for defendant.

STACY, C. J., after stating the facts as above: We are here confronted with (1) the ruling on the motion for a continuance, (2) objections to admissions and exclusions of evidence, and (3) exceptions to the charge.

I. *Motion for continuance:* In support of the motion for a continuance, counsel for defendant submitted affidavits from Doctors J. F. Owen and Watson Wharton, each affirming his unpreparedness to give expert testimony in the case without first conferring with Dr. Haywood Taylor, toxicologist at Duke University, to whom a specimen of defendant's blood had been sent for examination and laboratory analysis. It was made to appear that Dr. Taylor was then at Myrtle Beach, S. C., on vacation and was not expected to return before 7 September.

In addition, it was asserted that Dr. John G. Sharpley and his nurse, Mrs. Rebecca Weathers, who had attended the defendant at a hospital in Savannah, Ga., on 22 July, 1948, were material witnesses and could not be reached by subpoena, and that counsel had arranged to take their depositions on 21 August for use in the trial of the cause.

In reply, the solicitor stated that Dr. Haywood Taylor was then at nearby Myrtle Beach, and had advised defense counsel by letter that he would be available at any time, upon request. The solicitor further stated that he had procured a written statement from Dr. John G. Sharpley showing the defendant's condition when he was in the hospital at Savannah; that he would turn this statement over to counsel for defendant and allow them to offer it in evidence as the sworn testimony

of both Dr. Sharpley and his nurse, and that he would admit the facts therein stated to be true. It was also asserted that when counsel for defendant gave notice of their intention to take the depositions of these witnesses, the solicitor offered to waive the time and take the depositions immediately or without delay, and notified counsel that he would press for trial at the August Term.

Finally, the solicitor and counsel for the private prosecution stated that they could, with some effort, secure the presence of each of the witnesses for the defendant, and would do so upon request if counsel for defendant were unable to prevail upon them to appear at the trial.

There was no affidavit by defense counsel that they had not had time to prepare for trial.

Upon this showing the ruling on the motion for a continuance was a matter resting in the sound discretion of the trial court. *S. v. Gibson, ante,* 497; *S. v. Strickland, ante,* 201; *S. v. Rising,* 223 N. C. 747, 28 S. E. (2) 221; *S. v. Wellmon,* 222 N. C. 215, 22 S. E. (2) 437; *S. v. Allen,* 222 N. C. 145, 22 S. E. (2) 233; *S. v. Godwin,* 216 N. C. 49, 3 S. E. (2) 347; *S. v. Lea,* 203 N. C. 13, 164 S. E. 737. It is not seriously contended that any constitutional right belonging to the defendant was infringed in disposing of the matter. *S. v. Farrell,* 223 N. C. 321, 26 S. E. (2) 322; *S. v. Whitfield,* 206 N. C. 696, 175 S. E. 93; *S. v. Ross,* 193 N. C. 25, 136 S. E. 193. Indeed, the record negatives any suggestion of want of due process or unconstitutionality. *Franklin v. South Carolina,* 218 U. S. 161, 54 L. Ed. 980; *Minder v. Georgia,* 183 U. S. 559, 46 L. Ed. 328.

In justification of the ruling, it may be noted that Dr. Taylor, whose presence was desired by the defendant, appeared at the trial and was used as a witness, and both Doctors Owen and Wharton gave expert testimony in the case without any suggestion of unpreparedness due to lack of time or want of preparation. Then, too, Doctor Sharpley's statement was offered in evidence by the defendant under agreement with the solicitor that it would be accepted as true. Thus the defendant had the benefit of the testimony of all of his witnesses. No hurtful error has been made to appear in respect of the ruling. The exception is not sustained.

II. *Exceptions to admissions and exclusions of evidence:* While the defendant entered a large number of exceptions to admissions and exclusions of evidence, only four or five questions arising thereon need presently engage our attention. Many of the evidentiary exceptions seem to have been taken out of the abundance of caution. In a number of instances, the record fails to disclose what the excluded evidence would have been, and several objections seem to have been sustained on the ground of repetitiveness.

1. The defendant was 37 years old, a member of a prominent family, weighed about 185 or 190 pounds, well educated and had considerable

business interests. The deceased was 28 years old, weighed about 100 pounds, and had been married to the defendant eight years. The State was allowed to show frequent quarrels, separations, reconciliations and ill-treatment of the deceased by the defendant throughout most of their married life. The main cause of all this was the defendant's excessive use of intoxicating liquors. When sober, his domestic relations were reasonably harmonious. In other words, the prosecution was allowed to paint the defendant before the jury as "not the man that God made, but the man that liquor marred."

The defendant contends that the court erred in allowing the prosecution to go back over his entire married life with the deceased, and thus bring before the jury his general conduct and character to speak against him, when he had neither gone upon the witness stand nor put his character in issue. This evidence was competent as tending to show malice on the part of the defendant or a settled state of feeling inimical to the deceased, and the decisions so hold. *S. v. Allen,* 222 N. C. 145, 22 S. E. (2) 233; *S. v. Goss,* 201 N. C. 373, 160 S. E. 357; *S. v. Kincaid,* 183 N. C. 709, 110 S. E. 612; *S. v. Langford,* 44 N. C. 436; *S. v. Rash,* 34 N. C. 383; 40 C. J. S. 1159. The exception is not sustained.

2. The prosecution sought to show by M. F. Courie, hotel operator at Morehead City, that in 1944, the defendant and his wife spent a week at the beach and fell to quarreling while on their vacation. On cross-examination, the witness stated: "They had been there two or three times before and seemed to be getting along all right." Then this question: "He gave her every consideration and comfort?" Objection; sustained; exception.

At this point, counsel for defendant made inquiry as follows: "May I inquire if it is permissible for the State to show ill-will on the part of James Creech towards his wife and not permissible for us to show by evidence that he exhibited good-will towards her?" The court: "Yes."

In the light of the record it is not altogether clear as to just what was intended by the court's reply. On numerous occasions, prior and subsequent to the inquiry and response, the defendant was allowed to show that, except when drinking, he was kind, considerate and attentive to his wife's wishes and needs, and that they got along very well together.

Of course, if the court intended to say, and did say, as the defendant contends the answer means, *i.e.,* that the defendant was not permitted to show want of ill-will by evidence of kind treatment, then the response was infelicitous. 40 C. J. S. 1160. However, conceding its infelicity, it does not appear that harmful consequences resulted therefrom. It was abundantly established by witnesses on both sides that the disquietude of the defendant's home came only from the curse of strong drink and tippling. *S. v. Capps,* 134 N. C. 622, 46 S. E. 730; *S. v. Johnson,* 48 N. C. 266.

Indeed, Leonard Woodall, brother of the deceased and a witness for the prosecution, said on cross-examination: "The defendant provided a nice home and furnished it well. . . . He showed every affection towards my sister and gave her practically everything a man of his means could give."

It is not enough to show error in the trial of a cause. To prevail on appeal, it must be made to appear that the appellant's rights have been injuriously and prejudicially affected. *S. v. Beal,* 199 N. C. 278, 154 S. E. 604. The party alleging error, "not only has the laboring oar, but the tide is also against him. Error must be shown; it will not be presumed." *Cole v. R. R.,* 211 N. C. 591, 191 S. E. 353. This burden does not seem to have been successfully carried in respect of the instant exception. Indeed, the defendant's generous treatment of his wife when sober, was attested by the State's own witnesses, and no doubt the trial court thought the defendant was only belaboring a matter which was conceded or really not disputed. Without approving the ruling, we do not sustain the exception, as no baneful consequence has been made to appear.

3. The defendant sought to show by Dr. J. F. Owen, a psychiatrist, that at the time of the homicide he was not capable of forming a deliberate and premeditated purpose to kill, with appreciation and understanding of what he was doing. On cross-examination, the prosecution was allowed to ask the witness whether he was being paid to testify for the defendant. His answer was that he made no statement about testifying, but that he charged the defendant $500, and that he would not have been there if he had not been paid. "Q. So, you merely came here in the capacity of a paid employee and a paid witness for the defendant?" A. "Yes, sir." Objection; overruled; exception. This examination was permissible to test the bias or partiality of the witness towards the party by whom he was called or introduced. *Johnson v. R. R.,* 163 N. C. 431, 79 S. E. 690; *S. v. Beal, supra;* Wigmore on Evidence (3d Ed.), Sec. 961. The exception is not sustained.

4. The defendant called his father as a witness to testify concerning his mental condition shortly after the homicide when the defendant stopped to inform him of the killing; also to tell, in a general way, to what extent the defendant had been drinking lately and the effect it had had upon his mind. On cross-examination, the prosecution was allowed to inquire into the defendant's business activities, the extent of his farming operations, his management of a large tobacco warehouse in Smithfield, etc. Objection; overruled; exception. This examination was permissible to show the defendant's mental capacity despite his use of intoxicants. The exception is not sustained.

The prosecution was also allowed to show by the cross-examination of this witness that the defendant had been twice married and twice divorced before his marriage to the deceased. Objection; overruled; exception.

It must be conceded that the admission of this evidence was an inadvertence. It was neither relevant nor material to the charge upon which the defendant was being tried. It was incompetent, but its prejudicial effect is without support or confirmation on the record. *S. v. Perry,* 226 N. C. 530, 39 S. E. (2) 460. *Cf. Lasater v. State* (Tex. Crim. App.), 227 S. W. 949. The defendant was being tried in the county where he had lived from boyhood. He was well known, and no doubt the jury was acquainted with his entire career. Nevertheless, disregarding the common knowledge of the community, the admission of this evidence does not appear to have had any appreciable effect on the verdict. "Admittedly, such evidence was incompetent, though not prejudicial." *Payne v. Com.,* 255 Ky. 533, 75 S. W. (2) 14. It is not enough for the appellant to show error, and no more. He must make it appear that he was prejudiced thereby. *S. v. Perry, supra; S. v. King,* 225 N. C. 236, 34 S. E. (2) 3. The ruling is disapproved, but the exception is not sustained for the reason that only a harmless inadvertence has been made manifest.

III. *Exceptions to the charge:* The defendant entered upon the trial with the common-law presumption of innocence in his favor and with the burden on the prosecution to establish his guilt beyond a reasonable doubt. *S. v. Singleton,* 183 N. C. 738, 110 S. E. 846. His plea of traverse put his guilt in issue. *S. v. Harvey,* 228 N. C. 62, 44 S. E. (2) 472. On the trial he neither admitted the killing, nor did he take the witness stand. It was therefore incumbent upon the prosecution to make out the case in all of its elements or to establish the guilt of the defendant beyond a reasonable doubt. *S. v. Grass,* 223 N. C. 31, 25 S. E. (2) 193. This, the prosecution proceeded to do by first establishing an intentional killing with a deadly weapon. Then evidence was offered tending to show premeditation and deliberation, which, with the presumptions arising from an intentional killing with a deadly weapon, was sufficient to establish the crime of murder in the first degree. *S. v. Floyd,* 226 N. C. 571, 39 S. E. (2) 598; *S. v. Harris,* 223 N. C. 697, 28 S. E. (2) 232; *S. v. Evans,* 198 N. C. 82, 150 S. E. 678.

In this connection there is one exception directed to a portion of the charge which deserves immediate attention. In a single instance, touching the question of presumptions, the court instructed the jury that, "If the State has satisfied you beyond a reasonable doubt that the defendant killed the deceased with a deadly weapon, as I have said, the law presumes that it was done with malice, . . . and (if) you find beyond a reasonable doubt that the defendant intentionally killed the deceased with malice, it would be your duty to return a verdict of guilty of murder in the second degree, subject to the instructions that will be hereafter given you as to responsibility or mental capacity."

The criticism of this instruction is that the presumption of malice was made to rest on the killing of the deceased by the defendant with a deadly

weapon without regard to whether the killing was intentional. *S. v. McNeill, ante,* 377; *S. v. Snead,* 228 N. C. 37, 44 S. E. (2) 359; *S. v. Childress,* 228 N. C. 208, 45 S. E. (2) 42; *S. v. Debnam,* 222 N. C. 266, 22 S. E .(2) 562. The exception is untenable because on several previous occasions the court had stated the presumption could arise only from an intentional killing with a deadly weapon, and the expression, "as I have said," refers to these previous instances. Moreover, before concluding the instruction the *lapsus linguæ* was corrected. *S. v. Davis,* 223 N. C. 381, 26 S. E. (2) 869; *S. v. Utley,* 223 N. C. 39, 25 S. E. (2) 195. The exception is not sustained.

The real debate, however, was over the defendant's contention, based on evidence offered and elicited by him, that he was in such a state of mental confusion, superinduced by chronic alcoholism, as not only to render him incapable of premeditation and deliberation, but also to deprive him of any moral perception or legal responsibility for his acts.

In submitting this phase of the case to the jury, the trial court followed closely the adjudications on the subject, especially the case of *S. v. Murphy,* 157 N. C. 614, 72 S. E. 1075, which he evidently had before him when charging the jury. The court's instructions also reveal an acquaintance and familiarity with and a flavoring of the following cases: *S. v. Hairston,* 222 N. C. 455, 23 S. E. (2) 885; *S. v. Cureton,* 218 N. C. 491, 11 S. E. (2) 469; *S. v. Alston,* 215 N. C. 713, 3 S. E. (2) 11; *S. v. Bracy,* 215 N. C. 248, 1 S. E. (2) 891; *S. v. Edwards,* 211 N. C. 555, 191 S. E. 1; *S. v. Alston,* 210 N. C. 258, 186 S. E. 354; *S. v. Walker,* 193 N. C. 489, 137 S. E. 429; *S. v. Ross,* 193 N. C. 25, 136 S. E. 193; *S. v. English,* 164 N. C. 497, 80 S. E. 72; *S. v. Shelton,* 164 N. C. 513, 79 S. E. 883; *S. v. Allen,* 186 N. C. 302, 119 S. E. 504; *S. v. Hancock,* 151 N. C. 699, 66 S. E. 137; *S. v. Kale,* 124 N. C. 816, 32 S. E. 892. Indeed, some of the instructions are couched in the very language of the decisions.

It is the law of this jurisdiction that an affirmative defense, *e.g.,* drunkenness or insanity, which partakes of the nature of a plea of confession and avoidance, is to be satisfactorily proved by the defendant unless it arise out of the evidence produced against him. *S. v. Swink, ante,* 123; *S. v. Hammonds,* 216 N. C. 67, 3 S. E. (2) 439; *S. v. Alston,* 214 N. C. 93, 197 S. E. 719; *S. v. Keever,* 177 N. C. 114, 97 S. E. 727; *S. v. Craton,* 28 N. C. 178. The *onus* of showing "justification, excuse or mitigation," to the satisfaction of the jury, is on the defendant. *S. v. Willis,* 63 N. C. 26; *S. v. Carland,* 90 N. C. 668; *S. v. Brittain,* 89 N. C. 481; *S. v. Ellick,* 60 N. C. 456 (see note to this case in 3 Anno. Ed.). "Matters in extenuation and excuse, or of discharge by reason of insanity," are for the defendant. *S. v. Jones,* 191 N. C. 753, 133 S. E. 81. "All matters of excuse or mitigation devolve upon the prisoner." *S. v. Rollins,* 113 N. C. 722, 18 S. E. 394.

Speaking to the question in *S. v. Foster,* 172 N. C. 960, 90 S. E. 785, *Walker, J.,* delivering the opinion of the Court, said: "That the burden is upon the prisoner to satisfy the jury by proof of any matters of justification, excuse, or mitigation has been too long settled to be now questioned. The jury were instructed that the burden was upon the State to establish beyond a reasonable doubt that the prisoner killed the deceased with premeditation and deliberation. The charge was correct and in accordance with the authorities."

Finally the whole matter in respect of the burden of proof and the burden of satisfaction, where insanity or mental debility is interposed as a defense, is thoroughly discussed in the case of *S. v. Harris,* 223 N. C. 697, 28 S. E. (2) 232, and it would only be a work of supererogation to restate it here. The presumption that the accused was sane and responsible for his acts persists until the contrary is shown to the satisfaction of the jury. Therefore, if the jury are left in doubt as to the sanity or responsibility of the accused, the presumption prevails. *S. v. Smith,* 77 N. C. 488.

As a *dernier ressort* the defendant says that while no one of his exceptions, standing alone, may be sufficient to work a new trial, nevertheless taken in their totality, they make it quite clear that the scales of justice were weighted against him, *S. v. Hart,* 186 N. C. 582, 120 S. E. 345, and that in no event should a case of this importance be upheld on the doctrine of harmless error.

The position might prevail but for the conduct and declarations of the defendant on the night of the homicide which clearly revealed his stubborn purpose and unbending will to kill the deceased, even over the efforts of those in the house to protect her, and an immediate consciousness of wrong which prompted the defendant to seek the sheriff's office, knowing full well that as between himself and the officers it was only a question as to who would make the call first. At any rate, these are the overshadowing facts of the record, and the jury has found them to be true. Not until the defendant reached the jail did he make any self-serving declaration. He then, for the first time, said to the jailer, "I am as crazy as hell." This was his last comment on the subject so far as the record discloses.

True it is, that the atrocity of the defendant's conduct was a circumstance from which opposite conclusions were sought to be drawn; the one that it exhibited a mind fatally bent on mischief; the other that it revealed a diseased intellect. The jury attributed it to the former.

The test of responsibility is the capacity to distinguish between right and wrong at the time and in respect of the matter under investigation. *S. v. Potts,* 100 N. C. 457, 6 S. E. 656; *S. v. Brandon,* 53 N. C. 463. He who knows the right and still the wrong pursues is amenable to the criminal law. *S. v. Jenkins,* 208 N. C. 740, 182 S. E. 324. On the other hand, if "the accused should be in such a state of mental disease as not

to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing wrong," the law does not hold him accountable for his acts, for guilt arises from volition, and not from a diseased mind. *S. v. Haywood,* 61 N. C. 376.

We are aware of the criticism of this standard by some psychiatrists and others. Still, the critics have offered nothing better. It has the merit of being well established, practical and so plain "that he may run that readeth it." Hab. 2:2. Moreover, it should be remembered that the criminal law applies equally to all sorts and conditions of people. It ought to be sufficiently clear to be understood by the ordinary citizen.

The conclusion is reached that no reversible error has been made to appear. Hence, the verdict and judgment will be upheld.

No error.

BARNHILL, J., dissenting: Error in the trial below is conceded. The majority are of the opinion the errors committed are not of sufficient moment to require a new trial. I regret to find myself in disagreement. Yet, after careful study of the record I am forced to the conclusion that the errors to which reference is made in the majority opinion, as well as others not mentioned, were sufficiently prejudicial to the defendant to require a new trial.

The testimony in the case presents this picture:

The defendant, a man about thirty-seven years of age, is addicted to the use of liquor. At times he would get on a spree. He was then disagreeable, quickly irritated, and rough in manner and conduct, abusing and assaulting his wife. She would leave him and return after he sobered up. While they were separated their relations seemed to be pleasant. She would go to his house, and he would visit the home in which she was staying, and they consulted each other about matters of mutual interest. They separated for the last time sometime prior to the homicide. During the week preceding the homicide, he went to Georgia. Before leaving, he sent her $100, gave her the name of the hotel at which he would stop, and told her to get in touch with him if she needed him. When he returned, he learned she had gone to Duke, and he called to inquire about her condition. When told she was at Duke, he said that if she was sick he hoped she would get well, and also said, as a part of the same statement, that he wished that she was dead, wished that he could wake up in the morning and hear that she was dead, that that would be the sweetest music he had ever heard. He had been drinking at the time.

On the night of the homicide he went to the home where she was staying and talked to her and the members of the household in a pleasant manner. He and deceased discussed her trip to Duke, and she told him about the X-ray photographs which were taken. He offered those present

some whisky and some peaches. When he got ready to leave, he asked her if she was going with him. When she said no, he flew into a rage and told her she could see his lawyer the next day. He left, drank more liquor, and returned. When he entered the house he had his gun, which he usually carried in his car, with him. The members of the family went into the middle bedroom, and Mrs. Elsie Mae Creech, Johnnie Grimes, and the deceased held the door to keep him from entering. The deceased was crouched down low with the right side of her head and her right shoulder against the middle of the door. He tried several times to shove the door open. Failing in that, he fired through the door. The load of shot struck the deceased in the right side of her head, scattering blood on the door, on Mrs. Elsie Creech, on the floor, and on the bed to the rear. Deceased immediately slumped down on the floor and never moved. Later she was examined by Johnnie Grimes. Her body was then lifeless. "I would say she was dead."

After the first shot was fired, the family ran out. Defendant went on the back porch and called Johnnie Grimes several times. He also went out in the back yard. He then, some minutes later, went into the room where the body was lying, turned on the light, pointed his gun in the direction of the body and fired. Whether this load struck the body of deceased is not made to appear. He then left and later surrendered to the sheriff.

The homicide was committed on the night of July 28. The defendant, on August 11, in a preliminary hearing, was committed to jail without bond. The defendant promptly served notice of intention to take the depositions of out-of-state witnesses, the hearing being set for August 21. On the morning of August 18, about noon, the Grand Jury returned a true bill. The court thereupon, of its own motion, ordered a special venire of 250 men to be drawn from the body of the citizenship of the county and set the trial for hearing on the following morning at 9:30, at which time the defendant was put on trial for his life.

The criminal law should be promptly and efficiently enforced. This applies with particular force when a crime such as the one portrayed by this record is committed. The slaying was inexcusable and the defendant should be punished according to the degree of the crime he committed. For him I hold no brief. But the law itself demands that the life of a citizen shall not be exacted for a crime until he has first been convicted in a trial as fair and free from error as it is humanly possible to make it. *S. v. Howell,* 218 N. C. 280, 10 S. E. (2) 815. Being convinced, as I am, that the defendant has not been accorded that type of trial, but that instead the able and conscientious judge who presided inadvertently committed errors during the trial which of necessity must have influenced the verdict of the jury, I am compelled to register my dissent and to state, as briefly as I can, the reasons which prompt me to do so.

Much could be said about the disposition of the motion for continuance. The defendant was allowed less than a day in which to summon and consult witnesses and no time in which to examine the list of special veniremen. But I do not rest my dissent on that ruling. Perhaps the defendant has not brought his case within the principle that controlled decision in *S. v. Farrell,* 223 N. C. 321, 26 S. E. (2) 322. Even so, we must always remember that undue haste, particularly in cases of this type, will pervert justice as surely as unnecessary delay will defeat it.

The State was permitted to prove, over objection, that the defendant was engaged extensively in farming operations, was a tobacco warehouseman and the son of one of the largest farmers of the community. These facts have no bearing on the guilt or innocence of the defendant. Yet the judge considered them of such importance that he reviewed them in detail in his charge to the jury. Thus he indicated that he thought they were facts to be considered by the jury.

No doubt at least some of the jurors knew these facts, but they did not know they were facts to be considered against the defendant on the question of his guilt or innocence. Yet they were so used. A man's wealth, position, or prominence should not avail him in a court of justice. Neither should they be used against him.

Likewise, the court permitted the State to prove that the defendant had been twice married and twice divorced before he married the deceased. These facts have no bearing whatever on the question at issue. Even so, the court gave them emphasis and importance by reviewing them in detail in his charge.

What more did an able, forceful solicitor desire than proof that defendant killed the deceased, that he was a wealthy son of a prominent citizen and had been divorced twice, with permission of the judge to use such proof in his argument? It laid a perfect foundation for the argument that defendant now, on this fateful night, was about the business of ridding himself of a third unwanted spouse. No doubt it was so used. If it was not, then the solicitor muffed his best bet on the evidence admitted, and the fact remains that it was submitted to the jury for their consideration in the charge of the court.

The assignments of error based on the admission of evidence to which I have referred, in my opinion, require a new trial. But there are others of even more serious nature.

All the testimony tends to show that the deceased was killed by the first shot, fired through the door. There is no evidence that she was alive when defendant fired the second shot at her body some time later.

The court below, however, inadvertently did not so construe the testimony. It charged the jury in part as follows:

"The State says and contends that . . . while out on the outside of the house he turned and went back in the house and turned on the light and

took his shotgun and aimed at the prostrate body of his wife lying upon the floor and shot her again in the head. The State says and contends that that shows a determination on his part to carry out and execute completely his previously formed plan and design to take her life.

"In that connection the Court charges you that dealing of the lethal blow after the deceased had been felled, if you find beyond a reasonable doubt she had been felled and rendered helpless and dealt such blows, is evidence from which you could infer premeditated and deliberated purpose to kill."

In addition to the foregoing charge, the court in the statement of contentions more than once referred to the second shot as the one which might have caused death. It, in its charge on the law, instructed the jury in effect that they could find that deceased was killed by the second shot and left it to the jury to find whether it was the first or the second shot that inflicted the fatal wound, though the record is devoid of evidence tending to show that she was alive at the time the second shot was fired. Instead, it conclusively discloses that she was killed by the first shot.

Was this prejudicial? In the first place the court charged the jury that if they found that the first shot killed the deceased they should return a verdict of murder in the second degree or manslaughter. While there is a conflicting charge, this instruction renders it most probable the verdict was rendered upon the assumption that the second shot inflicted the lethal wound. Whether the second shot was deliberately fired or was the act of a person whose mind was deranged by liquor, it was a horrible, repulsive act. If his wife was at the time alive, lying helpless on the floor, it would move any juror to return a verdict of premeditated murder. On this record she was not killed then, under those circumstances. Yet the jury were led to believe they could so find from the evidence offered, and the issue was presented to them squarely and unequivocally for them to decide.

The atrocity of the defendant's conduct in this respect was a circumstance from which opposite conclusions might be drawn—the one that it exhibited a mind fatally bent on mischief; the other, that it revealed a diseased and deranged mind. The manner in which it was submitted to the jury, as substantive evidence of a homicide deliberately committed, constitutes prejudicial and reversible error.

The deceased was killed when the defendant shot through the door. There is no evidence in the record tending to show that he knew that she was then leaning against the door. There is no direct evidence that he knew she was in the room into which he shot. These are the immediate circumstances of the slaying. He should be tried for this homicide thus committed, in the light of all competent evidence, *pro* and *con*, on the issue of prémeditation and deliberation. He should not be required to

answer for a homicide under more atrocious circumstances which did not exist. While the second shot constitutes a fact to be considered on the question of premeditation and deliberation, it cannot, on this record, be made the basis of a finding that the homicide was then committed. Yet, under the charge of the court below the jury were permitted to so find. The record in this respect is in such condition that the conclusion the defendant was prejudiced thereby seems to me to be clear.

"The court should never give the jury instructions based upon a state of facts not presented by some reasonable view of the evidence produced on the trial, nor upon a supposed state of facts." *S. v. Wilson,* 104 N. C. 868.

The theory that (1) drunkenness is no excuse for crime, (2) to avail the defendant it must be made to appear that his reason was utterly dethroned, (3) the burden of so showing rests upon him, and (4) the test is the capacity to distinguish right from wrong, permeates the whole charge without distinction between the count of murder in the second degree on the one hand, and murder in the first degree on the other.

We have said many times that voluntary drunkenness is no legal excuse for crime and that to avail the defendant he must show, the burden being on him, that his reason was dethroned to such an extent that he was incapable, at the time, of distinguishing between right and wrong. But in these cases we were discussing crimes in which premeditation and deliberation or other specific intent was not an essential element of the crime charged.

This principle, however, is not allowed to prevail where, in addition to the overt act, it is required that a definite specific intent be established as an essential feature of the crime.

This qualifying rule or exception, if it may be so termed, was first stated and applied to the charge of murder in the first degree after the adoption, in 1893, of the statute which is now G.S. 14-17, dividing murder into two degrees and making premeditation and deliberation an essential element of murder in the first degree. It is fully stated and discussed in *S. v. Murphy,* 157 N. C. 614, 72 S. E. 1075. It is quoted with approval and applied in the following cases: *S. v. English,* 164 N. C. 497, 80 S. E. 72; *S. v. Shelton,* 164 N. C. 513, 79 S. E. 883; *S. v. Foster,* 172 N. C. 960, 90 S. E. 785; *S. v. Allen,* 186 N. C. 302, 119 S. E. 504; *S. v. Williams,* 189 N. C. 616, 127 S. E. 675; *S. v. Ross,* 193 N. C. 25, 136 S. E. 193; and *S. v. Alston,* 210 N. C. 258, 186 S. E. 354. See also *S. v. McManus,* 217 N. C. 445, 8 S. E. (2) 251; 15 A. J. 30, 26 A. J. 381.

"Although drunkenness, in point of law, constitutes no excuse or justification for crime, still, when the nature and essence of a crime is made, by law, to depend upon the peculiar state and condition of the criminal's mind at the time, and with reference to the act done, drunkenness, as a

matter of fact, affecting such state and condition of mind, is a proper subject for consideration and inquiry by the jury." *S. v. Allen, supra.*

"Such testimony of intoxication is admitted, not as a defense, but as showing lack of an essential ingredient of the crime in question." Smoot, Law of Insanity, 38; 1 Wharton's Criminal Law, 12th Ed., 101, 102. It is to be considered, *pro* and *con,* on the issue of premeditation and deliberation. *S. v. Hauser,* 202 N. C. 738, 164 S. E. 114.

"To regard the fact of intoxication as meriting consideration in such a case is not to hold that drunkenness will excuse crime, but to inquire whether the very crime which the law defines and punishes has, in point of fact, been committed." *S. v. Allen, supra.*

This modification of the common law rule has become firmly imbedded in our law, subject to this qualification: Where the evidence shows that the purpose to kill was deliberately and premeditatedly formed when sober, the imbibing of intoxicants to whatever extent in order to carry out the design will not avail the defendant. *S. v. Foster, supra; S. v. Adams,* 214 N. C. 501, 199 S. E. 716; *S. v. Hairston,* 222 N. C. 455, 23 S. E. (2) 885.

The court did, at one time, it is true, state the rule relating to evidence of drunkenness on the first degree count substantially as formulated in our decisions, but he coupled with that statement language which had the effect of placing the burden on the defendant to refute the charge of premeditation and deliberation by showing that "he was utterly unable to form or entertain this essential purpose." This is emphasized by his other statements on the burden of proof.

When it is admitted or proven that the defendant intentionally killed the deceased with a deadly weapon, the presumptions arising from such proof, nothing else appearing, make the crime murder in the second degree. If the defendant would reduce the crime to manslaughter by rebutting the presumption of malice or excuse it altogether on the grounds of self-defense, insanity, or other cause, the burden is on him. Conversely, if the State would raise the crime to murder in the first degree, it has the burden of establishing the additional element of premeditation and deliberation. That burden never shifts. It remains on the State throughout the trial. *S. v. Redman,* 217 N. C. 483, 8 S. E. (2) 623; *S. v. Harris,* 223 N. C. 697, 28 S. E. (2) 232. The State is aided by the presumption of sanity, *S. v. Harris, supra,* but no presumption of premeditation and deliberation ever arises, whatever the defense interposed by the defendant.

"The additional elements of premeditation and deliberation, necessary to constitute the capital offense, are not presumed from a (intentional) killing with a deadly weapon. These must be established beyond a reasonable doubt, and found by the jury, before a verdict of murder in the first degree can be rendered against the defendant." *S. v. Keaton,* 206 N. C.

682, 175 S. E. 296; *S. v. Davis,* 214 N. C. 787, 1 S. E. (2) 104; *S. v. Redman, supra; S. v. Harris, supra.* The presumption of innocence prevails until overcome by evidence of the truth of the criminal charge, and this must be such as to remove all reasonable doubt from the minds of the jury. *S. v. Potts,* 100 N. C. 457; *S. v. Williams, supra.*

When the State offers evidence of premeditation and deliberation, defendant may elect either to offer evidence in rebuttal or take the risk of an adverse verdict. *S. v. Peterson,* 225 N. C. 540, 35 S. E. (2) 645. Thus he may offer evidence of drunkenness to be considered by the jury on that issue, but that does not mean that the burden shifts or that he must show that "he was utterly unable to form or entertain this essential purpose." He offers the evidence, not as a defense but in rebuttal, to be considered by the jury on that phase of the case.

There are, it is true, statements in some of our decisions which seem to point in the other direction. These, perhaps, misled the able trial judge. But to so hold would create two irreconcilable rules respecting the same matter. The State must prove premeditation and deliberation, but if defendant relies on drunkenness in rebuttal, he must prove that he was utterly incapable of forming a specific intent. If the State fails to prove premeditation and deliberation and the defendant fails to show incapacity to form any specific intent, what then? Is he to be convicted of the capital felony? Once you put the burden on him, that would be the only reasonable conclusion. That is to say, the State must prove premeditation and deliberation unless the defendant relies upon drunkenness. In that event, this element is conclusively presumed unless the defendant successfully rebuts it. Such is not the law.

There are other exceptions in the record which well might command consideration. Yet, if the ones I have discussed do not warrant a new trial, neither would they, and so I do not extend the discussion further.

There is evidence in the record to sustain the charge of murder in the first degree, and it may be that upon a retrial the same result will be reached. And yet, it is important that a defendant shall not suffer the penalty of death until he has been convicted in a trial in which there has been a scrupulous observance of constitutional and statutory safeguards, protecting and preserving his rights. When there is a general plea of not guilty, as here, and no admission of an unlawful killing, the death penalty should be exacted only upon the verdict of a jury which has been given full opportunity to pass upon the weight and credibility of the evidence without the injection of extraneous matter and under instructions which correctly apply the pertinent principles of law. *S. v. Howell, supra.* I am of the opinion that the prisoner has not been accorded that type of trial, so very essential in cases involving capital punishment. Therefore, I vote for a new trial.

ERVIN, J., dissenting: In my judgment, the prisoner ought to be granted a new trial for the reasons set forth in the foregoing opinion of *Mr. Justice Barnhill.*

CAROLINA POWER & LIGHT COMPANY v. WILLIAM MURPHY BOWMAN AND WIFE, BETTY B. BOWMAN, AND W. W. SNOW.

(Filed 7 January, 1949.)

1. Easements § 5—

In an action for mandatory injunction to remove a building from plaintiff's right of way, the burden is upon the plaintiff to show that the building erected on the right of way by the owners of the servient tenement constitutes an interference with the use and enjoyment of the easement.

2. Same—

As a general rule, the owner of the servient tenement has the right to use same for any purposes not inconsistent with the free use and enjoyment of the easement.

3. Same—

Where an easement is condemned for electric power transmission lines, the condemnor has the right, ordinarily, to the unobstructed use at all times of the servient land for the exercise of such rights as are necessary or incident to the enjoyment of the easement.

4. Same—Evidence held to justify directed verdict that defendants' building constituted interference with plaintiff's easement for transmission lines.

The decree in condemnation condemned a 50-foot right of way for electric transmission lines, and stipulated that the owners of the fee should have right of use for all purposes not inconsistent with the easement. Plaintiff's evidence disclosed that subsequent to the construction of its transmission lines, the owners of the servient tenement constructed a brick building covering almost the entire width of the right of way and extending upward within a few feet of the heavily charged transmission lines. Defendants' evidence tended to show that the transmission lines could be repaired and maintained over the building without serious difficulty, but that if plaintiff made proposed changes in its lines the presence of defendants' building would necessitate additional construction, labor and equipment. *Held:* Plaintiff was entitled upon the evidence to a directed verdict to the effect that the location of defendants' building constituted an interference with the exercise of plaintiff's easement, particularly in view of the provision of the decree of condemnation that the owners of the servient tenement should have the right and privilege to use the land for agricultural purposes, which would seem to exclude all other uses under the maxim *expressio unius est exclusio alterius.*

5. Eminent Domain § 26—

Where an easement for electric transmission lines has been condemned and compensation paid therefor, the decree has the effect of appropriating an easement for service to the public and withdrawing from the owner of the fee the right to any private use which would interfere with the public use, and mandatory or prohibitory injunction will lie to remove or prevent any encroachment upon the easement.

STACY, C. J., dissenting.

WINBORNE and SEAWELL, JJ., concur in dissent.

APPEAL by plaintiff from *Carr, J.*, March Term, 1948, of ROBESON. New trial.

This case was here at Fall Term, 1947, and is reported in 228 N. C. 319. The action was instituted to restrain the maintenance of obstructions on land upon and over which the plaintiff had acquired an easement by condemnation for the construction and operation of its electric power lines. It was alleged that the defendants had erected a permanent brick building, now used as a moving picture theater, on plaintiff's right of way in violation of its easement and constituting an interference inconsistent with its rights and its ability to operate, maintain, and repair its transmission lines, and creating hazards to plaintiff, defendants, and the public.

The defendants Bowman admitted the construction of the theater building as a permanent structure on the land described, but entered a general denial of plaintiff's allegations, and further denied that plaintiff had a valid easement as against defendants' fee simple title to the land, alleging specifically that at the time defendants took title to the land no easement thereon, by contract or condemnation, appeared of record in the office of the Register of Deeds of the county. The defendant Snow is lessee of the theater building and has no other interest in the controversy.

At the first trial, June Term, 1947, there was judgment of involuntary nonsuit, and plaintiff's appeal therefrom was heard at Fall Term, 1947, of this Court. It was determined on that appeal that plaintiff's easement was valid and subsisting, and that the condemnation proceedings and judgment of record in the Superior Court, under pertinent statutes, were not required to be recorded also in the Register's office, and that plaintiff's easement described in the judgment was not lost or defeated by subsequent conveyance from the original owners under whom defendants Bowman claim. The judgment of nonsuit was set aside and the cause remanded for the determination of issues of fact raised by the pleadings.

On the trial at March Term, 1948, the issue raised by the allegation in the complaint and denial in the answer was submitted to the jury as follows: "Does the erection and use of defendants' theater building con-

stitute an interference inconsistent with plaintiff's easement, as alleged in the complaint?" Other questions referred to in the pleadings were eliminated.

It was stipulated that plaintiff's predecessor in title, the Yadkin River Power Company, had condemned fifty feet in width over the land of defendants' grantors in a proceeding instituted and prosecuted to final judgment in the Superior Court of Robeson County in 1913, and that the defendants Bowman are the owners of the land subject to such rights as plaintiff has by virtue of the easement thereon. The judgment roll in that proceeding was offered in evidence. Therein the rights acquired upon payment of $500 compensation were described and defined as "right of way" across the lands of the defendants "for the purpose of building and forever maintaining, inspecting and keeping in repair its said lines for the transmission of electricity and its telephone lines, and the right of access along and upon said easement for its officers, agents and employees, and those of its successors and assigns, for the purpose of inspecting, repairing and maintaining said lines for transmitting electricity and its telephone lines, and to keep said easement and right of way and the land adjacent thereto cleared of all such trees and objects as might fall upon and across said lines. And, except for the purpose aforesaid, petitioner shall not interfere with the rights of the defendants; and the defendants shall have full power and right to use the land over which said easement and right of way is condemned for any and all purposes not inconsistent with said easement of petitioner, its successors and assigns." In the Superior Court at term time, to which the proceeding was removed, it was adjudged by consent that the final order of the Clerk be in all respects confirmed, with the following proviso: "Provided, that defendants and their heirs and assigns shall have the right and privilege to use a portion of the land condemned in this proceeding for agricultural purposes when not necessary for the use of the plaintiff."

Plaintiff offered evidence that the defendants had recently erected and now maintain on the 50-foot strip of land so condemned a brick building with concrete foundation, 35 feet wide, 95 feet long, and 20 or 25 feet high, immediately underneath plaintiff's power lines which carry 110,000 volts of electricity. The roof of the building is within approximately 10 feet of plaintiff's power lines, and metal vents extend above the roof within 8 feet and 4 inches of the wires. Four wires for the transmission of this electric current are strung from steel towers 350 feet apart and are and were suspended over this 50-foot right of way at the time of the erection of the building. The building covers all but a small portion of the width of the right of way for its entire length, and a smaller building is also on the right of way in rear of brick building. The brick building

was constructed for and is now in use as a moving picture theater with seating capacity of some 400. This evidence was uncontroverted.

Plaintiff also offered evidence from electrical experts and engineers that the height, size, and construction of this building on the right of way interfered with the inspection, maintenance and repair of plaintiff's power lines and prevented free access over and along the right of way for this purpose, particularly in case of injury to structures, and for the installing of new and larger conductors now in prospect incident to a new major steam electric power plant under construction near Lumberton. The building would also interfere with transportation and use of equipment and material for work on wires, insulators, conductors and towers.

The defendants offered an electrical engineer who described in some detail methods which in his opinion could be used without serious difficulty in making repairs by pulling the wires to one side and away from the building; though some difficulty would be presented it would not be insuperable; that in case the Light Company should decide to relocate some of its structures and desire to use the space occupied by the building, it would be in the way; and that in the delicate work of changing insulators, or in case lightning should strike, potential hazards to the power wires, the building, and those who might be therein would be occasioned. He testified in effect if it became necessary to change conductors for larger ones the building would interfere with the operation or necessitate additional construction. There was also testimony that if the transmission line came in contact with the building it would likely burn, and that due to the presence of the building on the right of way more labor and additional equipment might be required to make repairs; that electric wires are strung over buildings in Lumberton and other cities, though usually these are low voltage wires and do not carry 110,000 volts of electricity.

The defendants consented that the frame building referred to in the testimony as partly on the right of way be removed, having been put there by another without defendants' knowledge.

At the conclusion of the testimony the plaintiff moved the court upon the pleadings and evidence for a directed verdict in its favor upon the issue submitted, which motion was denied, and plaintiff excepted. Among other requests for instruction, the plaintiff asked the court to charge the jury as follows:

"The court charges you as a matter of law, under this contention (as to size, character and location of the building and its effect upon plaintiff's use of its easement), that the plaintiff is entitled to have the land within the boundaries of its right of way, and every part thereof, kept open and unobstructed by any structures of permanent nature, such as the building in question, so that plaintiff and its agents and employees may travel on foot and by vehicle upon and along said right of way as occasion may

arise, and for all purposes which are reasonably necessary now, or which may probably become necessary at any time in the future, in the inspection, repair, maintenance, or reconstruction and operation of its transmission lines, and I charge you gentlemen that if you should find from the evidence, and by its greater weight, that the said building is of such general character and is so located and maintained by defendants upon the plaintiff's easement, that it would constitute a use of the land inconsistent with the easement, it will be your duty to answer the issue yes. I further charge you that if you believe the evidence in respect to the nature, size, and location of said building, that you should answer the issue yes." This request for instruction was denied, and plaintiff excepted.

The jury answered the issue no, and from judgment on the verdict plaintiff appealed.

Varser, McIntyre & Henry and A. Y. Arledge for plaintiff, appellant.
McKinnon & Seawell and McLean & Stacy for defendants, appellees.

DEVIN, J. The former appeal in this case by the plaintiff was from a judgment of nonsuit. *Light Co. v. Bowman,* 228 N. C. 319, 45 S. E. (2) 531. The question then debated was whether plaintiff's easement acquired by judgment in condemnation proceeding was valid and subsisting as against subsequent purchasers from the original owners of the land. Consideration of pertinent recording statutes was involved. Plaintiff's rights under the condemnation decree were upheld, and the cause was remanded for determination of the issue raised by the defendants' general denial of plaintiff's action for mandatory injunction to remove obstructions on its right of way.

The burden was on the plaintiff to show that the building erected and maintained by defendants on the strip of land condemned for use by the plaintiff in the construction and continued operation of its electric power transmission lines constituted an interference inconsistent with plaintiff's easement.

The uncontroverted evidence disclosed that the defendants erected shortly before this suit was begun and now maintain on plaintiff's 50-foot right of way a substantial and permanent brick theater building 35 feet wide, 94 feet long, and 20 or 25 feet high, underneath plaintiff's electric power transmission lines carrying 110,000 volts, the top of the building coming within 10 feet of the wires thus charged. The wires supported by steel towers 350 feet apart are suspended over the building which covers almost the entire width of the right of way. Metal vents on the roof of this building reach within 8 feet, 4 inches of the wires. It was testified that due to its height, size, construction and location this building interfered with inspection, repair and maintenance of plaintiff's power lines.

It was also testified that plaintiff is building a major steam electric plant near Lumberton, and in connection with it expects to make changes in its power lines including that portion over defendants' building, and to install larger conductors and heavier wires, with which operations the building would interfere. Defendants' evidence tended to show methods by which ordinary repairs could be made and operations maintained on plaintiff's power lines without serious difficulty with the building as now located, though this might entail some additional equipment and labor, but it also appeared that for the purpose of and in making changes in its wires, conductors and installations the presence of defendants' building would necessitate additional construction, labor and equipment.

After careful consideration of the evidence adduced at the trial as it appears of record, we reach the conclusion that plaintiff was entitled to have the court charge the jury, as prayed, that upon all the evidence if found to be true as testified, they should answer the issue submitted in favor of the plaintiff. Plaintiff's prayer for instruction should have been given substantially as prayed. There was error in refusing plaintiff's prayer for which a new trial must be awarded.

The easement acquired by plaintiff is described and defined in the final judgment in the condemnation proceeding, and this was offered in evidence as the basis of plaintiff's action. By this decree plaintiff acquired the right of access along and upon a 50-foot strip of land described for the purpose of constructing, inspecting, repairing and maintaining its electric transmission lines, while the landowner retained the right to use the land so condemned for all purposes not inconsistent with the plaintiff's easement.

To draw a definite line between the reciprocal and oftentimes overlapping rights and obligations of the owners of the dominant and servient tenements in an easement is not always simple. But the general rule in regard to land condemned for use for electric power transmission lines seems to be that the landowner has the right to make use of the strip of land condemned in any manner which does not conflict with the rights of the Power Company, and which is not inconsistent with the use of the land for the purposes for which condemnation was allowed, and which does not interfere with the free exercise of the easement acquired. *Kesterson v. California-Oregon Power Co.*, 114 Oregon 22; *Alabama Power Co. v. Berry*, 222 Alabama 20; *Cantrell v. Appalachian Power Co.*, 148 Va. 431; *Aycock v. Houston Lighting & Power Co.*, 175 S. E. (2) 710; *Hastings v. Sou. Natural Gas Corp.*, 45 Ga. App. 774; *Patterson Orchard Co. v. Southwest Arkansas Utilities Corp.*, 179 Ark. 1029, 65 A. L. R. 1446; 30 C. J. S. 207, 209; 46 A. L. R. 1463; *R. R. v. McLean*, 158 N. C. 498, 74 S. E. 461; *Power Co. v. Wissler*, 160 N. C. 269, 76 S. E. 267; *Collins v. Alabama Power Co.*, 214 Ala. 643. Ordinarily the owner of

the dominant tenement has a right to the unobstructed use at all times of the servient land for the exercise of such rights as are necessary or incident to the enjoyment of the easement. 17 A. J. 1007. The principle is well stated in the recent case of *Alabama Power Co. v. Berry,* 222 Ala. 20: "The easement and servitude extend to all uses directly or incidentally conducive to the advancement of the purpose for which the right of way was acquired, and the owner retains merely the title in fee, carrying the right to make such use as in no way interferes with the full and free exercise of the easement."

The right of the landowner to erect and maintain a building on the right of way of an electric power company was decided adversely to the landowner in *Collins v. Power Co.,* 214 Ala. 643. There the landowner erected a 5-room house extending 15 feet over and upon the land covered by the Power Company's easement. The transmission line was suspended 25 feet above the building, capacity 44,000 volts. The Court said, "We think there can be no doubt that the dwelling house, resting in part upon complainant's right of way, is an obstruction such as complainant sought to guard against when it took a grant of its right of way from Evans." It was held the Power Company had right to have the building removed. And in *Kesterson v. California-Oregon Power Co.,* 114 Oregon 22, it was held that the piling of lumber 15 feet high on the Power Company's right of way was a wrongful invasion of the Power Company's easement; that while the owner of the land reserved the right to cultivate the right of way and otherwise use and enjoy it, the evident design of the instrument was to give the Power Company exclusive possession of the land except for cultivation, raising livestock, or possibly mining.

In *Patterson Orchard Co. v. Southwest Arkansas Utilities Corp.,* 179 Ark. 1029, it was held that by virtue of the decree of condemnation of a strip of plaintiff's land for erection and operation of electric power transmission lines, the Power Company was granted exclusive possession of the property to the extent such possession was necessary for this purpose, but the owner of the land also had right to possession subordinate to the paramount possession of the condemnor, and could lawfully exercise any and all rights except such as were inconsistent with and in interference with the easement granted.

In *Cantrell v. Appalachian Power Co.,* 148 Va. 431, 139 S. E. 247, the Court quoted with approval from 9 R. C. L. 784: "It is an established principle that the conveyance of an easement gives the grantee all such rights as are incident or necessary to the reasonable and proper enjoyment of the easement." And the Court also quoted from Curtis on the Law of Electricity that the Power Company "may make such use of the easement acquired as is necessary or convenient for the purpose for which it was acquired." In *Aycock v. Houston Lighting & Power Co.,* 175

S. W. 710, it was held the condemnor acquired such dominion over the land as is "proper and needful to carry out the purpose for which the land is taken," with right in the owner of the fee to use the property in a manner not inconsistent with the uses for which it was condemned.

It was suggested by the defendants in the case at bar that the language in which the easement is set out in the judgment here is sufficiently comprehensive to leave open as a question of fact whether any particular obstruction maintained on plaintiff's right of way by the defendants is inconsistent with the Power Company's easement. But we think the recital of the respective rights of the condemnor and the landowners stated in the judgment here are substantially similar to those considered by the Courts in the decisions examined, whether contained in decrees of condemnation or contracts and conveyances, and that the general principles herein stated are applicable to the language of the plaintiff's easement and the facts of this case.

Applying these principles of law with respect to the conflicting claims of the owners of the dominant and servient tenements in the use of a strip of land appropriated for the building and operation of an electric power transmission line, we think where pursuant to decree of condemnation the electric power company has erected steel towers and strung therefrom its wires carrying powerful electric current over and upon such strip of land for the purposes and public uses declared, the servient owner may not be permitted, against its protest and over its objection, to erect and maintain a large permanent building, covering almost the entire width of the right of way and extending upward within a few feet of the power charged wires, and that if these facts are properly made to appear from the evidence, this would constitute a use by the landowner inconsistent with the easement and an encroachment on the rights acquired. Such a building, so located, would seem, necessarily to interfere with the exercise of the plaintiff's "right of access upon and along said easement," for purposes incident to the maintenance of its electric power transmission lines. 28 C. J. S. 771.

Furthermore, considering the purpose for which the easement was acquired and the use of the land for stringing its overhead wires as contemplated by the Power Company, it is significant that in the final decree of condemnation in the Superior Court the original owners of the land, under whom the present defendants claim, consented to the incorporation in the judgment of the express declaration that the defendants should have the "right and privilege" to use the land condemned "for agricultural purposes," thus apparently indicating agreement that the effect of the decree was to divest them of all rights to use the 50-foot strip save in the cultivation of the surface, under the maxim *expressio unius est exclusio alterius.* Evidently the judgment did not contemplate the use by

the landowner of the airways in the zone occupied and to be occupied by the plaintiff's elevated power lines. Again, should the Power Company make any change in the location or structure of its towers, or raise or lower its wires, the presence of the brick building described would necessarily interfere with the plaintiff's use of the right of way it has acquired for that purpose.

Defendants call attention to the evidence that sometimes electric companies string their wires over buildings in the first instance, but in such case the distributor of electric current assumes the risk and undertakes the burden and increased difficulty of construction, inspection and maintenance, and usually such wires carry low voltage. But that is not our case. Here, the plaintiff acquired for its purposes the use of a strip of land unhampered by obstructions and has continued to enjoy that right until the erection of defendants' building.

When the servient owner of land subject to an easement for the construction over and upon it of electric power lines undertakes to erect, and does erect and maintain, a permanent building of the size, height, and dimensions shown by the uncontradicted evidence in this case, to hold the Power Company, the dominant owner, without adequate remedy to prevent this encroachment upon an easement lawfully acquired would seem to us create an unwise precedent. A high degree of care is required of those who handle and distribute electric current, the degree of care being that commensurate with the dangers reasonably to be apprehended from contact with so powerful and subtle an agency, and when a right has been conferred therefor its exercise in the interest of public safety and public service should not be hampered by permitting unreasonable encroachments upon or interference with the means and facilities it may lawfully use. *Calhoun v. Light Co.,* 216 N. C. 256, 4 S. E. (2) 858; *Arrington v. Pinetops,* 197 N. C. 433, 149 S. E. 549; *Helms v. Power Co.,* 192 N. C. 784, 136 S. E. 9; *Lawrence v. Power Co.,* 190 N. C. 664, 130 S. E. 735. Upon land now owned by the defendants the right to use a strip 50 feet wide in the erection, operation and maintenance of plaintiff's electric power transmission lines had been lawfully appropriated for a service to the public. G.S. 56-5; G.S. 40-1; *Wissler v. Power Co.,* 158 N. C. 465, 74 S. E. 460. Just compensation for the easement taken according to law was paid. This effected a withdrawal of the private use of this strip by the owner to the extent that such use by him would interfere with the public use. *Hastings v. Sou. Natural Gas Corp.,* 45 Ga. App. 774. And where a right of way or easement which has been acquired by a public service corporation for the purpose of enabling it to perform its duty to the public is invaded or its enjoyment interfered with a remedy by injunction mandatory or prohibitory is available. *R. R. v. Olive,* 142 N. C. 257 (264), 55 S. E. 263.

We conclude that the plaintiff was entitled to have the instructions substantially as prayed for given to the jury, and that there must be another trial for the proper determination of the facts from the evidence in accordance with the principles of law herein stated.

New trial.

STACY, C. J., dissenting: The case ought to turn on whether the trial court has followed our former opinion. Instead it has taken a reverse course on the second appeal.

The late Dean MacRae was wont to say to his classes, when some ambiguous answer was given, "You cannot ride two horses going in opposite directions at the same time." If the venerable dean were living today, he would doubtless erase this aphorism from his mind, for here the Court decides two ways in the same case. True, the majority says not, and uses many words to say it, but let us take a look at the record.

The case has been here before and the "law as previously established" has intervened with its binding effect, both on the parties and the Court. Whatever was decided on the first appeal is now *res judicata,* and, right or wrong, it bears the impress of finality. *George v. R. R.,* 210 N. C. 58, 185 S. E. 431; *Bank v. Furniture Co.,* 120 N. C. 475, 26 S. E. 927; *Hospital Asso. v. R. R.,* 157 N. C. 460, 73 S. E. 242; *Stanback v. Haywood,* 213 N. C. 535, 196 S. E. 844. "A decision by the Supreme Court on a prior appeal constitutes the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal"—Headnote (6th), *Harrington v. Rawls,* 136 N. C. 65, 48 S. E. 57, cited with approval in numerous later cases, some of them collected in *Robinson v. McAlhaney,* 216 N. C. 674, 6 S. E. (2) 517.

Two questions were decided on the former appeal:

1. Is plaintiff's recorded but unregistered easement good as against a subsequent registered deed of a purchaser for a valuable consideration?

This question was answered in the affirmative by a divided Court. Nevertheless, it is the law of the case, and if the defendants had sought to relitigate the matter in the trial court they would have been met with a plea of *res judicata* and short shrift would have been made of their position. The only remedy open to them as against the ruling was a petition to rehear. *Pinnix v. Griffin,* 221 N. C. 348, 20 S. E. (2) 366. No doubt they were advised by counsel to accept the decision on the first question without further protest, largely because of the ruling on the second question, which follows:

2. "If so, does the erection of the buildings as described constitute an interference inconsistent with the rights acquired by plaintiff by condemnation?"

The plaintiff contended that a verdict should have been directed in its favor as there was no dispute in respect of the character and position of

the buildings erected by the defendants, and that this Court should accordingly instruct the trial court to direct such a verdict. Plaintiff's position was not adopted on the former appeal. Contrariwise, the second question was answered without division of opinion or dissent in the following language: "Is there evidence of use by defendants of land subject to plaintiff's right of way inconsistent with plaintiff's easement?" From an examination of the record it would seem that the evidence offered, *when considered in the light most favorable for the plaintiff,* tends to show that the defendants' use of the land in the erection and maintenance of the buildings complained of would constitute an obstruction and an interference with plaintiff's rights inconsistent with the easement acquired, *and that the issues of fact raised by the pleadings and evidence should have been submitted to the jury* (italics added).

When the case came on for another hearing at the March Term, 1948, Robeson Superior Court, the plaintiff offered three expert electrical engineers who testified that the presence of the theater building, in the first place, "would interfere with the ordinary acts of maintaining, repairing and keeping the power line in operation"; secondly, "would increase the hazards," and constitute "an obstruction to the maintenance and repair of these lines," and, thirdly, "would make the work of maintenance more difficult, require more time," and add to the cost of operation.

The defendants, on the other hand, offered Bertram O. Vannort, a consulting electrical engineer, who gave it as his opinion that the plaintiff's lines could be repaired and maintained "over the theater building where it is presently located"; and while not as conveniently done with the building there, "in my opinion the building in itself does not present any great difficulty." The witness explained in detail how power lines, which run over and above buildings, are maintained and kept in repair. "A crew properly organized and under proper supervision would not have any trouble with the problem of maintenance."

The jury returned the following verdict:

"Does the erection and use of defendant's theatre building constitute an interference inconsistent with plaintiff's easement, as alleged in the complaint? Answer: No."

From judgment on the verdict, plaintiff again appeals, assigning as its principal exception the refusal of the court to render judgment in its favor on the pleadings or to direct a verdict of like tenor.

The defendants have paid little heed to this exception, assuming that under the law of the case the matter was settled on the former appeal and is now *res judicata,* binding alike on the parties and the courts. The trial court so understood it, just as some members of this Court still understand it.

Surprisingly, however, the majority now completely ignores the decision of the second question on the former appeal, and says: "The question then debated was whether plaintiff's easement acquired by judgment in condemnation proceedings was valid and subsisting as against subsequent purchasers from the original owners of the land."

If this were all that the Court decided on the former appeal, the judgment of nonsuit could not have been reversed, for the burden was on the plaintiff to show an inconsistent use by the defendants before it could ask for a ruling in its favor. On this further showing, which was not materially different from what it is on the present record, the Court said the issue of fact was for the jury.

Compare the Court's present statement with the above quotation from the former opinion and note how consistency and the "law of the case" have been abandoned. While this Court can overrule its previous decisions, it is not at liberty to ignore the law of the given case, once established. *Newbern v. Tel. Co.,* 196 N. C. 14, 144 S. E. 375.

Can it be that the defendants are bound by our former opinion and the plaintiff is not? Is the principle of equality or the rule of fair play no longer applicable as between the present parties litigant? Is this Court not to respect its own established "law of the case"? What becomes of our repeated decisions on the subject? It will not do to ignore these questions nor to answer them with sophistry or specious reasoning. Having gone to great expense to comply with our former decision, the defendants are entitled to know why such compliance should now mean their undoing. "It was the duty of the judge below to follow the ruling made here," *Pretzfelder v. Ins. Co.,* 123 N. C. 164, 31 S. E. 470, just as it is our duty to honor the law of the case, rather than to seek to evade it. Where the subsequent hearing is in substantial conformity to the opinion of this Court, the same questions may not again be presented on a second appeal. *Bradsher v. Cheek,* 112 N. C. 838, 17 S. E. 533. "It is not allowable to rehear a cause by raising on a second appeal the same points decided on a former appeal"—Headnote, *Kramer v. R. R.,* 128 N. C. 269, 38 S. E. 872.

The plaintiff cites one case, *Collins v. Alabama Power Co.,* 214 Ala. 643, 108 So. 868, 46 A. L. R. 1459, which, it is said, is the only case in the books dealing with the erection of a building on a right of way beneath electric transmission lines. There is also cited a second case, *Kesterson v. California-Oregon Power Co.,* 114 Ore. 22, 228 P. 1092, which involved the piling of lumber on the right of way of a power company.

Both of these cases are distinguishable by reason of different fact situations and variant provisions in the easements. Both affirm the thesis, however, that the language of the particular easement governs in the determination of the respective rights of the parties. It is the general

law of contracts that the purport of a written instrument is to be gathered from its four corners, and the four corners are to be ascertained from the language used in the instrument. *Jones v. Casstevens,* 222 N. C. 411, 23 S. E. (2) 303; *Whitley v. Arenson,* 219 N. C. 121, 12 S. E. (2) 906.

It is to be observed that the easement in question, not only declares the rights of the petitioner, but those of the defendants as well. When mutual rights and obligations are set out in a single instrument the rule of reasonable enjoyment and forbearance applies. 28 C. J. S. 771. Mutual accommodation is the yardstick by which the rights of the parties are to be measured. Under this rule and the conflict in the evidence, the jury has determined that both parties are within their stipulated rights according to the terms of the subject easement.

The easement grants the plaintiff the right to build, maintain, inspect and keep in repair its transmission lines over the lands of the defendants, and at the same time provides that, except for such purposes, the grantee "shall not interfere with the rights of the defendants." Then follows immediately the provision that the "defendants shall have full power and right to use the lands over which the easement and right of way is condemned for any and all purposes not inconsistent with said easement of petitioner, its successors and assigns." Note the language, "for any and all purposes not inconsistent with said easement." Inconsistent use is the restraint against the defendants, while interference is the prohibition against the plaintiff. An inconvenient use is not necessarily an inconsistent one. Undoubtedly the reservation in favor of the owners of the land reduced the price of the easement at the time of its acquisition; and if the plaintiff would now take a more liberal grant, or a less restricted right, it is but meet that just compensation should be the *quid pro quo.* The evidence of the defendants clearly shows, and the jury has found, that defendants' use of the lands is not inconsistent with plaintiff's easement. For this Court to hold otherwise as a matter of law is to reform the easement, not to interpret it, and this in direct conflict with its previously established law of the case.

It should be noted that we are not dealing with the general law of easements, but with a judgment in condemnation containing special provisions, which establish reciprocal rights and restraints *inter partes,* and the law of the case as heretofore declared.

Moreover, the evidence is not all one way on the vital issue in the case, and it is the rule with us that an affirmative finding may not be directed in favor of the party having the burden of proof, where there is evidence to support a contrary inference. *Forsyth v. Oil Mill,* 167 N. C. 179, 83 S. E. 320; *Mfg. Co. v. R. R.,* 128 N. C. 280, 38 S. E. 849; McIntosh on Practice, 632. "It is rarely, if ever, permissible for the court to direct a verdict in favor of a party upon whom rests the burden of proof." *Barrett v. Williams,* 217 N. C. 175, 7 S. E. (2) 383.

So, notwithstanding the special provisions and restraints of the easement, the "law of the case" and the conflict in the evidence, and despite the adverse finding of the jury, a third trial is ordered to the end that the plaintiff may again move for a directed verdict in its favor. What becomes of all the decisions at variance with such procedure? There is none to support it. The case is *sui generis* from a procedural standpoint. Its nearest parallel would seem to be *Williams v. McLean,* 221 N. C. 228, 18 S. E. (2) 864, but even that case is a far cry from this one.

The trial having been conducted in accordance with our former opinion, my vote is for an affirmance.

WINBORNE and SEAWELL, JJ., concur in dissent.

CAROLINA AND NORTHWESTERN RAILWAY COMPANY v. PIEDMONT WAGON AND MANUFACTURING COMPANY.

(Filed 7 January, 1949.)

1. Eminent Domain § 20½—

Where a railroad company which is given the right of eminent domain by its charter constructs its road with the acquiescence of the owner on land to which it has not acquired title by condemnation or conveyance, it acquires a right of way by implied grant or statutory presumption, with right in the owner to maintain an action for compensation.

2. Same: Eminent Domain § 21a—

Where a railroad company has taken a right of way by implied grant, the owner's action for compensation must be instituted prior to the ripening of title in the railroad company by adverse possession or prior to the bar of any applicable charter or statutory limitation.

3. Eminent Domain §§ 20½, 26—

Where a railroad company having the power of eminent domain builds its road over lands to which it has not acquired title by conveyance or condemnation, and no action for compensation is instituted by the owner within the time limited, it acquires the right of way by implied grant to the full width which it might have taken by condemnation, if not under express charter provision, then under the general law.

4. Easements § 5—

Where a railroad company acquires a right of way either by condemnation or operation of law, the fee remains in the original owner and he may use the land for any purpose not inconsistent with the easement and to the extent that the land is not actually used for railroad purposes, subject to the right of the railroad company to extend its use of the right of way to the full width whenever in its judgment its business necessitates.

5. Same—

A railroad company, after having acquired a right of way by operation of law, sought to extend its use of the right of way by constructing sidetracks on a portion of the right of way occupied by the owner of the fee. *Held:* The railroad company is the sole judge of the necessity for such expansion and it may enjoin any interference therewith by the owner of the fee irrespective of any alleged arbitrariness or unreasonableness on its part in giving notice of its intention to extend its facilities.

ERVIN, J., took no part in the consideration or decision of this case.

APPEAL by plaintiff from *Warlick, J.*, in Chambers at Newton, 25 June, 1948—from CATAWBA.

Civil action for mandatory injunction to require defendant to remove fence and other obstructions from plaintiff's right of way in the City of Hickory.

On the hearing, plaintiff sought to show the following facts:

1. That by Act of Assembly, Chap. 190, Private Laws 1895, the plaintiff was duly incorporated in this State and granted the right to construct, maintain and operate a railroad from a point on the South Carolina line in Gaston County to a point on the Tennessee line in Watauga County, with authority to acquire any railroad along any part of the route by purchase or consolidation, and with authority to acquire by condemnation or otherwise, rights of way "as is given to any other railway company in this State." (Sec. 10.)

2. By deed bearing date 30 January, 1897, the plaintiff acquired from the Chester & Lenoir Narrow Gauge Railroad Company the line of railroad extending from Chester, S. C., to Lenoir, N. C., including all rights of way, property rights, powers and interest of every kind and nature thereto belonging or in any wise appertaining.

3. The Chester & Lenoir Narrow Gauge Railroad Company, chartered by Act of Assembly, Chap. 25, Public Acts, 1872-73, was a consolidation of the Carolina Narrow Gauge Railroad Company and the Chester & Lenoir Narrow Gauge Railroad Company of South Carolina, the consolidated company being given "all the rights, powers, privileges, immunities and franchises conferred upon the Carolina Narrow Gauge Railroad Company."

The first of these consolidated companies constructed that part of the railroad south of Hickory, and the consolidated corporation completed the line from Hickory to Lenoir in 1884. The charter of the Carolina Narrow Gauge Railroad Company, Chap. 130, Public Acts, 1871-72, provided that "whenever lands shall be required for the construction of the road . . . and for any cause the same cannot be purchased from the owner, the same may be taken at a valuation" to be fixed by five disinterested freeholders of the county, etc., after deducting the enhanced value

and adding any particular loss, "and upon the payment or tender . . . of the amount so assessed, the title to the property so seized and appraised shall thereby vest in the said corporation . . .; And provided further, that not more than one hundred feet from the center of the road shall be allowable to be so condemned." (Sec. 7.)

4. In 1947, the plaintiff found need for additional facilities or sidetracks on the west side of its main line between the right of way of the Southern Railway Company and Twelfth Avenue in the City of Hickory. To construct these will require laying the facilities over a parcel of land within 50 feet of the center line of plaintiff's track, but presently occupied by the defendant and to which the defendant holds the underlying title in fee, deed thereto having been acquired by defendant or its predecessor in title in 1882.

Due notice was given to the defendant of plaintiff's intention, which met with objection and physical resistance. Whereupon this action was instituted for injunctive relief.

On the hearing, it was conceded that plaintiff's predecessor in title entered upon the right of way at the point in question and constructed its railroad without any condemnation of the right of way or agreement with the owner of the land as to its value, or payment or tender of its appraised worth.

It was also conceded that the actual use of the land at the point in question, by the plaintiff and its predecessors, extended no farther than the ditch banks beside the main line track. The defendant admits in its answer and says in its brief that it "has never denied the plaintiff's right of way over the land occupied and used by the road," *i.e.,* the roadbed, main line track, drains and side ditches.

Plaintiff further conceded that, for the purposes of this suit, the authority of its predecessor was to acquire a right of way of not more than 100 feet in width.

It was admitted that the defendant or its predecessors in title had occupied and used continuously and without interference the tract of land west of the western edge of the western ditch bank to a point 50 feet from the center of defendant's line of track. This is the *locus in quo.*

From judgment denying the plaintiff's prayer for injunctive relief, and removing plaintiff's claim as a cloud on defendant's title, in accordance with the latter's prayer, the plaintiff appeals, assigning errors.

J. C. Rudisill, J. W. Aiken, and W. T. Joyner for plaintiff, appellant.
Eddy S. Merritt and T. F. Cummings for defendant, appellee.

STACY, C. J., after stating the facts as above: The case turns on the width or extent of plaintiff's right of way at the location in question.

The plaintiff says its easement extends a distance of 50 feet on either side of the center line of its roadbed or main line track. The defendant says the right of way extends no farther than the outer banks of the side ditches along the main line track, *i.e.*, only to the extent of the land actually "required for the construction of the road."

It is conceded that plaintiff's predecessor, Chester & Lenoir Narrow Gauge Railroad Company, constructed the railroad at the point in question, without obtaining deed for the right of way or paying the assessed or appraised value of the land taken for the purpose, and that no application has ever been made by the owner or owners for the assessment of its value or to recover compensation therefor.

The question then arises: What did the railroad company acquire under these circumstances?

Manifestly the entry and taking of the right of way at the point in question by the Chester & Lenoir Narrow Gauge Railroad Company in 1884 was under and by virtue of its charter. Hence, the action of the company was not that of a trespasser, but rather the act of one clothed with authority. The company was not obliged to know that compensation would be demanded but could assume from the owner's silence that he regarded the enhanced value of his land, caused by the construction of the railroad, fully the equivalent of any loss he might have sustained. *McIntyre v. R. R.*, 67 N. C. 278.

The thesis is stated in 23 A. & E. Enc. of Law (2d Ed.), at page 700, as follows: "The accepted doctrine, in most jurisdictions, now is that where a railroad company proceeds to build its road upon land to which it has not acquired title by condemnation or conveyance, the owner may have his action for damages or for the value of the land, or may maintain ejectment or other possessory action, or may enjoin the company from appropriating or using such land, provided he proceeds with reasonable promptitude; but that if the owner stands by and acquiesces, until the company has expended its money and constructed its road across his land, and until the road at that point has become a part of its railroad line, whereby the public, as well as the company, has acquired an interest in the maintenance of the enterprise, he forfeits every remedy except that of an action for compensation or damages. In such a case the railroad company is said to acquire its right of way by implied grant."

The principle announced in the above quotation finds support in our own decisions and is generally referred to as the doctrine of statutory presumption. It is usually, but not always, set out in the charter *in extenso*. *So. Ry. Co. v. Lissenbee,* 219 N. C. 318, 13 S. E. (2) 561; *Dowling v. R. R.*, 194 N. C. 488, 140 S. E. 213; *Griffith v. R. R.*, 191 N. C. 84, 131 S. E. 413; *Tighe v. R. R.*, 176 N. C. 239, 97 S. E. 164; *Barker v. R. R.*, 137 N. C. 214, 49 S. E. 115; *Dargan v. R. R.*, 131 N. C. 623, 42 S. E. 979.

Obviously the railroad company acquired a right of way at the location in question. This is conceded. Leastwise it is not controverted. What was its width? The charter authorized a taking of not more than one hundred feet from the center of the track. The general law then in force, Sec. 1707 of the Code (1883), declared that "The width of the land condemned for any railroad shall not be less than eighty feet nor more than one hundred, except where the road may run through a town, when it may be of less width; or where there may be deep cuts or high embankments, when it may be of greater width." In the absence of any provision in the charter limiting the owner's right to recover compensation for the lands taken, the same may not have been extinguished at that early period in the law until plaintiff's title had ripened by adverse possession for twenty years. *Land v. R. R.*, 107 N. C. 72, 12 S. E. 125; *Narron v. R. R.*, 122 N. C. 856, 29 S. E. 356, 20 L. R. A. 415. Later the General Assembly enacted Chap. 152, Public Laws 1893, now G.S. 1-51, making uniform the periods of limitation respecting actions against railroad companies for damages or compensation for lands taken for rights of way or use and occupancy.

It follows, therefore, that if a condemnation proceeding had been instituted in 1884, or the owner or owners had sought compensation by appropriate action, the maximum recovery in either case would have been the value of a right of way of one hundred feet.

It is generally held that where a common carrier by railroad, under provision of its charter, enters upon land and builds a railroad, without grant or condemnation of the right of way, and no action or proceeding is commenced by the landowner within the statutory period for recovering compensation, a presumption of a grant or conveyance arises from the concurrence of these circumstances, and this presumption extends to the limits which the railroad company might have taken by condemnation and for which the landowner could have recovered compensation had he brought his action within the prescribed period of time. *Earnhardt v. R. R.*, 157 N. C. 358, 72 S. E. 1062. In such circumstances the railroad is said to acquire its right of way by implied grant or by operation of law. *R. R. v. McCaskill*, 94 N. C. 746; *R. R. v. Sturgeon*, 120 N. C. 225, 26 S. E. 779; *R. R. v. Olive*, 142 N. C. 257, 55 S. E. 263, and cases there analyzed and reviewed.

True it is, that in most of the charters the rights of the parties are spelled out in detail, as will appear by reference to the charter provisions set out in many of the cases, notably the *McCaskill* and *Lissenbee cases*—to mention only one of the first and one of the last cases on the subject—nevertheless the general law on the subject may be called in aid of a charter which is not so specific in its terms; provided the entry and appropriation of the right of way is authorized, therefore lawful, and is

not the result of a trespass. *Holloway v. Railroad,* 85 N. C. 452; *Vinson v. R. R.,* 74 N. C. 510; *Liverman v. R. R.,* 109 N. C. 52, 13 S. E. 734; *S. c.,* 114 N. C. 692, 19 S. E. 64; *Parks v. R. R.,* 143 N. C. 289, 55 S. E. 701; *Tighe v. R. R., supra.*

Speaking to the matter in *Earnhardt's case,* it was said: "The effect of inaction on the part of the owner for a period of two years after the completion of the road has been considered in several cases in this Court, under charters similar to the one before us, and without difference of opinion, it has been held that under such circumstances, a presumption of a grant from the owner arises for the land on which the road is located and for the right of way provided for in the charter." Then quoting from *McCaskill's case:* " 'The presumption of the conveyance arises from the company's act in taking possession and building the railway, when in the absence of a contract the owner fails to take steps, for two years after it has been completed, for recovering compensation.' "

Here, it appears that, by charter provision and the general law, the plaintiff's predecessor was authorized to take, and we apprehend did acquire by implied grant, a right of way of 100 feet, or 50 feet on either side of the center line of its roadbed or main line track. *Beattie v. R. R.,* 108 N. C. 425, 12 S. E. 913. At least, such is the reasonable conclusion to be drawn from the evidence offered on the hearing and the law applicable thereto. G.S. 40-29; *Griffith v. R. R., supra.*

The showing is:

1. That plaintiff's predecessor did not acquire its right of way either by purchase or by condemnation. However, it further appears:

2. That the original entry and appropriation of a right of way of 100 feet in width at the point in question and the actual construction of the railroad were all by authority of charter provision and the general law.

3. That suit for compensation was the only remedy available to the landowner at the time, which under the law then in force, was not extinguished until the company's title had ripened by adverse possession.

4. That no such action was instituted by the owner or owners of the *locus in quo* within the time specified.

5. That a presumption of a grant from the owner or owners to the railroad company for the easement in question thereupon arose by operation of law.

6. That this right was acquired by the Chester & Lenoir Narrow Gauge Railroad Company and conveyed to the plaintiff on 30 January, 1897, along with the entire railroad, including all rights of way, property rights, powers and interests of every kind and description thereto belonging or in any wise appertaining. If the right were not complete at the time of the conveyance, it later became so.

Thus, under the applicable statutory provisions and the pertinent decisions on the subject, it would seem that the plaintiff has made out a case for injunctive relief. *R. R. v. Lissenbee, supra; R. R. v. Olive, supra.*

Needless to add that, under the general law, and ordinarily under special charter provisions, when a right of way is acquired by condemnation, or by operation of law, only an easement passes to the railroad company, and to the extent that the right of way is not presently needed for railroad purposes, it may be occupied and used by the original owner in any manner not inconsistent with the easement acquired. *Lumber Co. v. Hines Bros.,* 126 N. C. 254, 35 S. E. 458. This occupancy and use by the owner, however, is subject to the right of the railroad company to extend its use of the right of way to its full extent, whenever the proper management and business necessities of the road may require it, and the company is made the judge of such necessity. *R. R. v. McLean,* 158 N. C. 498, 74 S. E. 461. Hence, the allegation of arbitrariness or unreasonableness on the part of the plaintiff in giving notice of its present intention to extend its facilities over the *locus in quo,* raises no issuable fact. Whether the plaintiff now has need to extend its user of the right of way for legitimate purposes is a matter resting in its sound business judgment. *R. R. v. Lissenbee, supra; R. R. v. Olive, supra; A. C. L. R. R. v. Bunting,* 168 N. C. 579, 84 S. E. 1009; *Tighe v. R. R.,* 176 N. C. 239, 97 S. E. 164.

Both sides have stated their respective positions with confidence and manifest research. Elaborate and exhaustive briefs have been filed, but in the end the case comes to a narrow compass. It would be a work of supererogation to consider and distinguish all the authorities appearing on brief, albeit none have been overlooked since the considerations are important and the parties are greatly interested in the result.

Error and remanded.

ERVIN, J., took no part in the consideration or decision of this case.

STATE v. ANDREW S. JOHNSON, BAYARD RUSTIN, IGAL ROODENKO AND JOSEPH A. FELMONT.

(Filed 7 January, 1949.)

1. Carriers § 18b—

G.S. 60-135 and G.S. 60-136 apply not only to transportation of passengers within a city or town but also to transportation of intrastate passengers from one city or town to another. G.S. 60-139.

2. Same—

In a prosecution under G.S. 60-135 and G.S. 60-136, evidence that a white and a colored defendant occupied the same seat on a bus and refused to move to unoccupied seats in the front and rear of the bus as required by statute, makes out a *prima facie* case of intent to violate the statute and is sufficient to withstand defendants' motion for judgment as of nonsuit even in the absence of evidence by the State that defendants were intrastate passengers, since the burden of going forward with the evidence to show that defendants were interstate passengers rests upon defendants as a matter relating to an exemption, immunity, or defense.

3. Criminal Law § 28—

Where a statute creates a substantive criminal offense, the State has the burden of establishing the *corpus delicti*, but the burden of going forward with the evidence to establish an independent, distinct, substantive matter of exemption, immunity or defense, beyond the essentials of the legal definition of the offense itself, rests upon defendant.

APPEAL by defendants from *Morris, J.*, at March Term, 1948, of ORANGE.

The defendants were tried and convicted upon warrants issued in the Recorder's Court of Orange County, charging them with violating G.S. 60-135 and G.S. 60-136, and the ordinances of the City of Chapel Hill. The defendants were adjudged guilty and from the judgments imposed they appealed to the Superior Court, where the cases were consolidated and tried together on the original warrants.

The evidence offered below tends to show the following facts:

On Sunday, 13 April, 1947, the defendants, Andrew S. Johnson, Bayard Rustin, Igal Roodenko and Joseph A. Felmont, the first two being colored men and the latter two white men, boarded one of the busses of the Carolina Coach Company in Chapel Hill, N. C. The bus was in charge of Ned Leonard, the driver, and was being operated on a regularly scheduled run from Raleigh to Charlotte via Chapel Hill and Greensboro.

The bus was equipped to accommodate thirty-seven passengers in addition to the driver. After these defendants entered the bus there were twenty-six passengers, four of whom were colored persons. Andrew S. Johnson and Joseph A. Felmont sat down in the third seat from the front of the bus, Johnson next to the window and Felmont next to the aisle. Roodenko sat down approximately four seats from the front and Rustin took a seat next to the last one on the first tier of seats from the rear. The rear seat was unoccupied. Only one seat was unoccupied in front of the seat occupied by Johnson and Felmont. White persons occupied a number of seats behind the colored man, Andrew S. Johnson.

The bus driver, Ned Leonard, requested Johnson to change his seat to a rear one and quoted to him the rules of the company with respect to

the seating of white and colored passengers. He refused to move. The bus driver also asked the defendant Felmont to change his seat, which he refused to do. He said he would not move unless he was under arrest.

A police officer of the City of Chapel Hill was called. The defendants Johnson and Felmont were again asked to change their seats, as required by the rules of the company, and they refused to do so. The officer thereupon arrested both of the defendants, Johnson and Felmont, and took them from the bus.

When the driver returned to the bus after the arrest had been made of Johnson and Felmont he found that the defendants Rustin and Roodenko had moved up and were sitting together in the same seat which had been occupied by Johnson and Felmont, that is, the third seat from the front of the bus, the colored man sitting next to the window and the white man sitting next to the aisle. The rules of the Company were quoted to them and they were requested by the bus driver to take the proper seats which were designated, but they refused to move.

At this point the driver of the bus asked the defendant Roodenko where he was going and he said he was going to Danville, Virginia. He told him that he was on the wrong bus and that if he would step off, he would fix his ticket to go through Durham, which is proper. He said, "No, I am going to Greensboro." He asked Rustin where he was going and he wouldn't tell him. He offered to fix their tickets for a refund. They would not show him their stubs.

The bus driver thereupon called an officer and had the defendants Roodenko and Rustin arrested. The bus driver testified that the defendant Roodenko never did give him a ticket to Greensboro. He was not sure what ticket he did give him. He did not have in his possession any ticket for Danville.

The bus driver testified he did not know of his own knowledge what the destination of the other defendants was at the time they boarded the bus.

None of the defendants testified as witnesses in the trial below, except Roodenko. He testified that after he was informed he was on the wrong bus, he stated to the driver "I might want to stop in Greensboro on the way over" and "When I explained to the driver that I might want to stop in Greensboro, he agreed I was on the right bus and tore off the first part of the ticket and let me go in."

On cross-examination this defendant testified that he and the other three defendants were traveling together in North Carolina. They had arrived in Chapel Hill in the middle of the afternoon on the day before, having traveled by bus from Raleigh. This witness stated he was not traveling for the purpose of testing the segregation laws of the State but was on a business and pleasure trip. "My purpose on this trip, as in

many other things in my life for many years past, has been to see what I could do in my own small way to promote better understanding among various groups of people. That was the purpose of this trip. On this trip I proposed to attempt to promote better understanding between negroes and whites."

This defendant testified further that after his arrest he went by private car from Chapel Hill to Greensboro, where he attended a meeting. He stated that the other defendants attended some of the meetings that he attended. He knew in advance that there would be a meeting in Greensboro on the night of September 13 (April 13) and he remained in Greensboro until the following day.

This defendant also testified that his expenses on this trip were being paid by the "Fellowship of Reconciliation," and that he was familiar with the instructions issued by this "Fellowship of Reconciliation" and that he was familiar with Memorandum No. 2, issued by them, entitled "Bus and Train Travel in the South," purported to have been issued by George M. Houser and Bayard Rustin.

The jury returned a verdict of guilty and from the judgments imposed, all four defendants appealed to the Supreme Court and assign error.

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

Herman L. Taylor and C. J. Gates for defendants.

DENNY, J. The defendants assign as error the refusal of the Court below to grant their motion to quash the warrants on the ground that the State has indicted them under inapplicable sections of the General Statutes.

The defendants contend that it was the intent of the Legislature to vest in the Utilities Commission, under Sections 62-109 and 62-118 of the General Statutes, the power to prescribe the rules and regulations with respect to the seating of passengers on public conveyances except in busses engaged in local transportation, within cities and towns in the State. Consequently it is contended that Sections 60-135 and 60-136 of the General Statutes do not apply to motor vehicles transporting passengers for hire except on busses used in transporting passengers within a city or town.

The contention is without merit. The provisions of Sections 3536 to 3539 of the N. C. Code, 1939 (now Sections 60-135 to 60-138, G.S. of N.C.), were extended by Chapter 489 of the Public Laws of 1933, G.S. 60-139, to include "motor busses operated in the urban, interurban or suburban transportation of passengers for hire, and to the operator or operators thereof, and the agents, servants, and employees of such operators."

Moreover, Section 62-109 of the General Statutes of North Carolina deals with the mandatory duty of the Utilities Commission to "require any motor vehicle carrier operating on a franchise granted by the Utilities Commission . . . if engaged in the transportation of both white and colored passengers for hire, to provide separate but equal accommodations for the white and colored races at passenger stations or waiting rooms where the carrier receives passengers of both races and/or on all busses or motor vehicles operating on a route or routes over which such carrier transports passengers of both races." While Section 62-118 prescribes the penalty which may be imposed upon those who willfully violate or fail to comply with "any order, decision, rule or regulation, direction or requirement of the Commission, made under the provisions of this article." (Being Art. 6, Chap. 62, G.S. 62-103 to 62-121 inclusive.) These statutes do not purport to deal with the enforcement of segregation, but to make it mandatory on the part of the Utilities Commission to require transportation companies to provide "equal accommodations for the white and colored races," in order that the settled policy of this State, which calls for the segregation of the white and colored races, in the public institutions of the State, and on our intrastate transportation systems, may be enforced. *Corporation Commission v. Interracial Com.,* 198 N. C. 317, 151 S. E. 648; *S. v. Harris,* 213 N. C. 758, 197 S. E. 594.

This assignment of error will not be upheld.

G.S. 60-135 requires railroads and other carriers in this State engaged in the transportation of passengers for hire, to provide separate accommodations for white and colored passengers. Section 60-136 provides the manner in which the provisions of G.S. 60-135 shall be carried out, and the pertinent parts thereof read as follows: "Any white person entering a street car or other passenger vehicle or motor bus for the purpose of becoming a passenger therein shall . . . occupy the first vacant seat or unoccupied space nearest the front thereof, and any colored person entering a street car or other passenger vehicle or motor bus for a like purpose shall occupy the first vacant seat or unoccupied space nearest the rear end thereof, provided, however, that no contiguous seat on the same bench shall be occupied by white and colored passengers at the same time, unless and until all the other seats in the car have been occupied. Upon request of the person in charge of the street car or other passenger vehicle or motor bus, and when necessary in order to carry out the purpose of providing separate seats for white and colored passengers, it shall be the duty of any white person to move to any unoccupied seat toward or in the front of the car, vehicle or bus, and the duty of any colored person to move to any unoccupied seat toward or in the rear thereof, and the failure of any such person to so move shall constitute *prima facie* evidence of an intent to violate this section. Any person violating the provisions of this

section shall be guilty of a misdemeanor, and, upon conviction, shall be fined not more than fifty dollars or imprisoned not exceeding thirty days. Any such person may also be ejected from the car, vehicle or bus by the person charged with the operation thereof."

The evidence adduced in the trial below was sufficient to withstand the defendants' motion for judgment as of nonsuit.

The white and colored defendants having occupied the same seat on the bus, in violation of the statute, and having refused to move to the unoccupied seats, in the front and rear of the bus, as required by the statute and the rules of the carrier, this made out a *prima facie* case of intent to violate the statute, and the burden of going forward with proof, not the burden of proof, shifted to the defendants. *S. v. Brown,* 225 N. C. 22, 33 S. E. (2) 121.

In *S. v. Davis,* 214 N. C. 787, 1 S. E. (2) 104, the defendant contended among other things that it was the duty of the State to negative by proof the possibility that the truck load of whiskey which had been seized in this State, was in process of movement in interstate commerce. *Barnhill, J.,* in speaking for this Court, said: "It is sufficient answer to these contentions to point out that it has long been settled in this State that although the burden of establishing the *corpus delicti* is upon the State, when defendant relies upon some independent, distinct, substantive matter of exemption, immunity or defense, beyond the essentials of the legal definition of the offense itself, the *onus* of proof as to such matter is upon the defendant. *S. v. Arnold,* 35 N. C. 184; *S. v. McNair,* 93 N. C. 628; *S. v. Buchanan,* 130 N. C. 660; *S. v. Smith,* 157 N. C. 578. In discussing this phase of the law in *S. v. Connor,* 142 N. C. 700, *Hoke, J.,* says: 'It is well established that when a statute creates a substantive criminal offense, the description of the same being complete and definite, and by a subsequent clause, either in the same or some other section, or by another statute, a certain case or class of cases is withdrawn or excepted from its provisions, these excepted cases need not be negatived in the indictment, nor is proof required to be made in the first instance on the part of the prosecution. . . . In such circumstances, a defendant charged with the crime who seeks protection by reason of the exception, has the burden of proving that he comes within the same. *S. v. Heaton,* 81 N. C. 543; *S. v. Goulden,* 134 N. C. 743. To the same effect are *S. v. Norman,* 13 N. C. 222; *S. v. Burton,* 138 N. C. 576; and *S. v. Johnson,* 188 N. C. 591; *S. v. Dowell,* 195 N. C. 523; *S. v. Hege,* 194 N. C. 526; *S. v. Foster,* 185 N. C. 674.'"

Even so, it appears on this record, that the court instructed the jury that if upon the evidence in this case the State "has failed to satisfy you beyond a reasonable doubt that the defendants were intrastate passengers, then you will return a verdict of not guilty, because if the State has

failed to satisfy you beyond a reasonable doubt that the defendants were intrastate passengers, then of necessity they would be interstate passengers and as the Court understands the law to be, if they were interstate passengers they would not be guilty of any violation of the law." This placed a greater burden upon the State than it was required to carry.

The case of *Morgan v. Virginia,* 328 U. S. 373, 90 L. Ed. 1317, relied upon by the defendants, is not applicable to intrastate passengers. *Cf. Pridgen v. Coach Co., ante,* 46, 47 S. E. (2) 609.

We have carefully considered all the exceptions and assignments of error brought forward by the defendants, and they present no prejudicial error. The verdicts and judgments entered below will be upheld.

No error.

CHARLES W. BUNDY, ADMINISTRATOR OF THE ESTATE OF JOEL JEHU SECREST, v. L. R. POWELL, JR., AND HENRY W. ANDERSON, RECEIVERS OF SEABOARD AIR LINE RAILWAY COMPANY; D. S. CRADDOCK AND W. T. BALLENTINE.

(Filed 7 January, 1949.)

1. Negligence § 11—

Contributory negligence is an affirmative defense which defendant must plead and prove. G.S. 1-139.

2. Negligence § 19c—

Nonsuit on the ground of contributory negligence is proper when plaintiff's own evidence establishes this defense, G.S. 1-183, but it may not be entered when it is necessary to rely in whole or in part upon defendant's evidence, or when diverse inferences upon the question are reasonably deducible from plaintiff's evidence.

3. Trial § 22b—

Upon motion to nonsuit, plaintiff's evidence is to be taken as true and considered in the light most favorable to him, and while defendant's evidence which is favorable to plaintiff or which tends to clarify or explain plaintiff's evidence may be considered, defendant's evidence which is inconsistent with that of plaintiff or which tends to contradict or impeach plaintiff's evidence must be ignored.

4. Railroads § 4: Negligence § 19c—Nonsuit on ground of contributory negligence is error when this defense is not established as sole reasonable deduction from plaintiff's evidence.

Plaintiff's evidence was to the effect that intestate had an unobstructed view along the track upon which the train approached for only 600 feet, that intestate looked and listened immediately before traveling onto the crossing, that the crossing was in bad repair and the car stalled on the track, and was hit by the speeding train seven seconds after its approach

could have been reasonably apprehended. *Held:* Defendant railroad company's motion to nonsuit on the ground of contributory negligence should have been denied notwithstanding defendants' testimony that plaintiff drove upon the track in the path of the oncoming train and defendants' photographic evidence showing an entirely different situation at the crossing, since the court cannot pass upon the credibility or weight of the evidence in considering the propriety of nonsuit.

APPEAL by plaintiff from *Coggin, Special Judge,* at the August Term, 1948, of UNION.

The plaintiff's intestate, Joel Jehu Secrest, was killed instantaneously on the morning of 19 February, 1945, when his automobile was demolished by an eastbound freight train of the Seaboard Air Line Railway Company at a grade crossing two miles west of Monroe in Union County. D. S. Craddock was the engineer in charge of the train, and the crossing was located in the section assigned to W. T. Ballentine, section foreman, for maintenance. The plaintiff sued the defendants, L. R. Powell, Jr., and Henry W. Anderson, Receivers of the Seaboard Air Line Railway Company, D. S. Craddock, and W. T. Ballentine, under G.S. 28-173, for damages for the death of his intestate upon a complaint alleging that such death was proximately caused by the negligence of the defendants. They denied that they had been guilty of any actionable negligence, and pleaded contributory negligence on the part of the intestate as an affirmative defense.

There was substantial disagreement in the evidence of the parties relating to the merits of the action. A few facts, however, were not in dispute. The railroad track ran east and west parallel to Highway No. 74 located at least 125 yards to the north. The grade crossing marked the place where the railroad was bisected at right angles by a dirt road affording the only means of communication between Highway No. 74 on the north and a farming community, in which W. H. Smith resided, on the south. Although this neighborhood road was a private way in a legal sense, the crossing had been habitually used by the public and maintained by the Seaboard Air Line Railway Company for many years. Indeed, the defendants admitted in their answer that it was their duty at the time in controversy to exercise due care to keep the crossing in a reasonably safe condition. The right of way of the railroad company covered "100 feet on each side of the center of the track."

The plaintiff offered testimony tending to establish the matters set out in this paragraph. At the time of the fatal accident, the crossing was "very rough." The ballast "seemed to be knocked out between the rails. On the outside of the rails it was very rough too. The rails stuck up above the level of the surrounding dirt or rocks 4 to 8 inches." As a motorist proceeded south from Highway No. 74 towards the crossing, he

traveled upgrade, and could not see the track to the westward on account of shrubbery which grew to a point within 10 or 15 feet of the track. From this point to the land lying south of the track, the motorist's view of an eastbound train coming from the west was limited to a space of 200 yards because the railroad beyond that distance lay within a hollow. When the tragic collision occurred, the plaintiff's intestate and a fellow-workmen, J. F. Griffin, were going south on the dirt road to resume carpentering which they had begun earlier that day at the home of W. H. Smith. They were traveling in an automobile, which was owned and operated by the intestate, and which was "in good working condition." Just before entering upon the crossing, they looked westwardly along the railroad to the head of the hollow, and noted that no eastbound train was approaching within range of sight or hearing.

Subsequent events were described by Griffin, who testified for plaintiff, in substantially this wise: "As we approached the crossing, Secrest was driving 10 or 15 miles per hour. The car stalled as he straddled the track. The motor stopped. The front wheels had crossed the south rail. The rear wheels had not crossed the north rail. As soon as I realized the car had stopped, I looked at the track and saw the train coming from the west, and I touched Secrest on the arm and told him to jump out, and by the time I opened the door and ran the train had done struck the car. I judge the train was around 200 yards away at the time it entered up there where I could see it. It had just entered the top of the hollow there. I got out without injury. At the time the train hit the automobile I hadn't got stopped from running. I could not tell that the train slackened its speed from the time I saw it until it hit the car. In my opinion, the train was running 65 to 70 miles an hour. I was on the right hand side of the car next to the driver. In getting out, I didn't have to go around anything to get clear of the train. Secrest would have had to get out from under the steering wheel. He had more opposition than I did. I didn't hear the train give any signal by whistle or bell as we approached the crossing and before I saw the train. I didn't hear it give any signal before the collision. I saw the train when it came to a stop. The front of the train ran about half a mile from the crossing. It was a pretty long freight train. I went down to Secrest before he was moved. He was dead. He was about 60 yards east of the crossing on the north side."

The defendants offered oral testimony of witnesses and photographs allegedly taken at the scene by their witness, W. M. White, shortly after the collision and received in evidence without objection tending to show that the conditions described in this paragraph prevailed at the time named in the pleadings. The ballast on the crossing formed a solid road-bed virtually even with the tops of the rails. The right of way was free

of shrubbery and other obstructions. The railroad track ran westward from the crossing in a straight line without material elevations or depressions for approximately three miles. As a southbound motorist on the dirt road neared the crossing, he had the benefit of an unobstructed view of the track westwardly for distances varying from 1,200 feet at a point 25 feet north of the crossing to upwards of three miles at the first rail.

Witnesses for the defendants testified, in substance, that the freight train drew near to the crossing at a speed not exceeding 35 miles an hour after signaling its approach by sounding its whistle, and that the plaintiff's intestate precipitately drove his automobile onto the crossing 200 feet ahead of the oncoming train, thereby rendering the lethal crash inevitable. In addition, the defendants offered testimony indicating that on the day of the accident some of the witnesses for the plaintiff made statements inconsistent with their testimony at the trial and calculated to cast doubt on their credibility.

The court entered a compulsory judgment of nonsuit pursuant to the motion of the defendants made when the plaintiff rested, and renewed at the close of all the evidence, and the plaintiff appealed, assigning such ruling as error.

E. O. Ayscue and Robinson & Jones for plaintiff, appellant.

Milliken & Richardson and Cansler & Cansler for defendants, appellees.

ERVIN, J. Counsel for the defendants conceded with commendable candor on the argument and in their brief that the plaintiff adduced enough evidence on the trial to make the question of actionable negligence on the part of the defendants one for the determination of a jury. For this reason, we pass over this phase of the case, and proceed at once to inquire whether the judgment of nonsuit can be sustained on the ground that the plaintiff's intestate was contributorily negligent as a matter of law. The parties join battle on this issue. The plaintiff asks a reversal upon the authority of *Cashatt v. Brown,* 211 N. C. 367, 190 S. E. 480, and *Moore v. R. R.,* 201 N. C. 26, 158 S. E. 556. The defendants pray for an affirmance on the basis of these decisions: *Penland v. R. R.,* 228 N. C. 528, 46 S. E. (2) 303; *Wilson v. R. R.,* 223 N. C. 407, 26 S. E. (2) 900; *Bailey v. R. R.,* 223 N. C. 244, 25 S. E. (2) 833; *Jeffries v. Powell,* 221 N. C. 415, 20 S. E. (2) 561; *McCrimmon v. Powell,* 221 N. C. 216, 19 S. E. (2) 880; *Godwin v. R. R.,* 220 N. C. 281, 17 S. E. (2) 137; *Temple v. Hawkins,* 220 N. C. 26, 16 S. E. (2) 400.

Contributory negligence is an affirmative defense which the defendant must plead and prove. G.S. 1-139. Nevertheless, the rule is firmly embedded in our adjective law that a defendant may take advantage of his plea of contributory negligence by a motion for a compulsory judg-

ment of nonsuit under G.S. 1-183 when the facts necessary to show the contributory negligence are established by the plaintiff's own evidence. *Daughtry v. Cline,* 224 N. C. 381, 30 S. E. (2) 322, 154 A. L. R. 789; *Montgomery v. Blades,* 222 N. C. 463, 23 S. E. (2) 844; *Smith v. Sink,* 211 N. C. 725, 192 S. E. 725; *Hayes v. Telegraph Co.,* 211 N. C. 192, 189 S. E. 499; *Ramsey v. Furniture Co.,* 209 N. C. 165, 183 S. E. 536; *Mason v. R. R.,* 208 N. C. 842, 181 S. E. 625; *Lincoln v. R. R.,* 207 N. C. 787, 178 S. E. 601; *Jones v. Bagwell,* 207 N. C. 378, 177 S. E. 170; *Davis v. Jeffreys,* 197 N. C. 712, 150 S. E. 488; *Elder v. R. R.,* 194 N. C. 617, 140 S. E. 298.

In ruling upon a motion for an involuntary judgment of nonsuit under the statute after all the evidence on both sides is in, the court may consider so much of the defendant's testimony as is favorable to the plaintiff or tends to clarify or explain evidence offered by the plaintiff not inconsistent therewith; but it must ignore that which tends to establish another and different state of facts or which tends to contradict or impeach the testimony presented by the plaintiff. *Humphries v. Coach Co.,* 228 N. C. 399, 45 S. E. (2) 546; *Buckner v. Wheeldon,* 225 N. C. 62, 33 S. E. (2) 480; *Atkins v. Transportation Co.,* 224 N. C. 688, 32 S. E. (2) 209; *Lindsey v. Speight,* 224 N. C. 453, 31 S. E. (2) 371; *Gregory v. Insurance Co.,* 223 N. C. 124, 25 S. E. (2) 398, 147 A. L. R. 283; *Godwin v. R. R., supra; Funeral Home v. Insurance Co.,* 216 N. C. 562, 5 S. E. (2) 820. But the court cannot allow a motion for judgment of nonsuit on the ground of contributory negligence on the part of the plaintiff in actions for personal injury or of the decedent in actions for wrongful death if it is necessary to rely either in whole or in part on testimony offered by the defense to sustain the plea of contributory negligence. *Beck v. Hooks,* 218 N. C. 105, 10 S. E. (2) 608; *Lunsford v. Manufacturing Co.,* 196 N. C. 510, 146 S. E. 129; *Nowell v. Basnight,* 185 N. C. 142, 116 S. E. 87; *Battle v. Cleave,* 179 N. C. 112, 101 S. E. 555.

A judgment of involuntary nonsuit cannot be rendered on the theory that the plea of contributory negligence has been established by the plaintiff's evidence unless the testimony tending to prove contributory negligence is so clear that no other conclusion can be reasonably drawn therefrom. *Daughtry v. Cline, supra; Atkins v. Transportation Co., supra; Crone v. Fisher,* 223 N. C. 635, 27 S. E. (2) 642; *Hampton v. Hawkins,* 219 N. C. 205, 13 S. E. (2) 227; *Cole v. Koonce,* 214 N. C. 188, 198 S. E. 637; *Manheim v. Taxi Corp.,* 214 N. C. 689, 200 S. E. 382; *Morris v. Johnson,* 214 N. C. 402, 199 S. E. 190. If the controlling or pertinent facts are in dispute, or more than one inference may reasonably be drawn from the evidence, the question of contributory negligence must be submitted to the jury. *Pearson v. Stores Corp.,* 219 N. C. 717, 14 S. E. (2) 811; *Templeton v. Kelley,* 215 N. C. 577, 2 S. E. (2) 696; *Ferguson v.*

Asheville, 213 N. C. 569, 197 S. E. 146. In ruling on a motion for nonsuit, the court does not pass on the credibility of the witnesses or the weight of the testimony. *Pappas v. Crist,* 223 N. C. 265, 25 S. E. (2) 850; *Wall v. Bain,* 222 N. C. 375, 23 S. E. (2) 330; *Alexander v. Utilities Co.,* 207 N. C. 438, 177 S. E. 427. It takes it for granted that the evidence favorable to the plaintiff is true, and resolves all conflict of testimony in his favor. *Diamond v. Service Stores,* 211 N. C. 632, 191 S. E. 358; *Cole v. R. R.,* 211 N. C. 591, 191 S. E. 353; *Brinkley v. R. R.,* 126 N. C. 88, 35 S. E. 238.

When the evidence adduced at the trial is tested by these principles, it becomes manifest that the question of whether the plaintiff's intestate was guilty of contributory negligence was for the jury, and that the court erred in allowing the motion of the defendants for a compulsory nonsuit.

The case is distinguishable from those cited by defendants in that the plaintiff's testimony does not impel the single conclusion that his intestate drove his automobile onto the crossing in the face of an oncoming train which he saw, or, in the exercise of reasonable care, should have seen. Here, opposing inferences are permissible. When interpreted most favorably for him, the plaintiff's evidence justifies the deductions that the intestate looked and listened immediately before driving onto the crossing and thereby ascertained that no train was within range of his view, which extended to the westward 600 feet. Clearly, it is not logical to conclude as a matter of law that the intestate was negligent in attempting to cross the railroad track under these circumstances. Besides, the plaintiff's testimony warrants the inference that the intestate's automobile stalled on the crossing in consequence of a breach of the railroad company's admitted duty to exercise due care to keep the crossing in a reasonably safe condition. *Cashatt v. Brown, supra; Moore v. R. R., supra; Stone v. R. R.,* 197 N. C. 429, 149 S. E. 399; *Goforth v. R. R.,* 144 N. C. 569, 57 S. E. 209; G.S. 60-43. It is not a necessary inference of law that the plaintiff's intestate failed to exercise reasonable care for his own protection under the existing circumstances, merely because he did not extricate himself from his perilous position before the fatal crash. According to plaintiff's evidence, the intestate had not exceeding seven seconds in which to escape after being apprised of the approach of the fast moving train.

The defendants invoke the statement of *Chief Justice Stacy* in *Powers v. Sternberg,* 213 N. C. 41, 195 S. E. 88, that "there are a few physical facts which speak louder than some of the witnesses" and the declaration of *Mr. Justice Barnhill* in *Caldwell v. R. R.,* 218 N. C. 63, 10 S. E. (2) 680, that "when a witness makes a statement of fact which is obviously impossible it does not rise to the dignity of evidence." They argue that the judgment of nonsuit was proper because the photographs allegedly made by their witness, W. M. White, shortly after the fatal accident truly

show the physical conditions at and near the crossing at the time in controversy, and render it obvious that the collision could not possibly have happened in the manner depicted by the plaintiff's witnesses. The defendants might well address this argument to a jury with satisfying result. But the court cannot utilize it without passing on the credibility of the photographer and the other witnesses, and determining the comparative probate force of the photographs and the other testimony. 32 C. J. S., Evidence, section 771. This the court is not permitted to do when considering the propriety of a nonsuit.

For the reasons given, the nonsuit is set aside, and

Reversed.

EUGENE G. SHAW, ADMINISTRATOR OF THE ESTATE OF PAUL V. STILES, DECEASED, v. L. F. BARNARD, T/A GATE CITY TRANSIT LINE, J. R. JONES, ATLANTIC GREYHOUND CORPORATION AND T. A. HUDSON, SR.

(Filed 7 January, 1949.)

1. Pleadings § 2—

A single action in tort for negligence may be maintained against two or more defendants only when the plaintiff relies on the doctrine of *respondeat superior* or the defendants are joint tort-feasors.

2. Torts § 4—

In order for parties to be joint tort-feasors they must either act together in committing the wrong or their tortious acts must unite in causing a single injury.

3. Same—

Plaintiff alleged that his intestate, while drunk, was wrongfully ejected from a bus by one carrier and that shortly thereafter, while attempting to cross the heavily traveled street, he was run over and fatally injured through the negligent operation of a bus of another carrier. *Held:* The complaint does not state a cause of action against the parties as joint tort-feasors.

4. Pleadings § 19b—

If a complaint states separate causes of action in tort against each of two groups of defendants and not a joint tort, dismissal upon demurrer for misjoinder of parties and causes is proper, since severance is not permissible and the defect is fatal.

5. Carriers § 20—

The complaint alleged that plaintiff's intestate, while in a drunken condition, was wrongfully ejected from defendant's bus at a place where the driver should have known that he would have to cross a heavily traveled street, that after he had alighted and walked some distance he attempted

to cross the street and was struck by the negligently operated bus of the other defendant. *Held:* Conceding that the ejection was wrongful, intestate was afforded a safe landing and his subsequent injuries through the negligent operation of the other bus did not flow from the wrongful ejectment, and no cause of action is stated against the original carrier or its driver.

6. Negligence §§ 7, 9—

Foreseeability is an essential element of proximate cause and a party is not under duty to anticipate intervening independent negligence on the part of others.

7. Same—

The complaint alleged that intestate, while in a drunken condition, was wrongfully ejected from one bus and that shortly thereafter he was run over while attempting to cross the heavily traveled street as the result of the negligent operation of a bus of another carrier. *Held:* The driver of the original bus was not under duty to anticipate the intervening independent negligence of the driver of the other bus, and the complaint fails to state a cause of action in tort against the original carrier.

8. Pleadings § 19b—

Where the complaint seeks to allege a cause of action against each of two groups of defendants as joint tort-feasors, but fails to state a cause of action against one group of defendants, dismissal upon demurrer for misjoinder of parties and causes is error, but the action should be dismissed as to the first group of defendants and reinstated for trial as against the other group.

APPEAL by plaintiff from *Armstrong, J.,* April Term, 1948, GUILFORD.

Civil action under the wrongful death statute, heard on demurrer to the complaint.

The plaintiff alleges, as against defendants Transit Line and J. R. Jones, in substance that on 2 January 1947, at about 7:00 p.m., his intestate, Stiles, became a passenger on a bus of defendant Transit Line; that Jones, the bus driver, ejected him at the corner of Summit Avenue and Sixteenth Street on the sidewalk for the reason he, the driver, insisted the deceased was drunk and disorderly; that, at the time, the driver knew that deceased was not in condition to take care of himself and also knew that he would have to cross to the west side of Summit Avenue, one of the main thoroughfares of Greensboro, bearing heavy traffic at all times; and that he negligently failed to aid deceased in crossing said dangerous highway.

As against defendants Greyhound Corporation and Hudson, he alleges that soon after being ejected from the Transit Line bus, deceased attempted to cross Summit Avenue at Seventeenth Street from east to west; that at the same time a Greyhound Corporation bus was being operated southerly along Summit Avenue by Hudson, at a rapid and unlawful rate

of speed; that the driver saw or should have seen that deceased was confused, incapacitated, and unable to care for himself; that the driver, going at an excessive rate of speed, attempted to pass around deceased at the intersection of Summit Avenue and Seventeenth Street, without stopping or paying attention to the safety of pedestrians; that the bus struck him and continued on 52 feet before stopping; and that the bus struck deceased with such force that it inflicted serious injury resulting in death.

The negligence of each defendant is particularized, and it is alleged that the death of plaintiff's intestate was proximately caused by the alleged negligent acts of said defendants.

The defendants appeared and demurred to the complaint for that (1) there is no allegation that the action was instituted within one year after the death of plaintiff's intestate, (2) for misjoinder of parties and causes of action, and (3) for that it affirmatively appears on the face of the complaint that the liability of the defendants, if any, is several and not joint, each cause of action being separate and distinct and no joint tort or other cause of action common to all defendants is alleged. The grounds for the demurrer in each instance are fully stated.

The court below sustained the demurrer for that there is a misjoinder of parties and causes of action and dismissed the action at the cost of plaintiff. Plaintiff excepted and appealed.

Frazier & Frazier and Adam Younce for plaintiff appellant.

Welch Jordan for defendant appellees.

BARNHILL, J. A single action in tort for negligence may be maintained against two or more defendants only when the plaintiff relies on the doctrine of *respondeat superior* or the defendants are joint tort-feasors.

"An action cannot be maintained against two or more defendants for distinct torts which were committed by the different defendants independently of and not in connection with each other, although the consequences of the tort, which was committed by one defendant, united with the consequences of the tort which was committed by the other. In such case the one defendant cannot be made liable for the consequences of the tort of the other. *Stephens v. Schadler,* 182 Ky. 833, 207 S. W. 704;" *Bost v. Metcalfe,* 219 N. C. 607, 14 S. E. (2) 648.

To constitute two or more persons joint tort-feasors the negligent or wrongful act of the one must be so united in time and circumstance with the negligent or tortious act of the other that the two acts in fact constitute but one transaction. While neither concert of action nor unity of purpose is required, there must be concurrence in point of time and place. The parties must either act together in committing the wrong, or their acts, if independent of each other, must unite in causing a single injury.

There must be a common intent to do that which results in injury, or their separate acts of negligence must concur in producing a single and indivisible injury. *Bost v. Metcalfe, supra,* and cases cited.

"The well established and familiar rule that a plaintiff may consistently and properly join as defendants in one complaint several joint tort-feasors applies where different persons, by related and concurring acts, have united in producing a single or common result upon which the action is based. 9 A. L. R. 942; Anno. 35 A. L. R. 410;" *Bost v. Metcalfe, supra; Smith v. Furniture Co.,* 220 N. C. 155, 16 S. E. (2) 685.

Here it appears on the face of the complaint from the facts alleged therein that the defendants Transit Line and Jones, on the one hand, and the Greyhound Corporation and Hudson, on the other, are not joint tort-feasors. The happening of each event portrayed in the complaint is wholly independent of the other. The cause of action, if any, against Jones and the Transit Line is grounded upon the breach of duty the law placed on them by reason of the relationship created by the contract of conveyance, while the cause of action, if any, against defendants Greyhound Corporation and Hudson arises out of Hudson's alleged negligent operation of a bus upon the public streets of Greensboro.

While the plaintiff does not make any allegation as to the length of time which expired between the two events, it does appear on the face of the complaint that the deceased, after being discharged from the Transit Line bus, went at least one block before he attempted to cross Summit Avenue, where he was struck by the bus of defendant Greyhound Corporation. The two events alleged were entirely separate and distinct in point of time and circumstance.

Thus it appears that related and concurring acts of negligence such as would create joint liability and give rise to one and only one cause of action against all the defendants are not alleged.

It follows that if a maintainable cause of action is alleged against each group of defendants the judgment must be affirmed, for a misjoinder of parties and causes of action constitutes a fatal defect. A severance is not permissible. *Bank v. Angelo,* 193 N. C. 576, 137 S. E. 705; *Southern Mills, Inc., v. Yarn Co.,* 223 N. C. 479, 27 S. E. (2) 289; *Moore County v. Burns,* 224 N. C. 700, 32 S. E. (2) 225.

But no cause of action is alleged against Jones and the Transit Line. As to them the plaintiff has alleged himself out of court.

Even if the deceased was wrongfully ejected from the Transit Line's bus, he was afforded a safe landing. The driver of the bus was under no duty to pilot him to his home. His injuries did not flow from that wrongful act but arose out of an entirely different and independent occurrence.

On the allegations made, the action of Jones in wrongfully ejecting the deceased from the bus was not a proximate cause of the injury and death.

His negligence had spent itself. It was no longer operative or active. It was broken by a new and independent, intervening and insulating, act of negligence which became and was the superseding proximate cause. *Insurance Co. v. Stadiem,* 223 N. C. 49, 25 S. E. (2) 202; *Ballinger v. Thomas,* 195 N. C. 517, 142 S. E. 761; *Haney v. Lincolnton,* 207 N. C. 282, 176 S. E. 573; *Baker v. R. R.,* 205 N. C. 329, 171 S. E. 342; *Beach v. Patton,* 208 N. C. 134, 179 S. E. 446; *Butner v. Spease,* 217 N. C. 82, 6 S. E. (2) 808. It cannot be said that his act and the conduct of Hudson constitute one continuous succession of events so linked together as to make a natural whole. *Henderson v. Powell,* 221 N. C. 239, 19 S. E. (2) 876; *Butner v. Spease, supra; Ballinger v. Thomas, supra; R. R. v. Kellogg,* 94 U. S. 469.

Proximate cause is a prerequisite of liability for negligence and foreseeability is an essential element of proximate cause. Hence, in the final analysis, reasonable foreseeability on the part of the original actor of the subsequent intervening act and the resultant injury is the test. *Henderson v. Powell, supra; Butner v. Spease, supra; Gold v. Kiker,* 216 N. C. 511, 5 S. E. (2) 548; *Murray v. R. R.,* 218 N. C. 392, 11 S. E. (2) 326; *Reeves v. Staley,* 220 N. C. 573, 18 S. E. (2) 239; *Insurance Co. v. Stadiem, supra; Rattley v. Powell,* 223 N. C. 134; *Beach v. Patton, supra; Montgomery v. Blades,* 222 N. C. 463, 23 S. E. (2) 844.

"The test . . . is whether the intervening act and the resultant injury is one that the author of the primary negligence could have reasonably foreseen and expected." *Harton v. Telephone Co.,* 141 N. C. 455.

The law does not require omniscience. *Wood v. Telephone Co.,* 228 N. C. 605. It was not the duty of Jones to anticipate negligence on the part of others. To say that he was under obligation to anticipate the occurrence which caused the death of plaintiff's intestate goes beyond the field of reasonable foresight. Hence the facts alleged exculpate him and his employer and relieve them of any liability for the injury and death of deceased. As to them no cause of action is stated. *Ballinger v. Thomas, supra.* On this record they are unnecessary parties.

The cause is remanded to the end that an order may be entered dismissing the action as to the defendants Jones and Transit Line and reinstating it on the civil issue docket for trial as against the defendants Hudson and Greyhound Corporation.

Error and remanded.

STATE v. CECIL CHURCH.

(Filed 7 January, 1949.)

1. Criminal Law § 40d—

Where defendant goes upon the stand and admits certain acts of misconduct and then introduces evidence of good character, the State has the right to cross-examine such character witnesses regarding the admitted acts of misconduct for the purpose of attacking the credibility of such character witnesses.

2. Criminal Law § 48c—

Where evidence is competent for a restricted purpose and no request is made that its admission be limited thereto, a general objection to the evidence cannot be sustained.

3. Criminal Law § 78e (2)—

Any misstatement in stating the contentions of the State must be brought to the court's attention in time to afford opportunity for correction in order for objection thereto to be sustained on appeal.

4. Homicide § 20—

The evidence in this case *is held* sufficient to support the view that defendant, being armed, and his father and two brothers, acted in concert in going to deceased's home and with vile language ordering him out, in stubborn pursuit of the controversy between them.

5. Homicide § 27f—

Ordinarily, a charge on the question of self-defense which is predicated solely upon a murderous assault, is erroneous, since a defendant has the right to defend himself or a member of his family against a *non-felonious* assault and to fight in defense of himself or a member of his family if he has reasonable grounds to believe that he or a member of his family is about to be killed or receive great bodily harm.

6. Same: Homicide § 30—Charge on right to defend member of family held not prejudicial when construed contextually in light of evidence.

The evidence tended to show that defendant and members of his family pursued an altercation originally started by deceased by going to the home of deceased and with vile language ordering him out, and that when deceased came out of the house and started pursuing defendant's brother, defendant shot and killed him. *Held:* An instruction on the right of self-defense predicated solely upon a murderous assault on defendant's brother cannot be held for prejudicial error since under the evidence defendant was the aggressor immediately prior to the fatal shooting and therefore the right of self-defense was not available to him, and the charge considered contextually in the light of the evidence is not prejudicial to defendant in this aspect.

7. Homicide § 11—

The right of self-defense is not available to one who invites another to engage in a fight, unless he first abandons and withdraws from the fight and gives notice to his adversary that he has done so.

STATE *v.* CHURCH.

APPEAL by defendant from *Clement, J.,* at August Term, 1948, of WILKES.

Criminal prosecution tried upon indictment charging the defendant with the murder of one Douglas Norris.

The defendant was not placed on trial for murder in the first degree, but for murder in the second degree or manslaughter, as the evidence might warrant.

The State's evidence tends to show the following facts: The defendant, Cecil Church, lived with his father, Jim Church, next door to his sister and brother-in-law, Douglas Norris. A garden belonging to the defendant's father separated the two houses. Douglas Norris will be referred to hereinafter as "the deceased." On Sunday afternoon, 6 June, 1948, the deceased, the defendant, Charles Osborne and others, went fishing. They drank some liquor and went to Williams' Cafe on Highway 421, near the town of North Wilkesboro. At the cafe a difficulty arose between the deceased and Charles Osborne. The defendant attempted to settle the difference between the two men and the deceased slapped the defendant. The defendant left the cafe in his pick-up truck. Shortly thereafter he returned with his father, Jim Church, in the pick-up truck and the defendant's brother, Herbert Church, and his wife drove up in a car. Jim Church, with rifle in hand, and the defendant got out of the pick-up truck and walked within a few feet of the deceased. There is some evidence which tends to show that the deceased was marched to his home by the defendant and his father at the point of the rifle. The evidence further tends to show that when the deceased and Cecil Church reached their respective homes they renewed their quarrel. Thereafter Cecil Church went into his house and got a rifle and the deceased backed away from him with his hands up and went into his own home. About this time the father of the defendant and Herman Church drove up in the pick-up truck and parked it in the road near Norris' home. Then Cecil Church and his father and brothers, Herman and Dillard Church, went near the Norris house and Cecil, with rifle in hand, put his foot on Norris' porch and called him a "s.o.b. coward," and told him to come out. The deceased did not come out immediately, but upon Dillard Church repeating the oath the deceased ran out of his house toward Dillard and while they were running around the pick-up truck Cecil Church shot the deceased and killed him. Several State's witnesses testified that the only weapon seen at the time of the killing was the rifle in the hands of the defendant.

The defendant offered evidence tending to show that just prior to the fatal shooting the deceased had stated he was going in his house and get his .45 and kill the last d——n one of the Churches; that when he came out of his house, he had his right hand in his hip pocket, he jumped off the porch and struck at the defendant's neck with a knife and then made

for Dillard Church. Dillard ran around the pick-up truck with the deceased striking at him, and as Dillard Church came around the end of the truck the deceased swerved and struck at the defendant. The defendant fired one shot, but the deceased kept on running Dillard around the truck. The next time he came around, the deceased again struck at defendant, who fired a second shot.

Verdict: Guilty of manslaughter. Judgment: Imprisonment in the Central Prison at Raleigh for a term of not less than eight nor more than twelve years.

Defendant appeals, and assigns error.

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

Trivette, Holshouser & Mitchell for defendant.

DENNY, J. The defendant assigns as error the ruling of the court below in permitting the State, over the objection of the defendant, to cross-examine one of defendant's character witnesses regarding specific acts of the defendant.

Ordinarily where a defendant introduces evidence of his good character it is error to permit the State to cross-examine the character witness as to particular acts of misconduct on the part of the defendant. Neither is it permissible for the State to introduce other evidence of such misconduct. Under such circumstances, however, the State is permitted to introduce evidence of the defendant's bad character. *S. v. Robinson,* 226 N. C. 95, 36 S. E. (2) 655; *S. v. Shepherd,* 220 N. C. 377, 17 S. E. (2) 469; *S. v. Lee,* 211 N. C. 326, 190 S. E. 234; *S. v. Nance,* 195 N. C. 47, 141 S. E. 468; *S. v. Adams,* 193 N. C. 581, 137 S. E. 657; *S. v. Holly,* 155 N. C. 485, 71 S. E. 450.

The above rule is subject to certain exceptions, among them being where a defendant goes upon the stand and admits certain specific acts of misconduct, as the defendant did in the trial below, and then introduces evidence of his good character, the State has the right to cross-examine such character witness regarding the admitted acts of misconduct in order to ascertain his conception of what constitutes good character. *S. v. Quick,* 150 N. C. 820, 64 S. E. 168; *S. v. Killian,* 173 N. C. 792, 92 S. E. 499; *S. v. Nance, supra.* Also, as *Barnhill, J.,* said in speaking for the Court in *S. v. Shepherd, supra:* "Such evidence is competent for the purpose of testing the knowledge of the witness concerning the general reputation about which he has testified and to impeach his testimony. That is, it goes to the credibility of the witness and is competent for that purpose only . . . Upon request the court should so limit it. However, upon general objection only, without request that it be restricted to the

use for which it is competent, the general objection and exception is not tenable. *S. v. Tuttle,* 207 N. C. 649, 178 S. E. 76, and cases cited; *S. v. Hawkins,* 214 N. C. 326, 199 S. E. 284."

The exceptions upon which this assignment of error is based are without merit.

The defendant brings forward a number of assignments of error based on exceptions to the manner in which the trial judge stated the contentions of the State in his charge to the jury. He insists it was prejudicial error for the court to charge the jury that the State contends that the Churches were mad, that they went to the home of the deceased for the purpose of killing him, with malice in their hearts, because he had assaulted the defendant. Since the court's attention was not called to any misstatement of facts or omissions in giving the State's contentions, in time to afford an opportunity for correction, these assignments of error will not be upheld. *S. v. Britt,* 225 N. C. 364, 34 S. E. (2) 408; *S. v. Smith,* 225 N. C. 78, 33 S. E. (2) 472; *Mfg. Co. v. R. R.,* 222 N. C. 330, 23 S. E. (2) 32; *S. v. Johnson,* 219 N. C. 757, 14 S. E. (2) 792; *S. v. Wagstaff,* 219 N. C. 15, 12 S. E. (2) 657. Moreover, the evidence on this record is sufficient to support the view that the defendant, his father and two brothers, were acting in concert at the time the deceased was killed. *S. v. Riddle,* 228 N. C. 251, 45 S. E. (2) 366.

The defendant also sets out eleven assignments of error based on exceptions to the court's charge on the right of self-defense. Among these he assigns as error the following portion of the charge: "If a murderous assault was being made on a member of his family, he had the same right to fight in defense of their life as he would in defense of his own." The defendant insists that the limitation upon the right to fight in defense of his family to a "murderous assault" was prejudicial, inasmuch as he would also have a right to fight in their defense in the case of a nonfelonious assault, citing *S. v. Bryant,* 213 N. C. 752, 197 S. E. 530. The defendant also contends the charge should have gone further and included an instruction to the effect that the defendant would likewise have the right to fight in defense of a member of his family to prevent their receiving great bodily harm, citing *S. v. Mosley,* 213 N. C. 304, 195 S. E. 830.

We concede that an instruction on the right of self-defense predicated solely upon a felonious assault and omitting to charge as to the defendant's right to defend himself or a member of his family against a nonfelonious assault is ordinarily erroneous. *S. v. Minton,* 228 N. C. 15, 44 S. E. (2) 346; *S. v. Bryant, supra.* Likewise, one may fight in defense of himself or a member of his family if he has reasonable grounds to believe that he or a member of his family is about to be killed or to receive great bodily harm. *S. v. Mosley, supra; S. v. Anderson,* 222 N. C.

148, 22 S. E. (2) 271. However, we think the charge, when considered contextually, is not erroneous in this respect.

Moreover, the cases cited by the appellant and similar decisions are predicated upon facts which warranted the submission of the plea of self-defense to the jury. But according to this record, after the deceased had forbidden the defendant and other members of his family to come on his premises, and after the defendant had caused the deceased to back into his own home at the point of a rifle; the defendant, accompanied by his father and two brothers went on the premises of the deceased and the defendant cursed him and ordered him to come out of his home. He did not come out and Dillard Church, brother of the defendant, called the deceased a coward and a s.o.b., whereupon the deceased ran out of the house and jumped off the porch. And according to the evidence of the State, while the deceased ran after Dillard Church he did not stirke at him with a knife nor did he attempt to assault the defendant, but, on the contrary, Dillard Church while running around the pick-up truck was hollering "shoot him, shoot him." According to the uncontradicted evidence on this record, the defendant and his father and two brothers were the aggressors just prior to the fatal shooting, demanding a continuance of the quarrel up to the moment the deceased came out of his house in response to the vile and abusive language of the defendant and his brother Dillard.

The right of self-defense is not available to one who invites another to engage in a fight, unless he first abandons the fight and withdraws from it, and gives notice to his adversary he has done so. *S. v. DeMai,* 227 N. C. 657, 44 S. E. (2) 218; *S. v. Davis,* 225 N. C. 117, 33 S. E. (2) 623; *S. v. Robinson,* 213 N. C. 273, 195 S. E. 824; *S. v. Kennedy,* 169 N. C. 326, 85 S. E. 42; *S. v. Garland,* 138 N. C. 675, 50 S. E. 853; 40 C. J. S., Homicide, Sec. 92, p. 954.

It is true the deceased started the controversy, but the defendant stubbornly pursued it, and at the time of the fatal shooting he had not indicated any desire or intention to withdraw from it, but, on the contrary, armed with a deadly weapon, and while under the influence of liquor, he brought a family quarrel to a tragic end. It would seem the jury gave him every consideration he could expect on this record.

We have carefully considered all the numerous exceptions and assignments of error brought forward in the appellant's brief and while they have been presented with commendable zeal and diligence by his counsel, such prejudicial error as would warrant a new trial has not been shown.

No error.

STATE v. OTIS BAGLEY.

(Filed 7 January, 1949.)

1. Homicide § 25—

The testimony of the State's witnesses placing defendant at the scene at the time of the shooting and permitting the reasonable inference that defendant, pursuant to a family altercation, fired the shot which killed deceased, though contradicted by defendant's evidence, *is held* sufficient to overrule defendant's motion to nonsuit.

2. Criminal Law § 42f—

The State cannot discredit its own witness by introducing testimony of previous statements made by her inconsistent with her testimony upon the stand.

3. Criminal Law § 42d—

Where testimony of previous statements is introduced by the State for the purpose of corroborating its witness, and such statements are inconsistent with and repugnant in material aspects to the witness' testimony upon the trial, such statements tend to discredit the witness, and therefore are incompetent for the purpose of corroboration, nor may such statements be admitted under instructions that they be considered only to the extent that they corroborate the witness, since the jury should not be given the task of eliminating the contradictory declarations.

APPEAL by defendant from *Pless, J.*, at March Criminal Term, 1948, of DURHAM.

Criminal prosecution upon a bill of indictment charging defendant with the murder of one William Coleman.

The solicitor for the State announced that he would not ask for a verdict of guilty of murder in the first degree, but would ask for a verdict of guilty of murder in the second degree, or of manslaughter, as the evidence might warrant.

Defendant pleaded not guilty, and relied upon alibi.

Upon the trial in Superior Court the State offered the testimony of the members of the Cheatham family, Lewis and his wife Pansy, and their twelve-year-old daughter Eldria, next door neighbors to William Coleman and his wife Viola, and her daughter Erline. They lived on South Street in the city of Durham, North Carolina. From their testimony this narrative appears: William Coleman, called Bush, came to his death on the night of 12 September, 1947, as result of a bullet wound in his chest,—he being found on the porch of his home, and dying soon thereafter. About 11 o'clock p.m., William Coleman and his wife had an "argument" at their home. Her screaming waked the Cheathams. While William was turning out the lights in the house Viola went out the front door, and down South Street. "Pretty soon" Frank and Curtis Bagley, brothers of Viola, and of defendant Otis Bagley, and their girl friends came up in a cab and got out and started arguing with Bush.

A "scrap" ensued there on the porch, and Erline, who was there also, got cut on her arm. Bush had a knife. Lewis Cheatham came as peacemaker, parted them, and took Erline to hospital. The others left too. Only Bush remained at the house. Lewis returned to his home from the hospital. Soon thereafter Bush came to the Cheatham home and tried to borrow a gun. Failing in this, he returned to his home. Soon thereafter two cars stopped in front of his home, and people got out.

As to subsequent events Pansy Cheatham and Eldria Cheatham as witnesses for the State gave their respective versions. Pansy Cheatham testified: "People got out and a great argument, you know, and this sister said to him, said 'Don't shoot Otis,' and immediately after that there were shots. The sister I was referring to was Geneva Perry, Otis Bagley's sister . . . I could not see the front porch of William Coleman's house. After the gun fired I heard footsteps, scrambling, down the steps and the cars started and they went up the street, all left . . . My husband returned home not long after the shooting . . . and he went for the officers . . . I know Otis Bagley. I know his sister Geneva. I did not hear Otis make any statement or say anything at all that night. I only heard his sister hollering over there." Then, on cross-examination, this witness continued: "I heard Geneva say, 'Don't shoot Otis.' That is all I heard . . . I was facing away from the Coleman house."

And Eldria Cheatham testified as to such subsequent events: "Two cars drove up and I saw their headlights. I was in my mother's room across the bed. I saw somebody get out of the cars. I recognized Otis Bagley and Geneva Bagley. I recognized Otis by his shirt and glance of his face. I then heard some people fussing. They were cursing. I knew Otis Bagley before this time. I know Otis' voice. Otis asked Bush why he was cutting up people. Bush told him to go away. Nothing else was said by Otis. I heard Geneva say, "Don't shoot Otis." Then I heard two shots. Then the people who were on the porch came down the steps and got in their cars and drove off. I did not see or hear anything else over there that night . . . I later told my mother who I had seen. I told her I saw Otis and Geneva." This witness, on cross-examination, continued in pertinent part: "I testified in Recorder's Court that the only way that I knew who any of the people were was by hearing their voices. I say the same thing now. I also testified in Recorder's Court that I heard someone say 'Don't shoot Otis,' and then I heard someone say 'Come again,' and that was all I testified in Recorder's Court that I heard. I testify now that that is all I heard said." Then on re-direct examination the witness was asked this question: "Did you—were you able to determine—do you testify now you were able to determine the identity of any of these people? Were you able to see any of these people so that you knew them?" (Objection. Exception 5.) The witness answered: "I

don't think so. O, yes, Otis." She then continued: "Otis was coming up the steps when I recognized him . . . I did not recognize anyone else other than Otis as they left the car and came toward the house." And, still on re-direct examination, the witness was asked this question: "I will ask you if you didn't also testify that there were other things said out there that night when you testified in Recorder's Court?" (Objection. Exception 6), to which she replied "Yes." And on re-cross-examination, the witness said: "I know what kind of shirt Otis had on that night; he had on a polo shirt."

Thereafter the State offered as witness C. W. Rigsbee, a member of the detective force of the city of Durham, as to declarations made by Eldria Cheatham on the morning of 13 September. He was asked: "What, if anything, did she tell you as to what she knew with reference to this killing? I am offering it for the purpose of corroborating Eldria Cheatham if it does corroborate her." In answer thereto the witness read from a written statement a recitation of events leading up to the shooting, and then, quoting her, continued: "Geneva and Otis were out there as I heard their voices. Otis told Bush he was acting bad, cutting up people like that, and Otis said 'Take off those glasses and put that knife down and I will shoot you,' and Geneva said, 'Don't shoot, don't shoot,' and Bush said, 'You all go ahead, go ahead,' and then I heard Bush say 'What are you doing with that pistol,' and then I heard two shots fired and all the people ran off the porch and got into the car and Geneva's car, and all of them left . . ." Defendant moved to strike the answer made by the witness. Denied. Exception No. 7. The court instructed the jury: "The motion is denied, but the court repeats that you will not consider for any purpose any statement of the witness as to what Eldria told him, except as it may tend to corroborate or support her testimony while she was on the stand. The court recalls at least one or two parts of that statement read by the officer that is not in accord with the testimony of Eldria in this case while she was on the stand, and of course that part of it is not competent and will not be considered by you."

Thereupon defendant entered motions, which the court denied, as follows: (1) That the court delete from the statements those portions which are not corroborative; (2) that the entire statement of witness be stricken as being unresponsive; and (3) that the court specify the portions of the officer's testimony which is not in corroboration or substantiation of Eldria's testimony. To the denial of these motions exceptions 8, 9 and 10 relate.

Also for purpose of corroborating the State's witness, Pansy Cheatham, the State, through the same witness, officer Rigsbee, read into the record a previous statement she had made. Exception 11. And to denial of his motions (1) to strike those portions which are not corroborative, and

(2) to strike the whole as being unresponsive, defendant excepts. Exceptions 12 and 13.

Defendant, on the other hand, reserving exception to denial of his motion for judgment as in case of nonsuit, entered when State first rested, offered evidence tending to show that on the night in question he was at work at Third Fork Inn operated by his brother-in-law James Perry and his wife, Geneva Perry, a mile or more from the Coleman home. And Viola Coleman, wife of deceased, and sister of defendant, as witness for defendant, testified in support of his plea of alibi,—stating that she shot her husband under circumstances detailed by her. Defendant renewed his motion for a dismissal of the prosecution and a directed verdict of not guilty, at close of all the evidence, and upon denial of it, excepted.

Verdict: Guilty of the crime of manslaughter.

Judgment: Confinement in the Central Prison at Raleigh, N. C., for a period of not less than nine years nor more than twelve years, to be worked under the supervision of the State Highway and Public Works Commission at hard labor.

Defendant appeals therefrom to Supreme Court, and assigns error.

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

Victor S. Bryant and Robert I. Lipton for defendant, appellant.

WINBORNE, J. Defendant presents for decision, first, exception to the ruling of the court in denying his motions for judgment as in case of nonsuit, and second, numerous exceptions to the admission of evidence.

As to the first: While there is conflict of testimony, as between that offered by the State, and that offered by the defendant, we are of opinion and hold that the evidence offered on the trial below, taken in the light most favorable to the State, as we must do in passing upon such motions, is sufficient to make out a case for consideration by the jury. The evidence favorable to the State places defendant on the scene at the time of the shooting, and there is evidence from which the jury may reasonably infer that defendant did the shooting.

But as to the second, we are of opinion that exceptions 7, 8, 9 and 10 considered together show error prejudicial to defendant. The admission of the evidence as to previous contradictory declarations of the State's witness Eldria Cheatham is erroneous in two aspects: (1) It violates the well settled rule of evidence that a party cannot discredit his own witness. *S. v. Melvin,* 194 N. C. 394, 139 S. E. 762; *S. v. Freeman,* 213 N. C. 378, 196 S. E. 308, and cases cited. See also Section 40 of Stansbury on North Carolina Evidence. (2) It exceeds the limits of the rule that, in the event the credibility of a witness is impaired, his previous similar

statements are admissible. For, as stated in *S. v. Melvin, supra, Brogden, J.,* writing for the Court: "The rule has never been expanded far enough to permit the introduction of previous contradictory statements, because in the very nature of things this would weaken credibility rather than strengthen or confirm it." See also *S. v. Lassiter,* 191 N. C. 210, 131 S. E. 577, where the Court said: "In no aspect of the law of evidence can contradictory evidence be used as corroborating, strengthening or confirming evidence."

The case of *S. v. Melvin, supra,* is very similar to the one in hand. Here, as in the *Melvin case,* the narrative of officer Rigsbee, in the particulars quoted hereinabove, is not a narrative "of previous similar declarations" made by Eldria Cheatham, but rather of previous dissimilar and contradictory statements made by Eldria Cheatham as tending to show how the killing occurred. "This is not permissible under the rules of law applicable to the trial of criminal cases." *S. v. Melvin, supra.*

Moreover, it may be noted that in the *Melvin case* the trial judge stated to the jury that the evidence of Dr. Brewer (C. W. Rigsbee in the present case) was offered "only for the purpose of corroborating Mary Bradley" (Eldria Cheatham in the present case). And, continuing, "You will only consider that part of his evidence which you find tends to corroborate Mary Bradley, if you find any of it does, and you are not to consider any part of it that does not corroborate her." Then this Court, after noting certain variations, said: "This testimony of Dr. Brewer, therefore, contradicts the testimony of Mary Bradley, another State's witness, in material particulars, which, if believed, totally destroyed the theory of the defendant that the cutting was accidentally done." Error was found, and a new trial granted.

See also *S. v. Jackson,* 228 N. C. 656, 46 S. E. (2) 858, where, referring to the charge, this Court stated, "While no particular harm seems to have resulted from the preliminary statement in the instant case, it is not to be approved as a general practice. The trial court ought not to submit his charge to the jury for elimination of inconsistencies." In like manner the trial judge should not submit to the jury the task of eliminating patent contradictory declarations from those tending to corroborate testimony given on the stand.

The same principle is applicable to the testimony of the same officer as to previous statements made to him by the State's witness Pansy Cheatham to which exceptions 11, 12 and 13 relate.

As the case must go back for retrial, other exceptions need not be considered.

Hence, for error pointed out, let there be a

New trial.

MARGIE L. HILL v. ATLANTIC GREYHOUND CORPORATION.

(Filed 7 January, 1949.)

1. Appeal and Error § 22—

Where, upon an appeal from denial of motion to remove to another county, it appears that the clerk found that defendant is a domesticated corporation, which finding is supported by the record, and the trial court, who settled case on appeal, certifies that the motion was heard and decided on the theory that defendant is a domesticated corporation, the matter is conclusive, since the Supreme Court is bound by the record.

2. Appeal and Error § 8—

The record and appellant's exceptions will be considered in the light of the theory of trial in the lower court.

3. Venue § 1c—

A foreign corporation which has domesticated here, G.S. 55-118, may sue and be sued under the rules and regulations which apply to domestic corporations, and is entitled to have an action against it, instituted by a nonresident, removed to the county of its main place of business in this State. G.S. 1-79, 1-82.

APPEAL by defendant from *Edmundson, Special Judge,* March Term, 1948, DURHAM. Reversed.

Action to recover damages for personal injuries, heard on motion to remove to Forsyth County for trial.

Plaintiff is a nonresident of North Carolina. Defendant is a foreign corporation duly domesticated in this State, with its principal place of business, in this State, in Winston-Salem, Forsyth County. Its buses travel through, and it does business in, Durham County.

Plaintiff, alleging that she suffered certain personal injuries while a passenger on one of defendant's buses, which injuries were proximately caused by the negligence of the bus driver, instituted this action in Durham County. The defendant, before answering, appeared and moved as a matter of right that this cause be removed to Forsyth County for trial. When the motion came on for hearing before the clerk, he found the facts, concluded that Forsyth County is the proper venue, and ordered the cause removed as prayed by defendant. Plaintiff appealed. The court below, upon hearing the appeal, reversed the order of the clerk and ordered that the cause be retained on the civil issue docket of Durham Superior Court for trial. Defendant excepted and appealed.

Egbert L. Haywood for plaintiff appellee.

Deal & Hutchins for defendant appellant.

BARNHILL, J. The case on appeal in this cause was settled by the trial judge. While he did not in his judgment find the facts in detail, he certifies that the motion was heard and decided "upon the theory that the defendant corporation was domesticated in the State of North Carolina, and that the records of the office of the Secretary of State would disclose that it was duly authorized to transact business in the State of North Carolina, and that its main place of business was in the City of Winston-Salem, N. C." The clerk so found, and the record sustains the finding. We are bound by the record as it comes to this Court. *Mason v. Board of Commissioners, ante,* p. 626; *S. v. Dee,* 214 N. C. 509, 199 S. E. 730.

An appeal to this Court is heard and disposed of on the theory upon which the cause was tried and decided in the court below. We interpret the record and determine the validity of the exceptions entered in the light of that theory. *Hinson v. Shugart,* 224 N. C. 207, 29 S. E. (2) 694; *Simons v. Lebrun,* 219 N. C. 42, 12 S. E. (2) 644; *Smith v. Bonney,* 215 N. C. 183, 1 S. E. (2) 371; *Potts v. Insurance Co.,* 206 N. C. 257, 174 S. E. 123, and cases cited; *Thrift Corp. v. Guthrie,* 227 N. C. 431, 42 S. E. (2) 601.

The defendant's motion was entered under authority of G.S. 1-83. The plaintiff contends that, inasmuch as defendant is a foreign corporation, venue in this cause is controlled by G.S. 1-80. The defendant insists that for the purpose of suing and being sued the defendant is in effect a domestic corporation and the proper venue for the trial of this cause is the county of its residence. G.S. 1-79, 1-82. The contention of the defendant must prevail.

When a foreign corporation complies with the provisions of G.S. 55-118, it subjects itself to the laws of this State and acquires in return certain compensating rights and privileges. Among these is the right to sue and be sued in the State courts under the rules and regulations which apply to domestic corporations. *Nutt Corp. v. R. R.,* 214 N. C. 19, 197 S. E. 534; *Bank v. Kerr,* 206 N. C. 610, 175 S. E. 102; *Mortgage Co. v. Long,* 205 N. C. 533, 172 S. E. 209; *Smith-Douglass Co. v. Honeycutt,* 204 N. C. 219, 167 S. E. 810; *Insurance Co. v. Lawrence,* 204 N. C. 707, 169 S. E. 636.

"For purposes of venue of the state courts, it is quite generally held that domesticated foreign corporations are residents of the state in which they have been domesticated." Anno. 126 A. L. R. 1510. We have so held. Hence the defendant, in respect to this motion, must be treated as a domestic corporation.

Since the plaintiff is a nonresident and the defendant, for the purposes of this action, is a resident of Forsyth County, G.S. 1-82 is controlling and Forsyth County is the proper venue for the trial of this cause. Therefore, the judgment below must be

Reversed.

KATHERINE S. BARNES v. HOTEL O.HENRY CORPORATION.

(Filed 7 January, 1949.)

1. Negligence § 4f (2)—

An innkeeper is required only to exercise due care to keep his premises in a reasonably safe condition and to give his guests warning of any hidden peril.

2. Negligence § 4d—

Evidence that plaintiff slipped and fell upon a waxed or polished floor and that her heel left a "deep furrow" or "skid mark" on the floor, is insufficient to overrule defendant's motion to nonsuit in the absence of evidence that any unusual material was used on the floor or that it had been applied in an improper, unusual or negligent manner, since *res ipsa loquitur* does not apply.

APPEAL by plaintiff from *Bobbitt, J.*, at September Term, 1948, of GUILFORD, Greensboro Division.

This is a civil action to recover for personal injuries, which the plaintiff alleges she sustained on 29 November, 1946, as the result of a fall caused by a heavy coat of wax on the composition and marble floor in the vestibule at the entrance to the elevators on the third floor of the O.Henry Hotel, in Greensboro, N. C.

The plaintiff testified she was a regular guest of the hotel, having lived there for nearly twelve years. She came out of her room on the above date, about 4:00 p.m., and walked over the strip of carpet in the hall to the vestibule or elevator entrance. When she got to the elevator entrance she looked at the whole area and saw nothing out of the ordinary. As she put her left foot on the marble strip her left heel shot out from under her and it went in sort of "diagonal position to the left. . . . When I got myself up in a little bit, I looked around to see what happened and I saw what looked to me like a deep furrow from where my left heel had struck the marble, . . . and I punched the bell and went down on the elevator . . ., got off the elevator, and stopped and talked to Mr. Padgett, the assistant manager of the hotel, at the desk. He then went back upstairs with me. When we got back upstairs I showed him the condition I have just stated to the jury, including the skid mark. . . . He said, 'You go on to your room until the doctor comes, and I'll have this cleaned up right away.' "

The plaintiff further testified that she had gone over the marble and composition floor in this vestibule probably more than seven thousand times; that she had been by this place three, four, five or six times a day for more than ten years; that at this particular time when she approached it, its appearance was no different than at other times, in so far as she could see.

At the close of plaintiff's evidence, the defendant moved for judgment as of nonsuit. The motion was granted and the plaintiff appeals and assigns error.

King & King and R. M. Robinson for plaintiff.
Smith, Wharton, Sapp & Moore for defendant.

DENNY, J. Did the court below commit error in granting the defendant's motion for judgment as of nonsuit? We do not think so.

An innkeeper is not an insurer of the personal safety of his guests. He is only required to exercise due care to keep his premises in a reasonably safe condition and to give his guests or invitees warning of any hidden peril. *Schwingle v. Kellenberger,* 217 N. C. 577, 8 S. E. (2) 918; *Sams v. Hotel Raleigh,* 205 N. C. 758, 172 S. E. 371; *Jones v. Bland,* 182 N. C. 70, 108 S. E. 344; *Patrick v. Springs,* 154 N. C. 270, 70 S. E. 395; 43 C. J. S., Innkeepers, Sec. 22, p. 1173; 28 Amer. Jur., Innkeepers, Sec. 56, p. 578.

The appellant is relying on the rule of liability stated in *Anderson v. Amusement Co.,* 213 N. C. 130, 195 S. E. 386; *Parker v. Tea Co.,* 201 N. C. 691, 161 S. E. 209; and *Bowden v. Kress,* 198 N. C. 559, 152 S. E. 625. An examination of these decisions will disclose that in each case the owner of the store or theatre had applied oil, grease, wax or some similar substance to the floor in an improper, unusual or negligent manner, causing the patron or invitee to fall.

In the instant case the plaintiff alleges there was a heavy coat of wax on the floor where she fell, which had been applied uniformly and smoothly over the entire floor of the vestibule or entrance to the elevators. At the trial, however, she offered no evidence to show what the substance was on the floor or what caused her to fall. Once in her testimony she did state that after she fell she looked around to see what happened and saw what looked like a "deep furrow" from where her left heel had struck the marble, but at other times she referred to the mark on the floor as "the skid mark." There is no evidence to the effect that any unusual material had been used in cleaning or polishing the floor or that such material had been applied in an improper, unusual or negligent manner. In fact, plaintiff offered no evidence tending to show that any substance had been placed on the floor except as it may be inferred from her testimony as to the "deep furrow" or "skid mark." On the other hand, she testified that the marble and composition floor in the vestibule where she fell, was no different in its appearance than at other times, in so far as she could see.

The fact that a floor is waxed does not constitute evidence of negligence. Nor does the mere fact that one slips and falls on a floor constitute evidence of negligence. *Res ipsa loquitur* does not apply to injuries

resulting from slipping or falling on a waxed or oiled floor. *Parker v. Tea Co., supra.* In order to recover for an injury, resulting from a fall on such a floor, it is necessary to show "defective or negligent construction or maintenance" and "express or implied notice of such defects." *Sams v. Hotel Raleigh, supra; Pratt v. Tea Co.,* 218 N. C. 732, 12 S. E. (2) 242.

It seems to be the general rule that an action will not be sustained against the owner or lessee of a building, founded solely upon the fact that a patron or invitee was injured by slipping on a waxed or polished floor, where the floor had been waxed or polished in the usual and customary manner and with material in general use for that purpose. *Brown v. Davenport Holding Co.,* 134 Neb. 455, 279 N. W. 161, 118 A. L. R. 423; *Ilgenfritz v. Missouri Power & Light Co.,* 340 Mo. 648, 101 S. W. (2) 723; *McCann v. Gordon,* 315 Pa. 367, 172 A. 644; *Smith v. Union New Haven Trust Co.,* 121 Conn. 369, 185 A. 81; *Herrick v. Breier,* 59 Idaho 171, 82 P. (2) 90; *Kay v. Audet,* 306 Mass. 337, 28 N. E. (2) 462; *Spickernagle v. Woolworth,* 236 Pa. 496, 84 A. 909, Ann. Cas. 1914 A. 132.

The evidence adduced in the trial below, when considered in the light most favorable to the plaintiff, is insufficient to justify its submission to the jury.

The ruling of the court below is

Affirmed.

R. E. NANCE AND PARKER W. MORRIS ON BEHALF OF THEMSELVES AND OTHER TAXPAYERS AND PROPERTY OWNERS SIMILARLY SITUATED, v. THE CITY OF WINSTON-SALEM, AND THE FORSYTH COUNTY BOARD OF ELECTIONS, AND T. SPRUILL THORNTON, PHILIP E. LUCAS AND NISSEN SHORE, AS MEMBERS OF THE FORSYTH COUNTY BOARD OF ELECTIONS.

(Filed 7 January, 1949.)

1. Appeal and Error § 31e—

Where an election sought to be enjoined has been held, an appeal from judgment denying injunctive relief against the holding of the election will be dismissed, since the questions sought to be presented by the appeal have become academic.

2. Same—

In a suit to enjoin the holding of a city limits extension election, allegations of irreparable damage in that plaintiffs' land would be subject to unlawful taxes by the city, cannot be construed as a cause of action to enjoin the levy or collection of taxes by the municipality, and thus prevent dismissal on appeal where the election sought to be enjoined has already been held.

3. Pleadings § 22b—

A party will not be allowed to amend his complaint so as to engraft on the action a cause which arose after the institution of the suit and after the hearing in the trial court.

APPEAL by plaintiffs from *Gwyn, J.*, September Term, 1948, FORSYTH.

Civil action to enjoin the holding of a city limits extension election.

The governing board of the City of Winston-Salem, acting under authority of its charter as amended by Chap. 710, Session Laws, 1947, adopted a resolution annexing five separate communities lying just outside of and adjacent to the corporate limits of the city, subject to the approval of the voters, and called an election for the purpose of submitting said proposal to the electorate for their approval or rejection. A separate election was to be held as to each community, but the elections as to all were to be held on the same day, to wit, 21 September 1948. Plaintiffs, on 11 September, instituted this action to restrain and enjoin defendants from proceeding with said election.

The cause came on to be heard in the court below on the motion for a permanent injunction. Upon said hearing the court entered judgment denying the motion and dismissing the action. Plaintiffs excepted and appealed.

John J. Ingle and Deal & Hutchins for plaintiff appellants.

Womble, Carlyle, Martin & Sandridge for City of Winston-Salem, appellee.

BARNHILL, J. The election plaintiffs seek to enjoin was held 21 September 1948. Hence the questions they seek to present on this appeal are now academic. The appeal is therefore dismissed on authority of *Eller v. Wall, ante,* p. 359, and *Penland v. Gowan, ante,* p. 449.

But the plaintiffs insist that they, in their complaint, seek also to enjoin the levy of a proposed tax on the residents of the annexed territory, and that therefore the action should not be dismissed but should be retained for the adjudication of the validity of this proposed tax. We do not so construe the complaint.

They allege that if the election is held, they "will be irreparably damaged . . . in that their lands and other property located in the territory proposed to be annexed will be subjected to unlawful taxes by the City of Winston-Salem, and the City of Winston-Salem will undertake to collect and will collect said taxes." This allegation is incorporated in the complaint as an allegation of an element of the damages which will flow from the holding of said election. In no sense is it a statement of fact made as the basis of an independent cause of action or demand for relief. Indeed, at that time defendants were not attempting or threatening to

levy a tax on the property in the territory they sought to annex. They were without power or authority so to do until and unless the resolution of annexation was approved by the voters.

No cause of action for the wrongful levy or threatened levy of an unlawful tax is alleged in the complaint. No such cause of action existed at the time this action was instituted. If it now exists it arose after the election was held and the results favorable to the annexation declared. Plaintiffs cannot now engraft on this action a cause of action which arose after the institution of this suit and after the hearing in the court below. Hence the motion to be allowed to amend the complaint, filed in this Court, is denied.

Appeal dismissed.

STATE v. BENJAMIN R. MASSEY AND C. H. BUNN.

(Filed 7 January, 1949.)

Constitutional Law §§ 13, 19½—

A municipal ordinance prohibiting the handling of venomous and poisonous reptiles in such manner as to endanger the public health, safety and welfare, will not be held invalid upon defendants' contention that the ordinance interferes with the exercise of their religious practices.

APPEALS by defendants from *Bone, J.*, March Term, 1948, of DURHAM.

Criminal prosecutions on separate warrants charging each of the defendants, in identical language and differing only as to date, with endangering the public health, safety and welfare by handling poisonous reptiles in such manner as to constitute a public nuisance in violation of an ordinance of the City of Durham forbidding such conduct or practice.

Both defendants were convicted in the Recorder's Court of Durham Township, and from the judgments pronounced, appealed to the Superior Court of Durham County, where by consent the cases were consolidated for trial.

The facts are not in dispute. On the evenings of 1 and 8 November, 1947, several policemen of the City of Durham visited the Zion Tabernacle Church, situate within the corporate limits of the City of Durham, and on each occasion found there a large gathering of men, women and children, engaged in religious services. During the services they saw the defendant, C. H. Bunn, on 1 November, and the defendant, Benjamin R. Massey, on 8 November, while standing in the pulpit, take into his bare hands a poisonous snake of the copperhead or highland moccasin variety and hold it within view of the congregation. No one was harmed by the snake on either occasion. The snakes were later tested by placing healthy

rats with them which they immediately struck with their fangs, and the rats died within a few minutes.

The defendants concede that their conduct falls within the condemnation of the ordinance, but they plead not guilty on the ground that the ordinance impinges on their freedom of religious worship and is therefore void.

Verdict: Guilty as charged in each warrant.

Judgments: Fine of $50 and costs in each case.

The defendants appeal, assigning errors.

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

C. H. Bunn and Benjamin R. Massey, in propria persona, defendants, appellants.

STACY, C. J. The ordinance inveighs against the handling of venomous and poisonous reptiles in such manner as to endanger the public health, safety and welfare, and none other.

The police are required to seize reptiles handled in an exposed way and have them examined by the health department. If found to be venomous they are to be destroyed; otherwise they are to be returned to the one from whom they were taken. Manifestly, then, the ordinance was enacted as a protective measure and its primary purpose is not to interfere with any ritual which the defendants may wish to observe. They are at liberty to handle reptiles in public, if they so desire; provided the reptiles are harmless to human safety, health and welfare.

The defendants say, however, that the handling of poisonous reptiles without harm to themselves or others is the power which they are commanded to show to the people, and to extract the venom of the reptiles renders them useless for such purpose. It was suggested on the argument by the defendants in person that in all probability we would not understand this. Even so, as a matter of law the case comes to a very simple question: Which is superior, the public safety or the defendants' religious practice? The authorities are at one in holding that the safety of the public comes first. *Kirk v. Com. of Virginia,* 186 Va. 839, 44 S. E. (2) 409; *Lawson v. Com. of Kentucky,* 291 Ky. 437, 164 S. W. (2) 972; *Reynolds v. United States,* 98 U. S. 163, 25 L. Ed. 244; *Latter-Day Saints v. United States,* 136 U. S. 49, 34 L. Ed. 478.

No detailed analysis of the ordinance is required since the defendants concede that unless it impinge on their freedom of religious worship, they are in defiance of its terms.

The record is devoid of any reversible error, hence the verdicts and judgments will be upheld.

No error.

E. B. SHEPHERD, ADMINISTRATOR OF W. A. JOHNSON, DECEASED, v. MASON DOLLAR.

(Filed 7 January, 1949.)

Appeal and Error § 6c (5)—

Where none of the evidence is sent up in the record or case on appeal, an exception to the charge cannot be considered.

PLAINTIFF'S appeal from *Bobbitt, J.*, May Term, 1948, ASHE Superior Court.

Bowie & Bowie and Ira T. Johnston for plaintiff, appellant.
Higgins & McMichael for defendant, appellee.

SEAWELL, J. This action was brought to recover for the death of the plaintiff's intestate, alleged to have been caused through the negligence of the defendant in parking his truck upon the highway in violation of highway laws and regulations, on the main traveled portion of the highway, without protection of flares or lanterns and without leaving sufficient clear and unobstructed highway for safe passing.

We infer from the record that the case was submitted to the jury on evidence bearing upon three issues: Negligence of the defendant, contributory negligence of the intestate, and damages. None of the evidence is sent up in the record or case on appeal; in fact, it was entirely omitted by stipulation. Whatever it was, the jury answered the first issue "No," which terminated the case adversely to plaintiff, and he appealed.

Plaintiff's only exception is to an instruction in the judge's charge respecting a phase of the evidence, none of which, as stated, is before us; and we are asked to pass upon the correctness of the instruction on a mere stipulation as to the evidence which gives neither detail nor circumstance, but merely says, "that there was sufficient competent evidence to justify each and every phase of his Honor's charge to the jury."

If this does not eliminate the objection, at least the question posed is rendered abstract, moot, wanting in individuation, and must await some auspicious occasion when it may be more securely caught in the web of circumstance.

The law requires the judge to "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. The function of the appellate Court on review is to determine whether this has been adequately done. We cannot perform that office in the absence of the evidence toward which the instruction was directed.

No other exception appearing, the judgment must be

Affirmed.

KATE P. STEWART v. R. W. DIXON.

(Filed 7 January, 1949.)

1. Trial § 31b: Appeal and Error § 39f—

In this action for assault, the battleground was the credibility of plaintiff's testimony, defendant not having gone upon the stand or offered his answer in evidence. The court inadvertently charged that defendant said and contended he had not assaulted plaintiff and that he had denied same in his answer. *Held:* Construing the charge contextually and in the light of the evidence on plaintiff's appeal, the inadvertence did not amount to reversible error.

2. Appeal and Error § 38—

The burden is on appellant not only to show error but that the error was material and prejudicial to appellant's cause.

APPEAL by plaintiff from *Morris, J.*, May Term, 1948, of ALAMANCE. No error.

P. W. Glidewell, Sr., for plaintiff, appellant.

W. D. Barrett and Thomas C. Carter for defendant, appellee.

DEVIN, J. Plaintiff's action for damages for an alleged assault and battery was defeated below by the adverse verdict of the jury. The triers of the facts gave a negative response to the primary issue raised by the pleadings: "Did the defendant wrongfully assault the plaintiff as alleged in the complaint?" From judgment on this finding the plaintiff appealed, assigning errors in the rulings of the trial judge which she contends were prejudicial to her cause.

The plaintiff's exceptions to the admission of certain testimony elicited on cross-examination for the purpose of impeachment we find on examination are of insufficient consequence to warrant a new trial. These may be dismissed without elaboration. But a more troublesome matter is presented by plaintiff's exception to the following instruction given by the court to the jury: "He (the defendant) says and contends in this cause he is denying the assault, he says and contends that while it is alleged in the complaint he committed an assault, he denied the same in his answer." The vice of this instruction lies in the fact that the defendant had not gone upon the stand or testified in his own behalf, nor had the allegations in his answer been offered in evidence. His failure to testify was a matter of legitimate comment by plaintiff's counsel before the jury, and she contends that the effect of the court's instruction was to answer counsel's argument on this point, and to strengthen defendant's defense. *Cuthrell v. Greene, ante,* 475.

It is apparent that the court in thus stating the contentions of the defendant inadvertently referred to the contents of defendant's answer, and presented his defense in this respect in an unduly favorable light. But the court immediately following this instruction, and in the same connection, stated that the defendant contended the jury should not accept the plaintiff's testimony or consider it of sufficient probative force to induce a finding by the preponderance of the evidence in her favor.

Upon consideration of the whole case we doubt the instruction complained of improperly influenced the verdict. Here the battleground was the credibility of the plaintiff's testimony. The question at issue was not the strength of defendant's defense but whether the plaintiff's testimony was such as to induce belief. The reliability of her testimony was impeached to some extent on cross-examination, and six witnesses testified her general character was not good. While there was other testimony *contra,* the question presented to the jury for determination was whether the plaintiff had successfully carried the burden of proof on the issues raised by the pleadings and shown she had been assaulted. The decision was for those who heard the witnesses and observed their demeanor on the stand.

In this view we think the statement of the trial judge excepted to was without harmful effect upon the real merits of the case. It is incumbent upon the appellant not only to show error in the ruling of the trial court but also that the error complained of was injurious to her cause, and that but for such ruling a different finding on the facts would have resulted. *S. v. Beal,* 199 N. C. 278 (303), 154 S. E. 604; *Collins v. Lamb,* 215 N. C. 719, 2 S. E. (2) 863; *S. v. Davis, ante,* 386, 50 S. E. (2) 37.

We conclude that the result reached below should not be disturbed.

No error.

WACHOVIA BANK & TRUST COMPANY, WILLIAM N. REYNOLDS, JOHN C. WHITAKER, AND L. D. LONG, EXECUTORS AND TRUSTEES UNDER THE WILL OF MRS. KATE G. BITTING REYNOLDS, DECEASED, V. THE PLUMTREE SCHOOL FOR BOYS, INCORPORATED, AND BOARD OF EDUCATION OF AVERY COUNTY.

(Filed 4 February, 1949.)

1. Corporations § 17b—

While a corporation which has been effectively dissolved cannot sue or defend as such, the suspension of its charter for failure to pay franchise tax does not deprive it of its capacity to defend its rights when sued.

2. Same: Wills § 34a—

Appellant contended that appellee had lost its corporate existence and therefore had no capacity to plead in the action or take as beneficiary under

the will, and introduced its charter and certificate of the Secretary of State containing cancellation or restriction of its charter for nonpayment of franchise tax. Defendant appellee introduced certificate of the Secretary of State stating that the cancellation was done through error and purporting to correct the error. *Held:* The trial court was justified in rejecting appellant's contention.

3. Corporations § 41: Wills § 34a—

The evidence tended to show that an incorporated boys' school was a part of an institute which also operated a girls' college some few miles distant, that upon destruction of the school by fire the remainder of its property and its student body were removed to the site of the girls' school, but that it maintained the same activities as far as possible, and that the trustees of the boys' school continued to be elected separately. *Held:* The evidence is sufficient to support the court's finding that the school had kept its entity and had not lost its right to sue or to take property because of asserted merger with the girls' college.

4. Corporations § 41—

A corporate merger can be accomplished only by appropriate legal procedure, and results in the loss of the separate entity of the merged corporation unless saved by the terms of the merger; while in an amalgamation of two organizations engaged in similar activities, the associated organization does not *ipso facto* cease to exist or necessarily lose its corporate entity.

5. Appeal and Error § 40d—

Ordinarily the appellate court is bound by the findings of fact of the trial court when they are supported by any competent evidence, even though there be evidence *contra*.

6. Wills § 39—

The rule that the appellate court is bound by findings of fact when supported by evidence is applicable to findings based on evidence of extrinsic facts or circumstances admitted to clarify the intent or identity of the beneficiaries in an action to construe a will.

7. Wills § 34b—

The will in question bequeathed a certain sum "to Plumtree School at Plumtree, N. C." There was evidence that testatrix was interested in an incorporated denominational school which had been operated under this name in the town designated, but that prior to the execution of the will it had been amalgamated with another institution at another locality when its buildings burned. There was also evidence that the words "at Plumtree, N. C." were inserted after the first drafts approved by testatrix. *Held:* The evidence is sufficient to support a finding that the school was the intended beneficiary.

PLAINTIFF Trustees and defendant Board of Education of Avery County appeal from *Edmundson, Special Judge,* 14 June, 1948, Civil Term, FOYSYTH Superior Court.

This action presents a controversy over a provision in the will of Mrs. Kate G. Bitting Reynolds making a bequest of $10,000 to the "Plumtree School at Plumtree, N. C." The action is brought by the Bank as executor and trustee under the will, against the Plumtree School for Boys, Inc., and the Board of Education of Avery County, in order that it may be judicially determined to which of the contending claimants, if either, the gift may now be paid, or whether it must be regarded as a lapsed legacy, and go under the residuary provision of the will which makes specific provision for lapsed legacies.

On its face the will appears to have been executed 26 July, 1934; and Mrs. Reynolds died 13 September, 1946. The will is very lengthy, disposes of a vast amount of property and many thousands of dollars to various persons, institutions and charities; but we are concerned only with the provision found in Section 3, Item 5, as follows:

"To Plumtree School at Plumtree, North Carolina, the sum of Ten thousand Dollars ($10,000)."

There is a separate donation of $10,000 to Lees McRae College which one of the defendants thinks might have a bearing on the question of intent, since the evidence tends to involve the management of the Plumtree School for Boys with that institution.

As between the codefendants there is the question as to which contender may best qualify as the object of the testator's bounty under the description given in the will; and, if the bequest is good at all, the case hinges on this identity.

Evidence pertinent to that issue may be summarized as follows:

Rev. Edgar Tufts, a Presbyterian minister, came to Banner Elk in 1897, and operated a boarding school for girls and a day school for boys. In 1903, and following for a period, the boys' department of this school was carried on at Plumtree, a little village on the Toe River about 20 miles away, and was there for some time operated under the supervision of Rev. Joe Hall, a brother-in-law of Mr. Tufts, in a building near the post office.

In 1924 this school was incorporated under the laws of North Carolina under the name "The Plumtree School for Boys, Inc.," to carry on charitable and religious work of the Presbyterian Church of the United States in the education of boys in Avery County and other points, if deemed necessary, and especially for maintaining and conducting a school or schools at or near Plumtree in Avery County for the education and instruction of boys under the supervision of Holston Presbytery.

Mrs. Kate Bitting Reynolds, a devout member of the Presbyterian Church, as well as her husband, W. N. Reynolds, were personally interested in the Rev. Edgar Tufts and the work he was doing in the various organizations and institutions which were being established by him and

through his influence and sponsored by the Presbyterian Church in the education of the youth in that section. Mrs. Reynolds was greatly interested in the work of the Presbyterian Church on behalf of boys and girls in western North Carolina, and had made many contributions to institutions organized under the influence of Mr. Tufts; and very many institutions in central and western North Carolina, the great majority of which were under the sponsorship of the Presbyterian Church. She had made contributions during her lifetime to the Plumtree School for Boys organized by Mr. Tufts.

There was evidence on the part of the defendant, the Plumtree School for Boys, tending to show that the Plumtree School had been, as stated, a part of Lees McRae Institute, now Lees McRae College, the girls' department being conducted at Banner Elk and the boys' department at Plumtree. There is further evidence to the effect that after its incorporation in 1924 the school was continuously operated at Plumtree until the dormitory building was destroyed by fire in 1927, after which time the student body of the school and the property which had survived the fire were transferred to Banner Elk, and the school was thereafter conducted as a department of Lees McRae College; having, however, separate trustees which were regularly elected by the Presbytery in whose jurisdiction the college and the school were located, and that its organization had been kept intact.

The evidence on the part of this defendant also tended to show that there never had been any school at Plumtree or in its vicinity, or indeed in Avery County, that was ever known as Plumtree School except the institution thus incorporated and carried on in that place until removed to Banner Elk.

There is evidence, however, on the part of the defendant Board of Education that a public school, a part of the State education system, had been conducted in the vicinity of Plumtree and had been sometimes known as the Plumtree School. For a considerable period of time the school was conducted within three-quarters mile of Plumtree and was later moved down the river at a site some two miles away, but it had meanwhile served the children of Plumtree and the district in which it was located was known as the Plumtree District. The evidence of the School for Boys tended to show this school was known as the Riverside School, and a conveyance made by the Board of Education was offered in which it was so designated.

There was further evidence on the part of this defendant, Board of Education, that the charter of the Plumtree School for Boys, Inc., had been suspended in 1938 on notification by the Commissioner of Revenue to the Secretary of State, for failure to make report and pay franchise tax. And further, that the corporation had transferred its property to Lees McRae College.

The Boys School was permitted, over its codefendant's objection, to introduce a certificate of the Secretary of State that the suspension or cancellation of the charter had been erroneously made, or made through mistake, and purportedly corrected.

There is much evidence as to the charities and philanthropies of Mrs. Reynolds. She was described as broad in her sympathies and generous in her contributions wherever she found the need for help; but the evidence of plaintiff tended to show that in these she leaned toward Presbyterian sponsored institutions and efforts.

The Board of Education brought out in the evidence that there were several institutions or organizations, legatees under Section three of the will containing the disputed bequest, which are not directly under the Presbyterian influence or sponsorship; and its codefendant, The Boys School, pointed out that most of these charities were motivated by peculiar personal reasons, and that they formed no real exception to the rule.

Chronologically, it appears that at the time the will was executed the School for Boys had already been transferred from Plumtree to Banner Elk, some twenty miles away. As to the phrase "at Plumtree, North Carolina," used in the designation of the school, the Board of Education contends that it excludes the claim of its codefendant. The latter contends that it is only a part of the description and explainable.

L. D. Long, witness for the defendant School for Boys, testified in substance that he was secretary to Mrs. Reynolds and made many notes and memoranda at her dictation respecting her intended will,—the beneficiaries and sums to be given them, as she intended to put them in the will. That he made several successive notes of this item to the Plumtree Boys School and testified that the words "at Plumtree, N. C.," were not in the memoranda as given him; but that when the draft had been taken to the Safe Deposit & Trust Company in Baltimore they wrote him to supply omitted addresses, and he added the location in his own handwriting. First having left a blank in the typewriting, he added it in pencil. It was then carried forward in successive drafts and so appears in the will as executed.

At the conclusion of the evidence the counsel for the Board of Education moved the court to strike out all pleadings filed by the Plumtree School for Boys, Inc., contending that the charter of the corporation had been canceled, and that the alleged corporation had no right to file any pleading, make any appearance, or claim the legacy in question. The motion was overruled.

The court made its findings of fact and conclusions thereupon, holding that the legacy was valid and subsisting; that the testator intended the Plumtree School for Boys, Inc., as the legatee and that it had the capacity to take under the will.

Judgment was entered accordingly "that the defendant The Plumtree School for Boys, Inc., recover from the plaintiff without interest the $10,000 bequest covered by Item 5 of Section 3 of the last will and testament of Mrs. Kate G. Bitting Reynolds." The defendant Board of Education objected and excepted "to each and every of the findings of fact," and to the judgment entered, and appealed. The plaintiff also appealed, but filed no brief.

R. W. Wall and Proctor & Dameron for defendant Board of Education, appellant.

Ratcliff, Vaughn, Hudson & Ferrell for defendant Plumtree School for Boys, Inc., appellee.

SEAWELL, J. Hereinafter it will be convenient to refer to the appellant as the Board of Education, and the appellee as the Boys School.

The appeal of the defendant Board suggests some legal hurdles in the way of recovery by its codefendant, the Boys School, which, if insurmountable, might bring about a lapse in the legacy with no resultant benefit to itself.

The appellant contends that in three ways at least, either of them efficient, the Boys School has lost its corporate entity or capacity to plead in this action or take under the will: Through the act of the Secretary of State in suspending its corporate rights and powers in failing to report and pay franchise tax; through the transfer of its property; and through its merger with Lees McRae College.

It is true, of course, that a corporation which has been effectually dissolved cannot sue or defend as such,—it is simply *civiliter mortuus*. A corporation which has been declared inoperative for failure to file its annual reports or suspension by the Secretary of State for failure to pay its franchise tax has not necessarily suffered extinction, 19 C. J. S., p. 1564, sec. 1774; *State v. Superior Court of Snohomish County,* 237 P. 722, 135 Wash. 315. And in *Pinchback v. Mining Co.,* 137 N. C. 171, 49 S. E. 106, we find that the corporation, even when it is in the hands of the receiver and its property sold, is not dead. "It seems that the defendant corporation had gone into the hands of a receiver and its property sold. This, of course, does not affect the existence of the corporation." In *State v. Superior Court of Snohomish County, supra,* where the statute in aid of tax collection is comparable with ours, the court does not regard the corporation as having lost all entity or capacity, but merely as dormant and, as suggested in the text above, still having the capacity at least to defend its rights when sued in the court. The statute provides no other method by which the assets and properties of the corporation can be protected and we do not believe it was the intention of the law to

leave the corporation defenseless against assault and sequestration from any and all quarters.

Moreover, if this attack upon the corporate capacity of the defendant Boys School was timely, which we doubt, the School, having put in evidence its charter, thereby established, *prima facie,* its corporate existence. Defendant Board introduced the certificate of the Secretary of State containing the cancellation or restriction of the charter powers and afterward the defendant Boys School introduced a certificate to the effect that the cancellation was done through error and purported to correct the error. We do not know upon what principle this could be excluded.

This later certificate of the Secretary of State was not based on the procedure of revival of the corporation or restoration of its powers after lawful suspension as laid down in the statute (P. L. 1937, Chapter 127), but was, as suggested, in the form of the correction of an erroneous action in declaring and recording the suspension. How the error came about is collateral to our present inquiry and not important; but it is worthy of note that Section 213 of the cited statute, among other excepted organizations, exempted "educational corporations not operated for profit" from the duty of filing returns or paying franchise tax, by excluding application of sections so requiring. As the record now stands, the trial court was justified in rejecting the view contended for by counsel for the Board.

The appealing Board contends that the evidence discloses that the Boys School had conveyed all of its assets and thereby rendered itself unable to carry on the purposes for which it was organized (G.S. 55-129), and that the judge should have so found. The appellant Board made no request for a finding of fact to fix the status of the corporation on this point, and under the evidence it would be difficult to reach the conclusion that the defendant appellee, an educational institution and not a business enterprise, had so disposed of its assets and properties as to render it unable to conduct the business for which it was organized. The evidence does disclose that after the so-called merger the Boys School still received income from securities which went to Lees McRae College for instruction similar to that which the students of that school originally received at Plumtree.

As for the merger with Lees McRae College, the evidence seems fairly susceptible to the view that the Boys School had been kept distinct as a corporate entity, although operated within the College, and that its trustees had been regularly elected by the Presbytery.

For these reasons we are of the opinion that the capacity of the Boys School to take under the will was not subject to this particular attack, if, indeed, the actual preservation of the corporate capacity of the group or organization should be considered a necessary qualification.

There is a marked distinction between amalgamation with another society, or organization, engaged in similar activities, although the latter may be the controlling associate, and a corporate merger or consolidation. In the former instance the associated organization does not *ipso facto* cease, or necessarily lose its civil rights; it is often easy for the organization to demonstrably maintain its identity and continuity of existence. In a corporate merger, which is accomplished only by appropriate legal procedure, the individuality and life of the association is liable, and likely, to be lost, unless saved by the terms of the merger. There is no evidence here of a corporate merger. There is evidence that the Boys School was joined with Lees McRae College and managed or carried on by that institution, providing instruction in all respects similar to that theretofore required by its charter, and maintaining its organization without break in the significant election of trustees or directors by the Presbytery. In that situation authority for favorable consideration of the legal capacity of the appellee to take under the will may be found in numerous authorities from which we cite, as in accord with the principle we are persuaded to apply; *Old Colony Trust Co. v. Third Universalist Society,* 285 Mass. 146, 188 N. E. 711, 91 A. L. R. 837; *Jordan's Estate,* 310 Pa. 401, 165 A. 652; *Boston Safe Deposit & Trust Co. v. Stratton,* 259 Mass. 465, 156 N. E. 885.

Ordinarily in this jurisdiction the appellate court is bound by the findings of fact made by the trial court where there is evidence to support them notwithstanding the fact that it may be contradictory. *Exterminating Co. v. Wilson,* 227 N. C. 96, 40 S. E. (2) 696; *Bell v. Lumber Co.,* 227 N. C. 173, 41 S. E. (2) 281; *S. v. Hart,* 226 N. C. 200, 37 S. E. (2) 487. That is true in the construction of wills where it is necessary to resort to extrinsic facts or circumstances to clarify the intent or identify the object of the bounty. The rule is correctly stated in 57 Am. Jur., Wills, sec. 1028: "While the findings of the trial court in a will construction case are open to review in an appellate court, they are, when based on extrinsic facts in addition to the will itself, to be given the same weight as they are in any other case."

Moreover, the stipulation provided that the trial judge should hear the controversy without a jury and the weight of the evidence and the inferences to be drawn from it must be considered in that light.

The defendant Board of Education has excepted to all the findings of fact and conclusions of law made by the trial court. We do not find it necessary to go into a detailed discussion of these exceptions or to institute a point by point comparison of the findings with the supporting evidence. It is sufficient to say that a diligent examination fails to discover any instance in which an essential finding of fact is not substantially supported by evidence, although at points the evidence may be variant or contradictory.

As we have already stated, there are two primary questions involved in the controversy: First, whether the legacy lapsed by the inability of the intended donee to take at the death of the testator; and second, the identity of the intended legatee. Upon these findings we are of the opinion that the trial court correctly held that the legacy did not lapse and that it was the intention of the donor to bestow it upon the Plumtree School for Boys, Inc., one of the contending defendants in this case.

The judgment of the trial court is, therefore,

Affirmed.

WACHOVIA BANK & TRUST COMPANY, WILLIAM N. REYNOLDS, JOHN C. WHITAKER AND L. D. LONG, TRUSTEES UNDER THE WILL OF MRS. KATE G. BITTING REYNOLDS, DECEASED, v. HARRY McMULLAN, ATTORNEY-GENERAL OF THE STATE OF NORTH CAROLINA; ST. JOSEPH'S HOSPITAL, INC., CHARLOTTE MEMORIAL HOSPITAL; CITY OF WINSTON-SALEM; NORTH CAROLINA BAPTIST HOSPITALS, INC.; REX HOSPITAL; JAMES WALKER MEMORIAL HOSPITAL; DUKE UNIVERSITY; WESLEY LONG HOSPITAL, INC.; HICKORY MEMORIAL HOSPITAL, INC.; ST. LEO'S HOSPITAL, INC.; PITT GENERAL HOSPITAL, INC.; HUGH CHATHAM MEMORIAL HOSPITAL, INC.; ELIZABETH CITY; PASQUOTANK COUNTY; GOOD SAMARITAN HOSPITAL, INC.; BAKER-THOMPSON MEMORIAL HOSPITAL, INC., TRUSTEES OF LINCOLN HOSPITAL; ROCKY MOUNT SANITARIUM, INC.; ALAMANCE GENERAL HOSPITAL, INC.; S. D. McPHERSON, TRADING AS McPHERSON HOSPITAL; LENOIR HOSPITAL, INC.; LEXINGTON MEMORIAL HOSPITAL, INC.; J. C. CASSTEVENS, TRADING AS CASSTEVENS CLINIC; THE ASHEVILLE ORTHOPEDIC HOME, INC.; MERCY HOSPITAL OF WILSON, INC.; LEAKSVILLE GENERAL HOSPITAL, INC.; PETRIE HOSPITAL, INC.; THE ANSON SANATORIUM; FORSYTH COUNTY; CITY OF RALEIGH; WAKE COUNTY; FELLOWSHIP SANATORIUM OF THE ROYAL LEAGUE, INC., CUMBERLAND COUNTY; AND PRESBYTERIAN HOSPITAL, INC.

(Filed 4 February, 1949.)

1. Trusts § 14b—

Testatrix devised the residuary estate to trustees with direction to pay the income therefrom to hospitals of the State for benefit of charity patients upon the basis of the number of charity patients cared for by participating hospitals, the decision of the trustees in respect thereto to be final. *Held:* The trustees have power to set up a reserve out of the income to be used in accordance with their judgment as conditions affecting the trust may require, to determine in the exercise of their discretion who are charity patients within the intent and meaning of the will, as well as what is a hospital, and which hospitals of the State should receive said benefits.

2. Parties § 4½—

Testatrix bequeathed property in trust with direction that the income therefrom be paid to hospitals of the State for the benefit of charity pa-

tients in proportion to the charity patient load of the participating hospitals. *Held:* In an action to construe the will, the class of beneficiaries was properly represented by representative hospitals located throughout the State, and the Attorney-General as representative for the State Hospitals. G.S. 1-70.

APPEAL by plaintiffs from *Edmundson, Special Judge,* at 24 May Term, 1948, of FORSYTH.

Civil action by Trustees named under the will of Mrs. Kate G. Bitting Reynolds, deceased, for construction of, and for advice as to, and instructions concerning, the rights and duties of the Trustees under Section five of said will which reads in pertinent part as follows:

"All the Rest, Residue and Remainder of my estate of every nature, including any undisposed remainders in the trusts or bequests hereinbefore created and including also any bequests herein made which shall for any reason fail to take effect or which shall at any time after my death become ineffective or lapse because of deaths or failure of purposes for which intended or for any other reasons, I give, devise and bequeath:

"To my trustees hereinafter named, in trust, . . . to pay three-fourths of the net income therefrom to the Hospitals located in the State of North Carolina, for the benefit of Charity patients, and said trustees shall pay such income quarterly to said hospitals upon the basis of the average number of charity patients cared for therein during each day of the immediately preceding period of three months. Any hospital participating under the provisions of this Will except those benefiting from specific bequests shall make a monthly report to my trustees showing the number of charity patients cared for during each day of the month, and my trustees shall be the sole judge as to the eligibility to receive benefits hereunder of any and all hospitals, and the decision of my trustees in respect thereto shall be final.

"I EXPRESSLY DIRECT THAT THE STOCK OF R. J. REYNOLDS TOBACCO COMPANY CONSTITUTING A PART OF MY RESIDUARY ESTATE AND ADMINISTERED UNDER THIS SECTION FIVE OF MY WILL SHALL NOT IN ANY EVENT BE SOLD, EXCHANGED OR OTHERWISE DISPOSED OF BY MY TRUSTEES, BUT THAT THE SAME SHALL BE HELD IN THE TRUST AS A PERMANENT INVESTMENT."

The advice and instructions sought pertain particularly in respect to:

"(a) Whether or not the Trustees have the right and power to set up a reserve out of the income of the trust and to increase, decrease, exhaust and replenish such reserve from time to time as conditions affecting the trust and the beneficiaries thereof may, in the judgment of the Trustees, require;

"(b) Whether or not the proper construction of said will, giving effect to the true intent and meaning thereof, confers upon the Trustees the authority, in the exercise of their discretion, to determine finally who is and who is not a charity patient as that term is used in said will;

"(c) Whether or not the proper construction of said will, giving effect to the true intent and meaning thereof, confers upon the Trustees the authority, in the exercise of their discretion, to determine finally what is and what is not a hospital as that term is used in said will; and

"(d) Whether or not the proper construction of said will, giving effect to the true intent and meaning thereof, confers upon the Trustees the authority from time to time, in the exercise of their discretion, to determine finally the hospitals located in the State of North Carolina which are to receive benefits under said will and whether or not it confers upon the plaintiffs as Trustees the authority to require any hospital seeking to receive benefits thereunder to make application for benefits and to furnish such information as the Trustees may deem necessary to enable them to make such determination intelligently."

The plaintiffs, who are the named, duly qualified and acting, Trustees under the will of Mrs. Kate G. Bitting Reynolds, who died resident of Forsyth County, North Carolina, on 23 September, 1946, and particularly as Trustees of the residuary trusts created by Section 5 thereof, as aforestated, set out in their petition, in summary, these facts:

(1) That while the ultimate beneficiaries of this charitable trust are the charity patients in hospitals located in the State of North Carolina, the Trustees are directed to make payments to hospitals located in the State of North Carolina; and, consequently, plaintiffs believe that the hospitals of the State of North Carolina should be represented in any suit to construe this trust and to determine the rights and powers of the Trustees thereunder.

(2) That, in this connection, Harry McMullan, who is the Attorney-General of North Carolina, with official residence in Wake County, North Carolina, officially is charged by law with the protection of the interests of the North Carolina beneficiaries under charitable trusts; and, as the Attorney-General of North Carolina, also represents all of the hospitals owned or operated by the State of North Carolina, such as The State Hospital at Morganton, The State Hospital at Raleigh, The State Hospital at Goldsboro, The North Carolina Orthopedic Hospital, and North Carolina Sanatorium for the Treatment of Tuberculosis owning and operating several Sanatoria in the State of North Carolina.

(3) That further, in this connection, institutions located in the State of North Carolina which might be classed as hospitals are very numerous and it is not possible to make all of them defendants herein; that there are many "clinics," "homes," "sanatoria," "infirmaries," "centers," and "dispensaries," some of which might and some of which might not be

classified as hospitals; that new hospitals are being built from time to time, and it would be impossible to now make parties to this action hospitals which might have an interest in this trust in the future; but that the questions involved in this suit are of a common and general interest to many persons, and the hospitals and related institutions located in the State of North Carolina have a common and general interest therein,—and, consequently, plaintiffs have filed this petition for the purpose of requesting the court to select a number of institutions representative of all the hospitals located in the State of North Carolina to defend this action for the benefit of all such institutions.

(4) That some of the factors which the plaintiffs think should be taken into consideration in selecting a representative group of hospitals are: (a) The type of service rendered by the hospital . . . (b) the size of the hospital . . . (c) geographic location . . . (d) ownership or control . . . (e) charity load . . . (f) persons served . . .

(5) That, after conferring with certain medical authorities, and making a study of the hospitals and related institutions located in North Carolina preparatory to the execution of their duties under this trust, plaintiffs submit a list of thirty-two hospitals so located, classified as to type, size, ownership or control, geographical location, charity load, and a map showing the location of each and the geographic distribution in the State of North Carolina, together with supporting evidence, as representative of all the hospitals and related institutions located in the State of North Carolina.

Upon these and other procedural allegations, the plaintiffs prayed the court to enter an order (a) designating such hospitals or related institutions located in the State of North Carolina, whether included on the list submitted or not, as the court may consider to be representative of all the hospitals and related institutions located in the State of North Carolina to be made additional defendants herein to defend this action on behalf of all of the hospitals and related institutions located in the State of North Carolina; (b) permitting any other hospital or related institution, or any association or other similar body representing hospitals, located in the State of North Carolina, to become parties to this action without further order of this court and to file answer herein; and (c) providing such other safeguards and precautions as the court may deem necessary to protect the interests of charity patients and of all of the hospitals and related institutions located in the State of North Carolina.

Thereafter, the cause coming on for hearing before the Judge presiding at the 10 November Mixed Term, 1947, of Superior Court of Forsyth County, on the foregoing petition, the Judge finds these facts:

(1) That the questions presented by this action arising under the will of Mrs. Kate G. Bitting Reynolds, and particularly under Section five,

being the residuary clause thereof, are questions of common or general interest of and to many persons, and that the parties interested in such questions and in this action are so numerous that it is impracticable, if not impossible, to bring them all before the court, and that this is a proper instance for one or more of the interested parties to defend for the benefit of all of the interested parties, as permitted by G.S. 1-70;

(2) That the Attorney-General of the State of North Carolina by virtue of his office is charged by law with the duty of representing North Carolina beneficiaries of charitable trusts and, as such, represents the beneficiaries of the trusts created by the will of Mrs. Kate G. Bitting Reynolds, and particularly by Section Five, being the residuary clause thereof;

(3) That certain hospitals or related institutions named, thirty-two of them, are representative, in all respects, of all of the hospitals and related institutions located in the State of North Carolina, and that the questions involved in this action are common to all of the hospitals and related institutions located in the State of North Carolina;

(4) That the Attorney-General of the State of North Carolina and the hospitals named and listed as indicated in the preceding paragraph together can fairly represent and defend this action on behalf of all of the beneficiaries of the trust involved in this action created by Section Five, being the residuary clause of the will of Mrs. Kate G. Bitting Reynolds, both direct, indirect, ultimate and incidental beneficiaries;

(5) That when summons and complaint are served upon the Attorney-General and the hospitals named and listed in paragraph (3) next hereinabove, knowledge of this suit and the purposes thereof will come to the attention of the other hospitals and related institutions in the State of North Carolina and to any other person having any interest in said trust, and that provision will be made by the court for any person not specifically named as beneficiary to intervene, file pleadings and be heard.

And, upon these facts so found, the Judge entered an order (1) making the hospitals and related institutions named and listed in the findings of fact, parties defendant herein to defend this action on behalf of all other hospitals and related institutions located in the State of North Carolina, and directing that service of summons, etc., as specified, be made upon all such hospitals or related institutions or any association or other similar body representing hospitals located in the State of North Carolina to become parties to this action without further order of this court, and to file answer within given time.

The plaintiffs thereupon filed a formal complaint alleging substantially the facts hereinabove set forth. Thereupon service of summons with copy of complaint was duly made upon all the hospitals and related institutions so made parties defendant, as aforesaid. Many of them as well as the Attorney-General filed answers.

Thereafter, the cause came on for hearing at the 24 May, 1948, Term of Superior Court, and being heard upon the pleadings and record, the presiding judge finding the facts to be as hereinabove set forth, and, also, that no issue of fact is raised by the answers filed requiring a jury trial, and, further, finding that "in order to accomplish the purposes of the trust, practical necessity and sound business practices require that the Trustees shall have the power to set up a reserve out of the income of the trust and to increase, decrease, exhaust and replenish such reserve from time to time as conditions affecting the trust and the beneficiaries thereof may, in the judgment of the Trustees, require," entered a judgment in which it is adjudged that the Trustees have the right and power to do the four things in respect of which advice and instructions are sought as first hereinabove stated.

And in connection with prayer of plaintiffs in their complaint, the court, finding that this trust is of indefinite duration, and that other questions may arise upon which advice and instructions of the court may be sought, ordered that the cause be retained upon the inactive docket of Superior Court of Forsyth County for further orders upon the application of interested parties, as to matters not now adjudicated.

And the record on this appeal contains further a statement of the trial judge to the effect that, in view of the facts that this cause is of interest to a large number of people residing in the State of North Carolina, both individually and as charitable institutions of the State, that the office of the Attorney-General of the State of North Carolina is an interested party, that the amount of money involved is large, and that the matter will be continuing for such a length of time, any judgment rendered in the cause should be appealed to the end that there may be a final adjudication thereof by the Supreme Court, and suggesting to plaintiffs that appeal be made to Supreme Court.

Plaintiffs appeal from the judgment so rendered to Supreme Court and assign "Possible error."

Womble, Carlyle, Martin & Sandridge for plaintiffs, appellants.

No counsel contra.

WINBORNE, J. The "possible error" assigned is directed to the rulings of the court in respect to each of the four things about which plaintiffs seek advice and instruction in the administration of the trust for the benefit of charity patients in hospitals located in the State of North Carolina. As to these rulings, counsel for plaintiffs, in brief filed in this Court, state very frankly that the judgment is entirely in accordance with the position of plaintiffs as Trustees under the will of Mrs. Reynolds, and that the appeal is prosecuted at the suggestion of the judge of the

Superior Court. Neither the Attorney-General of the State of North Carolina, charged by law with the protection of the interests of North Carolina beneficiaries under charitable trusts, nor any of the thirty-two hospitals and related institutions, has filed a brief in this Court.

And the record discloses that the case has been prosecuted in minute detail in accordance with applicable law and judicial procedure. Prudently both the Attorney-General of the State of North Carolina and such hospitals and related institutions as are representative of all the hospitals and related institutions in the State of North Carolina, as found by the court, have been made parties to the action, and duly brought into court.

Apparently there is no real discordant note, or real controversy as to the judgment from which this appeal is taken,—and it is

Affirmed.

J. MURREY ATKINS, BROCK BARKLEY, J. H. GLENN, R. M. MAUDLIN, F. O. ROBERTS, DR. HERBERT SPAUGH AND MRS. F. O. CLARKSON, SCHOOL COMMISSIONERS OF THE CITY OF CHARLOTTE, v. S. Y. McADEN, J. CALDWELL McDONALD, SANDY G. PORTER, J. CARL McEWEN AND ARNIE D. CASHION, THE BOARD OF COUNTY COMMISSIONERS OF MECKLENBURG COUNTY, AND GEORGE P. HOUSTON.

(Filed 4 February, 1949.)

1. Taxation § 11: Schools § 10b—

A bond order must set forth one of the purposes enumerated in G.S. 153-77, but it is not required that it set out in detail the estimates of cost and descriptions of the particular projects for which the funds are proposed to be used, and their inclusion does not limit the allocation of the proceeds of the bonds, provided the use of the funds falls within the general purpose designated. G.S. 153-78, G.S. 153-107.

2. Schools § 9e—

The bond order in question set out in detail the estimates and projects for which the funds were proposed to be used in discharge of the constitutional requirement of a six months school term within the municipal administrative unit. *Held:* G.S. 153-107 does not preclude the board of county commissioners, upon its finding, after investigation, of changed conditions, to reallocate the proceeds of the bonds to different projects upon its further finding, after investigation, that such reallocation of the funds is necessary to effectuate the purpose of the bond issue. G.S. 115-83.

3. Same—

The question of changing the location of a schoolhouse, as well as the selection of a site for a new one, is vested in the sound discretion of the school authorities, which discretionary power is not subject to control by the courts except for manifest abuse of discretion or improper motives on

the part of the school authorities, but all expenditure for the construction, repair and equipment of school buildings in the county must be authorized by the county commissioners. G.S. 115-83.

APPEAL by defendants from *Patton, Special Judge,* at September, 1948, Extra Term, of MECKLENBURG.

This action is brought under the provisions of the Uniform Declaratory Judgment Act, to determine whether or not the Board of Commissioners of Mecklenburg County has the legal right to allocate or reallocate the proceeds from the sale of school bonds for the erection, repair or equipment of any school buildings except those referred to in the bond order adopted by the County Commissioners and in accordance with the estimates contained therein.

On 5 February, 1946, the Board of Commissioners of Mecklenburg County met in special session to consider a request from the School Commissioners of the City of Charlotte to provide certain school improvements aggregating $3,980,000.00. The Board decided to consider the advisability of issuing school bonds in the sum of $5,972,000.00, of which $3,980,000.00 would be allocated to the City of Charlotte School Administrative Unit and the sum of $1,992,000.00 to be used and expended in the Mecklenburg County School Administrative Unit.

Pursuant to the requests of the School Commissioners of the City of Charlotte and the County Board of Education of Mecklenburg County, the Board of Commissioners of Mecklenburg County found the following facts: "Whereas, the Board of Commissioners of the County of Mecklenburg has carefully examined the facts and has determined, and hereby finds as a fact, that it has become the duty of said Board of Commissioners, acting as an administrative agent of the State in providing a State system of public schools, to order the issuance of a sufficient amount of County bonds to provide the school improvements mentioned in said resolutions, in order to maintain the constitutional six months' school term in Mecklenburg County," . . . Whereupon the following resolution was adopted: "That, pursuant to the County Finance Act, as amended, bonds of Mecklenburg County be issued in an amount not exceeding $5,972,000.00 for the purpose of providing funds for erecting, remodeling and enlarging school buildings, including the acquisition of necessary land and equipment, in order to maintain the constitutional six months' school term in Mecklenburg County, the estimated costs of which are as follows:

Charlotte Administrative Unit for remodeling or enlarging 19 School Buildings (naming them)	$1,497,500.00
New School buildings (naming them), among them being Chantilly and Park Road Elementary Schools	2,022,500.00
2 New Buildings to replace old sections of First Ward and Elizabeth Schools and equipment	460,000.00

(The estimates for the Mecklenburg County Administrative Unit not being pertinent to this appeal, they are omitted.)

The order authorizing the issuance of these bonds was duly adopted. The approval of the bond issue by the voters of Mecklenburg County was obtained in a special election, 23 April, 1946, and the notice of election contained the same descriptive information as to building projects as that which appeared in the bond order.

On 19 July, 1948, the School Commissioners of the City of Charlotte, informed the Board of Commissioners of Mecklenburg County that while it was originally contemplated to use $230,000.00 of this bond issue to demolish the present old First Ward School Building, used for white children, and to erect in lieu thereof a new building, in view of the exodus of white families from the area, which reduced the enrollment in the First Ward School by 199 during the 1947-48 school year under the 1945-46 enrollment; the encroachment of business and industry within the territory and the increase of the colored population in the area, it has been determined that the present building, with the expenditure of $65,000.00 could be made adequate to meet the requirements of the district; and that to expend more of these funds on the First Ward School Building would be "improvident and against their better judgment." Whereupon, they requested the Board of Commissioners of Mecklenburg County to allocate from the so-called First Ward School Funds $100,000.00 to be used for further improving Chantilly and Park Road Elementary Schools and that the balance of the said funds, after renovating and repairing the First Ward School, be made available for constructing, repairing and equipping other school buildings in the City of Charlotte.

The Board of Commissioners, being of the opinion that it had no legal right or authority to reallocate these funds, or to permit their use for any other purposes than those enumerated in the bond order, refuse to accede to the request of the plaintiffs.

This action was instituted and came on to be heard before his Honor, without a jury, and after argument of counsel for both plaintiffs and defendants, the trial Judge, in addition to finding facts as set out above, also found as a fact that the plaintiffs in their administrative discretion, without being influenced by improper motives and without misconduct on their part, have determined that to replace the old section of First Ward School would be unwise, improvident and not in the best interest of education in the City of Charlotte and not to expend over $65,000.00 on the old section of First Ward School; that the plaintiffs, having so found, in good faith made the request for the reallocation of the funds as set out hereinabove. The court further found that the defendant George P. Houston is a resident of the First Ward in the City of Charlotte, a taxpayer of said City, and interested in this proceeding.

Upon the foregoing facts, his Honor concluded as a matter of law, that the purpose for which these funds may be used is the general purpose set forth in the bond order, and that the details set forth therein were but estimates of costs and as such are not binding as detailed purposes for which the bond funds must be used, and entered judgment accordingly; and also held that the request by the plaintiffs for the transfer or reallocation of these funds should have been granted as requested.

Defendants appeal and assign error.

John D. Shaw for appellees.

Taliaferro, Clarkson & Grier for County Commissioners of Mecklenburg County.

Whitlock, Dockery & Moore for George P. Houston.

DENNY, J. No attack is made upon the validity of the bonds referred to in this action. The sole question raised is whether or not, under the facts and circumstances disclosed, the Board of Commissioners of Mecklenburg County has the legal authority to authorize a transfer of funds from the First Ward School project, as requested by the plaintiffs.

We concur in the ruling of the court below in so far as it holds that the purpose for which these funds may be used is the general purpose set forth in the bond order, as provided in G.S. 153-78. The detailed estimates given and the projects described in the bond order were not essential to the validity of the order, and it is so provided in the statute. Therefore, the inclusion of this detailed information would not change the purpose for which these bonds were issued and create a multiplicity of purposes in lieu thereof. These bonds were issued for the purpose of providing funds for erecting, remodeling and enlarging school buildings, including the acquisition of necessary land and equipment, in order to maintain the constitutional six months' school term in Mecklenburg County.

The statute provides (G.S. 153-78) that the bond order must state the purpose for which the bonds are to be issued, but not more than one purpose of issue shall be stated, and that the purposes set forth in any one subsection of G.S. 153-77 shall be deemed as one purpose.

The defendants contend that the proceeds of the sale of these bonds must be used only for the purposes specified in the bond order authorizing the bonds, citing G.S. 153-107. It is so provided in this statute, which further provides: "If any member of the governing body or any county officer shall vote to apply or shall apply, or shall participate in applying any proceeds of bonds . . . in violation of this section, such member or such officer shall be guilty of a felony . . ."

In construing this statute, however, we must keep in mind that a bond order may contain several sections and authorize the issue of bonds for

different purposes. G.S. 153-77 sets out eleven different purposes for which bonds may be issued. But G.S. 153-107, in our opinion, does not place a limitation upon the legal right to transfer or allocate funds from one project to another included within the general purpose for which bonds were issued. The inhibition contained in the statute is to prevent funds obtained for one general purpose being transferred and used for another general purpose. For example, the statute prohibits the use of funds derived from the sale of bonds to erect, repair and equip school buildings, from being used to erect or repair a courthouse or a county home, or similar project. This view is in accord with the provisions of G.S. 159-49.1, which provides: "If for any reason the whole or any part of the proceeds of the sale of bonds heretofore issued by a county, city or town, cannot be applied to the purpose for which such bonds were authorized, such proceeds may be invested in either bonds, notes or certificates of indebtedness of the United States of America . . .," etc.

We are of the opinion and so hold that the Board of Commissioners of Mecklenburg County does have the legal authority to transfer the funds in question: Provided, however, the Board upon investigation, shall find as a fact that since these bonds were authorized, conditions have so changed in the First Ward area that such funds are no longer necessary for the adequate repair, renovation and equipment of First Ward School. In the event the Board so finds, it may then transfer the $100,000.00 to be used for further enlarging and improving Chantilly and Park Road Elementary Schools; and any additional part of the $230,000.00 not required on the First Ward School project may also be transferred to other school building or repair projects: Provided, however, the Board of Commissioners shall find upon investigation, that the use of such funds is necessary to provide the proper buildings and equipment for Chantilly and Park Road Elementary Schools and for constructing, repairing and equipping other school buildings in the City of Charlotte. G.S. 115-83.

The county board of education and the school commissioners or trustees of an administrative unit, are charged with the responsibility of building all new schoolhouses and repairing the old ones in their respective administrative units. However, the board of county commissioners is charged with the duty to determine what expenditures shall be made for the erection, repair and equipment of school buildings in the respective administrative units in the county. And when a board of commissioners, upon investigation, finds that an expenditure is necessary in order to maintain the constitutional six months' school term in the county, or in an administrative unit therein, it becomes the duty of the county commissioners to

provide the funds necessary to meet such expenditures. G.S. 115-83. *Johnson v. Marrow,* 228 N. C. 58, 44 S. E. (2) 468.

This control over the expenditure of funds for the erection, repair and equipment of school buildings by the board of county commissioners, will not be construed so as to interfere with the exclusive control of the schools vested in the county board of education or the trustees of an administrative unit. *School Commissioners v. Aldermen,* 158 N. C. 191, 73 S. E. 905.

The question of changing the location of a schoolhouse, as well as the selection of a site for a new one, is vested in the sound discretion of the school authorities, and their action cannot be restrained by the courts, unless in violation of some provision of the law, or the authorities have been influenced by improper motives, or there has been a manifest abuse of discretion on their part. G.S. 115-85; *Venable v. School Committee,* 149 N. C. 120, 62 S. E. 902; *School Commissioners v. Aldermen, supra; Board of Education v. Forrest,* 190 N. C. 753, 130 S. E. 621; *Board of Education v. Pegram,* 197 N. C. 33, 147 S. E. 622.

Likewise, all expenditures for the construction, repair and equipment of school buildings in a county, must be authorized by the board of county commissioners, acting in good faith, pursuant to statutory and constitutional authority.

The judgment of the court below will be modified in accordance with this opinion, and, except as modified, it will be upheld.

Modified and affirmed.

ROBERT L. COLE, ADMINISTRATOR C. T. A. OF THE ESTATE OF A. B. COLE, DECEASED, AND ROBERT L. COLE, INDIVIDUALLY, v. ELIZABETH S. COLE, KATE COLE RANCKE, HANNAH PICKETT RANCKE ATKINSON AND HUSBAND, HAL W. ATKINSON, WALTER F. COLE, JR., AND WIFE, ELEANOR MYERS COLE, ANN W. COLE BOYD AND HUSBAND, KEN BOYD, CATHERINE COLE, ROBERT LEAKE STEELE COLE AND WIFE, MARY GREGG COLE, ROBERT LEAKE STEELE COLE, JR., A MINOR, CHARLES STUART COLE, A MINOR, ROBERT LEAKE STEELE COLE, GENERAL GUARDIAN FOR SAID MINORS, AND THE UNBORN CHILDREN OF ROBERT LEAKE STEELE COLE AND WIFE, MARY GREGG COLE, BY THEIR GUARDIAN AD LITEM, G. S. STEELE.

(Filed 4 February, 1949.)

1. Appeal and Error § 51b—

A subsequent decision cannot, by mere implication, be held to overrule a prior case unless the principle is directly involved and the inference clear and impelling.

2. Wills § 34c—

The rule that where a testamentary gift is made to a class, without creation of a preceding estate, only those living or *en ventre sa mere* at the time of the death of the testator may take, *is held* to create a rebuttable presumption only, which will yield to a contrary intention expressed by the testator so long as such intent is within the rule against perpetuities and is not prevented by any statutory rule of construction.

3. Same—

Testator devised realty together with the contents of the house thereon to his grandnephews "and any other children who may be born to" his nephew and his nephew's wife. *Held:* The beneficiaries are not limited to members of the class *in esse* or *en ventre sa mere* at the time of testator's death, but the devise is to all members of the class born to the persons specified as ancestors until the possibility of issue becomes extinct by the death of either of them, in accordance with the expressed intent of testator.

4. Same—

Where a devise to a class embraces an executory devise to those who may later be born into the class, those living at the date of testator's death take in their representative capacity, and they are not required to account for rents and profits in the interim before the subsequent enlargement of the class by the birth of others, but the arrival of the newcomers has the effect of merely defeating their interest *pro tanto*.

APPEAL of guardian *ad litem* for the unborn children of Robert Leake Steele Cole and Mary Agnes Cole, from *Armstrong, J.*, holding the courts of the 13th Judicial District, in Chambers at Troy, on 21 August, 1948.

This action was brought by the plaintiff as administrator *c. t. a.* of the estate of A. B. Cole, and in his individual right, against various interested parties, to secure a declaratory judgment construing a part of the will as to which some doubt had arisen affecting the administration. The item directly concerned reads as follows:

> "Item V. I will devise and bequeath to my beloved nephews and any other children who may be born to Robert and Peg Cole, my house and lot at 301 Fayetteville together with the contents and the lot west of the home on Fayetteville Road."

The will was written 27 April, 1945. Cole died 10 January, 1948. At the time the will was written and at his death the testator had three nephews: Robert L. Cole, Robert Leake Steele Cole (referred to in the will as Robert Cole and Robert S. Cole), and Walter F. Cole, Jr. At the time the will was written, and at his death, the testator had three grand nephews, minor children of Robert Leake Steele Cole and wife, Mary Gregg (Peggy) Cole, and a fourth child of Robert and Peg was *en ventre sa mere*, and was born 10 May, 1945.

At the time of testator's death there was in the house described in the above item of the will a metal safe containing choses in action, securities, and intangibles, including a trailer patent, in all worth approximately $47,000.00. The residuary clause of the will left the remainder of the property, except that specifically given, to the eight nieces and nephews of the testator.

No other children have been born to Robert and Peggy Cole since testator's death.

The controversy was submitted to Armstrong, J., holding courts of the 13th Judicial District, at Chambers in Troy, 21 August, 1948, who, by consent of parties, found the facts upon the pleadings and admissions, made his conclusions of law, and entered judgment.

The court below dealt with three phases of the controversy: (a) Whether by the reference to "nephews" in Item V the testator intended to designate his grand nephews the children of Robert S. and Peggy Cole; (b) whether in his reference to the "contents" of the house devised in that item he intended to include the contents of the metal safe, *i.e.*, the $47,000 securities and other intangibles it held; (c) whether the devise in Item V was intended to include children born to Robert and Peg after testator's death.

With aid of some reconciliation of views on the part of the litigants, expressed in the pleadings, the first two problems of construction have been eliminated (except as hereinafter noted). The appeal is concerned only with the third. From the adverse judgment construing the devise in Item V to include only the children *in esse* at the death of the testator, the guardian *ad litem* for the unborn children appealed.

G. S. Steele, guardian ad litem for the unborn children of Robert Leake Steele Cole and Mary Gregg Cole, appellant.

Thomas H. Leath, A. A. Webb, and Hudgins & Adams for appellees.

SEAWELL, J. We have left for solution what seems to be the most troublesome problem dealt with by the court below: Whether the testator intended to include as beneficiaries under Item V of the will, above copied, only the children of Robert and Peggy Cole born, or to be born, prior to his death, or *en ventre sa mere,* or to include, as well, any and all children born to them at any future time before or after his death, and whether that intention may prevail over rules of construction contended for by appellees. The directness of the issue depending upon the force and effect of the rule of construction invoked seems to demand a more specific, however brief, discussion of its nature and application than we find in our own decisions.

It is difficult to conceive how the testator could have used more comprehensive or all-inclusive language to express the intent that all the

children born to Robert and Peggy Cole, regardless of his own span of life, should share in his bounty. The rule widely accepted, however, is that when a testamentary gift is made to a class, with no preceding estate, only those of the class living or *en ventre sa mere* at the time of the death of the testator may take. 57 Am. Jur., Wills, 1275; Page on Wills (Lifetime Ed.), Sec. 1053; Thompson on Wills, 3rd Ed., sec. 301; *Wise v. Leonhardt,* 128 N. C. 289, 38 S. E. 892; *Sawyer v. Toxey,* 194 N. C. 341, 139 S. E. 692. This is sometimes referred to as the "rule of convenience." Page on Wills, sec. 1053, p. 224; Jarman on Wills, Vol. 2, p. 1665; Restatement, Property, Future Interests, Ch. 22, Class Gifts. It is obviously based on the inconveniences of administration, distribution, or enjoyment of those presently let into possession by the immediacy of the gift, especially the uncertainties attending enjoyment and restriction on alienation, all of which might be obviated by a rule which closes membership in the class by calling the roll at the death of the testator, so that the owners, and the extent of their property rights, may then be ascertained without waiting for future members of the class, or cotenants who may never arrive. The "convenience" promoted by its application is that of the class members first taking and not that of the members excluded, or even of the testator who may have wished them to share.

The term "rule of convenience" aptly indicates its origin, its *raison d'etre;* but it argues little for its engraftment on the most fundamental canon of will construction,—that of finding the intent of the testator from the will,—since the inconveniences implied are objective and not necessarily connected with subjective intent.

Since these inconveniences are, as we have said, objective, and only by astute reasoning can be related to the intent, the assumptions which have been made to affiliate the rule with the intent of the testator have been challenged as unreal,—as devices carrying only the camouflaged expression of a public policy modifying or destroying the intent. One of the assumptions involved in applying the rule is that the average man in making a will would hardly intend to leave his property in such an anomalous or unsatisfactory condition; or at least that propriety would not be offended by a presumption to the contrary. Page on Wills, sec. 4. Frankly there is no evidence that the average man ever made a will or ever will; and the standardization is open to the criticism that it ignores both the intelligentsia and those of humbler comprehension, just able to know their property, the objects of their bounty, and the effect of the disposition which they are making. And it is safe to say that the difficulties presented as a basis of the rule are the inconveniences to the members of the class earlier admitted and would appeal more strongly to the legalistic mind than that of the layman making the will. "In theory, at least, the determination of membership in a class is a matter of construction; that

is, if the testator clearly states his intent as to the time a maximum or minimum membership is to be determined, that statement controls. *Rules as to the determination of classes are simply rebuttable presumptions.* However, here, as in many other situations calling for constructions, it is improbable that the testator has thought of the problem which subsequently arises. Hence it is futile to talk of his intent. What we are doing is either determining what the testator would have done had he thought of the situation with which the Court was confronted, or else apply a rule of construction based on public policy." Simes, Future Interests, Part II, Sec. 372, *et seq.*

Many of the terms used in cases following the rule,—"administration," "distribution," "demand," are more appropriate to bequests of personalty than to devises of realty; and with such a testamentary disposition it may be said that the need of the rule is much more apparent than in case of a devise. "On the application of the rule to realty, the authority is slight." Simes on Future Interests, Part II, p. 146, sec. 382. But little discrimination is apparent in the use of the terms applied. It is worth while to note, however, that the majority of the older cases in our jurisdiction exemplifying the rule deal with bequests of personalty and not infrequently speak a language of necessity appropriate to that subject. This itself by eliminating difficulties to administration and distribution suggests a cleavage in treatment between bequests and devises.

The most troublesome problem dealt with by the courts has been the question of the accumulation of profits or income *ad interim.* In this we might well follow the analogy of *Shepherd v. Ingram,* Amb., 448, holding, under comparable facts of that case, that those previously let into possession and enjoyment are not required to account for rents and profits accruing pending the birth of others entitled to share in the devise, the earlier takers being in the position of holding interests *pro tanto* defeasible. There is no necessity, therefore, of giving bond as suggested in the cited cases on bequests of money or personalty, or uncertainty as to the extent of the enjoyment.

These observations are not directed toward abrogation of the rule but toward its more considerate application, and the greater propriety of yielding to the contrary intent of the will, in particular cases when clearly expressed. Restatement, Property, Future Interests, 3 and 4, sec. 294, p. 1574; Simes, Future Interests, *supra,* sec. 372 *et seq.* "The rule usually defeats the intent of the testator and the tendency of the courts is not to apply it unless it is necessary." Jarman, Wills, p. 1665. Nevertheless in the jurisdictions adopting it, the rule has been variously stated and applied with different degrees of strictness. We have to determine in the instant case whether in this jurisdiction the rule, however evolved, presents an insuperable barrier to the intent and in its strict application

may have become a rule of property binding as *stare decisis;* and if not, then what effect it may have upon the present devise.

There are many cases in our records which may be regarded as holding the rule contended for by the appellees as merely presenting a rebuttable presumption which may be overthrown by a clearly expressed intent which has been permitted to prevail. *Roper v. Roper,* 58 N. C. 16, 75 Am. Dec. 427; *Shull v. Johnson,* 55 N. C. 202; *Shinn v. Motley,* 56 N. C. 490; *Pickett v. Southerland,* 60 N. C. 615. Cited as *contra* are *Petway v. Powell,* 22 N. C. 308; *Walker v. Johnston,* 70 N. C. 576, 579; *Robinson v. McDiarmid,* 87 N. C. 455, 461; *Wise v. Leonhardt, supra; Sawyer v. Toxey, supra;* and many English decisions found in accord.

Appellees rely on *Wise v. Leonhardt* and *Sawyer v. Toxey* as overruling earlier decisions. *Wise v. Leonhardt* uniquely seats the rule on the theory that otherwise the title, *ad interim,* must float *in nubibus;* disregarding the principle that the class might vest by representation when those living at the death of the testator answered the class description.

Typical of the apparent uncertainty in the trend of decisions from which we are compelled to draw the answer to our problem we find in *Mason v. White,* 53 N. C. 422 (the subject was a legacy), the rule stated with positiveness by *Chief Justice Pearson,* speaking for the Court, and without qualification; but in *Shull v. Johnson, supra,* while the personnel of the Court was still the same, and again in *Shinn v. Motley, supra,* reported in the following volume (56), it was unanimously held that such a testamentary disposition was good.

Following these cases through the reports we find that construction has alternately tolerated and rejected conditions supposedly offensive to the rule without much expatiation on its force, effect or conclusiveness. Generally speaking, this can be inferred only from the circumstances of its application or the vigor of its assertion.

This is hardly enough to produce the conviction that the former cases have been overruled. A subsequent decision cannot, by mere implication, be held to overrule a prior case unless the principle is directly involved and the inference clear and impelling. We are not satisfied that the cases cited as having that effect can be held to justify us in wholly abandoning the intention of the will, clearly expressed, as a factor in construction, or that a reconciliation of authority cannot be made.

The determination of the maximum or minimum membership in the class to which the testator's bounty is directed is a substantial and important testamentary right, a property right, which ought not to be destroyed or abridged except through public necessity combining with clear authority.

We are led to the conclusion that we are dealing with a rebuttable presumption only; and that so long as the testator is within the rule against

perpetuities and is not prevented by any statutory rule of construction, and when the intention to do so clearly appears, he may, without the creation of a preceding estate, make a class devise or bequest, of the character with which we are dealing, which may carry the gift beyond his death; and as in the instant case include all members of the class born to the persons specified as ancestors until the possibility of issue becomes extinct by the death of either of them. We think the language employed in this will, in its ordinary acceptation, is broad enough with respect to its futurity, nothing else appearing, to accomplish that purpose.

Introducing matter extraneous to the will on the question of intent, the appellees on the one hand argue that the language used by the testator is persuasively within the "rule of convenience," because he must have known the fact that Peg Cole was at the time *enceinte,* since she was a frequent visitor at his home, and that the provision for "any other children who may be born to Robert and Peg Cole" must have referred to this unborn child. And in favor of the opposite interpretation, the appellant points out that the devise was of the ancestral home of Robert and Peg, which had been acquired by the testator, and that he was in this devise giving the house back to the descendants of the original owner, amongst whom there was no reason to discriminate.

It is frequently said that in the judicial interpretation of a will every case must stand on its own bottom. We refrain from detailed discussion and comparison of the language used in the cited cases in making the devises and bequests, some of which are comparable and some disparate, although we have given them careful attention.

We are satisfied from the language of the will and the circumstances under which it was executed that it was the intention of the testator to extend his bounty to all the members of the described class which might at any subsequent period be born to Robert and Peg Cole and that the class membership may not be closed until the possibility of afterborn children is extinct through the death of one of these ancestors.

We do not know how long the inconveniences pointed out in the brief may be suffered by the devisees. The testator no doubt may have understood from the common experience of man that the period of gestation might be fixed at 10 lunar months; but he would hardly be supposed to have appreciated the naiveté of the law, which still refuses to be advised, but contrary to human experience accepts the possibility of issue as long as there is life.

The modern attitude toward future interests is different from that which obtained when this rule was evolved. The appellees, however, point out that no relief can be had on that score since G.S. 41-11 does not apply to this situation. Probably, however, if a sufficiently important public necessity is involved, the extension of legislative relief of more general

application might be indicated rather than an arbitrary judicial adjustment.

There are certain other modifications of the judgment below upon which all the parties are agreed and which seem to us to be justified as a proper construction of the will.

The judgment below, it is agreed, inadvertently failed to include the safe (not, however, its contents) as passing with the dwelling; and the parties are in accord in so interpreting the will. We think this is a proper construction, and the judgment will be modified in that respect. It will be further modified in accordance with the construction we have herein given to Item V.

The cause is remanded to the Superior Court of Richmond County for judgment in accordance with this opinion.

Modified and affirmed.

STATE v. OWEN BALLANCE.

(Filed 4 February, 1949.)

1. Appeal and Error § 51b; Criminal Law § 85b—

A single decision, rendered by a divided Court, which decision is irreconcilable with a subsequent decision of the Supreme Court upon a related matter, does not properly call for the application of the doctrine of *stare decisis.*

2. Same—

The doctrine of *stare decisis* will not be applied to preserve and perpetuate error.

3. Constitutional Law § 20c—

The term "law of the land" as used in our State Constitution is synonymous with "due process of law." Art. I, sec. 17.

4. Constitutional Law § 15½—

Personal liberty as guaranteed by the Constitution means more than mere freedom from unlawful physical restraint or servitude, but embraces the right of the individual to be free in the use of his faculties in all lawful ways, and to select his place of abode and method of livelihood, subject only to the police power of the State. Art. I, sec. 1; Art. I, sec. 17.

5. Constitutional Law § 11—

The State, in its capacity as a sovereign, possesses the police power, which the General Assembly may exercise within constitutional limits, but the police power is in derogation of personal liberty and extends only to measures enacted for the good of the citizens as a whole and which have a

rational, real, or substantial relation to the public health, morals, order, safety, or the general welfare.

6. Constitutional Law § 12—

The Legislature may prescribe reasonable qualifications for persons desiring to pursue a profession or calling which requires special skill or knowledge and which intimately affects the public health, morals, order, safety, or general welfare; but it may not deny nor unreasonably curtail the common right to pursue the ordinary lawful and innocuous occupations which are not affected with any public interest even though they may require skill and special knowledge.

7. Same—Statute regulating practice of photography held void as being beyond the police power of the State.

While the practice of photography requires special skill, the calling is not affected with a public interest, since the special hazards threaten the individual practitioner rather than the public and are no greater than those incident to many other occupations, and protection against lack of skill in such calling can be best obtained by free competition of free men in a free market, and the danger of fraud in the practice of photography is common to other ordinary callings and is insufficient ground for the exercise of the police power, and therefore Chap. 92 of the General Statutes, providing for the licensing and supervision of photographers, is unconstitutional as violative of Art. I, sec. 1, and Art. I, sec. 17, of the State Constitution.

8. Constitutional Law § 17—

G.S., Chap. 92, relating to the licensing and supervision of photographers, tends to create a monopoly in violation of Art. I, sec. 31.

STACY, C. J., dissenting.

WINBORNE, J., concurs in dissent.

APPEAL by defendant, Owen Ballance, from *Harris, J.*, and a jury, at the September Term, 1948, of WAKE.

The defendant was charged with violating Chapter 92 of the General Statutes by engaging in the practice of photography for compensation without being licensed so to do by the State Board of Photographic Examiners.

The jury returned a special verdict in which it found, in substance, that on 25 June, 1948, in Raleigh, North Carolina, a city having a population in excess of twenty-five hundred, the defendant took and produced photographs and sold the same at unit prices exceeding ten cents per picture without being licensed to practice photography in North Carolina by the State Board of Photographic Examiners.

The court adjudged upon the special verdict that the defendant was guilty "under and according to the ruling made by the Supreme Court in the case of *State v. N. L. Lawrence* reported in Volume 213 at page 674

of the N. C. reports," ordered that a verdict of guilty as charged be entered against the defendant, and gave judgment that the defendant pay a fine of $50.00 and the costs. The defendant excepted to the rulings of the court and appealed from the judgment against him.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Rhodes, and Moody, and E. M. Stanley and Womble, Carlyle, Martin & Sandridge for the State.

Douglass & McMillan, Thomas A. Banks, and Deal & Hutchins for the defendant, appellant.

ERVIN, J. Chapter 92 of the General Statutes had its origin in Chapter 155 of the Public Laws of 1935, and was enacted to control or regulate the practice of photography, which is defined to be "the profession or occupation of taking or producing photographs or any part thereof for hire." G.S. 92-1. It establishes a State Board of Photographic Examiners consisting of five members designated by the Governor, "all of whom shall be residents of the State of North Carolina and shall have had not less than five years experience as professional photographers." G.S. 92-2. The statute prohibits the practice of photography by persons who have not been licensed by the Board of Photographic Examiners. G.S. 92-20. Any person engaging in the practice of photography without being so licensed is guilty of a misdemeanor. G.S. 92-24. The Board issues a license upon application and without examination to every photographer who was continuously engaged in the practice of photography in North Carolina for one year next preceding the passage of the act. G.S. 92-18. Any other person desiring to practice photography must undergo an examination by the Board and qualify thereon "as to competency, ability, and integrity." G.S. 92-10. The statute prescribes that "Prior to any applicant being admitted to an examination or licensed, said Board shall have the power to require proof as to the technical qualifications, business record and moral character of such applicant, and if an applicant shall fail to satisfy the Board in any or all of these respects, the Board may decline to admit said applicant to examination, or to issue license." G.S. 92-11. The Board is given power upon notice and hearing to revoke any license granted by it to any photographer "found by the Board to be guilty of fraud or unethical practices or of wilful misrepresentation, or found guilty under the laws of the State of North Carolina of any crime involving moral turpitude." G.S. 92-23. The Board is authorized to adopt and enforce all rules and orders necessary to carry out the provisions of the chapter. G.S. 92-7. It is directed to collect specified examination fees from applicants and specified annual license fees from practicing photographers, and to use the same to defray the expenses of administering the law. G.S. 92-13, 92-14, 92-19, 92-27.

The exceptive assignments of error of the accused challenge the validity of his trial, conviction, and sentence upon the specific ground that the Legislature transgressed designated provisions of the organic law of the State when it adopted Chapter 92 of the General Statutes.

It is plain that the position of the defendant cannot be sustained without overruling *S. v. Lawrence,* 213 N. C. 674, 197 S. E. 586, 116 A. L. R. 1366, where a divided Court adjudged this statute to be constitutional. Consequently, the accused is met at the threshold of the case by the assertion of the State that the only question raised by the appeal has heretofore been deliberately examined and decided and ought to be deemed as settled and closed to further argument.

At first blush, this suggestion appears to have much force. In adjudicating a case, a court is not concerned with what the law ought to be, but its function is to declare what the law is. Moreover, the law must be characterized by stability if men are to resort to it for rules of conduct. These considerations have brought forth the salutary doctrine of *stare decisis* which proclaims, in effect, that where a principle of law has become settled by a series of decisions, it is binding on the courts and should be followed in similar cases. *S. v. Dixon,* 215 N. C. 161, 1 S. E. (2) 521; *Spitzer v. Comrs.,* 188 N. C. 30, 123 S. E. 636; *Williamson v. Rabon,* 177 N. C. 302, 98 S. E. 830; *Hill v. R. R.,* 143 N. C. 539, 55 S. E. 854, 9 L. R. A. (N. S.) 606.

But the case at bar does not call the rule of *stare decisis* in its true sense into play. Here, no series of decisions exists. *Spitzer v. Comrs., supra.* We are confronted by a single case which is much weakened as an authoritative precedent by a dissenting opinion "of acknowledged power and force of reason." *Collie v. Commissioners,* 145 N. C. 170, 59 S. E. 44. Indeed, *S. v. Lawrence, supra,* appears to be irreconcilable with the subsequent well considered holding in *S. v. Harris,* 216 N. C. 746, 6 S. E. (2) 854, 128 A. L. R. 658. Besides, the doctrine of *stare decisis* will not be applied in any event to preserve and perpetuate error and grievous wrong. *Spitzer v. Comrs., supra; Patterson v. McCormick,* 177 N. C. 448, 99 S. E. 401. As was said in *Spitzer v. Comrs., supra,* "There is no virtue in sinning against light or in persisting in palpable error, for nothing is settled until it is settled right."

Some observations of the Supreme Court of Pennsylvania seem specially pertinent. "Where a question involving important public or private rights extending through all coming time has been passed on on a single occasion, and the decision can in no just sense be said to have been acquiesced in, it is not only the right but the duty of the courts, when properly called on, to re-examine the questions involved and again subject them to judicial scrutiny." *Commonwealth ex. rel. Margiotti v. Lawrence,* 326 Pa. 526, 193 A. 46.

It is noteworthy that *S. v. Lawrence, supra,* stands alone, and is contrary to the conclusion reached by the courts of last resort in the other seven jurisdictions which have had occasion to pass upon the constitutionality of practically identical statutes professing to regulate the practice of photography through the agency of examining boards. *Buehman v. Bechtel,* 57 Ariz. 363, 114 P. (2) 227, 134 A. L. R. 1374; *Sullivan v. DeCerb,* 156 Fla. 496, 23 So. (2) 571; *Bramley v. State,* 187 Ga. 826, 2 S. E. (2) 647; *Territory v. Kraft,* 33 Haw. 397; *State v. Cromwell,* 72 N. D. 565, 9 N. W. (2) 914; *Wright v. Wiles,* 173 Tenn. 334, 117 S. E. (2) 736, 119 A. L. R. 456; *Moore v. Sutton,* 185 Va. 481, 39 S. E. (2) 348. The Arizona, Florida, Georgia, North Dakota, and Virginia decisions were handed down after the *Lawrence case.*

During the past 172 years, the organic law of this State has contained the solemn warning that "a frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." Const., 1776, Declaration of Rights, Art. XXI; Const., 1868, Art. I, section 29. When the representatives of the people of North Carolina assembled in Congress at Halifax on 12 November, 1776, for the express purpose of framing a Constitution, they possessed an acute awareness of the long and bitter struggle of the English speaking race for some substantial measure of dignity and freedom for the individual. They loved liberty and loathed tyranny, and were convinced that government itself must be compelled to respect the inherent rights of the individual if freedom is to be preserved and oppression is to be prevented. In consequence, they inserted in the basic law a declaration of rights designed chiefly to protect the individual from the State. When it rewrote the fundamental law, the Convention of 1868 retained these provisions and incorporated them and certain other guaranties of personal liberty in the First Article of the present State Constitution, which like its counterpart in the Constitution of 1776 is designated a "Declaration of Rights."

This appeal presents the question of whether the statute under attack is void for repugnancy to the constitutional guaranties now appearing in Article I, sections 1, 17, and 31 of the Constitution.

Article I, section 1, was placed in the Constitution by the Convention of 1868, and declares "that we hold it to be self-evident that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness." In drafting this section, the Convention borrowed certain phraseology from the Declaration of Independence, changed the words "these truths" therein appearing to "it," and made the interpolation "the enjoyment of the fruits of their own labor."

Article I, section 17, was copied in substance from Magna Charta by the framers of the Constitution of 1776, and prescribes that "no person

ought to be taken, imprisoned, or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty or property, but by the law of the land." The term "law of the land" is synonymous with "due process of law," a phrase appearing in the Federal Constitution and the organic law of many states. *Yancey v. Highway Commission,* 222 N. C. 106, 22 S. E. (2) 256; *Plott v. Ferguson,* 202 N. C. 446, 163 S. E. 688; *Yarborough v. Park Commission,* 196 N. C. 284, 145 S. E. 563; *Gunter v. Sanford,* 186 N. C. 452, 120 S. E. 41; *Parish v. Cedar Co.,* 133 N. C. 478, 45 S. E. 768, 98 Am. S. R. 718.

These fundamental guaranties are very broad in scope, and are intended to secure to each person subject to the jurisdiction of the State extensive individual rights, including that of personal liberty. The term "liberty," as used in these constitutional provisions, does not consist simply of the right to be free from arbitrary physical restraint or servitude, but is "deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. . . . It includes the right of the citizen to be free to use his faculties in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or vocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out these purposes to a successful conclusion." 11 Am. Jur., Constitutional Law, section 329. See, also, in this connection: *Allgeyer v. Louisiana,* 165 U. S. 578, 41 L. Ed. 832, 17 S. Ct. 427; *S. v. Moore,* 113 N. C. 697, 18 S. E. 342, 22 L. R. A. 472.

Undoubtedly, the State possesses the police power in its capacity as a sovereign, and in the exercise thereof, the Legislature may enact laws, within constitutional limits, to protect or promote the health, morals, order, safety, and general welfare of society. *Clinton v. Ross,* 226 N. C. 682, 40 S. E. (2) 593; *Brewer v. Valk,* 204 N. C. 186, 167 S. E. 638, 87 A. L. R. 237; *Elizabeth City v. Aydlett,* 201 N. C. 602, 161 S. E. 78; *Wake Forest v. Medlin,* 199 N. C. 83, 154 S. E. 29; *S. v. Lockey,* 198 N. C. 551, 152 S. E. 693; *Sanitary District v. Prudden,* 195 N. C. 722, 143 S. E. 530.

An exertion of the police power inevitably results in a limitation of personal liberty, and legislation in this field "is justified only on the theory that the social interest is paramount." *S. v. Mitchell,* 217 N. C. 244, 7 S. E. (2) 567. In exercising this power, the Legislature must have in view the good of the citizens as a whole rather than the interests of a particular class. 11 Am. Jur., Constitutional Law, section 274. If a statute is to be sustained as a legitimate exercise of the police power, it must have a rational, real, or substantial relation to the public health, morals, order, or safety, or the general welfare. In brief, it must be

reasonably necessary to promote the accomplishment of a public good, or to prevent the infliction of a public harm. *Skinner v. Thomas,* 171 N. C. 98, 87 S. E. 976, L. R. A. 1916 E, 338; *Glenn v. Express Co.,* 170 N. C. 286, 87 S. E. 136.

In consequence, a statute which prevents any person from engaging in any legitimate business, occupation, or trade cannot be sustained as a valid exercise of the police power unless the promotion or protection of the public health, morals, order, or safety, or the general welfare makes it reasonably necessary. Where the practice of a profession or calling requires special knowledge or skill and intimately affects the public health, morals, order, or safety, or the general welfare, the Legislature may prescribe reasonable qualifications for persons desiring to pursue such profession or calling, and require them to demonstrate their possession of such qualifications by an examination on the subjects with which such profession or calling has to deal as a condition precedent to the right to follow such profession or calling. *S. v. Van Doran,* 109 N. C. 864, 14 S. E. 32; *S. v. Call,* 121 N. C. 643, 28 S. E. 517; *S. v. McKnight,* 131 N. C. 717, 42 S. E. 580, 59 L. R. A. 187; *In re Applicants for License,* 143 N. C. 1, 55 S. E. 635, 10 L. R. A. (N. S.) 288, 10 Ann. Cas. 187; *S. v. Hicks,* 143 N. C. 689, 57 S. E. 441; *St. George v. Hardie,* 147 N. C. 88, 60 S. E. 920; *Allen v. Carr,* 210 N. C. 513, 187 S. E. 809; 16 C. J. S., Constitutional Law, section 669; 11 Am. Jur., Constitutional Law, section 275. But it is otherwise with respect to the ordinary lawful and innocuous occupations of life. They must be open to all alike upon the same terms. While it may adopt such regulations relating thereto as are reasonably necessary to promote the accomplishment of a public good or to prevent the infliction of a public harm, the Legislature can neither deny nor unreasonably curtail the common right secured to all men by Sections 1 and 17 of Article I of the State Constitution to maintain themselves and their families by the pursuit of the usual legitimate and harmless occupations of life. *S. v. Harris, supra.*

Photography is an honored calling which contributes much satisfaction to living. Like all honest work, it is ennobling. In the economy of nature, toil is necessary to support human life, and essential to develop the human spirit. The great sculptor, Michelangelo, spoke a profound truth applicable to all mankind in uttering the cryptic phrase, "It is only well with me when I have a chisel in my hand."

When all is said, photography is one of the many usual legitimate and innocuous vocations by which men earn their daily bread. It is, in essence, a private business unaffected in a legal sense with any public interest.

The arguments advanced to sustain the statute in question as a valid exercise of the police power are without convincing force for reasons so

ably stated in the dissenting opinion in *S. v. Lawrence, supra,* and in the majority opinion in *S. v. Harris, supra.* While there may be some fire risk incident to the practice of photography on account of combustible materials employed, such hazard is certainly no greater than that inseparable from the things utilized daily in the home and in scores of other vocations. Any danger incidental to the practice of photography may threaten injury to the individual practitioner, but it does not imperil the public safety.

It is undoubtedly true that the photographer must possess skill. But so must the actor, the baker, the bookbinder, the bookkeeper, the carpenter, the cook, the editor, the farmer, the goldsmith, the horseshoer, the horticulturist, the jeweler, the machinist, the mechanic, the musician, the painter, the paper-hanger, the plasterer, the printer, the reporter, the silversmith, the stonecutter, the storekeeper, the tailor, the watchmaker, the wheelwright, the woodcarver, and every other person successfully engaged in a definitely specialized occupation, be it called a trade, a business, an art, or a profession. Yet, who would maintain that the Legislature would promote the general welfare by requiring a mental and moral examination preliminary to permitting individuals to engage in these vocations merely because they involve knowledge and skill?

It is urged, finally, that restricting the practice of photography to those whose competency and integrity is certified by a board of professional photographers will accomplish a public good because unskilled photographers may impose inferior pictures upon their customers, and dishonest photographers may practice fraud upon those who deal with them. The initial defect in this argument is that it runs counter to the economic philosophy generally accepted in this country that ordinarily the public is best served by the free competition of free men in a free market. To be sure, a dishonest photographer may defraud those with whom he deals. So may a dishonest person in any other calling. Indeed, fraud has been practiced on occasion in all relations of life since the serpent invaded Eden and misrepresented the qualities of the forbidden fruit to the woman. Under this statute, the Board of Photographic Examiners may refuse to license any applicant who fails to satisfy the Board as to his moral character, and may revoke the license of any licensed photographer whose practice may offend the undefined ethical standards of the Board. G.S. 92-11, 92-23. We concur in what the Court of Appeals of Kentucky said in a somewhat similar case: "In our opinion, the right to earn one's daily bread cannot be made to hang on so narrow a thread. Broad as is the police power, its limit is exceeded when the State undertakes to require moral qualifications of one who wishes to engage or continue in a business which, as usually conducted, is no more dangerous to the public than any other ordinary occupation of life." *Rawles v. Jenkins,* 212 Ky. 287, 279 S. W. 350.

When Chapter 92 of the General Statutes is laid alongside the relevant legal authorities and principles, it is plain that it is not a valid exercise of the police power of the State, and that it violates the constitutional guaranties securing to all men the right to "liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness" and providing that no person is to be deprived of "liberty or property, but by the law of the land." It unreasonably obstructs the common right of all men to choose and follow one of the ordinary lawful and harmless occupations of life as a means of livelihood, and bears no rational, real, or substantial relation to the public health, morals, order, or safety, or the general welfare. Instead, it is addressed to the interests of a particular class rather than the good of society as a whole, and tends to promote a monopoly in what is essentially a private business. In so doing, it offends the additional constitutional guaranty that "Monopolies are contrary to the genius of a free state and ought not to be allowed." Const. 1776, Declaration of Rights, Art. XXIII; Const. 1868, Art. I, section 31.

For the reasons given, Chapter 92 of the General Statutes is adjudged void for repugnancy to Article I, sections 1, 17, and 31 of the State Constitution, and the decision in *S. v. Lawrence, supra,* to the contrary is overruled. It follows that there was error in holding the defendant guilty. The special verdict required that a verdict of not guilty be entered and the accused discharged. Hence, the judgment rendered below is

Reversed.

STACY, C. J., dissenting: The present decision overrules *S. v. Lawrence,* 213 N. C. 674, 197 S. E. 586, 116 A. L. R. 1366 (writ of *certiorari* denied, 305 U. S. 638, 83 L. Ed. 411), and renders the subject enactment void. I dissent. The statute and the applicable constitutional provisions are the same today as they were in 1938. Nothing was overlooked at that time. The wisdom or impolicy of the legislation is not the test of its validity.

Fraud and deceit in the use and practice of photography, which the General Assembly has sought to prevent in the public interest because of its frequency, or the difficulty experienced by individuals in circumventing it, may no longer be dealt with in the manner here challenged, but it is to be redressed, if at all, after the event by the injured persons or the law enforcement officers. The majority opinion so declares.

The police power of the State is not limited to regulations necessary for the preservation of good order or the public health and safety. The prevention of fraud and deceit, cheating, unfair competition, and imposition is equally within the power. *S. v. Call,* 121 N. C. 643, 28 S. E. 517; *Merrick v. Halsey & Co.,* 242 U. S. 568, 61 L. Ed. 498; *Hall v. Geiger-*

Jones Co., 242 U. S. 539, 61 L. Ed. 480; *Baccus v. Louisiana,* 232 U. S. 334, 58 L. Ed. 627; *Lawton v. Steele,* 152 U. S. 133, 38 L. Ed. 1076; *Dent v. West Virginia,* 129 U. S. 114, 32 L. Ed. 626; *Shea v. Olson,* 185 Wash. 143, 53 P. (2) 615, 186 Wash. 700, 59 P. (2) 1183, 111 A. L. R. 998. In *Beer Co. v. Massachusetts,* 97 U. S. 32, it is laconically stated: "All rights are held subject to the police power of the State." While this generalization may appear somewhat tolerant, still the subject statute, it seems to me, is within the power of the General Assembly. At least it is not clearly *dehors* the power.

The legislative bodies are as much the guardians of the liberties of the people as are the courts, and every presumption is to be indulged in favor of their enactments. *S. v. Lueders,* 214 N. C. 558, 200 S. E. 22; *S. v. Revis,* 193 N. C. 192, 136 S. E. 346. As said by *Mr. Justice Holmes* in *Tyson v. Banton,* 273 U. S. 418, 71 L. Ed. 718, "I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the state, and that courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular court may happen to entertain." Indeed, a majority of this particular Court presently entertains a different conception of these prohibitions from what a majority did eleven years ago. The arguments, *pro* and *con,* were the same then as they are now. The later out-of-State decisions are neither controlling nor convincing. They shed no new light on the subject. Neither the constitutional prohibitions nor the legislative enactment should be made to bend to the Court's inconstant economic views or predilections. *McLean v. Arkansas,* 211 U. S. 539, 53 L. Ed. 315.

WINBORNE, J., concurs in dissent.

MRS. META L. HUGHES, ADMINISTRATRIX OF THE ESTATE OF DARRELL C. HUGHES, v. L. C. THAYER.

(Filed 4 February, 1949.)

1. Trial § 22a—

On motion to nonsuit, plaintiff's evidence will be taken as true and the plaintiff given the benefit of every fair inference which can be reasonably drawn therefrom in his favor.

2. Automobiles § 12f—

A motorist is under duty to exercise due care to avoid injuring children whom he may see, or by the exercise of reasonable care should see, on or

near the highway, taking into account the fact that a child of tender years may attempt to cross in front of an approaching automobile unmindful of impending danger.

3. Automobiles § 18h (2), 18h (3): Negligence § 12—Evidence held for jury on issues of negligence and contributory negligence in this action to recover for fatal injury of child on highway.

The evidence tended to show that a school bus and two following cars stopped on the right side of the highway, that two children alighted, one of whom ran immediately in front of the bus across the highway, and the other, a boy eight years old, waited until the three vehicles were in motion and crossed the highway after the third vehicle had passed, and was struck by defendant's truck operated by defendant's agent which was traveling in the opposite direction about thirty miles per hour, and which failed to give any warning of its approach and failed to reduce speed prior to the collision. *Held:* Although the evidence fails to show a violation of the letter of G.S. 20-217, since the school bus was in motion and its stop signal had been withdrawn prior to the impact, the evidence is sufficient to be submitted to the jury upon the issues of the negligence of the driver of the truck and the contributory negligence of the child.

APPEAL by defendant from *Bobbitt, J.*, and a jury, at the August Term, 1948, of the High Point Division of the Superior Court of GUILFORD.

The plaintiff, Mrs. Meta L. Hughes, administratrix, sued the defendant, L. C. Thayer, under G.S. 28-173, for damages for the death of her intestate, Darrell C. Hughes, upon a complaint alleging that such death was proximately caused by the negligence of the defendant's employee, Lloyd Vinson Pearce, while operating the defendant's motor truck in behalf of the defendant. The defendant conceded his ownership of the truck and the agency of Pearce for him. He also admitted that the plaintiff's intestate met death as a result of a collision between himself and the truck while the truck was being driven by Pearce "in and about the business of the said defendant and within the scope and authority of the said Lloyd Vinson Pearce as the agent and employee of the defendant." The defendant denied, however, that the plaintiff's intestate had suffered death on account of negligence on the part of Pearce, and pleaded contributory negligence on the part of the deceasd as an affirmative defense.

The defendant offered no evidence. When viewed in the light most favorable to her, the plaintiff's testimony presented the tragedy set forth below.

On the early afternoon of 14 November, 1947, Darrell C. Hughes, a small boy eight years of age, was returning to his home after a day in school. He was traveling with other school children on a school bus which was proceeding northward along a public road known as Centennial Avenue Extension near the city limit of High Point. After displaying its regulation "Stop Signal" to notify approaching motorists that it was stopping to discharge passengers, the school bus came to a standstill facing

in a northerly direction on the east half of the paved portion of the road approximately opposite the home of the plaintiff's intestate located on the west side of the road. The drivers of two automobiles following in the track of the school bus thereupon brought their vehicles to full stops on the road to the rear of the bus. At this point, Centennial Avenue Extension runs north and south, consists of a paved roadway twenty-one feet in width with dirt shoulders six feet wide on each side, and extends a distance of more than nine hundred feet to the north in a straight line.

After the school bus had stopped, the plaintiff's intestate and another schoolboy of approximately the same age descended from the right-hand front side of the bus to the dirt shoulder east of the paved roadway. The other boy immediately passed in front of the stationary bus to the west side of the road, but the plaintiff's intestate waited until the "Stop Signal" of the bus had been withdrawn and the bus and the two automobiles behind it had begun to move northward.

As the second trailing automobile cleared the roadway before him, plaintiff's intestate undertook to walk directly across the road towards his home "with his hands in his pockets," when he was struck by the front part of the southbound truck of the defendant and knocked to the pavement, suffering practically instantaneous death. The collision occurred "in the middle of the highway," and the truck proceeded at least one hundred and twelve feet beyond the place of impact before stopping. Prior to the accident, the driver of the truck traveled southward along Centennial Avenue Extension, which was straight for at least nine hundred feet. As he approached "the school bus and those two cars that stopped behind it," there was "no obstruction or anything to prevent" him from observing the character and function of the bus, and the other attending conditions. He was driving at a speed estimated by witnesses at thirty miles per hour, and failed to give any warning of the approach of the truck by horn or other signal, and failed to reduce the speed of the truck prior to the collision.

Issues of negligence, contributory negligence, and damages were answered by the jury in favor of the plaintiff; the court rendered judgment thereon for the plaintiff and against the defendant; and the defendant appealed, assigning as errors the refusal of his motion for involuntary judgment of nonsuit and excerpts from the charge.

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

ERVIN, J. The defendant puts his chief emphasis on this appeal on his exception to the refusal of his motion for judgment of involuntary nonsuit under G.S. 1-183. He asserts the motion ought to have been

allowed either on the ground that there was no sufficient evidence of actionable negligence on the part of the driver of his truck, or on the ground that the plaintiff's intestate was guilty of contributory negligence as a matter of law.

In passing upon a motion for a compulsory nonsuit under the statute, the court must assume the evidence in behalf of the plaintiff to be true and must extend to the plaintiff the benefit of every fair inference which can be reasonably drawn therefrom by the jury in favor of the plaintiff. *Swink v. Horn,* 226 N. C. 713, 40 S. E. (2) 353; *Buckner v. Wheeldon,* 225 N. C. 62, 33 S. E. (2) 480; *Atkins v. Transportation Co.,* 224 N. C. 688, 32 S. E. (2) 209. We must measure the evidence by this criterion.

The law imposes upon a motorist the duty to exercise due care to avoid injuring children whom he may see, or by the exertion of reasonable care should see, on or near the highway. *Sparks v. Willis,* 228 N. C. 25, 44 S. E. (2) 343; *Moore v. Powell,* 205 N. C. 636, 172 S. E. 327; *Goss v. Williams,* 196 N. C. 213, 145 S. E. 169; *S. v. Gray,* 180 N. C. 697, 104 S. E. 647. In so doing, he must recognize that children have less discretion and capacity to shun danger than adults, and are entitled to a care proportionate to their inability to foresee and avoid peril. *Yokeley v. Kearns,* 223 N. C. 196, 25 S. E. (2) 602. Due care may require a motorist in a particular situation to anticipate that a child of tender years, whom he sees on or near the highway, will attempt to cross in front of his approaching automobile unmindful of the attendant danger. *Fox v. Barlow,* 206 N. C. 66, 173 S. E. 43.

The "Stop Signal" of the bus involved here had been withdrawn, and the bus itself had been put in motion just before the defendant's truck met the bus. In consequence, the testimony did not support a conclusion that the driver of the truck had violated the letter of the statute embodied in G.S. 20-217, which was enacted by the Legislature for the manifest purpose of saving children boarding or alighting from school busses from injury or death at the hands of approaching motorists.

But the evidence tends to show that the tragedy happened on the afternoon of a school day, and that the driver of the defendant's truck approached the scene before the school bus was put into motion and in time to see it standing on the highway with its stop sign fully displayed. This constituted a danger signal, and was sufficient to give the driver of the truck notice that in all probability children were alighting from the bus and would be on or near the highway as he passed, and placed him under the legal duty of proceeding in such a manner and at such a speed as were reasonably calculated to enable him to avoid striking any child who might attempt to cross the highway.

Hence, the jury might reasonably have drawn these inferences from the evidence, namely: (1) That the driver of the defendant's approaching

truck saw, or by the exercise of due care should have seen, the plaintiff's intestate, a small boy of tender years, alight from the school bus and take a position on the dirt shoulder east of the paved portion of the road; (2) that the driver of the truck anticipated, or by the exercise of reasonable care should have anticipated, that the plaintiff's intestate would undertake to cross to the west side of the road the instant the school bus and the automobiles following in its track cleared the pavement before him oblivious of the peril of the defendant's approaching truck; (3) that notwithstanding such knowledge or means of knowledge, the driver of the defendant's truck met and passed the school bus and the trailing automobiles in a negligent manner in that he drove the truck at a speed greater than was reasonable and prudent under the conditions then existing, or in that he failed to keep a proper lookout, or in that he failed to have the truck under reasonable control, or in that he failed to give the intestate warning of the approach of the truck by sounding his horn when due care under the existing circumstances required such warning; and (4) that such negligence of the driver of the truck proximately caused the death of the intestate while he was attempting to cross to the west side of the road. Thus, the trial judge properly left to the decision of the jury the question of the actionable negligence of the operator of the defendant's truck. *Morgan v. Coach Co.*, 228 N. C. 280, 45 S. E. (2) 339; *Smith v. Miller*, 209 N. C. 170, 183 S. E. 370.

The same observation applies to the question of whether the plaintiff's intestate was guilty of contributory negligence. Under the pertinent decisions, this was a question of fact to be answered by the jury in the light of the intelligence, age, and capacity of the intestate. *Morgan v. Coach Co., supra; Manheim v. Taxi Corp.*, 214 N. C. 689, 200 S. E. 382; *Leach v. Varley*, 211 N. C. 207, 189 S. E. 636.

The charge is free from error. Indeed, the court declared and explained the law of the case with highly commendable accuracy and clarity.

In closing, we deem it not amiss to quote these words of caution to motorists from a decision of the Supreme Court of Pennsylvania: "Children are capricious. They act heedlessly without giving the slightest warning of their intentions. They dart here and there with the exuberance of youth. No law or edict of court will stop them; we shall not attempt to do so, but rather warn those who may meet them to be on the lookout." *Frank v. Cohen*, 288 Pa. 221, 135 A. 624

Because we find in law no error, the judgment of the Superior Court is affirmed.

No error.

HAROLD MORSE v. RAPHELIUS SHADE WALKER

and

MRS. FREDDIE MORSE v. RAPHELIUS SHADE WALKER

and

JUANITA MORSE, BY HER NEXT FRIEND, MRS. FREDDIE MORSE, v. RAPHELIUS SHADE WALKER.

(Filed 4 February, 1949.)

1. Courts § 15—

The laws of the State of Virginia govern the right to recover for injuries sustained in an automobile accident occurring in that State.

2. Automobiles § 19—Evidence held sufficient on issue of negligence entitling paying passengers to recover from driver under Virginia statute.

Plaintiffs were passengers in defendant's automobile. Plaintiffs' evidence tended to show that the car had a defective windshield wiper, that it was dark and rainy and that defendant driver turned from the right-hand lane into the center lane of a three-lane highway in the State of Virginia and collided head on with a car which was being driven slowly in the opposite direction in the center lane with its lights burning. Defendant testified that he turned to the left to avoid a car which he thought was approaching in his lane. *Held:* The evidence is sufficient to be submitted to the jury on the issue of negligence, but is insufficient to establish gross negligence or willful and wanton disregard of the safety of plaintiffs which is prerequisite to recovery under the Virginia statute if plaintiffs should be found to be gratuitous guests within the purview of that statute. Virginia Code, 2154 (232).

3. Same—

Evidence tending to show that plaintiff and defendant planned a trip in defendant's car for their mutual benefit and pleasure, that prior to the trip defendant stated he was financially unable to make the trip and that thereupon plaintiff agreed to purchase all gas and oil necessary for the trip if he could take his wife and child with him on the trip, *is held* sufficient to be submitted to the jury on the question of plaintiff's contractual obligation to purchase the gas and oil so as to constitute "payment for transportation," rendering plaintiff and his wife and child paying passengers and not gratuitous guests within the meaning of the Virginia statute.

4. Same—

A passenger is a guest within the meaning of an automobile guest statute if the owner or possessor permits him to ride without remuneration or other benefit therefor, and the voluntary purchase of gas and oil by such passenger while on a trip does not alter such *status*, but a passenger who enters into a contractual obligation to purchase gas and oil for the trip as a condition or consideration therefor is not a gratuitous guest.

DEVIN, J., concurring.

SEAWELL and ERVIN, JJ., join in concurring opinion.

MORSE *v.* WALKER.

APPEAL by plaintiffs from *Coggin, Special Judge,* September Term, 1948, of FORSYTH.

Civil action for recovery of damages alleged to have been sustained by the respective plaintiffs as a result of the negligence of the defendant in the operation of his automobile in which the plaintiffs were passengers.

The three actions were consolidated for trial by consent of all parties.

The plaintiffs allege in their respective complaints, that Harold Morse, acting for himself and the other members of his family, contracted with the defendant to transport the plaintiffs from Winston-Salem, N. C., to Elizabeth, N. J., and that it was agreed that Harold Morse should provide money for the purchase of all the gasoline and oil used on the trip, that the defendant would receive no compensation or profit out of the trip, it being understood and agreed that the trip was for the mutual pleasure and convenience of all concerned.

The defendant denies these allegations and alleges that solely as an accommodation to the plaintiffs he offered to transport the plaintiffs from Winston-Salem, N. C., to New Jersey, over the week-end, without charge to the plaintiff, Harold Morse; that the plaintiff, Harold Morse, voluntarily offered to pay for the gasoline and oil on the trip which was satisfactory to the defendant.

The plaintiff, Harold Morse, testified as follows: "I first talked with Walker at the Veterans' Club, on the night of 16 January, about making the trip to Elizabeth, N. J. . . . I had planned to go by train the next day. Four or five of us got to talking about making trips, and I mentioned I was going to New Jersey . . . the next evening, . . . and finally Raphelius Walker, Lindsay Walker and another fellow who I do not remember, and I, said the four of us would pay the expenses four ways. We planned to leave about 9:00 o'clock the next morning . . . in Mr. Walker's car. We did not leave next morning because nobody came to the dairy to pick me up. . . . I waited at the dairy until noon. . . . Mr. Walker came to my house about 2:30 that afternoon and said he did not have the money to make the trip and the other boys did not want to go, that they had changed their minds, and he would not be able to go; that he would like to make the trip, but he would not be able to go. I told him I had the money, I would go the expenses for the gas and oil up there if he would take my wife and my other baby with us. Walker said 'Yes' and asked me if it would be all right to take a friend of his with us, and I said 'Yes.' Walker then left and came back to my house about 3:00 o'clock with his friend, Louis Larimore."

According to this plaintiff's further evidence, the plaintiffs and one other Morse child, the defendant and Louis Larimore left Winston-Salem for Elizabeth, N. J., about 3:00 p.m., on Saturday, 17 January, 1948. Later in the afternoon this plaintiff purchased gas and oil for the car.

It began to rain about 6:00 o'clock and continued to rain until about 7:30, when the collision occurred near South Hill, in the State of Virginia. The defendant was driving the car at the time of the collision. The highway was three lanes wide, and the defendant was proceeding north at a speed of approximately 45 miles per hour, when his car collided with a car driven by Charlie Whittle, a colored man, proceeding south on the highway. The plaintiffs were in the back seat of the car and did not see how the accident occurred. But this plaintiff testified the defendant told him afterwards: "He looked up and saw this car coming towards him in his lane, on the right-hand side of the road, and he cut his car to the left in order to avoid a head-on collision. Mr. Walker did tell me that he was going along on his right-hand side of the highway, in his right-hand lane, and that he looked up and saw the lights on this other car coming towards him, in his lane, and he cut to the left to avoid a head-on collision."

Charlie Whittle testified: "I was driving south on U. S. Highway No. 1. I was in the center lane. I had gotten in the center lane about 75 yards or more back up the road toward the north. I was driving slow. . . . We were near the turn. . . . There were three cars that met me heading north and they went on by. Mr. Walker was the fourth car coming north. He was about 20 yards behind the last car that passed on and I didn't know whether he was intending to pass the car or what but he pulled out from behind the other car as if he was coming towards me, I tried to miss him by cutting a little further to my left. The speed of my car was less than 15 miles an hour." According to this witness he pulled his car into the center lane for the purpose of making a left turn into a dirt road which he was nearing but had not reached at the time of the collision. The defendant's car collided with the right front end of the car driven by Whittle.

The plaintiffs also offered evidence tending to show that the windshield wiper on the defendant's car was not working properly and they had requested him to get it fixed, but he neglected to do so.

At the close of plaintiffs' evidence the defendant moved for judgment as of nonsuit in each action, and the motion was granted.

Plaintiffs appeal and assign error.

Eugene H. Phillips for plaintiffs.

Womble, Carlyle, Martin & Sandridge for defendant.

DENNY, J. The plaintiffs having sustained their injuries in the State of Virginia, their right to recover therefor must be determined by the law of that jurisdiction. *Wise v. Hollowell,* 205 N. C. 286, 171 S. E. 82;

Baird v. Baird, 223 N. C. 730, 28 S. E. (2) 225; *Harper v. Harper,* and *Wickham v. Harper,* 225 N. C. 260, 34 S. E. (2), 185.

The defendant contends that at the time the plaintiffs were injured they were his guests within the meaning of the Virginia guest statute, which reads as follows: "No person transported by the owner or operator of any motor vehicle as a guest without payment for such transportation and no personal representative of any such guest so transported, shall be entitled to recover damages against such owner or operator for death or injuries to the person or property of such guest resulting from the operation of such motor vehicle, unless such death or injury was caused or resulted from the gross negligence or willful and wanton disregard of the safety of the person or property of the person being so transported on the part of such owner or operator." Virginia Code of 1942, Section 2154 (232).

The plaintiffs contend, however, that when the defendant informed Harold Morse that he could not make the trip to New Jersey because he was without funds, and consented to go only after Harold Morse agreed to purchase all the gas and oil to be used on the trip, they were not guest passengers within the purview of the Virginia statute.

In our opinion, if the plaintiffs were not guest passengers within the purview of the Virginia statute, the evidence of negligence adduced in the trial below is sufficient to carry these cases to the jury, otherwise not. We do not think the evidence is sufficient to establish "gross negligence or willful and wanton disregard of the safety" of these plaintiffs at the time of their injury, which finding is a prerequisite to a recovery under the provisions of the Virginia statute. *Hale v. Hale,* 219 N. C. 191, 13 S. E. (2) 221; *Keen v. Harmon,* 183 Va. 670, 33 S. E. (2) 197; *Woodrum v. Holland,* 185 Va. 690, 40 S. E. (2) 169; *Austin v. Austin,* 186 Va. 382, 43 S. E. (2) 31; *Hill v. Bradley,* 186 Va. 394, 43 S. E. (2) 29; *Reel v. Spencer,* 187 Va. 530, 47 S. E. (2) 359; *Miller v. Ellis,* 188 Va. 207, 49 S. E. (2) 273.

The authorities are not altogether in agreement as to what facts and circumstances are necessary to destroy the relationship of host and guest under the provisions of guest statutes, where the passenger is riding in an automobile or other motor vehicle by invitation or permission of the owner or possessor thereof.

However, the weight of authority seems to be to the effect that where the owner of a vehicle insists upon or requests that a passenger obligate himself to share the expenses of a trip, and the passenger agrees to be so obligated, the agreement will constitute such a "payment for transportation" as will defeat the relationship of host and guest. *McMahon v. DeKraay,* 70 S. D. 180, 16 N. W. (2) 308; *Fortuna v. Sangster,* 296 N. Y. 923, 73 N. E. (2) 40; *Miller v. Fairley,* 141 Ohio St. 327, 48 N. E.

(2) 217; *Sprenger v. Braker,* 71 Ohio Ap. 349, 49 N. E. (2) 958; *Pence v. Berry,* 13 Wash. (2) 564, 125 P. (2) 645; *Teders v. Rothermel,* 205 Minn. 470, 286 N. W. 353; *Smith v. Clute,* 277 N. Y. 407, 14 N. E. (2) 455; *Potter v. Juarez,* 189 Wash. 476, 66 P. (2) 290; *Beer v. Beer,* 52 Ohio Ap. 276, 3 N. E. (2) 702; *Copp v. Vanhise* (1914; C. C. A. 9th), 119 F. (2) 691; *Campbell v. Campbell,* 104 Vt. 468, 162 A. 379, 85 A. L. R. 626; *Kerstetter v. Elfman,* 327 Pa. 17, 192 A. 663.

We think the opinion in the case of *Hale v. Hale, supra,* supports this view. There *Barnhill, J.,* speaking for the Court, said: "The motorist who transports for pay or some other direct benefit is accountable as at common law, while the 'host' who transports his 'guest without payment for such transportation' is liable only for injuries caused by his gross negligence or willful or wanton misconduct. The passenger is 'a guest without payment for such transportation' when there is no contractual relationship between the parties under which the passenger was obligated to pay for the transportation and there are no sufficient facts to show that the transportation was contractually for the mutual benefit of both the passenger and the operator. *Master v. Horowitz,* 262 N. Y. 609, 188 N. E. 86, 95 A. L. R. 1182. It does not include persons who are being transported for the mutual benefit of both the passenger and the operator or owner of the car. However, the extent and nature of the reciprocal advantages which will exclude the passenger are not unlimited but are confined to certain definite relations, such as Master and Servant, and to tangible benefits accruing from the transportation—as in saving time for which he, as master, pays—facilitation of a servant's work, or the like. *Kruy v. Smith,* 144 Atl. 304; *Sullivan v. Richardson,* 6 Pac. (2) 567; *Crawford v. Foster,* 293 Pac. 841 (Cal.); *Master v. Horowitz, supra; Chaplowe v. Powsner,* 175 Atl. 470 (Conn.), 95 A. L. R. 1177."

In the case of *McMahon v. DeKraay, supra,* which was an action to recover for personal injuries sustained in Arkansas, the appeal presented the identical question now before us. The Arkansas statute, like the Virginia statute, excluded recovery except for gross negligence when the guest was transported "without payment for such transportation." The Supreme Court of South Dakota said: "Reason, and these authorities, have induced the conclusion that notwithstanding the fact that a trip may have a social complexion, if the owner of the vehicle insists upon a prearrangement by which his passenger friend is obligated to share the expense, the provision thus made is for such a payment for the transportation as will defeat the relationship of host and guest under the Arkansas statute."

In *Smith v. Clute, supra,* the Court of Appeals of New York, in considering whether or not a statute of the State of Montana, permitting a guest to sue only for gross negligence, precluded the plaintiff from recov-

ery, notwithstanding the existence of an agreement which required the plaintiff to pay her pro rata part of the expenses on a trip to California, the Court said: "The question whether sharing expenses of an automobile trip results in such benefit to the owner or operator as to take a passenger out of the purview of a guest statute has been before the courts in a number of cases. Where there is no fixed understanding or agreement for sharing expenses, but merely a likelihood or a general statement by the passenger that he will pay his share, it is not sufficient . . ., and this court has so held. . . . On the other hand, where there is a definite agreement, as in the case at bar, a number of states have permitted recovery for ordinary negligence, holding the passenger who contributed toward the expenses was not a guest within the purview of the statute." And the court held the plaintiff was not a guest within the purview of the Montana statute.

Likewise, the same court, in considering the Virginia statute in *Fortuna v. Sangster, supra,* held that the evidence in the case showed there was a fixed agreement between the passengers in the automobile involved and the owner and driver thereof, to pay a given proportion of the expenses of the trip which took such passengers "out of the class of gratuitous guests within the meaning of the Virginia statute. Motor Vehicle Code of Virginia, Sec. 2154, subsec. 232."

The authorities seem to hold uniformly that the word "guest" within the meaning of the various automobile guest statutes, denotes one whom the owner or possessor of an automobile or other vehicle permits or invites to ride with him without receiving any remuneration or other benefit therefor, except such slight benefits as may be classed as mere courtesies. These authorities also hold that the voluntary offer or insistence of a guest to share the expenses of an automobile trip, or the voluntary purchase of gas and oil by such guest while on a trip, will not destroy the relationship of host and guest within the meaning or purview of automobile guest statutes. Such voluntary contributions to the expense of an automobile trip, will not ordinarily be construed as compensation or payment for transportation, but will be considered mere acts of courtesy. *Hale v. Hale, supra; Fiske v. Wilkie,* 67 Cal. Ap. (2) 440, 154 P. (2) 725; *Brady v. Harris,* 308 Mich. 234, 13 N. W. (2) 273; *McDougald v. Coney,* 150 Fla. 748, 9 So. (2) 187; *Bushouse v. Brow,* 297 Mich. 616, 298 N. W. 303; *McCown v. Schrom,* 139 Neb. 738, 298 N. W. 681; *Mayer v. Puryear* (1940 C. C. A. 4th), 115 F. (2) 675; *Stephen v. Spaulding,* 32 Cal. App. (2) 326, 89 P. (2) 683; *Elliott v. Benner,* 146 Kan. 827, 73 P. (2) 1116; *Vance v. Grohe,* 223 Iowa 1109, 274 N. W. 902; *Master v. Horowitz, supra.*

Each case must be decided in the light of its own facts. Here the evidence tends to show that the defendant was anxious to make this trip, but

was without sufficient funds to do so. Whether or not the plaintiff, Harold Morse, and the defendant entered into an agreement which obligated Morse to purchase the gas and oil to be consumed on the trip and such agreement was made a condition or consideration, without which the defendant would not have undertaken the trip, is a question for the jury. If such a contract was made, we think payment of the gas and oil bills would constitute "payment for transportation" within the purview of the Virginia guest statute.

We deem it unnecessary to discuss and distinguish the additional authorities cited by the appellee.

The motion for judgments as of nonsuit should have been overruled.

Reversed.

DEVIN, J., concurring: I concur in the well-considered opinion written for the Court by Justice Denny that the evidence shows the plaintiffs on this occasion were not "guests without payment" for the transportation, within the meaning of the Virginia statute, and that plaintiffs were entitled to go to the jury on the issue of ordinary negligence.

However, while it thus becomes immaterial on this appeal, I desire to express my disagreement with the statement in the opinion that, in the absence of such showing as to the status of the plaintiffs in relation to the transportation, the evidence was insufficient to be submitted to the jury on the question of gross negligence which, otherwise, would have been essential to the maintenance of plaintiffs' action.

The plaintiffs' evidence tended to show that the plaintiffs were injured as result of a collision between the defendant's automobile in which plaintiffs were riding, and an automobile driven by the witness Whittle. The collision occurred on the night of 17 January, 1948, on the North-South U. S. Highway No. 1 near South Hill, Virginia. At this place the highway is surfaced with concrete 30 feet wide divided by white lines into three traffic lanes, and is substantially level and straight. At the time it was raining and had been for some time, and the windshield wiper on defendant's automobile was not working properly, blurring the driver's vision. Defendant's automobile was proceeding north on the east lane at a speed of 45 miles per hour, behind three other automobiles proceeding in the same direction. The automobile driven by Whittle was proceeding south in the center lane at a speed of 10 to 15 miles per hour, with headlights burning, and had been in that lane for 75 yards, Whittle intending to turn off to the left into a side road 33 yards south of the point where the collision occurred. The three automobiles in front of the defendant passed Whittle, and then suddenly the defendant turned his automobile with unchecked speed to his left into the center lane and ran almost head-on into Whittle's car. This was done so quickly and when so close

that Whittle had only time to "cut a little" to his left, and the right side of defendant's automobile struck the right front of Whittle's automobile. The Whittle car stopped on the highway about where it was struck, heading southwest, and the Walker car after the impact ran across and beyond the highway 60 feet and turned completely around heading south. Whittle testified, "I didn't know whether he (defendant) was intending to pass the other cars or what, but he pulled out from behind the other cars" into the center lane in front of witness' car and came "straight into me."

The defendant did not testify and offered no evidence. The picture thus presented by plaintiffs' evidence when viewed in the light most favorable for them shows the defendant under these circumstances of night, rain, wet pavement, and much traffic, with his vision obscured and blurred by rain on his windshield, driving at a speed of 45 miles an hour from the right-hand lane across the white line into the center lane in the face of a lighted oncoming automobile already in that lane (in violation of the Virginia statute), and driving "straight into" a head-on collision with it.

In my opinion this evidence would have been sufficient to have required submission of the question of gross negligence to the jury. According to the decisions of the Virginia Supreme Court which must be regarded here as authoritative in the interpretation of a Virginia statute, the distinction between ordinary and gross negligence is one of the degree of inattention, both differing from willful and intentional wrong. *Wright v. Osborne,* 175 Va. 442, 9 S. E. (2) 452; *Thornhill v. Thornhill,* 172 Va. 553, 2 S. E. (2) 318. "Whether the conduct of an automobile driven under given circumstances constitutes gross negligence is generally a question of fact for the jury." *Smith v. Turner,* 178 Va. 172, 16 S. E. (2) 370. In that case the defendant drove his car at excessive speed across the path of the oncoming Smith car and without seeing or heeding its approach. It was held the question of gross negligence should have been submitted to the jury, and nonsuit was reversed.

It seems to be well settled that gross negligence is something more than simple or ordinary negligence and something less than willful, wanton and reckless conduct. It falls short of being such reckless disregard of probable consequences as is equivalent to a willful and intentional wrong. *Thomas v. Snow,* 162 Va. 654, 174 S. E. 837; *Boggs v. Plybon,* 157 Va. 30, 160 S. E. 77, 80. "What might be deemed ordinary care in one case may under different surroundings and circumstances be gross negligence. The policy of the law has relegated the determination of such questions to the jury under proper instructions from the court." *Grand Trunk Ry. Co. v. Ives,* 144 U. S. 408 (417); *Boggs v. Plybon, supra; Pool v. Kelly,* 173 S. E. 537 (541); *Mariotta v. Aycock,* 174 S. E. 831; *Yonkers v. Williams,* 192 S. E. 753: *Farfour v. Fahad,* 214 N. C. 281 (287). The

reference in *Wise v. Hollowell,* 205 N. C. 286, to wanton or culpable negligence which was the issue submitted in that case, does not affect the question of gross negligence under the present Virginia statute.

What constitutes gross negligence under this statute, when considered in relation to the varying circumstances in each case presented, has been discussed in numerous recent decisions by Virginia's highest court. These, I think, support the view I have here expressed as to the evidence in this case. *McGeehee v. Perkins,* 188 Va. 116, 49 S. E. (2) 304 (decided Sept. 1948); *Crew v. Nelson,* 188 Va. 108, 49 S. E. (2) 326 (decided Sept. 1948); *Masters v. Cardi,* 186 Va. 261, 42 S. E. (2) 203; *Smith v. Turner,* 178 Va. 172, 16 S. E. (2) 370. See also *Pepper v. Morrill,* 24 F. (2) 320; *Campbell v. Costin,* 293 Mass. 225.

I concur in the view that the evidence in the case at bar warrants its submission to the jury on the issue of ordinary negligence, but I venture to express the opinion that the record here also affords evidence of gross negligence worthy of the consideration of the jury.

As the case goes back for trial on all the evidence, in the event defendant's evidence should throw a different light on the relationship of the parties to the transportation, the question of the degree of negligence necessary to be shown may become important.

I am authorized to say that *Justice Seawell* and *Justice Ervin* join in this opinion.

C. W. MYERS v. S. W. ALLSBROOK.

(Filed 4 February, 1949.)

1. Pleadings § 3a—

The right to recover is determined by the allegations of the complaint.

2. Contracts § 5—

Forbearance to exercise legal rights is sufficient consideration for a promise given to secure such forbearance even though the forbearance is in respect to the liability of a third person rather than that of the promisor.

3. Frauds, Statute of, § 5—

The fact that the promise to answer for the debt or default of another is supported by consideration does not take such promise out of the statute of frauds when the original obligation is not extinguished by the new promise and the consideration for the promise moves to the original debtor and not to the promisor.

4. Same—Complaint held not to allege that consideration for promise moved to promisor and nonsuit was proper.

The evidence was to the effect that a check given by an automobile retailer to plaintiff in payment of a car was returned unpaid, that plain-

tiff went to the debtor's place of business and that defendant, who was the debtor's brother, and who was handling the business during debtor's illness, told plaintiff to redeposit the check in about two weeks and that if it were not then paid by the bank he would send plaintiff a cashier's check for part and a personal check for the balance. It was alleged that after the debtor's death the defendant and two others purchased the business, but it was not alleged that at the time of the promise defendant contemplated purchasing the business or any interest therein. *Held:* While the evidence is sufficient to justify a finding that defendant personally promised to pay the check if his brother's funds were insufficient, and plaintiff's forbearance to take any action on the check for a period of two weeks was sufficient consideration for the promise, there is no allegation that the defendant made the promise to obtain any personal advantage from such forbearance, and therefore the promise comes within the statute of frauds, G.S. 22-1, and defendant's motion to nonsuit was properly allowed.

5. Same—

While the statute of frauds does not apply to an oral promise to pay the debt of another out of money or property which the debtor has placed in the hands of the promisor for the purpose of paying the debt, evidence tending to show that the debtor entrusted certain funds to the promisor for the purpose of carrying on the debtor's business, without evidence that he entrusted the funds for the specific purpose of paying debtor's debts, is insufficient to bring the promise within this rule.

APPEAL by plaintiff from *Edmundson, Special Judge,* at April Term, 1948, of FORSYTH.

The complaint stated a cause of action against the defendant for breach of a contract to pay the plaintiff a check for $4,175 originally issued to plaintiff by a third person, Joe Allsbrook, trading as "City Auto Service." The answer denied the making of the contract, and specifically pleaded the statute of frauds as contained in G.S. 22-1 as a defense.

To sustain the complaint, the plaintiff presented testimony tending to establish the matters set out below.

Before the events giving rise to this litigation, the plaintiff, C. W. Myers, a wholesaler of motor vehicles at Winston-Salem, North Carolina, had many business dealings with Joe Allsbrook, who retailed automobiles and automobile accessories and supplies in Scotland Neck, North Carolina, under the assumed name of "City Auto Service."

On 26 April, 1947, the plaintiff sold Joe Allsbrook a Dodge for $2,275 and a Chevrolet and a Ford for $4,175, taking therefor separate checks for such sums drawn by Joe Allsbrook in his trade name of "City Auto Service" on the Bank of Halifax at Scotland Neck. It was expressly agreed that the sale of the Chevrolet and Ford was a cash transaction, but on 14 May, 1947, the check for $4,175 covering the sale price of those cars was returned to the plaintiff "unpaid." About the same time, the plaintiff learned that the Bank of Halifax had declined to honor the check for $2,275.

On 16 May, 1947, plaintiff went to Scotland Neck "to try to get either the money or the cars back." Upon arrival there, he ascertained that Joe Allsbrook was seriously ill in a hospital, and that his brother, S. W. Allsbrook, the defendant herein, was actively managing the business of "City Auto Service" for Joe Allsbrook "while he was away."

The plaintiff did not find any of the vehicles he had sold to Joe Allsbrook. He was informed by defendant, however, that "one of the cars had been sold a day or two before" and "the money was deposited in the bank."

Defendant advised plaintiff that he "was looking after the business for his brother," who was in "bad shape," and that he would pay the $2,275 check immediately, if the plaintiff had it with him. The defendant offered to sell the plaintiff "tires or batteries or anything he had there to pay the $4,175 check that day," but the plaintiff did not avail himself of this proposition.

Upon being apprised that the $2,275 check was in transit unpaid between the Bank of Halifax and the plaintiff's bank in Winston-Salem, the defendant told the plaintiff "to return such check and it would be paid" at once. He asked plaintiff to put the check for $4,175 "back in the bank in about two weeks" and assured plaintiff "that when the $4,175 check came in . . . he'd pay all of it or he'd send plaintiff a cashier's check for part of it and a personal check wrote on the special account for the rest of it." The defendant showed the plaintiff a "bank statement, where he had about sixteen or seventeen thousand dollars at the time, but said that was on a special account."

The defendant called the Bank of Halifax by telephone and told the officers of the bank in the presence of plaintiff to pay the $2,275 check immediately upon its return, and to pay the $4,175 check in full when it was again presented "if the money was in there to pay the whole check."

The defendant told the plaintiff that he "owned two or three good farms, and ten or twelve houses in Scotland Neck" and said: "Don't worry about that $4,175 check. I will personally see that that is paid."

All communications and transactions between plaintiff and defendant were oral.

The check for $2,275 was duly paid on its second presentation to the Bank of Halifax. Plaintiff held the $4,175 check for "ten days or two weeks and had it deposited again for collection." On 31 May, 1947, it was returned to plaintiff unpaid the second time.

The drawer, Joe Allsbrook, died 6 June, 1947, and thereafter plaintiff filed a verified claim for the amount of the $4,175 check with the administrator. But the plaintiff has "never received anything from anybody on the check." Subsequent to the death of Joe Allsbrook, the defendant

and two other persons purchased from his administrator the business known as "City Auto Service."

In addition to the evidence stated above, the plaintiff gave this testimony: "Mr. Allsbrook told me that he and his brother and some other gentlemen had signed a note for $25,000 at the bank." The record does not explain the relation of this particular evidence to the controversy. Counsel for plaintiff indulge in the speculation that it reveals the source of the "special account" mentioned at the trial. No reference is made to the note or to anything connected therewith in any of the pleadings.

The legal battle between the parties on the trial was waged around the question as to the effect of the evidence, the defendant contending that in any event it was not sufficient, under the statute of frauds, to bind him. The court was of this view, and entered a compulsory judgment of nonsuit under G.S. 1-183 at the close of plaintiff's evidence. The plaintiff excepted to this ruling, and appealed.

Felix L. Webster and H. Bryce Parker for plaintiff, appellant.

Deal & Hutchins, Weston P. Hatfield, and Wade H. Dickens for defendant, appellee.

ERVIN, J. The defendant asserts that the nonsuit might well be sustained on the ground that the evidence shows that in his transactions with plaintiff he acted solely as agent for Joe Allsbrook, a disclosed principal; that any promise he may have made to plaintiff to pay the check for $4,175 was simply a promise to make payment of a debt of his principal out of assets of his principal subject to his control as agent; and that both he and the plaintiff understood that he did not undertake to assume any obligation of his principal as a personal liability. *Way v. Ramsey,* 192 N. C. 549, 135 S. E. 454; *Davis v. Burnett,* 49 N. C. 71, 67 Am. Dec. 263; *McCall v. Clayton,* 44 N. C. 422; *Meadows v. Smith,* 34 N. C. 18. To be sure, the testimony is susceptible of this construction.

Interpreted most favorably for plaintiff, however, the evidence is sufficient to justify an alternative finding by a jury that the defendant promised to pay to plaintiff the pre-existing obligation of Joe Allsbrook to plaintiff evidenced by the $4,175 check in consideration of the plaintiff extending the time for the payment of such obligation for "about two weeks" and refraining from taking legal action against Joe Allsbrook or his property upon such obligation during such period. But since the promise shown by this view of the testimony was made to plaintiff by defendant by word of mouth only, we are confronted on this appeal by the determinative question of whether the promise constituted "a special promise to answer the debt, default or miscarriage" of Joe Allsbrook under the section of the statute of frauds prescribing that "no action shall

be brought whereby . . . to charge any defendant upon a special promise to answer the debt, default or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party charged therewith or some other person thereunto by him lawfully authorized." G.S. 22-1.

In our opinion, this question must be answered in the affirmative as a matter of law under the pleadings and the testimony. It is to be noted that the creation of the debt of Joe Allsbrook to plaintiff antedated the making of the promise of the defendant to plaintiff. Since there was neither allegation nor proof of any agreement that the debt was extinguished by the promise, the liability of Joe Allsbrook to the plaintiff remained. Indeed, the language used by the defendant to plaintiff clearly manifested that the defendant had no intent to assume any independent duty of payment making the debt his own irrespective of the liability of Joe Allsbrook. His promise to the plaintiff was, in effect, that he would personally see that the check in controversy was paid in the event the assets of Joe Allsbrook proved insufficient to satisfy it. Thus, he simply superadded his promise to the antecedent obligation of Joe Allsbrook, rendering it collateral to the same.

It is elementary that the plaintiff must recover, if he recovers at all, on the cause of action made out by his complaint. *Barron v. Cain,* 216 N. C. 282, 4 S. E. (2) 618; *McCollum v. Chisholm,* 146 N. C. 18, 59 S. E. 160; *Simpson v. Simpson,* 107 N. C. 552, 12 S. E. 447; *Willis v. Branch,* 94 N. C. 142; *Melvin v. Robinson,* 42 N. C. 80. The complaint contains no allegation to the effect that the promise of the defendant was made for his own benefit or that he had any personal, immediate, or pecuniary interest in the transaction. While it is alleged "that after the death of Joe Allsbrook, the defendant and two other persons bought the business of Joe Allsbrook known as City Auto Service, and the defendant and the two other persons are continuing the operation of said business," it is nowhere suggested either in the pleadings or in the testimony that the defendant ever contemplated purchasing the business or any interest therein at any time during the life of Joe Allsbrook.

The only consideration for the oral promise of the defendant alleged in the complaint and shown by the evidence was the agreement and act of the plaintiff extending time for the payment of the check of Joe Allsbrook for "about two weeks" and forbearing to take legal action against Joe Allsbrook or his property upon such check during that period.

Undoubtedly, a forbearance to exercise legal rights is a sufficient consideration for a promise made on account of it in the general law of contracts. *Chemical Co. v. McNair,* 139 N. C. 326, 51 S. E. 949; *Lowe v. Weatherley,* 20 N. C. 353. This is true even when the forbearance

is in respect to the liability of a third person rather than that of the promisor. *Bank v. Bridgers,* 98 N. C. 67, 3 S. E. 826, 2 Am. S. R. 317.

But the mere fact that there may be a new consideration for the oral promise of a defendant to pay the subsisting debt of another is not sufficient of itself to take the promise out of the prohibition of the statute of frauds. "To say that any consideration will take a promise based thereon out of the statute is to make the statute useless. For if there is no consideration the promise is invalid without the statute. The statute is aimed at what were valid contracts; that is to say, it makes invalid contracts not in writing which would otherwise have been valid." *Martin v. Harrington,* 174 Mo. A. 707, 161 S. W. 275. See, also, in this connection, *Stanly v. Hendricks,* 35 N. C. 86. Here, the forbearance of the plaintiff was a benefit to the debtor, Joe Allsbrook, and a detriment to the plaintiff. Nevertheless, it was not beneficial to the defendant. This statement is applicable to this phase of the case: "A promise to a creditor to pay his debtor's debt, the debtor not being discharged by the arrangement, in consideration of the creditor giving time to the debtor, or forbearing to sue him, or staying, or discontinuing a suit against him, or forbearing to levy an attachment or execution, on the debtor's property, or suspending proceedings on an execution against the debtor, the lien of the execution remaining unimpaired, or forbearing to evict the debtor from premises leased by him, or to take out administration on the estate of the original debtor, is within the statute of frauds for the reason that such considerations are not regarded as directly beneficial to the promisor. The rule is different where the creditor's forbearance results in a direct benefit to the promisor, which was the object of the promise, as where the promisor has an interest in the property which will be prejudiced by the bringing or continuing of the adverse proceedings. Mere forbearance without benefit to the promisor therefrom may be a sufficient consideration to uphold the promise as a contract, although it may be insufficient to take it out of the operation of the statute." 27 C. J., Statute of Frauds, section 33.

This passage is in complete accord with *Peele v. Powell,* 156 N. C. 553, 73 N. E. 234, and *Gennett v. Lyerly,* 207 N. C. 201, 176 S. E. 275, where the relevant rules are thus stated. "Where the promise is for the benefit of the promisor, and he has a personal, immediate, and pecuniary benefit in the transaction, or where the promise to pay the debt of another is all or part of the consideration for property conveyed to the promisor, or is a promise to make good notes transferred in payment of property, the promise is valid although in parol. If, however, the promise does not create an original obligation, and it is collateral, and is merely superadded to the promise of another to pay the debt, he remaining liable, the promisor is not liable, unless there is a writing; and this is true whether made at the time the debt is created or not."

We have not overlooked the contention of the plaintiff that this case is governed by the principle that the statute of frauds does not embrace an oral promise to pay the debt of another out of money or property which the debtor has placed in the hands of the promisor for the purpose of paying his debts. *Dale v. Lumber Co.*, 152 N. C. 651, 68 S. E. 134, 28 L. R. A. (N. S.) 407; 49 Am. Jur., Statute of Frauds, section 87; 37 C. J. S., Statute of Frauds, section 18. The complaint does not present this theory. But even if it did, the plight of the plaintiff would not be improved. According to the testimony, Joe Allsbrook did not put the so-called "special account" or any other effects in the hands of the defendant for the specific purpose of paying his debts. He entrusted his funds and property to defendant to the end that defendant, acting as his agent, might carry on his business.

The considerations stated require an affirmance of the compulsory judgment of nonsuit. It is so ordered.

Judgment affirmed.

EURENE GILKEY AND LOIS GILKEY v. J. D. BLANTON AND RALPH L. MORRIS.

(Filed 4 February, 1949.)

1. Judgments § 30—

Where plaintiffs, in an action to restrain foreclosure under the power contained in a deed of trust, give notice of appeal from successive judgments entered upon the hearing of successive temporary restraining orders, but failed to perfect appeal therefrom, the matters therein adjudicated may not be again presented by appeal from judgment confirming sale of the property by the commissioner appointed by the court.

2. Mortgages § 30d—

In a suit to restrain foreclosure under power of sale, plaintiffs' contention that the personal representative of one of the original mortgagors is a necessary party should be made in apt time, and plaintiffs will not be allowed to wait until after sale and confirmation and present the matter upon appeal from judgment of confirmation.

WINBORNE and ERVIN, JJ., took no part in the consideration or decision of this case.

PLAINTIFF'S appeal from *Clement, J.*, June Term, 1948, MCDOWELL Superior Court.

William J. Cocke for plaintiffs, appellants.

Proctor & Dameron for defendants, appellees.

PER CURIAM. The defendant in this case undertook to foreclose a mortgage made by the plaintiffs Eurene and Lois Gilkey, and their mother, Sallie E. Gilkey, now deceased, by exercise of the power of sale contained therein. The mortgage purports to have been made to secure the indebtedness of the mortgagors to the said Blanton in the sum of $23,265.80 under a judgment of the Superior Court of McDowell County, and a further sum of $17,734.20 for additional moneys alleged to have been advanced to them, represented in a promissory note in the sum of $41,000, upon which 71 payments of $105 each had been made.

Foreclosure proceedings under the power of sale were commenced 11 September, 1946, and the property advertised for sale on 14 October, 1946. On 12 October, 1946, the plaintiffs brought an action to restrain the sale and to have the Superior Court "take jurisdiction of the parties to this action and the property referred to and hear and determine the rights of the respective parties therein to the end that the indebtedness of the plaintiffs to the defendant may be paid out of said property without sacrificing the same unnecessarily." The temporary order of Judge Nettles restraining the sale was made returnable before Judge Gwyn at Burnsville, on the 21st day of October, 1946. But because this term of court was canceled the order was continued to be heard in the Superior Court of Rutherford County in November, 1946; and was again continued at the request of counsel for the plaintiffs, to be heard in Hendersonville before Judge Gwyn on 26 November, 1946. Meantime the defendant in that case filed an answer containing counterclaim which appears to have been served on the plaintiffs on 5 November, 1946, in which the defendant Blanton asserted his title and ownership to one-third undivided interest in the properties concerned.

On 26 November, 1946, Judge Gwyn signed an order appointing a receiver to collect the rents from the property in question and hold the same subject to the orders of the court.

The cause came on for a hearing at the February Term, 1947, of McDowell County before Judge W. G. Pittman and he entered judgment on the pleadings and by default, the plaintiffs having filed no reply to the counterclaim served on them and not being present in court, or represented by counsel, at the time the case was called.

Finding facts, the court entered judgment against the plaintiffs, Eurene and Lois Gilkey, for the amount of the principal and interest due upon the note, and appointed Ralph L. Morris as Commissioner to sell the property described in said deed of trust for the purpose of satisfying the indebtedness; however, ordering the Commissioner not to advertise or offer the said property for sale before 15 April, 1947.

Sometime after the signing of the judgment, about an hour later, the plaintiffs came into court with their counsel, Mr. Guy Weaver of Ashe-

ville, and moved orally and in open court to set the judgment aside. After a full hearing the court overruled the motion. The plaintiffs thereupon appealed, but did not perfect the appeal.

The property described in the deed of trust was again advertised for sale under this judgment 31 May, 1947; and on the day of the sale plaintiffs obtained another restraining order from the Superior Court and prevented the sale, again filing written motion to set aside the judgment rendered by Judge Pittman at the February 1947 Term; and the defendant filed answer.

The motion was heard by Judge Patton at the July Term of the Superior Court of McDowell County and a judgment was entered denying the motion and again ordering the property to be sold by the Commissioner to satisfy the indebtedness. The plaintiffs gave notice of appeal, but no appeal was perfected.

The property in question was again advertised and sold on 12 December, 1947, and the sale was duly reported to the court.

The matter again came on for hearing at the February Term, 1948, of the Superior Court of McDowell County before Judge Patton, upon the Commissioner's report of said sale; and after a full hearing Judge Patton entered an order declining to confirm said sale and ordering that the property in question be subdivided and sold in separate parcels as set out in said order.

The property was again advertised for sale in compliance with the judgment or order entered at the February 1948 Term, the sale being set for 10 April, 1948. On 29 March, 1948, an order was served on the defendants requiring them to show cause why such sale should not be restrained and enjoined. This order was made returnable before Judge Patton on the 8th day of April, 1948. No restraining order was issued and the property was sold.

The plaintiffs at that time filed a petition asserting that the personal representative of Sallie E. Gilkey, deceased, was a necessary and indispensable party to the action. The defendants filed an answer to the petition of the plaintiffs and the matter came on again for a hearing at the March-April 1948 Term of the Superior Court of Transylvania County at which time the hearing and said order to show cause was continued to the June Term, 1948, of McDowell County. Judge Clement then entered judgment confirming the sale of the property made under the Commissioner, and from this judgment the plaintiffs appealed.

Upon the hearing of this appeal the plaintiffs demurred *ore tenus* to the counterclaim of the defendant Blanton contained in his original answer.

Upon this record the plaintiffs cannot now be permitted to bring up questions heretofore raised by them, settled by the court and made the

subject of appeals which were never perfected. Of this character is the demurrer to the counterclaim made by the present defendant in his original answer that the record shows to have been served on the plaintiffs and to which they took no action.

Supposing, however, that the appeal brings up the question whether Sallie Gilkey, mother of the plaintiffs and one of the original mortgagors, is a necessary party, that, too should have been presented in apt time to the court below. There is no such necessity now apparent in that part of the proceeding or judgment which is now before us on appeal.

The judgment of the court below is

Affirmed.

WINBORNE and ERVIN, JJ., took no part in the consideration or decision of this case.

MRS. MYRTLE JACKSON v. HUDSON-BELK COMPANY, INC.

(Filed 10 November, 1948.)

APPEAL by plaintiff from *Harris, J.*, at June Civil Term, 1948, of WAKE.

Civil action to recover damages for personal injury—allegedly sustained by plaintiff as result of actionable negligence of defendant,—when, as she alleges, on 6 February, 1947, after she had entered the store of defendant in the city of Raleigh, North Carolina, "as a customer to make purchases," and was in the act of descending the stairway leading from the main floor to the basement, provided by defendant for use of its customers in entering the basement to make purchases there, "her foot suddenly slipped from under her as she stepped on orange peel, popcorn and other rubbish" which defendant had negligently permitted to accumulate on said steps,—and fell to her injury and great damage.

From judgment as of nonsuit entered at close of plaintiff's evidence, she appeals to Supreme Court and assigns error.

E. D. Flowers for plaintiff appellant.

Wilson & Bickett for defendant appellee.

PER CURIAM. The correctness of the ruling of the trial court in allowing motion for judgment as in case of nonsuit finds support in the case of

Pratt v. Tea Company, 218 N. C. 732, 12 S. E. (2) 242, under authority of which the judgment below is

Affirmed.

CAROLINA STANDARD CORPORATION v. NICHOLAS W. DOCKERY AND JOHN C. DOCKERY, TRADING & DOING BUSINESS AS SERVICE FARM EQUIPMENT COMPANY.

(Filed 1 December, 1948.)

APPEAL by defendants from *Warlick, J.,* at March Term, 1948, of RICHMOND. No error.

Pittman, McLeod & Webb for plaintiff, appellee.

George S. Steele, Jr., for defendants, appellants.

PER CURIAM. Plaintiff instituted action to recover for building materials sold and delivered to the defendants, in the sum of $369.34. The defendants admitted plaintiff's claim, but set up a counterclaim for damages for alleged breach of contract on the part of plaintiff in regard to a trailer which plaintiff had engaged defendants to build. Plaintiff had canceled the contract, and an issue of fact was raised and litigated whether the defendants had "commenced work on the trailer at the time of the cancellation of the contract." The jury answered the issue in favor of the plaintiff. There was evidence sufficient to support the verdict. An examination of the record, in the light of the exceptions noted by the defendants, fails to show that the trial court committed error which would warrant the award of a new trial. Accordingly the judgment on the verdict is

Affirmed.

APPENDIX

STATE Ex REL. OWENS v. CHAPLIN.

(Filed 4 June, 1948.)

1. Quo Warranto § 2—

Admissions by relator that each challenged elector was duly registered and that his absentee ballot was in proper form raise a presumption of correctness, and the burden is on relator to show the contrary.

2. Same: Evidence § 17—

The relator is bound by the testimony of electors called by relator as witnesses.

3. Same—

Where relator having the burden of establishing alleged nonresidence of electors in the face of his admissions that they were properly registered and that their absentee ballots were in proper form, calls the electors as witnesses, their testimony disclosing that they were residents of the county at the time of registering and voting is binding on relator, and there being no evidence *contra*, the evidence fails to support the findings of the referee or the trial court that they were disqualified on the ground of nonresidence.

4. Elections § 2f—

The fact that an elector's intention to return to the county of his domicile is indefinite does not deprive him of residence in the county for the purpose of voting, it being necessary in order to lose the old residence that he intend to make his new place of abode his permanent domicile so that a new residence is there established. G. S., 163-25 (f).

5. Same—

The word "residence" as used in G. S., 163-25 (f), means domicile as distinguished from a temporary dwelling-place.

6. Elections § 11b—

The certificate of the notary establishes *prima facie* that the electors had been sworn as required by statute when they signed the affidavits accompanying their absentee ballots. G. S., 10-4.

7. Quo Warranto § 2—

Doubtful statements of electors on the question of whether they had been sworn by the attesting officer when they signed the statutory affidavits accompanying their absentee ballots is insufficient to overcome the presumption of regularity arising from the certificate of the notary, the stipulation of the parties that their absentee ballots were in proper form, and the testimony of the attesting officer called as a witness by relator, and therefore the evidence is insufficient to justify a finding that relator had established their disqualification.

8. Quo Warranto § 2—

Upon challenge of absentee ballots, the question is the right of the challenged electors to vote and not the conduct of election officials, and if permissible, misconduct on their part will excuse rather than condemn any irregularity on the part of the electors.

PETITION by relator, Delmar C. Owens, to rehear this case, reported in 228 N. C., 705.

The Justices to whom the petition was referred, filed the following memorandum in passing upon the petition:

John A. Wilkinson and H. S. Ward for petitioner.

STACY, C. J., and SEAWELL, J., considering the petition to rehear.

The appeal was originally argued here on the assumption that all differences in the evidence, actual or inferential, were exclusively for the referee and the trial court. The petition to rehear seeks to perpetuate this assumption. They both overlook the basic error in the proceeding.

In the first place, the relator "concedes that each of the voters," whose vote is here attacked, "was duly registered in Tyrrell County and in the precinct in which he voted in the 1946 election." (R. 270.) And further, "that each of the affidavits of said voters was on a regular printed form, in the language of the statute and approved on the ballot envelope as required by law; that each affidavit bore the signature of the voter, the signature of the attesting officer, the seal of said attesting officer, the date executed and the County and State where executed in the places indicated on said affidavit form." (R. 139.)

We start, then, with an admission on the part of the relator that each challenged elector was "duly registered in Tyrrell County" and that his absentee ballot was in proper form. This concession of regularity gives rise to a presumption of correctness. *Omnia praesumuntur rite esse acta.* The burden, therefore, was not upon the electors to establish their right to vote, but upon the relator to show the contrary. Perhaps the case might have been allowed to rest just here on respondent's motion to dismiss as in case of nonsuit. However, the opinion of the Court deals with all the exceptions.

Secondly, the relator called the electors as witnesses to prove their own disqualifications. On the crucial questions, *i.e.,* residence at the time of voting, and being sworn, they testified against the relator, and he is bound by their testimony. *S. v. Todd,* 222 N. C., 346, 23 S. E. (2d), 47; *Sawrey v. Murrell,* 3 N. C., 397. They were quite specific as to their residence and in most cases of being sworn when they voted, especially on cross-examination, and there is nothing on the record to overbalance their testimony or to show otherwise. *S. v. Cohoon,* 206 N. C., 388, 174 S. E., 91. In several instances they were corroborated, and in others supported, by the attesting officer as to their being sworn. The relator was still struggling with the laboring oar at the close of his evidence. The respondent offered none.

The following examples will suffice as typical of those mentioned in the petition to rehear:

1. Mrs. J. M. Bateman, one of the challenged electors, testified as follows: "We left this county and went to Washington (County) and rented a house there about five years ago. Q. Did you register in Plymouth? A. Yes, sir, I did, about two or three years ago."

The relator contends that this is some evidence to support the finding of nonresidence and disqualification by the referee, which was approved by the trial court.

Note, however, what she says in explanation: "Every time I went up town they were after me to register, and I registered to get clear of them. I never voted in Washington County. My husband was in the Army at that time. (He enlisted from Tyrrell County.) I consider this my home. The only reason I was there was because of the shortage of houses in Tyrrell County; he couldn't find a house here and I went over there."

This undisputed testimony of the witness who says that she considered Tyrrell County her home, is binding on the relator. She was his witness. He vouched for her veracity and worthiness of belief. *S. v. Freeman,* 213 N. C., 378, 196 S. E., 308; *S. v. Taylor,* 88 N. C., 694.

Furthermore, the statutory definition of residence, G. S., 163-25, subsec. "f," is not as stringent against the absentee elector as the relator seems to think. This section provides that "If a person remove to another state or county within this state, with the intention of remaining there an indefinite time *and making such state or county his place of residence* (italics added), he shall be considered to have lost his place of residence in this state or county *from which he has removed* (italics added), notwithstanding he may entertain an intention to return at some future time." To square this with the Constitution, it is necessary that the word "residence," as here used, should be construed in the sense of domicile, denoting a permanent abode, as distinguished from a temporary dwelling-place. *Hannon v. Grizzard,* 89 N. C., 115. Indeed, such appears to accord with the legislative intent. *Jenkins v. Board of Elections,* 180 N. C., 169, 104 S. E., 346, 14 A. L. R., 1247. Where one's domicile is, there will his voting residence be also. *S. v. Williams,* 224 N. C., 183, 29 S. E. (2d), 744.

2. J. F. White, another of the challenged electors, testified as follows: "Q. You had not made up your mind definitely about coming back? A. I had in one way and in another I hadn't. I had thought about coming back. I had thought about not coming back also; depends on whether I could get work. I was considering the possibility of coming back, but had not definitely made up my mind."

On this evidence the referee found that the elector was a nonresident and the trial court affirmed.

Nevertheless, the foregoing was only a part of his testimony, as witness the following: "In November, 1946 (at time of voting), it was my intention to return to Tyrrell County. . . . I have always considered it

my home here in Tyrrell. . . . I voluntarily enlisted in the armed forces. . . . I gave Tyrrell County as the county in which I lived. . . . I came home in Tyrrell County to my father and mother upon being discharged. I later registered and voted in the same precinct. . . . I have always considered and counted myself a citizen of Tyrrell County. . . . I wouldn't think there would be any objection to my voting in the county in which I lived after having served my country for four years."

As this evidence is undisputed and binding on the relator, it unquestionably establishes the elector's right to vote in Tyrrell County. Certainly it does not prove the opposite. Moreover, the indefiniteness of the elector's intention to return to Tyrrell County is insufficient to establish loss of voting residence—no other having been acquired or intended, and the relator has rightly been held to have defaulted in the necessary proof. *Gower v. Carter,* 195 N. C., 697, 143 S. E., 513.

3. J. O. Everton, the third-challenged elector mentioned in the petition to rehear, testified that he hoped to return to Tyrrell County within the next four or five years. "Q. Can you state to the Commissioner any definite condition on which you intend to go back? A. Yes, sir. If I am laid off, which is barely possible at some future day, I would go back to Tyrrell County."

The relator contends that this suffices to support the referee's finding of loss of voting residence, which was affirmed by the trial court.

Yet observe what the witness further says: "In connection with my engineering work in the War Department, I am sent about the country. I do not know from one day to the next where I am going to be, not over 30 days at a time. . . . I have not registered to vote in any county other than Tyrrell. . . . I have paid my taxes down there, and I own property down there, and eventually I intend to return. I intended to return when I voted my absentee ballot. I considered it as my residence and still do."

Thus, the relator is again face to face with the uncontradicted testimony of his own witness which shows no loss of voting residence in Tyrrell County. He is therefore bound by it. *Lynch v. Veneer Co.,* 169 N. C., 169, 85 S. E., 289. The evidence falls short of the required proof.

Similar situations appear in respect of the other electors mentioned in the petition to rehear. It would only be repetitive to set them out *seriatim.* The fundamental error in the proceeding is, that the challenged electors were required to establish their right to vote in Tyrrell County, whereas the burden was on the relator to show that this right had been lost. Apparently, the presumptions arising from the certificate of election and the concession of regularity were overlooked. *Jones v. Flynt,* 159 N. C., 87, 74 S. E., 817. One who has the burden of proof is required to begin by taking up and carrying the burden, and to win,

he must end with it carried. *Speas v. Bank,* 188 N. C., 524, 125 S. E., 398. This the relator has failed to do on the record as it is brought here.

4. The petition to rehear names seven electors whose ballots were held by the trial court to be invalid on the ground that none of them was sworn by the attesting officer when they signed the statutory affidavits accompanying the absentee ballots, and it is now asserted that there was evidence to support the finding in each instance.

Exceptions to these rulings were sustained here, because the several negative, or at most doubtful, statements of these electors were regarded as insufficient to overcome (1) the certificate of the notary which imports *prima facie* truth of pertinent recitals, G. S., 10-4; *Pipe and Foundry Co. v. Woltman,* 114 N. C., 178, 19 S. E., 109; 39 Am. Jur., 230; (2) the stipulation of the parties, and (3) the evidence of the attesting officer which the relator presented as credible. 1 Am. Jur., 945. Consequently, it was thought that the relator had again faltered in his effort to shoulder the burden of proof.

The vital matter at issue is the right of the challenged electors to vote, and not the conduct of the Chairman of the County Board of Elections. Whatever strictures this conduct may deserve as a matter of propriety or ethics, it is not provided in the statute that such conduct shall disfranchise the otherwise duly qualified electors who voted absentee ballots. Indeed, official misconduct which misleads an elector would tend to excuse if permissible, rather than to condemn, any irregularity on his part. *Davis v. Board of Education,* 186 N. C., 227, 119 S. E., 372; *DeBerry v. Nicholson,* 102 N. C., 465, 9 S. E., 545; 11 Am. St. Rep., 767.

The conclusion is reached that upon due consideration of the petition no inadvertence or error has been made to appear. Needless to add, nothing herein has any binding effect upon the Court. It is simply a statement of the reasons inducing our action on the petition to rehear.

Petition denied.

WORD AND PHRASE INDEX.

Absentee Ballots—*Owens v. Chaplin*, 797.

Abuse of Process—Action for may not be set up as counterclaim to action on check, *Hancammon v. Carr*, 52.

Academic Questions—Appeal presenting will be dismissed, *Eller v. Wall*, 359; *Penland v. Gowan*, 449; *Nance v. Winston-Salem*, 732.

Acceleration Clause—*Sanders v. Hamilton*, 43.

Accessory After the Fact—*S. v. Williams*, 348.

Accident—Death from heart disease ordinarily is not "accidental," *West v. Dept. of Conservation*, 232.

Acknowledgment—Wife's acknowledgment does not preclude attack of instrument for want of consideration where evidence shows instrument was obtained through fraud, *Garrett v. Garrett*, 290; necessity for certificate in transfer from wife to husband, *McCullen v. Durham*, 418.

Actions—Particular actions, see particular titles of actions; actions based on party's own wrong, *Bledsoe v. Lumber Co.*, 128; *Garner v. Phillips*, 160; joinder of actions, see Pleadings; enjoining prosecution of actions, *Davis v. Whitehurst*, 226; arbitration agreement as bar to civil action, *Hargett v. Delisle*, 384; *Brown v. Moore*, 406; for contribution against joint *tort-feasor*, *Paschal v. Transit Co.*, 435; physician may not maintain action to recover for services to employee covered by Compensation Act, *Worley v. Pipes*, 465; *Matros v. Owen*, 472; matters which may be litigated in caveat proceedings, *In re Will of Brock*, 482.

Administration—See Executors and Administrators.

Administrative Law and Procedure—Authority and review of orders of Utilities Commission, see Utilities Commission; power of regulatory bodies to make rules and regulations, *States' Rights Democratic Party v. Board of Elections*, 179; statutory remedy to determine dispute as to fees for medical services to injured employee is exclusive and precludes physician from maintaining action against employee, *Worley v. Pipes*, 465; *Matros v. Owen*, 472.

Admissions—of one jointly charged with fornication and adultery incompetent, *S. v. Davis*, 386.

Adultery—See Fornication and Adultery.

Advancements—*Harrelson v. Gooden*, 654.

Adverse Possession—Tacking possession, *Ramsey v. Ramsey*, 270.

Affirmative Defense—Burden of proving affirmative defense is on defendant, *MacClure v. Casualty Co.*, 305.

After-Acquired Title—Vendor's after-acquired title inures to benefit of vendee, but not as against subsequent purchaser without notice, *Chandler v. Cameron*, 62.

Agent—See Principal and Agent.

Alienation—Restraint on, *Hendley v. Perry*, 15.

Alimony—With or without divorce, see Divorce; failure to pay alimony *pendente lite* must be willful to justify imprisonment for contempt, *Lamm v. Lamm*, 248.

Allegata—Recovery cannot be had upon theory not alleged in complaint, *King v. Coley*, 258; *McCullen v. Durham*, 418; defendant's right to recover is governed by, *Myers v. Allsbrook*, 786.

Amalgamation — Distinction between merger and, *Trust Co. v. School for Boys*, 738.

Amendment—Of complaint, *Nance v. Winston-Salem*, 732.

Ancillary Writ of Attachment, *Whitaker v. Wade*, 327.

Anticipation of Injury—*Shaw v. Barnard*, 713.

Appeal and Error—Appeals from Industrial Commission, see Master and Servant; appeals to Superior

Courts, see Courts; to review judgment on return of writ of *habeas corpus*, *In re Taylor*, 297; *In re McKnight*, 303; parties who may object and take exception, *Coach Co. v. Motor Lines*, 650; requirement that matter be brought to trial court's attention to support exception to charge, *Coach Co. v. Motor Lines*, 650; necessity, form and sufficiency of exceptions to findings of fact, *Henley v. Perry*, 15; *Poole v. Gentry*, 266; *Cannon v. Blair*, 606; form and sufficiency and requisites of exceptions to charge, *Shepherd v. Dollar*, 736; preservation of grounds of review—demurrer, *Rhodes v. Asheville*, 355; preservation of grounds of review—motions, *Hawkins v. Dallas*, 561; *Coach Co. v. Motor Lines*, 650; theory of trial in lower court, *Hill v. Greyhound Corp.*, 728; appeal and appeal entries, *Mason v. Comrs. of Moore*, 626; necessity for "case on appeal," *Western N. C. Conference v. Tally*, 1; *Harvey v. Comrs. of McFarlan*, 71; Settlement of case on appeal by court, *Western N. C. Conference v. Tally*, 1; requisites and proceedings for pauper appeal, *Williams v. Tillman*, 434; powers of and proceedings in lower court after appeal, *In re* Will of Puett, 8; correction of record, *Mason v. Comrs. of Moore*, 626; conclusiveness and effect of record, *Mason v. Comrs. of Moore*, 626; *Hill v. Greyhound Corp.*, 728; dismissal for that question has become moot or academic, *Eller v. Wall*, 359; *Penland v. Gowan*, 449; *Nance v. Winston-Salem*, 732; presumptions and burden of showing error, *Harrelson v. Gooden*, 654; *S. v. Davis*, 386; *S. v. Gibson*, 497; *Stewart v. Dixon*, 737; harmless and prejudicial error, *Johnson v. Johnson*, 542; *Coach Co. v. Motor Lines*, 650; *Ramsey v. Ramsey*, 270; *Poole v. Gentry*, 266; *Landis v. Gitlin*, 521; *In re Will of Etheridge*, 280; *Wyatt v. Coach Co.*, 340; *Stewart v. Dixon*, 737; *Cuthrell v. Greene*, 475; review of exceptions to judgment or to signing of judgment, *Western N. C. Conference v. Tally*, 1; *Harney v. Comrs. of McFarlan*, 71; *Drainage District v. Bullard*, 633; *Coach Co. v. Motor Lines*, 650; review of discretionary matters, *In re Estate of Galloway*, 547; review of injunctive proceedings, *McLeod v. Wrightsville Beach*, 621; review of findings of fact, *S. v. Speller*, 67; *Coble v. Coble*, 81; *Poole v. Gentry*, 266; *Griggs v. York-Shipley*, 572; *Trust Co. v. School for Boys*, 738; *Ledford v. Ledford*, 373; *Cannon v. Blair*, 606; *In re Estate of Galloway*, 547; *Nall v. Nall*, 598; *McLeod v. Wrightsville Beach*, 621; review of exceptions relating to pleadings, *Rhodes v. Asheville*, 355; *Lowman v. Asheville*, 247; review of exceptions relating to motions to set aside verdict, *Edmunds v. Allen*, 250; *Garrett v. Garrett*, 290; *McCullen v. Durham*, 418; remand, *Calaway v. Harris*, 117; *stare decisis*, *Cole v. Cole*, 757; *S. v. Ballance*, 764; mandates from Supreme Court of U. S., *S. v. Brunson*, 37.

Appeal Entry—Is necessary to give Supreme Court jurisdiction, *Mason v. Comrs. of Moore*, 626.

Arbitration and Award—Common law arbitration, *Brown v. Moore*, 406; agreements as bar to civil action, *Hargett v. Delisle*, 384; abandonment and revocation of agreements, *Brown v. Moore*, 406.

Argument—Of solicitor, *S. v. Hawley*, 167; of private prosecution, *S. v. Correll*, 640; of counsel, *Cuthrell v. Greene*, 475.

Armed Robbers—Are not "public enemies" within rule absolving carrier from liability for loss of goods, *Cigar Co. v. Garner*, 173.

Army and Navy—Soldiers' and Sailors' Civil Relief Act does not enlarge time for bringing action for wrongful death, *McCoy v. R. R.*, 57.

Arrest and Bail—Right of officers to make arrest without warrant, *Perry v. Hurdle*, 216; force permis-

sible in making arrest, *S. v. Fain*, 644; proceedings to secure bail, *White v. Ordille*, 490; rights and liabilities on bonds, *White v. Ordille*, 490; action against officers for wrongful arrest, *Perry v. Hurdle*, 216; action for false arrest is improperly pleaded as counterclaim in action for negligent injury, *Vestal v. White*, 414.

Arrest of Judgment—Where warrant fails to charge crime, judgment will be arrested, *S. v. Harris*, 413.

Asbestosis—*Young v. Whitehall Co.*, 360.

Assault—With intent to commit rape, see Rape; evidence *held* insufficient on charge of conspiracy to commit felonious assault, *S. v. Wellborn*, 617; relevancy and competency of evidence, *S. v. Wellborn*, 617; sufficiency of evidence and nonsuit, *S. v. Robinson*, 647; instructions on defenses, *S. v. Fain*, 644; duty to charge on less degrees of crime, *S. v. Muse*, 536; action by wife against husband for assault and validity of release executed by her, *Garrett v. Garrett*, 290.

Assignments—*Wike v. Guaranty Co.*, 370.

Assumption of Risk—Inapplicable in actions under Federal Employers' Liability Act, *Medlin v. Powell*, 323.

Attachment—Grounds for attachment, *Whitaker v. Wade*, 327: property subject to attachment, *White v. Ordille*, 490; vacation of attachment on application of defendant, *Whitaker v. Wade*, 327; liabilities for wrongful attachment, *Whitaker v. Wade*, 327.

Attorney and Client—Argument of solicitor, *S. v. Hawley*, 167; *S. v. Correll*, 640; of counsel, *Cuthrell v. Greene*, 475; defendant in prosecution for capital charge is entitled to have counsel, *In re Taylor*, 297; constitutional right to be represented by counsel includes right to sufficient time to prepare defense, *S. v. Gibson*, 497; presumption that attorney signing consent judgment had authority, *Ledford v. Ledford*, 373; attorneys fees not recoverable under indemnity agreement, *Coach Co. v. Coach Co.*, 534; one attorney's fee allowable as part of cost upon rendition of judgment in favor of drainage district, *Drainage District v. Bullard*, 633.

Auctions—Upon dishonor of check given for purchase of car at auction, title remains in seller, *Parker v. Trust Co.*, 527.

Automobiles—Regulation of bus lines, see Carriers; liability of motor carriers as carriers, see Carriers; segregation of races on carriers, *Pridgen v. Coach Co.*, 46; *S. v. Johnson*, 701; bus driver ejecting drunken passenger and independent driver negligently hitting him *held* not joint *tort-feasors*, *Shaw v. Barnard*, 713; check is conditional payment and upon dishonor, title to property purchased therewith does not pass, *Parker v. Trust Co.*, 527; child's right to recover for negligent driving of father, *Wright v. Wright*, 503; autoist sued for collision with mule-drawn wagon may not file cross-action against co-defendant for damages to his own car, *Horton v. Perry*, 319; prosecution for involuntary manslaughter will not support plea of former jeopardy in prosecution for hit and run driving, *S. v. Williams*, 415; false arrest sequent to automobile collision improperly joined as cross-action, *Vestal v. White*, 414; safety statutes and ordinances in general, *Lee v. Chemical Co.*, 447; stopping and parking, *Warner v. Lazarus*, 27; *Bus Co. v. Products Co.*, 352; *Barlow v. Bus Lines*, 382; *Pascal v. Transit Co.*, 435; traversing intersections, *Donivant v. Swaim*, 114; *Lee v. Chemical Co.*, 447; due care in regard to children on or near highway, *Hughes v. Thayer*, 773; right side of highway, *Lewis v. Watson*, 20; pedestrians, *Lewis v. Watson*, 20; weight and sufficiency of evidence in general, *S. v. Blankenship*, 589; sufficiency of evidence and nonsuit on issue of negligence,

Brown v. Truck Lines, 122; *Hughes v. Thayer*, 773; sufficiency of evidence and nonsuit on issue of contributory negligence, *Lewis v. Watson*, 20; *Bus Co. v. Products Co.*, 352; *Barlow v. Bus Lines*, 382; *Hughes v. Thayer*, 773; nonsuit on issue of intervening negligence and concurring negligence, *Warner v. Lazarus*, 27; *Pascal v. Transit Co.*, 435; instruction in auto accident cases, *Lewis v. Watson*, 20; *Donivant v. Swaim*, 114; *Lee v. Chemical Co.*, 447; guests' and passengers' right of action for negligent injuries in general, *Wright v. Wright*, 503; right to recover under automobile guest statute, *Morse v. Walker*, 778; liability of owner for permitting incompetent to drive, *McElroy v. Motor Lines*, 509; nature and extent of owner's liability for driving of employees in general, *Wright v. Wright*, 503; liability of owner to passengers of driver, *Wright v. Wright*, 503; sufficiency of evidence and nonsuit on issue of *respondeat superior*, *Donivant v. Swaim*, 114; *McIlroy v. Motor Lines*, 509; definition of culpable negligence, *S. v. Blankenship*, 589; sufficiency of evidence in manslaughter prosecutions, *S. v. Blankenship*, 589; prosecutions for reckless driving, *S. v. Blankenship*, 589; definition of drunk or "under the influence" of intoxicants or drugs, *S. v. Blankenship*, 589; prosecutions for drunken driving, *S. v. Hough*, 532; *S. v. Blankenship*, 589; elements of offense of "hit and run" driving, *S. v. Ray*, 40; prosecutions for "hit and run" driving, *S. v. Ray*, 40.

Bad Checks—Action for abuse of process may not be set up as counterclaim to action on check, *Hancammon v. Carr*, 52.

Bail—See Arrest and Bail.

Banks and Banking—Duties and liabilities in paying checks, *Bank v. Marshburn*, 104.

Baseball—Liability to patron for injuries from fall, *Patterson v. Lexington*, 637.

Bill of Discovery—Right to introduce secondary evidence upon failure of party, after notice, to produce documents, *Landis v. Gittlin*, 521.

Bill of Particulars—Denial of motion to make pleading more definite does not preclude, *Lowman v. Asheville*, 247.

Bills and Notes—Action for abuse of process may not be set up as counterclaim to action on check, *Hancammon v. Carr*, 52; holders in due course and purchasers for value, *Bank v. Marshburn*, 104; provision for acceleration, *Sanders v. Hamilton*, 43; action on note, *Hancammon v. Carr*, 52.

Bills of Lading—See Carriers.

Blackmail—Prosecution and punishment, *S. v. Strickland*, 201.

Bona Fide Holder—See Bills and Notes.

Bond Order—*Atkins v. McAden*, 752.

Bonds—Vote on, for necessary expense is not against the registration, *Mason v. Comrs. of Moore*, 626.

Boundaries—General and specific descriptions, *Hudson v. Underwood*, 273; calls to natural objects, *Cherry v. Anderson*, 333; reversing calls, *Poole v. Gentry*, 266; parol testimony, *Poole v. Gentry*, 266; maps, *Poole v. Gentry*, 266; nature and grounds of processioning proceeding, *Roberts v. Sawyer*, 279.

Brakeman—Injury in interstate commerce, *Hill v. R. R.*, 236.

Briefs—Exceptions not set out in, deemed abandoned, *S. v. Frye*, 581.

Building Permits—James v. Sutton, 515.

Burden of Proof—Rule as to party having, *Johnson v. Johnson*, 541; is on State to establish each element of offense, *S. v. Creech*, 662; burden of proving affirmative defense is on defendant, *MacClure v. Casualty Co.*, 305; *Barnes v. Trust Co.*, 409; *S. v. Johnson*, 701; defendant is presumed sane and has burden of

establishing irresponsibility due to drunkenness, *S. v. Creech*, 662; in action for partition, *Johnson v. Johnson*, 541; in action on note, *Hancammon v. Carr*, 52; is on relator to prove disqualification of electors, *Owens v. Chaplin*, 797; burden is on plaintiff to show that building constituted interference with plaintiff's easement, *Light Co. v. Bowman*, 682; is on taxpayer to prove he comes within exception, *Henderson v. Gill*, 313; burden of proving resulting trust is by clear, strong and convincing evidence, *Bass v. Bass*, 171; directed verdict is proper when party upon whom rests burden of proof fails to offer evidence, *McCullen v. Durham*, 418; inadvertent statement of *quantum* of proof *held* corrected, *Wyatt v. Coach Co.*, 340; instruction that defense of insanity must be clearly established, *held* error, *S. v. Swink*, 123.

Burden of Showing Error—On appeal, *S. v. Davis*, 386 *Harrelson v. Gooden*, 654; *S. v. Creech*, 662; *Stewart v. Dixon*, 737.

Burglary—Judgment and sentence, *In re McKnight*, 303.

Bus Companies—Segregation of races on interstate bus, *Pridgen Coach Co.*, 46; segregation of races on intrastate bus, *S. v. Johnson*, 701; liability as carriers, see Carriers; liability for accidents on highway, see Automobiles.

Cancellation and Rescission of Instruments—For fraud, *Harrison v. R. R.*, 92; *Kee v. Dillingham*, 262; *Garrett v. Garrett*, 290; *Graham v. Graham*, 565; damages and relief, *Kee v. Dillingham*, 262.

Candy Manufacturer—Building permit, *James v. Sutton*, 515.

Capital Felony—Defendant in prosecution for capital charge is entitled to have counsel, *In re Taylor*, 297.

Cargo—Insurance on cargo while in transit, *Electric Co. v. Insurance Co.*, 518.

Carriers — Liability insurance on goods in transit, *Electric Co. v. Insurance Co.*, 518; indemnity agreement of bus company operating over franchise of another, *Coach Co. v. Coach Co.*, 534; Federal regulations, *Cigar Co. v. Garner*, 173; franchises, *Greyhound Corp. v. Utilities Com.*, 31; bills of lading, *Griggs v. York-Shipley*, 572; liability for loss of goods, *Cigar Co. v. Garner*, 173; liability for wrongful delivery of goods, *Griggs v. York-Shipley*, 572; liability for freight charges, *Griggs v. York-Shipley*, 572; segregation of races, *Pridgen v. Coach Co.*, 46; *S. v. Johnson*, 701; ejection of passengers, *Shaw v. Barnard*, 713.

Cartways—Statutory right to establish, *Garris v. Byrd*, 343; *Brown v. Glass*, 657.

Case on Appeal—Where court modifies appellant's statement of case, appellant must submit case as modified for judge's signature, *Western N. C. Conference v. Tally*, 1; is necessary to present exceptions relating to alleged errors in progress of trial, *Western N. C. Conference v. Tally*, 1; *Harney v. Comrs. of McFarlan*, 71.

Caveat—See Wills.

Certificate—Distinction between petition and, *States' Rights Democratic Party v. Board of Elections*, 179.

Certiorari—To review judgment on return of writ of *habeas corpus*, *In re Taylor*, 297; *In re McKnight*, 303.

Character Evidence—*S. v. Jones*, 276; *S. v. Church*, 718.

Charge—See Instructions.

Charities—Devise to hospitals of State for charity patients, *Trust Co. v. McMullan*, 746; control and management of property, *Western N. C. Conference v. Tally*, 1; *Wheeless v. Barrett*, 282; *Brandis v. McMullan*, 411.

Checks—Action for abuse of process may not be set up as counterclaim to action on check, *Hancammon v. Carr*, 52; bank paying check under mistake as to identity of drawer may not recover from payee with-

out fault, *Bank v. Marshburn*, 104; for pre-existing debt is for value, *Bank v. Marshburn*, 104; check is conditional payment and upon dishonor title to property purchased therewith does not pass, *Parker v. Trust Co.*, 527.

Children—Awarding custody of in divorce action, *Coble v. Coble*, 81; jurisdiction of court to award custody of children in divorce action not ousted by prior order issued in *habeas corpus*, *Robbins v. Robbins*, 430; juvenile court has exclusive jurisdiction to determine custody of minor except as between parents, *Phipps v. Vannoy*, 629; right to recover for father's negligent driving, *Wright v. Wright*, 503; in minor's suit by father as next friend demanding recovery for loss of earnings during minority, father waives right thereto, *Pascal v. Transit Co.*, 435; evidence held for jury on issues of negligence and contributory negligence in action for fatal injury of child on highway, *Hughes v. Thayer*, 773.

Churches—Whether congregation or denomination was entitled to use of trust property, *Western N. C. Conference v. Tally*, 1; title and right of trustees of religious societies, *Wheeless v. Barrett*, 282; exchange of property by church into and out of trust, *Brandis v. McMullan*, 411.

Circumstantial Evidence—Sufficiency of in criminal prosecution, *S. v. Strickland*, 201; *S. v. Frye*, 581; charge on, *held* without error, *S. v. Strickland*, 201; in absence of request, court need not charge on, *S. v. Hicks*, 345; fraud may be established by, *Garrett v. Garrett*, 290.

Cities—See Municipal Corporations.

Class—Devise to, without preceding estate, *Cole v. Cole*, 757.

Classification—Of transactions for imposition of tax, *Henderson v. Gill*, 313.

Clerks of Court—*Quo Warranto* to challenge election to office, *Owens v. Chaplin*, 797; appeals to Superior Court, *Moody v. Howell*, 198; revocation of letters of administration, *In re Estate of Galloway*, 547; jurisdiction of clerk as court in general, *Moody v. Howell*, 198; probate jurisdiction, *In re Will of Puett*, 8; jurisdiction as juvenile court, *Phipps v. Vannoy*, 629.

Cloud on Title—Actions to remove, see Quieting Title.

Codicil—Holographic codicil, *In re Will of Goodman*, 444.

Collateral Attack—Of probate, *In re Will of Puett*, 8.

Commerce—Segregation of races on interstate carriers, *Pridgen v. Coach Co.*, 46; liability of carrier for wrongful delivery of goods, *Griggs v. York-Shipley, Inc.*, 572.

Common Law—In force in this State, *S. v. Sullivan*, 251; arbitration, *Brown v. Moore*, 406.

Compensation Act—See Master and Servant.

Complaint—See Pleadings.

Concurring Negligence — Instruction on issue of contributory negligence *held* for error in charging that plaintiff's negligence must be sole proximate cause to bar recovery, *Noah v. R. R.*, 176; evidence that accident resulted from concurring negligence of defendants *held* for jury, *Pascal v. Transit Co.*, 435.

Condemnation—See Eminent Domain.

Conditions—Whether condition in policy is condition subsequent or precedent, *MacClure v. Casualty Co.*, 305.

Confessions—*S. v. Hammond*, 108; of one jointly charged with fornication and adultery incompetent, *S. v. Davis*, 386.

Conflict of Laws—Laws of Virginia govern right to recover for automobile accident occurring in that State, *Morse v. Walker*, 778.

Congregations — Whether congregation or denomination was entitled to use of trust property, *Western N. C. Conference v. Tally*, 1.

Consent Judgments—See Judgments.

Consideration — Wife's acknowledgment does not preclude attack of instrument for want of consideration where evidence shows instrument was obtained through fraud, *Garrett v. Garrett*, 290; inadequacy of is alone insufficient to establish fraud, *Ledford v. Ledford*, 373; agreement in deed *held* to constitute sufficient consideration to support the instrument, *Lee v. Ledbetter*, 330; *Cannon v. Blair*, 606; forbearance to pursue legal remedy is adequate consideration, *Myers v. Allsbrook*, 786.

Consolidation—Of actions, *Hancammon v. Carr*, 52; *Horton v. Perry*, 319.

Conspiracy—Sufficiency of evidence of criminal conspiracy and nonsuit, *S. v. Wellborn*, 617.

Constitutional Law—Physician may not sue employee on contract when injury is covered by Compensation Act, *Worley v. Pipes*, 465; power of General Assembly to delegate authority, *States' Rights Democratic Party v. Board of Elections*, 179 power and duty to determine constitutionality of statutes, *Boney v. Kinston Graded Schools*, 136; *Palmer v. Smith*, 612; scope of State police power in general, *S. v. Ballance*, 764; regulation of trades and professions, *Palmer v. Smith*, 612; *S. v. Ballance*, 764; regulations relating to safety, sanitation and health, *S. v. Massey*, 734; personal and civil rights in general, *S. v. Ballance*, 764; exclusive emoluments and privileges, *Green v. Kitchin*, 450; *S. v. Ballance*, 764; searches and seizures, *S. v. Hammond*, 111; religious liberty, *S. v. Massey*, 734; "due process of law" and "law of the land" in general, *S. v. Ballance*, 764; what constitutes "due process," notice and hearing, *Coble v. Coble*, 81; *States' Rights Democratic Party v. Board of Elections*, 179; necessity for, and requisites of indictment, *S. v. Speller*, 67; due process in criminal prosecutions in general, *In re Taylor*, 297; *S. v. Gibson*, 497; right to counsel in criminal prosecutions, *In re Taylor*, 297; *S. v. Gibson*, 497; procedure to raise question of deprivation of constitutional rights in prosecution, *In re Taylor*, 297.

Constructive Malice—In institution of prosecution, *Taylor v. Hodge*, 558.

Constructive Trust—Murderer will hold property inherited from his victims as constructive trustee, *Garner v. Phillips*, 160.

Contempt of Court—Willful disobedience of court order, *Lamm v. Lamm*, 248; *Finance Co. v. Putnam*, 555; acts tending to impede administration of justice, *In re* Walters, 111.

Contentions—Charge held erroneous in failing to explain law arising on defendant's contention supported by evidence, *S. v. Fain*, 644; misstatement of, must be brought to court's attention in apt time, *Coach Co. v. Motor Lines*, 650; *S. v. Church*, 718.

Continuance—Motion for is addressed to discretion of court, *S. v. Strickland*, 201; *S. v. Creech*, 662.

Contractors—Right of guarantor on performance bond, *Wike v. Guaranty Co.*, 370.

Contracts—Required to be in writing, see Frauds, Statute of; insurance contracts, see Insurance; carrier may recover on shipper's agreement with purchaser to pay freight charges, *Griggs v. York-Shipley*, 572; money to become due on contract is assignable, *Wike v. Guaranty Co.*, 370; municipal contract void for failure of advertising will support recovery on *quantum meruit*, *Hawkins v. Dallas*, 561; rescission of contract of sale, *Kee v. Dillingham*, 262; actions *ex delicto* which may be set up as counterclaim in action *ex contractu*, *Hancammon v. Carr*, 52; complaint *held* to charge negligence alone in serving poisonous food by defendants and recovery could not be had for breach of implied warranty, *King v. Coley*, 258; consideration, *Myers v. Allsbrook*, 786; contracts against

statutory policy, *Worley v. Pipes*, 465; general rules of construction, *Electric Co. v. Ins. Co.*, 518; parties who may sue, *Coleman v. Mercer*, 245; measure and assessment of damages for breach, *Meier v. Miller*, 243.

Contribution—Action for against joint *tort-feasor*, *Pascal v. Transit Co.*, 435; *Fleming v. Light Co.*, 397.

Contributory Negligence—Person pushing hand-cart on right side of highway is not guilty of as matter of law, *Lewis v. Watson*, 20; whether motorist hitting unlighted bus parked on highway is guilty of, as matter of law, *Bus Co. v. Products Co.*, 352; *Barlow v. Bus Lines*, 382; instruction on question of *held* error in omitting question of concurring negligence, *Noah v. R. R.*, 176; nonsuit on ground of, cannot be rendered on defendant's evidence, *Bundy v. Powell*, 707.

Conversion—See Trover and Conversion.

Cooperation Clause—In liability policy, *MacClure v. Casualty Co.*, 305.

Coram Nobis—Is proper procedure to test validity of matters de hors record, *In re Taylor*, 297.

Corporations—Venue of action against domesticated corporations, *Hill v. Greyhound Corp.*, 728; power to sue and defend in corporate name, *Trust Co. v. School for Boys*, 738; distinction between merger and amalgamation, *Trust Co. v. School for Boys*, 738.

Corroborating Evidence—Where previous statements of witness are inconsistent in material aspects to witness' testimony, such statements are incompetent for purpose of corroboration, nor may court charge the jury to disregard inconsistent parts, *S. v. Bagley*, 723.

Costs—Defense bond not required in actions to quiet title or in processioning proceedings, *Roberts v. Sawyer*, 279; one attorney's fee allowable as part of cost upon rendition of judgment in favor of drainage district, *Drainage District v. Bullard*, 633; taxing of costs in equity suits, *Chandler v. Cameron*, 62.

Counsel—Argument to jury, *Cuthrell v. Greene*, 475; constitutional right to be represented by counsel includes right to sufficient time to prepare defense, *S. v. Gibson*, 497.

Counterclaim—Matters which may be set up as, *Hancammon v. Carr*, 52; *Fleming v. Light Co.*, 397; *Vestal v. White*, 414.

County Commissioners—Power to allocate funds from bond issue, *Atkins v. McAden*, 752.

Courts—Probate jurisdiction of clerks of court, see Clerks of Court; juvenile court has exclusive jurisdiction to determine custody of minor except as between parents, *Phipps v. Vannoy*, 629; County courts, *Electric Co. v. Motor Lines*, 86; Industrial Commission has exclusive jurisdiction to determine dispute as to fee for medical expenses to employee covered by Compensation Act, *Worley v. Pipes*, 465; *Matros v. Owen*, 472; ouster of jurisdiction of Superior Court by arbitration agreement, *Hargett v. Delisle*, 384; *Brown v. Moore*, 406; jurisdiction of court to award custody of children in divorce action not ousted by prior order issued in *habeas corpus*, *Robbins v. Robbins*, 430; power and duty to declare statute unconstitutional, *Palmer v. Smith*, 612; will resolve doubt in favor of constitutionality of statute, *Boney v. Kinston Graded Schools*, 136; construction by Federal Courts of Federal Employers' Liability Act governs, *Hill v. R. R.*, 236; *Medlin v. Powell*, 323; contempt of court, see Contempt of Court; qualification of expert rests in discretion of, *S. v. Strickland*, 201; *S. v. Jones*, 596; discretionary matters not reviewable on appeal, *Lowman v. Asheville*, 247; *Edmunds v. Allen*, 250; *Garrett v. Garrett*, 290; exercise of legal discretion is reviewable, *In re Estate of Galloway*, 547; statutory affi-

davit necessary to give court jurisdiction of pauper appeal, *Williams v. Tillman*, 434; where court modifies appellant's statement of case, appellant must submit case as modified for judge's signature, *Western N. C. Conference v. Tally*, 1; mandate of Supreme Court of U. S. in Brunson Case, see page 37; jurisdiction of courts in general, *Coble v. Coble*, 81; original jurisdiction of Superior Court in general, *Greyhound Corp. v. Utilities Com.*, 31; concurrent original jurisdiction, *Moody v. Howell*, 198; appeals to Superior Court from municipal or county courts, *Electric Co. v. Motor Lines*, 86; appeals to Superior Court from clerk, *In re Will of Puett*, 8; *Moody v. Howell*, 198; jurisdiction relating to orders or proceedings before another Superior Court, *Davis v. Whitehurst*, 226, what law governs causes arising in another state in actions in *tort*, *Morse v. Walker*, 778.

Creditors—Right to join claims against common debtor, *Davis v. Whitehurst*, 226; sufficiency of pleading to set aside contract as fraudulent, *Davis v. Whitehurst*, 226.

Criminal Law — Particular crimes, see particular titles of crimes; mental responsibility, *S. v. Swink*, 123; *S. v. Jones*, 596; *S. v. Creech*, 662; burden of proving insanity or mental irresponsibility, *S. v. Creech*, 662; entrapment, *S. v. Love*, 99; State's witnesses, *S. v. Love*, 99; accessories after the fact, *S. v. Williams*, 348; mental capacity to plead to indictment and make rational defense, *S. v. Sullivan*, 251; former jeopardy, *S. v. Williams*, 415; *S. v. Correll*, 640; presumptions and burden of proof, *S. v. Creech*, 662; *S. v. Johnson*, 701; expert and opinion evidence in general, *S. v. Davis*, 552; qualification of experts, *S. v. Strickland*, 201; *S. v. Jones*, 596; testimony as to sanity, *S. v. Jones*, 596; *S. v. Creech*, 662; expert testimony in typewriter types, *S. v. Strickland*, 201; evidence of motive and malice, *S. v. Creech*, 662; telephone conversations, *S. v. Strickland*, 201; confessions, *S. v. Hammond*, 108; acts and declarations of co-defendants, co-conspirators or companions, *S. v. Wellborn*, 617; evidence of bad character of defendant, *S. v. Jones*, 276; *S. v. Church*, 718; competency and credibility of witnesses in general, *S. v. Davis*, 386; credibility of accomplices, co-defendants and witnesses turning State's evidence, *S. v. Love*, 99; evidence competent to corroborate witness, *S. v. Bagley*, 723; evidence competent to impeach witness, *S. v. Jones*, 276; *S. v. Creech*, 662; whether State is bound by its own exculpatory evidence, *S. v. Ray*, 40; *S. v. Robinson*, 647; *S. v. Bagley*, 723; evidence obtained by unlawful means, *S. v. Love*, 99; time of trial and continuance, *S. v. Strickland*, 201; *S. v. Creech*, 662; *S. v. Gibson*, 497; order of proof, *S. v. Strickland*, 201; evidence competent for restricted purpose, *S. v. Church*, 718; withdrawal of evidence, *S. v. Strickland*, 201; argument and conduct of solicitor or private prosecutor, *S. v. Hawley*, 167; *S. v. Correll*, 640; province of court and jury in general, *S. v. Hawley*, 167; *S. v. Correll*, 640; sufficiency of evidence and nonsuit, *S. v. Strickland*, 201; *S. v. Frye*, 581; *S. v. Blankenship*, 589; *S. v. Robinson*, 647; *S. v. Ray*, 40; peremptory instructions and directed verdict, *S. v. Baker*, 73; instructions on presumptions and burden of proof, *S. v. Swink*, 123; statement of evidence and explanation of law arising thereon, *S. v. Lunsford*, 229; *S. v. Hicks*, 345; *S. v. Fain*, 644; charge on circumstantial evidence, *S. v. Strickland*, 201; expression of opinion by court on evidence, *S. v. Love*, 99; necessity for charge on less degrees of crime, *S. v. Lunsford*, 229; *S. v. McNeill*, 377;

S. v. Muse, 536; charge on failure of defendant to testify, *S. v. McNeill*, 377; charge on credibility of witnesses, *S. v. Love*, 99; requests for instructions, *S. v. Hicks*, 345; arrest of judgment, *S. v. Harris*, 413; new trial for newly discovered evidence, *S. v. Gibson*, 497; attack of judgment on grounds of deprivation of constitutional rights, *In re* Taylor, 297; formalities and requisites of judgment and sentence in capital cases, *S. v. Hawley*, 167; conclusiveness and effect of record, *S. v. Robinson*, 647; necessity, form and requisites of objections and exceptions in general, *S. v. Hawley*, 167; necessity for calling attention to misstatement of contentions to support exception thereto, *S. v. Church*, 718; briefs on appeal, *S. v. Frye*, 581; dismissal for incomplete or defective record, *S. v. West*, 416; review of discretionary matters, *S. v. Strickland*, 201; *S. v. Gibson*, 497; presumptions and burden of showing error, *S. v. Sullivan*, 251; *S. v. Davis*, 386; *S. v. Gibson*, 497; *S. v. Creech*, 662; prejudicial and harmless error, *S. v. Creech*, 662; *S. v. Franklin*, 336; *S. v. Davis*, 386; *S. v. Strickland*, 201; *S. v. Jones*, 596; *In re McKnight*, 303; *S. v. McNeill*, 377; *S. v. Gibson*, 497; *S. v. Hawley*, 167; *S. v. Correll*, 640; review of findings on motions, *S. v. Speller*, 67; *stare decisis*, *S. v. Ballance*, 764; proceedings after mandate from Supreme Court of the U. S., *S. v. Brunson*, 37.

Cross-Actions—Causes which may be set up as counterclaim or cross-action, *Hancammon v. Carr*, 52; *Horton v. Perry*, 319; *Fleming v. Light Co.*, 397; *Vestal v. White*, 414; for contribution against joint *tort-feasor*, *Pascal v. Transit Co.*, 435.

Cross Examination—As to matters not relevant to issue *held improper*, *Cuthrell v. Greene*, 475; State may show defendant paid expert witness in order to establish witness' bias, *S. v. Creech*, 662; of character witnesses as to particular acts of misconduct by defendant, *S. v. Church*, 718.

Crossings—Accidents at railroad, *Noah v. R. R.*, 176; *Bundy v. Powell*, 707.

Culpable Negligence—In driving, *S. v. Blankenship*, 589.

Damages—For breach of contract, *Meier v. Miller*, 243; special damages sustained as a result of fraud may be recovered in action for cancellation, *Kee v. Dillingham*, 262; contract indemnifying against loss, *Coach Co. v. Coach Co.*, 534; instructions on issue of, *Pascal v. Transit Co.*, 435; motion to set aside verdict as excessive is addressed to discretion and not reviewable, *Edmunds v. Allen*, 250.

Deadly Weapon—Charge on presumption from killing with, *S. v. Franklin*, 336; *S. v. Phillips*, 538; presumptions from killing with, do not arise unless killing is intentional, *S. v. McNeill*, 377; *S. v. Phillips*, 538; failure to charge in single instance that killing must be intentional to raise presumptions *held* not prejudicial, *S. v. Creech*, 662; assault with, *S. v. Muse*, 536; *S. v. Robinson*, 647.

Death—Of principal terminates agency, *Parker v. Trust Co.*, 527; time within which action for wrongful death must be instituted, *McCoy v. R. R.*, 57; parties who may sue for wrongful death, *McCoy v. R. R.*, 57; dying declarations, *West v. Department of Conservation*, 232; distribution of recovery in actions for wrongful death, *McCoy v. R. R.*, 57.

Debt—Promise to answer for debt or default of another, *Cuthrell v. Greene*, 475; *Myers v. Allsbrook*, 786.

Decedents—Action to recover for personal services rendered decedent, *Potter v. Clark*, 350; administration see Executors and Administrators.

Declarations—Of decedent as to cause of death, *West v. Dept. of Conservation*, 232.

Deeds—Right of grantee to tack adverse possession of grantor, *Ramsey v. Ramsey*, 270; ascertainment of boundaries, see Boundaries; title and right of trustees of religious societies, *Wheeless v. Barrett*, 282; necessity for certificate in acknowledgment in transfer from wife to husband, *McCullen v. Durham*, 418; grantees in deeds executed by testator prior to death not necessary parties to caveat, *In re Will of Brock*, 482; undue influence, *Lee v. Ledbetter*, 330; designation of grantee, *Byrd v. Patterson*, 156; consideration, *Lee v. Ledbetter*, 330; *Cannon v. Blair*, 606; presumption from delivery that instrument had been signed, sealed and delivered, *Johnson v. Johnson*, 541; *Cannon v. Blair*, 606; deed *held* not deed of gift requiring registration, *Cannon v. Blair*, 606; intent of grantor, *Hudson v. Underwood*, 273; property conveyed, *Hudson v. Underwood*, 273; estates created, *Byrd v. Patterson*, 156; agreement to support grantor, *Lee v. Ledbetter*, 330; timber deed, *Chandler v. Cameron*, 62.

Deeds of Trust—See Mortgages.

Default Judgment—Motions to set aside, *Moody v. Howell*, 198.

Default of Another—Promise to answer for debt or, *Cuthrell v. Greene*, 475; *Myers v. Allsbrook*, 786.

Defeasible Fee—*Hales v. Renfrow*, 239.

Defense Bond—Not required in actions to quiet title or in processioning proceedings, *Roberts v. Sawyer*, 279.

Defense of Another—Evidence *held* not to present question of right to kill in, *S. v. Correll*, 640; charge on right of self-defense or right to defend member of family *held* not prejudicial, *S. v. Church*, 718.

Delegation of Authority—General Assembly cannot delegate authority to make law, *States' Rights Democratic Party v. Board of Elections*, 179.

Delivery—Registration raises presumption that instrument was signed, sealed and delivered, *Johnson v. Johnson*, 541; *Cannon v. Blair*, 606.

Demurrer—See Pleadings.

Deputy Sheriff—Force permissible in serving legal process, *S. v. Fain*, 644.

Descent and Distribution—Husband is "heir," *Trust Co. v. Shelton*, 150; murderer of ancestor may not inherit, *Garner v. Phillips*, 160; title and rights of heirs, *In re Estate of Galloway*, 547; advancements, *Harrelson v. Gooden*, 654.

Directed Verdict—In criminal case, *S. v. Baker*, 73; is proper when party upon whom rests burden of proof fails to offer evidence, *McCullen v. Durham*, 418; for insurer on conflicting evidence as to conditional delivery of policy *held* error, *Stallings v. Insurance Co.*, 529; evidence *held* to justify directed verdict that defendants' building interfered with easement for transmission lines, *Light Co. v. Bowman*, 682; insufficiency of defendants' evidence on affirmative defense must be raised by motion for, *Coach Co. v. Motor Lines*, 650.

Disability — From silicosis within meaning of Compensation Act, *Young v. Whitehall Co.*, 360.

Discretion of Court—Order of proof rests in, *S. v. Strickland*, 201; motion for continuance is addressed to, *S. v. Strickland*, 201; motion for special venire is addressed to, *S. v. Strickland*, 201; motion to set aside verdict as contrary to evidence is addressed to, *King v. Byrd*, 177; motion to strike made in apt time is not addressed to, *Fleming v. Light Co.*, 397; qualification of expert rests in, *S. v. Strickland*, 201; *S. v. Jones*, 596; discretionary matters not reviewable on appeal, *Lowman v. Asheville*, 247; *Edmunds v.*

Allen, 250; *Garrett v. Garrett*, 290; exercise of legal discretion is reviewable, *In re Estate of Galloway*, 547.

Discrimination—New trial awarded for systematic exclusion of Negroes from grand jury, *S. v. Speller*, 67.

Disease—Heart disease is not occupational disease and ordinarily is not compensable, *West v. Dept. of Conservation*, 232; silicosis is occupational disease, *Young v. Whitehall Co.*, 360.

Distributee—Defined, *Trust Co. v. Shelton*, 150.

Divorce—Laches, *Nall v. Nall*, 598; complaint in action for alimony without divorce *held* sufficient, *Trull v. Trull*, 196; alimony *pendente lite*, *Nall v. Nall*, 598; contempt for failure to pay alimony, *Lamm v. Lamm*, 248; custody and support of children, *Coble v. Coble*, 81; *Robbins v. Robbins*, 430; *Phipps v. Vannoy*, 629.

Doctors—See Physicians and Surgeons.

Doctrine of Assumption of Risk—Inapplicable in actions under Federal Employers' Liability Act, 323.

Doctrine of Election—Does no apply where beneficiary is devised her own property, *Byrd v. Patterson*, 156.

Documents—Secondary evidence of contents of, *Landis v. Gittlin*, 521.

Domesticated Corporations—Venue of action against domesticated corporations, *Hill v. Greyhound Corp.*, 728.

Domicile—Alone cannot confer juristion, *Coble v. Coble*, 81; for purpose of voting, *Owens v. Chaplin*, 797.

Dominant Highway—Failure to stop before entering intersection with through highway is not negligence *per se*, *Lee v. Chemical Corp.*, 447.

Double Jeopardy—*S. v. Williams*, 415; *S. v. Correll*, 640.

Double Taxation—Income tax on distributive share of resident beneficiary derived from trust business carried on in another state, *Sabine v. Gill*, 599.

Drainage Districts—Power of commissioners to make improvements *held* not presented for review, *Drainage District v. Bullard*, 633; judgment to foreclose drainage lien *held* proper, *Drainage District v. Bullard*, 633.

Drugs—Osteopath may not prescribe or administer, *S. v. Baker*, 73; expert and opinion testimony as to effect of, *S. v. Jones*, 596.

Drunken Driving—*S. v. Hough*, 532; *S. v. Blankenship*, 589.

Drunkenness—Defendant is presumed sane with burden of establishing irresponsibility due to, *S. v. Creech*, 662.

Due Process—Notice and hearing are essential to, *Coble v. Coble*, 81; *States' Rights Democratic Party v. Board of Elections*, 179; is synonymous with "law of the land," *S. v. Ballance*, 764; defendant in prosecution on capital charge is entitled to have counsel, *In re Taylor*, 297.

"Duty of Retreat"—Officer serving search warrant may kill in self-defense without retreating. *S. v. Fain*, 644.

Dying Declarations—Of decedent as to cause of death, *West v. Dept. of Conservation*, 232.

Easements—Statutory right to establish cartway, *Garris v. Byrd*, 343; *Brown v. Glass*, 657; extent of right of way, *Light Co. v. Bowman*, 682; *R. R. v. Mfg. Co.*, 695.

Education—Physical training is legitimate function of education. *Boney v. Kinston Graded Schools*, 136.

Ejectment—Plaintiff must show right to immediate possession, *Bass v. Moore*, 211; necessity for bond, *Roberts v. Sawyer*, 279.

Election—Doctrine of does not apply where beneficiary is devised her own property, *Byrd v. Patterson*, 156.

Election of Remedies—Special damages sustained as a result of fraud

may be recovered in action for cancellation, *Kee v. Dillingham*, 262.

Elections—Where election sought to be enjoined has been held plaintiff's appeal will be dismissed as academic, *Eller v. Wall*, 359; *Penland v. Gowan*, 449; *Nance v. Winston-Salem*, 732; absentee ballots, *Owens v. Chaplin*, Appendix, 797; formation of new party, *States' Rights Democratic Party v. Board of Elections*, 179; is not necessary to municipal expenditure for special training of policeman, *Green v. Kitchin*, 450.

Electricity—Joinder of parties to recover damages from fire started by transmission line, *Fleming v. Light Co.*, 397; interference with easement for transmission lines, *Light Co. v. Bowman*, 682.

Emancipation—In minor's suit by father as next friend demanding recovery for loss of earnings during minority father waives right thereto, *Pascal v. Transit Co.*, 435.

Emergency Price Control—Penalties and persons liable, *Bledsoe v. Lumber Co.*, 128.

Eminent Domain—Implied grant, *R. R. v. Mfg. Co.*, 695; effect of decree, *Light Co. v. Bowman*, 682.

Employer and Employee—See Master and Servant.

Employers' Liability Act—*Hill v. R. R.*, 236; *Medlin v. Powell*, 323.

Employment Security Commission—*Unemployment Compensation Com. v. Lunceford*, 570.

Entireties—Estate by, *Byrd v. Patterson*, 156.

Entrapment—*S. v. Love*, 99.

Equal Protection of Laws—New trial awarded for systematic exclusion of Negroes from grand jury, *S. v. Speller*, 67.

Equity—In equity suit taxing of costs is in discretion of court, *Chandler v. Cameron*, 62; estoppel by misrepresentations, *McCullen v. Durham*, 418; party will not be allowed to benefit from own wrong, *Garner v. Phillips*, 160.

Estate by Entireties—*Byrd v. Patterson*, 156.

Estates—Consent judgment for settlement of estate approved, *Bank v. Hendley*, 432; estates of decedents, see Executors and Administrators; estates by entireties, *Byrd v. Patterson*, 156; estates created by deeds, see Deeds; estates created by wills, see Wills; trust estates, see Trusts; termination of life estate and vesting of remainder, *Bass v. Moore*, 211.

Estoppel—By election under will, *Byrd v. Patterson*, 156; parent bringing action as next friend is estopped by demand for recovery of earnings during minority from thereafter asserting his right thereto, *Pascal v. Transit Co.*, 435; employer *held* not estopped from setting up defense that claim was not filed within one year, *Jacobs v. Manufacturing Co.*, 660; after-acquired title, *Chandler v. Cameron*, 62; estoppel by misrepresentation, *McCullen v. Durham*, 418; sovereign not estopped, *Henderson v. Gill*, 313.

Evidence—In particular actions, see particular titles of actions; in criminal prosecutions, see Criminal Law and particular titles of crimes; judicial notice of facts within common knowledge, *Green v. Kitchin*, 450; burden of proof, *Johnson v. Johnson*, 541; preponderance of evidence, *Wyatt v. Coach Co.*, 340; burden of proving defense, *MacClure v. Ins. Co.*, 305; rule that party is bound by testimony of his own witness, *Owens v. Chaplin*, Appendix, 797; cross-examination, 475; facts in issue and relevant to issues, *Cuthrell v. Greene*, 475; photographs, *Coach Co. v. Motor Lines*, 650; secondary evidence, *Landis v. Gittlin*, 521; parol evidence, *McCullers v. Durham*, 418; *Bass v. Bass*, 171; hearsay evidence, *Landis v. Gittlin*, 521; opinion evidence, *Harrelson v. Gooden*, 654; *S. v. Hough*, 532; sufficiency of evi-

dence to overrule nonsuit, *Barlow v. Bus Lines*, 382; *Pascal v. Transit Co.*, 435; consideration of evidence on motion to nonsuit, *Pascal v. Transit Co.*, 435; motion to set aside verdict as contrary to, *King v. Byrd*, 177; *Coach Co. v. Motor Lines*, 650; motion for new trial for newly discovered evidence, *S. v. Gibson*, 497; declaration of decedent as to cause of death, *West v. Dept. of Conservation*, 232; order of proof rests in sound discretion of court, *S. v. Strickland*, 201; withdrawal of, by court, *S. v. Strickland*, 201; expression of opinion on, in charge, *S. v. Love*, 99; statement of evidence and application of law thereto, *Lewis v. Watson*, 20; *S. v. Lunsford*, 229; *Kee v. Dillingham*, 262; *S. v. Hicks*, 345; prejudicial and harmless error in admission or exclusion of evidence, *Poole v. Gentry*, 266; *Landis v. Gittlin*, 521; *S. v. Jones*, 596; *Coach Co. v. Motor Lines*, 650; *S. v. Creech*, 662.

Exceptions—Case on appeal is necessary to present exceptions relating to alleged errors in progress of trial, *Western N. C. Conference v. Tally*, 1; *Harney v. Comrs. of McFarlan*, 71; form and sufficiency of exceptions to findings or failure to make findings, *Hendley v. Perry*, 15; *Poole v. Gentry*, 266; sole exception to denial of motion to strike presents only question of whether judgment is supported by record, *Rhodes v. Asheville*, 355; to signing of judgment, *Coach Co. v. Motor Lines*, 650; where evidence is not in record exception to charge cannot be considered, *Shepherd v. Dollar*, 736; party may not except to ruling in his favor, *Coach Co. v. Motor Lines*, 650; not set out in brief deemed abandoned, *S. v. Frye*, 581; where exceptions are not grouped appeal will be dismissed, *S. v. West*, 416.

Exclusive Emoluments—Special training of policemen is not, *Green v. Kitchin*, 450.

Exculpatory Evidence—Whether State is bound by, *S. v. Ray*, 40; *S. v. Robinson*, 647.

Execution—Property in *custodia legis*, *Davis v. Whitehurst*, 226; life of lien, *McCullers v. Durham*, 418; sale held open for ten days, *McCullers v. Durham*, 418; title and rights of purchaser, *Davis v. Whitehurst*, 226; *McCullers v. Durham*, 418; attack of sale, *McCullers v. Durham*, 418; supplemental proceedings, *Finance Co. v. Putnam*, 555.

Executors and Administrators—Only personal representative may maintain action for wrongful death, *McCoy v. R. R.*, 57; appointment of personal representative for deceased administratrix not necessary in caveat proceeding, *In re Will of Brock*, 482; advancements, *Harrelson v. Gooden*, 654; whether personal representative of deceased mortgagor should have been made party in action to restrain foreclosure *held* not presented in apt time, *Gilkey v. Blanton*, 792; revocation of letters, *In re Estate of Galloway*, 547; assets of estate, *Parker v. Trust Co.*, 527; *In re Estate of Galloway*, 547; claims for personal services rendered decedent, *Potter v. Clark*, 350; distribution of estate under family agreement, *Bank v. Hendley*, 432.

Expert Testimony—As to sanity or effect of drugs, *S. v. Jones*, 596; State may show defendant paid expert witness in order to establish witness' bias, *S. v. Creech*, 662; qualification of experts rests in discretion of court, *S. v. Strickland*, 201; *S. v. Jones*, 596.

Explosives—Punishment for burglary with, *In re* McKnight, 303; sentence for burglary with, *In re* McKnight, 303.

Expression of Opinion—By court on evidence, *S. v. Love*, 99.

Extradition—Personal property brought into State by nonresident subject to attachment unless non-

resident is brought into State by extradition or after waiver thereof, *White v. Ordille*, 490.

Facts, Findings of—See Findings of Fact.

False Imprisonment—Action for wrongful arrest, see Arrest; action for, is improperly pleaded as counterclaim in action for negligent injury, *Vestal v. White*, 414; nature and essentials of right of action, *Pridgen v. Coach Co.*, 46; liability of principal or employer for acts of agent or employee in causing arrest, *Pridgen v. Coach Co.*, 46.

Family Agreement—Consent judgment for settlement of estate approved, *Bank v. Hendley*, 432.

Federal Courts—Mandate of Supreme Court of U. S. in Brunson Case, see page 37; construction of Federal Employers' Liability Act governs, *Hill v. R. R.*, 236 *Medlin v. Powell*, 323.

Federal Employers' Liability Act—*Hill v. R. R.*, 236; *Medlin v. Powell*, 323.

Felonious Assault—See Assault.

Felonious Intent—Charge *held* for error in failing to define felonious intent, *S. v. Lunsford*, 229.

Felony—Defendant in prosecution for capital charge is entitled to have counsel, *In re Taylor*, 297.

Filling Stations—Liability of lessor and lessee for injury to patron, *Rogers v. Oil Corp.*, 241.

Findings of Fact—Form and sufficiency of exceptions to findings or failure to make findings, *Hendley v. Perry*, 15; *Poole v. Gentry*, 266; failure of court to set forth in full, not fatal in absence of request, *Nall v. Nall*, 598; supported by evidence are conclusive, *Ledford v. Ledford*, 373; *Poole v. Gentry*, 266; *Griggs v. York-Shipley*, 572; *Cannon v. Blair*, 606; *Trust Co. v. School for Boys*, 738; where findings of fact are not supported by evidence, rulings thereon are reviewable, *S. v. Speller*, 67; *Coble v. Coble*, 81; findings made under misapprehension of law will be set aside, *In re Estate of Galloway*, 547; of Industrial Commission are conclusive when supported by evidence, *West v. Dept. of Conservation*, 232; *Jacobs v. Manufacturing Co.*, 660; are not binding when not supported by evidence, *Young v. Whitehall Co.*, 360; findings *held* insufficient to support judgment that petitioners were entitled to cartway, *Garris v. Byrd*, 343.

Fire—Joinder of parties to recover damages from fire negligently started, *Fleming v. Light Co.*, 397.

Fire Insurance—See Insurance.

Florists—Liability for sales tax in sale of flowers, *Henderson v. Gill*, 313.

Flowers—Liability for sales tax in sale of, *Henderson v. Gill*, 313.

Foods—Complaint *held* to charge negligence alone in serving poisonous food by defendants and recovery could not be had for breach of implied warranty, *King v. Coley*, 258.

Foot Tracks—As circumstantial evidence of guilt, *S. v. Frye*, 581.

Foreclosure — See Mortgages; of drainage assessment liens, *Drainage District v. Bullard*, 633; matters adjudicated in hearings on restraining orders where appeal is not perfected may not be presented upon appeal from judgment of confirmation, *Gilkey v. Blanton*, 792; whether personal representative of deceased mortgagor should have been made party in action to restrain foreclosure *held* not presented in apt time, *Gilkey v. Blanton*, 792.

Foreign Corporations—Process agent for, *Townsend v. Coach Co.*, 523; venue of action against domesticated corporation, *Hill v. Greyhound Corp.*, 728.

Foreseeability—*Warner v. Lazarus*, 27; *Shaw v. Barnard*, 713.

Forma Pauperis—Statutory affidavit necessary to give court jurisdiction of pauper appeal, *Williams v. Tillman*, 434.

Former Jeopardy—*S. v. Williams*, 415; *S. v. Correll*, 640.

Fornication and Adultery—*S. v. Davis*, 386.

Franchises—Of bus companies, *Greyhound Corp. v. Utilities Com.*, 31; general statute *held* not to limit power of city to levy franchise tax under special act, *Power Co. v. Bowles*, 143.

Fraud—Attack of judgment for, *Bass v. Moore*, 211; cancellation of instruments for, see Cancellation of Instruments; deception constituting fraud, *Garrett v. Garrett*, 290; *Kee v. Dillingham*, 262; deception and reliance on misrepresentation, *Harrison v. R. R.*, 92; sufficiency of evidence of fraud, *Garrett v. Garrett*, 290.

Frauds, Statute of—Promise to answer for debt or default of another, *Cuthrell v. Greene*, 475; *Myers v. Allsbrook*, 786; parol trusts, *Bass v. Bass*, 171; *Cuthrell v. Greene*, 475.

Fraudulent Conveyances—Pleadings, *Davis v. Whitehurst*, 226.

Freedom—To pursue ordinary occupations, *S. v. Ballance*, 764; religious freedom, *S. v. Massey*, 732.

Gambling—Prosecution for possessing and leasing slot machines, *S. v. Davis*, 552.

Garnishment — Prospective earnings not subject to supplemental proceedings, *Finance Co. v. Putnam*, 555; property subject to, *White v. Ordille*, 490.

General Assembly—Cannot delegate authority to make law, *States' Rights Democratic Party v. Board of Elections*, 179.

Gifts—Where husband pays for land conveyed to wife, law will presume gift, *Bass v. Bass*, 171; trust indenture *held* not deed of gift requiring registration within one year, *Cannon v. Blair*, 606; advancements, *Harrelson v. Gooden*, 654.

Grade Crossings—Accidents at, *Noah v. R. R.*, 176; *Bundy v. Powell*, 707.

Grand Jury—Qualification and selection of grand jurors, *S. v. Speller*, 67.

Grantor and Grantee—Right of grantee to tack adverse possession of grantor, *Ramsey v. Ramsey*, 270; grantees in deeds executed by testator prior to death not necessary parties to caveat, *In re* Will of Brock, 482.

Guests—Within meaning of automobile guest statute, *Morse v. Walker*, 778.

Habeas Corpus—To obtain freedom from unlawful restraint, *In re Taylor*, 297; to obtain custody of minor children, *Robbins v. Robbins*, 430; *Phipps v. Vannoy*, 629; appeal and review, *In re Taylor*, 297; *In re McKnight*, 303.

Handcart—Is not vehicle and must be pushed on left side of highway, *Lewis v. Watson*, 20.

Harmful and Deleterious Substances —Complaint *held* to charge negligence in serving poisonous food by defendants and recovery could not be had for breach of implied warranty, *King v. Coley*, 258.

Harmless and Prejudicial Error—See Prejudicial and Harmless Error.

Health—Statute may not create monopoly when restrictions have no real relation to public health, safety or welfare, *Palmer v. Smith*, 612; ordinance prohibiting handling of poisonous reptiles, *S. v. Massey*, 734.

Hearsay Evidence — Testimony by party as to statement he made as to contents of documents not hearsay, *Landis v. Gittlin*, 521.

Heart Disease—Is not occupational disease and ordinarily is not compensable, *West v. Dept. of Conservation*, 232.

"Heirs"—Whether word "heirs" is used to designate heirs general so that Rule in *Shelley's case* applies, *Ratley v. Oliver*, 120; *Wheeler v. Wilder*, 379; realty passes directly to heirs and they are entitled to rents, *In re Estate of Galloway*, 547; advancement to, *Harrelson v.*

Gooden, 654; consent judgment for settlement of estate approved, *Bank v. Hendley*, 432.

Highways—Nature and grounds of remedy to establish cartway, *Garris v. Byrd*, 343; *Brown v. Glass*, 657; use of highways and law of the road, see Automobiles.

Hit and Run Driving—*S. v. Ray*, 40; prosecution for involuntary manslaughter will not support plea of former jeopardy in prosecution for, *S. v. Williams*, 415.

Holographic Codicil—*In re Will of Goodman*, 444.

Homicide—Accessory after the fact of murder, *S. v. Williams*, 348; self-defense, *S. v. Church*, 718; presumptions and burden of proof, *S. v. McNeill*, 377; *S. v. Phillips*, 538; *S. v. Creech*, 662; relevancy and competency of evidence in general, *S. v. Creech*, 662; evidence of motive and malice, *S. v. Creech*, 662; sufficiency of evidence and nonsuit, *S. v. Bagley*, 723; charge on presumptions and burden of proof, *S. v. Franklin*, 336; *S. v. Creech*, 662; *S. v. Phillips*, 538; charge on defenses, *S. v. Franklin*, 336; *S. v. Correll*, 640; *S. v. Church*, 718; instructions on less degree of crime, *S. v. McNeill*, 377; prosecution for involuntary manslaughter will not support plea of former jeopardy in prosecution for hit and run driving, *S. v. Williams*, 415; manslaughter in operation of automobile, *S. v. Blankenship*, 589; after new trial is granted on appeal, plea of former jeopardy to higher offenses *held* untenable on second trial, *S. v. Correll*, 640.

Hospitals—Devise to hospitals of State for charity patients, *Trust Co. v. McMullan*, 746.

Hotels—Liability of hotel for guest's fall, *Barnes v. Hotel Corp.*, 730.

Husband and Wife—Action by wife against husband for assault and validity of release executed by her, *Garrett v. Garrett*, 290; divorce and alimony with or without divorce, see Divorce; husband takes as distributee not by virtue of *lex mariti*, *Trust Co. v. Shelton*, 150; marital rights, privileges and disabilities, *Coble v. Coble*, 81; wife's separate estate, *Bass v. Bass*, 171; transactions between husband and wife, *Bass v. Bass*, 171; *Garrett v. Garrett*, 290; conveyances between husband and wife, *Henley v. Perry*, 15; *Bass v. Bass*, 171; *McCullen v. Durham*, 418; creation of estates by entireties, *Byrd v. Patterson*, 156.

Immunity—Of State's witness from prosecution, *S. v. Love*, 99.

Implied Emancipation—In minor's suit by father as next friend demanding recovery for loss of earnings during minority, father waives right thereto, *Pascal v. Transit Co.*, 435.

Implied Grant—Acquisition of right of way by, *R. R. v. Manufacturing Co.*, 695.

Implied Powers—Of municipality, *Green v. Kitchin*, 450.

Implied Warranty—Complaint *held* to charge negligence alone in serving poisonous food by defendants, and recovery could not be had for breach of implied warranty, *King v. Coley*, 258.

Inadequacy of Consideration—Is alone insufficient to establish fraud, *Ledford v. Ledford*, 373.

Income Tax—On distributive share of resident beneficiary derived from trust business carried on in another state, *Sabine v. Gill*, 599.

Indemnity—Nature and requisites of right of action, *Bledsoe v. Lumber Co.*, 128; matters secured, *Coach Co. v. Coach Co.*, 534; rights and remedies of person indemnified, *Fleming v. Light Co.*, 397.

Indictment—Grounds for quashal of, *S. v. Speller*, 67; effect of quashal of indictment, *S. v. Speller*, 67.

Infants—Awarding custody of, in divorce action, *Coble v. Coble*, 81; jurisdiction is not ousted by prior order in *habeas corpus*, *Robbins v. Robbins*, 430; juvenile court has exclusive jurisdiction to determine custody of minor except as between

parents, *Phipps v. Vannoy*, 629; attack of judgment against on ground that guardian *ad litem* failed to properly represent them, *Bass v. Moore*, 211; contention of want of sufficient notice before judgment against minor, *Garner v. Phillips*, 160; damages recoverable by infants in actions for negligent injury, *Pascal v. Transit Co.*, 435; right to recover for father's negligent driving, *Wright v. Wright*, 503; evidence *held* for jury on issues of negligence and contributory negligence in action for fatal injury of child on highway, *Hughes v. Thayer*, 773.

Injunctions—In equity suit taxing of costs is in discretion of court, *Chandler v. Cameron*, 62; where election sought to be enjoined has been held plaintiff's appeal will be dismissed as academic, *Eller v. Wall*, 359; *Penland v. Gowan*, 449; *Nance v. Winston-Salem*, 732; findings in injunctive proceedings are reviewable, *McLeod v. Wrightsville Beach*, 621; to remove building from right of way for transmission lines, *Light Co. v. Bowman*, 682; enjoining nuisances, *McLeod v. Wrightsville Beach*, 621; enjoining institution or prosecution of civil action, *Davis v. Whitehurst*, 226; enjoining infringement on franchises, *Greyhound Corp. v. Utilities Com.*, 31; *Greyhound Corp. v. Transportation Co.*, 31.

Innkeepers—Liability of hotel for guest's fall, *Barnes v. Hotel Corp.*, 730.

Insanity—Mental responsibility for crime, *S. v. Swink*, 123; *S. v. Creech*, 662; procedure to raise and determine question of mental capacity of defendant to plead the indictment and conduct defense, *S. v. Sullivan*, 251; defendant is presumed sane with burden of establishing irresponsibility due to drunkenness, *S. v. Creech*, 662.

Instructions—Relating to particular actions, see particular titles of actions; in criminal prosecutions, see particular titles of crimes; request for, *S. v. Hicks*, 345; statement of evidence and application of law thereto, *Lewis v. Watson*, 20; *S. v. Lunsford*, 229; *Kee v. Dillingham*, 262; *S. v. Hicks*, 345; charge *held* for error in failing to define felonious intent, *S. v. Lunsford*, 229; is error to fail to explain law arising on defendant's contention supported by evidence, *S. v. Fain*, 644; expression of opinion in, *S. v. Love*, 99; duty of court to charge on less degree of crime, *S. v. Lunsford*, 229; *S. v. McNeill*, 377; *S. v. Muse*, 536; peremptory instructions in criminal case, *S. v. Baker*, 73; upon defendant's motion for peremptory instructions, evidence will be considered in light most favorable to plaintiff, *Garrett v. Garrett*, 290; inadvertent statement of *quantum* of proof *held* corrected, *Wyatt v. Coach Co.*, 340; on failure of defendant to testify, *S. v. McNeill*, 377; on right of self-defense or right to defend member of family *held* not prejudicial, *S. v. Church*, 718; failure to charge in single instance that killing must be intentional to raise presumptions, *held* not prejudicial, *S. v. Creech*, 662; failure of charge to limit prospective losses to present cash value *held* not prejudicial, *Pascal v. Transit Co.*, 435; on question of contributory negligence *held* error in omitting question of concurring negligence, *Noah v. R. R.*, 175; exceptions to, *Coach Co. v. Motor Lines*, 650; where evidence is not in record, exception to cannot be considered, *Shepherd v. Dollar*, 736; where charge is not in record it will be presumed correct, *S. v. Sullivan*, 251; misstatement of contentions must be brought to court's attention in apt time, *Coach Co. v. Motor Lines*, 650; *S. v. Church*, 718; prejudicial and harmless error in, *In re Will of Etheridge*, 280; *S. v. Franklin*, 336; *Wyatt v. Coach Co.*, 340; *S. v. McNeill*, 377; *S. v. Davis*,

386; *S. v. Creech*, 662; *Stewart v. Dixon*, 737.

Insulating Negligence — *Warner v. Lazarus*, 27.

Insurance—Change of beneficiary to one employee upon agreement that such employee would pay out of proceeds mortgage on another employee's house, *Cuthrell v. Greene*, 475; construction of policies, *Electric Co. v. Ins. Co.*, 518; *MacClure v. Ins. Co.*, 305; construction of fire policy, *Ziberlin v. Ins. Co.*, 567; notice and proof of loss and waiver, *Ziberlin v. Ins. Co.*, 567; effective date of life policy, *Stallings v. Ins. Co.*, 529; actions on life policies, *Barnes v. Trust Co.*, 409; construction of liability policies as to persons covered, *MacClure v. Ins. Co.*, 305; construction of collision policy as to risks covered, *Electric Co. v. Ins. Co.*, 518; notice of accident in liability and collision insurance, *MacClure v. Casualty Co.*, 305; cooperation of insured in preparing and prosecuting defense to action on policy by third person, *MacClure v. Casualty Co.*, 305; actions on liability and collision policies, *MacClure v. Ins. Co.*, 305.

Intent—Charge *held* for error in failing to define felonious intent, *S. v. Lunsford*, 229.

Interstate Commerce—Segregation of races on interstate carriers, *Pridgen v. Coach Co.*, 46; Federal Employers' Liability Act, *Hill v. R. R.*, 236; liability of carrier for wrongful delivery of goods, *Griggs v. York-Shipley*, 572.

Intervening Negligence—*Warner v. Lazarus*, 27.

Intoxicating Liquor—Immunity of State's witness from prosecution, *S. v. Love*, 99; drunken driving, *S. v. Hough*, 532; *S. v. Blankenship*, 589.

Intrinsic Fraud—Attack of judgment *held* for, *Bass v. Moore*, 211.

Invitee—Free passenger is invitee of taxi company, *Wright v. Wright*, 503; liability to, for injuries from fall, *Patterson v. Lexington*, 637.

Involuntary Manslaughter—Prosecution for, will not support plea of former jeopardy in prosecution for hit and run driving, *S. v. Williams*, 415.

Issues—As to mental capacity to plead to indictment may be submitted with issue of guilt or innocence, *S. v. Sullivan*, 251; must arise on pleadings, *McCullen v. Durham*, 418; complaint *held* to charge negligence alone in serving poisonous food by defendants and recovery could not be had for breach of implied warranty, *King v. Coley*, 258; insufficiency of defendants' evidence on affirmative defense must be raised by motion for directed verdict, *Coach Co. v. Motor Lines*, 650.

Jeopardy—*S. v. Williams*, 415; *S. v. Correll*, 640.

Joinder of Actions—Causes which may be set up as counterclaim or cross-action, *Hancammon v. Carr*, 52; *Horton v. Perry*, 319; joinder of causes in complaint, *Davis v. Whitehurst*, 226.

Joinder of Parties—Joinder of joint *tort-feasors*, *Fleming v. Light Co.*, 397; *Shaw v. Barnard*, 713.

Joint Tort-Feasors—Joinder of, *Fleming v. Light Co.*, 397; *Shaw v. Barnard*, 713; action for contribution against, *Pascal v. Transit Co.*, 435.

Judgments—Review of exceptions to judgment, *Western N. C. Conference v. Tally*, 1; *Harney v. Comrs. of McFarlan*, 71; execution of judgments, see Execution: motion for on the pleadings, *Bass v. Moore*, 211; *Wike v. Guaranty Co.*, 370; *Brown v. Moore*, 406; where warrant fails to charge crime, judgment will be arrested, *S. v. Harris*, 413; not supported by allegations cannot stand, *King v. Coley*, 258; *McCullen v. Durham*, 418; consent judgment for settlement of estate approved, *Bank v. Hendley*, 432; nature and essentials of consent judgments, *Ledford v. Ledford*, 373; attack and setting aside consent judgments, *Davis v. White-*

hurst, 226; *Ledford v. Ledford*, 373; lien of judgment, *McCullen v. Durham*, 418; life of lien of judgment, *McCullen v. Durham*, 418; parties who may attack, *Davis v. Whitehurst*, 226; validity of judgments and procedure to attack, *Bass v. Moore*, 211; attack of and setting aside default judgments, *Moody v. Howell*, 198; attack of judgments for fraud, *Bass v. Moore*, 211; contention that motion to vacate void order would not lie because order had been carried into effect, *Coble v. Coble*, 81; matters concluded by judgment, *Gilkey v. Blanton*, 792.

Judicial Notice—Court will take judicial notice policeman needs special training, *Green v. Kitchin*, 450.

Jurisdiction—See Courts; juvenile court has exclusive jurisdiction to determine custody of minor except as between parents, *Phipps v. Vannoy*, 629.

Jury—Preservation of right to jury trial on exceptions to referee's report, *Cherry v. Andrews*, 333; selection of jurors, jury rolls and boxes, *S. v. Brunson*, 37; *S. v. Speller*, 67; special venires, *S. v. Strickland*, 201.

Justices of the Peace—Power to take bail, *White v. Ordille*, 490.

Juvenile Court—Has exclusive jurisdiction to determine custody of minor except as between parents, *Phipps v. Vannoy*, 629.

Labor Unions—Right of employees to unemployment benefits during strike, *Unemployment Compensation Com. v. Lunceford*, 570.

Laches—Right to insist on defense bond in action involving title in realty may be lost by laches, *Roberts v. Sawyer*, 279; does not bar action for divorce *a mensa*, *Nall v. Nall*, 598.

Landlord and Tenant—Liability of landlord for injuries to third persons, *Rogers v. Oil Corp.*, 241.

Lapsed Legacies—*Trust Co. v. Shelton*, 150.

Larceny—Sufficiency of evidence and nonsuit, *S. v. Frye*, 581.

"Law of the Land"—*S. v. Ballance*, 764.

Leases—See Landlord and Tenant.

Legal Discretion—Exercise of, is reviewable, *In re Estate of Galloway*, 547.

Legal Process—Force permissible in serving legal process, *S. v. Fain*, 644.

Less Degree of Crime—Duty of court to charge on, *S. v. Lunsford*, 229; *S. v. McNeill*, 377; *S. v. Muse*, 536.

Lessor and Lessee—Liability of lessor and lessee for injury to patron, *Rogers v. Oil Corp.*, 241.

"Liberty"—*S. v. Ballance*, 764.

Licenses—License tax is kind of privilege tax, *Power Co. v. Bowles*, 143; statute providing for licensing of photographers *held* unconstitutional, *S. v. Ballance*, 764.

Liens—Of judgment, *McCullen v. Durham*, 418.

Life Estate—Contingent remainder cannot vest during life of life tenant even though life estate be forfeited, *Bass v. Moore*, 211.

Life Insurance—See Insurance.

"Light Work"—Is not synonymous with "ordinary work," *Young v. Whitehall Co.*, 360.

Limitation of Actions—Time within which action for wrongful death must be instituted, see Death; presumption of satisfaction of mortgage after 15 years, *Thomas v. Myers*, 234; life of judgment lien for purpose of execution, *McCullen v. Durham*, 418; time in which claim for compensation under Workmen's Compensation Act must be filed, *Jacobs v. Manufacturing Co.*, 660; on actions to recover compensation for easement taken under implied grant, *R. R. v. Manufacturing Co.*, 695; accrual of cause of action, *Sanders v. Hamilton*, 43; no statute bars action for divorce *a mensa*, *Nall v. Nall*, 598.

Logs—Standing timber is realty, *Chandler v. Cameron*, 62; conveyancing and contracts affecting

standing timber, *Chandler v. Cameron*, 62.

Malice—In institution of prosecution, *Taylor v. Hodge*, 558; in prosecution for uxoricide evidence of defendant's ill treatment of wife over period of married life *held* competent, *S. v. Creech*, 662.

Malicious Prosecution—Actions for, *Taylor v. Hodge*, 558; *Perry v. Hurdle*, 211; *Pridgen v. Coach Co.*, 46.

Mandamus—Ministerial duty, *States' Rights Democratic Party v. Board of Elections*, 179.

Mandatory Injunctions—To remove building from right of way for transmission lines, *Light Co. v. Bowman*, 682.

Manslaughter—See Homicide; in operation of automobile, see Automobiles.

Maps—Competentcy of, *Poole v. Gentry*, 266.

Market Value—Opinion evidence as to value of lands, *Harrelson v. Gooden*, 654.

Married Women—See Husband and Wife; divorce and alimony, see Divorce.

Master and Servant—Liability of employer for employee's driving, *Donivant v. Swaim*, 114; *Wright v. Wright*, 503; *McIlroy v. Motor Lines*, 509; prospective earnings not subject to supplemental proceedings, *Finance Co. v. Putnam*, 555; Federal Employers' Liability Act, *Hill v. R. R.*, 236; *Medlin v. Powell*, 323; employers subject to Compensation Act, *Hunter v. Peirson*, 356; injuries compensable under N. C. Compensation Act, *West v. Department of Conservation*, 232; whether injury results from "accident," *West v. Department of Conservation*, 232; occupational diseases, *West v. Department of Conservation*, 232; *Young v. Whitehall Co.*, 360; notice and filing of claim for accident, *Jacobs v. Mfg. Co.*, 660; jurisdiction of Industrial Commission and exclusion of other remedies, *Worley v. Pipes*, 465; *Matros v. Owen*, 472; proceedings before Industrial Commission, *Young v. Whitehall Co.*, 360; recovery and award, *Worley v. Pipes*, 465; *Matros v. Owen*, 472; review of award of Industrial Commission, *Young v. Whitehall Co.*, 360; *Jacobs v. Mfg. Co.*, 660; *West v. Department of Conservation*, 232; Unemployment Compensation Act, *Unemployment Compensation Com. v. Lunceford*, 570.

Medicine—Osteopath may not prescribe or administer drugs, *S. v. Baker*, 73.

Mental Capacity—Mental responsibility for crime, *S. v. Swink*, 123; *S. v. Jones*, 596; *S. v. Creech*, 662; procedure to raise and determine question of mental capacity of defendant to plead the indictment and conduct defense, *S. v. Sullivan*, 251; defendant is presumed sane with burden of establishing irresponsibility due to drunkenness, *S. v. Creech*, 662.

Merger—Distinction between amalgamation and, *Trust Co. v. School for Boys*, 738.

"Milk"—Is food and not a drug, *S. v. Baker*, 73.

Minors—Awarding custody of in divorce action, *Coble v. Coble*, 81; jurisdiction of court to award custody of children in divorce action not ousted by prior order issued in *habeas corpus*, *Robbins v. Robbins*, 430; juvenile court has exclusive jurisdiction to determine custody of minor except as between parents, *Phipps v. Vannoy*, 629; attack of judgment against on ground that guardian *ad litem* failed to properly represent them, *Bass v. Moore*, 211; evidence *held* for jury on issues of negligence and contributory negligence in action for fatal injury of child on highway, *Hughes v. Thayer*, 773; in minor's suit by father as next friend demanding recovery for loss of earnings during minority, father waives right thereto, *Pascal v. Transit Co.*, 435; right to recover for father's negli-

gent driving, *Wright v. Wright*, 503.

Misrepresentations—Estoppel by, *McCullen v. Durham*, 418; employer *held* not estopped from setting up defense that claim was not filed within one year, *Jacobs v. Manufacturing Co.*, 660.

Mistake—Cancellation of release for mistake induced by fraud, *Garrett v. Garrett*, 290.

Money Received—Nature and essentials of right of action, *Bank v. Marshburn*, 104.

Monopoly—Statute may not create monopoly when restrictions have no real relationship to public health, safety or welfare, *Palmer v. Smith*, 612; statute regulating photographers *held* unconstitutional, *S. v. Ballance*, 764.

Moot and Academic Questions—Appeal presenting will be dismissed, *Eller v. Wall*, 359; *Penland v. Gowan*, 449; *Nance v. Winston-Salem*, 732.

Mortgages—Right to foreclose, *Sanders v. Hamilton*, 43; parties to suit to enjoin foreclosure, *Gilkey v. Blanton*, 792; presumption of satisfaction of instrument after fifteen years, *Thomas v. Myers*, 234; *cestuis* may purchase, *Graham v. Graham*, 565.

Motions—To set aside verdict as contrary to evidence, *King v. Byrd*, 177; *Coach Co. v. Motor Lines*, 650; motions for nonsuit, see Trial; for continuance is addressed to discretion of court, *S. v. Strickland*, 201; *S. v. Creech*, 662; for special venire is addressed to discretion of court, *S. v. Strickland*, 201; motion for judgment on the pleadings, *Bass v. Moore*, 211; *Wike v. Garrett Co.*, 370; *Brown v. Moore*, 406; to make pleadings more definite, *Lowman v. Asheville*, 247; for new trial for excessiveness of verdict, *Edmunds v. Allen*, 250; *Garrett v. Garrett*, 290; to strike made in apt time is not addressed to discretion, *Fleming v. Light Co.*, 397; matter which should be stricken on motion, *Fleming v. Light Co.*, 397; *Vestal v. White*, 414; sole exception to denial of presents only question of whether judgment is supported by record, *Rhodes v. Asheville*, 355.

Motive and Malice—In prosecution for uxorcide, evidence of defendant's ill treatment of wife over period of married life *held* competent, *S. v. Creech*, 662.

Mules—Autoist sued for collision with mule-drawn wagon may not file cross-action against co-defendant for damages to his own car, *Horton v. Perry*, 319.

Municipal Corporations—Transfer of athletic field to, for use of schools, *Boney v. Kinston Graded Schools*, 136; liability to patron for injuries from fall, *Patterson v. Lexington*, 637; dismissal of appeal from judgment denying injunction against extension election, *Nance v. Winston-Salem*, 732; powers in general, *Green v. Kitchin*, 450; governmental powers, *Green v. Kitchin*, 450; proceedings, orders and resolutions of governing board, *Green v. Kitchin*, 450; police officers, *Green v. Kitchin*, 450; rights of parties under void municipal contract, *Hawkins v. Dallas*, 561; control and use of municipal property, *McLeod v. Wrightsville Beach*, 621; streets and sidewalks, *McLeod v. Wrightsville Beach*, 621; zoning ordinances and building permits, *James v. Sutton*, 515; regulations relating to public safety and health, *Lee v. Chemical Co.*, 447; *S. v. Massey*, 734; municipal charges and expenses, *Green v. Kitchin*, 450; levy and collection of taxes. *Power Co. v. Bowles*, 143.

Municipal Courts—*Electric Co. v. Motor Lines*, 86.

Murder—See Homicide.

Murderer—Will not be allowed to inherit property of victims, *Garner v. Phillips*, 160.

Narcotics—Expert and opinion testimony as to effect of, *S. v. Jones*, 596.

Necessary Expense—Municipal expenditure for special training of police officer is, *Green v. Kitchin*, 450; vote on bonds for, is not against the registration, *Mason v. Comrs. of Moore*, 626.

Negligence—In automobile accident cases, see Automobiles; of railroad company in regard to grade crossings, *Bundy v. Powell*, 707; as basis of recovery under Federal Employers' Liability Act, *Hill v. R. R.*, 236; child's right to recover for negligent driving of father, *Wright v. Wright*, 503; liability as between lessor and lessee, see Landlord and Tenant; complaint *held* to charge negligence in serving poisonous food by defendants and recovery could not be had for breach of implied warranty, *King v. Coley*, 258; instruction as to right to recover for loss of prospective earnings, *Pascal v. Transit Co.*, 435; determination of whether injury was result of joint tort, *Shaw v. Barnard*, 713; joinder of parties to recover damages from fire negligently started, *Fleming v. Light Co.*, 397; release from liability for negligent injury and attack of release, see Torts; repair and condition of buildings, *Barnes v. Hotel Corp.*, 730; obstructions and conditions of lands, *Patterson v. Lexington*, 637; duties and liability of patron to invitees, *Patterson v. Lexington*, 637; *Barnes v. Hotel Corp.*, 730; intervening negligence, *Warner v. Lazarus*, 27; *Shaw v. Barnard*, 713; foreseeability a prerequisite of proximate cause, *Warner v. Lazarus*, 27; *Shaw v. Barnard*, 713; contributory negligence, *Noah v. R. R.*, 176; *Bundy v. Powell*, 707; contributory negligence of minors, *Hughes v. Thayer*, 773; nonsuit on issue of contributory negligence, *Barlow v. Bus Lines*, 382; *Bundy v. Powell*, 707; instructions in negligent injury actions, *Noah v. R. R.*, 176.

Negroes—Segregation of races on interstate carriers, *Pridgen v. Coach Co.*, 46; segregation of races on intrastate bus, *S. v. Johnson*, 701; new trial awarded for systematic exclusion of Negroes from grand jury, *S. v. Speller*, 67.

New Trial—Motions for new trial for excessiveness of verdict, *Edmunds v. Allen*, 250; *Garrett v. Garrett*, 290; motion for new trial for newly discovered evidence, *S. v. Gibson*, 497.

Newly Discovered Evidence—Motion for new trial for, *S. v. Gibson*, 497.

Nolle Prosequi—Is sufficient termination of prosecution to support action for malicious prosecution, *Perry v. Hurdle*, 216; *Taylor v. Hodge*, 558.

Nonresident—Personal property brought into State by nonresident subject to attachment unless nonresident is brought into State by extradition or after waiver thereof, *White v. Ordille*, 490; income tax on distributive share of resident beneficiary derived from trust business carried on in another state, *Sabine v. Gill*, 599.

Nonsuit—On motion to nonsuit, evidence will be considered in light most favorable to plaintiff, *Perry v. Hurdle*, 216; *Garrett v. Garrett*, 290; *Pascal v. Transit Co.*, 435; *Bundy v. Powell*, 707; *Hughes v. Thayer*, 773; or to State, *S. v. Blankenship*, 589; defendant's evidence in conflict should not be considered, *Perry v. Hurdle*, 216; *Taylor v. Hodge*, 558; *Bundy v. Powell*, 707; sufficiency of evidence to overrule nonsuit, *Barlow v. Bus Lines*, 382; *Pascal v. Transit Co.*, 435; on issue of negligence in automobile accident cases, *Brown v. Truck Lines*, 122; conflict in State's testimony does not justify, *S. v. Robinson*, 647; defendant is entitled to, where State's exculpatory evidence is not contradicted, *S. v. Robinson*, 647; motion must be renewed at close of all the evidence, *Hawkins v. Dallas*, 561; on ground of contributory negligence, *Lewis v. Watson*, 20; *Bus Co. v. Products Co.*, 352; *Barlow v. Bus Lines*, 382;

Bundy v. Powell, 707; *Hughes v. Thayer*, 773; on ground of intervening negligence, *Warner v. Lazarus*, 27; is improper on evidence offered by defendant on affirmative defense, *MacClure v. Casualty Co.*, 305; *Barnes v. Trust Co.*, 409; evidence *held* insufficient on charge of assault with a deadly weapon, *S. v. Robinson*, 647; evidence of guilt of murder *held* sufficient, *S. v. Bagley*, 723; evidence *held* insufficient on charge of drunken driving, *S. v. Hough*, 532; evidence *held* sufficient for jury on charge of drunken driving, reckless driving and manslaughter, *S. v. Blankenship*, 589; sufficiency of evidence in nonsuit in prosecution for hit and run driving, *S. v. Ray*, 40; circumstantial evidence of guilt of larceny sufficient to withstand, *S. v. Frye*, 581; circumstantial evidence of guilt of blackmail *held* sufficient, *S. v. Strickland*, 201; evidence of guilt of receiving stolen property *held* sufficient, *S. v. Larkin*, 126; evidence *held* insufficient on charge to commit felonious assault, *S. v. Wellborn*, 617; evidence *held* sufficient in action for malicious prosecution, *Taylor v. Hodge*, 558; evidence *held* insufficient in action for malicious prosecution, *Perry v. Hurdle*, 216; evidence *held* sufficient to show mistake induced by fraud in action to cancel instrument, *Garrett v. Garrett*, 290.

N. C. Workmen's Compensation Act—See Master and Servant.

Nuisances—Arising from use of municipal property for recognized municipal purpose may not be enjoined, *McLeod v. Wrightsville Beach*, 621.

Objections—Exceptions to findings on ground they were based on incompetent evidence untenable when there is no objection to evidence, *Poole v. Gentry*, 266.

Obligation of Contract—Physician may not sue employee on contract when injury is covered by Compensation Act, *Worley v. Pipes*, 465.

Occupational Disease—Heart disease is not occupational disease and ordinarily is not compensable, *West v. Dept. of Conservation*, 232; disability from silicosis, *Young v. Whitehall Co.*, 360.

Occupations—Freedom to pursue, *S. v. Ballance*, 764.

Officers—Credibility of officer who buys whiskey for purpose of obtaining evidence for conviction, *S. v. Love*, 99; force permissible in serving legal process, *S. v. Fain*, 644.

Opinion Evidence—As to intoxication, *S. v. Hough*, 532: as to time necessary to reconvert machines into coin slot-operated machines, *S. v. Davis*, 552; as to sanity or effect of drugs, *S. v. Jones*, 596; as to value of lands, *Harrelson v. Gooden*, 654.

Options—*Hornaday v. Hornaday*, 164.

Optometry — Statutory requirement that person replacing or duplicating ophthalmic lens must be licensed *held* unconstitutional, *Palmer v. Smith*, 612.

Ordinances—Municipal traffic ordinances in conflict with State law, void as to streets constituting highway, *Lee v. Chemical Corp.*, 447: ordinance prohibiting handling of poisonous reptiles, *S. v. Massey*, 732; zoning ordinances and building permits, *James v. Sutton*, 515.

"Ordinary Work"—Is not synonymous with "light work," *Young v. Whitehall Co.*, 360.

Osteopath—May not prescribe or administer drugs, *S. v. Baker*, 73.

Parent and Child—Child murdering parents will not be allowed to retain inheritance, *Garner v. Phillips*, 160; jurisdiction to award custody in divorce action, *Coble v. Coble*, 81; jurisdiction of court to award custody of children in divorce action not ousted by prior order issued in *habeas corpus*, *Robbins v. Robbins*, 430; juvenile court has exclusive jurisdiction to determine custody of minor except as between parents, *Phipps v. Vannoy*, 629; lia-

bility of parent for negligent injury to child, *Wright v. Wright*, 503; right of parent to recover for injuries to child, *Pascal v. Transit Co.*, 435; advancements to child, *Harrelson v. Gooden*, 654.

Parking—Stopping on highway without rear lights, *Warner v. Lazarus*, 27; *Bus Co. v. Products Co.*, 352; *Barlow v. Bus Lines*, 382; *Pascal v. Transit Co.*, 435.

Parol Evidence—*McCullen v. Durham*, 418; *Bass v. Bass*, 171.

Parol Trusts—See Trusts.

Parties—Only personal representative may maintain action for wrongful death, *McCoy v. R. R.*, 57; third party beneficiary may sue on contract, *Coleman v. Mercer*, 245; joinder of joint *tort-feasors*, *Fleming v. Light Co.*, 397; to caveat proceedings, *In re Will of Brock*, 482; whether personal representative of deceased mortgagor should have been made party in action to restrain foreclosure *held* not presented in apt time, *Gilkey v. Blanton*, 792; parties representative of class, *Trust Co. v. McMullan*, 746; joinder of additional parties, *Fleming v. Light Co.*, 397; deletion of parties, *Fleming v. Light Co.*, 397.

Partition—Actual partition, *Chandler v. Cameron*, 62; burden of proof in actions for partition, *Johnson v. Johnson*, 541.

Partnership—Individual liability of partners, *Coleman v. Mercer*, 245.

Passengers—Within meaning of automobile guest statute, *Morse v. Walker*, 778.

Pauper Appeal—Statutory affidavit necessary to give court jurisdiction of, *Williams v. Tillman*, 434.

Paying Passengers—Within meaning of automobile guest statute, *Morse v. Walker*, 778.

Payment—By check, *Parker v. Trust Co.*, 527; Presumption of satisfaction of deed of trust after 15 years, *Thomas v. Myers*, 234.

Pedestrian—Person pushing handcart is, *Lewis v. Watson*, 20.

Peremptory Instructions—In criminal case, *S. v. Baker*, 73; upon defendant's motion for peremptory instructions, evidence will be considered in light most favorable to plaintiff, *Garrett v. Garrett*, 290.

Performance Bond—Right of guarantor on contractor's performance bond, *Wike v. Guaranty Co.*, 370.

Personal Representative—See Executors and Administrators; only personal representative may maintain action for wrongful death, *McCoy v. R. R.*, 57.

Personalty—Standing timber is realty. *Chandler v. Cameron*, 62.

Petition—Distinction between certificate and, *States' Rights Democratic Party v. Board of Elections*, 179.

Petition to Rehear—*Owens v. Chaplin*, 797.

Photographers — Statute regulating, unconstitutional, *S. v. Ballance*, 764.

Photographs—*Coach Co. v. Motor Lines*, 650; *Bundy v. Powell*, 707.

"Physical Facts"—As evidence of negligent operation of automobile, *S. v. Blankenship*, 589; as shown by defendant's photographic evidence *held* not to compel nonsuit for contributory negligence, *Bundy v. Powell*, 707.

Physical Training—Is legitimate function of education, *Boney v. Kinston Graded Schools*, 136.

Physicians and Surgeons and Allied Professions—Validity and construction of regulatory statutes, *S. v. Baker*, 73; *Palmer v. Smith*, 612; prosecutions for practicing medicine without license, *S. v. Baker*, 73; compensation and remedies of physicians, *Worley v. Pipes*, 465; *Matros v. Owen*, 472.

Playgrounds—Physical training is legitimate function of education, *Boney v. Kinston Graded Schools*, 136.

Pleadings—In divorce actions, see Divorce; in action to set aside contract as fraudulent as to creditors, see Fraudulent Conveyances; sole exception to denial of motion to

strike presents only question of whether judgment is supported by record, *Rhodes v. Asheville*, 355; issues must arise on, *McCullen v. Durham*, 418; joinder of actions, *Davis v. Whitehurst*, 226; *Horton v. Perry*, 319; *Fleming v. Light Co.*, 397; *Shaw v. Barnard*, 713; statement of causes of action, *King v. Coley*, 258; *Myers v. Allsbrook*, 786; prayer for relief, *Griggs v. York-Shipley*, 572; counterclaims and cross-actions, *Hancammon v. Carr*, 52; *Horton v. Perry*, 319; *Fleming v. Light Co.*, 397; *Vestal v. White*, 414; verification, *Calaway v. Harris*, 117; office and effect of demurrer, *Rhodes v. Asheville*, 355; *Green v. Kitchin*, 450; *Sabine v. Gill*, 599; frivolous demurrers, *Davis v. Whitehurst*, 226; demurrer for misjoinder of parties and causes, *Davis v. Whitehurst*, 226; *Shaw v. Barnard*, 713; amendment by permission of court, *Nance v. Winston-Salem*, 732; variance between allegations and proof, *King v. Coley*, 258; *McCullen v. Durham*, 418; motions for bill of particulars or to make pleading more definite and certain, *Lowman v. Asheville*, 247; nature and grounds for judgment on the pleadings, *Bass v. Moore*, 211; *Wike v. Guaranty Co.*, 370; *Brown v. Moore*, 406; motions to strike, *Fleming v. Light Co.*, 397; determination of whether matter should be stricken on motion, *Hancanimon v. Carr*, 52; *Fleming v. Light Co.*, 397; *Vestal v. White*, 414.

Poisonous Reptiles—Ordinance prohibiting handling of, *S. v. Massey*, 734.

Poisonous Substances — Complaint *held* to charge negligence in serving poisonous food by defendants and recovery could not be had for breach of implied warranty, *King v. Coley*, 258.

Police Officer—Authority to arrest, *Perry v. Hurdle*, 216; power of municipality to expend funds for training of, *Green v. Kitchin*, 450; force permissible in serving legal process, *S. v. Fain*, 644.

Police Power—Zoning ordinances, *James v. Sutton*, 515; statute may not create monopoly when restrictions have no real relation to public health, safety or welfare, *Palmer v. Smith*, 612; statute regulating photographers unconstitutional, *S. v. Ballance*, 764; ordinance prohibiting handling of poisonous reptiles, *S. v. Massey*, 734.

Political Party—Creation of new, *States' Rights Democratic Party v. Board of Elections*, 179.

Power Companies—Joinder of parties to recover damages from fire negligently started, *Fleming v. Light Co.*, 397; interference with easement for transmission lines, *Light Co. v. Bowman*, 682.

Prayer for Relief—Does not govern recovery, *Griggs v. York-Shipley*, 572.

Prejudicial and Harmless Error—In admission or exclusion of evidence, *Poole v. Gentry*, 266; *Landis v. Gittlin*, 521; *S. v. Jones*, 596; *Coach Co. v. Motor Lines*, 650; *S. v. Creech*, 662; in instructions, *In re Will of Etheridge*, 280; *S. v. Franklin*, 336; *Wyatt v. Coach Co.*, 340; *S. v. McNeill*, 377; *S. v. Davis*, 386; *S. v. Creech*, 662; error in admitting evidence cured by subsequent withdrawal, *S. v. Strickland*, 201; when appellant is not entitled to relief sought in any aspect, alleged error is immaterial, *Ramsey v. Ramsey*, 270; *Johnson v. Johnson*, 541; error relating to one count only *held* not prejudicial, *In re McKnight*, 303; correction of improper argument *held* to render it harmless, *S. v. Correll*, 640; failure of court to correct improper argument to jury, *Cuthrell v. Greene*, 475; argument *held* so grossly improper that correction could not have cured, *S. v. Hawley*, 167; record *held* not to show that denial of motion for continuance prejudiced defendant, *S. v. Strickland*, 201; *S. v. Gibson*, 497; *S. v. Creech*, 662;

failure of charge to limit prospective losses to present cash value *held* not prejudicial, *Pascal v. Transit Co.*, 435; appellant has burden of showing prejudicial error, *S. v. Davis*, 386; *S. v. Gibson*, 497; *Harrelson v. Gooden*, 654; *S. v. Creech*, 662; *Stewart v. Dixon*, 737.

Presumptions—Presumption of sanity, *S. v. Swink*, 123; defendant is presumed sane with burden of establishing irresponsibility due to drunkenness, *S. v. Creech*, 662; charge on presumptions from killing with deadly weapon, *S. v. Franklin*, 336; *S. v. Phillips*, 538; presumptions from killing with deadly weapon do not arise unless killing is intentional, *S. v. McNeill*, 377; *S. v. Phillips*, 538; failure to charge in single instance that killing must be intentional to raise presumptions *held* not prejudicial, *S. v. Creech*, 662; presumption of regularity when absentee ballot is in proper form, *Owens v. Chaplin*, 797; of satisfaction of deed of trust after 15 years, *Thomas v. Myers*, 234; in favor of regularity of consent judgment, *Ledford v. Ledford*, 373; recent possession alone insufficient to raise presumption of guilty of receiving stolen goods with guilty knowledge, *S. v. Larkin*, 126; where husband pays for land conveyed to wife law will presume gift, *Bass v. Bass*, 171; in absence of indication to contrary it will be presumed that denial of motion to make pleading more definite was discretionary, *Lowman v. Asheville*, 247; that personal services were gratuitous, arising from family relationship, rebuttable, *Potter v. Clark*, 350; registration raises presumption that instrument was signed, sealed and delivered, *Johnson v. Johnson*, 541; *Cannon v. Blair*, 606; acquisition of right of way by statutory, *R. R. v. Manufacturing Co.*, 695; where charge is not in record it will be presumed correct. *S. v. Sullivan*, 251; is against appellant and he must show prejudicial error, *S. v. Creech*, 662.

Price Control—*Bledsoe v. Lumber Co.*, 128.

Primary Laws—Have no bearing on creation of new political parties, *States' Rights Democratic Party v. Board of Elections*, 179.

Principal and Agent—Process agent for foreign corporation, *Townsend v. Coach Co.*, 523; authority of life insurance agent to deliver policy without full payment of first premium, *Stallings v. Insurance Co.*, 529; local fire insurance agent has no authority to extend time of filing proof of loss, *Zibelin v. Insurance Co.*, 567; termination of the relationship by death, *Parker v. Trust Co.*, 527; liability of principal for torts of agent, *Wright v. Wright*, 503; *Pridgen v. Coach Co.*, 46; relevancy and competency of evidence of agency, *Pridgen v. Coach Co.*, 46.

Principal and Surety — Indemnity agreement, see Indemnity.

Private Roads—Statutory right to establish cartway, *Garris v. Byrd*, 343.

Privilege Tax—Includes both franchises and license taxes, *Power Co. v. Bowles*, 143.

Probable Cause—As element of malicious prosecution, see Malicious Prosecution.

Probata—Recovery cannot be had upon theory not alleged in complaint, *King v. Coley*, 258.

Probate—See Wills.

Process—Force permissible in serving legal process, *S. v. Fain*, 644; issuance and time of service, *In re Walters*, 111; service on foreign corporations, *Townsend v. Coach Co.*, 523.

Processioning Proceeding—See Boundaries.

Production of Writings—Where party fails to produce documents in answer to notice, adverse party may introduce secondary evidence thereof, *Landis v. Gittlin*, 521.

Promissory Representations—as basis for action to rescind contract, *Kee v. Dillingham*, 262.

Proof of Loss—Local fire insurance agent has no authority to extend time of filing, *Zibelin v. Insurance Co.*, 567.

Prospective Earnings—Instruction as to right to recover for loss of prospective earnings, *Pascal v. Transit Co.*, 435; prospective earnings not subject to supplemental proceedings, *Finance Co. v. Putnam*, 555.

Proximate Cause—*Warner v. Lazarus*, 27; *Shaw v. Barnard*, 713.

"Public Enemies"—Armed robbers are not "public enemies" within rule absolving carrier from liability for loss of goods, *Cigar Co. v. Garner*, 173.

Public Health, Safety and Welfare—Statute may not create monopoly when restrictions have no real relation to, *Palmer v. Smith*, 612; *S. v. Ballance*, 764; ordinance prohibiting handling of poisonous reptiles, *S. v. Massey*, 734.

Public Policy—Contracts contrary to public policy void, *Worley v. Pipes*, 465.

Public Purpose—Municipal expenditure for special training of police officer, *Green v. Kitchin*, 450.

Public Service Commission-Utilities Commission, see Utilities Commission.

Punishment—For burglary with explosives, *In re McKnight*, 303.

Purchaser for Value—See Bills and Notes.

Pushcart—Is not vehicle and must be pushed on left side of highway, *Lewis v. Watson*, 20.

Quantum Meruit—*Held apposite* as measure of damages but not as basis of recovery in action on express contract, *Meier v. Miller*, 243; action to recover for personal services rendered decedent, *Potter v. Clark*, 350; municipal contract void for failure of advertising will support recovery on, *Hawkins v. Dallas*, 561.

Qui Facit Per Alium, Facit Per Se—*Wright v. Wright*, 503.

Quieting Title—Nature and grounds of remedy, *Thomas v. Myers*, 234; proceedings, *Roberts v. Sawyer*, 279; *McCullen v. Durham*, 418.

Quo Warranto—Proceedings, *Owens v. Chaplin*, 797.

Races—Segregation of races on interstate carriers, *Pridgen v. Coach Co.*, 46; segregation of races on intrastate bus, *S. v. Johnson*, 701; new trial awarded for systematic exclusion of Negroes from grand jury, *S. v. Speller*, 67.

Railroads—Federal Employers' Liability Act, *Hill v. R. R.*, 236; acquisition of right of way by implied grant, *R. R. v. Manufacturing Co.*, 695; accidents at crossings, *Noah v. R. R.*, 176; *Bundy v. Powell*, 707.

Rape—Prosecution for assault with intent to commit rape, *S. v. Heater*, 540.

Realty—Standing timber is, *Chandler v. Cameron*, 62.

Receiving Stolen Goods—Presumptions and burden of proof, *S. v. Larkin*, 126; sufficiency of evidence and nonsuit, *S. v. Larkin*, 126.

Recent Possession—Alone insufficient to raise presumption of guilty of receiving stolen goods with guilty knowledge, *S. v. Larkin*, 126.

Reckless Driving—*S. v. Blankenship*, 589.

Recognizance—Defendant has property right in cash recognizance which is subject to attachment, *White v. Ordille*, 490.

Record—Where charge is not in record it will be presumed correct, *S. v. Sullivan*, 251; where exceptions are not grouped, appeal will be dismissed, *S. v. West*, 416; where evidence is not in record, exception to charge cannot be considered, *Shepherd v. Dollar*, 736; counsel may not correct record proper, *Mason v. Comrs. of Moore*, 626; Supreme Court cannot supply jurisdictional fact, *Mason v. Comrs. of Moore*, 626; Supreme Court is bound by, *Mason v. Comrs. of*

Moore, 626; *S. v. Robinson*, 647; *Hill v. Greyhound Corp.*, 728.

Reference—Preservation of right to jury trial, *Cherry v. Andrews*, 333.

Registration—Vote on bonds for necessary expense is not against the registration, *Mason v. Comrs. of Moore*, 626; raises presumption that instrument was signed, sealed and delivered, *Johnson v. Johnson*, 541; *Cannon v. Blair*, 606; trust indenture *held* not deed of gift requiring registration within one year, *Cannon v. Blair*, 606; instruments required to be or which may be registered, *Chandler v. Cameron*, 62; as notice, *Chandler v. Cameron*, 62.

Rehearing—Petition to rehear, *Owens v. Chaplin*, 797.

Release—Attack of release for fraud, *Harrison v. R. R.*, 92; *Garrett v. Garrett*, 290.

Religious Freedom—Ordinance prohibiting handling of poisonous reptiles, *S. v. Massey*, 734.

Religious Societies—Whether congregation or denomination was entitled to use of trust property, *Western N. C. Conference v. Tally*, 1; title and right of trustees of religious societies, *Wheeless v. Barrett*, 282; exchange of property by church into and out of trust, *Brandis v. McMullan*, 411.

Remainders — Contingent remainder cannot vest during life of life tenant even though life estate be forfeited, *Bass v. Moore*, 211; construction of will as to whether remainder is vested or contingent, *Ward v. Black*, 221.

Remand—Judgment entered under misapprehension of law will be remanded, *Calaway v. Harris*, 117; cause remanded for insufficient findings, *Garris v. Byrd*, 343.

Representation—Joinder of parties as representative of class, *Trust Co. v. McMullan*, 746.

Representations—As basis for action to rescind contract, *Kee v. Dillingham*, 262.

Reptiles—Ordinance prohibiting handling of poisonous, *S. v. Massey*, 734.

Request for Instructions—*S. v. Hicks*, 345.

Res Ipsa Loquitur—Does not apply to fall on waxed floor. *Barnes v. Hotel Corp.*, 730.

Res Judicata—Matters adjudicated in hearings on restraining orders where appeal is not perfected may not be presented upon appeal from judgment of confirmation. *Gilkey v. Blanton*, 792.

Rescission of Instruments—See Cancellation and Rescission of Instruments.

Residence—For purpose of voting, *Owens v. Chaplin*, 797.

Respondeat Superior—Liability of employer for employee's driving, *Donivant v. Swaim*, 114; *Wright v. Wright*, 503.

Restraining Orders—Where election sought to be enjoined has been held plaintiff's appeal will be dismissed as academic, *Eller v. Wall*, 359; *Penland v. Gowan*, 449; suits for injunction, see Injunctions.

Restraint on Alienation—*Hendley v. Perry*, 15.

Revocation — Of arbitration agreement, *Brown v. Moore*, 406.

Right of Way—Interference with easement for transmission lines, *Light Co. v. Bowman*, 682; acquisition of right of way by implied grant, *R. R. v. Manufacturing Co.*, 695.

Robbers—Armed robbers are not "public enemies" within rule absolving carrier from liability for loss of goods, *Cigar Co. v. Garner*, 173.

Robbery—Nature and elements of the crime, *S. v. Lunsford*, 229; prosecution and punishment, *S. v. Lunsford*, 229.

Rule in Shelley's Case—*Ratley v. Oliver*, 120; *Wheeler v. Wilder*, 379.

"Run of the Swamp"—Whether call in deed "up said swamp" takes land to edge of swamp or run of swamp

held question of fact for jury, *Cherry v. Andrews*, 333.

Safety—Statute may not create monopoly when restrictions have no real relation to public health, safety or welfare, *Palmer v. Smith*, 612; ordinance prohibiting handling of poisonous reptiles, *S. v. Massey*, 734.

Salary—Prospective earnings not subject to supplemental proceedings, *Finance Co. v. Putnam*, 555.

Sales—Under execution, see Execution; transfer of title as between parties, *Parker v. Trust Co.*, 527.

Sales Taxes—*Henderson v. Gill*, 313.

Satisfaction—Presumtion of satisfaction of deed of trust after 15 years, *Thomas v. Myers*, 234.

Schools—Application and use of school property and funds, *Boney v. Kinston Graded Schools*, 136; *Atkins v. McAdams*, 752; requisites and validity of bond issues, *Atkins v. McAden*, 752.

School Bus—Injury to child alighting from, *Hughes v. Thayer*, 773.

Scope of Authority—Agent has no authority to swear out warrant for purpose of punishment and not to enforce principal's regulations, *Pridgen v. Coach Co.*, 46.

Seals—Registration raises presumption that instrument was signed, sealed and delivered, *Johnson v. Johnson*, 541.

Search Warrant—Necessity for, *In re Walters*, 111; force permissible in serving, *S. v. Fain*, 644.

Searches and Seizures—*In re Walters*, 111.

Secondary Evidence—Of contents of written instrument, *Landis v. Gittlin*, 521.

Segregation—Of races on interstate carriers, *Pridgen v. Coach Co.*, 46; of races on intrastate bus, *S. v. Johnson*, 701.

Self-Defense—Charge on, *S. v. Franklin*, 336; charge on right of, or right to defend member of family *held* not prejudicial, *S. v. Church*, 718; evidence *held* not to present question of right to kill in defense of another, *S. v. Correll*, 640; officer serving search warrant may kill in self-defense without retreating, *S. v. Fain*, 644.

Service of Process—See Process.

Service Stations—Liability of lessor and lessee for injury to patron, *Rogers v. Oil Corp.*, 241.

Servient Highway—Failure to stop before entering intersection with through highway is not negligence *per se*, *Lee v. Chemical Corp.*, 447.

Settlement of Case on Appeal—Where court modifies appellant's statement of case, appellant must submit case as modified for judge's signature, *Western N. C. Conference v. Tally*, 1.

Shelley's Case—*Ratley v. Oliver*, 120; *Wheeler v. Wilder*, 371.

Sheriff—Service of process, see Process; force permissible in serving legal process, *S. v. Fain*, 644.

Signature—Registration raises presumption that instrument was signed, sealed and delivered, *Johnson v. Johnson*, 541.

Silicosis—*Young v. Whitehall Co.*, 360.

Slot Machines—Prosecution for possessing and leasing, *S. v. Davis*, 552.

Snakes—Ordinance prohibiting handling of poisonous reptiles, *S. v. Massey*, 734.

Soldiers' and Sailors' Civil Relief Act—Does not enlarge time for bringing action for wrongful death, *McCoy v. R. R.*, 57.

Solicitor—Argument of *held* grossly improper, *S. v. Hawley*, 167.

Sovereign—State cannot be estopped in performance of governmental function, *Henderson v. Gill*, 313.

Special Privilege—Statute may not create monopoly when restrictions have no real relation to public health, safety or welfare, *Palmer v. Smith*, 612; *S. v. Ballance*, 764.

Special Venire—Motion for is addressed to discretion of court, *S. v. Strickland*, 201.

Specific Performance—Contracts specifically enforceable and parties

against whom remedy lies, *Chandler v. Cameron*, 62; after-acquired title, *Chandler v. Cameron*, 62.

Speed—Mere reading of statutory speed regulations *held* insufficient charge on, *Lewis v. Watson*, 20; excessive speed as negligence, see Automobiles.

Stare Decisis—*Cole v. Cole*, 757; *S. v. Ballance*, 764.

State—Cannot be estopped in performance of governmental function, *Henderson v. Gill*, 313.

State Board of Elections—*States' Rights Democratic Party v. Board of Elections*, 179.

State Bureau of Investigation—Credibility of officer who buys whiskey for purpose of obtaining evidence for conviction, *S. v. Love*, 99.

Statement of Case on Appeal—Is necessary to present exceptions relating to alleged errors in progress of trial, *Western N. C. Conference v. Tally*, 1.

States—Levy of income tax derived from business in another state, *Sabine v. Gill*, 599; laws of Virginia govern right to recover for automobile accident occurring in that state, *Morse v. Walker*, 778.

State's Witness—Immunity of from prosecution, *S. v. Love*, 99.

States' Rights Democratic Party—*States' Rights Democratic Party v. Board of Elections*, 179.

Statute of Frauds—See Frauds, Statute of.

Statutes—Reasonable doubt as to constitutionality will be resolved in favor of validity, *Boney v. Kinston Graded Schools*, 136; power and duty to declare statute unconstitutional, *Palmer v. Smith*, 612; contracts contrary to public policy void, *Worley v. Pipes*, 465; statutory form insurance policy, see Insurance; general rules of construction, *S. v. Baker*, 73; *Young v. Whitehall Co.*, 360; *Sabine v. Gill*, 599; repeal by implication and construction, *Power Co. v. Bowles*, 143.

Statutes of Limitations—See Limitation of Actions and Adverse Possession; no statute bars action for divorce *a mensa*, *Nall v. Nall*, 598.

Statutory Presumption—Acquisition of right of way by, *R. R. v. Manufacturing Co.*, 695.

Stopping—Stopping on highway without rear light, *Warner v. Lazarus*, 27; *Bus Co. v. Products Co.*, 352; *Barlow v. Bus Lines*, 382; *Pascal v. Transit Co.*, 435.

Streets—Municipal traffic ordinances in conflict with State law void as to streets constituting highway, *Lee v. Chemical Corp.*, 447.

Strikes—Right of employees to unemployment benefits during, *Unemployment Compensation Com. v. Lunceford*, 570.

Summons—See Process.

Superior Courts—See Courts.

Supplemental Proceedings—Prospective earnings not subject to, *Finance Co. v. Putnam*, 555.

Supreme Court—Appeal and review, see Appeal and Error.

Supreme Court of U. S.—Mandate of in Brunson Case, see page 37.

Swamp—Whether call in deed "up said swamp" takes land to edge of swamp or run of swamp *held* question of fact for jury, *Cherry v. Andrews*, 333.

Tacking Possession—Right of grantee to tack adverse possession of grantor, *Ramsey v. Ramsey*, 270.

Taxation—Drainage assessments, see Drainage Districts: classification of property and transactions for taxation, *Henderson v. Gill*, 313; limitation on increase of indebtedness without vote, *Mason v. Comrs. of Moore*, 626; necessary expenses, *Green v. Kitchin*, 450; public purpose, *Green v. Kitchin*, 450; formal requisites of bond issue, *Atkins v. McAden*, 752; definition and distinctions between license and franchise taxes, *Power Co. v. Bowles*, 143; construction of taxation statutes, *Henderson v. Gill*, 313; *Sabine v. Gill*, 599; situs of property for purpose of, *Sabine v. Gill*, 599; levy and assessment of corporate franchise and excess, *Power Co. v.*

Bowles, 143; levy and assessment of income taxes, *Sabine v. Gill*, 599; levy and assessment of sales taxes, *Henderson v. Gill*, 313; duties and authority of collecting agents, *Henderson v. Gill*, 313.

Taxicabs—Liability of owner to son of driver riding in cab, *Wright v. Wright*, 503.

Telephone Conversations — Competency of, *S. v. Strickland*, 201.

Tenants in Common—Partition, see Partition.

Theory of Trial—Appeal will follow, *Hill v. Greyhound Corp.*, 728.

Third Party Beneficiary — Carrier may recover on shipper's agreement with purchaser to pay freight charges, *Griggs v. York-Shipley*, 572.

Threats—See Blackmail.

Timber—Standing timber is realty, *Chandler v. Cameron*, 62.

Tire Tracks—As circumstantial evidence of guilt, *S. v. Frye*, 581.

Tort-Feasor—Joinder of joint *tort-feasors*, *Fleming v. Light Co.*, 397; action for contribution against joint *tort-feasors*, *Paschal v. Transit Co.*, 435.

Torts—Particular torts, see particular titles of torts; actions *ex delicto* which may be set up as counterclaim in action *ex contractu*, *Hancammon v. Carr*, 52; autoist sued for collision with mule-drawn wagon may not file cross-action against co-defendant for damages to his own car, *Horton v. Perry*, 319; determination of whether tort is joint or several, *Shaw v. Barnard*, 713; liabilities of joint *tort-feasors* to person injured, *Pascal v. Transit Co.*, 435; right to contribution among joint *tort-feasors* and joinder, *Pascal v. Transit Co.*, 435; *Fleming v. Light Co.*, 397; validity of release, *Harrison v. R. R.*, 92.

Towns—See Municipal Corporations.

Trades—Freedom to pursue, *S. v. Ballance*, 764.

Traffic Regulations—Municipal traffic ordinances in conflict with State law void as to streets constituting highway, *Lee v. Chemical Corp.*, 447.

Transmission Lines—Interference with easement for, *Light Co. v. Bowman*, 682.

Trial—Of criminal cases, see Criminal Law; argument and conduct of counsel, *Cuthrell v. Greene*, 475; conduct and acts of parties and witnesses, *Cuthrell v. Greene*, 475; consolidation of actions for trial, *Horton v. Perry*, 319; later admission of testimony initially excluded, *Poole v. Gentry*, 266; time of making and renewal of motions to nonsuit, *Hawkins v. Dallas*, 561; consideration of plaintiff's evidence on motion to nonsuit, *Perry v. Hurdle*, 216; *Garrett v. Garrett*, 290; *Bundy v. Powell*, 707; *Hughes v. Thayer*, 773; *Pascal v. Transit Co.*, 435; consideration of defendant's evidence on motion to nonsuit, *Perry v. Hurdle*, 216; *Taylor v. Hodge*, 558; *Bundy v. Powell*, 707; contradictions and discrepancies in plaintiff's evidence, *Barlow v. Bus Lines*, 382; sufficiency of evidence to overrule nonsuit, *Barlow v. Bus Lines*, 382; *Pascal v. Transit Co.*, 435; nonsuit on affirmative defense, *MacClure v. Ins. Co.*, 305; *Barnes v. Trust Co.*, 409; office and effect of motion for directed verdict, *Coach Co. v. Motor Lines*, 650; directed verdict in favor of defendant, *Garrett v. Garrett*, 290; *McCullen v. Durham*, 418; statement of evidence and application of law thereto, *Lewis v. Watson*, 20; *Kee v. Dillingham*, 262; *Stewart v. Dixon*, 737; charge on burden of proof, *Wyatt v. Coach Co.*, 340; conformity of issues to pleadings and evidence, *McCullen v. Durham*, 418; setting aside verdict, *McCullen v. Durham*, 418; motions to set aside verdict as being contrary to evidence, *King v. Byrd*, 177; *Coach Co. v. Motor Lines*, 650; motions to set aside verdict for inadequate or excessive award, *Edmunds v. Allen*, 250; *Garrett v. Garrett*, 290; find-

ings of fact in trial by court by agreement, *Poole v. Gentry*, 266.

Trover and Conversion—Shipper may treat wrongful delivery by carrier as conversion, *Griggs v. York-Shipley*, 572; nature and essentials of cause of action, *Parker v. Trust Co.*, 527.

Trucking Companies—Rights and liabilities as carrier, see Carriers; liability insurance on goods in transit, *Electric Co. v. Insurance Co.*, 518.

Trusts—Title and right of trustees of religious societies, *Wheeless v. Barrett*, 282; exchange of property by church into and out of trust, *Brandis v. McMullan*, 411; income tax on distributive share of resident beneficiary derived from trust business carried on in another state, *Sabine v. Gill*, 599; creation and validity of parol trust, *Bass v. Bass*, 171; *McCullen v. Durham*, 418; actions to establish parol trust, *Cuthrell v. Greene*, 475; requisites and validity of written trusts, *Cannon v. Blair*, 606; transactions creating resulting trusts, *Bass v. Bass*, 171; transactions creating constructive trusts, *Garner v. Phillips*, 160; title and rights of parties, *Western N. C. Conference v. Tally*, 1; power and authority of trustee, *Trust Co. v. McMullan*, 746.

"Under the Influence"—Of intoxicants, *S. v. Blankenship*, 589.

Undue Influence—*Lee v. Ledbetter*, 330; *Graham v. Graham*, 565.

Unemployment Benefits—Right of employees to, during strike, *Unemployment Compensation Com. v. Lunceford*, 570.

Unions—Right of employees to unemployment benefits during strike, *Unemployment Compensation Com. v. Lunceford*, 570.

U. S.—Mandate of Supreme Court of U. S. in Brunson Case, see page 37.

Unjust Enrichment—Municipal contract void for failure of advertising will support recovery on *quantum meruit*, *Hawkins v. Dallas*, 561.

Utilities Commission — Nature and functions, *Greyhound Corp. v. Utilities Com.*, 31; appeal and review, *Greyhound Corp. v. Utilities Com.*, 31.

Vagrancy—Prosecution and Punishment, *S. v. Harris*, 413.

Value—Opinion evidence as to value of lands, *Harrelson v. Gooden*, 654.

Variance—Recovery cannot be had upon theory not alleged in complaint, *King v. Coley*, 258; *McCullen v. Durham*, 418.

Vehicle—Handcart is not, *Lewis v. Watson*, 20.

Vendor and Purchaser—Rescission of contract of sale, *Kee v. Dillingham*, 262; remedies of purchaser, *Chandler v. Cameron*, 62.

Venue—Of action against domesticated corporation, *Hill v. Greyhound Corp.*, 728.

Verdict—Directed verdict in criminal case, *S. v. Baker*, 73; directed verdict is proper when party upon whom rests burden of proof fails to offer evidence, *McCullen v. Durham*, 418; directed verdict for insurer on conflicting evidence as to conditional delivery of policy *held* error, *Stallings v. Insurance Co.*, 529; evidence *held* to justify directed verdict that defendants' building interfered with easement for transmission lines, *Light Co. v. Bowman*, 682; insufficiency of defendants' evidence on affirmative defense must be raised by motion for directed verdict, *Coach Co. v. Motor Lines*, 650; motion to set aside as contrary to evidence, *King v. Byrd*, 177; *Coach Co. v. Motor Lines*, 650; motion to set aside for excessiveness is addressed to discretion, *Edmunds v. Allen*, 250; *Garrett v. Garrett*, 290; setting aside of verdict as matter of law is reviewable, *McCullen v. Durham*, 418.

Verification—*Calaway v. Harris*, 117.

Vote—Is not necessary to municipal expenditure for special training of policeman, *Green v. Kitchin*, 450; on bonds for necessary expense is

not against the registration, *Mason v. Comrs. of Moore*, 626.

Voting—Absentee ballots, *Owens v. Chaplin*, 797.

Wages—Prospective earnings not subject to supplemental proceedings, *Finance Co. v. Putnam*, 555.

Waiver—Right to insist on defense bond in action involving title to realty may be waived, *Roberts v. Sawyer*, 279; matters which may be waived, *Callaway v. Harris*, 117.

War—Emergency Price Control, *Bledsoe v. Lumber Co.*, 128.

Warrant—Where warrant fails to charge crime, judgment will be arrested, *S. v. Harris*, 413; force permissible in serving legal process, *S. v. Fain*, 644.

Warranty—Complaint *held* to charge negligence in serving poisonous food by defendants and recovery could not be had for breach of implied warranty, *King v. Coley*, 258.

Waste—Forfeiture of life estate for, *Bass v. Moore*, 211.

Welfare—Statute may not create monopoly when restrictions have no real relation to public health, safety or welfare, *Palmer v. Smith*, 612; statute regulating photographers *held* unconstitutional, *S. v. Ballance*, 764.

Widower—Takes by descent and not by virtue of *lex mariti*, *Byrd v. Patterson*, 156.

"Willful"—*Lamm v. Lamm*, 248.

Wills—Action to recover for personal services rendered decedent, *Potter v. Clark*, 350; consent judgment for settlement of estate approved, *Bank v. Hendley*, 432; signature of testator in statutory wills, *In re Will of Etheridge*, 280; holographic codicils, *In re Will of Goodman*, 444; proof of will and probate proceedings, *In re Will of Puett*, 8; effect of probate in common form and attack of probate, *In re Will of Puett*, 8; nature of caveat proceedings, *In re Will of Brock*, 482; parties to caveat proceedings, *In re Will of Brock*, 482; instructions in caveat proceedings, *In re Will of Etheridge*, 280; general rules of construction of wills, *Hornaday v. Hornaday*, 164; *Ward v. Black*, 221; *Wheeler v. Wilder*, 379; application of Rule in *Shelley's Case*, *Ratley v. Oliver*, 120; *Wheeler v. Wilder*, 379; vested and contingent interests and defeasible fees, *Bass v. Moore*, 211; *Ward v. Black*, 221; *Hales v. Renfrow*, 239; restraint on alienation, *Hendley v. Perry*, 15; persons who may take as devisees or legatees, *Trust Co. v. School for Boys*, 738; designation of devisees and legatees, *Trust Co. v. School for Boys*, 738; devises or bequests to a class, *Cole v. Cole*, 757; actions to construe wills, *Trust Co. v. School for Boys*, 738; lapsed legacies, *Trust Co. v. Shelton*, 150; doctrine of election under will, *Byrd v. Patterson*, 156; provision that one devisee might purchase land devised to another, *Hornaday v. Hornaday*, 164; title of devisees and right to convey, *Hales v. Renfrow*, 239.

Witnesses—Credibility of officer who purchases whiskey for purpose of obtaining evidence, *S. v. Love*, 99; party is bound by testimony he elicits from his own witness, *Owens v. Chaplin*, 797; whether State is bound by exculpatory evidence, *S. v. Ray*, 40; *S. v. Robinson*, 647; State may not discredit its own, *S. v. Bagley*, 723; State may show defendant paid expert witness in order to establish witness' bias, *S. v. Creech*, 662; impeaching and corroborative evidence, *S. v. Jones*, 276; where previous statements of witness are inconsistent in material aspects to witness' testimony, such statements are incompetent for purpose of corroboration, nor may court charge the jury to disregard inconsistent parts, *S. v. Bagley*, 723; character evidence, *S. v. Jones*, 276; cross-examination of character witnesses as to particular acts of misconduct by defendant, *S. v. Church*, 718; cross-examination as to matters not relevant to issue

held improper, *Cuthrell v. Greene*, 475; charge on failure of defendant to testify, *S. v. McNeill*, 377; admission of one jointly charged with fornication and adultery incompetent, *S. v. Davis*, 386; qualification of witness as expert is for court, *S. v. Strickland*, 201; competency to testify as to location of boundaries, *Poole v. Gentry*, 266; may testify as to value of lands, *Harrelson v. Gooden*, 654.

Workmen's Compensation Act—See Master and Servant.

Writ of Attachment—*Whitaker v. Wade*, 327.

Writ of Error *Coram Nobis*—Is proper procedure to test validity of matters *dehors* the record, *In re Taylor*, 297.

Written Instruments—Secondary evidence of contents of, *Landis v. Gittlin*, 521.

Wrongful Death—Only personal representative may maintain action for *McCoy v. R. R.*, 57; Soldiers' and Sailors' Civil Relief Act does not enlarge time for institution of action for, *McCoy v. R. R.*, 57.

Zoning Ordinances—*James v. Sutton*, 515.

ANALYTICAL INDEX.

ACTIONS.

§ 3c. Action Based on Party's Own Wrong.

A party will not be allowed to maintain an action based upon his own unlawful act. *Bledsoe v. Lumber Co.*, 128.

A party will not be allowed to take advantage of his own wrong. *Garner v. Phillips*, 160.

ADMINISTRATIVE LAW AND PROCEDURE.

§ 3. Power of Regulatory Bodies to Make Rules and Regulations.

The General Assembly cannot delegate authority to make law, and an administrative agency has no power to promulgate rules and regulations which alter or add to the law it is set up to administer. *States' Rights Democratic Party v. Board of Elections*, 179.

In construing the regulations of an administrative agency it must be presumed that every part of the regulation was promulgated for a purpose and intended to be carried into effect, and the courts may not uphold such regulation by striking therefrom such portions as are beyond the authority of the agency. *Ibid.*

§ 4. Administrative Procedure.

A petition is a formal written request made to some official or body having authority to grant it; a certificate is a document in which the issuing officer states that a thing has or has not been done, or that an act has or has not been performed. *State's Rights Democratic Party v. Board of Elections*, 179.

Statutory remedy to determine dispute as to fees for medical services to injured employee is exclusive and precludes physician from maintaining action against employee. *Worley v. Pipes*, 465; *Matros v. Owen*, 472.

ADVERSE POSSESSION.

§ 7. Tacking Possession.

A grantee is not entitled to tack the adverse possession of his predecessor in title as to a parcel of land not embraced within the description in his deed, and therefore where he has been in possession for less than twenty years, he cannot establish title by adverse possession to land lying outside the boundaries of his deed. *Ramsey v. Ramsey*, 270.

APPEAL AND ERROR.

§ 6a. Parties Who May Object and Take Exception.

A party may not take exception to a ruling by the court in his favor. *Coach Co. v. Motor Lines*, 650.

§ 6c (3). Necessity, Form and Sufficiency of Exceptions—Exceptions to Findings of Fact.

Where no exception is taken by appellants to the failure of the trial judge to find facts and state conclusions of law in respect to a matter argued by appellants in their brief, the question is not presented for decision on appeal. *Henley v. Perry*, 15.

APPEAL AND ERROR—*Continued.*

Where evidence is admitted without objection, exceptions to the findings of the court on the ground that they were based upon incompetent evidence are untenable. *Poole v. Gentry*, 266.

In a trial by the court under agreement, G.S. 1-184, the court's findings are conclusive and are not subject to review in the absence of exceptions that they are not supported by evidence. *Cannon v. Blair*, 606.

§ 6c (5). Form and Sufficiency and Requisites of Exception to Charge.

Where none of the evidence is sent up in the record or case on appeal, an exception to the charge cannot be considered. *Shepherd v. Dollar*, 736.

§ 6c (6). Requirement That Matter be Brought to Trial Court's Attention to Support Exception to Charge.

Exceptions to the court's statement of the contentions ordinarily will not be sustained when it does not appear that appellant objected and called same to the attention of the trial court at the time. *Coach Co. v. Motor Lines*, 650.

§ 7a. Preservation of Grounds of Review—Demurrer.

Where there is no demurrer, the sufficiency of the complaint to state a cause of action is not presented for review. *Rhodes v. Asheville*, 355.

§ 7b. Preservation of Grounds of Review—Motions.

Motion to nonsuit must be renewed at the close of all the evidence in order to present on appeal the question of the sufficiency of the evidence. *Hawkins v. Dallas*, 561.

Plaintiff must move for directed verdict on affirmative defense in order to present question that issue was not supported by evidence. *Coach Co. v. Motor Lines*, 650.

§ 8. Theory of Trial in Lower Court.

The record and appellant's exceptions will be considered in the light of the theory of trial in the lower court. *Hill v. Greyhound Corp.*, 728.

§ 9. Appeal and Appeal Entries.

Appeal by the party seeking review is necessary to give the Supreme Court jurisdiction, and this fact must appear by appeal entry of record, G.S. 1-279, G.S. 1-280, and in the absence of appeal entry of record the purported appeal must be dismissed. *Mason v. Comrs. of Moore*, 626.

§ 10a. Necessity for "Case on Appeal."

A case on appeal is necessary to present exceptions relating to alleged errors occurring during progress of trial. *Western N. C. Conference v. Tally*, 1; *Harney v. Comrs. of McFarlan*, 71.

§ 10e. Settlement of Case on Appeal by Court.

Where the trial court adopts appellant's statement of case with modifications, appellant is under duty to have the statement of case as modified redrafted and submitted to the judge for signature, and upon failure to do so there is no "case on appeal." *Western N. C. Conference v. Tally*, 1.

§ 12. Requisites and Proceedings for Appeal—Pauper Appeals.

The statutory requirements governing appeals *in forma pauperis* are mandatory and jurisdictional, and where the order allowing the appeal *in forma*

APPEAL AND ERROR—*Continued.*

pauperis is not supported by the statutory affidavit, there can be no authority for granting the appeal *in forma pauperis*, and the Supreme Court acquires no jurisdiction and can take no cognizance of the case except to dismiss it from the docket. *Williams v. Tillman*, 434.

§ 14. Powers of and Proceedings in Lower Court After Appeal.

An appeal suspends further proceedings in the cause in the court from which the appeal is taken, but where appeal is taken from order of the clerk probating a second will and thereafter the clerk enters an order revoking the order appealed from, the contention that the clerk was without jurisdiction to enter the order of revocation is untenable when the judge of the Superior Court determines the appeal from the order of probate and revokes the action of the clerk thereon to the extent that it conflicts with the judge's affirmance of the order of revocation. *In re Will of Puett*, 8.

§ 21½. Correction of Record.

Where the record fails to show a jurisdictional fact, the Supreme Court is without power to correct the record, since it can have no jurisdiction of the cause. *Mason v. Comrs. of Moore*, 626.

Counsel may not correct the record proper by stipulation. *Ibid.*

§ 22. Conclusiveness and Effect of Record.

The Supreme Court is bound by the record as certified. *Mason v. Comrs. of Moore*, 626.

Where, upon an appeal from denial of motion to remove to another county, it appears that the clerk found that defendant is a domesticated corporation, which finding is supported by the record, and the trial court, who settled case on appeal, certifies that the motion was heard and decided on the theory that defendant is a domesticated corporation, the matter is conclusive, since the Supreme Court is bound by the record. *Hill v. Greyhound Corp.*, 728.

§ 31c. Dismissal for That Question Has Become Moot or Academic.

Where, on appeal from the dissolution of a temporary restraining order, it appears that the act sought to be restrained has been done, the appeal will be dismissed, since the question presented by the appeal has become academic. *Eller v. Wall*, 359.

Where an election sought to be enjoined has been held, an appeal from judgment denying injunctive relief against the holding of the election will be dismissed, since the questions sought to be presented by the appeal have become academic. *Penland v. Gowan*, 449; *Nance v. Winston-Salem*, 732.

In a suit to enjoin the holding of a city limits extension election, allegations of irreparable damage in that plaintiffs' land would be subject to unlawful taxes by the city, cannot be construed as a cause of action to enjoin the levy or collection of taxes by the municipality, and thus prevent dismissal on appeal where the election sought to be enjoined has already been held. *Nance v. Winston-Salem*, 732.

§ 38. Presumptions and Burden of Showing Error.

The burden is on appellant not only to show error but that the error was material and prejudicial to appellant's cause. *Harrelson v. Gooden*, 654; *S. v. Davis*, 386; *S. v. Gibson*, 497; *Stewart v. Dixon*, 737.

APPEAL AND ERROR—*Continued.*

§ 39a. Harmless and Prejudicial Error in General.

Error favorable to appellant cannot be prejudicial. *Johnson v. Johnson*, 542; *Coach Co. v. Motor Lines*, 650.

§ 39b. Error Harmless Because of Determination of Other Issues.

Exceptions relating to an issue correctly left unanswered by the jury because of answers to previous issues will not be sustained, since the matter cannot be prejudicial. *Coach Co. v. Motor Lines*, 650.

§ 39c. Error Harmless Because Appellant Not Entitled to Relief Sought in Any Aspect.

Where appellant, as a matter of law, is not entitled to the relief sought, alleged errors committed by the lower court cannot be prejudicial to him, and the verdict and judgment against him will be sustained. *Ramsey v. Ramsey*, 270; *Johnson v. Johnson*, 541.

§ 39e. Prejudicial and Harmless Error in Admission on Exclusion of Evidence.

Exceptions to the exclusion of testimony will not be considered on appeal where the record fails to disclose what the witnesses would have testified had they been permitted to answer the questions. *Pool v. Gentry*, 266; *Coach Co. v. Motor Lines*, 650.

Any error in the admission of evidence over objection is cured by the later admission of like testimony of the same witnesses without objection. *Landis v. Gittlin*, 521.

§ 39j. Prejudicial and Harmless Error in Instructions Generally.

In this caveat proceeding the court charged the jury that it was necessary for testator to have signed the will in the presence of the attesting witnesses. *Held:* The instruction must be held for reversible error notwithstanding the court's instruction to answer the issue as to the formal execution of the will in the affirmative if the jury believed the evidence, since the erroneous instruction may have influenced the jury in answering the issue in the negative. *In re Will of Etheridge*, 280.

The charge of the court will be construed contextually, and exceptions to excerpts therefrom will not be sustained when the charge, so construed, does not contain prejudicial error. *Wyatt v. Coach Co.*, 340.

In this action for assault, the battleground was the credibility of plaintiff's testimony, defendant not having gone upon the stand or offered his answer in evidence. The court inadvertently charged that defendant said and contended he had not assaulted plaintiff and that he had denied same in his answer. *Held:* Construing the charge contextually and in the light of the evidence on plaintiff's appeal, the inadvertence did not amount to reversible error. *Stewart v. Dixon*, 737.

§ 39h. Prejudicial and Harmless Error in Charge on Burden of Proof.

In this negligent injury action, the court, after several times correctly stating the burden of proof, charged that the jury should be satisfied "beyond a reasonable doubt" that defendant's negligence was the proximate cause of the injury in order to find the issue in the affirmative. After the jury had been out a short time, the court recalled it and explicitly withdrew and corrected the erro-

neous instruction. *Held:* The erroneous instruction was rendered harmless. *Wyatt v. Coach Co.*, 340.

§ 39l. Prejudicial and Harmless Error in Course and Conduct of Trial.

Failure of court to correct improper argument to jury *held* prejudicial. *Cuthrell v. Greene*, 475.

§ 40a. Review of Exceptions to Judgment or to Signing of Judgment.

Where there is no proper statement of case on appeal, the appeal itself will be treated as an exception to the judgment, presenting only whether there is error on the face of the record proper. *Western N. C. Conference v. Talley*, 1.

Where the sole exception properly presented is to the judgment, and the judgment is supported by the findings of fact, the exception must fail. *Harney v. Comrs. of McFarlan*, 71.

Exception to judgment cannot present for review matters not ruled upon by the trial court; and when the judgment is supported by the record it will be affirmed. *Drainage District v. Bullard*, 633.

Exception to the signing of the judgment is untenable when the judgment follows the verdict. *Coach Co. v. Motor Lines*, 650.

§ 40b. Review of Discretionary Matters.

In revoking letters of administration under G.S. 28-32 the clerk exercises a legal discretion which is reviewable. *In re Estate of Galloway*, 547.

§ 40c. Review of Injunctive Proceedings.

While findings of fact in injunctive proceedings are reviewable on appeal, nevertheless such findings will not be disturbed when they are supported by evidence and appellant fails to show cause for reversal. *McLeod v. Wrightsville Beach*, 621.

§ 40d. Review of Findings of Fact.

Where the evidence does not support the findings of fact upon which the conclusions of the trial court are based, the rulings are subject to review on appeal. *S. v. Speller*, 67.

Finding not supported by evidence is not binding on appeal. *Coble v. Coble*, 81.

Findings of fact by the court are conclusive when supported by evidence. *Poole v. Gentry*, 266; *Griggs v. York-Shipley*, 572; *Trust Co. v. School for Boys*, 738.

The finding by the trial court that movent's attorney was authorized to sign the consent judgment, *held* supported by the evidence, and is conclusive on appeal. *Ledford v. Ledford*, 373.

In absence of exceptions on ground that findings were not supported by evidence, the court's findings are conclusive. *Cannon v. Blair*, 606.

Findings of fact made under a misapprehension of the law will be set aside and the cause remanded for consideration of the evidence in its true legal light. *In re Estate of Galloway*, 547.

Where there is no request for findings of fact and the sole exception is to the signing of the order appealed from, the failure of the court to set forth in detail the facts constituting the basis of its order is not fatal. *Nall v. Nall*, 598.

APPEAL AND ERROR—*Continued.*

Findings in injunctive proceedings are reviewable. *McLeod v. Wrightsville Beach*, 621.

§ 40j. Review of Exceptions Relating to Pleadings.

Where there is but a single exception and assignment of error relating to the ruling of the court upon motion to strike certain portions of the complaint as irrelevant, the appeal presents only the question of whether the record is sufficient to uphold the judgment, and when the judgment is supported by the record, the exception must fail. *Rhodes v. Asheville*, 355.

The discretionary denial of a motion to make a pleading more definite is not reviewable on appeal. *Lowman v. Asheville*, 247.

§ 40g. Review of Exceptions Relating to Motions to Set Aside Verdict.

A motion to set aside a verdict for excessiveness is addressed to the discretion of court, and its action thereon is not ordinarily reviewable. *Edmunds v. Allen*, 250; *Garrett v. Garrett*, 290.

The action of the court in setting aside the verdict as a matter of law upon a designated ground is reviewable, and an exception to the refusal of the court to enter judgment on the verdict is sufficient to present the question. *McCullen v. Durham*, 418.

§ 50. Remand.

Where rulings are made under a misapprehension of the law or the facts, the rulings will be vacated and the cause remanded for such further proceedings as to justice appertains and the rights of the parties may require. *Calaway v. Harris*, 117.

§ 51b. Stare Decisis.

A subsequent decision cannot, by mere implication, be held to overrule a prior case unless the principle is directly involved and the inference clear and impelling. *Cole v. Cole*, 757.

Single decision by divided Court, irreconcilable with subsequent decision on related matter, does not properly call for application of doctrine of *stare decisis*. *S. v. Ballance*, 764.

Doctrine of *stare decisis* will not be applied to preserve and perpetuate error. *Ibid.*

§ 54. Mandates From Supreme Court of United States.

In these cases involving exceptions to the overruling of motions to quash the warrants and to denial of challenge to the array, the judgment of the Supreme Court of North Carolina was reversed by the Supreme Court of the United States in memorandum decision citing authorities dealing with the administrative practices in the selection of juries. *Held:* The mandate of the Supreme Court of the United States does not require the quashal of the warrants nor adjudicate that the North Carolina statutes on the subject of jurors are invalid. *S. v. Brunson*, 37.

ARBITRATION AND AWARD.

§ 1a. Common Law Arbitration.

The common law governs a written agreement for arbitration which is not in accordance with the procedure prescribed by the Uniform Arbitration Act. *Brown v. Moore*, 406.

ARBITRATION AND AWARD—*Continued.*

§ 2. Agreements as Bar to Civil Action.

Where both parties invoke the jurisdiction of the Superior Court to determine their rights under their contract, and thus ignore or waive the provision of the contract for arbitration, neither party having pleaded the arbitration agreement or requested that their differences should be settled by arbitration, it is error for the court to dismiss the action, over the objection of one of them, on the ground that the arbitration agreement precluded an action at law. *Hargett v. Delisle*, 384.

§ 3. Abandonment and Revocation of Agreements.

An arbitration agreement under the common law may be revoked by any party thereto at any time before the award is rendered. *Brown v. Moore*, 406.

ARREST AND BAIL.

§ 1b. Right of Officers to Make Arrest Without Warrant.

Within the limits of the city a police officer may summarily and without warrant arrest a person for a misdemeanor committed in his presence, but it is the duty of the officer to inform the person arrested of the charge against him and to immediately swear out a warrant before an authorized person, giving the person arrested opportunity to provide bail and communicate with counsel and friends. *Perry v. Hurdle*, 216.

§ 2. Force Permissible in Making Arrest.

An officer, if assaulted or resisted in serving legal process or in making an arrest, is not under duty to retreat, but has the right to use such force as may be necessary in the proper discharge of his duties, even to the extent of taking life, the limitations upon his conduct being that he may not act maliciously so as to be guilty of wanton abuse of authority, or use any greater force than is reasonable and apparent under the circumstances. *S. v. Fain*, 644.

§ 6. Proceedings to Secure Bail.

Any justice of the peace has the power to take bail for persons brought before him charged with a misdemeanor or a felony less than capital, and a person charged may give a recognizance bond or deposit the amount required in cash or may elect to refuse to give security and go to jail. *White v. Ordille*, 490.

§ 8. Rights and Liabilities on Bonds.

A recognizance, either bond or cash in lieu thereof, is an acknowledgment of a debt to the State conditioned upon defendant's appearance at the time and place specified and his compliance with the judgment of the court, and therefore cash deposited by him as security for his appearance remains his property subject to the conditions of his recognizance, and his right to the return of the cash upon performance of the conditions of the recognizance is a property right which exists in him. *White v. Ordille*, 490.

§ 11. Actions for Wrongful Arrest Against Officers.

In this action for wrongful arrest and assault, the record disclosed that defendant police officers arrested plaintiff on the streets of their city, advised him he was under arrest and took him immediately to the police station where a warrant was sworn out by one of the officers and issued by the officer authorized by statute to do so. Plaintiff failed to provide bail and was committed to

ARREST AND BAIL—*Continued.*

jail. The evidence tended to show that plaintiff was apparently committing a misdemeanor in their presence and there was no evidence that the officers used violence or undue force or acted from any improper motive. *Held:* Defendants' motion to nonsuit was properly allowed, it appearing that the officers acted in substantial conformity with prescribed procedure in making the arrest without a warrant. *Perry v. Hurdle*, 216.

ASSAULT.

(Assault with intent to commit rape, see Rape.)

§ 12. Relevancy and Competency of Evidence.

Where, in a prosecution for felonious assault, there is no sufficient evidence of a conspiracy between defendant and his companion, testimony of prior threats to kill such third person made by defendant's companion and evidence as to ill feeling between those two, is incompetent, and the admission of such evidence entitles defendant to a new trial on the charge. *S. v. Wellborn*, 617.

§ 13. Sufficiency of Evidence and Nonsuit.

Where all the evidence of record tends to show an accidental shooting, and there is no evidence that the weapon was intentionally discharged or was handled so recklessly as to constitute culpable negligence, defendant is entitled to his discharge in a prosecution for assault with a deadly weapon, and judgment against him will be reversed on appeal. *S. v. Robinson*, 647.

§ 14b. Instructions on Defenses.

The evidence was not conclusive as to whether defendant officer was clothed with a search warrant when he knocked at the door of prosecuting witness at nighttime. Defendant's testimony was to the effect that upon being admitted by the prosecuting witness, he disclosed his mission to serve a search warrant, and that an affray immediately ensued in which both parties fired and in which he inflicted serious injury. *Held:* It was error for the court to fail to explain the law relating to defendant's right to use such force as was necessary in the performance of his duty and his right to kill in self-defense without retreating if the jury should find from the evidence the facts to be as contended by him. G.S. 1-180. *S. v. Fain*, 644.

§ 14c. Duty to Charge on Less Degrees of Crime.

Upon evidence tending to show that defendant hit his antagonist with as many as four rocks while his antagonist was prone on the ground, and the deadly character of the weapons in the manner and circumstance of their use is submitted to the jury, it will not be held for reversible error that the court submitted the case on the question of defendant's guilt of assault with a deadly weapon or not guilty and refused to submit the question of defendant's guilt of simple assault, the character of the affray prior to the time defendant's antagonist was knocked unconscious not being controlling. *S. v. Muse*, 536.

ASSIGNMENTS.

§ 1. Rights and Interests Assignable.

Remuneration which a party is to receive upon the completion of a contract is assignable, the liability of the debtor to pay the money to the assignee being merely postponed until the happening of the contingency under which it is to

ASSIGNMENTS—*Continued.*

become payable, at which time the assignment operates upon the fund. *Wike v. Guaranty Co.*, 370.

§ 3. Construction and Operation of Agreement in General.

Where a contractor's performance bond contains an assignment of the contract to secure the obligations of the bond and any other indebtedness or liabilities of the contractor to the guaranty company, whether theretofore or thereafter incurred, the assignment to be effective in the event of breach of the bond or any other bond executed by the guaranty company on behalf of the contractor, specifically listing another contract for which the guaranty company had executed performance bond, the assignment is sufficient to cover moneys due under the contract for the purpose of indemnifying the guaranty company for loss sustained on such other bond because of breach in performance by the contractor. *Wike v. Guaranty Co.*, 370.

ATTACHMENT.

(Attachment of property of defendant in hands of third person, see Garnishment.)

§ 3. Grounds for Attachment.

The ancillary writ of attachment may be issued only on one or more of the grounds specified by statute, G.S. 1-440.3, and the grounds upon which it is issued must be made to appear by affidavit. G.S. 1-440.11. *Whitaker v. Wade*, 327.

§ 4. Property Subject to Attachment.

Where it does not appear that a nonresident has been brought into this State by, or after waiver of, extradition, personal property brought into the State by such nonresident is subject to attachment or garnishment. *White v. Ordille*, 490.

§ 18. Vacation of Attachment on Application of Defendant.

A defendant may attack the grounds of an attachment prior to the trial of the main issue, G.S. 1-440.36, or by allegations in his answer for determination upon the trial. G.S. 1-440.41. *Whitaker v. Wade*, 327.

Where defendant, in his answer, alleges the falsity of the averment in plaintiff's affidavit upon which attachment was issued, an issue thereon is properly submitted at the trial, and upon a determination by the jury in defendant's favor, the court properly dissolves the attachment and discharges defendant's surety from liability. *Ibid.*

§ 23. Liabilities for Wrongful Attachment.

Damages for wrongful attachment may not be assessed in the trial of the main action regardless of whether defendant's cause be considered an action on plaintiff's bond or a cross-action for the wrongful issuance of the writ, since in neither case can the cause arise until wrongfulness in the issuance of the writ has been adjudicated. G.S. 1-440.45. *Whitaker v. Wade*, 327.

Where it is determined upon the trial of the main issue that plaintiff's averment upon which attachment was issued was false, defendant may have damages assessed for the wrongful attachment either upon motion in the cause after judgment or by subsequent independent action. *Ibid.*

AUTOMOBILES.

§ 7. Safety Statutes and Ordinances in General.

Statutory traffic regulations do not prevent proper municipal traffic ordinances, but the State regulations govern the operation of motor vehicles on State highways, including city streets which constitute a portion thereof, and municipal regulations to the extent of any conflict therewith are invalid. *Lee v. Chemical Co.*, 447.

§ 8d. Stopping and Parking.

Even conceding motorist was negligent in suddenly decreasing speed on highway, he could not have anticipated negligence of following motorist in driving at excessive speed or with defective brakes, and such intervening negligence was proximate cause of injury to person standing on highway. *Warner v. Lazarus*, 27.

Motorist hitting unlighted truck parked on highway on a dark and foggy night *held* guilty of contributory negligence as matter of law. *Bus Co. v. Products Co.*, 352.

Motorist hitting bus he was following on dark and foggy night when bus suddenly stopped without functioning brake lights *held* not guilty of contributory negligence as matter of law. *Barlow v. Bus Lines*, 382.

Evidence that codefendant's bus was stopped on highway on rainy, foggy night without red light burning on rear, and that original defendant, traveling in same direction, applied brakes to keep from hitting parked bus, and skidded into plaintiff's car, *held* sufficient for jury on issue of concurring negligence. *Pascal v. Transit Co.*, 435.

§ 8i. Traversing Intersections.

It is negligence *per se* for a motorist to overtake and pass another vehicle proceeding in the same direction at an intersection of a highway, unless permitted to do so by a traffic officer. *Donivant v. Swaim*, 114.

It is not negligence *per se*, but only evidence of negligence to fail to stop in obedience to highway sign before entering intersection with through highway. *Lee v. Chemical Co.*, 447.

§ 12f. Due Case in Regard to Children on or Near Highway.

A motorist is under duty to exercise due care to avoid injuring children whom he may see, or by the exercise of reasonable care should see, on or near the highway, taking into account the fact that a child of tender years may attempt to cross in front of an approaching automobile unmindful of impending danger. *Hughes v. Thayer*, 773.

§ 13. Right Side of Highway.

Person pushing handcart is pedestrian and is required to travel on left side of highway. *Lewis v. Watson*, 20.

§ 16. Pedestrians.

A person pushing a handcart along the highway is a pedestrian, since a handcart, being propelled solely by human power, is not a vehicle as defined by G.S. 20-38 (ff). *Lewis v. Watson*, 20.

And is required to travel on left side of highway. *Ibid.*

AUTOMOBILES—*Continued.*

§ 18h (1). Weight and Sufficiency of Evidence in General.

Physical facts at the scene may speak louder than the testimony of witnesses, and justify overruling motion to nonsuit. *S. v. Blankenship*, 589.

§ 18h (2). Sufficiency of Evidence and Nonsuit on Issue of Negligence.

The accident in suit occurred in the State of Virginia. Evidence tending to show that defendant's truck had been driven to its left of the center of the highway, but that it had been brought back on its right side of the highway and had traveled some distance thereon when the collision between it and the truck operated by plaintiff's intestate, approaching from the opposite direction, occurred, without evidence that defendant's truck was being operated at excessive speed or of any other act of negligence, *is held* insufficient to overrule defendant's motion to nonsuit. *Brown v. Truck Lines*, 122.

Evidence *held* for jury in action against motorist who struck child attempting to cross highway immediately after alighting from school bus. *Hughes v. Thayer*, 773.

§ 18h (3). Sufficiency of Evidence and Nonsuit on Issue of Contributory Negligence.

The evidence disclosed that intestate was pushing his handcart on the right-hand side of the highway in violation of G.S. 20-174 (d), and was struck from the rear by a vehicle traveling in the same direction. Plaintiff's evidence was to the effect that the operator of the vehicle was traveling at excessive speed and failed to keep a proper lookout. *Held:* The fact that intestate was traveling on the wrong side of the road did not render him guilty of contributory negligence as a matter of law upon the evidence, since the operator of a vehicle is under duty notwithstanding the provisions of G.S. 20-174 (d), to exercise due care to avoid colliding with any pedestrian upon the highway. G.S. 20-174 (e). *Lewis v. Watson*, 20.

The evidence tended to show that plaintiff's bus, shortly after a truck traveling in the opposite direction had passed it, struck the rear of defendant's truck which was parked on the right side of the highway on a dark and foggy night without lights, flares, or other signal. *Held:* While there was evidence of negligence on the part of defendant in violating G.S. 20-161, the evidence discloses contributory negligence as a matter of law on the part of plaintiff's driver, and defendant's motion to nonsuit should have been allowed. *Bus Co. v. Products Co.*, 352.

Evidence tending to show that plaintiff was following a bus on a wet, slippery road, through fog and rain, that the bus suddenly stopped to discharge a passenger and that plaintiff's car collided with the rear of the bus, together with plaintiff's testimony that he did not see any brake lights or stop lights, and testimony of a patrolman that upon his investigation after the accident the auxiliary brake lights of the bus were not functioning and that the regulation rear lights, though burning, were covered with a film, *is held* to require the submission of the issue of contributory negligence to the jury, and judgment of nonsuit on the ground of contributory negligence is error. *Barlow v. Bus Lines*, 382.

Issue of contributory negligence of eight-year-old boy, fatally injured while attempting to cross highway after alighting from school bus *held* for jury. *Hughes v. Thayer*, 773.

AUTOMOBILES—*Continued.*

§ 18h (4). Nonsuit on Issue of Intervening Negligence and Concurring Negligence.

Intervening negligence *held* not reasonably foreseeable upon the evidence and therefore it insulated primary negligence. *Warner v. Lazarus*, 27.

The evidence considered in the light most favorable to the original defendant on its cross-action against its codefendant for contribution tended to show that the codefendant's bus was stopped on the highway on a rainy, foggy night without a red light burning on the rear thereof in violation of G.S. 20-129 (d), that the driver of the original defendant's bus, headed in the same direction, did not see the stationary bus until he was upon it, that he then applied his brakes and skidded to the left of the center of the road, where he collided with the car in which plaintiffs were traveling in the opposite direction. *Held:* The evidence was sufficient to overrule the codefendant's motion to nonsuit the cross-action. *Pascal v. Transit Co.*, 435.

§ 18i. Instruction in Auto Accident Cases.

A charge which fails to define careless and reckless driving or explain what constitutes a proper lookout in relation to the evidence adduced at the trial is insufficient to meet the requirements of G.S. 1-180. *Lewis v. Watson*, 20.

The mere reading of the statutory speed regulations, G.S. 20-141, without separating the irrelevant provisions from those pertinent to the evidence and without application of the relevant provisions to the evidence adduced, *is held* insufficient to meet the requirements of G.S. 1-180. *Ibid.*

The evidence disclosed that intestate was pushing a handcart on the right side of the highway, and that he was struck from the rear by defendant's vehicle traveling in the same direction. Plaintiff contended that the handcart was a vehicle and that G.S. 20-146, and G.S. 20-149, applied. Defendant contended that intestate was a pedestrian and was required by G.S. 20-174 (d), to push the handcart along the extreme left-hand side of the highway. *Held:* An instruction failing to define intestate's *status* and explain the law arising upon the evidence fails to meet the requirements of G.S. 1-180. *Ibid.*

The evidence tended to show that the driver of an automobile overtook and attempted to pass a truck proceeding in the same direction at an intersection of streets in a municipality at which no traffic officer was stationed, and that the vehicles collided when the river of the truck made a left turn at the intersection. *Held:* It was error for the court to instruct the jury that the provisions of G.S. 20-150 (c), did not apply. *Donivant v. Swaim*, 114.

Failure of defendant traveling on a servient highway to stop in obedience to a highway stop sign before attempting to traverse an intersection with a through State highway, either within or outside the limits of a municipality, is not negligence *per se* but only evidence of negligence, and an instruction that it constitutes negligence *per se* must be held for reversible error. *Lee v. Chemical Co.*, 447.

§ 19a. Guests' and Passengers' Right of Action for Negligent Injuries in General.

The duty which the owner owes to an invitee or guest is that of ordinary care. *Wright v. Wright*, 503.

§ 19b. Right to Recover Under Automobile Guest Statute.

Evidence *held* sufficient on issue of negligence entitling paying passengers to recover from driver under Virginia statute. *Morse v. Walker*, 778.

AUTOMOBILES—*Continued.*

Evidence tending to show that plaintiff and defendant planned a trip in defendant's car for their mutual benefit and pleasure, that prior to the trip defendant stated he was financially unable to make the trip and that thereupon plaintiff agreed to purchase all gas and oil necessary for the trip if he could take his wife and child with him on the trip, *is held* sufficient to be submitted to the jury on the question of plaintiff's contractual obligation to purchase the gas and oil so as to constitute "payment for transportation," rendering plaintiff and his wife and child paying passengers and not gratuitous guests within the meaning of the Virginia statute. *Ibid.*

A passenger is a guest within the meaning of an automobile guest statute if the owner or possessor permits him to ride without remuneration or other benefit therefor, and the voluntary purchase of gas and oil by such passenger while on a trip does not alter such *status*, but a passenger who enters into a contractual obligation to purchase gas and oil for the trip as a condition or consideration therefor is not a gratuitous guest. *Ibid.*

§ 23b. Liability of Owner for Permitting Incompetent to Drive.

Where the owner has knowledge, actual or imputable, that the driver is unfit at the time the vehicle is entrusted to him, the owner will be liable for the negligence of the driver, but in order for the principle to apply there must be evidence of actual or constructive knowledge on the part of the employer that the driver was incompetent, reckless or was addicted to excessive and habitual use of liquor. *McIlroy v. Motor Lines*, 509.

Evidence *held* insufficient to show that employer had knowledge, express or implied, that driver was intoxicated at time truck was entrusted to him, or that driver was addicted to intoxicants. *Ibid.*

§ 24a. Nature and Extent of Owner's Liability for Driving of Employees in General.

The owner of a taxicab is under duty of observing due care in its operation of which duty he cannot divest himself by employing another to operate the automobile in the prosecution of his business, and the owner will be held liable for the negligence of the driver in such instance under the principle of *qui facit per alium, facit per se. Wright v. Wright*, 503.

§ 24d. Liability of Owner to Passengers of Driver.

Where an invitee of the driver is riding in the automobile with the knowledge and consent of the owner, the owner is liable on the principle of *respondeat superior* for injury to the invitee proximately caused by the negligence of the driver. *Wright v. Wright*, 503.

Testimony that a taxicab driver had his minor son in the cab with him and that the employer owner saw the son in the car and knew the driver was about to make a business trip, is sufficient to take the question to the jury as to whether the employer owner acquiesced in the child's riding as a nonpaying passenger. *Ibid.*

§ 24½c. Sufficiency of Evidence and Nonsuit on Issue of Respondeat Superior.

Admissions in the answer that the driver of the truck involved in a collision was in defendant's employ and was driving defendant's truck at the time, with testimony by defendant to the effect that when the accident occurred the driver was engaged in making a trip for defendant's father, which defendant had

authorized, *is held* sufficient to overrule nonsuit upon the issue of whether the driver was defendant's employee engaged in the scope of his employment at the time of the collision. *Donivant v. Swain*, 114.

Evidence offered by plaintiff tending to show that the employer sent the employee in the employer's truck on an errand requiring about an hour's time, that the employee accomplished the mission and then drove the truck on several exclusively personal trips, and that the accident in suit occurred while the employee was driving the truck on one of the personal trips, some eight hours after he had been sent on the mission, *is held* to justify nonsuit on the issue of *respondeat superior*. *McIlroy v. Motor Lines*, 509.

§ 28a. Definition of Culpable Negligence.

Culpable negligence is the intentional, willful or wanton violation of an ordinance for the protection of human life which proximately results in injury or death, or the inadvertent violation of such statute or ordinance under circumstances amounting to a thoughtless disregard of consequences or a heedless indifference to the safety of others, proximately resulting in injury or death. *S. v. Blankenship*, 589.

§ 28e. Sufficiency of Evidence in Manslaughter Prosecutions.

Evidence that defendant was driving on the public highways of the State while under the influence of intoxicating liquor in violation of G.S. 20-138, and was driving recklessly in violation of G.S. 20-141, which proximately caused the death of a passenger in his car, is sufficient to be submitted to the jury in a prosecution for manslaughter. *S. v. Blankenship*, 589.

§ 29b. Prosecutions for Reckless Driving.

Evidence that defendant, while intoxicated, was driving his car at a speed of from 55 to 60 miles per hour from one side of the road to the other, and had passed a truck after the truck had passed his car, that he had been requested several times by a passenger in his car to slow down, and that he lost control of the car, which twice ran off the road onto the shoulder and turned over leaving scuffed marks on the highway for a distance of 267 feet and throwing one of the passengers from the car to his fatal injury, *is held* sufficient to be submitted to the jury on a charge of reckless driving. *S. v. Blankenship*, 589.

§ 30a. Definition of Drunk or "Under the Influence" of Intoxicants or Drugs.

A person is intoxicated within the purview of G.S. 20-138 if he has drunk a sufficient quantity of intoxicating beverage to impair to an appreciable extent the normal control of his bodily or mental faculties. *S. v. Blankenship*, 589.

§ 30d. Prosecutions for Drunken Driving.

Officers who reached the scene of the accident some thirty minutes after it occurred testified that in their opinion defendant driver was intoxicated or under the influence of something, and one of them testified that he smelled something on defendant's breath, but both testified that they did not know whether defendant's condition was due to drink or to injuries sustained by him in the accident. *Held:* The evidence raises no more than a suspicion or conjecture as to whether defendant was driving under the influence of liquor or narcotic drugs, and defendant's motion as of nonsuit should have been allowed. *S. v. Hough*, 532.

AUTOMOBILES—*Continued.*

Defendant had an accident while driving his car on the highway. Testimony of witnesses who saw and observed defendant shortly before and shortly after the accident that they smelled alcohol on his breath, and that at that time defendant was intoxicated, *is held* sufficient to be submitted to the jury in a prosecution for driving a motor vehicle on the highways while under the influence of intoxicants. *S. v. Blankenship*, 589.

§ 31a. Elements of Offense of "Hit and Run" Driving.

Knowledge of the driver that his vehicle had been involved in an accident resulting in injury to a person is an essential element of the offense of "hit and run driving." *S. v. Ray*, 40.

§ 31b. Prosecutions for "Hit and Run" Driving.

In this prosecution under G.S. 20-166, the State introduced testimony of a statement by defendant that he had just driven the highway in question but that he had no knowledge or notice that he had struck any vehicle or injured any person during the trip. This statement was not contradicted or shown to be false by any other fact or circumstance in evidence. *Held:* The statement is binding upon the State, and defendant's motion for judgment of nonsuit is sustained in the Supreme Court, G.S. 15-173, for want of evidence that defendant knew he had been involved in an accident resulting in injury to a person. *S. v. Ray*, 40.

BANKS AND BANKING.

§ 8a. Duties and Liabilities in Paying Checks.

Bank paying check under mistake as to identity of drawer may not recover from payee without fault. *Bank v. Marshburn*, 104.

BILLS AND NOTES.

§ 18. Holders in Due Course and Purchasers for Value.

A person who accepts a check for a pre-existing debt owed him by the maker is a purchaser for value. *Bank v. Marshburn*, 104.

The fact that the payee of a check knows that the maker has no funds on deposit with the drawee bank for payment at the time of its execution, and accepts it upon representations of the maker that he would have funds in the bank for payment at a later date certain, does not alter the payee's *status* as a *bona fide* holder. *Ibid.*

§ 24b. Maturity—Provision in Notes in Levies for Acceleration.

Where bonds or notes secured by mortgage or deed of trust are unconditional on their face and do not contain the acceleration clause set forth in the mortgage or deed of trust, the institution of foreclosure proceedings does not advance the maturity dates of the bonds or notes so as to affect the running of the statute of limitations against an action on the bonds or notes. *Sanders v. Hamilton*, 43.

§ 29. Defenses to Action on Note.

Fraud in procurement of note of which plaintiffs had notice at time holder acquired the note, is a defense. *Hancammon v. Carr*, 52.

BILLS AND NOTES—*Continued.*

§ 31. Pleadings in Actions on Notes.

In an action on a note, answer alleging want of consideration, fraud in the procurement, and notice to plaintiffs, holders, of the defects in the instrument at the time it was acquired by them, *held* improperly stricken on plaintiffs' motion. *Hancammon v. Carr*, 52.

§ 32. Presumptions and Burden of Proof.

Upon proof of fraud in the inception of the contract, the burden shifts to the holder of a negotiable instrument to show that he is a holder in due course for value and without notice of the infirmity. *Hancammon v. Carr*, 52.

BLACKMAIL.

§ 2. Prosecution and Punishment.

In this prosecution for blackmail, testimony of a telephone call to prosecuting witness directing him to look under the mat of his front door for the extortion letter was admitted without identification of the defendant as the person who had called. Subsequently, the trial court withdrew the conversation from the evidence, leaving only the fact that the prosecuting witness looked for and found the letter in consequence of the telephone call. *Held:* Any error in the admission of testimony of the telephone conversation was cured. *S. v. Strickland*, 201.

Circumstantial evidence of defendant's guilt of blackmail, G.S. 14-118, and of transmitting a threatening letter, *is held* sufficient to sustain conviction and overrule defendant's motions for judgment as of nonsuit. *Ibid.*

BOUNDARIES.

§ 2. General and Specific Descriptions.

Where there is repugnancy between a general and a particular description in a deed, the particular description must prevail, but this rule has no application where the particular and the general descriptions are not an attempt to describe the same lands but relate to different parcels, in which instance there is no repugnancy and the deed will convey both tracts. *Hudson v. Underwood*, 273.

§ 3b. Calls to Natural Objects.

Whether a call in a deed down a branch to a swamp, thence up said swamp to another corner, conveys the land to the edge of the swamp or extends to the run of the swamp, involves a matter of fact for the determination of the jury, and nonsuit by the court predicated upon its holding as a matter of law that the description embraced the land only to the edge of the swamp, is error. *Cherry v. Anderson*, 333.

§ 3c. Reversing Calls.

Where a natural monument has disappeared, it is competent for the surveyor to testify that he located the corner by reversing the line from another corner. *Poole v. Gentry*, 266.

§ 5b. Parol Testimony.

A person present at the survey of lands for partition and who saw the commissioners mark natural monuments called for in their report and in the deeds

BOUNDARIES—*Continued.*

for partition, is competent to testify as to the location of the natural monuments and that he saw defendants' surveyor run the line to such monuments. *Poole v. Gentry*, 266.

It is competent for a surveyor to testify that certain persons, who were present at the time of the original survey for partition and who testified at the trial as to the location of the monuments, pointed out to him a natural monument called for as a corner in the report of the commissioners and the muniments of title. *Ibid.*

§ 5e. Maps.

A map prepared by a surveyor, who, together with another surveyor who had made an independent survey, vouches for its accuracy, is competent for the purpose of explaining their testimony with respect to their surveys of the *locus*. *Pool v. Gentry*, 266.

§ 6. Nature and Grounds of Processioning Proceeding.

Where the clerk, upon the filing of amended petition and amended answer in a processioning proceeding, finds that title to real estate had become involved, and transfers the cause to the civil issue docket, it is error for the trial court to strike respondent's answer from the record for want of defense bond and to enter judgment by default on the petition. *Roberts v. Sawyer*, 279.

In a processioning proceeding there is no denial of petitioners' title except as to the true boundary line, and title is not really in dispute. *Ibid.*

A defense bond is not required in a special proceeding to establish boundaries. G.S. 38-1 to 38-4. *Ibid.*

BURGLARY.

§ 14. Judgment and Sentence.

Burglary with explosives is punishable as for burglary in the second degree, which is by imprisonment for life or for a term of years in the discretion of the court. *In re McKnight*, 303.

CANCELLATION AND RESCISSION OF INSTRUMENTS.

§ 2. Cancellation for Fraud.

Conversations by the parties subsequent to the execution of the instrument are impertinent to the issue of fraud in the procurement of the execution of the instrument. *Harrison v. R. R.*, 92.

Person who has ability and opportunity to read instrument may not attack it for alleged misrepresentations of its contents in the absence of fraud or oppression. *Ibid.*

While ordinarily, promissory representations are insufficient predicate for an action for fraud or rescission, allegation and evidence to the effect that defendants represented that they had talked to city officials and that the city would fill a large gully on the lot in a matter of days, that this representation was material and false, and that the house extended four inches over the street line in violation of defendants' representation that the house was built on the lot described, are sufficient to overrule defendants' demurrer to the complaint and demurrer to the evidence. *Kee v. Dillingham*, 262.

CANCELLATION AND RESCISSION OF INSTRUMENTS—*Continued.*

§ 12. Sufficiency of Evidence and Nonsuit.

Plaintiff's evidence in support of her allegations to the effect that defendants employed agents who, by the use of flattery and attentions to her and by plying her with intoxicants, procured plaintiff to sign a release from liability by misrepresenting it to be an advantageous settlement of her suit against defendant and that she did not know, or her mental condition was such that she could not comprehend at the time the nature of the instrument, and that she actually received no consideration for the release, *is held* sufficient to be submitted to the jury and upon its affirmative finding to vitiate the release for mistake induced by fraud. *Garrett v. Garrett*, 290.

Where plaintiff, attacking a deed of trust for fraud or undue influence, introduces some evidence of misrepresentation after the execution of the instrument but no evidence of overreaching on the part of the *cestui* at the time the instrument was executed, it is not error for the trial court to instruct the jury to answer the issue of fraud and undue influence in the negative. *Graham v. Graham*, 565.

§ 15. Damages and Relief.

While ordinarily, damages for breach of contract or for fraud cannot be recovered in an action for rescission, plaintiffs in an action for rescission are nevertheless entitled to recover special damages sustained as a result of the fraud which cancellation of the contract does not repair. *Kee v. Dillingham*, 262.

Upon rescission of the contract of sale at the instance of vendee, the vendee is entitled to recover expenditures for permanent improvements less rental value of the property while in vendee's possession, but not expenditures for personal property which vendee is entitled to remove nor expenditures made for improvements after knowledge of all the facts or after discovery of the fraud. *Ibid.*

CARRIERS.

§ 3. Federal Regulation.

The Federal statutes regulating transportation in interstate commerce by rail are made applicable to motor carriers. 49 U. S. C. A. 319. *Cigar Co. v. Garner*, 173.

§ 5. Franchises.

The right to transport freight or passengers over the highways of the State is a privilege and a franchise granted by the State through the Utilities Commission for this purpose does not vest the holder with an interest in the highways but merely grants permission for their use. *Greyhound Corp. v. Utilities Com.*, 31.

While a franchise creates rights which the law will protect in the interest of the public, a franchise is not an exclusive right, and whether other carriers shall be let in is a question for the determination of the Utilities Commission in the public interest, with statutory right of existing franchise holders to come in and defend against a new application for the privilege of using the same highways and serving the same communities. *Ibid.*

§ 9. Bills of Lading.

A bill of lading is both a receipt and a contract to transport and to deliver the goods as therein stipulated. *Griggs v. York-Shipley*, 572.

CARRIERS—*Continued.*

§ 12. Liability for Loss of Goods.

The common law rule that a carrrier, in the absence of special contract, is liable for loss of goods in transit unless the carrier can show that loss was attributable to act of God, the public enemy, fault of the shipper, or inherent defect in the goods shipped, applies to interstate shipments as well as intrastate shipments, since the rule has not been changed by decision of the Federal courts or by Federal statute, the reference to negligence in the Carmack and Cummins amendments to the Hepburn Act applying only in case of failure to give required notice of claim. *Cigar Co. v. Garner*, 173.

Armed robbers are not "public enemies" within the meaning of the rule of liability of common carriers. *Ibid.*

Allegations of delivery of goods to a carrier for shipment and nondelivery by the carrier are sufficient to state a cause of action, and the fact that the complaint also alleges the loss was due to carelessness of the carrier in handling the goods does not require plaintiff to prove negligence or make the law of bailments applicable. *Ibid.*

§ 12½. Liability for Wrongful Delivery of Goods.

It is the duty of a common carrier not only to safely transport goods entrusted to it but also to deliver them to the party designated by the terms of the shipment, or to his order, at the place of destination, and when the carrier, contrary to the terms of shipment, delivers the goods without surrender of the bill of lading, the delivery is wrongful and the carrier becomes liable for any loss which the shipper sustains thereby. The fact that the bill of lading contains direction to notify the purchaser at the place or destination does not affect the liability of the carrier for wrongful delivery. *Griggs v. York-Shipley*, 572.

Where the carrier delivers the goods without surrender of the bills of lading properly endorsed as required by the contract, the shipper may treat such wrongful delivery as a conversion of the property by the carrier and sue the carrier for the full value of the goods, or it may repossess the goods and recover from the carrier the amount expended in such repossession as damages proximately resulting from the wrongful delivery. *Ibid.*

A shipper may ratify the wrongful delivery of goods by the carrier, but what constitutes a ratification depends upon the facts of each particular case and the burden is on the carrier to show a ratification by the shipper with full knowledge of all material facts. *Ibid.*

The shipper made twelve separate and unrelated shipments under twelve separate and unrelated bills of lading. In each case the carrier delivered the goods without surrender of the original bills of lading as required by the contract. Thereafter the shipper accepted full payment for the articles covered by three of the bills of lading. *Held:* The act of the shipper in ratifying the wrongful delivery under the three bills of lading neither compels nor justifies an inference that he thereby intended to ratify the other wrongful deliveries. *Ibid.*

Evidence tending to show that after wrongful delivery of articles by the carrier without the surrender of the original bills of lading as required by the contract, the shipper accepted full payment of certain items from the person to whom wrongful delivery was made, and repossessed the other items, *held* not to compel the conclusion as a matter of law that the shipper ratified the wrongful delivery, but to the contrary, is sufficient to support the court's find-

CARRIERS—*Continued.*

ing that the acts of the shipper did not constitute a ratification, since such acts are consonant with intention on the part of the shipper merely to minimize the loss. *Ibid.*

§ 14. Liability for Freight Charges of Carriers.

Where, in making a settlement with the purchaser after wrongful delivery of the goods to him by the carrier, the seller contracts with the purchaser to pay the freight charges, the carrier may recover charges from the seller on the contract. *Griggs v. York-Shipley*, 572.

Under bills of lading conforming to the Federal Act and regulations of the Interstate Commerce Commission, 49 U.S.C.A. 81-124, the shipper is liable to the carrier for freight charges unless it signs the non-recourse statement on the face of the bill directing the carrier not to make delivery without payment of freight. *Ibid.*

Where, after delivery by the carrier to the purchaser without the surrender of the bill of lading, the seller accepts from the purchaser full payment for the article covered by the bill of lading, the seller by accepting the benefits of the wrongful delivery is estopped to deny liability to the carrier for the freight charges. *Ibid.*

§ 18b. Segregation of Races on Carriers.

Motor carriers of passengers are required by law to adopt "reasonable regulations and practices" relating to the "transportation of passengers in interstate or foreign commerce." 49 U.S.C.A., 316 (a). And while it is held in *Morgan v. Virginia*, 328 U. S. 373, that a state statute which requires segregation of interstate passengers is beyond the state's power to make, the decision does not purport to invalidate reasonable rules and regulations of interstate carriers, which require segregation of the white and Negro races. *Pridgen v. Coach Co.*, 46.

Removal of passenger for refusal to comply with carrier's reasonable regulations for segregation of races is not false imprisonment. *Ibid.*

Act of agent in swearing out warrant for purpose of punishment and not to enforce carrier's regulations for segregation of races *held* beyond scope of authority, and carrier is not liable. *Ibid.*

G.S. 60-135 and G.S. 60-136 apply not only to transportation of passengers within a city or town but also to transportation of intrastate passengers from one city or town to another. G.S. 60-139. *S. v. Johnson*, 701.

In a prosecution under G.S. 60-135 and G.S. 60-136, evidence that a white and a colored defendant occupied the same seat on a bus and refused to move to unoccupied seats in the front and rear of the bus as required by statute, makes out a *prima facie* case of intent to violate the statute and is sufficient to withstand defendants' motion for judgment as of nonsuit even in the absence of evidence by the State that defendants were intrastate passengers, since the burden of going forward with the evidence to show that defendants were interstate passengers rests upon defendants as a matter relating to an exemption, immunity, or defense. *Ibid.*

§ 20. Ejection of Passengers.

The complaint alleged that plaintiff's intestate, while in a drunken condition, was wrongfull ejected from defendant's bus at a place where the driver should have known that he would have to cross a heavily traveled street, that after he

CARRIERS—*Continued.*

had alighted and walked some distance he attempted to cross the street and was struck by the negligently operated bus of the other defendant. *Held:* Conceding that the ejectment was wrongful, intestate was afforded a safe landing and his subsequent injuries through the negligent operation of the other bus did not flow from the wrongful ejectment, and no cause of action is stated against the original carrier or its driver. *Shaw v. Barnard*, 713.

CHARITIES.

§ 2. Control and Management of Property.

A conveyance of land to trustees for the erection of a church to belong to a denomination, to have and to hold to them and their successors in office forever in trust for the erection of a place of worship for the use of members of the denomination, takes the title in trust for the use of the denomination, G.S. 61-3, and therefore members of the congregation of the church so erected who withdraw affiliation from the denomination, even though they be a majority of the congregation, are not entitled to the control and use of the property as against the denomination irrespective of whether the particular church is congregational or connectional. *Western N. C. Conference v. Tally*, 1.

Where land is conveyed to the officers and trustees of a non-denominational religious organization for the purposes of the organization, its officers and trustees have title to the property in trust and are entitled to hold it for the use and occupancy of the organization as against members of the organization, even though they are in the large majority, who seek possession of the property for use and occupancy by a denominational church. *Wheeless v. Barrett*, 282.

Where deed to the officers and trustees of a non-denominational religious organization does not appear of record, it will be presumed that the deed conveyed the land in trust for the purposes for which the organization was formed. *Ibid.*

Judgment approving an exchange by the trustees of a church of land held by it in fee simple for land of equal value held by it under a trust, upon the court's finding that all interested parties had duly assented to the exchange, and that the exchange was advantageous to all the parties, is affirmed. *Branch v. McMullan*, 411.

An exchange by a church of properties owned by it out of and into a charitable trust upon condition that the church continue to use the present church building and facilities rent free until a new church building could be erected will not be held invalid for indefiniteness or as subject to unlimited postponement. *Ibid.*

CLERKS OF COURT.

§ 3. Jurisdiction of Clerk as Court in General.

Clerk has concurrent jurisdiction with Superior Court to enter default judgments and to hear motions to vacate such judgments. *Moody v. Howell*, 198.

§ 4. Probate Jurisdiction.

G.S. 28-31, empowering the clerk to revoke letters of administration or testamentary upon proof of a will, does not empower the clerk to set aside probate in common form upon proffer of proof of a later will. *In re Will of Puett*, 8.

§ 7. Jurisdiction as Juvenile Court.

In a proceeding by the father to obtain custody of his child from the parents of his deceased wife, his contention that defendant's motion to dismiss the pro-

CLERKS OF COURT—*Continued.*

ceeding in the Superior Court for want of jurisdiction should be denied since there is no controversy respecting the custody of the child such as would confer jurisdiction upon the juvenile court is untenable, since the question is one of jurisdiction and not the right of petitioner to the custody, and since the contention is perforce made in the midst of a controversy. *Phipps v. Vannoy*, 629.

The juvenile court has exclusive original jurisdiction to determine the custody of an infant under sixteen years of age, G.S. 110-21 (3), in all cases except those in which the Superior Court is given jurisdiction by G.S. 17-39 or by G.S. 50-13. *Ibid.*

Petitioner's wife was awarded the custody of their child in the action between them for divorce. After her death petitioner instituted *habeas corpus* proceedings against her parents to obtain the custody of the child. *Held:* The juvenile court has exclusive jurisdiction of the controversy, and the dismissal of the *habeas corpus* proceedings by the Superior Court on the ground of want of jurisdiction is affirmed. G.S. 110-21 (3). *Ibid.*

COMMON LAW.

So much of the common law as had not been abrogated or repealed by statute is in full force and effect within this State. G.S. 4-1. *S. v. Sullivan*, 251.

CONSPIRACY.

§ 6. Sufficiency of Evidence of Criminal Conspiracy and Nonsuit.

The evidence tended to show that a gun fight between defendant and his companion on the one hand and a third person on the other was precipitated by defendant's companion, that defendant's companion had made repeated threats to kill such third person, and that defendant and his companion were seen together several times shortly before the affray. There was no evidence that defendant had any knowledge of the threats or of his companion's intent prior to the actual encounter. *Held:* The evidence is insufficient to resist defendant's motion to nonsuit the charge of conspiracy to commit a felonious assault. *S. v. Wellborn*, 617.

CONSTITUTIONAL LAW.

§ 8c. General Assembly—Power to Delegate Authority.

The General Assembly cannot delegate authority to make law, and an administrative agency has no power to promulgate rules and regulations which alter or add to the law it is set up to administer. *State's Rights Democratic Party v. Board of Elections*, 179.

§ 10b. Power and Duty to Determine Constitutionality of Statutes.

Reasonable doubt as to the constitutionality of a legislative enactment is to be resolved in favor of the lawful exercise of their power by the representatives of the people. *Boney v. Kinston Graded Schools*, 136.

The duty of the courts to declare a statute void when it contravenes the organic law is essential to orderly government under our constitutional system. *Palmer v. Smith*, 612.

§ 11. Scope of State Police Power in General.

The State, in its capacity as a sovereign, possesses the police power, which the General Assembly may exercise within constitutional limits, but the police

power is in derogation of personal liberty and extends only to measures enacted for the good of the citizens as a whole and which have a rational, real, or substantial relation to the public health, morals, order, safety, or the general welfare. *S. v. Ballance*, 764.

§ 12. Regulation of Trades and Professions.

Legislative declaration cannot convert a private business into a public one, and the police power cannot be extended to create a monopoly or special privilege when the restrictions have no real or substantial relation to the public health, safety or welfare. *Palmer v. Smith*, 612.

The Legislature may prescribe reasonable qualifications for persons desiring to pursue a profession or calling which requires special skill or knowledge and which intimately affects the public health, morals, order, safety, or general welfare; but it may not deny nor unreasonably curtail the common right to pursue the ordinary lawful and innocuous occupations which are not affected with any public interest even though they may require skill and special knowledge. *S. v. Ballance*, 764.

While the practice of photography requires special skill, the calling is not affected with a public interest, since the special hazards threaten the individual practitioner rather than the public and are no greater than those incident to many other occupations, and protection against lack of skill in such calling can be best obtained by free competition of free men in a free market, and the danger of fraud in the practice of photography is common to other ordinary callings and is insufficient ground for the exercise of the police power, and therefore Chap. 92 of the General Statutes, providing for the licensing and supervision of photographers, is unconstitutional as violative of Art. I, sec. 1, and Art. I, sec. 17, of the State Constitution. *Ibid.*

§ 13. Regulations Relating to Safety, Sanitation and Health.

A municipal ordinance prohibiting the handling of venomous and poisonous reptiles in such manner as to endanger the public health, safety and welfare, will not be held invalid upon defendants' contention that the ordinance interferes with the exercise of their religious practices. *S. v. Massey*, 734.

§ 15½. Personal and Civil Rights in General.

Personal liberty as guaranteed by the Constitution means more than mere freedom from unlawful physical restraint or servitude, but embraces the right of the individual to be free in the use of his faculties in all lawful ways, and to select his place of abode and method of livelihood, subject only to the police power of the State. Art. I, sec. 1; Art. I, sec. 17. *S. v. Ballance*, 764.

§ 17. Exclusive Emoluments and Privileges.

Expenditure for special training of police officer does not grant exclusive emolument or privilege. *Green v. Kitchin*, 450.

G.S., Chap. 92, relating to the licensing and supervision of photographers, tends to create a monopoly in violation of Art. I, sec. 31. *S. v. Ballance*, 764.

§ 19a. Searches and Seizures.

Ordinarily an officer may not invade a person's home except under authority of a search warrant issued in accord with pertinent statutory provisions. *S. v. Hammond*, 111.

CONSTITUTIONAL LAW—*Continued.*

Home owner cannot be held in contempt for failure to admit officers without search warrant from entering home to serve process on third person in absence of evidence that such third person was inmate of or was actually present in the home. *Ibid.*

§ 19½. Religious Liberty.

A municipal ordinance prohibiting the handling of venomous and poisonous reptiles in such manner as to endanger the public health, safety and welfare, will not be held invalid upon defendants' contention that the ordinance interferes with the exercise of their religious practices. *S. v. Massey*, 734.

§ 20c. "Due Process of Law"—"Law of the Land" in General.

The term "law of the land" as used in our State Constitution is synonymous with "due process of law." Art. I, sec. 17. *S. v. Ballance*, 764.

§ 21. What Constitutes "Due Process"—Notice and Hearing.

Domicile alone cannot confer jurisdiction of the person, but there must be service of process so that there is notice and an opportunity to be heard. *Coble v. Coble*, 81.

The contention that an order awarding the custody of the children in a divorce action, entered without jurisdiction over the person of defendant, does not violate due process of law because it affects no substantial right, is untenable, since, although defendant may thereafter apply for a hearing, the burden of proof at such hearing would be upon her and not upon the plaintiff. *Ibid.*

In order to meet the constitutional requirement of due process, the State Board of Elections must give petitioners for the creation of a new political party notice and an opportunity to be heard before rejecting the petition as insufficient. *State's Rights Democratic Party v. Board of Elections*, 179.

§ 32. Necessity for, and Requisites of Indictment.

The evidence disclosed that the names of Negroes were printed in red and the names of white persons were printed in black in preparing names for the jury box, and that in drawing the names from the box the names of Negroes were without exception rejected. *Held:* The motion of the defendant, a Negro, to quash the indictment found by a grand jury so selected, should have been allowed, since such systematic and arbitrary exclusion of Negroes from the grand jury deprived him of his constitutional rights. Constitution of N. C., Art. I, sec. 17. Fourteenth Amendment to the Constitution of the U. S. *S. v. Speller*, 67.

§ 34a. Due Process in Criminal Prosecutions in General.

Failure to appoint counsel for a person prosecuted for a capital offense relates only to due process and not the guilt or innocence of the accused, and therefore even though the conviction be set aside upon such ground, the accused would not be entitled to his discharge but only to a vacation of the judgments against him and a restoration of the indictments to the docket for trial. *In re Taylor*, 297.

Constitutional rights of one accused of crime cannot be granted or withheld by the court as a matter of discretion, and therefore claim of deprivation of such rights raises a question of law which must be considered and determined upon appeal. *S. v. Gibson*, 497.

CONSTITUTIONAL LAW—*Continued.*

§ 34d. Due Process in Criminal Prosecutions—Right to Counsel.

Where defendant in a prosecution less than capital is unable to employ counsel, the appointment of counsel for him is discretionary with the trial court; but in a capital case the right to the appointment of counsel is vouchsafed by provision of both the State and Federal Constitutions and by statute. *In re Taylor*, 297.

A defendant has the constitutional right to be represented by counsel whom he has selected and employed, and in prosecutions for capital felonies the court has an inescapable duty to assign counsel to a person unable to employ one. *S. v. Gibson*, 497.

Right to counsel implies right to sufficient time to prepare defense, but record in this case *held* not to disclose deprivation of constitutional rights in denial of motion for continuance. *Ibid.*

§ 39. Procedure to Raise Question of Deprivation of Constitutional Rights in Prosecution.

Where a person has been convicted of crime and final judgment entered, the proper procedure for him to challenge the constitutionality of his conviction for matters *dehors* the record is by writ of error *coram nobis*. *In re Taylor*, 297.

CONTEMPT OF COURT.

§ 2b. Willful Disobedience of Court Order.

Failure to obey a court order cannot be punished for contempt unless the disobedience is willful, which imports knowledge and a stubborn purpose. *Lamm v. Lamm*, 248.

An employer cannot be held in contempt for paying salary accruing to a judgment debtor after issuance and service on the employer of an order in proceedings supplemental to execution, since the order, properly construed, speaks as of the date of its issuance, and since in law the order could not apply to prospective earnings of the judgment debtor. *Finance Co. v. Putnam*, 555.

§ 2c. Acts Tending to Impede Administration of Justice.

Officers of the law sought entrance into respondent's home for the purpose of serving civil process on a third person. Respondent refused to permit the officers to enter. There was no evidence that the person sought was an inmate of or was actually in respondent's home at the time. *Held:* Respondent was within his rights in refusing admittance to the officers, and his act in so doing cannot be held for contempt of court on the ground that it tended to obstruct or embarrass the administration of justice. *In re Walters*, 111.

CONTRACTS.

§ 5. Consideration.

Forbearance to exercise legal rights is sufficient consideration for a promise given to secure such forbearance even though the forbearance is in respect to the liability of a third person rather than that of the promisor. *Myers v. Allsbrook*, 786.

§ 7g. Contracts Against Statutory Policy.

Agreement by an injured employee to pay the physician engaged by him any balance due on his account after application of the amount approved by the

CONTRACTS—*Continued.*

Industrial Commission for the services is unenforceable and void, since the Act, G.S. 97-90 (b), makes the receipt of any fee for such services not approved by the Commission a misdemeanor. *Worley v. Pipes*, 465.

§ 8. General Rules of Construction.

The heart of a contract is the intention of the parties, which is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time. *Electric Co. v. Ins. Co.*, 518.

§ 19. Parties Who May Sue.

Where parties, upon forming partnership, take over assets of old concern theretofore operated by one of them, and assume its liabilities, debtor of old concern, as third person beneficiary of the agreement, may sue new partner. *Coleman v. Mercer*, 245.

§ 25c. Measure and Assessment of Damages for Breach.

Plaintiff's contention that a certain sum borrowed by him for the operation of the business of corporate defendant should have been added to his recovery for breach by the individual defendant of the contract for the operation of the joint enterprise, is untenable when the finding of the referee was that the loan was made to the corporate defendant and that plaintiff had sustained no loss thereby, especially where plaintiff fails to make it appear that the amount borrowed was not taken into account in arriving at the amount of plaintiff's recovery. *Meier v. Miller*, 243.

Where plaintiff loses both money and services as a result of defendant's wrongful breach of the contract with plaintiff for the operation of a joint enterprise, both the money lost and the fair value of the services are recoverable as damages in his suit for breach of contract, and objection by defendant on the ground that recovery could not be had as upon *quantum meruit* is untenable, since *quantum meruit* of the services is used only as a measuring stick in ascertaining the damages. *Ibid.*

CORPORATIONS.

§ 17b. Power to Sue and Defend in Corporate Name.

While a corporation which has been effectively dissolved cannot sue or defend as such, the suspension of its charter for failure to pay franchise tax does not deprive it of its capacity to defend its rights when sued. *Trust Co. v. School for Boys*, 738.

Introduction in evidence of certificate of Secretary of State that cancellation of charter was erroneous *held* to support finding that corporation existed for purposes of defending suit and taking property as beneficiary under will. *Ibid.*

§ 41. Distinction Between Merger and Amalgamation.

A corporate merger can be accomplished only by appropriate legal procedure, and results in the loss of the separate entity of the merged corporation unless saved by the terms of the merger; while in an amalgamation of two organizations engaged in similar activities, the associated organization does not *ipso facto* cease to exist or necessarily lose its corporate entity. *Trust Co. v. School for Boys*, 738.

COSTS.

§ 4d. Taxing of Costs in Equity Suits.

Where, in a suit for injunction, one of defendants seeks affirmative relief by way of specific performance, the taxing of costs is in the discretion of the trial court since the controversy is of an equitable nature, G. S., 6-20, and the order of the court apportioning the costs will not ordinarily be disturbed on appeal upon affirmance of the judgment. *Chandler v. Cameron*, 62.

COURTS.

§ 2. Jurisdiction of Courts in General.

Domicile alone cannot confer jurisdiction of the person, but there must be service of process so that there is notice and an opportunity to be heard in order to constitute due process of law. *Coble v. Coble*, 81.

Where the court enters an order without jurisdiction, the court's denial of defendant's motion to vacate the order does not constitute an implied ratification of the original order. *Ibid.*

§ 3a. Original Jurisdiction of Superior Court in General.

An independent suit against the Utilities Commission for a mandatory injunction relating to its orders affecting a franchise cannot be maintained, since the Superior Court will not take original jurisdiction of matters within the exclusive jurisdiction of the Commission. *Greyhound Corp. v. Utilities Com.*, 31.

§ 3c. Concurrent Original Jurisdiction.

The Judge of a Superior Court has concurrent jurisdiction with the Clerk of the Court to enter judgments by default, G. S., 1-211; G. S., 1-212, and to vacate such judgments, and the jurisdiction of the Judge on motion to set aside a default judgment entered by the Clerk is original as well as appellate. *Moody v. Howell*, 198.

§ 4b. Appeals to Superior Court from Municipal or County Courts.

The statute prescribed that appeals from a municipal-county court should be governed by the rules governing appeals from justices of the peace. Through no fault of appellant, its appeal was not filed within ten days after notice of appeal in open court, but was filed during the next succeeding term of the Superior Court. If it had been filed within the ten-day period, it would not have been on the Superior Court docket for ten days prior to the beginning of the term. *Held:* Appellee is not entitled to dismissal of the appeal at such term of the Superior Court notwithstanding appellant's failure to apply for *recordari*. *Electric Co. v. Motor Lines*, 86.

§ 4c. Appeals to Superior Court from Clerk.

An appeal suspends further proceedings in the cause in the court from which the appeal is taken, but where appeal is taken from order of the clerk probating a second will and thereafter the clerk enters an order revoking the order appealed from, the contention that the clerk was without jurisdiction to enter the order of revocation is untenable when the judge of the Superior Court determines the appeal from the order of probate and revokes the action of the clerk thereon to the extent that it conflicts with the judge's affirmance of the order of revocation. *In re Will of Puett*, 8.

COURTS—*Continued.*

G. S., 1-272; G. S., 1-273; G. S., 1-274, regulating appeals from the Clerk of the Superior Court to the Judge have no application in regard to appeals from orders and decrees in proceedings over which the Judge of the Superior Court has concurrent jurisdiction. *Moody v. Howell*, 198.

The Clerk entered a default judgment in an action in ejectment for failure of defendants to file bond required by statute, G. S., 1-111; G. S., 1-211 (4). Defendants' motion to vacate the default judgment upon tender of bond, was denied by the Clerk, and defendants appealed. *Held:* Dismissal of the appeal for failure of defendants to perfect same in the manner prescribed by G. S., 1-272; G. S., 1-273; G. S., 1-274, was error, since these statutes are inapplicable to orders or judgments entered pursuant to G. S., 1-211, and G. S., 1-212. *Ibid.*

§ 5. Jurisdiction Relating to Orders or Proceedings Before Another Superior Court.

Ordinarily injunction will not lie to enjoin the Superior Court of another county from proceeding in an action duly constituted and pending before it. *Davis v. Whitehurst*, 226.

§ 15. What Law Governs Causes Arising in Another State—Actions in Tort.

The laws of the State of Virginia govern the right to recover for injuries sustained in an automobile accident occurring in that State. *Morse v. Walker*, 778.

CRIMINAL LAW

§ 5. Responsibility for Crime—Mental Capacity.

A person who commits a criminal act but who is mentally incapable of knowing the nature and quality of his act or incapable of distinguishing between right and wrong in relation to such acts, is exempt from criminal responsibility. *S. v. Swink*, 123.

The presumption of sanity applies to persons charged with crime, but the presumption is rebuttable. *Ibid.*

A defendant has the burden of proving his defense of insanity to the satisfaction of the jury, and an instruction that the defense must be "clearly established" must be held for reversible error in placing upon the accused a higher degree of proof than that required by law. *Ibid.*

Upon the plea of mental irresponsibility, the test is the capacity of defendant to distinguish between right and wrong at the time and in respect of the matter under investigation. *S. v. Jones*, 596; *S. v. Creech*, 662.

§ 5c. Burden of Proving Insanity or Mental Irresponsibility.

A defendant is presumed sane, and the burden is upon him to show to the satisfaction of the jury the affirmative defense of insanity, or drunkenness to an extent which renders him mentally incompent. *S. v. Creech*, 662.

§ 6a. Responsibility for Crime—Entrapment.

Mere initiation, instigation, invitation or exposure to temptation by enforcement officers is not sufficient to establish the defense of entrapment, it being necessary that the defendants would not have committed the offense except for misrepresentation, trickery, persuasion or fraud. *S. v. Love*, 99.

CRIMINAL LAW—*Continued.*

§ 6b. Responsibility for Crime—State's Witnesses.

G. S., 18-8, grants immunity from prosecution under the prohibition laws only to a witness who is required to testify under compulsion. *S. v. Love*, 99.

§ 9. Parties and Offenses—Accessories After the Fact.

In prosecution of one accused as an accessory after the fact, the burden is upon the State to prove that the principal felon had actually committed the felony stipulated, that the accused knew that such felony had been committed by the principal felon, and that the accused received, relieved, comforted, or assisted the principal felon in some way in order to help him escape, or to hinder his arrest, trial, or punishment. *S. v. Williams*, 348.

One cannot become an accessory after the fact to a felony until such felony has become an accomplished fact. *Ibid.*

Where the State's evidence discloses that the accused rendered aid to the principal felon after the principal felon had mortally wounded deceased but before death ensued, motion to nonsuit in a prosecution of accused for being an accessory after the fact to the felony of murder should be allowed, since the evidence discloses that the felony of murder was not an accomplished fact when the assistance was given. *Ibid.*

§ 17g. Mental Capacity to Plead to Indictment and Make Rational Defense.

G. S., 122-83, and G. S., 122-84, prescribe no procedure by which the question of whether an accused is mentally incapable of understanding the nature of the proceedings against him and to make a rational defense may be brought to the attention of the court, or the manner in which such inquiry shall be conducted, and therefore, the procedure in each instance is controlled by the common law. *S. v. Sullivan*, 251.

Whether the circumstances call for an inquiry as to the mental capacity of defendant to plead to the indictment and conduct a rational defense is for the determination of the trial court in the exercise of its discretion, and the question may be raised either before or during the trial upon suggestion of counsel or the court may act *ex mero motu* upon its own observation. *Ibid.*

The manner and form of an inquiry to determine whether a person accused of crime has the mental capacity to plead to the indictment and prepare a rational defense is for the determination of the trial court in the exercise of its discretion, and the court may submit an issue as to the present mental capacity of defendant and the issue of his guilt or innocence of the offense charged at the same time. *Ibid.*

Where the court submits an issue of defendant's present mental capacity at the same time it submits issues arising upon the trial, and the charge of the court is not in the record, it will be assumed that the court properly charged that if the jury should find on the first issue that defendant is mentally deranged, the jury should not answer the other issues. *Ibid.*

§ 21. Former Jeopardy—Same Offense.

In a prosecution for hit and run driving, the trial court properly refuses to submit an issue of former acquittal based upon a prior prosecution for involuntary manslaughter arising out of the same collision, since the offenses are different, both in law and in fact, and therefore the plea of former jeopardy is inapposite as a matter of law. *S. v. Williams*, 415.

CRIMINAL LAW—*Continued.*

§ 22. Mistrials and New Trials.

When a defendant charged with murder is convicted of manslaughter and is granted a new trial on appeal, the new trial is upon the original indictment, and defendant's contention that upon the second trial he could not be prosecuted for murder in the second degree because the former conviction of manslaughter amounted to an acquittal on that charge, is untenable. *S. v. Correll*, 640.

§ 28. Presumptions and Burden of Proof.

Defendant enters upon a trial with the common law presumption of innocence in his favor, and upon his plea of not guilty, the burden is upon the State to establish his guilt beyond a reasonable doubt. *S. v. Creech*, 662.

Where a statute creates a substantive criminal offense, the State has the burden of establishing the *corpus delicti*, but the burden of going forward with the evidence to establish an independent, distinct, substantive matter of exemption, immunity or defense, beyond the essentials of the legal definition of the offense itself, rests upon defendant. *S. v. Johnson*, 701.

§ 31a. Expert and Opinion Evidence in General.

It is competent for a witness who has examined, studied and operated the machines in question to testify as to the physical changes necessary to convert, or reconvert, them into coin slot operated machines, since such testimony relates to matters within his knowledge based upon facts of his own observation, and is not expert testimony based upon hypotheses of fact; and further, his testimony as to the time necessary for such reconversion, if incompetent, could not be prejudicial. *S. v. Davis*, 552.

§ 31c. Qualification of Experts.

The competency of a witness as an expert is *imprimus* a question for the trial court. *S. v. Strickland*, 201.

The qualification of an expert is ordinarily a matter resting in the sound discretion of the trial court. *S. v. Jones*, 596.

§ 31h. Testimony as to Sanity.

The exclusion of testimony as to whether defendant "knew exactly what he was doing" when under the influence of narcotics cannot be held for error, since the inquiry upon the issue of defendant's mental irresponsibility is whether he knew right from wrong and not whether he knew exactly what he was doing. *S. v. Jones*, 596.

On the issue of mental capacity, the exclusion of opinion evidence as to the effect specified drugs would have on a person connot be held for reversible error when it does not appear that the testimony of the witness would have related to whether the drugs would render a person unable to distinguish right from wrong. *Ibid.*

Where defendant's witness testifies as to defendant's mental incapacity due to habitual drunkenness, it is competent for the State on cross-examination to inquire as to defendant's extensive business activities in order to show defendant's mental capacity despite his use of intoxicants. *S. v. Creech*, 662.

§ 31j. Expert Testimony—Typewriter Types.

A person found by the court upon the evidence to be an expert in documents and in the comparison of the writing of typewriters is competent

to testify that the extortion note in question was written on the typewriter found in defendant's possession. *S. v. Strickland*, 201.

§ 32e. Evidence of Motive and Malice.

In a prosecution for *uxoricide*, evidence of defendant's conduct toward his wife during period of entire marriage *held* competent to show motive and malice; and exclusion of testimony on cross-examination of single witness as to his kind treatment of wife on specified occasion held not prejudicial when there is plenary evidence by both parties that defendant was kind to his wife during periods of sobriety. *S. v. Creech*, 662.

§ 32½. Telephone Conversations.

Testimony of a telephone conversation is competent if the identity of the person making the call is established, either directly or by circumstantial evidence, and it is not required that identity be established at the time of the admission of the testimony, it being necessary only that the identity be established either then or at a later time in the development of the case, the order of proof being in the discretion of the trial court. *S. v. Strickland*, 201.

§ 33. Confessions.

The competency of a confession is a preliminary question for the trial court, and while its rulings in regard to the competency of evidence upon the question and as to what facts render a confession competent, are questions of law and are reviewable, its findings of fact are conclusive on appeal when supported by evidence. *S. v. Hammond*, 108.

The trial court's findings upon conflicting evidence that the confessions admitted in evidence were voluntary and made without threats, promises, or inducements are conclusive, and defendants' exceptions to the admission of the confessions in evidence cannot be sustained. *Ibid.*

§ 34g. Acts and Declarations of Codefendants, Coconspirators or Companions.

Where, in a prosecution for felonious assault, there is no sufficient evidence of a conspiracy between defendant and his companion, testimony of prior threats to kill such third person made by defendant's companion and evidence as to ill feeling between those two, is incompetent, and the admission of such evidence entitles defendant to a new trial on the charge. *S v. Wellborn*, 617.

§ 40d. Character Evidence of Defendant—Evidence of Bad Character.

Where defendant does not put his character in issue as substantive evidence and does not testify as a witness, the prosecution may not introduce evidence of his bad character; when defendant testifies but does not put his character in issue, impreaching evidence affects only his credibility as a witness and not the question of his guilt or innocence. *S. v. Jones*, 276.

But where defendant does not testify or put character in issue, evidence competent to impeach one of his witnesses is admissible notwithstanding it may obliquely reflect on character of defendant. *Ibid.*

Where defendant goes upon the stand and admits certain acts of misconduct and then introduces evidence of good character, the State has the

CRIMINAL LAW—*Continued.*

right to cross-examine such character witnesses regarding the admitted acts of misconduct for the purpose of attacking the credibility of such character witnesses. *S. v. Church*, 718.

§ 41a (1). Competency and Credibility of Witnesses in General.

The trend of the development of the rules of evidence has been to open the avenues to legal proof and to remove personal disqualification to testify, and testimony should not be barred except in the interest of a clearly defined public policy or unless clearly prohibited by statute. G. S. 8-49. *S. v. Davis*, 386.

§ 41g. Credibility of Accomplices, Codefendants and Witnesses Turning State's Evidence.

The testimony of an officer of the law who purchases whiskey for the purpose of obtaining evidence against a suspect and who therefore participates in the offense and receives remuneration therefor, should be scrutinized as to its credibility. *S. v. Love*, 99.

§ 42d. Evidence Competent to Corroborate Witness.

Where testimony of previous statements is introduced by the State for the purpose of corroborating its witness, and such statements are inconsistent with and repugnant in material aspects to the witness' testimony upon the trial, such statements tend to discredit the witness, and therefore are incompetent for the purpose of corroboration, nor may such statements be admitted under instructions that they be considered only to the extent that they corroborate the witness, since the jury should not be given the task of eliminating the contradictory declarations. *S. v. Bagley*, 723.

§ 42e. Evidence Competent to Impeach Witness.

Defendant did not put his character in issue and did not testify. On cross-examination of his wife as a witness in his behalf objection was sustained to the solicitor's question as to how many times she had been in the courts of North Carolina to testify on his behalf. After she had been recalled as a witness, the solicitor was permitted to ask her on cross-examination how many times she had appeared as a witness in the courts of named counties. *Held:* The question was permissible to impeach the witness or to show her interest and bias, and any inferential or oblique reflection on the character of defendant was incidental, and exception thereto cannot be sustained. *S. v. Jones*, 276.

It is competent for the prosecution to disclose by cross-examination of defendant's expert witness that defendant paid him to testify in order to test the bias or partiality of the witness. *S. v. Creech*, 662.

§ 42f. Whether State Is Bound by Its Own Exculpatory Evidence.

The State is bound by an exculpatory statement of the defendant introduced in evidence by the State when such statement is not contradicted or shown to be false by any other facts or circumstances in evidence. *S. v. Ray*, 40; *S. v. Robinson*, 647.

Where one or more of the State's witnesses testifies adversely to the State, the State is not precluded from showing by other witnesses a contrary state of facts upon the point. *S. v. Robinson*, 647.

CRIMINAL LAW—*Continued.*

The State cannot discredit its own witness by introducing testimony of previous statements made by her inconsistent with her testimony upon the stand. *S. v. Bagley*, 723.

§ 43. Evidence Obtained by Unlawful Means.

Officer who buys intoxicating liquor and voluntarily testifies against his seller breaches the law and is so immune to prosecution, and his testimony should be scrutinized. *S. v. Love*, 99.

§ 44. Time of Trial and Continuance.

Motion for continuance is addressed, ordinarily, to sound discretion of trial court. *S. v. Strickland*, 201; *S. v. Creech*, 662.

Continuances are not favored and ought not to be granted unless the reasons therefor are fully established, and therefore an application for a continuance should be supported by an affidavit showing sufficient grounds for the motion. G. S. 1-176. *S. v. Gibson*, 497.

The constitutional guarantee of the right of counsel requires that the accused and his counsel shall be afforded a reasonable time for the preparation of his defense. *Ibid.*

Record in this case *held* not to show deprivation of constitutional rights in denial of motion for continuance. *Ibid.*

§ 48a. Order of Proof.

The order of proof rests in the sound discretion of the trial court. *S. v. Strickland*, 201.

§ 48c. Evidence Competent for Restricted Purpose.

Where evidence is competent for a restricted purpose and no request is made that its admission be limited thereto, a general objection to the evidence cannot be sustained. *S. v. Church*, 718.

§ 48d. Withdrawal of Evidence.

Ordinarily, error in the admission of evidence is cured by its withdrawal by the court, and it is only in instances where the serious character and gravity of the incompetent evidence make it obviously difficult to erase its prejudicial effect from the minds of the jurors that its subsequent withdrawal will not be held to cure the error. *S. v. Strickland*, 201.

§ 50f. Argument and Conduct of Solicitor or Private Prosecution.

Argument of the solicitor in the trial of a capital offense that the jury has only a small part in determining the final punishment of defendant because in the event of conviction the case would be reviewed for errors by the Supreme Court even without appeal, and in the event no error was found by the Supreme Court, executive clemency would be sought, *is held* such gross impropriety that the harmful effects cannot be removed from the minds of the jurors even by full instructions from the court. *S. v. Hawley*, 167.

While ordinarily objection to argument of the solicitor must be brought to the trial court's attention in time to afford opportunity to the court to correct the transgression by instructions to the jury, this rule does not apply when the impropriety is so gross that its prejudicial effect cannot be removed from the minds of the jurors by instructions from the court. *Ibid.*

CRIMINAL LAW—*Continued.*

While wide latitude is allowed in the argument to the jury, counsel should not inject into the argument facts of his own knowledge or outside the record, and when counsel does so it is the right and duty of the judge to correct the transgression either at the time or in the charge to the jury. *S. v. Correll,* 640.

Defendant in a criminal prosecution should not be subjected to unwarranted abuse by the solicitor or private prosecution in the argument to the jury, and the characterization of defendant as a "small-time racketeering gangster" *is held* highly improper and objectionable. *Ibid.*

Where the court sustains defendant's objection to improper remarks of counsel for the private prosecution in the argument to the jury, and immediately instructs the jury that they should not consider such remarks, the defendant will not be held prejudiced thereby. *Ibid.*

§ 51. Province of Court and Jury in General.

The sole province and responsibility of the jury is to find the facts, and the consequences of the verdict on the facts is of no concern to the jury. *S. v. Hawley,* 167.

The conduct of the trial, including the argument of counsel, is largely within the control and discretion of the trial court, but the judge should be careful that nothing is said or done which would be calculated unduly to prejudice any party in the prosecution or defense of his case. *S. v. Correll,* 640.

§ 52a. Sufficiency of Evidence and Nonsuit.

Circumstantial evidence, direct evidence, or a mixture of both, must induce conviction beyond a reasonable doubt before the accused may be found guilty. *S. v. Strickland,* 201.

In order for circumstantial evidence to be sufficient to sustain conviction it is necessary that the facts established be of such nature and so connected or related as to point unerringly to defendant's guilt and exclude any other reasonable hypothesis. *S. v. Frye,* 581.

Upon motion to nonsuit, the evidence must be taken in the light most favorable to the State, giving it the benefit of every reasonable inference deducible therefrom. *S. v. Blankenship,* 589.

Conflict in the testimony of the State's witnesses, some testimony being inculpatory and some being exculpatory, does not justify nonsuit. *S. v. Robinson,* 647.

Where the State offers exculpatory testimony defendant is entitled to the benefit thereof, and when the State offers no evidence *contra,* defendant is entitled to nonsuit. *S. v. Robinson,* 647; *S. v. Ray,* 40.

§ 52b. Peremptory Instructions and Directed Verdict.

Where defendant introduces no evidence and intent is not an element of the offense, the court may charge the jury upon the State's unambiguous and uncontradicted evidence of guilt that the jury should convict defendant if they find beyond a reasonable doubt that all the evidence in the case is true and that otherwise they should return a verdict of not guilty. *S. v. Baker,* 73.

§ 53b. Instructions on Presumptions and Burden of Proof.

Instruction that defense of insanity must be "clearly established" *held* error. *S. v. Swink,* 123.

CRIMINAL LAW—*Continued.*

§ 53d. Statement of Evidence and Explanation of Law Arising Thereon.

In a prosecution for robbery the court should charge that the taking of the property must be with a specific intent on the part of the taker to deprive the owner of his property permanently and to convert it to his own use, and an instruction merely that the taking must be with felonious intent is insufficient. *S. v. Lunsford*, 229.

The State relied upon the testimony of several eyewitnesses, one of whom testified he saw defendant fire the fatal shot, and also introduced some circumstantial evidence of guilt. *Held:* The failure of the court to charge upon the law of circumstantial evidence in response to defendant's oral request cannot be held for error, since the court is not required to charge on circumstantial evidence when the State relies mainly upon direct evidence which is sufficient, if believed, to warrant conviction. *S. v. Hicks*, 345.

Charge held for error in failing to explain law arising upon defendant's contentions supported by evidence. *S. v. Fain*, 644.

§ 53e. Charge on Circumstantial Evidence.

The charge of the court upon the consideration and sufficiency of circumstantial evidence to sustain conviction *is held* without error. *S. v. Strickland*, 201.

Where State relies mainly on direct evidence, failure to charge on consideration to be given circumstantial evidence is not error in absence of written request. *S. v. Hicks*, 345.

§ 53f. Expression of Opinion by Court on Evidence.

No assumption of fact or opinion expressed or fairly inferable from the charge respecting the credibility of the testimony can be made by the trial court without violating G. S., 1-180. *S. v. Love*, 99.

Charge giving impression that testimony of S.B.I. officer who had bought liquor should be given special credulity *held* error. *Ibid.*

§ 53g. Necessity for Charge on Less Degrees of Crime Charged.

Testimony of defendants in a prosecution for robbery that they took the pistol from prosecuting witness to prevent him from harming them or some other person, requires the court to submit the question of each defendant's guilt of simple assault to the jury as a lesser offense included in the crime charged, G. S., 15-169; G. S., 15-170, since such verdict would be justified in the event the jury should find that defendants took the pistol without intent to steal it, but were not warranted in doing so on the principle of self-protection. *S. v. Lunsford*, 229.

Evidence *held* to require submission of question of guilt of manslaughter in this prosecution for murder. *S. v. McNeill*, 377.

Evidence *held* not to require submission of question of guilt of simple assault in this prosecution for assault with deadly weapon. *S. v. Muse*, 536.

§ 53h. Charge on Failure of Defendant to Testify.

The failure of defendant to testify in his own behalf should not be made the subject of comment by the court except to inform the jury that a defendant may or may not testify in his own behalf as he may see fit, and that his failure to testify does not create any presumption against him. *S. v. McNeill*, 377.

CRIMINAL LAW—*Continued.*

§ 53j. Charge on Credibility of Witnesses.

An officer of the law purchased intoxicating liquor in order to obtain evidence against a suspect, and voluntarily testified for the prosecution. *Held:* An instruction which leaves the impression that the officer's credibility was enhanced by the fact that he was an officer in the performance of his duty and that he was protected from prosecution by G. S., 18-8, must be held for error as an expression of opinion on the credibility of the testimony. *S. v. Love*, 99.

§ 53l. Requests for Instructions.

The court is at liberty to disregard oral requests for instructions which do not relate to a substantial and essential feature of the case. *S. v. Hicks*, 345.

§ 56. Arrest of Judgment.

Where the warrant upon which defendant is tried fails to charge a crime, defendant's motion in arrest of judgment will be allowed. *S. v. Harris*, 413.

§ 57b. New Trial for Newly Discovered Evidence.

Motion for a new trial for newly discovered evidence may be made in the trial court at the next succeeding term after the case is certified down. *S. v. Gibson*, 497.

§ 57d. Attack of Judgment on Grounds of Deprivation of Constitutional Rights.

Where a person has been convicted of crime and final judgment entered, the proper procedure for him to challenge the constitutionality of his conviction for matters *dehors* the record is by writ of error *coram nobis*. *In re Taylor*, 297.

§ 61b. Formalities and Requisites of Judgment and Sentence in Capital Cases.

Upon appeal from sentence of death, it is necessary that the Supreme Court find that there was no error in the trial before the sentence can be carried out. G. S., 15-194. *S. v. Hawley*, 167.

§ 77d. Conclusiveness and Effect of Record.

The Supreme Court is bound by the record as certified regardless of whether the case is settled by counsel or by the judge or is fixed by operation of law, and the appeal must be decided upon the record without indulging in assumptions as to what might have occurred. *S. v. Robinson*, 647.

§ 78c. Necessity for, Form and Requisites of Objections and Exceptions in General.

Where the record shows that the solicitor agreed that statement of case on appeal, containing exception to his argument to the jury and assignment of error based thereon, should constitute the case on appeal, this is sufficient as an exceptive assignment of error even though defendant made no objection and took no exception at the time. *S. v. Hawley*, 167.

CRIMINAL LAW—*Continued.*

§ 78c (2). Necessity for Calling Attention to Misstatement of Contentions to Support Exception Thereto.

Any misstatement in stating the contentions of the State must be brought to the court's attention in time to afford opportunity for correction in order for objection thereto to be sustained on appeal. *S. v .Church*, 718.

§ 79. Briefs on Appeal.

Exceptions not set out in appellant's brief or in support of which no reason is stated or authority cited will be deemed abandoned. *S. v. Frye*, 581.

§ 80b (5). Dismissal for Incomplete or Defective Record.

Where defendant's exceptions are not brought forward and grouped as required by Rule of Practice in the Supreme Court, No. 19 (3), the appeal will be dismissed, but where defendant has been convicted of a capital crime this will be done only after an inspection of the record proper and the exceptions fails to disclose prejudicial error. *S. v. West*, 416.

§ 81a. Matters Reviewable—Discretionary Matters.

A motion for continuance is addressed to the sound discretion of the trial court, and denial of the motion is not reviewable except upon abuse of discretion. *S. v. Strickland*, 201, *S. v. Gibson*, 497.

But where exception is pressed on ground of denial of constitutional right to be represented by counsel, question must be reviewed on appeal. *S. v. Gibson*, 497.

A motion for a special venire, both as a matter of practice and under the statute, G. S., 9-29; G. S., 9-30, is addressed to the sound discretion of the trial court, and denial of the motion is not reviewable except upon abuse of discretion. *Ibid.*

§ 81b. Presumptions and Burden of Showing Error.

Where the judge's charge does not appear of record, it will be presumed that the court correctly instructed the jury on every principle of law applicable to the facts in evidence. *S. v. Sullivan*, 251.

The burden is on defendant to show error which materially and prejudicially affects his rights and but for which a different result probably would have ensued. *S. v. Davis*, 386; *S. v. Gibson*, 497.

The burden is upon appellant not only to show error but also that the error injuriously and prejudicially affected his cause, as the presumption is against him. *S. v. Creech*, 662.

§ 81c (1). Prejudicial and Harmless Error in General.

Defendant's exceptions, even considered in their totality, *held* not to disclose prejudicial error in this prosecution for murder in the first degree, in view of the fact that the record as a whole discloses defendant's stubborn purpose to kill deceased and an immediate consciousness of wrong which prompted him to surrender to the sheriff. *S. v. Creech*, 662.

§ 81c (2). Prejudicial and Harmless Error in Instructions.

The charge of the court will be considered contextually, and an exception to the charge will not be sustained when the charge, so construed, is in substantial compliance with law. *S. v. Franklin*, 336; *S. v. Davis*, 386.

CRIMINAL LAW—*Continued.*

§ 81c (3). Prejudicial and Harmless Error in Admission or Exclusion of Evidence.

Ordinarily, error in admission of evidence is cured by its subsequent withdrawal. *S. v. Strickland*, 201.

The exclusion of testimony cannot be held prejudicial when the record fails to show what the witness would have answered. *S. v. Jones*, 596.

Exclusion of testimony of one witness as to matter amply established by witnesses for both sides held not prejudicial. *S. v. Creech*, 662.

§ 81c (4). Prejudicial and Harmless Error—Error Relating to One Count Only.

Defendant cannot be prejudiced by an inadvertence relating to a count, the punishment for which is not in excess of that imposed on another count upon which alone judgment was entered. *In re McKnight*, 303.

§ 81c (5). Error Cured by Verdict.

The verdict of guilty of the offense charged in the indictment does not cure error of the court in failing to submit to the jury the question of defendant's guilt of less degrees of the crime. *S. v. McNeill*, 377.

§ 81c (6). Harmless and Prejudicial Error in Denial of Motion for Continuance.

Record *held* not to show that defendant was prejudiced by denial of motion for continuance. *S. v. Gibson*, 497; *S. v. Creech*, 662.

§ 81c (7). Harmless and Prejudicial Error in Course or Conduct of Trial.

Argument to jury *held* so grossly improper that its prejudicial effect could not be cured by instructions, and warranted new trial even in absence of objection. *S. v. Hawley*, 167.

Impropriety in argument *held* cured by court's instructions. *S. v. Correll*, 640.

§ 81h. Review of Findings on Motions.

Where the evidence does not support the findings of fact upon which the conclusions of the trial court are based, the rulings are subject to review on appeal. *S. v. Speller*, 67.

§ 85b. Stare Decisis.

A single decision, rendered by a divided Court, which decision is irreconsilable with a subsequent decision of the Supreme Court upon a related matter, does not properly call for the application of the doctrine of *stare decisis*. *S. v. Ballance*, 764.

The doctrine of *stare decisis* will not be applied to preserve and perpetuate error. *Ibid.*

§ 85c. Proceedings After Mandate from Supreme Court of the United States.

In these cases involving exceptions to the overruling of motions to quash the warrants and to denial of challenge to the array, the judgment of the Supreme Court of North Carolina was reversed by the Supreme Court of the United States in memorandum decision citing authorities dealing with

CRIMINAL LAW—*Continued.*

the administrative practices in the selection of juries. *Held:* The mandate of the Supreme Court of the United States does not require the quashal of the warrants nor adjudicate that the North Carolina statutes on the subject of jurors are invalid. *S. v. Brunson*, 37.

DAMAGES.

§ 13a. Instructions on Issue of Damages.

While it is preferable for the trial court to limit the recovery of prospective damages based on diminished earning capacity resulting from the injury to the present worth of such prospective losses, where the charge is based on a lump sum recovery for all injuries past and prospective and is otherwise full and comprehensive upon the issue, the failure of the court to limit prospective losses to the present cash value thereof will not be held for reversible error when it appears that the verdict is not excessive and that there was no request for further instructions on the issue. *Pascal v. Transit Co.*, 435.

DEATH.

§ 4. Time Within Which Action for Wrongful Death Must Be Instituted.

Right of action for wrongful death rests solely upon statute, and the requirement of the statute that the action be instituted in one year after the death must be strictly construed and is not a simple statute of limitations but a condition annexed to the cause of action, and failure of appointment of an administrator does not affect the bar of the statute. *McCoy v. R. R.*, 57.

At the time of intestate's death plaintiff administrator was in the armed forces. Plaintiff was appointed administrator within one year after discharge from the army and instituted this suit for wrongful death. Intestate had other adult children not in the armed forces. *Held:* The Soldiers' and Sailors' Civil Relief Act, Title 50, U.S.C.A., sec. 525, does not justify maintenance of the action more than one year after intestate's death, G. S., 28-173, since plaintiff in an action for wrongful death, even though a distributee, does not maintain the action as in his own right but solely in his official capacity as a representative of the estate. *Ibid.*

§ 5. Parties Who May Sue for Wrongful Death.

Only the personal representative may institute action for wrongful death, which he maintains in his official capacity as a representative of the estate and not as representative of the distributees of the recovery. *McCoy v. R. R.*, 57.

§ 7. Dying Declarations.

Testimony of a statement by an officer shortly before his death from coronary occlusion that he "had had a time all the morning" arresting three men who resisted him, is incompetent as a dying declaration when not brought within the terms of G. S., 28-173. *West v. Department of Conservation*, 232.

§ 9. Distribution of Recovery in Actions for Wrongful Death.

Under our statute, the distribution of recovery in an action for wrongful death is not made to a designated class but in accordance with the canons

DEATH—*Continued.*

of descent and distribution, and the existence or number of possible distributees is immaterial to the right of action and is inadmissible to be shown in evidence. *McCoy v. R. R.*, 57.

DEEDS.

§ 2a (3). Competency of Grantor—Undue Influence.

Undue influence is the exercise of an improper influence over the mind and will of another to such an extent that his professed action is not that of a free agent, but in reality is the act of the person who procures the result. *Lee v. Ledbetter*, 330.

Evidence of undue influence of nephew in obtaining deed in consideration of agreement to take care of uncle in his declining years *held* insufficient to be submitted to the jury. *Lee v. Ledbetter*, 330.

§ 2b. Competency and Designation of Grantee.

In order to be operative as a conveyance, a deed must designate as grantee a person capable of taking the land either by name or by description sufficiently definite for identification, and extrinsic evidence is admissible for the purpose of fitting the description to the person or persons intended. *Byrd v. Patterson*, 156.

Where the premises and granting clause in a deed is to a person named "and wife" the deed conveys an estate by entireties notwithstanding the fact that the name of the wife nowhere appears therein, since the description is sufficiently definite to permit evidence of identity *aliunde*, established in this case by stipulation of the parties. *Ibid.*

§ 4. Consideration.

Deed executed upon agreement of grantee to look after grantor in his declining years is based upon a sufficient consideration. *Lee v. Ledbetter*, 330.

Trust indenture reserving life estate in trustors and precluding partition *held* supported by adequate consideration. *Cannon v. Blair*, 606.

§ 5. Signing, Sealing and Delivery.

Either plaintiff or defendant who claims title under a probated and registered deed is entitled to call to his aid the rebuttable presumption arising from the probate and registration that the instrument had been duly signed, sealed and delivered, and the burden of proving the contrary rests upon the party seeking to establish title upon allegation that the grantor did not in fact execute the instrument. *Johnson v. Johnson*, 541.

The presumption of delivery arising from the registration of a deed obtains notwithstanding that the registration is made subsequent to the death of grantor, and such presumption is sufficient to support a finding by the court that the instrument was duly delivered. *Cannon v. Blair*, 606.

And this presumption of delivery is not overcome by finding the instrument among valuable papers of one of grantors when he had reserved interest in property entitling him to possession after delivery. *Ibid.*

§ 6. Requisites and Validity of Deeds of Gift—Registration.

Trust indenture *held* supported by mutual covenants of trustors, and therefore was not deed of gift requiring registration. *Cannon v. Blair*, 606.

DEEDS—*Continued.*

§ 11. General Rules of Construction.

The main purpose of rules of construction is to find from the four corners of the instrument the intention of the grantor. *Hudson v. Underwood*, 273.

§ 12. Property Conveyed.

Where there is repugnancy between a general and a particular description in a deed, the particular description must prevail, but this rule has no application where the particular and the general descriptions are not an attempt to describe the same lands but relate to different parcels, in which instance there is no repugnancy and the deed will convey both tracts. *Hudson v. Underwood*, 273.

§ 13a. Estates and Interests Created by Construction of Instrument.

Where the premises and granting clause of a deed is to a man and his wife, the fact that the *habendum* and warranty clauses fail to designate the wife does not affect the nature of the estate conveyed, since the granting clause prevails where there is any repugnancy between it and preceding or succeeding recitals. *Byrd v. Patterson*, 156.

§ 16c. Agreements to Support or Care for Grantor.

A deed based upon agreement of the grantees to maintain and care for grantor in his declining years is based upon sufficient consideration and is not voluntary. *Lee v. Ledbetter*, 330.

§ 21. Requisites and Validity of Timber Deeds.

The conveyancing of standing timber is governed by the rules applicable to the conveyancing of any other realty. *Chandler v. Cameron*, 62.

DESCENT AND DISTRIBUTION.

§ 3a. Definition of Heirs and Distributies.

A distributee is a person who takes a share in the surplus estate of an intestate under our statute of distributions. *Trust Co. v. Shelton*, 150.

Where a wife dies leaving her surviving a husband but no issue, he is her sole distributee, and her collateral kin are not entitled to share in the estate and are not "distributees." *Ibid.*

Who would have been distributees of the estate had the testatrix died intestate must be determined as of the date of her death and not as of the date of the execution of her will. *Ibid.*

§ 3b. Right to Inherit in General.

Son who murders his parents acquires legal title to property of which they die intestate, but equity will impress property with constructive trust in favor of heirs who would have inherited if murderer had predeceased his victims. *Garner v. Phillips*, 160.

§ 5. Surviving Husband.

The contention that a surviving husband takes by virtue of the *lex mariti* and not as a distributee of his wife's estate is untenable, since C. S., 7 (G. S., 28-7), and C. S., 137 (G. S., 28-149), must be construed *in pari materia* as separate parts of a single scheme of devolution, and this intent

DESCENT AND DISTRIBUTION—*Continued.*

is clarified by the codification of the two sections in the General Statutes as subsections of the same statute. *Trust Co. v. Shelton*, 150.

§ 12. Title and Rights of Heirs in General.

Title to the realty passes immediately to the heirs subject to be divested only if personalty is insufficient to pay debts of estate. *In re Estate of Galloway*, 547.

All amounts due for use and occupancy of real property after the death of intestate become the property of the heirs to whom the realty descends. *Ibid.*

§ 13. Advancements to Heirs.

An advancement is an irrevocable gift *in praesenti* to enable the donee to anticipate his inheritance to the extent of the gift, and whether a gift constitutes an advancement depends upon the intention of the parent at the time the gift is made. *Harrelson v. Gooden*, 654.

The nature of the gift, the consideration expressed, and the circumstances under which it was made, are material in determining whether a gift by a parent is intended to be an advancement. *Ibid.*

Where a parent conveys land of substantial value to one of several children for a nominal consideration and thereafter dies intestate, the presumption is he intended the conveyance as an advancement. *Ibid.*

The value of an advancement is to be determined as of the date of its making. *Ibid.*

Conflicting evidence as to the value of land conveyed by the parent to his child and as to the amount of consideration paid therefore and as to declarations by the son as to whether the land was given and received as an advancement, *held* to raise issue of fact determined by the verdict of the jury. *Ibid.*

In ascertaining the value of an advancement of realty for the purpose of equalizing the heirs' share in the real estate, or in charging the child advanced in the distributive share of the personalty in the event the advancement exceeds the value of his share of the realty, the commissioners should take into consideration any payments found to have been made for the land conveyed as an advancement. *Ibid.*

DIVORCE.

§ 2½e. Laches and Limitations.

The lapse of seven years from the time of the separation does not bar a cross-action for divorce *a mensa* on the ground of constructive abandonment, or an application for alimony *pendente lite*, either by laches or any statute of limitation. *Nall v. Nall*, 598.

§ 5d. Pleadings in Actions for Alimony Without Divorce.

The essential elements required to be alleged in an action for alimony without divorce, G. S., 50-16, are (1) separation of the husband from his wife, and (2) his failure to provide her with necessary subsistence according to his means and condition in life, and demurrer to the complaint on the ground that the acts of defendant husband of which plaintiff complains are not stated with definiteness and particularity, is properly overruled. *Trull v. Trull*, 196.

DIVORCE—*Continued.*

An allegation in an action for alimony without divorce that the separation of defendant from plaintiff wife was without fault or misconduct on her part, is a sufficient allegation that his acts were without provocation on her part. *Ibid.*

§ 12. Alimony Pendente Lite.

In an action for divorce, a verified answer and cross-action setting forth a cause of action for divorce *a mensa*, G. S. 50-7, is sufficient to sustain an order allowing alimony *pendente lite*. G.S. 50-15. *Nall v. Nall*, 598.

§ 16. Enforcing Payment of Alimony.

Where defendant testifies that his failure after knowledge to obey a court order for the payment of alimony *pendente lite* was due to his lack of financial means, and no evidence is presented at the hearing tending to negative the truth of defendant's explanation or to establish as an affirmative fact that he possessed the means wherewith to comply with the order, the court's finding that defendant willfully disobeyed the order is not supported by the record, and judgment committing him to imprisonment for contempt must be set aside. *Lamm v. Lamm*, 248.

§ 17. Custody and Support of Children—Jurisdiction and Procedure.

Where the husband has alleged that he had notified wife he would no longer live with her as husband and wife, he may not assert the fictional unity of persons for the purpose of maintaining that his domicile is the domocile of his wife and children in order show jurisdiction of the court over her and the children to enter an order awarding their custody to him. *Coble v. Coble*, 81.

Evidence held not to support finding that wife was about to remove herself and minor children from State. *Ibid.*

Domicile alone cannot confer jurisdiction on court, but there must be notice and an opportunity to be heard. *Ibid.*

The awarding of the custody of the children in an action for divorce is *in rem*, and the court must have jurisdiction over the children who are the *res*, or must have jurisdiction of the person of their custodian who is given notice and an opportunity to be heard in order to have authority to enforce its decree by coercive action. *Ibid.*

A decree in a divorce action awarding the custody of the children to plaintiff, entered without service of process on defendant and while defendant and the children are out of the State, is void. *Ibid.*

A divorce action is not instituted so as to give the court jurisdiction to award the custody of the children of the marriage until the court acquires jurisdiction of the person of defendant so as to meet the fundamental requirement of notice and opportunity to be heard, and a decree awarding custody of the children to plaintiff, entered while defendant and the children are out of the State, and without service of process on defendant, cannot be upheld on the ground that it is a temporary remedial decree authorized by G.S. 50-13, since the statute, in so far as it undertakes to vest the court with authority without service of process and without notice, is unconstitutional. *Ibid.*

Entering of order awarding custody affects substantial right, since although injured party may apply for a hearing, the burden of proof upon such hearing would be on her. *Ibid.*

DIVORCE—*Continued.*

Motion to set aside the void order will lie. *Ibid.*

Denial of defendants' motion to vacate the void order does not constitute implied ratification of original order. *Ibid.*

A decree awarding the custody of a child under the provisions of G. S. 17-39 does not oust the jurisdiction of the court to hear and determine a motion in the cause for the custody of the child in a subsequent divorce action between the parties. G.S. 50-13. *Robbins v. Robbins*, 430.

Immediately upon the institution of an action for divorce the jurisdiction to determine the custody of minor children of the parties is vested in the Superior Court in which the divorce action is pending, and such action is pending for this purpose until the death of one of the parties. G.S. 50-13. *Phipps v. Vannoy*, 629.

Where decree for divorce is entered outside this State either parent may have the question of custody of the children of the marriage determined as between them in a special proceeding in the Superior Court. G.S. 50-13. *Ibid.*

DRAINAGE DISTRICTS.

§ 4. Authority of Commissioners and Operation of District.

Power of district to use surplus funds for improvements and repairs after expiration of three years from completion of canals *held* not presented for review. *Drainage District v. Bullard*, 633.

§ 215. Foreclosure of Drainage Liens.

Judgment of foreclosure *held* proper when validity of assessments and fact that they are due and unpaid appears of record. *Drainage District v. Bullard*, 633.

The court has authority under G.S. 160-93 upon rendition of judgment for plaintiff to include as an element of cost one reasonable attorney's fee for plaintiff. *Ibid.*

EASEMENTS.

§ 5. Extent of Right.

In an action for mandatory injunction to remove a building from a right of way, the burden is upon the plaintiff to show that the building erected on the right of way by the owners of the servient tenement constitutes an interference with the use and enjoyment of the easement. *Light Co. v. Bowman*, 682.

As a general rule, the owner of the servient tenement has the right to use same for any purposes not inconsistent with the free use and enjoyment of the easement. *Ibid.*

Where an easement is condemned for electric power transmission lines, the condemnor has the right, ordinarily, to the unobstructed use at all times of the servient land for the exercise of such rights as are necessary or incident to the enjoyment of the easement. *Ibid.*

Evidence held to justify directed verdict that defendants' building constituted interference with plaintiff's easement for transmission lines. *Ibid.*

Where a railroad company acquires a right of way either by condemnation or operation of law, the fee remains in the original owner and he may use the land for any purpose not inconsistent with the easement and to the extent that the land is not actually used for railroad purposes, subject to

EASEMENTS—*Continued.*

the right of the railroad company to extend its use of the right of way to the full width whenever in its judgment its business necessitates. *R. R. v. Mfg. Co.*, 695.

A railroad company, after having acquired a right of way by operation of law, sought to extend its use of the right of way by constructing side-tracks on a portion of the right of way occupied by the owner of the fee. *Held:* The railroad company is the sole judge of the necessity for such expansion and it may enjoin any interference therewith by the owner of the fee irrespective of any alleged arbitrariness or unreasonableness on its part in giving notice of its intention to extend its facilities. *Ibid.*

EJECTMENT.

§ 10. Nature and Essentials of Right of Action.

Plaintiffs in ejectment must show right to immediate possession; and therefore contingent remaindermen cannot maintain an action in ejectment during the life of the life tenant. *Bass v. Moore*, 211.

§ 14. Answer and Bond.

Before striking answer from the record because of the failure of defendants to file defense bond, the court should consider whether the right to move to strike had been waived or lost by laches when it appears that objection had not been aptly made. *Roberts v. Sawyer*, 279.

§ 19. Verdict and Judgment.

Plaintiffs in ejectment are not entitled to judgment unless they show right to immediate possession; and therefore when plaintiffs are contingent remaindermen and attack the judgment under which defendants claim a life estate, plaintiffs are not entitled to judgment on the pleadings, since even if the life estate be declared fortified plaintiffs would not be entitled to possession until the death of the life tenant since the contingent remainder could not vest until that time. *Bass v. Moore*, 211.

ELECTIONS.

§ 2f. Qualification of Electors—Residence.

The fact that an elector's intention to return to the county of his domicile is indefinite does not deprieve him of residence in the county for the purpose of voting, it being necessary in order to lose the old residence that he intend to make his new place of abode his permanent domicile so that a new residence is there established. *Owen v. Chaplin*, Appendix, 797.

The word "residence" as used in G.S. 163-25 (f), means domicile as distinguished from a temporary dwelling-place. *Ibid.*

§ 7. Duties and Authority of State Board of Elections.

Upon the filing of a petition under G.S. 163-1, for the creation of a new political party, it is the duty of the State Board of Elections, in the first instance, to determine whether the petition is in accordance with the statutory requirements. *States' Rights Democratic Party v. Board of Elections*, 179.

One of which is whether petition is signed by at least 10,000, which State Board may do by resort to registration books through agency of county boards of elections. *Ibid.*

ELECTIONS—*Continued.*

State Board need not determine matter at time petition is filed, but must give petitioners notice and opportunity to be heard before adjudging petition insufficient. *Ibid.*

The State Board of Elections has power to make reasonable rules and regulations for carrying into effect the law it was created to administer, but it cannot promulgate rules and regulations which conflict with any provisions of the statute. *Ibid.*

Board may not promulgate regulation that petition be accompanied by certificate or that persons who voted in primary election were not qualified to sign petition. *Ibid.*

§ 11b. Absentee Ballots—Preliminary Procedure.

The certificate of the notary establishes *prima facie* that the electors had been sworn as required by statute when they signed the affidavits accompanying their absentee ballots. G.S. 10-4. *Owen v. Chaplin*, Appendix.

EMERGENCY PRICE CONTROL.

§ 2. Penalties and Persons Liable.

A party who buys goods and resells them at cost plus his lawful commission at a price which violates the Emergency Price Control Act is *in pari delicto* with his seller, 50 U.S.C.A., Appendix, 904 (a), 925 (e), and he may not maintain an action against his seller for the statutory penalty under the Emergency Price Control Act. *Bledsoe v. Lumber Co.*, 128.

Under the Emergency Price Control Act the good faith of the seller is not a defense to an action to recover the penalty for violation of a regulation, but is to be considered solely in ascertaining the statutory damages. 50 U.S.C.A., Appendix, 925 (e). *Ibid.*

Commission merchants, after paying a judgment obtained against them by the Price Administrator for violating price regulations in the resale of timber, instituted this action against their seller, alleging that their violation of the regulations was due to the negligent or tortious failure of the seller to properly grade the timber in accordance with the regulations, and that therefore they were entitled to indemnity against their seller for the amount of the judgment. *Held:* The seller's demurrer to the complaint should have been sustained, since to permit recovery would exempt plaintiffs from the consequences of their own wrong in contravention of public policy as expressed in the Act, and would permit plaintiffs to maintain an action based upon their own unlawful act. *Ibid.*

EMINENT DOMAIN.

§ 20½. Implied Grant.

Where a railroad company which is given the right of eminent domain by its charter constructs its road with the acquiescence of the owner on land to which it has not acquired title by condemnation or conveyance, it acquires a right of way by implied grant or statutory presumption, with right in the owner to maintain an action for compensation. *R. R. v. Mfg. Co.*, 695.

The width of a right of way under implied grant extends to full width which railroad company could have condemned. *Ibid.*

EMINENT DOMAIN—*Continued.*

§ 21a. Limitations on Actions to Recover Compensation.

Where a railroad company has taken a right of way by implied grant, the owner's action for compensation must be instituted prior to the ripening of title in the railroad company by adverse possession or prior to the bar of any applicable charter or statutory limitation. *R. R. v. Mfg. Co.*, 695.

§ 26. Nature and Extent of Title or Right Acquired.

Where a railroad company having the power of eminent domain builds its road over lands to which it has not acquired title by conveyance or condemnation, and no action for compensation is instituted by the owner within the time limited, it acquires the right of way by implied grant to the full width which it might have taken by condemnation, if not under express charter provision, then under the general law. *R. R. v. Mfg. Co.*, 695.

Where an easement for electric transmission lines has been condemned and compensation paid therefor, the decree has the effect of appropriating an easement for service to the public and withdrawing from the owner of the fee the right to any private use which would interfere with the public use, and mandatory or prohibitory injunction will lie to remove or prevent any encroachment upon the easement. *Light Co. v. Bowman*, 682.

EQUITY.

§ 2d. Party Will Not Be Allowed to Benefit by His Own Wrong.

It is a basic principle of law and equity that no man shall be permitted to take advantage of his own wrong, or acquire property as the result of his own crime. *Garner v. Phillips*, 160.

ESTATES.

§ 9a. Termination of Life Estate and Vesting of Remainder.

Forfeiture of a life estate for waste, cannot accelerate the vesting of contingent remainders, and therefore plaintiffs in ejectment claiming as contingent remaindermen cannot establish right to immediate possession by showing such forfeiture of the life estate. *Bass v. Moore*, 211.

ESTOPPEL.

§ 2. After Acquired Title.

A tenant in common, without authorization or knowledge by his co-tenants, executed a written contract to convey standing timber upon the entire land. This contract was registered. Thereafter the tenant acquired an additional interest in the land, and he and his co-tenants executed to another party deed for the timber. The grantee in the timber deed had no actual knowledge of the prior contract to convey. *Held:* As to the tenant's original interest, his vendee is entitled to specific performance as against the grantee in the timber deed, but as to the after-acquired title, the vendee is not entitled to specific performance as against the grantee. *Chandler v. Cameron*, 62.

§ 6b. Estoppel by Misrepresentation.

In an action by a party attacking her conveyances to the judgment debtor, plaintiff is not estopped from attacking the validity of the execution sale under the judgment on the ground that it was not completed

ESTOPPEL—*Continued.*

within the ten year period, since her acts prior to the sale amount to no more than a representation that title was then vested in the judgment debtor. *McCullen v. Durham*, 418.

Representations made after execution sale cannot estop a party from attacking the sale, since such subsequent representations could not have induced the other party to bid at the sale. *Ibid.*

§ 10. Persons Estopped—The Sovereign.

The sovereign cannot be estopped in the performance of a governmental function. *Henderson v. Gill*, 313.

EVIDENCE.

§ 5. Judicial Knowledge—Of Facts Within Common Knowledge.

Courts will take judicial notice that competent policeman must have special training. *Green v. Kitchin*, 450.

§ 7a. Party Having Burden of Proof in General.

The placing of the burden of proof is determinable from the pleadings before the introduction of evidence under the rule that the burden of proof lies upon the party who will be defeated if no evidence relating to the issue is given on either side. *Johnson v. Johnson*, 541.

Plaintiff has the burden of proof on all allegations, negative as well as affirmative, which are essential to his claim or cause of action. *Ibid.*

§ 7b. Burden of Proof—Greater Weight or Preponderance of Evidence.

In ordinary civil actions the burden of proof is by the preponderance of the evidence, which is simply evidence of greater weight than that offered in opposition to it. *Wyatt v. Coach Co.*, 340.

§ 8. Burden of Proof on Defenses.

The burden of proving an affirmative defense is on defendant. *MacClure v. Ins. Co.*, 305.

§ 17. Rule that Party Is Bound by Testimony of His Witness.

The relator is bound by the testimony of electors called by relator as witnesses. *Owens v. Chaplin*, Appendix.

§ 22. Cross-Examination.

Cross-examination which relates to matters not relevant to the issue *held* improper. *Cuthrell v. Greene*, 475.

§ 25. Facts in Issue and Relevant to Issues.

Plaintiff employee alleged that her employer changed the beneficiary in a policy on his life to defendant employee under an agreement that defendant would pay out of the proceeds thereof a mortgage on plaintiff's home. *Held:* Questions asked on cross-examination by defendant's attorneys relating to whether plaintiff was seeking to hold the employer liable on plaintiff's debt and as to the fact that proceeds of life insurance could not be charged with the debts of insured are irrelevant to the issue of the existence of a parol trust and were improper. *Cuthrell v. Greene*, 475.

EVIDENCE—*Continued.*

§ 30a. Photographs.

The admission of photographs for the purpose of explaining the testimony of witnesses after they had testified that the photographs were a fair representation of the conditions existing at the time of the accident, with minor exceptions pointed out, cannot be held for error on exception on the ground that the photographs were taken after material changes had been made at the scene when the objecting party offers no evidence to sustain its contention. *Coach Co. v. Motor Lines*, 650.

§ 37. Admissibility of Secondary Evidence.

Where notice to produce certain designated documents is served on defendant in time for defendant to procure and produce the documents at the trial, defendant cannot complain of the admission of secondary evidence in proof of their contents upon his failure to produce the documents. *Landis v. Gittlin*, 521.

Testimony by party as to what he said to defendant as to contents of instrument, which defendant did not deny, is not incompetent as secondary evidence of the contents of the instrument. *Ibid.*

§ 39. Parol Evidence Affecting Writings.

A grantor may not engraft a parol trust on his warranty deed absolute in form regardless of whether the consideration recited was actually paid or not. *McCullen v. Durham*, 418.

§ 41. Hearsay Evidence in General.

Testimony by plaintiff as to statements he had made to defendant as to the contents of certain documents, which defendant did not deny, is not incompetent either as secondary proof of the written instruments or under the hearsay rule. *Landis v. Gittlin*, 521.

§ 46. Opinion Evidence by Non-Experts—Value of Lands.

A witness who establishes his familiarity with the lands in question and states he has an opinion satisfactory to himself as to their value at the time in question, is competent to give his opinion as to their value. *Harrelson v. Gooden*, 654.

EXECUTION.

§ 3c. Property Exempt from Execution—Property in Custodia Legis.

As soon as it is made to appear that property against which execution is authorized is in the hands of a receiver appointed in another action, the clerk properly recalls the execution, since the judgment creditors cannot proceed against the property while it is *incustodia legis*. *Davis v. Whitehurst*, 226.

§ 16. Time of Sale—During Life of Judgment Lien.

The lien of a judgment for the payment of money, except the lien of a judgment upon a homestead duly allotted, expires at the end of ten years from the date of its rendition, and an execution thereon must be completed by a sale within the life of the lien in order to be effective. *McCullen v. Durham*, 418.

Where execution sale is had less than ten days before the expiration of ten years after the rendition of the judgment, the sale is ineffective, since it

EXECUTION—*Continued.*

cannot be consummated within the ten year period, and the purchaser's contentions that the sheriff's deed related back to the day of the sale and that delay on the part of the sheriff in executing deed or making formal return could not adversely affect his rights as purchaser, are inapposite. *Ibid.*

§ 21. Ten Day Period During Which Sale Must Be Held Open.

A sale under execution must remain open for ten days to afford opportunity for an increase in the bid, and during this period the bidder acquires no rights in law or in equity but occupies merely the *status* of a proposed purchaser or preferred bidder. G.S. 45-28. *McCullen v. Durham*, 418.

§ 22. Title and Rights of Purchaser.

Since sale under execution can convey only the right, title and interest of the judgment debtor, title or interest in the property asserted by third persons is insufficient to entitle them to move to vacate the judgment. *Davis v. Whitehurst*, 226.

Statutory provisions for sale under execution must be strictly followed in order for the sale to transfer title to the purchaser. *McCullen v. Durham*, 418.

§ 23½a. Parties Who May Attack Execution Sale.

In an action to remove cloud on title, defendant's contention that plaintiff could not attack the sheriff's deed pursuant to execution under which he claims because plaintiff did not claim through or under the judgment debtor, is untenable when defendant files a cross-action or counterclaim asserting his title under the execution as against plaintiff in her capacity as widow of the judgment debtor. *McCullen v. Durham*, 418.

§ 25. Funds and Interests Subject to Supplemental Proceeding.

Prospective earnings of the judgment debtor are neither property nor a debt, and may not be reached in supplemental proceedings against the employer of the judgment debtor. *Finance Co. v. Putnam*, 555.

EXECUTORS AND ADMINISTRATORS

§ 3. Removal and Revocation of Letters.

In a proceeding under G.S. 28-32 for revocation of letters of administration, the question determinable by the clerk is solely whether the administrators have been guilty of default or misconduct in the due execution of their office, and the rights and liabilities of adverse parties in the estate may not be litigated in such proceeding. *In re Estate of Galloway*, 547.

In revoking letters of administration under G.S. 28-32 the clerk exercises a legal discretion which is reviewable on appeal. *Ibid.*

Heirs at law of the estate were appointed administrators of the estate. *Held:* An order of the clerk revoking the letters of administration upon consideration of evidence of their failure to account for rents and profits from the realty is based upon a confusion of their duties, obligations and liabilities as administrators and their rights and liabilities as heirs at law, and the cause will be remanded in order that the evidence may be considered in its true legal light. *Ibid.*

EXECUTORS AND ADMINISTRATORS—*Continued.*

§ 5. Assets of the Estate.

Plaintiff's intestate gave a check for the purchase of an automobile and authorized his agent to resell it. Intestate died before the check was presented for payment and prior to the resale by his agent. *Held:* Title to the car never passed and the administrator receiving the proceeds of the resale with notice holds same in trust for the owners, and such sum was never the property of intestate or his estate, and is not liable for the debts of the estate or cost of administration. *Parker v. Trust Co.*, 527.

Personal property of a person who dies intestate passes directly to his administrator, his real property descends directly to his heirs at law, subject to be divested only if it becomes necessary to sell lands to make assets with which to pay debts, and the only interest of the administrator in the realty is the right to subject the lands to the payment of the debts and costs of administration when the personalty is insufficient. *In re Estate of Galloway*, 547.

§ 15d. Claims for Personal Services Rendered Decedent.

Plaintiff's evidence tending to show that he rendered valuable services to his foster grandmother, which services were rendered and accepted in expectation of compensation, *is held* sufficient to be submitted to the jury in an action against the foster grandmother's estate to recover the reasonable value of the services for the three years next preceding her death, the evidence being sufficient to rebut the presumption arising from the family relationship that the services were gratuitously rendered. *Potter v. Clark*, 350.

In this action by plaintiff to recover the reasonable value of services rendered his foster grandmother, allegations in the answer to the effect that the care and maintenance given plaintiff by his foster grandmother prior to her death exceeded the value of his services, though denominated a counterclaim, is treated as a further denial of plaintiff's right to recover, since defendant offered no evidence to support a counterclaim, and the defense was properly presented to the jury in a charge free from prejudicial error. *Ibid.*

§ 24. Distribution of Estate Under Family Agreements.

Family agreements for the settlement of estates are favored by the courts, and the court properly approves a consent judgment signed by all interested parties not under disability and the guardians *ad litem* of unborn children and minor beneficiaries upon its finding from the evidence that such settlement is to the best interests of all parties. *Bank v. Hendley*, 432.

FALSE IMPRISONMENT.

§ 1. Nature and Essentials of Right of Action.

Removal of passenger from bus for refusal to comply with carrier's reasonable regulations held not false imprisonment. *Pridgen v. Coach Co.*, 46.

§ 1½. Liability of Principal or Employer for Acts of Agent or Employee in Causing Arrest.

Act of agent in swearing out warrant for purpose of punishment and not to enforce carrier's regulations for enforcement of segregation regulations is beyond agent's authority. *Pridgen v. Coach Co.*, 46.

FORNICATION AND ADULTERY.

§ 3. Competency of Evidence.

In a prosecution for fornication and adultery the person jointly charged, but who is no longer on trial, is competent to testify against defendant as to the acts constituting the basis of the prosecution, since the proviso of G.S. 14-184 that the admissions or confessions of one shall not be received in evidence against the other relates to extra-judicial declarations and does not purport to render the person incompetent as a witness. *S. v. Davis*, 386.

Where, in a prosecution for fornication and adultery, the person jointly charged has testified as to the acts forming the basis of the prosecution, testimony that she had made substantially the same statements to another upon the investigation is competent for the purpose of corroboration. *Ibid.*

In a prosecution for fornication and adultery, testimony of an admission made by defendant that "he was guilty" of another charge based upon sexual relations with the other party, is competent as an admission of acts which with other similar acts tend to prove the offense of fornication and adultery. *Ibid.*

Defendant was charged with fornication and adultery with one of the orphanage girls under his supervision. *Held:* Testimony of another orphanage girl that defendant made improper advances to her is competent for the purpose of showing attitude, animus and purpose of defendant, and as corroborative of the State's case. *Ibid.*

§ 4. Sufficiency of Evidence and Nonsuit.

Evidence of defendant's guilt of fornication and adultery held sufficient to be submitted to the jury and overruled defendant's motion for nonsuit. *S. v. Davis*, 386.

§ 5. Instructions in Prosecutions.

In a prosecution for fornication and adultery, an instruction that if the jury found beyond a reasonable doubt that defendant and his alleged paramour, not being married to each other, engaged in sexual intercourse with each other, with such frequency during the period to which the testimony related, that these illicit relations were habitual, they should return a verdict of guilty, *is held* without error. *S. v. Davis*, 386.

FRAUD.

§ 1. Deception Constituting Fraud in General.

Equity will not define fraud lest crafty men circumvent it. *Garrett v. Garrett*, 290.

§ 3. Deception Constituting Fraud—Part or Subsisting Fact.

While ordinarily, promissory representations are insufficient predicate for an action for fraud or rescission, allegation and evidence to the effect that defendants represented that they had talked to city officials and that the city would fill a large gully on the lot in a matter of days, that this representation was material and false, and that the house extended four inches over the street line in violation of defendants representation that the house was built on the lot described, are sufficient to overrule defendants' demurrer to the complaint and demurrer to the evidence. *Kee v. Dillingham*, 262.

FRAUD—*Continued.*

§ 5. Deception and Reliance on Misrepresentation.

Person having ability and opportunity to read instrument signed by him cannot rely on misrepresentations as to its contents. *Harrison v. R. R.*, 92.

Knowledge on part of representee forestalls deception. *Ibid.*

§ 12. Sufficiency of Evidence of Fraud.

Fraud may be established by circumstantial evidence without the aid of direct evidence of fraud, and even in the teeth of positive testimony to the contrary. *Garrett v. Garrett*, 290.

§ 5. Promise to Answer for Debt or Default of Another—Application.

Plaintiff alleged that her employer changed the beneficiary in a policy of insurance on his life to another employee under an agreement, understood, discussed and acquiesced in by all parties, that upon his death such other employee would pay out of the proceeds of such insurance the balance due on a mortgage on plaintiff's home, and thus recompense both employees for services faithfully rendered. *Held:* The action is one to establish a parol trust and not one to recover on a promise by the employer to answer for the debt of plaintiff, and therefore G.S. 22-1 has no application. *Cuthrell v. Greene*, 475.

The fact that the promise to answer for the debt or default of another is supported by consideration does not take such promise out of the statute of frauds when the original obligation is not extinguished by the new promise and the consideration for the promise moves to the original debtor and not to the promisor. *Myers v. Allsbrook*, 786.

Complaint held not to allege that consideration for promise moved to promisor and nonsuit was proper. *Ibid.*

While the statute of frauds does not apply to an oral promise to pay the debt of another out of money or property which the debtor has placed in the hands of the promisor for the purpose of paying the debt, evidence tending to show that the debtor entrusted certain funds to the promisor for the purpose of carrying on the debtor's business, without evidence that he entrusted the funds for the specific purpose of paying debtor's debts, is insufficient to bring the promise within this rule. *Ibid.*

§ 12. Parol Trusts.

Grantor may not engraft parol trust in his favor on his deed absolute in form in absence of fraud or mistake. *Bass v. Bass*, 171.

But party may establish parol trust on property upon proof that he furnished consideration and that grantee agreed to hold title for his benefit. *Bass v. Bass*, 171.

Agreement under which employer changed beneficiary in policy on his life to one employee upon understanding that such employee would pay out of proceeds mortgage on another employee's house, *held* parol trust not coming within statute. *Cuthrell v. Greene*, 475.

FRAUDULENT CONVEYANCES.

§ 9. Pleadings.

In order to state a cause of action to set aside a contract as a fraud upon creditors, the complaint must allege the facts and circumstances constituting the fraud, and a mere allegation of fraud is insufficient. *Davis v. Whitehurst*, 226.

GAMING.

§ 8. Competency of Evidence in Prosecution for Gaming.

In a prosecution under G.S. 14-304, it is competent for witnesses who have examined and studied the machines in question to testify as to their physical description and operation, and that they could be reconverted into coin operated slot machines with a few physical changes requiring only a few minutes to make. *S. v. Davis*, 552.

§ 9. Sufficiency of Evidence in Prosecutions for Gaming.

It was admitted that the machines in question were owned by one defendant and rented by him to the other defendants. The State introduced testimony of an officer, who had examined and studied the machines, that from his observation they could be converted, or reconverted, to coin slot operated machines by simple mechanical changes. *Held:* The evidence was sufficient to overrule defendants' demurrer, and the fact that the witness failed to complete a demonstration of the conversion of such a machine because of lack of soldering tools, does not amount to a failure of the State's evidence upon the critical issue. *S. v. Davis*, 552.

GARNISHMENT.

§ 2. Property Subject to Garnishment.

Where it does not appear that a nonresident has been brought into this State by, or after waiver of, extradition, personal property brought into the State by such nonresident is subject to attachment or garnishment. *White v. Ordille*, 490.

Where a nonresident has filed a cash recognizance, his right to the return of the money upon compliance with the conditions of the recognizance is an intangible property right which is subject to garnishment although the money may not be taken out of the hands of the magistrate prior to the satisfaction of the conditions of the recognizance, and upon appearance of defendant at the preliminary hearing in compliance with the recognizance the entire amount is subject to the lien of the garnishment, and the magistrate properly requires an additional recognizance upon binding the defendant over to the Superior Court for trial. *Ibid.*

GRAND JURY.

§ 1. Qualification and Selection of Grand Jurors.

Rejection of prospective jurors for want of good moral character and sufficient intelligence is available to the County Commissioners as a general objection only when the jury list is being prepared, G.S. 9-1, and not after the names are in the box, G.S. 9-2, G.S. 9-7. *S. v. Speller*, 67.

The law permits no distinction in the selection of prospective jurors from names rightly in the jury box. *Ibid.*

New trial awarded for systematic exclusion of Negroes from grand jury that returned indictment against defendant. *Ibid.*

HABEAS CORPUS.

§ 2. To Obtain Freedom from Unlawful Restraint.

Habeas corpus is inappropriate to test the validity of a trial which resulted in conviction and final judgment against petitioner, both by rea-

HABEAS CORPUS—*Continued.*

son of established procedure and also by statute. G.S. 17-4. *In re Taylor*, 297.

§ 3. To Obtain Custody of Minor Children.

Habeas corpus to determine the right to the custody of a child applies only when the issue arises between husband and wife who are living in a state of separation without being divorced. G.S. 17-39. *Robbins v. Robbins*, 430; *Phipps v. Vannoy*, 629.

And order in *habeas corpus* does not oust jurisdiction of Superior Court to hear motion in subsequent divorce action, *Robbins v. Robbins*, 430; but jurisdiction in *habeas corpus* is ousted immediately upon filing complaint in divorce action. *Phipps v. Vannoy*, 629.

Habeas corpus does not lie to determine custody as between father and parents of deceased wife. *Phipps v. Vannoy*, 629.

§ 8. Appeal and Review.

Petition for *certiorari* to review judgment on return of writ of *habeas corpus* issued in petitioner's endeavor to collaterally attack a final judgment of conviction, will be dismissed. *In re Taylor*, 297.

Where *habeas corpus* is issued on the ground that the punishment imposed was in excess of that permitted by law, and it appears that the punishment imposed was within the statutory limits, petition for *certiorari* for review of the judgment on the return of the writ of *habeas corpus* will be dismissed, since review could avail petitioner naught. *In re McKnight*, 303.

HIGHWAYS.

§ 15. Nature and Grounds of Remedy to Establish Cartway.

Petitioner is entitled to the establishment of a cartway across the lands of another only if petitioner's land is not adjacent to a public road and has no adequate and proper means of ingress and egress to the highway, and he is not entitled to the relief if he has such means available to him at the time. G.S. 136-69. *Garris v. Byrd*, 343.

G. S. 136-68 and G.S. 136-69, relating to the establishment of cartways for ingress and egress to a highway over intervening lands, are in derogation of common law and must be strictly construed. *Brown v. Glass*, 657.

Petitioners are not entitled to the establishment of a cartway over the intervening lands of another for the purpose of egress to the highway for a home they propose to construct on their adjoining land, since such use does not come within those enumerated in the statute. *Ibid.*

§ 16. Proceedings to Establish Cartway.

The trial court found that petitioner had adequate ingress and egress to a public highway by permissive use of a private road across the lands of respondent, and then found that such permissive use was not sufficient and that petitioner is entitled to the establishment of a cartway over the lands of respondent. *Held:* The conflicting findings of the court make it advisable to vacate the judgment and remand the cause. *Garris v. Byrd*, 343.

Upon judgment establishing petitioner's right to a cartway over private lands, the laying off of a cartway and the adjudication of damages are matters for the jury of view, subject to review by the court. G.S. 136-69. *Ibid.*

HOMICIDE.

§ 11. Self-Defense.

The right of self-defense is not available to one who invites another to engage in a fight, unless he first abandons and withdraws from the fight and gives notice to his adversary that he has done so. *S. v. Church*, 718.

§ 16. Presumptions and Burden of Proof.

The killing of a human being with a deadly weapon must be intentional in order to raise the presumptions that the killing was unlawful and that it was done with malice. *S. v. McNeill*, 377; *S. v. Phillips*, 538.

Where, in a prosecution for first degree murder, defendant does not admit the killing nor take the witness stand, the burden is upon the State to establish each element of the offense beyond a reasonable doubt, which it may do by establishing an intentional killing with a deadly weapon with further evidence that the killing was premeditated and deliberate. *S. v. Creech*, 662.

Defendant is presumed sane with burden on him to prove mental irresponsibility due to drunkenness to the satisfaction of the jury when relied on by him. *Ibid.*

§ 17. Relevancy and Competency of Evidence in General.

In a prosecution for uxoricide, evidence that defendant had been twice married and twice divorced before his marriage to deceased, is irrelevant to the issue and incompetent, but its admission in the present case, where defendant was tried by a jury selected from the county where he had lived from boyhood and which doubless knew defendant's entire career, *is held* a harmless inadvertence. *S. v. Creech*, 662.

§ 20. Evidence of Motive and Malice.

In a prosecution for uxoricide, evidence of defendant's conduct toward wife during period of entire marriage, disclosing cruelty, mistreatment, quarrels, etc., during times of defendant's periodic drunkenness, *held* competent to show malice or a settled feeling of ill-will; and while evidence of his kind treatment of her during periods of sobriety is competent to rebut the evidence of ill-will, the exclusion of testimony on cross-examination of one witness as to his kind treatment of wife on one occasion will not be held for reversible error when his considerate treatment of her during such periods is testified to by witness for both sides and matter is not really disputed. *S. v. Creech*, 662.

§ 25. Sufficiency of Evidence and Nonsuit.

The testimony of the State's witnesses placing defendant at the scene at the time of the shooting and permitting the reasonable inference that defendant, pursuant to a family altercation, fired the shot which killed deceased, though contradicted by defendant's evidence, *is held* sufficient to overrule defendant's motion to nonsuit. *S. v. Bagley*, 723.

§ 27b. Charge on Presumptions and Burden of Proof.

A charge that where an intentional killing is admitted or established the law presumes that it was unlawful and that it was done with malice, will not be held for prejudicial error in failing to stipulate that the presumption arises only where the killing is of a human being with a deadly weapon, when all the evidence establishes that deceased was killed with a

deadly weapon by defendant, and the only question arising on defendant's evidence is whether the gun was intentionally or accidentally fired. *S. v. Franklin*, 336.

The failure of the court, in a single instance, to charge that the killing with a deadly weapon must be intentional in order to raise the presumption of malice will not be held for reversible error when in other portions of the charge the rule is correctly stated and the *lapsus linguæ* is corrected by the court before concluding the instructions. *S. v. Creech*, 662.

Where there is no evidence that defendant intentionally killed deceased, a charge on the presumptions arising from an intentional killing with a deadly weapon and upon the burden resting upon defendant to rebut such presumptions, will be held prejudicial error as tending to confuse the jury. *S. v. Phillips*, 538.

§ 27f. Charge on Defenses.

The failure of the charge to include a threatened assault as well as an actual one as sufficient legal provocation to reduce murder in the second degree to manslaughter will not be held for prejudicial error when defendant's testimony is to the effect that an actual assault was being made upon him at the time, which the jury found was sufficient provocation to reduce the charge of murder in the second degree to manslaughter. *S. v. Franklin*, 336.

A charge that if the accused killed the deceased in the heat of passion caused by the assault and not from premeditation and deliberation, and not from malice, accused would not be guilty of more than manslaughter and would not be guilty of murder in the second degree, will not be held for prejudicial error as denying the defendant his right of self-defense when immediately following such charge the court gives proper and comprehensive instructions on defendant's plea of self-defense. *Ibid.*

Where all the evidence tends to show that defendant, after the inception of difficulty, sought out his *feme* companion and attempted to use her as a shield in his gun fight with his victim, and there is no evidence that his adversary had any animosity towards his companion, the refusal of the court to give special instructions requested as to the right to kill in defense of another, is without error, since the principle is not presented by the evidence. *S. v. Correll*, 640.

Ordinarily, a charge on the question of self-defense which is predicted solely upon a murderous assault, is erroneous, since a defendant has the right to defend himself or a member of his family against a non-felonious assault and to fight in defense of himself or a member of his family if he has reasonable grounds to believe that he or a member of his family is about to be killed or receive great bodily harm. *S. v. Church*, 718.

But where evidence shows defendant was aggressor immediately prior to fatal shooting, error in charge on this point is harmless. *Ibid.*

§ 27h. Instructions on Less Degree of Crime.

Evidence for the State which tends to show that defendant had beaten his wife on many previous occasions, and that on the occasion in question he had been drinking and brutally beat her with a poker or other instrument, and that death ensued from the injuries thus inflicted, *is held* to require the submission to the jury of the question of defendant's guilt of manslaughter, since the evidence is susceptible to the interpretation that the killing was not intentional. *S. v. McNeill*, 377.

HUSBAND AND WIFE.

§ 4. Marital Rights Privileges and Disabilities in General.

Where the husband in his divorce action alleges that he had notified his wife that he would no longer live with her as husband and wife, he may not assert the fictional unity of persons for the purpose of maintaining that his domicile was the domicile of his wife and children. *Coble v. Coble*, 81.

§ 6. Wife's Separate Estate.

Where the husband pays the purchase price and has conveyance of land made to his wife, her agreement to hold title for the benefit of them both does not affect her separate estate, and it is not required that the agreement be executed in the manner set forth in G.S. 52-12. *Bass v. Bass*, 171.

§ 12a. Transactions Between Husband and Wife in General.

Where the husband pays the purchase price of land and has conveyance made to his wife, the law will presume a gift of the land to the wife, but the presumption is subject to rebuttal by clear, strong and convincing proof. *Bass v. Bass*, 171.

Where the jury finds that a release signed by the wife in favor of the husband was procured by fraud, the husband's contention that the fact that the acknowledgment of the release taken in conformity with G.S. 52-12, precludes attack of the release for want of consideration, is untenable, since in such instance there is no contract to which the privisions of the statute could apply. *Garrett v. Garrett*, 290.

§ 12c. Conveyances Between Husband and Wife.

A husband may convey to his wife any right, title or interest in real estate which he possesses. *Henley v. Perry*, 15.

Demurrer is properly sustained to a cause of action based on allegations that plaintiff conveyed to his wife certain lands pursuant to an agreement that she would hold the property for the benefit of both, since a grantor may not engraft a parol trust in his favor on his deed absolute in form. *Bass v. Bass*, 171.

Wife may not engraft parol trust on her deed to husband absolute in form. *McCullen v. Durham*, 418.

Certification by the officer taking the acknowledgment of the wife that the deed is not unreasonable or injurious to her is essential to the validity of her conveyance of her property to her husband, whether directly or by indirection by conveyance to a third person who reconveys to the husband. *McCullen v. Durham*, 418.

The fact that deed executed by husband and wife to a third person conveying her separate property failed to contain certificate that the deed is not unreasonable and injurious to her, and that such third person shortly thereafter reconveyed to the husband, is alone insufficient to invalidate the transaction, it being necessary that there be allegation and proof that the transaction was for the purpose of conveying the wife's land to the husband by indirection in order for G.S. 52-12 to apply and raise the issue as to the invalidity of the transaction on this ground. *Ibid.*

§ 14. Creation of Estates by Entireties.

Where the premises and granting clause in a deed is to a person named "and wife" the deed conveys an estate by entireties notwithstanding the

HUSBAND AND WIFE—*Continued.*

fact that the name of the wife nowhere appears therein, since the description is sufficintly definite to permit evidence of identity *aliunde*, established in this case by stipulation of the parties. *Byrd v. Patterson*, 156.

A deed to husband and wife conveys an estate by entireties notwithstanding the deed fails to characterize the estate conveyed. *Ibid.*

Where the premises and granting clause of a deed is to a man and his wife, the fact that the *habendum* and warranty clauses fail to designate the wife does not affect the nature of the estate conveyed, since the granting clause prevails where there is any repugnancy between it and preceding or succeeding recitals. *Ibid.*

INDEMNITY.

§ 1. Nature and Requisites of Right of Action.

Commission merchant not entitled to indemnity against his seller for penalty under Emergency Price Control Act. *Bledsoe v. Lumber Co.*, 128.

§ 2c. Matters Secured.

Plaintiff coach company authorized defendant coach company to operate under its franchise with proviso that defendant should indemnify and save harmless the plaintiff from any and all loss or damage occasioned by the operation of motor vehicles of the defendant. *Held:* The indemnity agreement does not cover attorney's fees and expenses expended by plaintiff in aiding in the defense of suits arising out of an accident in the operation of defendant's bus over the franchise route, it not being alleged that plaintiff was called upon or required to defend or that defendant failed to pay all damages and costs growing out of the suits. *Coach Co. v. Coach Co.*, 534.

§ 4. Rights and Remedies of Person Indemnified.

In suit by indemnitor against indemnitee for negligence, indemnitee cannot bring in third parties and set up possible liability to them as defense. *Fleming v. Light Co.*, 397.

INDICTMENT.

§ 13. Grounds for Quashal of Indictment.

Systematic exclusion of Negroes from grand jury is valid ground for quashal of indictment return by it against Negro. *S. v. Speller*, 67.

§ 14. Effect of Quashal of Indictment.

Upon quashal of an indictment because returned by an improperly selected grand jury, defendant is not entitled to his discharge, but should be held for action by a duly constituted grand jury. *S. v. Speller*, 67.

INFANTS.

§ 11. Damages Recoverable by Infants in Actions for Negligent Injury.

Where, in an action by a minor to recover for negligent injury, brought by his father as next friend, the pleadings and theory of trial seek recovery by plaintiff, as elements of damage, medical expenses and loss of earnings during plaintiff's minority, the father waives his right to recover and would be estopped from thereafter maintaining an action therefor even though the father is not a party of record, and therefore the failure of the court

INFANTS—*Continued.*

to exclude these items as elements of damages will not be held for error on defendant's exception taken after verdict. *Pascal v. Transit Co.*, 435.

§ 13. Actions Against Infants—Service of Process and Notice.

Defendant guardian's exception that judgment was rendered against his minor ward before sufficient time had elapsed after notice as prescribed by G.S. 1-65, *held* not supported by the record. *Garner v. Phillips*, 160.

INJUNCTIONS.

§ 4d. Subjects of Injunctive Relief—Nuisances.

Persons having no title or interest in certain property may not enjoin a municipality from using such property for a recognized municipal purpose on the ground that such use would constitute a nuisance, since the municipality has the power of eminent domain and relief for any depreciation in value of plaintiff's contiguous property would be by action for damages and not injunction. *McLeod v. Wrightsville Beach*, 621.

§ 4f. Subjects of Injunctive Relief—Enjoining Institution or Prosecution of Civil Action.

Ordinarily injunction will not lie to enjoin the Superior Court of another county from proceeding in an action duly constituted and pending before it. *Davis v. Whitehurst*, 226.

§ 4i. Subjects of Injunctive Relief—Franchises.

A carrier may not maintain a suit for a mandatory injunction directing the Utilities Commission to expunge from its records orders amending the franchise of a competing carrier on the ground that such orders were entirely beyond the power and jurisdiction of the Commission, since if the orders were void they did not change the *status quo* and no mandatory writ to wipe them from the docket is necessary. *Greyhound Corp v. Utilities Com.*, 31.

The exercise by a competing carrier of rights granted it by the Utilities Commission by amendments to its franchise may not be enjoined by a carrier by suit against the Utilities Commission for a mandatory injunction to expunge from its records the amendatory orders, but the exercise of such rights by the competing carrier must be challenged in a proper proceeding to which the competing carrier is a party and has an opportunity to defend. *Ibid.*

Plaintiffs instituted action against a competing carrier to restrain it from exercising rights given it by orders of the Utilities Commission amending its franchise. The orders were entered in proceedings to which plaintiffs were parties. *Held:* Plaintiffs had adequate remedy for the protection of their rights by appeal, G.S. 62-19; G.S. 62-20, and judgment sustaining defendant's demurrer in the independent action was proper. *Greyhound Corp. v. Transportation Co.*, 31.

INSURANCE.

§ 13a. Construction of Policies in General.

If a policy of insurance prepared by insurer is reasonably susceptible to two interpretations, the one imposing liability, the other excluding it, the former is to be adopted and the latter rejected. *Electric Co. v. Ins. Co.*, 518.

INSURANCE—*Continued.*

§ 13e. Construction and Operation of Policy in General—Conditions.

A condition avoiding liability on a policy for matters relating to conduct of insured subsequent to the happening of the event upon which liability attaches, is at most a condition subsequent, regardless of the fact that the policy designates it a condition precedent. *MacClure v. Ins. Co.*, 305.

§ 19a. Construction and Operation of Fire Policy—in General.

The provisions of the standard form of fire insurance policy are valid, and the rights and liabilities of both insurer and insured must be determined in accordance with its terms. *Ziberlin v. Ins. Co.*, 567.

§ 24a. Notice and Proof of Loss and Waiver.

In order for denial of liability to dispense with the provision of the policy requiring the filing of proof of loss within a specified time, it must appear that such denial was made on other grounds within the time limited for filing of proof of loss. *Ziberlin v. Ins. Co.*, 567.

At the time of the issuance of the policy, knowledge of the local agent is ordinarily imputable to insurer, but after the policy has been issued and loss has occurred, the local agent has no authority to waive provisions or conditions in the policy contrary to the express limitation on his authority contained therein. *Ibid.*

Insurer is ordinarily bound by waiver or extension of time for filing proof of loss based upon the acts of its officer or adjuster, but is not so bound by unauthorized acts of its local agent. *Ibid.*

The allegations of the complaint disclose that after the occurrence of loss, insurer's local agent advised insured to defer filing formal claim until such time as materials could be obtained for repairs, and that insured failed to file proof of loss within the time specified in the policy and did not institute action on the policy until after the expiration of the time limited therein. There was no denial of liability by insurer on other grounds within the time limited for filing proof of loss. *Held:* Insurer's demurrer should have been sustained. *Ibid.*

§ 27. Effective Date of Life Policy—Payment of First Premium.

The life policy in suit provided that it should not be effective until the first premium was paid and that no agent had authority to deliver the policy contrary to the provisions thereof. Insurer's agent delivered the policy and countersigned receipt for advance payment of part of the first premium. *Held:* Upon conflicting evidence as to whether there was conditional delivery for the purpose of inspection or an absolute delivery upon applicant's promise to pay the balance of the first premium, the issue should be submitted to the jury, and it is error for the court to direct a verdict against insurer. *Stallings v. Ins. Co.*, 529.

While the acts of a life insurance agent which render him liable for the balance due on the first premium on a policy delivered by him may not inure to the benefit of the applicant or beneficiary, a letter by insurer to the agent inquiring whether the applicant had given a note for the balance of the first annual premium may be competent upon the question of the agent's authority to deliver the policy upon the applicant's promise to pay the balance of the first annual premium. *Ibid.*

INSURANCE—*Continued.*

§ 37. Actions on Life Policies.

Where plaintiff beneficiary establishes a *prima facie* case in an action on a policy of life insurance, insurer's evidence that the indebtedness for money borrowed by insured equalled or exceeded the cash surrender value of the policy and that it had exercised the right to cancel the policy, vested in it by the terms of the loan agreement, and had so notified insured, relates to matters in defense upon which insurer has the burden of proof, and nonsuit thereon is error. *Barnes v. Trust Co.*, 409.

§ 43b. Construction of Liability Policies as to Persons Covered.

When the policy provides coverage while the car insured is being driven with insured's permission by another in the prosecution of insured's business, such driver stands in the same relation to the injured person as the named insured in regard to liability on the policy. *MacClure v. Ins. Co.*, 305.

§ 43c. Construction of Collision Policy as to Risks Covered.

A policy insuring specified goods while in transit "against loss or damage directly caused by . . . collision of the conveyance on which the goods are carried . . . derailment, overturning of trucks or collapse of bridges," *is held* to cover damage to the topmost articles on the load protruding above the top of the truck resulting when the articles collided with an overhead concrete bridge under which the truck was driven. *Electric Co. v. Ins. Co.*, 518.

Where a policy insures against loss or damage to a cargo of goods while in transit, the enumeration of the methods by which loss or damage usually occurs will not be construed as a limitation of liability when such construction is contrary to the mutual intent of the parties as gathered from the language of the instrument as a whole. *Ibid.*

§ 44c. Liability and Collision Insurance—Notice of Accident.

Where it appears that insured's agent gave insurer notice of the accident shortly after it occurred, and that insurer investigated the accident, knew of the institution of action against insured, and employed counsel to defend that suit, the defense that insurer had not been notified of the accident in the manner stipulated in the policy is not available. *MacClure v. Casualty Co.*, 305.

§ 44d. Cooperation of Insured in Preparing and Prosecuting Defense to Action on Policy by Third Person.

Provision in a liability policy for co-operation by insured in preparing and prosecuting the defense to an action by the injured party is material, and substantial breach of this provision by insured would defeat recovery on the policy. *MacClure v. Casualty Co.*, 305.

After notice to the insurer of the accident, non-co-operation by insured in the preparation and prosecution of the defense to an action instituted by the injured party against insured, constitutes an affirmative defense to liability on the policy, regardless of whether the policy designates the co-operation clause a condition precedent, since such matters relate to conduct of insured subsequent to the accident maturing the liability. *Ibid.*

Breach of the co-operation clause in the policy of liability insurance must result in detriment to insured in performance of its obligation to defend an action instituted by the injured person against insured in order to constitute a defense to liability on policy. *Ibid.*

INSURANCE—*Continued.*

§ 50. Actions on Liability and Collision Policies.

Execution on judgment obtained against insured by the party injured in an accident was returned *nulla bona*, and the person injured instituted this action against insurer on a policy of liability insurance. *Held:* Nonsuit on insurer's evidence of breach of the co-operation clause by insured was error, since such breach constitutes an affirmative defense with the burden of proof thereon upon insurer. *MacClure v. Ins. Co.*, 305.

JUDGMENTS.

§ 1. Nature and Essentials of Consent Judgments.

Consent of the parties is prerequisite to the power of the court to sign a consent judgment, and if such consent does not exist at the time the court sanctions or approves the agreement, the judgment is void. *Ledford v. Ledford*, 373.

§ 4. Attack and Setting Aside Consent Judgments.

A consent judgment cannot be modified or set aside without the consent of the parties except by independent action based on fraud or mistake, and persons not parties to a consent judgment may not move to vacate it. *Davis v. Whitehurst*, 226.

The law will presume that a consent judgment duly entered of record is regular and that the attorney who signed it acted in good faith under authority from his client. *Ledford v. Ledford*, 373.

A consent judgment cannot be modified or set aside without the consent of the parties except for fraud or mutual mistake, or actual absence of consent. *Ibid.*

The proper procedure to attack a consent judgment on the ground of want of consent at the time it was entered is by motion in the cause. *Ibid.*

The question presented by a motion to set aside a consent judgment on the ground that movent did not consent thereto at the time it was entered is for the determination of the court, and the court is the sole judge of the weight and credibility of the evidence, and his findings are conclusive and not reviewable when supported by the evidence. *Ibid.*

Inadequacy of the consideration for the signing of a consent judgment is alone insufficient to overthrow the consent judgment on the ground of fraud or mutual mistake.

§ 22b. Lien of Judgment—Later Acquired Property.

A duly docketed judgment constitutes a lien on realty of the judgment debtor acquired by him within ten years from the date of the rendition of the judgment, G.S. 1-234, and the court erroneously sets aside the verdict of the jury that the lien of the judgment attached to lands acquired by the judgment debtor within ten years when the wife of the deceased judgment debtor is unable to show that he acquired such lands as trustee for her benefit. *McCullen v. Durham*, 418.

§ 23. Life of Lien of Judgment.

Lien of judgment, except lien of judgment upon a homestead duly allotted, expires at end of ten years from date of rendition. *McCullen v. Durham*, 418.

JUDGMENTS—*Continued.*

§ 24. Parties Who May Attack.

Since sale under execution can convey only the right, title and interest of the judgment debtor, title or interest in the property asserted by third persons is insufficient to entitle them to move to vacate the judgment. *Davis v. Whitehurst*, 226.

§ 25. Validity of Judgments and Procedure to Attack.

Where the court acquires jurisdiction of the parties and subject matter of an action its judgment cannot be treated as a nullity. *Bass v. Moore*, 211.

The remedy to attack a judgment for intrinsic fraud is by motion in the cause. *Ibid.*

A party is not entitled to judgment on the pleadings setting aside a former judgment when the attack of the judgment is for intrinsic fraud by independent action. *Ibid.*

§ 27a. Attack of, and Setting Aside Default Judgments.

The Judge of a Superior Court has concurrent jurisdiction with the Clerk of the Court to enter judgments by default, G.S. 1-211; G.S. 1-212, and to vacate such judgments, and the jurisdiction of the Judge on motion to set aside a default judgment entered by the Clerk is original as well as appellate. *Moody v. Howell*, 198.

The Clerk entered a default judgment in an action in ejectment for failure of defendants to file bond required by statute, G.S. 1-111; G.S. 1-211 (4). Defendants' motion to vacate the default judgment upon tender of bond, was denied by the Clerk, and defendants appealed. *Held:* Dismissal of the appeal for failure of defendants to perfect same in the manner prescribed by G.S. 1-272; G.S. 1-273; G.S. 1-274, was error, since these statutes are inapplicable to orders or judgments entered pursuant to G.S. 1-211, and G.S. 1-212. *Ibid.*

§ 27e. Attack of Judgments for Fraud.

Judgment was entered in an action by a widow, vacating certain deeds which had been executed to destroy the estate by entirety in lands theretofore held by herself and husband and declaring that the husband's devisees took no interest in the land. Attack of the judgment on the ground that the infant contingent remaindermen were represented by a guardian *ad litem* who was a creditor of the widow, that he failed to assert valid defenses to the action existing in their favor, and that the widow thereafter mortgaged the lands to him to secure her debt to him, is an attack of the judgment for intrinsic fraud. *Bass v. Moore*, 211.

§ 27h. Contention That Motion to Vacate Void Order Would Not Lie Because Order Had Been Carried into Effect.

While injunction will not lie to restrain an act which has already been accomplished, this principle is inapplicable to a motion to set aside a void order under which plaintiff has obtained custody of the children of the marriage. *Coble v. Coble*, 81.

§ 30. Matters Concluded by Judgment.

Where plaintiffs, in an action to restrain foreclosure under the power contained in a deed of trust, give notice of appeal from successive judgments entered upon the hearing of successive temporary restraining orders,

JUDGMENTS—*Continued.*

but failed to perfect appeal therefrom, the matters therein adjudicated may not be again presented by appeal from judgment confirming sale of the property by the commissioner appointed by the court. *Gilkey v. Blanton*, 792.

JURY.

§ 8. Selection of Jurors, Jury Rolls and Boxes.

Mandate of Supreme Court of United States held not to adjudicate that State statutes on the subject of selection of jurors are invalid, but new trial is awarded for errors in administrative procedure. *S. v. Brunson*, 37.

Want of good moral character and sufficient intelligence is available to county commissioners as objection only when jury list is being prepared and not after names are in the box. *S. v. Speller*, 67.

§ 9. Special Venires.

Motion for special venire is addressed to sound discretion of trial court. *S. v. Strickland*, 201.

LANDLORD AND TENANT.

§ 11. Liability for Injuries to Third Persons.

Evidence tending to show that lessee was under duty to maintain and repair the leased equipment, that it was in good condition when turned over to him by the former lessee, and that the lessor reserved no right to control the operation of the leased premises, justifies nonsuit as to the lessor in an action by a patron injured by alleged defective condition of the equipment some eleven months after the lessee had taken over control and operation of the property. *Rogers v. Oil Corp.*, 241.

LARCENY.

§ 7. Sufficiency of Evidence and Nonsuit.

Tire-tracks, similarity of paint, etc., tending to show defendant's car was used in larceny, with foot-tracks of defendant found where car broke down in asportation, *held* sufficient to be submitted to jury on charge of larceny. *S. v. Frye*, 581.

LIMITATION OF ACTIONS.

§ 6d. Accrual of Cause of Action—Actions on Bills and Notes.

Where bonds or notes secured by mortgage or deed of trust are unconditional on their face and do not contain the acceleration clause set forth in the mortgage or deed of trust, the institution of foreclosure proceedings does not advance the maturity dates of the notes so as to affect the running of the statute or limitations against an action on the bonds or notes. *Sanders v. Hamilton*, 43.

MALICIOUS PROSECUTION.

§ 1a. Nature and Essentials of Right of Action in General.

To make out a case of malicious prosecution it is necessary that the plaintiff show (1) malice; (2) want of probable cause; and (3) favorable termination of the proceeding upon which the action is based. *Taylor v. Hodge*, 558.

MALICIOUS PROSECUTION—*Continued.*

§ 3. Probable Cause.

A police officer acts with probable cause in making an arrest if the apparent facts are such as to lead a discreet and prudent person to believe that a criminal offense had been committed by the party charged, even though subsequently it be shown that the person arrested and prosecuted was not guilty of the offense. *Perry v. Hurdle*, 211.

Want of probable cause is mixed question of law and fact. *Taylor v. Hodge*, 558.

The fact that the recorder has found probable cause for the purpose of binding plaintiff over for trial in the Superior Court upon the charge, does not conclude plaintiff in an action for malicious prosecution when a *nol. pros.* has been taken in the Superior Court. *Ibid.*

§ 4. Malice.

In an action for malicious prosecution, constructive malice may be inferred from want of probable cause. *Taylor v. Hodge*, 558.

§ 5. Termination of Prosecution.

A *nolle prosequi* with leave upon failure of the jury to agree upon a verdict is a final determination of a criminal action for the purpose of an action for malicious prosecution. *Perry v. Hurdle*, 216.

A *nolle prosequi* is a sufficient termination of a criminal action to support an action for malicious prosecution. *Taylor v. Hodge*, 558.

§ 8. Burden of Proof.

In an action for malicious prosecution the burden is upon plaintiff to show termination of the criminal action in his favor and also that it had been instituted without probable cause and was prompted by malice, either actual or constructive, by a showing that the arresting officers acted without reasonable grounds to believe him guilty of an offense. *Perry v. Hurdle*, 216.

§ 10. Sufficiency of Evidence and Nonsuit.

A holding by the trial court that the warrant on which plaintiff was arrested is void, to which ruling no exception was taken, and that therefore plaintiff has no cause of action for malicious prosecution, is tantamount to a dismissal of that cause of action and such ruling is not subject to review on appeal. *Pridgen v. Coach Co.*, 46.

Evidence held to show that officers had probable cause for arresting plaintiff, and nonsuit in action for malicious prosecution was proper. *Perry v. Hurdle*, 216.

The evidence tended to show that, incident to a controversy between them, plaintiff refused to surrender possession of defendant's saw until defendant returned plaintiff's brace and bit, and that on the following day defendant swore out a warrant charging plaintiff with larceny of the saw. *Held:* The question of want of probable cause is for the determination of the jury upon the basis of whether a man of ordinary prudence and intelligence under the circumstances would have known that the charge of larceny had no reasonable foundation. *Taylor v. Hodge*, 558.

MANDAMUS.

§ 2a. Ministerial Duty.

Where a petition which meets all of the requirements of G.S. 163-1, is aptly filed, it is the statutory duty of the State Board of Elections to cause the names of the nominees of such new political party to be printed on the official ballot, and *mandamus* will lie to compel the performance of such duty. *States' Rights Democratic Party v. Board of Elections*, 179.

MASTER AND SERVANT.

§ 25a. Construction and Operation of Federal Employers' Liability Act.

Under the construction of the Federal Employers' Liability Act by the Federal Courts, the employer is not an insurer of the safety of his employees, nor does the Act subject railroads to that degree of liability imposed by a workmen's compensation law, but the basis of liability under the Act is negligence on the part of the employer which constitutes in whole or in part the cause of the jury. *Hill v. R. R.*, 236.

§ 26. Federal Employers' Liability Act—Negligence of Carrier.

Negligence of carrier is basis of recovery. *Hill v. R. R.*, 236.

A brakeman, in the performance of his duties in interstate commerce, was proceeding from the engine to the caboose when he was struck by a crosstie thrown by workmen from the slowly moving train. The workmen were throwing the crossties from the car in the customary way for unloading them for use along the track. *Held:* The evidence fails to show any duty incumbent upon the workmen to anticipate the movements or position of plaintiff at the time of the injury, or to show negligent failure on their part to perform a duty owed plaintiff which proximately caused the injury, and nonsuit was proper. *Ibid.*

§ 27. Assumption of Risks Under Federal Employers' Liability Act.

Since the amendment of 1939, the doctrine of assumption of risk is entirely immaterial in an action under the Federal Employers' Liability Act, and therefore the carrier's plea of assumption of risk as a plea in bar is properly stricken from the answer upon motion of plaintiff employee. *Medlin v. Powell*, 323.

The doctrine of assumption of risk, which constituted a defense under the Federal Employers' Liability Act except in cases where the negligence of the carrier consisted in the violation of some statute enacted for the safety of employees, 45 U. S. C. A. 54, was entirely abrogated by the amendment of 1939, 53 Stat., 1404, and since the amendment, assumption of risk in any guise or form is not available to the carrier as a defense. *Ibid.*

§ 38. Employers Subject to Compensation Act.

Evidence tending to show that the employer regularly employed three persons in his general mercantile business and that for more than two months prior to the accident in suit he had employed two other persons at stated weekly wages to deliver fertilizers by truck in the operation of his mercantile business, *is held* to support the finding of the Industrial Commission that the employer had five or more persons regularly employed in his business and that he was therefore subject to the Workmen's Compensation Act. *Hunter v. Peirson*, 356.

MASTER AND SERVANT—*Continued.*

§ 39g. Employees Subject to Compensation Act—Casual Employees.

The evidence tended to show that the defendant operated a general mercantile business, which included the selling and delivery of commercial fertilizers, and that plaintiffs' intestates had been working for a period of more than two months at stated weekly wages in delivering the fertilizers by truck when they met with fatal accident arising out of and in the course of their employment. *Held:* Decedents were not casual employees, and further, the injury arose within the scope of the employer's regular business, and therefore they were employees of defendant within the coverage of the Workmen's Compensation Act. *Hunter v. Peirson*, 356.

§ 40a. Injuries Compensable Under N. C. Compensation Act in General.

Ordinarily, heart disease is not an injury and death therefrom is not ordinarily compensable. *West v. Department of Conservation*, 232.

§ 40b. Whether Injury Results from "Accident."

A game warden died of coronary occlusion shortly after he had arrested three persons for fishing without a license. There was no competent evidence before the Industrial Commission as to the nature, extent or effect on the officer of their resistance to arrest. *Held:* There was no evidence from which the Industrial Commission could have found that the death resulted from an "accident." *West v. Department of Conservation*, 232.

§ 40f. Occupational Diseases.

Heart disease is not an occupational disease. G.S. 97-53. *West v. Department of Conservation*, 232.

The provisions of the N. C. Workmen's Compensation Act relating to asbestosis and silicosis will be construed upon the basis that the remedies were provided with reference to the peculiar nature and incidents of these diseases. *Young v. Whitehall Co.*, 360.

The provisions of the N. C. Workmen's Compensation Act relating to asbestosis and silicosis were designed to affect the following objects: (1) To prevent employment in occupations with attendant dust hazards of unaffected persons peculiarly susceptible to asbestosis or silicosis; (2) to secure compensation to those workers affected with the diseases whose principal need is compensation; and (3) to provide compulsory changes of occupations for those workmen affected by asbestosis or silicosis, whose primary need is removal to employments without dust hazards. *Ibid.*

A worker suffering from asbestosis or silicosis is disabled as defined by G.S. 97-54, if he is by reason of the disease incapacitated "from performing normal labor in the last occupation in which remuneratively employed," and the distinction between this definition and the definition of incapacity from other diseases or injury, G.S. 97-2, is highly significant in construing the provisions of the statute relating to asbestosis and silicosis, and must have been made to prevent unjust and oppressive consequences which might arise from the indiscriminate compulsion of workers suffering from these diseases to transfer to other employments. *Ibid.*

The provision of G.S. 97-61, for the compulsory change of occupation by a worker affected by asbestosis or silicosis to "employment in some other occupation" contemplates a transfer only when it appears to the Commission that there is a reasonable basis for the conclusion that the employee possesses the actual or potential capacity of body and mind to

MASTER AND SERVANT—*Continued.*

work with substantial regularity during the foreseeable future in some gainful occupation free from the hazards of asbestosis or silicosis. *Ibid.*

If an employee is disabled by silicosis from performing normal labor in an occupation subject to the hazard of silica dust, such worker is entitled to ordinary compensation under the general provisions of the Workmen's Compensation Act unless the Industrial Commission further finds that there is a reasonable basis for the conclusion that he shows the actual or potential capacity of body and mind to work with substantial regularity during the foreseeable future in another occupation free from this hazard, and findings as to disablement and employability in other occupations is necessary for a proper determination by the Commission of the applicability of G.S. 97-61. *Ibid.*

§ 43. Notice and Filing of Claim for Accident.

The evidence tended to show that claim for compensation was not filed within one year of the accidents, that defendant's superintendent, in response to messages from claimant, promised to come see claimant, but failed to do so, and that claimant's sister, on a visit to the superintendent, was referred to a clerk to ascertain whether the accident had been reported, but that the superintendent was gone when she returned to his office. *Held:* The evidence does not show any representation by defendant that the accident had been reported, or any agreement, express or implied, that the bar of the statute would not be pleaded, and therefore defendant was not estopped from setting up the defense of the bar of the statute, and the finding of the Industrial Commission that the claim was barred is conclusive. *Jacobs v. Mfg. Co.*, 660.

§ 47. Jurisdiction of Industrial Commission and Exclusion of Other Remedies.

Industrial Commission has exclusive jurisdiction to determine dispute as to charges for medical services rendered employee covered by Compensation Act, and physician may not maintain suit in Superior Court to recover therefor. *Worley v. Pipes*, 465; *Matros v. Owen*, 472.

§ 51. Proceedings Before Industrial Commission.

A summary order of the Industrial Commission directing that an employee be removed from employment having attendant hazards of silicosis, and stipulating that the employee is entitled to compensation as stipulated in G.S. 97-61, does not preclude the worker from contesting before the Industrial Commission the applicability of the statute to him, since such order is entered without notice or hearing. *Young v. Whitehall Co.*, 360.

§ 53b (3). Recovery and Award—Medical Expenses.

Compensation Act provides exclusive remedy for determination of dispute as to fee for medical services to employee. *Worley v. Pipes*, 465; *Matros v. Owen*, 472.

§ 55d. Review of Award of Industrial Commission.

Where a material finding of fact of the Industrial Commission is not supported by evidence and other findings are insufficient for a proper determination of the cause, the Superior Court properly sets aside the award and remands the cause to the Industrial Commission. *Young v. Whitehall Co.*, 360.

MASTER AND SERVANT—*Continued.*

The findings of fact of the Industrial Commission are conclusive on appeal when supported by any competent evidence. *Jacobs v. Mfg. Co.*, 660; *West v. Department of Conservation*, 232.

§ 60. Unemployment Compensation Act—Right to Unemployment Benefits

The labor dispute which brought about a stoppage of work involved the maintenance of membership clause in the contract of employment and also a general increase in wages. Employee-claimants belonged to a grade or class of workers some of whom participated in and were directly interested in the controversy. *Held:* Employee-claimants are not entitled to unemployment compensation benefits, G.S. 96-14 (d) (2), nor may they successfully contend that, as they were not members of the union and did not participate in, or help finance the labor dispute, they should not be deprived of unemployment compensation benefits, since the labor dispute also involved a general increase in wages from which they stood to benefit. *Unemployment Compensation Com. v. Lunceford*, 570.

MONEY RECEIVED.

§ 1. Nature and Essentials of Right of Action.

The drawee bank paid a check under a mistake of fact that the maker was its depositor having a large amount of money to his credit, whereas in fact the maker was another person of the same name without funds on deposit. The payee, a holder in due course, acted in good faith in taking, presenting, and collecting the check and was without fault in causing or contributing to the drawee bank's mistake, and was without knowledge that its payment was made under a mistake. *Held:* The maker being insolvent, the drawee bank is not entitled to recover the amount from the payee upon the theory of unjust enrichment, but the bank must suffer the loss for the same reasons that it would be liable if the signature to the check had been a forgery. *Bank v. Marshburn*, 104.

MORTGAGES.

§ 30c (1). Right to Foreclose—Default in Payment of Installment and Acceleration.

An acceleration clause in a mortgage or deed of trust securing bonds or notes containing no such stipulation, operates on the secured bonds or notes to the extent of rendering the debt due for the purpose of foreclosing on default. *Sanders v. Hamilton*, 43.

The *cestui*, upon default in the payment of one of a series of notes, instructed the trustee to foreclose. Purported sale was had but thereafter abandoned, and the *cestui* instructed the trustor to remain on the land, which he did. *Held:* This was an abandonment of the election to foreclose and restored the *status quo ante* in regard to the acceleration clause of the deed of trust. *Ibid.*

§ 30d. Parties to Suit to Enjoin Foreclosure.

In a suit to restrain foreclosure under power of sale, plaintiffs' contention that the personal representative of one of the original mortgagors is a necessary party should be made in apt time, and plaintiffs will not be

MORTGAGES—*Continued.*

allowed to wait until after sale and confirmation and present the matter upon appeal from judgment of confirmation. *Gilkey v. Blanton*, 792.

§ 30i (2). Presumption of Satisfaction of Instrument After Fifteen Years.

Where a deed of trust is executed subsequent to the effective date of Chap. 192, Public Laws of 1923, and the note thereby secured falls due more than fifteen years prior to plaintiffs' purchase of the property, and no affidavit is filed or marginal entry is made on the record by the register of deeds as required by the statute, plaintiffs are entitled to have the deed of trust removed in so far as it constitutes a cloud on their title. *Thomas v. Myers*, 234.

§ 35c. Parties Who May Purchase—Cestuis.

The evidence tended to show that the *cestui* instructed the trustee to foreclose the deed of trust and to have someone bid in the property for him, and that at the sale the person selected by the trustee did bid in the property for the *cestui*. *Held:* An instruction to the effect that as a matter of law the bidder was an agent of the trustee and the sale voidable, is error, since a *cestui* is entitled to buy at the foreclosure sale in the absence of fraud or collusion, and therefore can do so through an agent. *Graham v. Graham*, 565.

MUNICIPAL CORPORATIONS.

§ 5. Municipal Powers in General.

A municipal corporation has the powers prescribed by statute and those necessarily implied by law, and no other. G.S. 160-1. *Green v. Kitchin*, 450.

The implied powers of a municipality are those which are necessarily or fairly implied in or incident to the powers expressly granted, or essential to the accomplishment of the purposes of the corporation. *Ibid.*

A municipality has governmental powers as an agency of the State and private or proprietary powers as a municipal corporation. *Ibid.*

The courts will not interfere with the exercise of discretionary powers conferred on municipal corporations for the public welfare unless their action is so clearly unreasonable as to amount to an oppressive and manifest abuse of discretion. *Ibid.*

§ 7. Governmental Powers.

The town of Weldon is given explicit authority both by its charter and by the general law to appoint and employ police to maintain law and order within its borders. *Green v. Kitchin*, 450.

And has implied power to provide special training for policeman. *Ibid.*

Duty to maintain law and order within its boundaries is governmental function as agency of the State, in the performance of which it exercises portion of State's delegated sovereignty. *Ibid.*

§ 10. Proceedings, Orders and Resolutions of Governing Board.

The action of the governing body of a municipality in authorizing an expenditure of funds for a necessary municipal expense sanctioned by statute will be deemed tantamount to a determination and declaration that

MUNICIPAL CORPORATIONS—*Continued.*

the expense is necessary in that particular municipality, and its action will not be held illegal on the ground that the resolution authorizing the expense failed to declare that the proposed expenditure is necessary in the particular locality or made such declaration in a defective manner. *Green v. Kitchin*, 450.

§ 11½b. Employees—Police Officers.

It is a matter of common knowledge, of which the Supreme Court will take judicial notice, that a competent policeman must have special knowledge as to his duties and how they may be performed, which must be acquired either through experience or special training, and that the proficiency of even an experienced officer can be enhanced by proper instruction. *Green v. Kitchin*, 450.

§§ 16, 22. Form and Requisites of Municipal Contracts; Rights of Parties Under Void Contract.

Where a party has performed work for a municipality under a contract involving more than $1,000.00 which was let without advertisement as required by G.S. 143-129, the contract is void and he may not recover thereon, but he is entitled to recover on the principle of *quantum meruit* the reasonable and just value for material and labor so furnished of which the town received the benefit. *Hawkins v. Dallas*, 561.

§ 25a. Control and Use of Municipal Property.

Persons having no title or interest in certain property may not enjoin a municipality from using such property for a recognized municipal purpose on the ground that such use would constitute a nuisance, since the municipality has the power of eminent domain and relief for any depreciation in value of plaintiff's contiguous property would be by action for damages and not injunction. *McLeod v. Wrightsville Beach*, 621.

§ 25b. Streets and Sidewalks.

The evidence in this case *is held* to support the court's finding that the land in question does not constitute a portion of a street of defendant municipality. *McLeod v. Wrightsville Beach*, 621.

§ 37. Zoning Ordinances and Building Permits.

The power of the governing body of the City of Charlotte to zone, both under the ordinance and the statute, is non-delegable, and therefore the municipal Board of Adjustment has no power to authorize a type of business or building prohibited by the municipal zoning ordinance. *James v. Sutton*, 515.

The municipal zoning ordinance in question provided that only structures intended "to be used in whole or in part for any of the following specified purposes" should be erected or altered, and then gave in succeeding sections those enterprises which were permitted and those which were prohibited. *Held:* The language "to be used in whole or in part" is controlling, and the ordinance does not require that property be used exclusively for the purposes specifically authorized in order to be permitted. *Ibid.*

Petitioner sought a building permit for the erection of a candy factory and a candy retail sales room. The zoning ordinance in question permitted the erection of buildings in the zone to be used in whole or in part for

MUNICIPAL CORPORATIONS—*Continued.*

retail of articles manufactured on the premises provided such use was not injurious to adjacent premises by reason of the emission of dust, fumes, smoke, etc. *Held:* The enterprise is not prohibited by the ordinance, and the Board of Adjustment should determine the application on its merits upon the basis of the good faith of petitioner's intention to use a substantial part of the structure for retail sales, and as to whether the manufacture and wholesale marketing of candy would be injurious to adjacent premises or in conflict with the general intent and purpose of the ordinance. *Ibid.*

§ 39. Police Powers—Regulations Relating to Public Safety and Health.

Statutory traffic regulations do not prevent proper municipal traffic ordinances, but the State regulations govern the operation of motor vehicles on State highways, including city streets which constitute a portion thereof, and municipal regulations to the extent of any conflict therewith are invalid. *Lee v. Chemical Co.*, 447.

A municipal ordinance prohibiting the handling of venomous and poisonous reptiles in such manner as to endanger the public health, safety and welfare, will not be held invalid upon defendants' contention that the ordinance interferes with the exercise of their religious practices. *S. v. Massey*, 734.

§ 41. Municipal Charges and Expenses.

The power of a municipality to appropriate money is governed by the same criterions as its taxing power, among which is that an expenditure must be for a public purpose. *Green v. Kitchin*, 450.

The explicit power of a municipality to appoint and employ police contemplates that the persons so engaged be qualified and competent, and therefore a municipality has implied authority, exercisable within the discretion of its governing body, to send its policemen to a police training school and to make proper expenditures for this purpose. *Ibid.*

Fact that policeman may not remain in service after receiving special training does not affect character of expenditure as one for public purpose, but only advisability of expenditure. *Ibid.*

§ 42. Levy and Collection of Taxes.

The power granted the City of Greensboro by Sec. 50, Chap. 37, Private Laws of 1923, to impose franchise taxes is not limited by Sec. 203 (5), Chap. 45, Public Laws of 1933 (G.S. 105-116 (6)), to the amount of municipal franchise taxes levied at the time of the enactment of the general statute, since the general statute imposes the limitation upon "privilege or license" taxes, which in its context does not include franchise taxes, it being apparent that the Legislature would have used the term "franchise" *eo nomine* if it had intended to include franchise taxes within the limitation. *Power Co. v. Bowles*, 143.

NEGLIGENCE.

§ 4d. Repair and Condition of Buildings.

Evidence that plaintiff slipped and fell upon a waxed or polished floor and that her heel left a "deep furrow" or "skid mark" on the floor, is insufficient to overrule defendant's motion to nonsuit in the absence of

evidence that any unusual material was used on the floor or that it had been applied in an improper, unusual or negligent manner, since *res ipsa loquitur* does not apply. *Barnes v. Hotel Corp.*, 730.

§ 4e. Obstructions and Condition of Lands.

Plaintiff was injured while leaving her seat on a grass covered bank or ramp in a baseball park, by a route other than the one she used in going to her seat, when she stepped into a hole some two inches deep and eight or ten inches long or stepped on a soft drink bottle or rock, and fell to her injury. *Held:* The operators of the park could not be expected to maintain the embankment free from roughness or unevenness or slight depressions and nonsuit was properly entered in her action against the proprietors. *Patterson v. Lexington*, 637.

§ 4f (2). Duties and Liability of Patron to Invitees.

Where a grass covered bank or ramp is customarily or frequently used by spectators at a baseball park, persons so using the ramp are invitees of the operators. *Patterson v. Lexington*, 637.

The operators of a baseball park are under duty to their patrons to exercise due care to prevent injury which reasonably could have been foreseen, and to give warning of hidden perils or unsafe conditions ascertainable by reasonable inspection. *Ibid.*

An innkeeper is required only to exercise due care to keep his premises in a reasonably safe condition and to give his guests warning of any hidden peril. *Barnes v. Hotel Corp.*, 730.

§ 7. Intervening Negligence.

Primary negligence is insulated by the independent negligence of another if such intervening negligence and resultant injury is not reasonably foreseeable by the person guilty of the primary negligence. *Warner v. Lazarus*, 27; *Shaw v. Barnard*, 713.

§ 9. Proximate Cause—Foreseeability.

The law requires only reasonable prevision, and foreseeability is a prerequisite of proximate cause. *Warner v. Lazarus*, 27; *Shaw v. Barnard*, 713.

The complaint alleged that intestate, while in a drunken condition, was wrongfully ejected from one bus and that shortly thereafter he was run over while attempting to cross the heavily traveled street as the result of the negligent operation of a bus of another carrier. *Held:* The driver of the original bus was not under duty to anticipate the intervening independent negligence of the driver of the other bus, and the complaint fails to state a cause of action in tort against the original carrier. *Shaw v. Barnard*, 713.

§ 11. Contributory Negligence in General.

Contributory negligence imports contribution rather than independent or sole proximate cause, and bars recovery if it contributes to the injury as a proximate cause or one of them. *Noah v. R. R.*, 176.

Contributory negligence is an affirmative defense which defendant must plead and prove. *Bundy v. Powell*, 707.

NEGLIGENCE—*Continued.*

§ 12. Contributory Negligence of Minors.

Issue of contributory negligence of eight year old boy, fatally injured when he ran across highway after alighting from school bus, *held* for jury. *Hughes v. Thayer,* 773.

§ 19c. Nonsuit on Issue of Contributory Negligence.

It is only when the plaintiff proves himself out of court that nonsuit may be entered on the issue of contributory negligence. *Barlow v. Bus Lines,* 382.

Nonsuit on the ground of contributory negligence is proper when plaintiff's own evidence establishes this defense, G.S. 1-183, but it may not be entered when it is necessary to rely in whole or in part upon defendant's evidence, or when diverse inferences upon the question are reasonably deducible from plaintiff's evidence. *Bundy v. Powell,* 707.

§ 20. Instructions in Negligent Injury Actions.

An instruction on the issue of contributory negligence that the burden is on defendant to satisfy the jury by the greater weight of the evidence not only that plaintiff was negligent but that his negligence was the proximate cause of the injury *is held* reversible error in omitting the question of concurring negligence. *Noah v. R. R.,* 176.

PARENT AND CHILD.

§ 3b. Liability of Parent for Negligent Injury to Child.

The rule that a minor child may not recover against his father for negligent injury does not preclude the child from recovering from the father's employer on the principle of *respondeat superior* for negligence committed by the father as employee, and *a fortiori* the employer comes under the rule when the negligence arises out of a breach of special duties and obligations to the public existing by reason of the business in which he is engaged. *Wright v. Wright,* 503.

Recovery by an infant on the principle of *respondeat superior* against his father's employer for injury resulting from the father's negligence does not permit recovery by the minor against his father indirectly, since any action brought by the employer against the father would not be upon the principle of subrogation to the minor's right but for breach of the agency contract by the father in not observing the requisite standard of faithfulness owed the employer. *Ibid.*

§ 8. Right of Parent to Recover for Injuries to Child.

Where, in an action by a minor to recover for negligent injury, brought by his father as next friend, the pleadings and theory of trial seek recovery by plaintiff, as elements of damage, medical expenses and loss of earnings during plaintiff's minority, the father waives his right to recover and would be estopped from thereafter maintaining an action therefor even though the father is not a party of record, and therefore the failure of the court to exclude these items as elements of damages will not be held for error on defendant's exception taken after verdict. *Pascal v. Transit Co.,* 435.

PARTIES.

(Demurrer for misjoinder of parties and causes see Pleadings.)

§ 4½. Parties Representative of Class.

Testatrix bequeathed property in trust with direction that the income therefrom be paid to hospitals of the State for the benefit of charity patients in proportion to the charity patient load of the participating hospitals. *Held:* In an action to construe the will, the class of beneficiaries was properly represented by representative hospitals located throughout the State, and the Attorney-General as representative for the State Hospitals. G.S. 1-70. *Trust Co. v. McMullan*, 746.

§ 10a. Joinder of Additional Parties.

Where a fire destroys the property of a number of parties, each injured party has a separate and independent cause of action, and in a suit by one of them, defendant is not entitled to compel the joinder of the others, either in equity or at law, for the purpose of avoiding a multiplicity of suits. *Fleming v. Light Co.*, 397.

§ 12. Deletion of Parties.

Where a person has been brought into a suit upon a compulsory order, and such party is neither a necessary nor a proper party to the suit, it is entitled to have its name stricken upon motion. *Fleming v. Light Co.*, 397.

PARTITION.

§ 1c (1). Actual Partition.

A tenant in common, without the knowledge or authorization of his co-tenants, contracted to sell the timber on the entire tract. *Thereafter* he joined his co-tenants in a timber deed to another person. *Held:* Provision of the judgment that if the vendee elected to purchase the timber covered by the contract, there should be actual partition of the timber between the vendee and the grantee, is upheld. *Chandler v. Cameron*, 62.

§ 5b. Burden of Proof in Actions for Partition.

Where defendants in partition deny co-tenancy and plead sole seizin the burden is upon plaintiffs to show title in the parties by tenancy in common. *Johnson v. Johnson*, 541.

Defendants' answer denied plaintiffs' allegation of co-tenancy and pleaded sole seizin. Plaintiffs, by reply, alleged the existence, probate and registration of a deed from the common source of title to one of defendants, and alleged that the deed was a forgery, and prayed that it be declared null and void. *Held:* The nonexistence of the deed is essential to the establishment of plaintiffs' claim of tenancy in common, and that the instrument had been duly signed, sealed and delivered is a rebuttable presumption arising from the fact of probate and registration, and therefore plaintiffs have the burden of proving that the deed was a forgery in order to establish their claim or cause of action. *Ibid.*

PARTNERSHIP.

§ 6. Individual Liability of Partners.

Where the evidence tends to show that upon the formation of a partnership to carry on the construction business theretofore operated by one

PARTNERSHIP—*Continued.*

of the parties, the partners agreed to take over the assets of the old business and to continue the business in the new trade name and pay the accounts then outstanding, nonsuit is improperly entered in favor of the new member in an action to recover for material taken over by the partnership and subsequently used in construction projects of the partnership, since if the new partner is not liable on the theory of partnership, he is liable on his specific agreement, supported by valuable consideration, to assume liability for the outstanding accounts, upon which contract the material furnisher may sue as a third party beneficiary. *Coleman v. Mercer*, 245.

PAYMENT.

§ 2. Payment by Note or Check.

Check is conditional payment, and upon dishonor, title to property purchased therewith at cash sale remains in seller. *Parker v. Trust Co.*, 527.

PHYSICIANS AND SURGEONS AND ALLIED PROFESSIONS.

§ 1. Validity and Construction of Regulatory Statutes.

The statutes recognize the distinction between the practice of osteopathy and the practice of medicine and surgery. *S. v. Baker*, 73.

Osteopathy is a system of healing without the use of medicine, drugs or surgery. *Ibid.*

A licensed osteopathic physician exceeds the limits of his certificate and is guilty of practicing medicine without being licensed and registered if he administers or prescribes drugs in treating the ailment of his patients. *Ibid.*

A "drug" within the meaning of the rule that an osteopath may not administer or prescribe drugs in treating his patients, is any substance used as a medicine or in the composition of medicines for internal or external use, irrespective of whether it contains poisonous ingredients or is purchasable without a physician's prescription, and the definition includes patent or proprietary remedies. *Ibid.*

An osteopath does not practice medicine in advising a client to feed her baby a designated brand of canned milk, since milk is a food and not a drug. *Ibid.*

Whether a vitamin preparation is a drug or a food depends upon whether or not it is administered or employed as a medicine, which is ordinarily a question of fact. *Ibid.*

Laxatives and tonics are "drugs" within the meaning of the law prohibiting an osteopath from prescribing or administering drugs. *Ibid.*

An osteopath may administer violet ray treatments to his patients without violating statute. *Ibid.*

The giving of a hypodermic injection is "administering" a drug. *Ibid.*

The giving of oral directions to the patient directly or indirectly by telephone directions to the druggist for the use or application of recommended remedies is "prescribing" drugs, even though the remedies are patent or proprietary remedies purchasable without a prescription. *Ibid.*

Mere statutory declarations that certain acts constitute the practice of optometry is ineffectual when such acts do not constitute the practice of optometry within the statutory definition thereof. *Palmer v. Smith*, 612.

PHYSICIANS AND SURGEONS AND ALLIED PROFESSIONS—*Continued.*

G.S. 90-115 proscribing a person not a licensed optometrist from replacing or duplicating an ophthalmic lens or replacing or duplicating the frame or mounting for such lens, is unconstitutional, since the acts proscribed do not constitute the practice of optometry as defined by G.S. 90-114, and the proscription has no reasonable relation to the public health, safety or welfare. *Ibid.*

§ 8. Prosecution for Practicing Medicine Without License.

In a prosecution of an osteopath for practicing medicine without a license, the State does not have the burden of showing that the administration or prescription of medicines with which defendant is charged was not taught in the recognized colleges of osteopathy. The statutory definition of osteopathy as "the science of healing without the use of drugs" is not enlarged by the words, "as taught by the various colleges of osteopathy," since the limitation perforce relates to the study of that particular system of healing and could not include any other system regardless of the curricula of such colleges. G.S. 90-129. *S. v. Baker*, 73.

Evidence that defendant osteopath prescribed and administered drugs to patients for fee *held* to justify peremptory instruction of guilty of practicing medicine without license. *Ibid.*

§ 13. Compensation and Remedies of Physician.

Compensation Act provides exclusive remedy for determination of dispute as to charges for medical services rendered injured employee, and physician may not maintain suit in Superior Court to recover therefor. *Worley v. Pipes*, 465; *Matros v. Owen*, 472.

PLEADINGS.

§ 2. Joinder of Actions.

Creditors cannot join their actions on independent claims against common debtor when action is not in nature of creditors' bill. *Davis v. Whitehurst*, 226.

The consolidation of actions for convenience of trial is a matter resting in the sound discretion of the trial court, and the rules governing the exercise of the discretionary power of consolidation are inapplicable to the joinder of actions, which, while under the supervision of the court, is done on the initiative of the parties and is subject to the restrictions provided by G.S. 1-123. *Horton v. Perry*, 319.

Defendants filing a cross-action are bound by the statutory restrictions relating to joinder of causes. *Ibid.*

Where a fire destroys the property of a number of parties, each injured party has a separate and independent cause of action, and in a suit by one of them, defendant is not entitled to compel the joinder of the others, either in equity or at law, for the purpose of avoiding a multiplicity of suits. *Fleming v. Light Co.*, 397.

A single action in tort for negligence may be maintained against two or more defendants only when the plaintiff relies on the doctrine of *respondeat superior* or the defendants are joint tort-feasors. *Shaw v. Barnard*, 713.

§ 3a. Statement of Causes of Action in General.

The rule that a complaint must be liberally construed upon a demurrer does not mean that the pleader may dispense with the certainty required

PLEADINGS—*Continued.*

at common law, since defendants have the right to know the grounds upon which they are charged with liability in order to prepare their defense, of which right they may not be deprived under the guise of liberal construction. *King v. Coley*, 258.

When plaintiff seeks to recover in one action on two or more causes of action, he must state each cause of action separately, setting out in each the facts upon which that cause of action rests. G.S. 1-123; Rule of Practice in the Supreme Court, No. 20 (2). *Ibid.*

The right to recover is determined by the allegations of the complaint. *Myers v. Allsbrook*, 786.

§ 5. Prayer for Relief.

The fact that plaintiffs make no specific demand for judgment against one of defendants does not preclude recovery against such defendant when the facts alleged are sufficient to support recovery and there is a general prayer for relief, since the right to recover is not dependent upon the prayer for relief but upon the allegations and proof. *Griggs v. York-Shipley*, 572.

§ 10. Counterclaims and Cross-Actions.

The purpose and intent of G.S. 1-123 (1), relating to causes which may be joined, and G.S. 1-137 (1), relating to causes which may be pleaded as counterclaims, are substantially the same, *i.e.*, to permit the trial in one action of all causes of action arising out of one contract or transaction connected with the same subject of action, and therefore decisions on one of the statutes is authority on the other. *Hancammon v. Carr*, 52.

Under G.S. 1-137 (1), a cause of action *ex delicto* may be pleaded as a counterclaim to an action *ex contractu* provided it arises out of the same transaction or is connecteed with the same subject of action. *Ibid.*

While a cause of action may be pleaded as a counterclaim if it arises out of the transaction or series of transactions constituting the basis of the cause alleged in the complaint, it is necessary that there be but one subject of controversy and that the counterclaim be so related to plaintiffs' claim that adjustment of both is necessary to a full and final determination of the controversy, and mere historical sequence or the fact that a connected story may be told of the whole, is not alone sufficient. *Ibid.*

A cause of action in tort may be pleaded as a counterclaim to an action on contract only if it rests upon some wrong or breach of duty committed by plaintiffs in making or performing the contract. *Ibid.*

Plaintiffs cashed a check for the payee upon his endorsement and gave the payee in exchange merchandise and money. The maker of the check stopped payment on it, and plaintiffs procured a warrant charging the maker with issuing a worthless check. The prosecution was *nol prossed* on appeal from the recorder's court. Plaintiffs then instituted this action to recover on the check. *Held:* Defendant maker is not entitled to set up a cross-action for abuse of process. *Ibid.*

Defendants filing a cross-action are bound by the statutory restrictions relating to joinder of causes. *Horton v. Perry*, 319.

Plaintiff, riding in a wagon drawn by mules, was injured when a car traveling at a high speed struck the car immediately following the wagon, causing it to collide with the wagon. Plaintiff instituted suit against

PLEADINGS—*Continued.*

the drivers and owners of both cars. The owner of the car which was immediately following the wagon filed a cross-action for damages to his car against the owner and driver of the other car, who demurred to the cross-action. *Held:* The demurrer to the cross-action should have been sustained. *Ibid.*

Cross-action must be germane to subject matter in litigation and be necessary to complete determination of plaintiff's cause. *Fleming v. Light Co.*, 397.

Alleged false arrest sequent to an automobile collision is improperly joined by defendant as a cross-action in plaintiff's action to recover damages sustained as a result of the collision. *Vestal v. White*, 414.

§ 12. Verification.

Where a verified complaint is filed and defendants file a verified answer, the fact that an amended answer, which merely amplifies the defense of the original answer, is not verified, does not justify the court in disregarding the defense. *Calaway v. Harris*, 117.

Plaintiff, filing verified complaint in an action in the nature of an action to quiet title, waives verification of the answer by filing reply and allowing the matter to go to two hearings before the referee and failing to interpose objection until after an adverse referee's report. G.S. 1-144. *Ibid.*

The statutory provision that when one pleading is verified every subsequent pleading, except a demurrer, must also be verified, G.S. 1-144, may be waived except in those cases where the form and substance of the verification is made an essential part of the pleading, G.S. 50-8; G.S. 98-14; G.S. 153-64. *Ibid.*

§ 15. Office and Effect of Demurrer.

The question of the sufficiency of the complaint to state a cause of action must be presented by demurrer. *Rhodes v. Asheville*, 355.

A demurrer admits allegations of fact but not conclusions of law drawn therefrom by the pleader. *Green v. Kitchin*, 450.

A demurrer tests the sufficiency of the allegations of the complaint, admitting for the purpose their truth, to state any cause of action for which plaintiff may demand relief, and the demurrer should be overruled unless there is fatal defect either in want of sufficient averment to state a cause, or because of positive allegations showing that the supposed grievance is not actionable. *Sabine v. Gill*, 599.

§ 18. Frivolous Demurrers.

Where a demurrer points out a fatal defect in the complaint a motion to strike the demurrer on the ground that it is frivolous is without merit. *Davis v. Whitehurst*, 226.

§ 19b. Demurrer for Misjoinder of Parties and Causes.

An action by several creditors on independent claims against a common debtor, which is not in the nature of a creditors' bill, is properly dismissed upon demurrer for misjoinder of parties and causes of action. *Davis v. Whitehurst*, 226.

If a complaint states separate causes of action in tort against each of two groups of defendants and not a joint tort, dismissal upon demurrer for misjoinder of parties and causes is proper, since severance is not permissible and the defect is fatal. *Shaw v. Barnard*, 713.

PLEADINGS—*Continued.*

Where the complaint seeks to allege a cause of action against each of two groups of defendants as joint tort-feasors, but fails to state a cause of action against one group of defendants, dismissal upon demurrer for misjoinder of parties and causes is error, but the action should be dismissed as to the first group of defendants and reinstated for trial as against the other group. *Ibid.*

§ 22b. Amendment by Permission of Court.

A party will not be allowed to amend his complaint so as to engraft on the action a cause which arose after the institution of the suit and after the hearing in the trial court. *Nance v. Winston-Salem*, 732.

§ 24a. Variance Between Allegations and Proof in General.

The complaints allege causes of action in favor of the several plaintiffs based upon negligence of defendants in serving plaintiffs poisonous and contaminated food. Upon failure of plaintiffs to make out a case of negligence, the court submitted the actions to the jury on the theory of breach of implied warranty. *Held:* Defendants should not be held liable in damages on a cause of action of which they had not been given prior notice and an opportunity to prepare their defense, and the verdict and judgment is vacated upon appeal. *King v. Coley*, 258.

Recovery by a plaintiff must be based upon the facts alleged in her complaint, and a recovery upon a theory entirely independent of that stated in the complaint cannot be allowed to stand. *McCullen v. Durham*, 418.

§ 27. Motions for Bill of Particulars or to Make Pleading More Definite and Certain.

Ordinarily, motion to make pleading more definite is addressed to discretion of trial court. *Lowman v. Asheville*, 247.

In the absence of indication to the contrary, it will be presumed that the trial court's denial of a motion to make a pleading more definite was in the exercise of his decision. *Ibid.*

The denial of a motion to make a pleading more definite does not preclude defendant from applying for a bill of particulars. G.S. 1-150. *Ibid.*

§ 28. Nature and Grounds for Judgment on the Pleadings.

Judgment on the pleadings may not be entered in an independent action attacking a judgment for intrinsic fraud, since the proper remedy to set aside the judgment is by motion in the cause. *Bass v. Moore*, 211.

Judgment on the pleadings cannot be properly entered in action in ejectment when, even granting plaintiffs' position, they would not be entitled to immediate possession. *Ibid.*

Where, in an action by a contractor to recover the balance due upon completion of the work, the guaranty company which executed the contractor's performance bond is made a party and files answer alleging that it is entitled to the fund under the contractor's valid assignment of the contract to reimburse it for loss sustained on another performance bond executed for the contractor, it is error for the court to strike the answer and render judgment on the pleadings for the contractor, since the answer raises issues of fact which must be determined before the rights of the parties can be adjudicated. *Wike v. Guaranty Co.*, 370.

PLEADINGS—*Continued.*

Where in an action to cancel an award under a common law arbitration, the complaint alleges that plaintiffs withdrew from the arbitration after notice before the award was made, defendants cannot be entitled to judgment on the pleadings. *Brown v. Moore*, 406.

§ 30. Motions to Strike—Time of Motion, Discretionary and Legal Right.

When a motion to strike matter from a pleading is made in apt time it is made as a matter of right and not of discretion. *Fleming v. Light Co.*, 397.

§ 31. Determination of Whether Matter Should Be Stricken on Motion.

In an action on a note, answer alleging want of consideration, fraud in the procurement, and notice to plaintiffs, holders, of the defects in the instrument at the time it was acquired by them, *held* improperly stricken on plaintiffs' motion. *Hancammon v. Carr*, 52.

In a suit by a consumer to recover damages to his property from a fire allegedly caused by the negligence of defendant power company, the power company alleged that the fire resulted from the negligence of the consumer in the installation and maintenance of equipment on the consumer's property, over which the consumer had sole control, and for a further defense, that the fire caused damage to the property of others and that under its contract with the consumer, the consumer obligated himself to indemnify the power company for any loss to it resulting from the consumer's negligence. The power company had the insurance companies which had paid the losses of such third parties brought in as parties defendant, and prayed for recovery against the consumer under the indemnity agreement or as joint tort-feasor for any amount which the insurance companies might recover against it on subrogated claims. *Held:* The further defense is not germane to the cause of action alleged in the complaint and such defense and the prayer for relief-thereon should have been stricken on plaintiff's motion. *Fleming v. Light Co.*, 397.

The granting of plaintiff's motion to strike a cross-action not properly pleadable in the action is without error, since the allegations of such cross-action are irrelevant and immaterial to plaintiff's cause. *Vestal v. White*, 414.

PRINCIPAL AND AGENT.

§ 4. Termination of the Relationship—Death.

Death of the principal terminates the authority of the agent. *Parker v. Trust Co.*, 527.

§ 10. Liability of Principal for Torts of Agent.

The owner of a taxicab is under duty of observing due care in its operation of which duty he cannot divest himself by employing another to operate the automobile in the prosecution of his business, and the owner will be held liable for the negligence of the driver in such instance under the principle of *qui facit per alium, facit per se. Wright v. Wright*, 503.

Act of agent in swearing out warrant for purpose of punishment and not to enforce principal's regulations is beyond scope of authority. *Pridgen v. Coach Co.*, 46.

§ 13c. Relevancy and Competency of Evidence of Agency.

The agent's authority to bind his principal cannot be shown by the acts or declarations of the agent. *Pridgen v. Coach Co.*, 46.

PROCESS.

§ 2. Issuance and Time of Service.

Where more than ten days has elapsed since the issuance of summons, officers have no authority to serve summons or any process in the action issued without notice. *In re Walters*, 111.

§ 8a. Service on Foreign Corporations—Service on Process Agents.

It is not required that a person in this State who receives money for a foreign corporation in the course of business must be an employee or agent of the corporation in order for service of process on such person to be effective. *Townsend v. Coach Co.*, 523.

It is not required that the designation of persons as agents for the purpose of service of process on foreign corporations must be factually agents or employees of the corporation provided the statutory designation of process agents has reasonable relevancy to the end sought. *Ibid.*

QUIETING TITLE.

§ 1. Nature and Grounds of Remedy.

Where a deed of trust is executed subsequent to the effective date of Chap. 192, Public Laws of 1923, and the note thereby secured falls due more than fifteen years prior to plaintiffs' purchase of the property, and no affidavit is filed or marginal entry is made on the record by the register of deeds as required by the statute, plaintiffs are entitled to have the deed of trust removed in so far as it constitutes a cloud on their title. *Thomas v. Myers*, 234.

§ 2. Proceedings.

If title becomes involved in a processioning proceeding, the proceeding becomes in effect an action to quiet title, and no defense bond is required in such action. G.S. 41-10. *Roberts v. Sawyer*, 279.

In an action to remove cloud on title, defendant's contention that plaintiff could not attack the sheriff's deed pursuant to execution under which he claims because plaintiff did not claim through or under the judgment debtor, is untenable when defendant files a cross-action or counterclaim asserting his title under the execution as against plaintiff in her capacity as widow of the judgment debtor. *McCullen v. Durham*, 418.

QUO WARRANTO.

§ 2. Quo Warranto Proceedings.

Admissions by relator that each challenged elector was duly registered and that his absentee ballot was in proper form raise a presumption of correctness, and the burden is on relator to show the contrary. *Owens v. Chaplin*, Appendix, 797.

Doubtful statements of electors on the question of whether they had been sworn by the attesting officer when they signed the statutory affidavits accompanying their absentee ballots is insufficient to overcome the presumption of regularity arising from the certificate of the notary, the stipulation of the parties that their absentee ballots were in proper form, and the testimony of the attesting officer called as a witness by relator, and therefore the evidence is insufficient to justify a finding that relator had established their disqualification. *Ibid.*

QUO WARRANTO—*Continued.*

Upon challenge of absentee ballots, the question is the right of the challenged electors to vote and not the conduct of election officials, and if permissible, misconduct on their part will excuse rather than condemn any irregularity on the part of the electors. *Ibid.*

The relator is bound by the testimony of electors called by relator as witnesses. *Ibid.*

Where relator having the burden of establishing alleged nonresidence of electors in the face of his admissions that they were properly registered and that their absentee ballots were in proper form, calls the electors as witnesses, their testimony disclosing that they were residents of the county at the time of registering and voting is binding on relator, and there being no evidence *contra*, the evidence fails to support the findings of the referee or the trial court that they were disqualified on the ground of nonresidence. *Ibid.*

RAILROADS.

§ 4. Accidents at Crossings.

New trial awarded for error in charge in stating that contributory negligence of driver must be proximate cause rather than one of proximate causes. *Noah v. R. R.*, 176.

Plaintiff's evidence that his intestate looked and listened before entering on track and that car stalled because crossing was not kept in repair *held* to preclude nonsuit on ground of contributory negligence notwithstanding defendant's photographic evidence that crossing was in good condition and that view of approaching train was not obstructed. *Bundy v. Powell*, 707.

RAPE.

§24. Elements of Offense of Assault with Intent to Commit Rape.

In order to constitute an assault with intent to commit rape there must not only be an assault but also an intent on the part of the defendant to gratify his passion notwithstanding any resistance on the part of his intended victim. *S. v. Heater*, 540.

§ 25. Prosecutions for Assault with Intent to Commit Rape.

Evidence in this case *held* sufficient to be submitted to the jury upon the charge of assault upon a female with intent to commit rape. *S. v. Heater*, 540.

In a prosecution for an assault with intent to commit rape it is error for the court to refuse to give, in substance at least, defendant's requested instruction, based upon his testimony, to the effect that he would not be guilty if he desisted immediately prosecutrix resisted his advances. *Ibid.*

RECEIVING STOLEN GOODS.

§ 4. Presumptions and Burden of Proof.

Recent possession of stolen property, without more, raises no presumption in a prosecution for receiving stolen goods with knowledge that they had been feloniously stolen, G.S. 14-71, and an instruction that recent possession raised no presumption of guilt but raised a presumption of fact to be considered by the jury in passing upon the guilt or innocence of defendant, must be held for reversible error. *S. v. Larkin*, 126.

RECEIVING STOLEN GOODS—*Continued.*

§ 6. Sufficiency of Evidence and Nonsuit.

Evidence in this case *held* sufficient to be submitted to the jury upon the charge of receiving stolen property with knowledge that it had been feloniously stolen. *S. v. Larkin*, 126.

REFERENCE.

§ 14a. Preservation of Right to Jury Trial.

Excepting to the order of compulsory reference and excepting to findings of fact of the referee and the filing of exceptions to the report of the referee and tendering issues and demanding a jury trial "upon said issues raised by the exceptions" *is held* sufficient to preserve the right to trial by jury upon the issues tendered. *Cherry v. Andrews*, 333.

REGISTRATION.

§ 1. Instruments Required to Be or Which May Be Registered.

Contracts to convey realty, including contracts to convey standing timber, are required to be registered, G.S. 47-18, but the statute does not require or authorize the registration of a mere personal contract. *Chandler v. Cameron*, 62.

§ 4. Registration as Notice.

Registration is constructive notice as to all instruments authorized to be registered, but is not constructive notice of provisions not coming within the registration laws, even though embodied in an instrument required to be recorded. *Chandler v. Cameron*, 62.

The written contract executed by a tenant in common without the knowledge or authorization of his co-tenants, to sell the timber on the entire tract, was recorded. The tenant in common later acquired an additional interest in the land. *Held:* Registration is constructive notice to all subsequent purchasers as to the tenant's original interest, but the vendee's right to demand conveyance of the timber as to the after-acquired interest rests upon the personal contract of the vendor, which is not required to be recorded by G.S. 47-18, and therefore registration is not notice to subsequent purchasers as to such after-acquired title. *Ibid.*

ROBBERY.

§ 1a. Nature and Elements of the Crime.

Robbery is the taking, with intent to steal, of the personal property of another, from his person or in his presence, without his consent or against his will, by violence or intimidation. *S. v. Lunsford*, 229.

§ 3. Prosecution and Punishment.

In a prosecution for robbery the court should charge that the taking of the property must be with a specific intent on the part of the taker to deprive the owner of his property permanently and to convert it to his own use, and an instruction merely that the taking must be with felonious intent is insufficient. *S. v. Lunsford*, 229.

Testimony of defendants in a prosecution for robbery that they took the pistol from prosecuting witness to prevent him from harming them

ROBBERY—*Continued.*

or some other person, requires the court to submit the question of each defendant's guilt of simple assault to the jury as a lesser offense included in the crime charged, G.S. 15-169; G.S. 15-170, since such verdict would be justified in the event the jury should find that defendants took the pistol without intent to steal it, but were not warranted in doing so on the principle of self-protection. *Ibid.*

SALES.

§ 11. Transfer of Title as Between Parties.

Where the cash sale of an automobile and transfer of title is effected upon receipt of a check from the purchaser, as between the parties, the check is conditional payment and the transfer of title is conditioned upon collection of the check, and upon the dishonor of the check no title passes and the property remains the property of the sellers. *Parker v. Trust Co.*, 527.

SCHOOLS.

§ 9e. Application and Use of School Property and Funds.

Article IX, sec. 5, of the N. C. Constitution sets apart school property and revenue for the support of the public school system and proscribes the diversion of such property and revenue to any other purpose. *Boney v. Kinston Graded Schools*, 136.

The maintenance of an athletic field and playground is a proper use of school funds, since physical training is a legitimate function of education. *Ibid.*

Transfer of school property to coterminous municipality held not diversion in view of statutory and contractual obligation that property be used for school athletics. *Ibid.*

The bond order in question set out in detail the estimates and projects for which the funds were proposed to be used in discharge of the constitutional requirement of a six months school term within the municipal administrative unit. *Held:* G.S. 153-107 does not preclude the board of county commissioners, upon its finding, after investigation, of changed conditions, to reallocate the proceeds of the bonds to different projects upon its further finding, after investigation, that such reallocation of the funds is necessary to effectuate the purpose of the bond issue. G.S. 115-83. *Atkins v. McAden*, 752.

The question of changing the location of a school house, as well as the selection of a site for a new one, is vested in the sound discretion of the school authorities, which discretionary power is not subject to control by the courts except for manifest abuse of discretion or improper motives on the part of the school authorities, but all expenditure for the construction, repair and equipment of school buildings in the county must be authorized by the county commissioners. G.S. 115-85. *Ibid.*

§ 10b. Requisites and Validity of Bond Issues.

A bond order must set forth one of the purposes enumerated in G.S. 153-77, but it is not required that it set out in detail the estimates of cost and descriptions of the particular projects for which the funds are proposed to be used, and their inclusion does not limit the allocation of the proceeds of the bonds, provided the use of the funds falls within the general purpose designated. G.S. 153-78, G.S. 153-107. *Atkins v. McAden*, 752.

SPECIFIC PERFORMANCE.

§ 1a. Contracts Specifically Enforceable and Parties Against Whom Remedy Lies.

A written contract to convey standing timber is specifically enforceable as between the parties without registration, and after registration is specifically enforceable even against subsequent purchases for value. *Chandler v. Cameron*, 62.

§ 1c. After Acquired Title.

Where a tenant in common, without knowledge or authorization of his co-tenants, executes a written contract to convey standing timber on the whole tract, and later acquires title to an additional interest in the land, he is estopped, as against his vendee, from asserting the after-acquired title which is inconsistent with that which he had contracted to convey, and the vendee is entitled to specific performance under the contract as against the vendor not only as to the vendor's original interest, but as to the after-acquired interest as well. *Chandler v. Cameron*, 62.

But is not entitled to specific performance as to the after acquired title against the vendor's grantee without notice. *Ibid.*

STATUTES.

§ 5a. General Rules of Construction.

In construing a statute it will be assumed that the Legislature comprehended the import of the words employed by it to express its intent. *S. v. Baker*, 73.

Where a statute is ambiguous, resort must be had to judicial construction to ascertain the legislative will. *Young v. Whitaker Co.*, 360.

In construing a statute the court should consider the language of the statute, the mischief sought to be avoided and the remedies intended to be applied. *Ibid.*

If the words of a statute permit, the court should not adopt a construction which will lead to unjust, oppressive or absurd consequences. *Ibid.*

A statute must be construed as written, and while it is subject to judicial construction it may not be amended by judicial interpretation. *Sabine v. Gill*, 599.

§ 13. Repeal by Implication and Construction.

Repeal by implication is not favored, and a general statute which has no repealing clause will not repeal a prior local statute unless the legislative intent to supersede the prior statute is clear. *Power Co. v. Bowles*, 143.

TAXATION.

§ 1c. Classification of Property and Transactions for Taxation.

Classification of businesses and transactions for taxation are unassailable when the description of the classes is reasonably definitive and clear and the classification is reasonable and not arbitrary. *Henderson v. Gill*, 313.

§ 3. Limitation of Increase of Indebtedness Without Vote.

The vote on the question of issuance of bonds for a necessary expense is not against the registration, and a favorable vote of the majority of those voting in the election is sufficient to validate the bond resolution and

TAXATION—*Continued.*

authorize the issuance and sale of the proposed bonds. *Mason v. Comrs. of Moore*, 626.

§ 4. Necessary Expenses.

What are necessary expenses of a municipality is a question of law for the determination of the courts, and whether a given project is necessary or needed in a designated municipality is for the determination of the governing authorities of the municipality in the exercise of their discretion. *Green v. Kitchin*, 450.

A muncipal corporation has the governmental function of maintaining law and order within its boundaries as a governmental agency of the State, and in the performance of such function exercises a portion of the State's delegated sovereignty, and therefore an expense for this purpose is a necessary expense and may be incurred without a vote of the people. *Ibid.*

Complaint in action to recover funds expended by municipality for special training of policeman, upon allegation that expenditure was not for necessary municipal expense *held* demurrerable, since what are municipal expenses is question of law not admitted by demurrer, and municipal authorization is tantamount to declaration that expenditure was necessary in that particular locality. *Ibid.*

§ 5. Public Purpose.

A tax or an appropriation is for a public purpose if it is for the support of the government, or for any of the recognized objects of the government. N. C. Constitution, Art. V, sec. 3. *Green v. Kitchin*, 450.

An expenditure by a municipality for special training of a police officer has for its object the maintenance of law and order, and therefore is for a public purpose. *Ibid.*

The fact that moneys are paid to an individual does not affect the character of the expenditure, since the object of the expenditure and not to whom paid determines whether it is for a public purpose. *Ibid.*

§ 11. Formal Requisites of Bond Issue.

A bond order must set forth one of the purposes enumerated in G.S. 153-77, but it is not required that it set out in detail the estimates of cost and descriptions of the particular projects for which the funds are proposed to be used, and their inclusion does not limit the allocation of the proceeds of the bonds, provided the use of the funds falls within the general purpose designated. G.S. 153-78, G.S. 153-107. *Atkins v. McAden*, 752.

§ 14. Definition and Distinctions Between License and Franchise Taxes.

While the term "privilege tax" includes franchise taxes as well as license taxes, a franchise is a special kind of privilege constituting a property right, which is ordinarily transferable and exclusive, and involves the use of public facilities. *Power Co. v. Bowles*, 143.

The word "privilege" is too broad, *per se*, as a classification for taxation, but is usually particularized into licenses and franchises in classifying businesses for taxation, and as used in our taxing statutes the term "privilege tax" does not ordinarily include franchise taxes. *Ibid.*

§ 23½. Construction of Taxation Statutes in General.

In an action to recover taxes paid under protest, the taxing statute will be construed strictly against the taxing agency in the enumeration of

classes subject to the tax, but the burden is upon the taxpayer to show that he comes within an exemption or exception. *Henderson v. Gill*, 313.

While double taxation is not favored, it is not *ipso facto* unconstitutional, and will be upheld when the intention to impose it is clear and its imposition is not discriminatory. *Sabine v. Gill*, 599.

While the coverage of a taxing statute must be construed against the State, the burden is on the taxpayer to show that he comes within an exception or exemption, and the State will never be presumed to have surrendered or relinquished its taxing power unless the intention to do so is expressed in clear and unambiguous terms, admitting of no other reasonable construction. *Ibid.*

§ 24. Situs of Property for Purpose of Taxation.

Where a resident of this State is a beneficiary of income derived from a business carried on by active trustees in another state, each state may constitutionally tax the income from the business, the other state against the trustees as the *situs* of its earning and this State against the beneficiary as the *situs* of its reception and residence of the recipient. *Sabine v. Gill*, 599.

§ 27. Levy and Assessment of Corporate Franchise and Excess.

The power granted the City of Greensboro by Sec. 50, Chap. 37, Private Laws of 1923, to impose franchise taxes is not limited by Sec. 203 (5), Chap. 445, Public Laws of 1933 (G.S. 105-116 (6)), to the amount of municipal franchise taxes levied at the time of the enactment of the general statute, since the general statute imposes the limitation upon "privilege or license" taxes, which in its context does not include franchise taxes, it being apparent that the Legislature would have used the term "franchise" *eo nomine* if it had intended to include franchise taxes within the limitation. *Power Co. v. Bowles*, 143.

§ 29. Levy and Assessment of Income Taxes.

In order for a resident taxpayer to be entitled to deduct income derived from a business situated in another state from his income taxable by this State, the taxpayer must show that he has a business or investment in such other state, that the income therefrom is taxable in that state, and that the quesioned income is derived from such business or investment. *Sabine v. Gill*, 599.

Where business of estate is managed by active trustees, resident beneficiary of income is liable for tax thereon notwithstanding state of situs collected income tax on the business. *Ibid.*

§ 30. Levy and Assessment of Sales Taxes.

Flowers grown upon the vendors' own land are farm products within the meaning of the exemption of such products from the N. C. Sales Tax. *Henderson v. Gill*, 313.

Plaintiffs operated a florist shop and sold therein flowers grown by themselves on their own land and also flowers purchased from wholesalers. *Held:* The sale of flowers grown by them on their own land is not exempt from the N. C. Sales Tax, since even though such flowers be regarded as farm products, such sales were made by plaintiffs in their character and capacity as florists and not as farmers or producers. *Ibid.*

TAXATION—*Continued.*

§ 34. Duties and Authority of Collecting Agents.

Plaintiff florists were advised by a collector of the Department of Revenue that sales of flowers grown on their own land were not subject to sales tax. Subsequently the Department of Revenue forced payment of sales tax on such sales and plaintiffs entered this suit to recover the tax paid under protest. *Held:* Even though plaintiffs are unable to collect sales tax from the purchasers on the past transactions and under the statute were merely agents for the collection of the taxes, and even though the acquiescence of the Commissioner of Revenue in the sales tax reports should be considered equivalent to an administrative interpretation of the statute, the State is not estopped by the misdirection and laches, since the collection of taxes is a governmental function and plaintiffs' agency in the collection of the taxes was one of law with fixed liability to account for the tax imposed. *Henderson v. Gill*, 313.

TORTS.

§ 4. Determination of Whether Tort Is Joint or Several.

In order for parties to be joint tort-feasors they must either act together in committing the wrong or their tortious acts must unite in causing a single injury. *Shaw v. Barnard*, 713.

Plaintiff alleged that his intestate, while drunk, was wrongfully ejected from a bus by one carrier and that shortly thereafter, while attempting to cross the heavily traveled street, he was run over and fatally injured through the negligent operation of a bus of another carrier. *Held:* The complaint does not state a cause of action against the parties as joint tort-feasors. *Ibid.*

§ 5. Liabilities of Joint Tort-Feasors to Person Injured.

Where plaintiffs seek no affirmative relief against a codefendant joined by the original defendant for the purpose of enforcing contribution against it as a joint tort-feasor, it is error for the court to enter joint and several judgments in favor of plaintiffs against both defendants upon the jury's finding that both were guilty of actionable negligence, since the liability of the codefendant is solely to the original defendant on its claim for contribution. G.S. 1-240. *Pascal v. Transit Co.*, 435.

§ 6. Right to Contribution Among Joint Tort-Feasors and Joinder.

Where plaintiff does not demand any relief against a codefendant joined by the original defendant as a joint tort-feasor, the burden is on the original defendant to prove its cross-action for contribution, and upon motion of the codefendant for nonsuit on the cross-action the evidence must be considered in the light most favorable to the original defendant upon that cause. G.S. 1-240. *Pascal v. Transit Co.*, 435.

Evidence of concurring negligence *held* sufficient on issue. *Ibid.*

G.S. 1-240 provides that a tort-feasor sued by the injured person may bring in joint tort-feasors as parties defendant, but the statute does not authorize a party sued for negligent injury to join injured third persons upon its allegation that plaintiff was a joint tort-feasor in causing the calamity resulting in injury to himself and such third parties, and thus force such injured third parties to prosecute their claims in plaintiff's action. *Fleming v. Light Co.*, 397.

TORTS—*Continued.*

§ 8a. Validity of Release—Fraud and Duress.

Evidence of conversations by the parties subsequent to the execution of the release signed by plaintiff is impertinent to the issue of fraud in the procurement of the execution of the release, and is properly stricken upon motion. *Harrison v. R. R.*, 92.

A person is under duty to read an instrument executed by him, and where he has the ability and opportunity to read the instrument he may not attack it for alleged misrepresentation as to its contents in the absence of fraud or oppression. *Ibid.*

Plaintiff was injured in the course of his employment by defendant. Plaintiff's evidence disclosed that defendant's agent stated that defendant would pay only hospital and medical expenses, that after debate over the matter for two or three weeks, plaintiff signed an instrument without reading it in reliance on the agent's representation that it was solely for the purpose of admitting him to the hospital. The instrument was a release from liability in consideration of defendant's agreement to pay all hospital and medical bills in connection with treating the injury. Defendant paid all hospital and medical expenses in accordance with the agreement. *Held:* The evidence discloses that plaintiff had knowledge of the nature of the instrument, and is insufficient to show fraud in the procurement of the release. *Ibid.*

Where plaintiff's reply alleges that defendant's agent represented that plaintiff would not be admitted to the hospital at defendant's expense unless "plaintiff executed a form which was the release mentioned in said answer," the allegation is tantamount to an averment that plaintiff knew the instrument was a release, and negates any fraud in the *factum*. *Ibid.*

Ordinarily a release may not be avoided on the ground that the injury did not yield to treatment as readily as was thought or anticipated at the time the release was executed. *Ibid.*

TRIAL.

§ 7. Argument and Conduct of Counsel.

While wide latitude is allowed counsel in his argument to the jury, counsel may not travel outside the record and inject into his argument facts of his own knowledge or other facts not included in the evidence, and when he does so, it is the duty of the presiding judge upon objection to correct the transgression. *Cuthrell v. Greene*, 475.

Ordinarily the failure of a party to testify in a civil action raises no presumption against him, but where the evidence is such as to call for testimony by the party in contradiction of the adverse party's direct testimony, the failure of such party to testify is a circumstance to be considered by the jury, and is a proper subject of fair comment by counsel. *Ibid.*

Failure of court to correct agreement of counsel outside record *held* prejudicial. *Cuthrell v. Greene*, 475.

§ 8. Conduct and Acts of Parties and Witnesses.

While ordinarily the failure of a party to testify in a civil action raises no presumption against him, where the evidence is such as to call for a denial by him of direct testimony, the failure to testify is a proper subject of comment in the argument, and a circumstance to be considered by the jury. *Cuthrell v. Greene*, 475.

TRIAL—*Continued.*

§ 11. Consolidation of Actions for Trial.

Plaintiff, riding in a wagon drawn by mules, was injured when a car traveling at a high speed struck the car immediately following the wagon, causing it to collide with the wagon. Plaintiff instituted suit against the drivers and owners of both cars. *Held:* A cross-action by the owner of the car immediately following the wagon to recover damages to the car against the owner who was driving the other car could not be properly consolidated with the plaintiff's action, since such cross-action constitutes an independent action between defendants unconnected with plaintiff's cause of action. *Horton v. Perry*, 319.

§ 16½. Later Admission of Testimony Initially Excluded.

Exceptions to the exclusion of competent testimony become immaterial when it appears that the court subsequently revised his rulings and admitted the testimony. *Poole v. Gentry*, 266.

§ 21. Motions to Nonsuit—Time of Making and Renewal.

Motion to nonsuit must be renewed at close of all the evidence. *Hawkins v. Dallas*, 561.

§ 22a. Consideration of Plaintiff's Evidence on Motion to Nonsuit.

Upon defendant's motion to nonsuit, plaintiff's evidence must be considered in the light most favorable to him. *Perry v. Hurdle*, 216; *Garrett v. Garrett*, 290; *Bundy v. Powell*, 707; *Hughes v. Thayer*, 773.

Upon co-defendant's motion to nonsuit cross-action for contribution, evidence on cross-action must be considered in light most favorable to original defendant. *Pascal v. Transit Co.*, 435.

§ 22b. Consideration of Defendant's Evidence on Motion to Nonsuit.

On motion to nonsuit, defendant's evidence may be considered in so far as it tends to explain or make clear plaintiff's evidence. *Perry v. Hurdle*, 216.

The defendant's evidence in contradiction to that of plaintiff is not to be considered in determining the sufficiency of the evidence to overrule nonsuit. *Taylor v. Hodge*, 558; *Bundy v. Powell*, 707.

§ 22c. Contradictions and Discrepancies in Plaintiff's Evidence.

Discrepancies and contradictions, even in plaintiff's evidence, do not warrant nonsuit. *Barlow v. Bus Lines*, 382.

§ 23a. Sufficiency of Evidence to Overrule Nonsuit in General.

When diverse inferences may reasonably be drawn from the evidence, nonsuit is improper, since the weight of the evidence is for the jury and not the court. *Barlow v. Bus Lines*, 382; *Pascal v. Transit Co.*, 435.

§ 24a. Nonsuit on Affirmative Defense.

Defendant cannot be entitled to nonsuit on an affirmative defense upon evidence offered by him, but nonsuit on an affirmative defense is proper only when plaintiff's evidence establishes the defense, since regardless of the weight and clarity of defendant's evidence upon the issue, the credibility of the evidence remains for the determination of the jury. *MacClure v. Ins. Co.*, 305; *Barnes v. Trust Co.*, 409.

TRIAL—*Continued.*

§ 28. Office and Effect of Motion for Directed Verdict.

In order to test the sufficiency of defendant's evidence upon an affirmative defense, plaintiff must move for a directed verdict on that issue, the burden thereon being upon defendant, and in the absence of such motion exception on appeal to the submission of the issue on the ground that it was not supported by evidence will not be considered. *Coach Co. v. Motor Lines*, 650.

§ 30. Directed Verdict in Favor of Defendant.

Upon defendants' demurrer to the evidence and defendants' motion for a peremptory instruction, the evidence is to be considered in the light most favorable to plaintiff and she is entitled to every fact and every inference of fact reasonably deducible therefrom. *Garrett v. Garrett*, 290.

Where the wife offers no evidence that the conveyance of her property to a third person by deed executed by herself and husband, and the reconveyance by such third person to the husband was for the purpose of conveying her property to him by indirection, it is error for the court to refuse the prayer of the opposing party for a directed verdict against her on the issue of the invalidity of the transaction because of the failure of her deed to comply with G.S. 52-12, since a verdict is properly directed against a party upon whom rests the burden of proof when such party fails to offer evidence upon the issue. *McCullen v. Durham*, 418.

§ 31b. Statement of Evidence and Application of Law Thereto.

G.S. 1-180, requires the trial court to instruct the jury as to the law upon all substantial features of the case without request for special instructions, and a general statement of the law is not sufficient, but the court must explain the law as it relates to the various aspects of the evidence adduced and to the particular issues involved. *Lewis v. Watson*, 20.

In this action by vendees to rescind the contract of sale for fraud, the charge of the court *is held* not to contain sufficiently definite instructions on the issue of damages to guide the jury to an intelligent determination of the issue, and a new trial is awarded. *Kee v. Dillingham*, 262.

In this action for assault, the battleground was the credibility of plaintiff's testimony, defendant not having gone upon the stand or offered his answer in evidence. The court inadvertently charged that defendant said and contended he had not assaulted plaintiff and that he had denied same in his answer. *Held:* Construing the charge contextually and in the light of the evidence on plaintiff's appeal, the inadvertence did not amount to reversible error. *Stewart v. Dixon*, 737.

§ 31d. Charge on Burden of Proof.

Inadvertent use of phrase "beyond a reasonable doubt" in charging on burden of proof in civil action *held* cured by court's action in recalling jury, explicitly withdrawing erroneous instruction and giving correct charge. *Wyatt v. Coach Co.*, 340.

§ 37. Issues—Conformity to Pleadings and Evidence.

Where it is not alleged that the conveyance of the wife's property by the husband and wife to a third person and the reconveyance by such third person to the husband was for the purpose of conveying her property to him by indirection, the question of the invalidity of the transaction be-

TRIAL—*Continued.*

cause the notary taking the acknowledgment of the wife failed to certify that the deed was not unreasonable or injurious to her does not arise upon the pleadings, and it is error for the court to submit issues relating thereto to the jury. *McCullen v. Durham*, 418.

§ 48½. Setting Aside Verdict in General.

Action of trial court in setting aside verdict as motion of law is reviewable. *McCullen v. Durham*, 418.

§ 49. Motions to Set Aside Verdict as Being Contrary to Evidence.

Motion to set aside the verdict on the ground that it is against the weight of the evidence is addressed to the sound discretion of the trial court. *King v. Byrd*, 177; *Coach Co. v. Motor Lines*, 650.

§ 49½. Motions to Set Aside Verdict for Inadequate or Excessive Award.

A motion to set aside the verdict for excessiveness is addressed to the sound discretion of the trial court and is not ordinarily reviewable on appeal. *Edmunds v. Allen*, 250; *Garrett v. Garrett*, 290.

§ 55. Trial by Court by Agreement—Findings of Fact.

Where the parties consent to trial by the court without a jury, G.S. 1-184, the findings of the court are as conclusive as a verdict of the jury if supported by competent evidence. *Poole v. Gentry*, 266.

TROVER AND CONVERSION.

§ 1. Nature and Essentials of Cause of Action.

Unauthorized sale of property of another constitutes a conversion, and the owner may elect to sue for the recovery of the specific property or he may ratify the sale and sue to recover the proceeds thereof, unless estopped. *Parker v. Trust Co.*, 527.

TRUSTS.

§ 2a. Creation and Validity of Parol Trust.

Grantee may not engraft parol trust on his deed absolute in form regardless of whether consideration recited was paid or not. *Bass v. Bass*, 171; *McCullen v. Durham*, 418.

§ 2b. Actions to Establish Parol Trust.

Plaintiff alleged that her employer changed the beneficiary in a policy of insurance on his life to another employee under an agreement, understood, discussed and acquiesced in by all parties, that upon his death such other employee would pay out of the proceeds of such insurance the balance due on a mortgage on plaintiff's home, and thus recompense both employees for services faithfully rendered. *Held:* The action is one to establish a parol trust and not one to recover on a promise by the employer to answer for the debt of plaintiff, and therefore G.S. 22-1 has no application. *Cuthrell v. Greene*, 475.

Plaintiff employee instituted this action against another employee upon an agreement under which the employer made defendant employee the beneficiary in a policy of insurance on his life with the understanding that defendant would pay out of the proceeds of the insurance the balance due

on a mortgage on plaintiff employee's house. *Held:* Questions asked plaintiff on cross-examination by defendant's attorney as to whether she was not seeking to hold defendant for a debt owed plaintiff by the deceased employer are irrelevant to the issue of the existence of a parol trust, and plaintiff was prejudiced by the refusal of the court to sustain her objections thereto. *Ibid.*

Plaintiff employee instituted this action against another employee upon an agreement under which the employer made defendant employee the beneficiary in a policy of insurance on his life with the understanding that defendant would pay out of the proceeds of the insurance the balance due on a mortgage on plaintiff's house. *Held:* Questions asked plaintiff's husband on cross-examination by defendant's counsel as to whether he did not know that the proceeds of policies of insurance could not be charged with the debts of the deceased insured, are irrelevant to the issue of the existence of a parol trust, and objection to the questions should have been sustained. *Ibid.*

§ 3a. Written Trusts—Requisites and Validity in General.

Heirs at law executed an instrument conveying the *locus* in trust for the purpose of investing the fee simple title in the son of one of them upon the death of the last trustor, and reserved to each of them the privilege of occupying and enjoying the premises for life. The instrument was found among the valuable papers of one of the heirs, who was also one of the trustees. *Held:* The deceased heir had an interest in the property entitling him to possession of the deed after its execution and delivery, and therefore the fact that it was found after his death among his valuable papers raises no presumption of nondelivery. *Cannon v. Blair*, 606.

Heirs at law executed an instrument conveying the *locus* in trust for the purpose of investing the fee simple title in the son of one of them after the death of the last trustor, and reserved to each heir the right to occupy and enjoy the premises during his life. *Held:* The instrument constituted a trust indenture to hold the property intact, to provide a homeplace for the heirs during their lives, and to enable the child of one of them to eventually receive the entire estate, and therefore the instrument was supported by a valuable consideration, especially as to the heir whose son was to eventually receive the property. *Ibid.*

§ 4b. Transactions Creating Resulting Trusts.

Grantee may not engraft parol trust in his favor on his deed absolute in form in absence of fraud or mistake. *Bass v. Bass*, 171.

But party may establish parol trust upon showing that he furnished consideration and that grantee agreed to hold title for his benefit. *Ibid.*

Burden of establishing such trust is by clear, strong and convincing proof. *Ibid.*

§ 5b Transactions Creating Constructive Trusts.

A son who murders his parents acquires legal title to property of which they die intestate, but equity will impress upon the legal title a constructive trust in favor of those who would have taken if the murderer had predeceased his parents in order that he may not receive any benefit as a result of his own crime. *Garner v. Phillips*, 160.

TRUSTS—*Continued.*

The fact that statutory provision that a murderer forfeits all interest in the estate of his victim is applicable only to the relation of husband and wife, G.S. 28-10; G.S. 30-4; G.S. 52-19; does not deprieve equity of the power of declaring an heir who has murdered his ancestor a constructive trustee for the benefit of those who would have taken if the murderer had predeceased the intestate. *Ibid.*

§ 11. Title and Rights of Parties.

A conveyance of land to trustees for the erection of a church to belong to a denomination, to have and to hold to them and their successors in office forever in trust for the erection of a place of worship for the use of members of the denomination, takes the title in trust for the use of the denomination, G.S. 61-3, and therefore members of the congregation of the church so erected who withdraw affiliation from the denomination, even though they be a majority of the congregation, are not entitled to the control and use of the property as against the denomination, irrespective of whether the particular church is congregational or connectional. *Western N. C. Conference v. Tally*, 1.

§ 14b. Power and Authority of Trustee in General.

Testatrix devised the residuary estate to trustees with direction to pay the income therefrom to hospitals of the State for benefit of charity patients upon the basis of the number of charity patients cared for by participating hospitals, the decision of the trustees in respect thereto to be final. *Held:* The trustees have power to set up a reserve out of the income to be used in accordance with their judgment as conditions affecting the trust may require, to determine in the exercise of their discretion who are charity patients within the intent and meaning of the will, as well as what is a hospital, and which hospitals of the State should receive said benefits. *Trust Co. v. McMullan*, 746.

UTILITIES COMMISSION.

§ 1. Nature and Functions in General.

The Utilities Commission is an administrative agency of the State with *quasi*-judicial powers. *Greyhound Corp. v. Utilities Com.*, 31.

§ 5. Appeal and Review.

Judicial determinations by the Utilities Commission are subject to review in accordance with the procedure provided by statute, and an independent action for mandatory injunction against the Utilities Commission in regard to its orders affecting a franchise will not lie as a substitute for appeal. *Greyhound Corp. v. Utilities Com.*, 31.

The statutory procedure for appeal from orders of the Utilities Commission is exclusive, and must be exhausted before resort to the courts. *Ibid.*

VAGRANCY.

§ 2. Prosecution and Punishment.

A warrant charging defendant with living in the county without visible means of support and without working, is insufficient to charge defendant with vagrancy. *S. v. Harris*, 413.

VENDOR AND PURCHASER.

§ 23. Remedies of Purchaser—Specific Performance.

A written contract to convey standing timber is specifically enforceable as between the parties without registration, and after registration is specifically enforceable even against subsequent purchases for value. *Chandler v. Cameron*, 62.

A tenant in common, without authorization or knowledge by his co-tenants, executed a written contract to convey standing timber upon the entire land. This contract was registered. Thereafter the tenant acquired an additional interest in the land, and he and his co-tenants executed to another party deed for the timber. The grantee in the timber deed had no actual knowledge of the prior contract to convey. *Held:* As to the tenant's original interest, his vendee is entitled to specific performance as against the grantee in the timber deed, but as to the after-acquired title, the vendee is not entitled to specific performance as against the grantee. *Ibid.*

VENUE.

§ 1e. Venue of Actions Against Corporations.

A foreign corporation which has domesticated here, G.S. 55-118, may sue and be sued under the rules and regulations which apply to domestic corporations, and is entitled to have an action against it, instituted by a non-resident, removed to the county of its main place of business in this State. *Hill v. Greyhound Corp.*, 728.

WAIVER.

§ 1. Matters Which May Be Waived.

Statutory provisions enacted for the benefit of a party litigant, as distinguished from those for the protection of the public, may be waived, expressly or by implication. *Callaway v. Harris*, 117.

WILLS.

§ 6. Statutory Wills—Signature of Testator.

It is not required that testator sign the will in the presence of the attested witnesses. G.S. 31-3. *In re Will of Etheridge*, 280.

§ 9½. Holographic Codicils.

Where a duly attested typewritten will has interlineations in the body thereof and a paragraph added at the end thereof in the handwriting of testatrix, and the instrument is again signed by her, and the written words are sufficient in themselves to express testamentary intent and manifest no intent to revoke the will as a whole, and are not so inconsistent with the provisions of the will as to constitute a revocation, the written portions will be upheld as a holograph codicil to the will upon proper proof of the handwriting of the testatrix and that the instrument was found among papers regarded by testatrix as valuable. *In re Will of Goodman*, 444.

§ 15a. Proof of Will and Probate Proceedings.

A paper-writing must be executed and proven in strict compliance with the statutory requirements in order to be effective as a testamentary disposition of property. *In re Will of Puett*, 8.

WILLS—*Continued.*

Notice to interested parties is not necessary to the probate of a will in common form. *Ibid.*

§ 16. Effect of Probate in Common Form and Attack of Probate.

The probate of a will in common form in accordance with statutory requirements, may be set aside upon motion after notice where it is clearly made to appear that the court was imposed upon or misled, but otherwise the probate is conclusive and cannot be collaterally attacked, and the paper-writing stands as the last will and testament until declared void in a direct proceeding in the nature of a caveat. *In re Will of Puett*, 8.

Where a paper-writing has been duly probated in common form, offer of proof of a will alleged to have been subsequently executed by the testatrix is a collateral attack, and the clerk is without jurisdiction to set aside the probate upon such proof. *Ibid.*

Language in a judgment susceptible to an interpretation that a probate of a will in common form could be attacked by proffered proof of a later will, will be stricken on appeal upon exception. *Ibid.*

§ 17. Nature of Caveat Proceedings in General.

A caveat proceeding is not a civil action but a special proceeding *in rem* for the determination of the single question of *devisavit vel non*. *In re Will of Brock*, 482.

The distinction between a caveat proceeding and other controversies or adversary civil actions is one of substance as well as of form. *Ibid.*

§ 18a. Parties to Caveat Proceedings in General.

Parties to whom citations must issue in a caveat proceeding are only those who are entitled under the will or interested in the estate, G.S. 31-32, G.S. 31-33, and who are parties interested in the estate must be determined in view of the nature of the proceeding as one *in rem*. *In re Will of Brock*, 482.

Persons to whom citations must issue in a caveat proceeding are not cited as parties, but merely as interested persons to view proceedings and participate if they elect so to do. G.S. 31-33. *Ibid.*

In a caveat proceeding, neither the grantees in deeds executed by testator prior to his death nor the persons to whom such grantees have conveyed the property, either before or after testator's death, nor the heirs at law of deceased grantees are necessary parties to the determination of the issue of *devisavit vel non* when such persons are not beneficiaries under the will nor heirs of testator, and therefore, even if it be conceded they are proper parties, the trial judge, in the exercise of his discretion, is under no legal obligation to order citations to bring them in. *Ibid.*

Where the executrix has fully administered the estate and filed her final account prior to the filing of a caveat, and has died pending the caveat proceeding, it is not necessary that the court appoint a personal representative for the deceased executrix nor an administrator *d. b. n.* for the estate of the testator. *Ibid.*

§ 25. Instructions in Caveat Proceedings.

In this caveat proceeding the court charged the jury that it was necessary for testator to have signed the will in the presence of the attesting witnesses. *Held:* The instruction must be held for reversible error not-

withstanding the court's instruction to answer the issue as to the formal execution of the will in the affirmative if the jury believed the evidence, since the erroneous instruction may have influenced the jury in answering the issue in the negative. *In re Will of Etheridge*, 280.

§ 31. General Rules of Construction of Wills.

In construing a will, the object is to ascertain the intent of the testator as gathered from his language, giving consideration to every part of the instrument. *Hornaday v. Hornaday*, 164.

In construing a will it is to be assumed that the testator understood the provisions of the instrument. *Ibid.*

While a will must be construed from its four corners or contextually, this rule of construction does not require courts to disregard the division of the instrument into sentences and paragraphs or to give a strained construction contrary to the grammatical sense of the words and form as ordinarily used by intelligent people for the expression of thought and intention. *Ward v. Black*, 221.

The cardinal rule in the interpretation of a will is to ascertain the intent of the testator as gathered from the four corners of the instrument, and to give effect to such intent unless contrary to some rule of law or in conflict with public policy. *Wheeler v. Wilder*, 379.

§ 33b. Application of Rule in Shelley's Case.

The rule in *Shelley's case* is a rule of law and of property. *Ratley v. Oliver*, 120.

A devise to a person and his heirs takes a fee simple to the devisee under the rule in *Shelley's case* unless it is apparent from the language of the instrument that the word "heirs" is used to describe particular persons or a particular class rather than heirs generally. *Ibid.*

A devise to R "for his natural life, and at his death to his nearest bodily heirs" takes a fee simple to R under the rule in *Shelley's case*, since "nearest heirs," standing alone, denote an indefinite succession of lineal descendants who are to take by inheritance. *Ibid.*

Testator devised an estate for life to his wife and then an estate to his nephew to have and to hold during his lifetime and after his death "to be inherited by nearest heir in the Wheeler family." Wheeler was the surname of both the testator and the nephew. *Held:* Construing the will as a whole, it is apparent that "nearest heir in the Wheeler family" referred to heir of testator and not the nephew, and the rule in *Shelley's case* is inapplicable. Since it appears that testator had collateral heirs who might inherit, the nephew cannot convey the fee simple. *Wheeler v. Wilder*, 379.

§ 33c. Vested and Contingent Interests and Defeasible Fees.

A contingent remainder cannot vest during the life of the life tenant, even though the life estate be declared forfeited, since the remainder cannot vest until the happening of the contingency. *Bass v. Moore*, 211.

In one paragraph of the will in suit the testator specified certain bequests to named beneficiaries. By subsequent paragraph he stipulated that after the payment of the debts and expenses of the estate and the bequests to the legatees set forth in the prior paragraph, naming them, the residue of the estate should be equally divided among named beneficiaries, with further provision that in the event of the death of any of "the above

WILLS—*Continued.*

named prior to the distribution of my estate" the share of the deceased legatee should be paid as stipulated. *Held:* The legacies set out in the first paragraph vested in the legatees at the time of the testator's death, and the provision that the legacy should lapse in the event a legatee died prior to the distribution of the estate applied only to those named in the residuary clause. *Ward v. Black*, 221.

A devise to testator's son with proviso that should he die without children, his interest should revert to testator's other children, constitutes a fee simple, defeasible upon the death of the son without children him surviving. *Hales v. Renfrow*, 239.

§ 33i. Restraint on Alienation.

A devise to testator's son "to be held and owned by my said son . . . during the term of his natural life . . ." grants an alienable life estate to the son, the word "held" and the word "owned" as there used being merely definitive of the extent of the ownership and not a restraint upon alienation. *Hendley v. Perry*, 15.

§ 34a. Persons Who May Take as Devisees or Legatees.

Appellant contended that appellee had lost its corporate existence and therefore had no capacity to plead in the action or take as beneficiary under the will, and introduced its charter and certificate of the Secretary of State containing cancellation or restriction of its charter for nonpayment of franchise tax. Defendant appellee introduced certificate of the Secretary of State stating that the cancellation was done through error and purporting to correct the error. *Held:* The trial court was justified in rejecting appellant's contention. *Trust Co. v. School for Boys*, 738.

The evidence tended to show that an incorporated boys' school was a part of an institute which also operated a girls' college some few miles distant, that upon destruction of the school by fire the remainder of its property and its student body were removed to the site of the girls' school, but that it maintained the same activities as far as possible, and that the trustees of the boys' school continued to be elected separately. *Held:* The evidence is sufficient to support the court's finding that the school had kept its entity and had not lost its right to sue or to take property because of asserted merger with the girls' college. *Ibid.*

§ 34b. Designation of Devisees and Legatees.

The will in question bequeathed a certain sum "to Plumtree School at Plumtree, N. C." There was evidence that testatrix was interested in an incorporated denominational school which had been operated under this name in the town designated, but that prior to the execution of the will it had been amalgamated with another institution at another locality when its buildings burned. There was also evidence that the words "at Plumtree, N. C." were inserted after the first drafts approved by testatrix. *Held:* The evidence is sufficient to support a finding that the school was the intended beneficiary. *Trust Co. v. School for Boys*, 738.

§ 34c. Devises or Bequests to a Class.

The rule that where a testamentary gift is made to a class, without creation of a preceding estate, only those living or *en ventre sa mere* at the time of the death of the testator may take, *is held* to create a rebuttable

WILLS—*Continued.*

presumption only, which will yield to a contrary intention expressed by the testator so long as such intent is within the rule against perpetuities and is not prevented by any statutory rule of construction. *Cole v. Cole*, 757.

Testator devised realty together with the contents of the house thereon to his grandnephews "and any other children who may be born to" his nephew and his nephew's wife. *Held:* The beneficiaries are not limited to members of the class *in esse* or *en ventre sa mere* at the time of testator's death, but the devise is to all members of the class born to the persons specified as ancestors until the possibility of issue becomes extinct by the death of either of them, in accordance with the expressed intent of testator. *Ibid.*

Where a devise to a class embraces an executory devise to those who may later be born into the class, those living at the date of testator's death take in their representative capacity, and they are not required to account for rents and profits in the interim before the subsequent enlargement of the class by the birth of others, but the arrival of the newcomers has the effect of merely defeating their interest *pro tanto*. *Ibid.*

§ 39. Actions to Construe Wills.

The rule that the appellate court is bound by findings of fact when supported by evidence is applicable to findings based on evidence of extrinsic facts or circumstances admitted to clarify the intent or identity of the beneficiaries in an action to construe a will. *Trust Co. v. School for Boys*, 738.

§ 42. Lapsed Legacies.

Testatrix left her surviving a husband but no issue. A legatee, a sister of testatrix, predeceased testatrix. *Held:* Since the legatee would not have been a distributee had testatrix died intestate, the legacy lapsed unless the will expresses a contrary intent or such intent can be gathered therefrom construing it from its four corners. *Trust Co. v. Shelton*, 150.

Construing the will in suit from its four corners, it *is held* no intent that the legacy to testatrix' sister should not lapse upon the prior death of the sister is apparent, testatrix having made separate provision for her sister's children, and having provided in regard to other legacies for disposition of the property to specified persons in the event the legatee predeceased her, and having provided that the residuary estate should include bequests which should for any reason become inoperative or lapse. *Ibid.*

§ 44. Doctrine of Election Under Will.

Where the husband devises a life estate to his wife in lands held by them by entireties and also bequeaths to her all of his personal estate, the doctrine of election does not apply, and her heirs are not estopped from claiming the realty by her acts in qualifying as executrix and accepting the personal property. *Byrd v. Patterson*, 156.

§ 45b. Provision That One Devisee Might Purchase Land Devised to Another.

Testator devised the remainder of his realty to two daughters and one son, with provision that at the election of the daughters they might purchase the son's share for a stipulated sum, with further provision that if they elected to exercise the option, the money should be paid the son part

in cash and the balance to a trustee to be paid the son in ten annual installments. The son died prior to the exercise of the option. *Held:* The daughters are not entitled to exercise the option as against the son's executor. *Hornaday v. Hornaday*, 164.

§ 46. Title of Devisees and Right to Convey.

A deed executed by the devises owning the defeasible fee and the devisees owning the contingent limitation over, with joinder of their spouses and the testator's widow, conveys a good and indefeasible fee simple title to the property. *Hales v. Renfrow*, 239.

Where testator's widow and all of his children are named in the will to share alike in the residuary estate, a deed executed by all of them together with the spouses of the married children, conveys a fee simple to property acquired by testator after the execution of the will regardless of whether the residuary clause is sufficient to devise the property, since the grantors hold all right, title and interest to the property either under the residuary clause or as heirs at law. *Ibid.*

GENERAL STATUTES CONSTRUED.

(For convenience in annotating.)

G. S.

1-51. Where railroad company has power of eminent domain and action for compensation for lands taken by it is not instituted within time allowed, railroad gets right of way by statutory presumption. *R. R. v. Mfg. Co.*, 695.

1-69. A consumer sued a power company for damages resulting from fire of electric origin. The power company alleged that the consumer was guilty of contributory negligence in causing the fire. *Held:* The power company was not entitled to joinder of third persons whose property was injured by the fire. *Fleming v. Light Co.*, 397.

1-65. Contention that judgment was rendered against minor ward before sufficient time had elapsed after notice, *held* not supported by record. *Garner v. Phillips*, 160.

1-70. Action to construe will against hospitals of state designated as beneficiaries held properly maintained against representative hospitals and Attorney-General as representative of State's hospitals. *Trust Co. v. McMullan*, 746.

1-89. Officer has no authority to serve process issued without notice more than 10 days after issuance of summons. *In re Walters*, 111.

1-97 (1). "Process agent" need not be agent or employee of foreign corporation. *Townsend v. Coach Co.*, 523.

1-123. Plaintiff must state each of his causes of action separately. *King v. Coley*, 259. Where complaint alleges only cause for negligence in serving spoiled food, defendants should not be held liable on theory of breach of implied warranty. *Ibid.* Cross-action is governed by same restrictions governing joinder of causes. *Horton v. Perry*, 319. Car owners joined as joint *tort-feasors* may not set up cross-actions as between themselves. *Ibid.*

1-137 (1). In action on check, defendant may not set up counter-claim for abuse of process based upon arrest for issuing bad check. *Hancammon v. Carr*, 52.

1-139. Contributory negligence is affirmative defense which must be pleaded and proven. *Bundy v. Powell*, 707.

1-144. Plaintiff waives verification of answer by filing reply and allowing matter to go to hearing. *Calaway v. Harris*, 117.

1-150. Denial of motion to make pleading more definite does not prevent application for bill of particulars. *Lowman v. Asheville*, 247.

1-153. Ordinarily, motion to make pleading more definite is addressed to discretion of trial court. *Lowman v. Asheville*, 247.

1-176. Application for continuance should be supported by affidavit setting forth grounds. *S. v. Gibson*, 497. Denial of motion for continuance did not abridge constitutional rights under facts of this case. *S. v. Gibson*, 497.

1-180. Charge which fails to define careless and reckless driving or explain what constitutes proper lookout in relation to evidence is insufficient. *Lewis v. Watson*, 20. Mere reading of statutory speed regulations is insufficient. *Ibid.* In larceny prosecution, charge which fails to define "felonious intent" is insufficient. *S. v. Lunsford*, 229. Charge

GENERAL STATUTES CONSTRUED—*Continued.*

G. S.

held for error in failing to explain law arising on defendant's contentions supported by evidence. *S. v. Fain*, 644. Failure to charge upon law of circumstantial evidence when State relies mainly upon direct evidence, not error in absence of request. *S. v. Hicks*, 345. Officer purchased liquor for purpose of obtaining evidence. Instruction which gives impression that his credibility was enhanced by fact that he was officer in performance of duty, *held* error. *S. v. Love*, 99.

1-181. Oral request for instructions not relating to substantial and essential feature of case may be disregarded. *S. v. Hicks*, 345.

1-183. Nonsuit on affirmative defense is proper only when plaintiff's own evidence established the defense. *MacClure v. Casualty Co.*, 305. Nonsuit on ground of contributory negligence is proper only when this defense is established by uncontradicted evidence of plaintiff. *Bundy v. Powell*, 707.

1-184. Findings of fact by court, supported by evidence, have effect of verdict. *Griggs v. York-Shipley*, 573. Findings of court are conclusive when supported by any competent evidence. *Poole v. Gentry*, 266. Findings of court are not subject to review in absence of exceptions that findings were not supported by evidence. *Cannon v. Blair*, 606.

1-198. It is error for court to submit issue which does not arise on pleadings. *McCullen v. Durham*, 418.

1-207. Motion to set aside verdict as against weight of evidence is addressed to discretion of trial court. *King v. Byrd*, 177; *Coach Co. v. Motor Lines*, 650.

1-211; 1-212. Superior court has concurrent jurisdiction with clerk to enter and vacate judgments by default. *Moody v. Howell*, 198.

1-234. Upon failure of evidence that land acquired by judgment debtor within ten years of docketing was impressed with trust, lien attaches. *McCullen v. Durham*, 418.

1-240. Statute does not authorize party sued for negligence to join injured third parties upon allegation that plaintiff was joint tort-feasor with defendant in causing calamity resulting in injury to himself and injured third parties. *Fleming v. Light Co.*, 397. Upon motion of co-defendant to nonsuit cross-action against it by original defendant, evidence must be considered in light most favorable to original defendant. *Pascal v. Transit Co.*, 435.

1-272; 1-273; 1-274. Have no application in proceedings over which superior court has concurrent jurisdiction with clerk. *Moody v. Howell*, 198.

1-279; 1-280. Appeal entry of record is necessary to give Supreme Court jurisdiction. *Mason v. Comrs. of Moore*, 626.

1-282; 1-283. Appellant is under duty to redraft statement of case on appeal as modified by judge and submit it for judge's signature, and upon failure to do so there is no "case on appeal". *Western N. C. Conference v. Tally*, 1.

1-300; 1-299; 7-181. Appeal from municipal-county court not filed within ten days from notice of appeal in open court, but filed at next succeeding term of superior court, will not be dismissed when appellant is without fault. *Electric Co. v. Motor Lines*, 86.

1-358, 1-360. Prospective earnings are not subject to supplemental proceedings. *Finance Co. v. Putnam*, 555.

GENERAL STATUTES CONSTRUED—*Continued.*

G. S.

1-368. Employer cannot be held in contempt for paying salary to employee after service of order in proceedings supplemental to execution. *Finance Co. v. Putnam*, 555.

1-440.3; 1-440.11. Attachment may be issued only on one of grounds specified by statute, and grounds must be made to appear by affidavit. *Whitaker v. Wade*, 327.

1-440.36; 1-440.41; 1-440.45. While defendant may attack ground of attachment either prior to or at trial of main issue, damages for wrongful attachment may not be assessed at the trial, but may be assessed upon motion after judgment or by subsequent independent action. *Whitakers v. Wade*, 327.

4-1. Common law not abrogated or repealed by statute is in effect. *S. v. Sullivan*, 251.

6-20. In equitable proceedings, taxing of costs is in discretion of court. *Chandler v. Cameron*, 62.

8-49. Testimony should not be barred except in interest of clearly defined public policy or unless clearly prohibited by statute. *S. v. Davis*, 386.

8-54. Failure of defendant to testify should not be made subject of comment by court except to state that such failure does not create presumption against him. *S. v. McNeill*, 377.

9-1; 9-2; 9-7. Rejection of prospective jurors for want of character and intelligence is available to commissioners as general objection only when jury list is being prepared and not after names are in box. *S. v. Speller*, 67.

9-29; 9-30. Motion for special venire is addressed to discretion of trial court. *S. v. Strickland*, 201.

10-4. Certificate of notary establishes *prima facie* that electors had been sworn and had signed affidavits accompanying their absentee ballots. *Owens v. Chaplin*, 797.

14-7. One cannot be accessory after the fact to felony until such felony has been accomplished. *S. v. Williams*, 348.

14-57; 14-52. Burglary with explosives is punishable as for burglary in the second degree—imprisonment for life or for a term of years in the discretion of court. *In re McKnight*, 303.

14-71. Recent possession, without more, raises no presumption of receiving stolen goods with knowledge. *S. v. Larkin*, 126.

14-118; 14-394. Circumstantial evidence of guilt of blackmail and of transmitting threatening letters held sufficient. *S. v. Strickland*, 201.

14-184. In prosecution for fornication and adultery, person jointly charged, but who is no longer on trial, is competent as witness. *S. v. Davis*, 386.

14-304. It is competent for witness who has examined machines to testify as to their physical description and that they could be reconverted into coin operated slot machines. *S. v. Davis*, 552.

14-336. Warrant charging defendant lived in county without visible means of support and without working, is insufficient to charge crime. *S. v. Harris*, 413.

15-25, et seq. Officer has no authority to force way into home to serve process on third person without evidence that such third person is inmate of or is actually in house. *In re Walters*, 111.

GENERAL STATUTES CONSTRUED—*Continued.*

G. S.

15-46; 160-21. Police officer may arrest without warrant for misdemeanor committed in his presence, but should inform person arrested of the charge and immediately swear out warrant. *Perry v. Hurdle*, 216.

15-79; 1-458; 1-461. Personal property brought into State by nonresident is subject to attachment or garnishment unless he came into State by, or after waiver of, extradition. *White v. Ordille*, 490.

15-102; 15-105. Justice of the peace may take bail, either bond or cash; and interest of defendant in return of cash bond is subject to garnishment, and upon garnishment, magistrate properly requires additional recognizance upon binding defendant over for trial. *White v. Ordille*, 490.

15-169; 15-170. Evidence in prosecution for robbery that defendants took pistol from prosecuting witness to prevent him from harming them or other persons, requires submission of lesser offense of simple assault. *S. v. Lunsford*, 229.

15-170. Where evidence is susceptible to interpretation that defendant did not intend to kill his wife when he beat her in drunken rage, court must submit question of defendant's guilt of manslaughter. *S. v. McNeill*, 377.

15-173. Exculpatory, uncontradicted evidence introduced by State justifies nonsuit. *S. v. Ray*, 40. When evidence establishes that felony of murder had not been committed when assistance was given felon, nonsuit must be entered in prosecution for being assessory after the fact of murder. *S. v. Williams*, 348.

15-194. Supreme Court must find no error in trial before sentence of death can be carried out. *S. v. Hawley*, 167.

17-4. *Habeas corpus* will not lie to test the validity of trial. *In re Taylor*, 297.

17-39. *Habeas corpus* to determine custody of child is apposite only as between parents living in state of separation but not divorced. *Robbins v. Robbins*, 430. Jurisdiction in *habeas corpus* to determine custody of child is ousted immediately upon filing of complaint in divorce action. *Phipps v. Vannoy*, 629.

17-39; 50-13. Decree in *habeas corpus* awarding custody of child does not oust jurisdiction to determine custody in later divorce action. *Robbins v. Robbins*, 430.

18-8. Statute grants immunity from prosecution only to those who are required to testify under compulsion. *S. v. Love*, 99.

20-38 (ff). Handcart is not vehicle as defined by statute. *Lewis v. Watson*, 20.

20-129 (d). Upon original defendant's evidence that codefendant was stopped on highway without proper rear lights, nonsuit of original defendant's cross-action against codefendant was properly denied. *Pascal v. Transit Co.*, 435.

20-138. Evidence raised only suspicion that defendant was driving while intoxicated, and nonsuit should have been allowed. *S. v. Hough*, 532. Testimony held sufficient on charge of drunken driving. *S. v. Blankenship*, 589.

20-138, 20-140. Evidence that defendant was driving while drunk and that he was driving in reckless manner, held to support conviction of manslaughter. *S. v. Blankenship*, 589.

GENERAL STATUTES CONSTRUED—*Continued.*

G. S.

20-140. Evidence held sufficient on charge of reckless driving. *S. v. Blankenship*, 589.

20-150 (c). Statute applies where there is no officer at intersection to allow motorist to pass another. *Donivant v. Swaim*, 114.

20-154. *Held:* Even conceding negligence of driving in slowing vehicle down rapidly without warning, defective brakes on following car was intervening negligence insulating such negligence. *Warner v. Lazarus*, 27.

20-158. Failure of autoist traveling servient highway to stop before entering intersection with dominant highway is only evidence of negligence and not negligence per se. *Lee v. Chemical Co.*, 447.

20-161. Evidence held to disclose contributory negligence in hitting truck parked on highway in violation of statute. *Bus Co. v. Products Co.*, 352.

20-166; 20-182. Knowledge of driver that he had been involved in accident resulting in injury is essential element of "hit and run driving." *S. v. Ray*, 40.

20-174 (d); 20-174 (e). Pedestrian pushing handcart on right side of road is not guilty of contributory negligence as matter of law, since operator of vehicle is under duty to exercise due care notwithstanding. *Lewis v. Watson*, 20.

20-217. Evidence held for jury on issues of negligence and contributory negligence in this action to recover for death of child killed on highway after he had alighted from school bus, even though technically there was no violation of statute. *Hughes v. Thayer*, 773.

22-1. Has no application to allegations that employer left insurance to one employee with understanding that she would pay out of proceeds mortgage indebtedness on plaintiff employee's house. *Cuthrell v. Greene*, 475. Complaint held not to allege that consideration for promise moved to promisor, and nonsuit was proper. *Myers v. Allsbrook*, 786.

25-30; 25-192. Person who accepts check for pre-existing debt owed him by maker is purchaser for value. *Bank v. Marshburn*, 104. Bank paying check under mistake as to indentity of maker is not entitled to recover against payee upon theory of unjust enrichment. *Ibid.*

28-7; 28-149. Wife died leaving surviving husband but no issue; husband is sole "distributee" to exclusion of her collateral kin. *Trust Co. v. Shelton*, 150.

28-10; 30-4, 52-19. Fact that statutory provisions relate only to husband and wife does not deprive equity of power of declaring son who murdered parents a trustee of estates for benefit of those who would have taken had son predeceased parents. *Garner v. Phillips*, 160.

28-31. Clerk may not set aside probate in common form upon proof of execution of later will. *In re Will of Puett*, 8.

28-32. In passing upon question of revocation of letters of administration, clerk should not consider obligations and duties of administrators in their capacity of heirs at law. *In re Estate of Galloway*, 547. Clerk exercises legal discretion in revoking letters of administration which is reviewable. *Ibid.*

GENERAL STATUTES CONSTRUED—*Continued.*

G. S.

28-173. Soldiers' and Sailors' Civil Relief Act does not extend time for action for wrongful death even though administrator was in armed services. *McCoy v. R. R.*, 57. In hearing before Industrial Commission, testimony of statement made by employee shortly before death is incompetent when not brought within statutory definition of "dying declaration". *West v. Dept. of Conservation*, 232.

29-1. Evidence held for jury on question of whether parent intended conveyance of land to be advancement. *Harrelson v. Gooden*, 654.

31-3. It is not required that testator sign the will in the presence of the attesting witnesses. *In re Will of Etheridge*, 280.

31-3; 31-18. Paper-writing must be executed and proven in strict compliance with statutory requirements. *In re Will of Puett*, 8.

31-19; 31-32. Probate in common form may be set aside on motion where it appears court was imposed upon, but otherwise is conclusive and may be set aside only upon caveat. *In re Will of Puett*, 8.

31-32; 31-33. Neither grantees in deeds executed by testator nor persons to whom such grantees have conveyed property, either before or after testator's death, nor heirs at law of deceased grantees are necessary parties to caveat. *In re Will of Brock*, 482.

31-42. Testatrix left her surviving a husband but no issue. A legatee, sister of testatrix, predeceased testatrix. *Held:* Legacy lapsed in absence of contrary intent expressed in will. *Trust Co. v. Shelton*, 150.

38-1; 38-4. Defense bond is not required in special proceeding to establish boundaries. *Roberts v. Sawyer*, 279.

41-10. If title becomes involved in processioning proceeding, it becomes in effect action to quiet title, and no defense bond is required in such action. *Roberts v. Sawyer*, 279.

43-37 (5). Deed of trust securing note falling due more than fifteen years prior to plaintiff's purchase of property, there being no affidavit or marginal entry on records, held properly removed as cloud on title. *Thomas v. Myers*, 234.

45-28; 1-234; 1-306. Execution sale had less than ten days before expiration of ten years from rendition of judgment is ineffective, since sale must be held open for ten days, and therefore sale cannot be completed within ten year period. *McCullen v. Durham*, 418.

46-3. Upon defendants' plea of sole seizin in partition, burden is on plaintiffs to show title as tenants in common. *Johnson v. Johnson*, 541.

46-25. Where vendor has only undivided interest, and later he joins other tenants in common in conveyance, provision of judgment that if vendee elected to purchase, there should be actual partition between vendee and grantee held without error. *Chandler v. Cameron*, 62.

47-18. Registration is constructive notice as to all instruments authorized to be registered; but right to require vendor to convey after acquired title rests on personal contract not required to be registered, and therefore registration is not notice of such right. *Chandler v. Cameron*, 62.

50-13. Immediately upon filing of action for divorce, jurisdiction to determine custody of children of marriage vests in superior court in

GENERAL STATUTES CONSTRUED—*Continued.*

G. S.

which divorce action is pending. *Phipps v. Vannoy*, 630. In so far as statute undertakes to vest court with authority to award custody of children without service of process or notice, it is unconstitutional. *Coble v. Coble*, 81.

50-15. Cross-action setting forth cause of action for divorce *a mensa*, G.S. 50-7, is sufficient to sustain order for alimony *pendente lite*. *Nall v. Nall*, 598.

50-16. Allegation that separation of defendant from plaintiff wife was without fault or misconduct on her part is sufficient allegation of want of provocation. *Trull v. Trull*, 196.

52-12. Certificate is essential to conveyance of property by wife to husband, either directly or indirectly; but mere conveyance by wife to third person and conveyance by third person to husband is insufficient in absence of allegation and proof that transaction was indirect conveyance to husband. *McCullen v. Durham*, 418. Agreement of wife to hold land purchased with husband's money for benefit of them both does not affect her separate estate. *Bass v. Bass*, 171. Acknowledgement of wife does not preclude a showing of want of consideration in an attack of the instrument for fraud. *Garrett v. Garrett*, 290.

55-118; 1-79; 1-82. Domesticated corporation sued here by nonresident is entitled to have action removed to county of its principal place of business. *Hill v. Greyhound Corp.*, 728.

60-135; 60-136; 60-139. Statutory provision for segregation of races on carriers applies to intrastate transportation between cities as well as within a city. *S. v. Johnson*, 701.

61-2; 61-3. Conveyance of land to officers and trustees of religious organization for purposes of the organization creates valid trust. *Wheeless v. Barrett*, 282.

61-3. Conveyance of land to trustees for erection of place of worship and use of members of demonination, establishes valid trust. *Western N. C. Conference v. Tally*, 1.

62-19; 62-20. Plaintiffs had adequate remedy by appeal from order granting competitor additional franchise rights, and could not maintain independent action. *Greyhound Corp. v. Utilities Com.*, 31.

90-18; 90-19. Osteopath is guilty of practising medicine without license if he administers or prescribes drugs, even though they be patent medicines. *S. v. Baker*, 73. But he may administer violet ray treatments. *Ibid.*

90-114; 90-115. Statute proscribing person from duplicating ophthalmic lens unless licensed is unconstitutional since this does not constitute practice of optometry. *Palmer v. Smith*, 612.

90-129. Osteopathy is system of healing without drugs, and curricula of colleges of osteopathy cannot enlarge statutory definition. *S. v. Baker*, 73.

92-1, et seq. Held unconstitutional of being in excess of police power. *S. v. Ballance*, 764.

92-2 (a). Evidence held to sustain finding that employer had five or more employees regularly employed in business. *Hunter v. Peirson*, 356.

GENERAL STATUTES CONSTRUED—*Continued.*

G. S.

92-2 (b). Evidence held to show that deceaseds were not casual employees and further that they were fatally injured in employer's regular business. *Hunter v. Peirson*, 356.

96-14(d) (2). Employees belonging to groups, members of which participated in strike, are not entitled to unemployment benefits. *Unemployment Compensation Comm. v. Lunceford*, 570.

97-24. Employer held not estopped from setting up defense that claim was not filed within one year of accident. *Jacobs v. Mfg. Co.*, 660.

97-25; 97-26; 97-83; 97-90. Compensation Act provides exclusive remedy for determination of dispute as to fee for medical services to employees. *Worley v. Pipes*, 465. Even though employer denies liability on ground that injury did not arise out of and in course of employment. *Matros v. Owen*, 472.

97-52; 97-54; 97-61. Employee disabled by silicosis from performing normal labor in occupation subject to hazard of silica dust is entitled to ordinary compensation unless there is reasonable basis for Commission to find that he has actual or potential capacity to work with substantial regularity during foreseeable future in another occupation. *Young v. Whitehall Co.*, 360.

97-53. Heart disease is not an occupational disease. *West v. Dept. of Conservation*, 232.

105-116 (6). Does not limit amount of franchise tax which City of Greensboro may impose. *Power Co. v. Bowles*, 143.

105-147 (10). Where business of estate is managed by active trustees, resident beneficiary of income is liable for income tax thereon notwithstanding that state of *situs* of business collected income tax thereon. *Sabine v. Gill*, 599.

105-169 (1). Sale of flowers grown on own land not exempt from sales tax when sale is made in capacity of florist and not farmers. *Henderson v. Gill*, 313.

110-21 (3). Juvenile court has exclusive original jurisdiction to determine custody of child as between father and parents of deceased wife to whom custody had been granted in divorce action. *Phipps v. Vannoy*, 629.

115-83; 153-77; 153-78; 153-107. County commissioners have power to allocate funds for school buildings among projects in manner different than that set out in bond order. *Atkins v. McAden*, 752.

122-83; 122-84. Since statutes prescribe no procedure for determining defendant's mental ability to plead and stand trial, procedure is governed by common law. *S. v. Sullivan*, 251.

136-68; 136-69. Petitioners are not entitled to cartway for purpose of ingress and egress to home they propose to build. Brown v. Glass, 657.

136-69. Finding that petitioner had adequate ingress and egress by permissive use of private road precludes establishment of cartway. *Garris v. Byrd*, 343. Laying off cartway and adjudication of damages are matters for jury of view in first instance and not court. *Ibid.*

143-129. Contractor is entitled to recover on *quantum meruit* for work done under contract let without advertisement as required by statute. *Hawkins v. Dallas*, 561.

GENERAL STATUTES CONSTRUED—*Continued.*

G. S.

153-92. Vote on bonds for necessary purpose is not against registration. *Mason v. Comrs. of Moore*, 626.

160-1. Municipality has only powers conferred by statute and those necessarily implied therefrom. *Green v. Kitchin*, 450.

160-9; 160-20; 160-21. Municipality has express authority to employ policeman, and implied power to provide special training for him. *Green v. Kitchin*, 450.

160-93. Court has authority, upon rendition of judgment of foreclosure of drainage lien, to include in costs one attorney's fee for district. *Drainage District v. Bullard*, 633.

160-172, et seq. Power of municipal governing body to zone is non-delegable, and municipal board of adjustment has no power to issue permit for type of business prohibited by zoning ordinance. *James v. Sutton*, 515. Proposed use of premises held not prohibited by zoning regulations, and board of adjustment should determine petition on merits. *Ibid.*

163-1; 163-10; 163-151; 163-183. Primary laws have no application to new political parties. State Board of Elections is without authority to require that petition for new party be accompanied by affidavits that signers are registered voters, and have not voted in primary. States' Rights Democratic Party v. Board of Elections, 179.

163-25 (f). "Residence" means domicile as distinguished from temporary dwelling-place. *Owens v. Chaplin*, 797.

CONSTITUTION OF NORTH CAROLINA, SECTIONS OF, CONSTRUED.
(For convenience in annotating.)

ART.

I, sec. 1. Liberty embraces right to choose profession or occupation subject only to legitimate exercise of police power. *S. v. Ballance*, 764.

I, sec. 11. Defendant has right to be represented by counsel, and in capital felonies court must appoint counsel for defendant unable to employ one. *S. v. Gibson*, 497. Right to counsel embraces right to sufficient time to prepare defense, but denial of continuance in this case was not prejudicial. *Ibid.*

I, sec. 7. Fact that policeman may not remain in employ of city after special training does not render expenditure for special training an exclusive emolument. *Green v. Kitchin*, 450.

I, sec. 15. Officer has no authority to force way into home to serve process on third person without evidence that such third person is inmate of or is actually in the house. *In re Walters*, 111.

I, sec. 17. Where Negroes are systematically excluded from grand jury, motion to quash must be allowed. *S. v. Speller*, 68. Statute regulating photography held void as being beyond police power of State. *S. v. Ballance*, 764.

I, sec. 31. Statute regulating photography held to create monopoly. *S. v. Ballance*, 764.

V, sec. 3. Expenditure by municipality for special training of policeman is for public purpose. *Green v. Kitchin*, 450.

V, sec. 4. Vote on bonds for necessary purpose is not against registration. *Mason v. Comrs. of Moore*, 626.

VII, sec. 7. Expenditure for special training of policeman is for necessary purpose and vote is not necessary. *Green v. Kitchin*, 450.

IX, sec. 5. Transfer of school property to coterminous municipality held not diversion in view of statutory and contractual obligation that property be used for school athletics. *Boney v. Kinston Graded Schools*, 136.

CONSTITUTION OF THE UNITED STATES, SECTION OF, CONSTRUED.
(For convenience in annotating.)

XIV Amendment. Where Negroes are systematically excluded from jury list, motion to quash must be allowed. *S. v. Speller*, 68. Defendant has right to be represented by counsel, and in capital felonies court must appoint counsel for defendant unable to employ one. *S. v. Gibson*, 497. Right to counsel embraces right to sufficient time to prepare defense, but denial of continuance was not prejudicial in this case. *Ibid.*